UNC SCHOOL OF GOVERNMENT

**2012 Juvenile Defender Conference**

August 17, 2012 / Chapel Hill, NC

# ELECTRONIC MATERIALS*

*This PDF file contains "bookmarks," which serve as a clickable table of contents that allows you to easily skip around and locate documents within the larger file. A bookmark panel should automatically appear on the left-hand side of this screen. If it does not, click the icon—located on the left-hand side of the open PDF document—that looks like a dog-eared page with a ribbon hanging from the top.

UNC SCHOOL OF GOVERNMENT

# 2012 Juvenile Defender Conference
## *Adolescent Brain Development: Putting Theory into Practice*

August 17, 2012 / Chapel Hill, NC

*Cosponsored by the UNC-Chapel Hill School of Government*
*& Office of Indigent Defense Services*

**AGENDA**

| | |
|---|---|
| 8:00 to 8:45am | Check-in |
| 8:45 to 9:00 | Welcome<br>*Whitney Fairbanks, Civil Defender Educator*<br>*UNC School of Government, Chapel Hill, NC* |
| 9:00 to 10:00 | **Adolescent Brain Development: The Science** (60 min.)<br>*Dr. Cindy Cottle, Ph.D., Psychological Services, Raleigh, NC*<br>Objective: Demystify the relationship between brain development and teenage behavior, with a discussion of adolescent brain development and how teenagers develop cognitive skills, moral frameworks, and social relations |
| 10:00 to 10:45 | **Talking to Kids** (45 min.)<br>*Fran Castillo, Assistant Public Defender, Office of the Public Defender, Raleigh, NC*<br>Objective: Provide defenders with effective techniques for interviewing children and imparting information |
| 10:45 to 11:00 | *Break* |
| 11:00 to 12:00pm | **Fairness Freaks: An Introduction to Procedural Justice** (60 min.) (Ethics)<br>*Tamar Birckhead, Associate Professor of Law*<br>*UNC School of Law, Chapel Hill, NC*<br>Objective: Introduce defenders to procedural justice and the effect the perception of fairness and expressed interest advocacy has on outcomes for children involved in the juvenile justice system |
| 12:00 to 1:00 | Lunch *(provided in building)** |

* IDS employees may not claim reimbursement for lunch

| | |
|---|---|
| 1:00 to 1:45 | **Assessments 101** (45 min.)<br>*Katrina Kuzyszyn-Jones, Psy.D.,*<br>*KKJ Forensic and Psychological Services, Durham, NC*<br>Objective: Provide defenders with a basic understanding of forensic evaluations, with a discussion of the type of information that must be included in evaluations, differences and similarities between commonly used instruments, and basic terminology |
| 1:45 to 2:00 | *Break (light snack provided)* |
| 2:00 to 3:00 | **Special Education and Disability Rights** (60 min.)<br>*Barbara Fedders, Clinical Assistant Professor of Law*<br>*UNC School of Law, Chapel Hill, NC*<br>*Jason Langberg, Attorney, Advocates for Children's Rights, Durham, NC*<br>Objective: Increase defenders' understanding of special education and disability rights laws, and the relevance of both in juvenile proceedings |
| 3:00 to 3:45 | **Transfer and the "Adultification" of Juvenile Proceedings** (45 min.)<br>*Jessica Feierman, Supervising Attorney*<br>*Juvenile Law Center, Philadelphia, PA*<br>Objective: Provide context for transfer of youth to criminal court by providing a brief history of the "adultification" of juvenile proceedings |
| 3:45 to 4:00 | *Break* |
| 4:00 to 4:45 | **Litigating in the Age of *JDB, Graham,* and *Miller*** (45 min.)<br>*Jessica Feierman*<br>Objective: Introduce defenders to strategic uses of adolescent brain development theory during juvenile delinquency proceedings |

**CLE HOURS: 6** (Includes 1 hour of ethics/professional responsibility)

# Adolescent Brain Development

August 2012

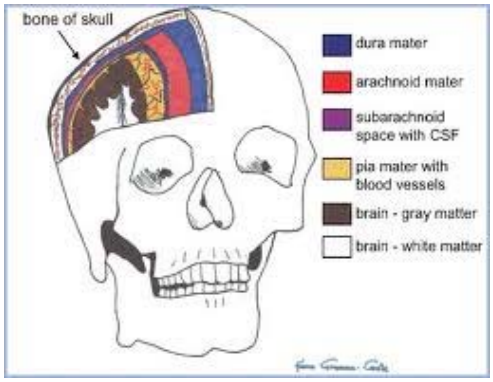
# Adolescent Brain Development

## Table of Contents

# I. Brain Structures and Functions

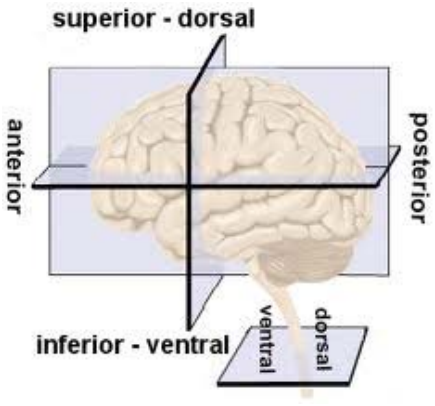
## A. Overview of the Brain

The human brain is made up of more than 100 billion nerves. It is covered by a tough outermost layer – the durra mater, a thin second membrane, the arachnoid mater, and an inner membrane that closely follows the dips of the actual brain, the pia mater. The subarachnoid space is between the arachnoid and pia mater is filled with cerebral spinal fluid and protects the brain and spinal cord (think of it as a "buffer").




www.acceleratedcure.org

## B. Basic Terminology

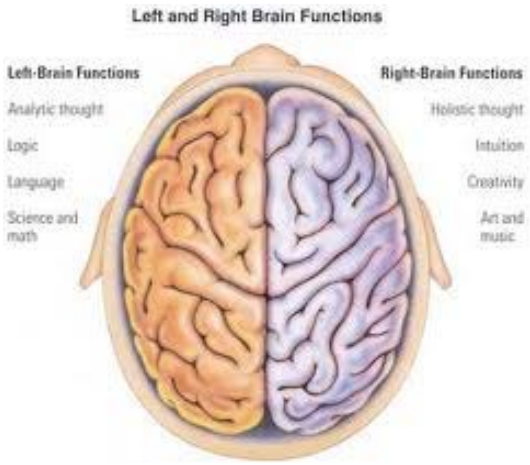



| | |
|---|---|
| Posterior/Caudal: | Hind end/rear |
| Anterior/rostral: | Front/head |
| Inferior/Ventral: | Bottom side/"belly" |
| Superior/Dorsal: | Top |
| Medial: | Towards the midline |
| Lateral: | Away from the midline |

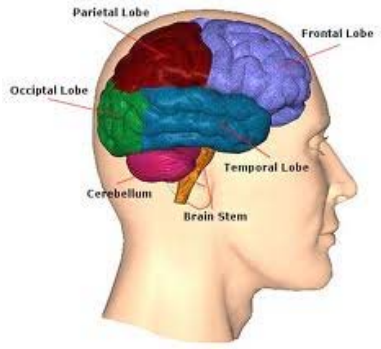
C. Brain Structures

There are several ways of discussing the brain – hemispheres and lobe divisions are most common.

Hemispheres: In general (not always and not exclusively), the left hemisphere is dominant for language, logic, math functions while the right hemisphere is dominant for spatial abilities, face recognition, and music. Also, the left side of the brain controls the right side of the body (sensory and muscles) while the right side of the brain controls the left side of the body.




Division by Lobes




There are four lobes of the brain, each separated by a particular sulci or fissure (grooves in the brain) and gyri (bumps of the brain.

Occipital Lobe: Located at the back of the brain and is associated with interpreting visual stimuli and information. Damage may result in visual problems, including difficulties recognizing objects, inability to identify colors or words.

www.neuroskills.com

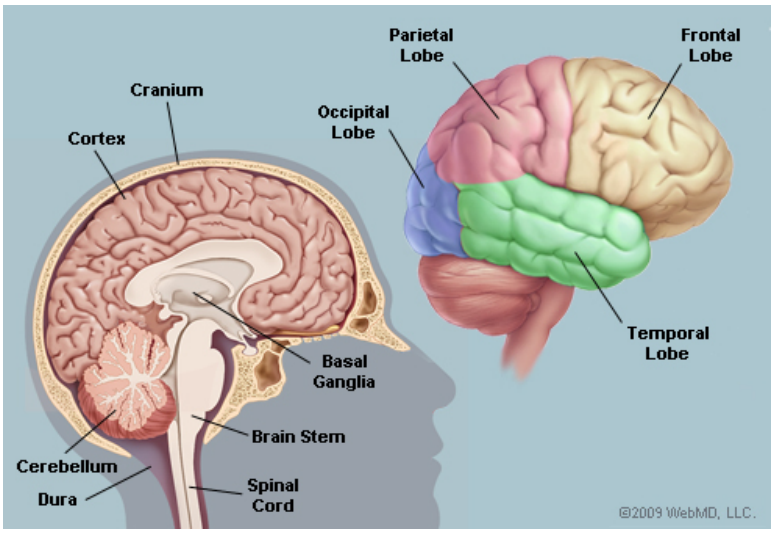
Temporal Lobe: Related to senses of olfaction and audition and also serves to integrate visual perception with information from other senses. It is important in terms of memory functioning. Damage may result in aphasia (speech), memory, and language skills.

Parietal Lobe: Located in the middle of the brain, the parietal lobe is associated with processing tactile information. Damage may result in problems with language, spatial orientation, and memory functioning.

Frontal Lobe: Makes up about a third of the cerebral hemispheres. It is associated with reasoning, motor skills (includes the motor cortex), higher level cognition, expressive language.

Damage: Effects depend on where the damage is.
Some possibility include "Frontal Lobe Syndrome" (Phineas Gage) – lack on inhibition, impulsivity, diminished anxiety or concern for future. Sometimes, there may be mild euphoria, lack of initiative and spontaneity. Difficulty in thinking abstractly, inability to plan and follow through a course of action, to take into account probably consequences, impairment in recent memory.

Main Structures of the Brain




www.webmd.com

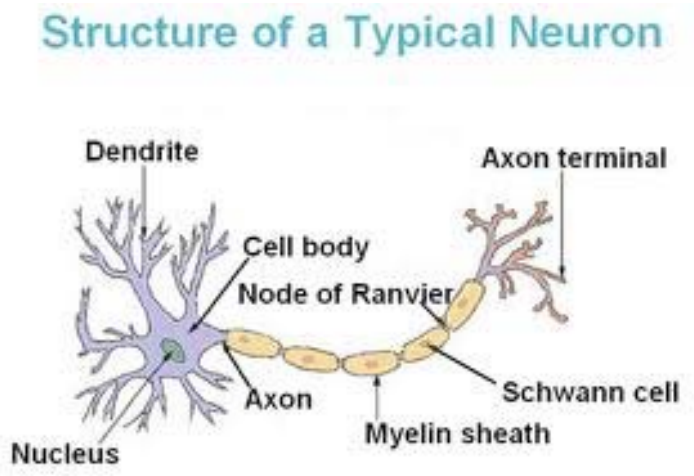
Brain Stem: Where information is channeled between the brain and the body. It is also where certain cell bodies cluster into groups that are critical for regulating alertness, arousal, breathing, temperature regulation.

Cerebellum: Large, folded structure at back of brain that is critical for skilled motor movements and balance.

Lymbic System: Involved in processing emotions and emotion-based behavior and in facilitating learning and memory. Includes the amygdala, which is influence emotional responses (e.g., fear).

D. The Neuron

The human brain contains about 10 billion neurons (nerve cells that transmit information throughout the body). Neurons communicate electrically and chemically (through neurotransmitters). There are three types of neurons: sensory (carry information from sensory receptor cells to the brain); motor (carry information from the brain to the muscles); and interneurons (carry information between neurons).




from: www.cancer.gov

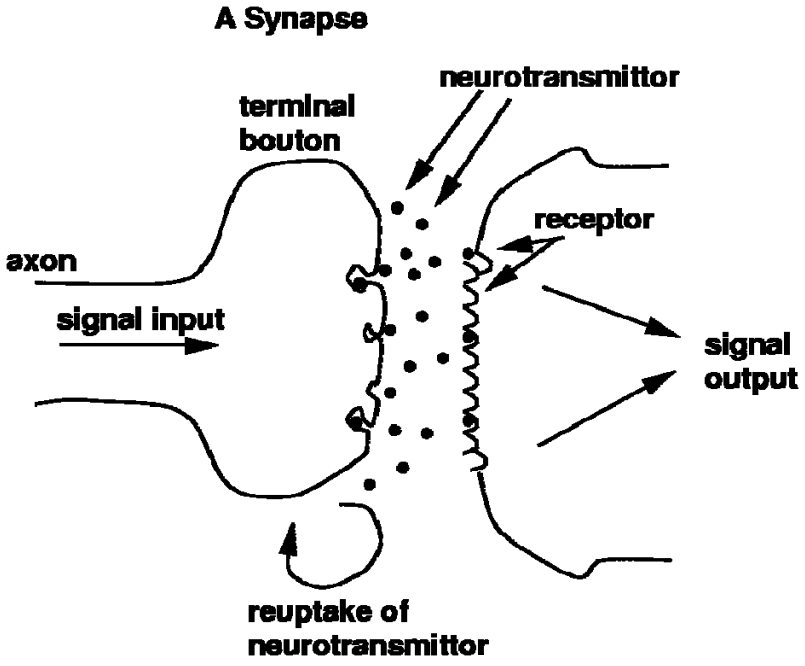
- Dendrites, which collect information from other neurons

- The Cell Body or Soma, where signals from the dendrites are joined and pass on. The nucleus maintains the cell and keeps the neuron functional.

- The axon – Elongated fiber that extends from the cell body to the terminal endings; transmits the neural signal. Some axons are covered with myelin sheath, a white fatty substance that insulates the neuron and allows information to be transmitted faster.

- Axon terminal or terminal buttons – At the end of the neuron and are
  responsible for sending a signal to other neurons.

The space between two neurons is called a synapse.



from: www.willamette.edu

Neurons communicate with each other through synapses in a process called Depolarization:

> Neurons receive input from thousands of other neurons. Once an certain level is reached, the neuron discharges an electrical pulse (a "spike") that travels from the cell body, down the axon, and to the next neuron. This event is called depolarization. It is followed by a refractory period, when the neuron is unable to fire.

When the neuron fires, neurotransmitters are released from the first neuron to the next. Neurotransmitters are chemicals which bind to the receptors of the second neuron. Neurotransmitters influence the extent to which a signal from one neuron is passed on the next. For example, the amount of neurotransmitter

that is available, the number/arrangement of the receptors, the amount of the neurotransmitter that is reabsorbed.

E. Neurotransmitters

Neurotransitters are chemicals that transmit signals between neurons.

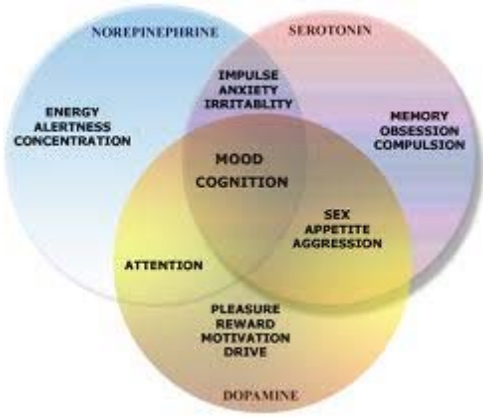



Image from www.nursingcrib.com

Neurotransmitters can be classified as excitatory (stimulate the brain) and inhibitory (which create balance or inhibit an action potential in the brain).

Major Neurotransmitters and their functions:

Norepinephrine: Brings the nervous system in "high alert," by increasing heart rate and blood pressure. NE is also important in the formation of memories. Amphetamines (speed) works by causing the release of NE, as well as domapine and seratonin.

Dopamine (DA): An inhibitory neurotransmitter, meaning when it binds on a receptor site, it blocks the tendency of that neuron to fire. DA is strongly associated with the reward mechanism of the brain ("feels good"). Drugs (cocaine, heroin, alcohol, nicotine) increase dopamine levels in the brain. Mental illnesses, like Schizophrenia, have been shown to involve excessive amounts of DA in the frontal lobes. Parkinson's Disease is associated with too little DA.

Serotonin (5-HT): An inhibitory neurotransmitter that is involved in emotion and mood. When low, there is insomnia, anxiety, depression, anger problems, suicide, panic attacks, obesity (increased appetite for starchy foods), chronic pain, and alcohol abuse. When high, there may be hypomania and hallucinations. Medications (prozac) prevent the uptake

of 5-HT so there is more of it floating around. Hallucinogens (LSD) work by attaching to 5-HT receptor sites, thereby blocking transmission.

Acetylcholine (ACH): Stimulates muscles and is found in sensory neurons and sleep. There is a link between a loss of ACH in the brains of individuals with Alzheimers.

# II. Developmental Psychology and Adolescent Brain Development

## A. Characteristics of Adolescent Development (Steinberg & Schwartz, 2000)

Adolescence is a transitional time of rapid and dramatic changes in physical, intellectual, emotional, and social capabilities.

- Experiences of others (family, peers, school) have a great deal of influence over the course of development.
- Despite the rapid and constant change, adolescence is a period during which many developmental trajectories become firmly established and increasingly difficult to alter.
- Adolescence is a period of tremendous variability, both within and between individuals.

Keep in mind the influence of other factors (e.g., poverty, mental illness, familial instability, abuse/neglect) on "normative" development.

Summary of developmental changes that occur during adolescence (see table)

| Overview of Adolescent Development | | | |
|---|---|---|---|
| Dimension | Major Changes | Effect on Behavior | Relevance to Legal Policy, Court |
| Physical | Growth spurt (height, weight, facial characteristics); development of sex characteristics.<br><br>Testosterone increases 10 fold in adolescence in boys(Adams, Montemayer, et al – Psychosocial dev't in adolescence)<br><br>African-American youths may go through puberty earlier than others (Herman-Giddens et al, 1997) | Early maturing youths are more likely to experience problem behaviors, perhaps because they are likely to associate with older peer groups.<br><br>Increase in aggression. | Adolescents who develop early physically may be at a disadvantage in court since their adult-like appearance may suggest to adults a higher capacity for decision making than is warranted. |
| Brain | Gray matter in the frontal lobe is overproduced, followed by a period of myelination | Inconsistent behavior/maturity<br><br>Some researchers suggest that adolescents are more likely to rely on "emotional" parts of the brain rather than the frontal lobes.<br><br>Poor decisions marked by failure to consider the consequences. This short-term thinking, combined with impulsivity, results in rather dangerous behaviors: Suicide (third leading cause of death among adolescents), drug use. | More interactions with the law.<br><br>Less likely to engage in logical decision making strategies when interacting with officers, attorneys, and other legal personnel. |
| Intellectual | The development of abstract thinking, and efficient and effective thinking mechanisms begin to develop (see brain, above)<br><br>"Raw" intelligence is quite childlike before age 16. By 17, intellectual functioning is similar to adults. | As adolescents develop, they are better able to think in terms of hypothetical situations, longer-term consequences (ages 16 and up); however, these gains are not consistent within a given individual or across all adolescents. Further, decision making abilities require additional skills and experiences. Therefore, there is likely continued difficulties in weighing options and problem solving. | As above.<br><br>Adolescents may be less likely to waive or invoke their rights *and* be more likely to acquiesce, particularly if they are susceptible to the influence of others due to disability or stress. |

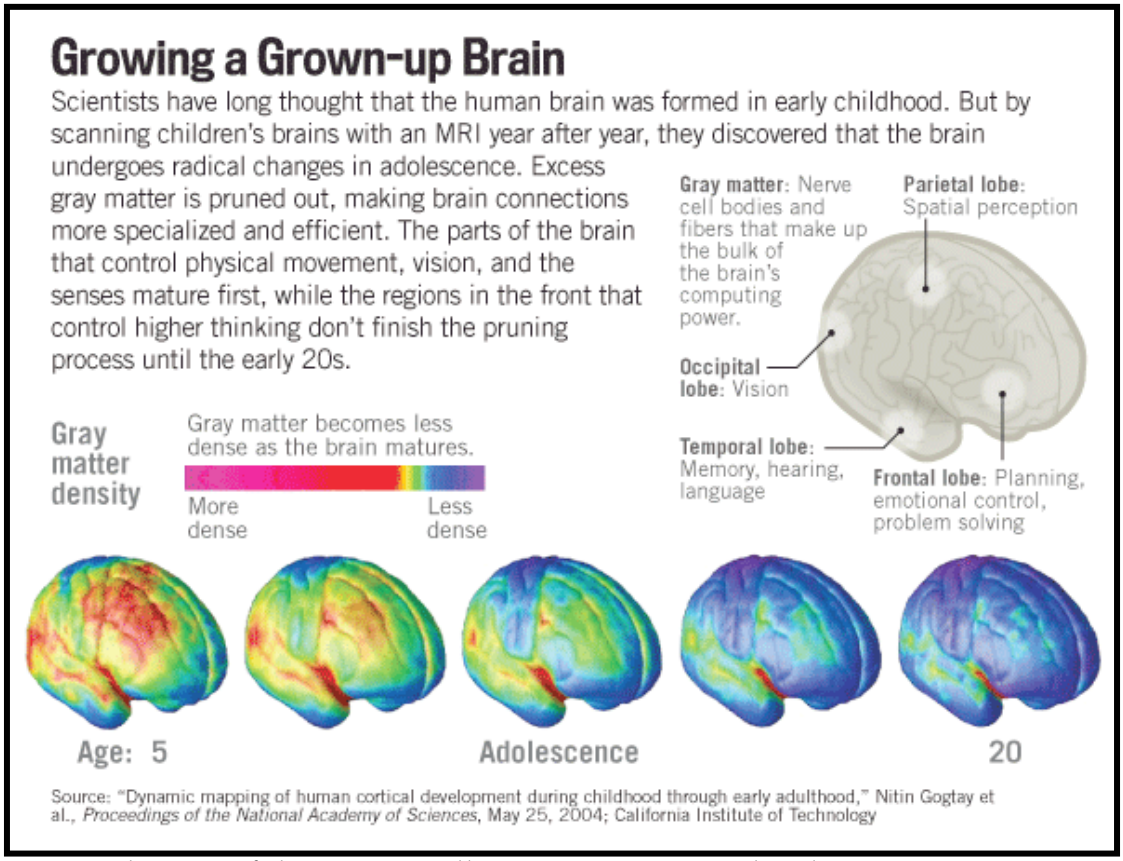
| | | | |
|---|---|---|---|
| Emotional | Identity - changes in the ways adolescents view themselves; more able to see themselves in psychological terms – to reflect on their personalities and to explain their motivations and behaviors.<br><br>Self-esteem: typically fluctuates but becomes more stable from about 13 yrs old on. Despite common wisdom, SE is likely to increase, if anything, over the course of middle and late adolescence (Steinberg/Sch). This is true for both delinquent and non delinquent youths.<br><br>Identity development takes place between late teens and early 20s.<br><br>Development of autonomy (12 yrs to 17 yrs) | Inconsistency in behaviors, desires, and thoughts about self.<br><br>Increase in risk-taking behaviors<br><br>More assertions of beliefs and less reliance on authority figures in later years. Many adolescents vacillate b/w childlike dependency and an exaggerated expression of confidence. | As above.<br><br>Inconsistency in responding to legal personnel and parents/guardians. Possibly having difficulty making decisions or making decisions impulsively. |
| Social | Increase in importance of peers and susceptibility to peer influence (peaks b/w 12 and 15 years and is followed by a decrease in late adolescence/ adulthood)<br><br>Emergence of interest in romantic relationships<br><br>Onset of sexual activity | Increase in peer related activities (phone, "hanging out," etc…)<br><br>Increased reliance on peers in making decisions.<br><br>Increase in risk taking situations with respect to sexual behavior | Gang involvement<br><br>"Group offending" (Zimring, 1998) is higher among adolescents than adults.<br><br>Following the group after arrest in making legal decisions. |

B. General Features of Adolescent Brain Development

1. Size: The adult weight of the brain is reached between the ages of 10 and 12 years.

2. Myelination: Speed of information flow is increased due to myelination of selected pathways. The process of myelination begins during early postnatal period and continues into midadulthood. Most axons are myelinated. Myelinated axons usually are long and extend between different brain regions and across the midline. The process tends to begin earliest in the back of the brain (brain stem) and gradually extend more frontally.

3. Pruning: Almost half of synaptic connections are eliminated. MORE IS NOT BETTER. The pruning that takes place may reflect a fine-tuning of neural connectivity to allow for the emergence of mature patterns to develop.

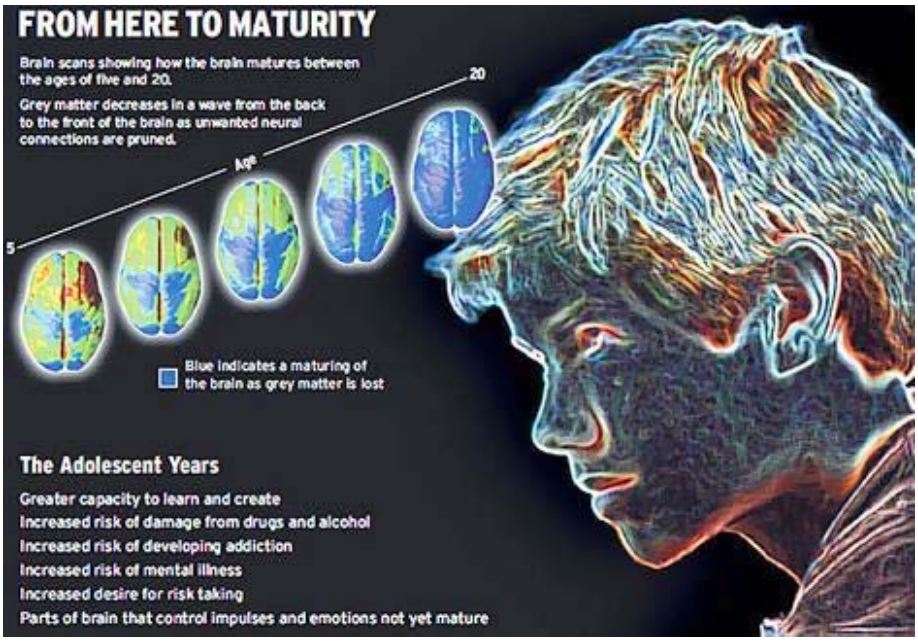



4. The size of the corpus collosum continues to develop into young

adulthood. The CC at the back of the brain tends to develop slowest and that at the front develops earlier.

5. Ratio Changes: During adolescence both increases in white matter and decreases in gray matter are seen in the brain – this results in a shift in balance between white and gray matter. Overall, the volume of white matter increases.

6. Timing: posterior regions (sensory and motor regions) develop before more anterior regions (prefrontal cortex).




Environmental Influence:

Not only does myelin speed axonal conduction, but axonal activity can stimulate the formation of myelin. Since neuronal activity is largely driven by input from the environment, myelination is sensitive to environmental experiences. Enriched environments lead to more myelinated axons and larger corpus collosums among animals. For humans: The corpus collosum is smaller in neglected children (Teicher, et al 2004). This is sometimes referred to as experience-dependent myelination.

# III. Application of Adolescent Brain Development

## A. Development of Cognitive Skills

There is variability among adolescents – and within certain skill sets in a given individuals. As described by L. Steinberg:

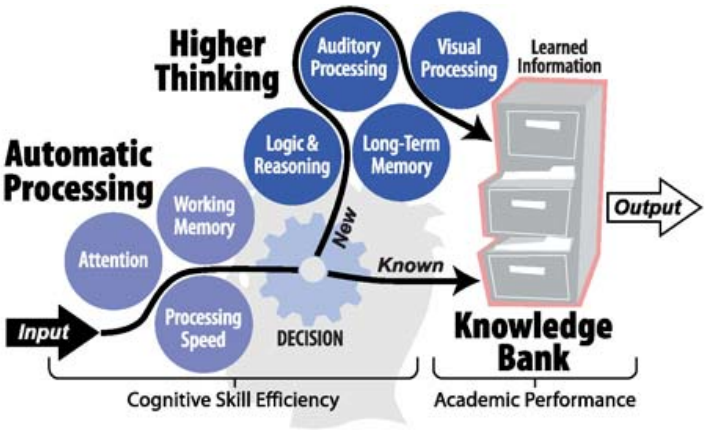
> *"rather than talking about a stage of cognitive activity characteristic of adolescence,…it is more accurate to depict these advanced reasoning capabilities as skills that are employed by older children more often than by younger ones, by some adolescents more often than by others, and by individuals when they are in certain situations (especially familiar situations) more often than when they are in other situations."*
>
> *- Lawrence Steinberg (2005)*

During adolescence, there are improvements in:

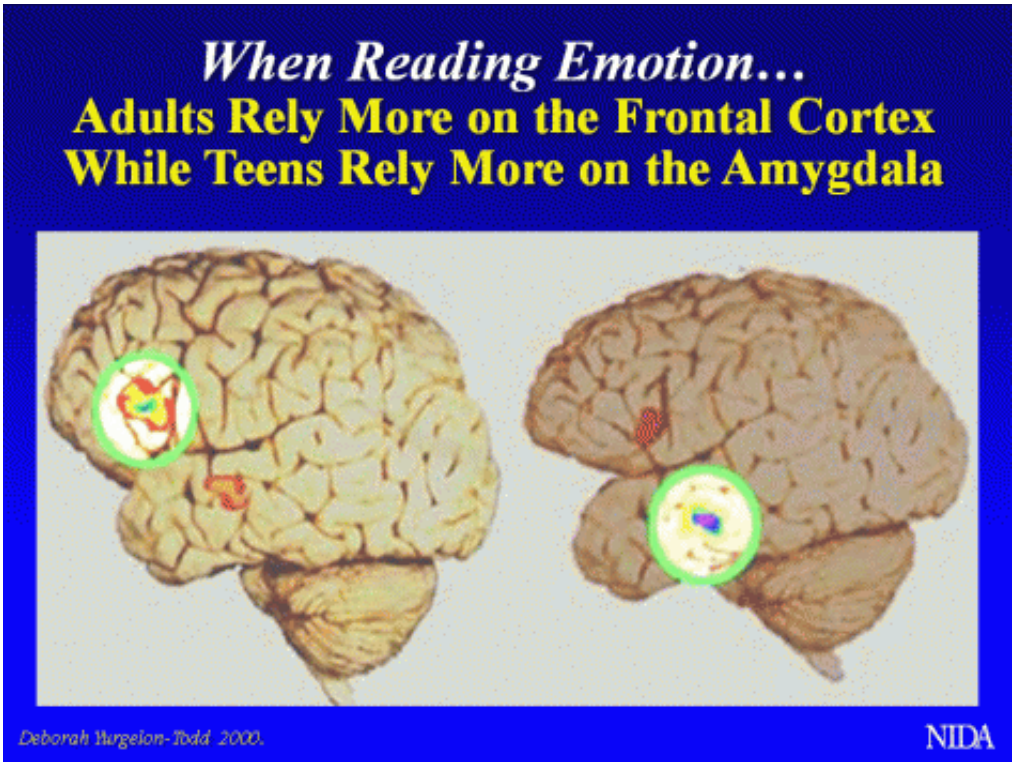
1. Information processing abilities, including processing speed, working memory, long-term memory, and planning ability (one of the slowest to develop).

2. Reasoning ability, including the ability to think logically, to consider hypothetical situations, to reflect on multiple facets of an issue, and introspective thought (thinking about self, behavior, and emotions)

3. "Executive Functioning Ability," which regulates lower processes and also helps with higher level functions of selective attention, goal-setting/planning, inhibition, cognitive flexibility




There is evidence of transient developmental declines in performance on certain tasks, including the abilities to faces and to correctly associate words describing emotions to pictures of faces depicting certain emotions.




from National Institute of Drug Abuse

Adolescents also do not perform as well on tasks requiring the processing of emotional, stressful, or anxiety provoking stimuli.

> *"Cognitive development can be viewed as a process of interactions among separate component abilities that each matures along its own time scale, with progress in one component necessary but not sufficient for improvements in another."*
>
> *- Demetriou et al, 2002)*

Changes in the Brain: Cognitive Functions

Improvements in cognitive function do not necessarily translate to specific anatomical changes in the brain. Therefore, a lot of studies rely on use of fMRI to determine which areas of brain are activated during performance of a specific task at different ages. Even with these studies, it is difficult to determine if differences are due to developmental changes or other factors that may also correlate with development (e.g., attention, frustration level). Typically, researchers use cross-sectional research relying on a subsection of a population of adolescents, with different age groups represented

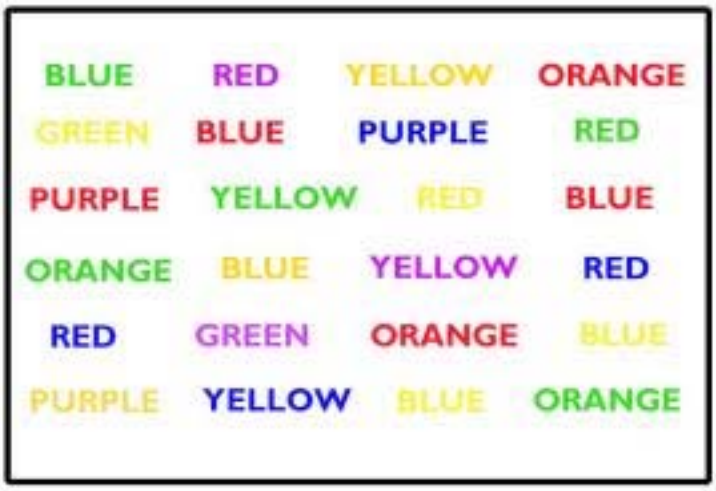
Facts to remember:

It is not that certain parts of the brain become functional or activated. Rather, there is an emergence of functional networks supporting more efficient strategies for performing particular cognitive tasks.

Younger children and adolescents rely on more brain regions for task performance. Further, younger individuals rely on more subcortical, posterior, and deeper regions of the brain – those that develop earlier – rather than the frontal and parietal cortical regions.

In general, the brain regions activated during performance of cognitive tasks are often broader – more diffuse – in younger than in mature individuals. Adolescence involves a transition from diffuse task-related activation to a more focal activation.

The Stroop Test

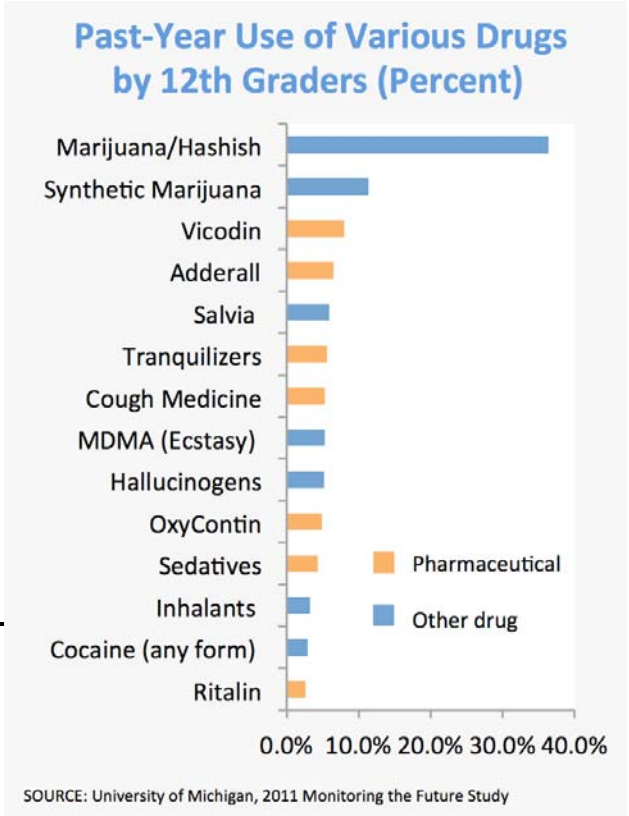



B. Risk Taking, Decision Making and Self Control

1. Risk Taking is normal, can be adaptive, but does have a cost

Some degree of involvement in risky behaviors (drinking, use of illegal drugs) has become normative, even across cultures (and species). For some adolescents, risk taking is limited while for other, it persists (see T. Moffitt's, Life Course Limited and Life Course Persistent Antisocial Behavior, 1993; available online and Cottle, Lee, and Heilbrun The prediction of criminal recidivism in juveniles: A meta-analysis. Criminal Justice and Behavior).

Risk taking allows humans to explore behaviors, privileges, face and conquer challenges, and increase status and peer affiliation. Some researchers (Shedler & Block, 1990) have found adolescents who show moderate experimentation with drugs to be more socially competent than either frequent users or abstainers.




However, there are costs:

- Teenagers are four times as likely as older drivers to be involved in a crash and three

times as likely to die in one, according to the Insurance Institute for Highway Safety.

- Death rates increase 2-4 fold during adolescents

- Accidents, homicide, and suicides account for 75% and 72% of all deaths among 15-19 year olds and 20-24 year olds, respectively (Heron & Smith, 2007).

2. Contributors to Adolescent Risk Taking and Decision Making

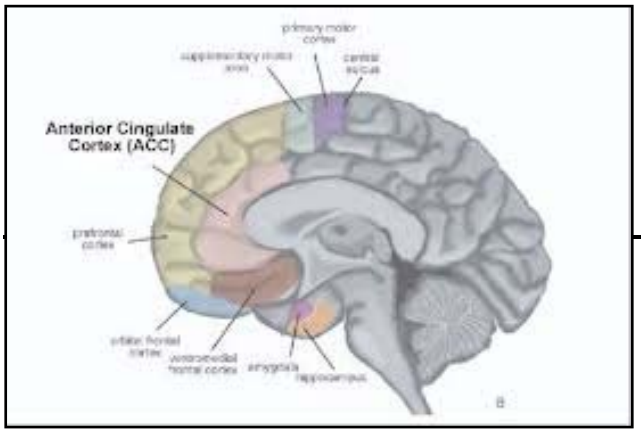
Adolescents engage in risk taking for a wide range of reasons. The following sections discuss factors that play a role in determining when and what risks adolescents take.

Decision Making Processes

What "data" do adolescents consider in deciding to engage in risky behavior? Does that data differ from that of adolescents? Adolescents who exhibit high levels of risk taking see more benefits in the behavior than those who engage in less risk-taking (Rolison & Sherman, 2003) and they view particular outcomes (increased peer acceptance) as being particularly important (Romer & Hennessy, 2007).

Adolescents may be aware of the costs of risky behavior; however, adolescents engaging in risky behavior tend to be less sensitive to the outcomes of their behavior.

What part of the brain is implicated in decision making? The prefrontal cortex. This part of the brain is associated with working memory, response selection, and inhibition of risky choices. The PFC also processes bodily signs of emotions that are generated in response to rewards and losses. When making decisions about risk, adolescents rely less on PFC, the insula, and the anterior cingulated cortex (ACC).




The Anterior Cingulate Cortex (ACC) is thought to be a key region for processing bodily information that provides cues

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about affective states and the nature of emotional experiences.

The amygdala: processes emotional stimuli, particularly in fearful, high anxiety, and social situations.

Because the prefrontal cortex is one of the last areas of the brain to mature, adolescents tend to use other areas of the brain – in this case emotional areas – when making decisions. Activity in the amygdala likely reflects more of a gut reaction than a reasoned one.

The Role of "Hot Cognitions"

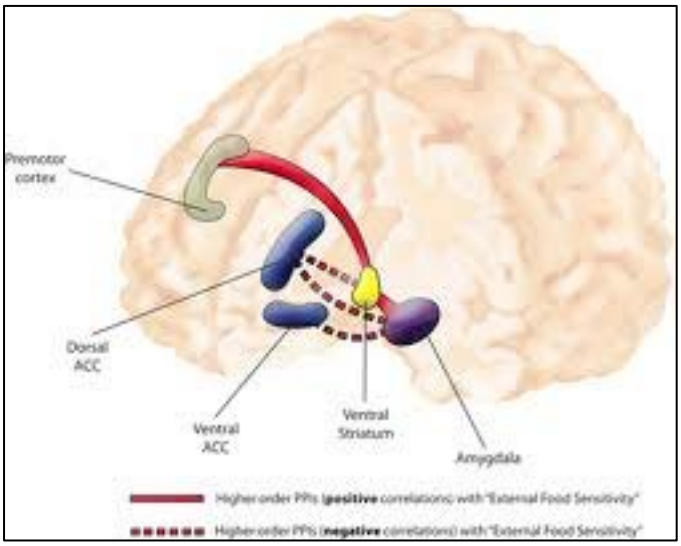
Research and clinical problem: Adolescents may think and reason about risky situations under typical laboratory or other testing conditions in ways that bear little resemblance to the risky choices they make in more affect-laden, high-arousing, and emotional "real world" settings with their friends (applies to legal decision making as well!)

Hot cognitions – or excitement and emotions that may drive behavior – may not take into account the costs-benefits of risks that adolescents weigh when making decisions.

Further, those individuals who are less able to regulate their emotional states or who are more excitable may be particularly prone to exhibit risk-taking behavior in these settings. These types of decisions are more common among adolescents than adults and among those who are most influenced by peers.

Sensation Seeking

Adolescents generally have higher sensation seeking levels than adults – and they do engage in more risky behaviors. As the costs of a given behavior decline (with age), some individuals may



engage in even riskier behavior in order to attain the "rush." This may lead to an escalation of behaviors for some individuals.

The ventral striatum (a circuitry involving the PFC and ACC) increases following rewards (food, alcohol, drugs, sex). Individuals prone to risky behavior show greater activation of this region in response to risk behavior and rewards.

For some individuals risk taking may not be the seeking of positive reinforcers but rather a means of reducing dysphoria or coping with stress. These adolescents may be particularly likely to engage in risk-taking as a means to attain pleasurable sensations associated with dangerous and intense stimuli. Alterations in levels of certain neurotransmitters (e.g., higher dopamine release during a reward) may also be related to risk-taking behavior.

In a recent study using functional MRI,[ii] Jane Joseph, Ph.D., and colleagues at the University of Kentucky found that different brain areas are activated in high- vs. low-sensation seekers in response to strongly arousing stimuli. The subjects viewed emotionally arousing pictures—some intensely arousing, others more neutral—while researchers recorded their brain activity. Regardless of whether the pictures were pleasant (e.g., mild erotica) or unpleasant (e.g., a snake poised to strike), the high-sensation seekers showed early and strong activation in the insula. (See Figure 1a.) This brain structure acts in part as a gateway where visceral signals from the body are first received and interpreted by the brain, Joseph says, so it made sense to her team that it was active in high-arousal states.

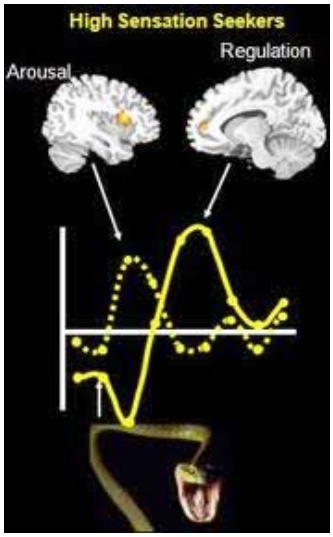



Image from www.dana.org

## Impulsivity or Limited Self-Control


Delayed gratification or "delayed discounting," is the tendency to prefer smaller, sooner rewards to larger, later ones.

Greater activity in the anterior prefrontal cortex helps people not only to manage complex problems, resulting in higher

intelligence, but also aids in dealing with simultaneous goals, leading to better self-control. Read more at: **http://phys.org/news140173735.html#jCp**

> The prefrontal cortex is involved in inhibiting impulses. Some studies have found the PFC to be more diffusely activated in younger individuals when they try to inhibit a response. Younger individuals use less effective strategies. In addition to PFC, inhibition requires motor control regions.

C. Social and Emotional Behavior

Social Functioning

During adolescence, there is an increase in:

Time spent with peers (4 times more with peers than with adults)

Emotional distance from parents and adults

Sexual Interest and behavior

There are also differences among adolescents in their susceptibility to peer influence. These differences have been found to be associated with different patterns of neural activation in adolescents when exposed to emotional stimuli. Youth with higher resistance to peer pressure have greater coordinated activity in brain regions associated with perception and decision-making (Grosbras et al, 2007).

Emotional Functioning

Emotions have an impact on decision making. Research supports the notion that adolescents experience emotions more intensely than do adults. Adolescents are not as good at reading emotion as are adults, which is likely related to brain development. Finally, adolescents who show greater emotional intensity, more emotional volatility, and problems in regulating emotions are more vulnerable to both internalizing and externalizing disorders.

At the McLean Hospital in Belmont, Mass., Deborah Yurgelun-Todd and a group of researchers have studied how adolescents perceive emotion as compared to adults. The adults correctly identified the expression as fear. Yet the teens answered "shocked, surprised, angry." And the teens and adults used different parts of their brains to process what they were feeling. The teens mostly used the amygdala, a small almond shaped region that guides instinctual or "gut" reactions, while the adults relied on the frontal cortex, which governs reason and planning. The teens seemed not only to be misreading the feelings on the adult's face, but they reacted strongly from an area deep inside the brain. The frontal cortex helped the adults distinguish fear from shock or surprise. Often called the executive or CEO of the brain, the frontal cortex gives adults the ability to distinguish a subtlety of expression: "Was this really fear or was it surprise or shock?"

## Hormonal Changes Influencing Social and Emotional Behavior

During adolescence, increases in hormones (including oxytocin and vasopressin), as well as stress hormones, could be related to an increase in the average number of stressors to which adolescents are exposed, the greater reactivity to stressors, and/or to changes in the systems contributing to the release of stress hormones.

### Oxytocin

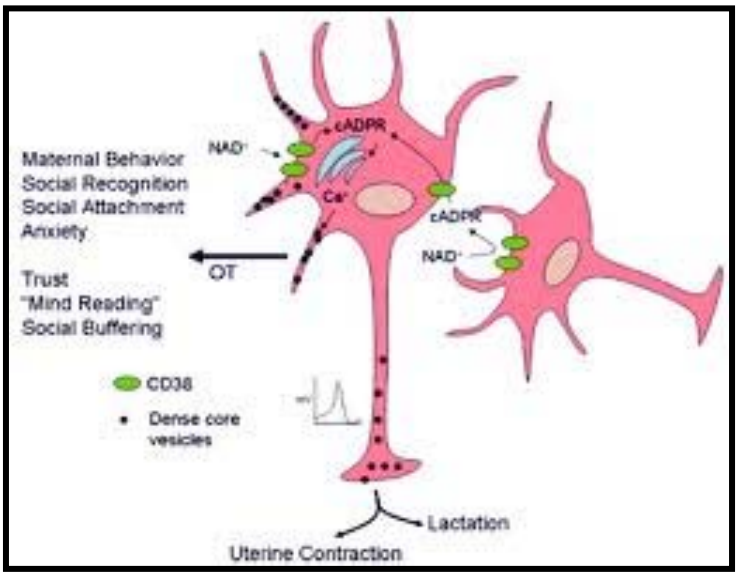



Image from http://scienceblogs.com

When stressed, the body releases "stress hormones" (corticotrophin, adrenocorticotropic, and corticosteroids). Oxytocin is also released (produced by hypothalamus), both in the blood and in a variety of brain regions.

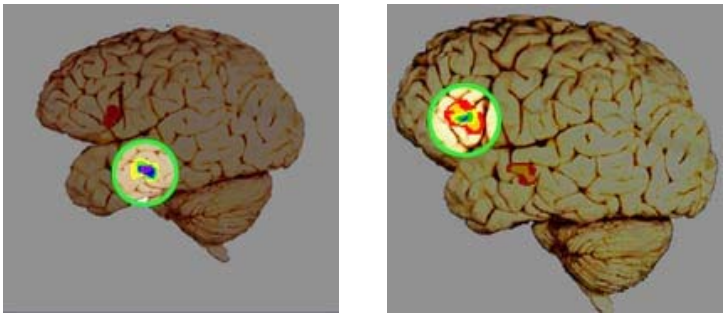
Social stressors seem to cause increases in levels of oxytocin, and these increases result in an increased motivation for social contact (DeAngelis, 2008). Oxytocin levels have been found to be lower in individuals with clinical disorders involving deficits in processing of social cues (Autism; Green et al., 2001) and children neglected early in life when interacting with their adoptive mothers than non-neglected children interacting with adoptive mothers (Fries et al, 2005). Some research suggests oxytocin produces a "relaxation response."

Brain Functioning in Social and Emotional Behavior: The Amygdala

The amygdala is involved in:

- The processing of, learning about, and remembering circumstances regarding emotional stimuli
- Process social signals of emotion
- Planning defense responses

When reading emotion, teens (left) rely more on the amygdala while adults (right) rely more on the frontal cortex.



Changes in the Brain

The volume of the amygdala increases throughout adolescence.

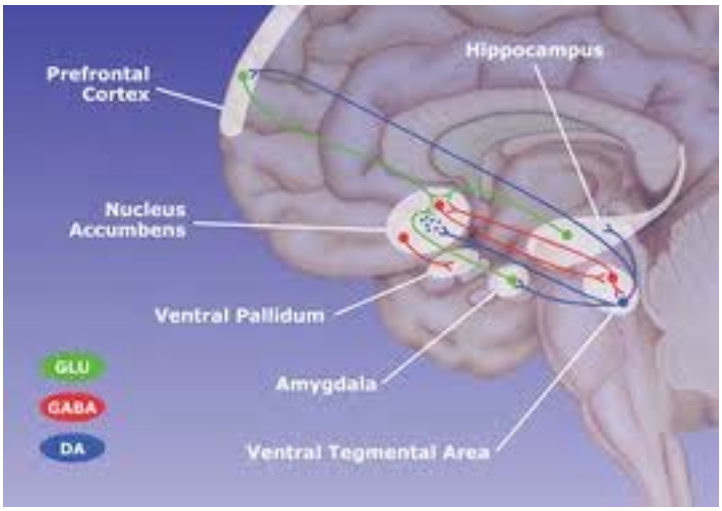
The connectivity of the amygdala to other regions of the brain also become more elaborative during adolescence.

The amygdala contains receptors for hormones contributing to socioemotional expression (CORT and oxytocin)

- Developmental changes in the amygdala play a critical role in the timing of puberty.

- Increased amygdala volume has been associated with aggressive behavior and predispositions for affective and other psychological disorders whose incidence increase during adolescence

Adolescent are more prone to read emotions and miss content – and they do so with the "emotional center" of the brain (the amygdala), whereas adult are more likely to rely on the more rational regions of the brain (prefrontal cortex).




When excited, the cerebral cortex signals the ventral tegmental area to release dopamine into the amygdala, the prefrontal cortex and the nucleus accumbens. This is the "reward center" of the brain and serves to increase the individual's attention so that s/he learns to repeat the behavior once more.

Adolescents' "reward center" of the brain is more active than are adults. In addition, there is evidence the "avoidance" region (also the amygdala)

is less activated so that they are not motivated to avoid negative consequences (gambling). In other words, there is a heightened sensitivity to reward more than punishment for adolescents. It is therefore more difficult to motivate teens with threats than with rewards.

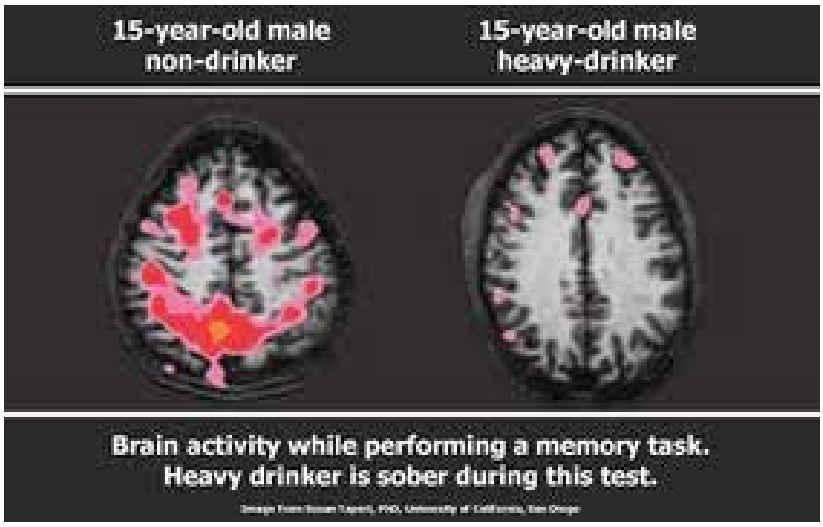
Example: When asked if individuals would play Russian roulette for $1 million – Almost all adults said "no." About half of teenagers said "yes – it's a lot of money."

D. Development of Substance Abuse and Psychological Disorders
Spear, 2012

Alcohol and Substance Abuse Researchers are now beginning to look at substance use as a form of learning, in terms of the way the brain changes in response to substance use. Repeated substance use reshapes learning pathways in the brain. Factors contributing to increased propensity of adolescents to use alcohol and other drugs:

- These are risk-taking activities. Thus, they may reflect the same immature capacities for self-control as other risky behaviors.
- Oftentimes, the use of alcohol/substances occurs socially, with adolescents being particularly susceptible to peer influence (either directly or indirectly).
- In the brain, alcohol and drugs interact with the same reward circuitry as other rewards (the dopamine system). Thus, adolescents are more rewarded by (and motivated for) the use of alcohol and drugs (animal studies).
- Adolescents may also have a reduced sensitivity to aversive consequences that normally serve to moderate use of

alcohol/drugs.




Researcher Susan Tapert, Ph.D., Image from: www.breakingthecycles.com

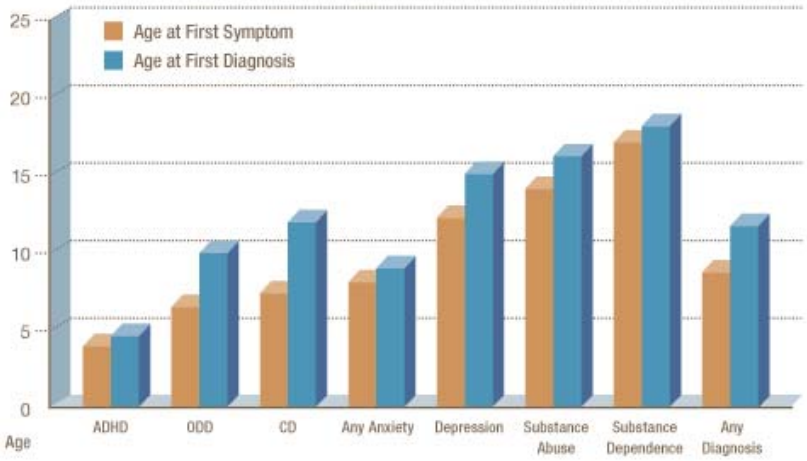
Psychological Disorders

The greatest risk for the emergence of psychological disorders generally occurs during adolescence (Spear, 2010). This could be related to stressors and other environmental changes: The "stress diathesis model" states that some individuals are sensitive to stress because of genetic vulnerabilities or early adversities, and the onset of stress during adolescence may precipitate the onset of psychological dysfunction.

Conduct Disorder and Oppositional Defiant Disorder: Adolescents with behavioral disorders tend to have reductions in grey matter than those without these disorders (when matched for age, gender, and IQ). These findings have been found to exist in the amygdala, hippocampus, orbitofrontal cortex, and insular cortex. Some fMRI studies have found individuals with CD to have reduced neural responsiveness to affective information (less activation of the amygdala in response to fearful facial stimuli). This line of research is just beginning.

Internalizing Disorders: About 3-5% of adolescents have an "internalizing disorder" (depression or anxiety). Neurobiological research has implicated the importance of neurotransmitters (serotonin) in these disorders among adolescents. In addition, depressed adolescents have been found to have differences in volume of gray and white matter, although inconsistencies across studies have prevented final conclusions

from being drawn. In general, the regions of the amygdala and the prefrontal cortex have been found to differ among adolescents with internalizing disorders. Keep in mind, however, that changes in brain activity/size work in both directions: additional changes can be made with treatment/intervention/life experiences.




From: http://www.thenationalcouncil.org

D. Adolescent Opportunities (Spear, 2012)

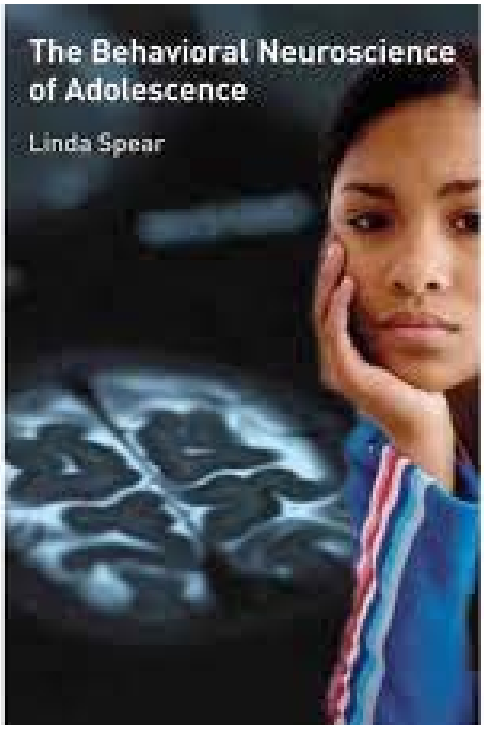
While the brain is most malleable to experience early in life, brain plasticity is retained during adolescence. Thus, adolescence is a period of particular vulnerability and opportunity.

The adolescent brain is "built to learn." Like muscles, neurons operate on a "use it or lose it" principle.

The adolescent brain is primed to pay attention to things that are new and different.

The adolescent brain may provide an enhanced opportunity for the nervous system to recover from drug exposure, brain damage, or other challenges.

Keep in mind, however, some of this research is based on animal studies. And, there is great variability among adolescents and their environments, and these differences (e.g., in temperament, intelligence, activity level) influence the extent to which changes occur.




# IV. Neuropsychology Application to Law, Policy, and Court

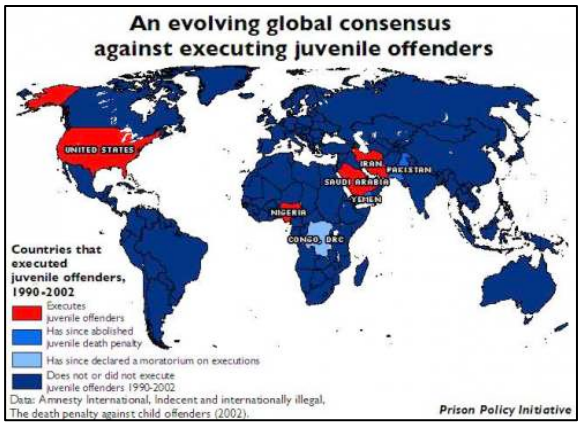
## A. Case Law

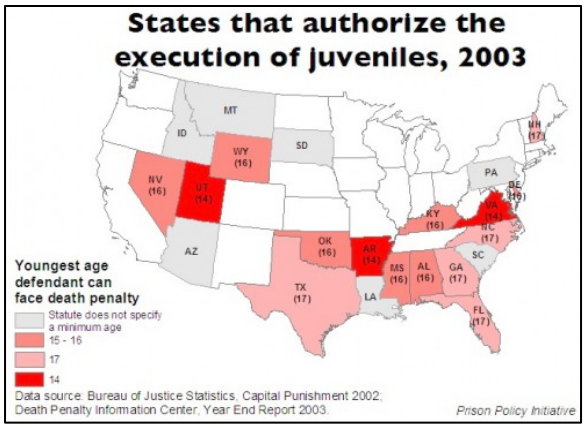
The Supreme Court has made a series of decisions since late 1980s indicating that youths under the age of 18 years should not be treated or sentenced in the same manner as adults. Some of the more recent cases are summarized below.

Roper v. Simmons, 543 US 551 (2005): The Supreme Court held that it is unconstitutional to impose capital punishment for crimes committed by individuals under the age of 18 years. In doing so, the Court cited neurological and developmental research to identify three characteristics

among juveniles: their immaturity, their vulnerability, and their changeability – that make juveniles different from adults.

Pre-Roper Statistics




> "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." - Roper v. Simmons, 543 US 551 (2005)

JDB v. North Carolina, 564 US (2011): Police must consider a juvenile's age when deciding whether to provide a Miranda Warning. The Court cited *Stansbury v. California* which held a child's age "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave." The Court concluded, "Children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave."

> "Time and again, this Court has drawn these common-sense conclusions for itself. We have observed that children "generally are less mature and responsible than adults," Eddings, 455 U. S., at 115–116; that they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," Bellotti v. Baird, 443 U. S. 622, 635 (1979) (plurality opinion); that they "are more vulnerable or susceptible to . . . outside pressures" than adults, Roper, 543 U. S., at 569; and so on…."

A note about understanding Miranda warnings…. Even when age is considered, the manner in which and circumstances of the waiver are important. In one study, The comprehensibility and content of juvenile Miranda warnings (R. Rogers et al, in Psychology, Public Policy, and Law, Vol 14(1), Feb 2008, 63-87), the authors concluded: "Even more variable than general Miranda warnings, juvenile warnings ranged remarkably from 52 to 526 words; inclusion of Miranda waivers and other material substantially increased these numbers (64-1,020 words). Flesch-Kincaid reading estimates varied dramatically from Grade 2.2 to postcollege."

Table 2
*Comparisons of Juvenile and General Miranda Warnings: Flesch-Kincaid and SMOG Reading Estimates*

| | Flesch-Kincaid[a] | | | | | | | | SMOG | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Juvenile | | | General | | | | | Juvenile | | | General | | | | |
| Miranda | *M* | *SD* | Range | *M* | *SD* | Range | *F* | *d* | *M* | *SD* | Range | *M* | *SD* | Range | *F* | *d* |
| 1. Silence | 3.55 | 2.17 | 1.6–14.2 | 3.15 | 2.03 | 1.0–15.0 | 4.10 | 0.20 | 4.85 | 2.65 | 3.0–12.5 | 3.88 | 2.13 | 3.0–14.0 | **21.08** | 0.44 |
| 2. Evidence against you | 6.24 | 3.27 | 3.6–18.0 | 4.87 | 1.71 | 3.3–17.8 | **51.99** | 0.70 | 9.87 | 2.34 | 6.2–18.0 | 8.87 | 1.25 | 3.0–18.0 | **52.31** | 0.70 |
| 3a. Attorney[b] | 8.81 | 2.83 | 1.0–14.2 | 8.57 | 2.23 | 1.0–16.0 | 1.15 | 0.10 | 8.80 | 2.90 | 3.0–14.0 | 7.46 | 3.56 | 3.0–15.3 | **15.95** | 0.38 |
| 3b. Parent/guardian | 10.79 | 3.08 | 2.7–17.0 | | | | | | 11.57 | 2.70 | 3.0–16.4 | | | | | |
| 4. Free legal services | 10.36 | 2.76 | 3.8–18.0 | 10.22 | 2.13 | 3.7–18.0 | 0.47 | 0.07 | 11.74 | 2.68 | 3.0–18.0 | 11.55 | 2.03 | 3.0–18.0 | 0.81 | 0.09 |
| 5. Continuing rights[c] | 8.83 | 3.50 | 3.1–18.0 | 9.49 | 2.70 | 2.5–18.0 | 4.84 | 0.24 | 9.52 | 2.51 | 3.0–17.5 | 9.87 | 2.36 | 3.0–18.0 | 1.87 | 0.15 |
| 6. Waiver | 6.44 | 3.26 | 1.0–18.0 | 6.20 | 3.53 | 1.0–18.0 | 0.41 | 0.07 | 9.07 | 1.98 | 3.0–17.5 | 9.09 | 2.69 | 3.0–18.0 | 0.004 | 0.01 |
| Total warning | 7.25 | 2.43 | 2.2–18.0 | 7.02 | 2.02 | 2.0–18.0 | 1.46 | 0.12 | 9.71 | 1.92 | 1.7–15.9 | 9.06 | 1.46 | 3.0–18.0 | **20.55** | 0.44 |
| Total Miranda[d] | 6.73 | 2.00 | 3.2–12.5 | 6.22 | 1.94 | 2.8–18.0 | **7.41** | 0.26 | 9.56 | 1.54 | 6.8–14.0 | 8.92 | 1.37 | 3.0–18.0 | **22.22** | 0.45 |
| Parent/guardian waiver | 10.31 | 3.76 | 4.7–18.0 | | | | | | 12.63 | 2.73 | 9.1–18.0 | | | | | |

*Note.* Component 3b and parent/guardian waivers do not apply to general Miranda warnings. *F* ratios that are significant with $ps < .01$ are bolded.
[a] This estimate represents the grade level required to be able to understand 75% of the material. Because these upper range estimates are less accurate, we imposed an upper limit of Grade 18.
[b] In 12 versions, the option of consulting with a parent or interested adult is included in the attorney component.
[c] In seven versions, the reassertion of rights includes a parent or interested adult.
[d] Because some Miranda warnings include additional material, these values are different from the average of the total warnings plus waivers.

Graham v. Florida 560 US (2010): Sentencing a juvenile to life in prison without possibility of parole for crimes other than murder violates 8th Amendment.

> "As petitioner's amici point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence…."
>
> "Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults.

Miller v. Alabama, Jackson v. Hobbs, 567 US (2012): The 8th Amendment prohibits sentencing that requires life in prison without possibility of parole for juveniles convicted of homicide.

Brief for American Psychological Association, American Psychiatric Association, and National Association of Social Workers noted:

- Juveniles are less capable of mature judgment than adults and that they are more likely to engage in risky behaviors. They cited research related to an "age-crime curve," which is "one of the most consistent findings across studies."

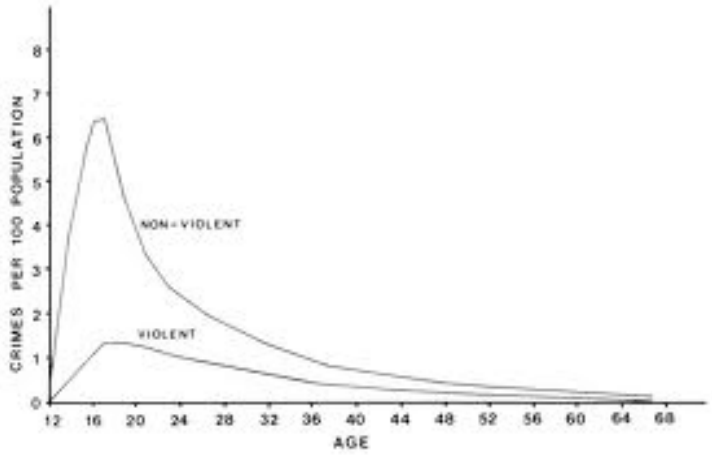



Image from: www.aic.gov.au

- Adolescents are less able to control impulses; weigh the risks and rewards of possible behavior differently; are less able to envision the future and apprehend the consequences of their behavior

- Adolescents experience continued growth and changes in brain regions associated with impulse control, planning, and self regulation.

- Adolescents place less emphasis on risk than on rewards and do not foresee consequences in the same manner as do adults ("future orientation"). They are not as skilled at taking into consideration others' perspectives

- Adolescents are more vulnerable to negative influences (peaking at age 14 and then declines slowly, with little change after age 18 years). Adolescents are even more likely than adults to engage in risky behavior when they believe they are being observed by peers. Influence of peers is direct (pressure) and indirect (desire for approval).

- The Brief also highlighted the "opportunities of adolescents:" Adolescents are more capable of change than are adults.

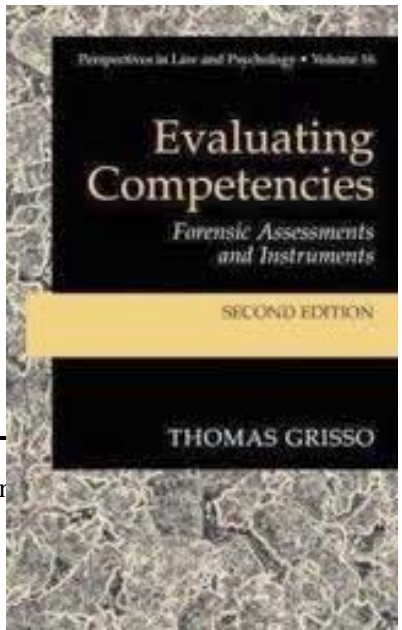
- The ability of clinicians and researchers to predict if any given individual juvenile will reoffend is limited. The vast majority of juveniles will not reoffend.

Timothy J. v. Superior Court, 150 Cal. App. 4th 847 (2007): In California, the Court held that developmental immaturity may be cause to stay proceedings based on a finding of incompetency (to stand trial) due to developmental immaturity (not just to "mental disability or defect").


Raising the Age of Delinquency in North Carolina: A current "hot topic" in North Carolina is the age at which a youth is considered an adult in the criminal justice system. Currently, that age is 16. In addition to other factors (e.g., crime rates, evolving standards across nation), Advocates for "raising the age" cite research on adolescent brain development – including reduced culpability and increased opportunity for change – to argue to increase the age to 18.

B. The Use of "Brain Science" in Juvenile Proceedings

The Supreme Court has made a series of decisions since late 1980s indicating that youths under the age of 18 years should not be treated or sentenced in the same manner as adults. The use of "brain science" or "adolescent brain development" in court is relevant in many domains, including:




Capacity to Waive/Invoke Miranda Rights (NCGS 7B-2101 refers to Interrogation Procedures for Juveniles). Developmental factors to consider in determination of capacity to waive Miranda Rights:

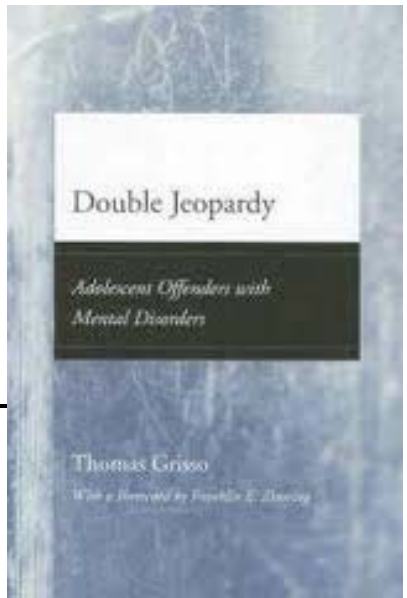
- Mental status of juvenile (IQ, age, time of day, level of stress in environment, number of adults present, emotional arousal and decision making)
- Grisso has found youths aged 12 and under typically lack understanding; youths aged 13 to 15 have "variable outcomes" in terms of (some understand, some don't); and youths 16 to 18 do understand the warnings (average or above IQ).
- Beliefs the juvenile may have about peers – do they worry about "ratting them out" or are they taking the blame for another peer
- Was their thinking characteristic of only considering "short-term" consequences (i.e., stopping the questioning?)

Transfer to Adult Court: NCGS 7B-2203 considers factors relevant at a transfer hearing, including the following: age, maturity, intellectual functioning, prior record, and prior attempts to rehabilitate the juvenile. In terms of applying adolescent brain development, consider:

- Decision making during alleged offense
- Susceptibility to peers, emotional arousal and interpretation
- Level of planning versus impulsivity
- Psychopathy research: we can't predict that in adolescence
- Treatment needs and amenability: "use it or lose it"

Capacity to Proceed to Trial: Ability: Consider the ability of the juvenile to weigh risks/benefits in making decisions (e.g., how to plead), to think in hypothetical situations (e.g., deciding if to accept a plea agreement); and to delay gratification (e.g., plead guilty versus wait in detention for trial).

Diminished Capacity/Mental State at Time of Offense: In addition to factors considered in preceding sections (see, e.g., Transfer), consider the juvenile's emerging mental health functioning and increased



susceptibility to alcohol/substance abuse and mental illness. Consider the possibility of misdiagnosis; effectiveness of treatment; and consistency of treatment.

Disposition/Sentencing: In NC, Miller v Alabama is applied through Senate Bill 635 regarding GS 15A-1476-78 (Life in Prison *with* Parole). Relevant to psychological evaluations is 15A-1477c: Penalty Determination: "The defendant or the defendant's counsel may submit mitigating circumstances to the court, including, but not limited to, the following factors:

(1) Age at the time of the offense
(2) Immaturity
(3) Ability to appreciate the risks and consequences of the conduct
(4) Intellectual capacity
(5) Prior record
(6) Mental health
(7) Familial or peer pressure exerted upon the defendant
(8) Likelihood that the defendant would benefit from rehabilitation in confinement
(9) Any other mitigating factor or circumstance.

# V. Useful Sites and Contacts: Staying Current

Websites

National Institute of Mental Health: http://www.nimh.nih.gov
(See section "The Teen Brain: Still Under Construction")

Act for Youth: http://www.actforyouth.net/

The University of Virginia Institute of Law, Psychiatry, and Public Police Juvenile Forensic Fact Sheets:
http://www.ilppp.virginia.edu/Juvenile_Forensic_Fact_Sheets.html

MacArthur Research Network on Mental Health and Law:

http://www.macarthur.virginia.edu/mentalhome.html

NC Bar Association Juvenile Justice and Children's Rights
http://juvenilejusticeandchildrensrights.ncbar.org/

Council for Children's Rights
http://cfcrights.org/

Recommended Resources and References

L. P. Spear. *The Behavioral Neuroscience of Adolescence*. W.W. Norton: London (2010).

L. Steinberg & E. Scott. *Less guilty by reason of adolescence: Developmental immaturity, diminished responsibility, and the juvenile death penalty.* In American Psychologist, 1009, 1018. (2003).

C. S. Fried, N. & D. Reppucci. *Criminal decision making: The Development of adolescent judgment, criminal responsibility, and culpability.* 25 (1) Law and Human Behavior 45, 61 (2004).

T. Grisso. *Forensic Evaluation of Juveniles*. Professional Resource Press (1998).

T. Grisso, G. Vincent, & D. Seagrave. *Mental Health Screening and Assessment in Juvenile Justice*. The Guilford Press (2005).

J. Fagan & F. Zimring. *The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court.* University of Chicago Press (2000).

K. Heilbrun. *Forensic Mental Health Assessment.* Oxford University Press (2002).

T. Moffitt. *Adolescent-limited and life-course-persistent Antisocial Behavior: A Developmental Taxonony.* 100 Psychological Review. 674, 701 (1993).

C. Cottle, R. Lee, & K. Heilbrun. *The prediction of criminal recidivism in juveniles: A meta-analysis.* 28(3) Criminal Justice and Behavior 367, 394 (2001).

K. Heilbrun, G. Marczk, & D. DeMatteo. *Forensic Mental Health Assessment: A Casebook*. Oxford University Press (2002).

K. Heilbrun, C. Cottle, & R. Lee. The prediction of violent, sexual, and general recidivism among juvenile offenders. In K. Heilbrun, N. Goldstein, & R. Redding. *Current perspectives on juvenile delinquency: Prevention, assessment, and intervention.* Oxford University Press (2006).

K. Walsh & Darby. Neuropsychology: A Clinical Approach. Churchill Livingstone (1999).

J. Bessant & R. Watts. *The mismeasurement of youth: why adolescent brain science is bad science.* Contemporary Social Science: Journal of the Academy of Social Sciences. 181, 196 (2012).

L. Green, D. Fein., C. Modahl, C. Feinstein, L. Waterhouse, & M. Morris. *Oxytocin and autistic disorder: Alterations in peptide forms*. Biological Psychiatry. 609, 613. (2001).

A.B. Fries, T. E. Ziegler, J.R. Kurlan, S. Jacoris, & S. D. Pollak. *Early experience in humans is associated with changes in neuropeptides critical for regulating social behavior.* Proceedings of the National Academy of Sciences, 17237, 17240. (2005).

T. DeAngelis. *The two faces of oxytocin: Why does the 'tend and befriend' hormone come into play at the best and worst of times?"* Monitor on Psychology, 30 (2008).

M/ Grosbras, M. Jansen, G. Leonard, A. McIntosh, K. Osswald, C. Pousen, et al. *Neural mechanisms of resistance to peer influence in early adolescence.* Journal of Neuroscience, 8040, 8045. (2007).

M. H. Teicher, N. L. Dumont, Y. Ito, C. K. Vaituzis, J. N. Giedd, & S. L. Anderson. *Childhood neglect is associated with reduced corpus callosum area.* Biological Psychiatry, 8, 85 (2004).

M. P. Heron & B. L. Smith. *Deaths: Leading causes for 2003.* National Vital Statistics Reports, 17. (2007).

J. Shedler & J. Block. *Adolescent drug use and psychological health: A longitudinal inquiry.* American Psychologist, 612, 630. (1990).

R. Rogers, L. Hazelwood, K. Sewell, D. Shuman, & H. Blackwood. *The comprehensibility and content of juvenile Miranda warnings.* Psychology Public Policy and the Law, 63, 87. (2008).

L. Steinberg & R. Schwartz. *Developmental psychology goes to court.* In T. Grisso ( R. G. Schwartz (Eds.). Youth on trial: A developmental perspective on juvenile justices. Chicago University Press (2000).

For additional information, resources, or to consult about a particular case, contact:

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# ADOLESCENT BRAIN DEVELOPMENT

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## Why is Adolescent Brain Development Research Relevant?

- Recent Supreme Court Decisions
- Legal Policies: "Raise the Age" in N.C.
- Individual Cases: Legal competencies, waiver/transfer, disposition

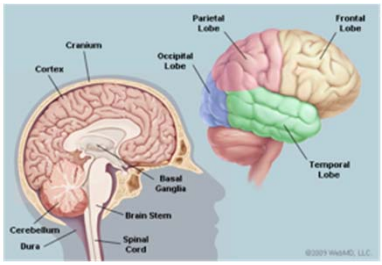
## Topics

- Characteristics of Adolescent Development
- Overview of Brain Structures and Functions
- Changes in the Brain during Adolescence
- Influence of Brain Changes on Behavior and Legal Competencies

## Adolescent Development

- Transition and Variability
- Domains of Development
  - Physical
  - Emotional
  - Social
  - Intellectual
- Environmental Influences

## Brain Structures

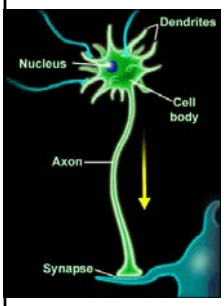



From: WebMD.Com

## Brain Structures


www.neuroskills.com

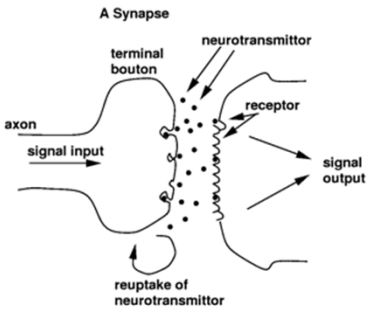
## The Neuron: Transmitter of Information




When do Neurons develop?

"Gray matter" versus "White" Matter:
Myelination

## Neurotransmitters

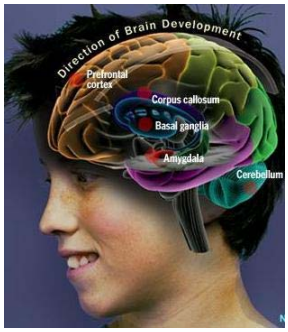



## Common Neurotransmitters

| Serotonin | Dopamine |
|---|---|
| • Emotion and Mood<br>• Hallucinations (high levels of serotonin)<br>• Medications prevent uptake of serotonin, leaving more in the system | • Associated with "Reward Center"<br>• Implicated in Schizophrenia and Parkinson's<br>• Drugs and meds can increase dopamine levels |

## Changes in the Brain During Adolescence

- Myelination
- Pruning
- Direction of change




Ken Winters, Ph.D. University of Minnesota
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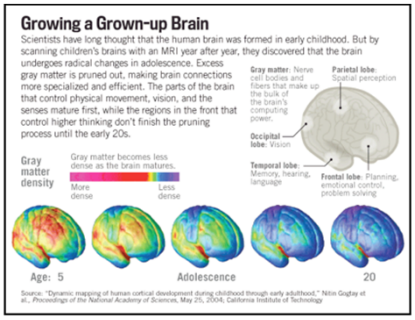
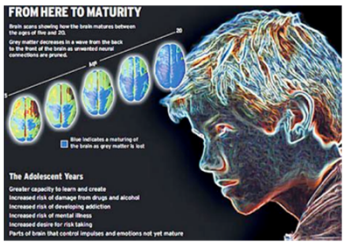
## Adolescent Brain Development




## Cognitive Changes

- Information Processing Abilities
- Reasoning Ability (logical thinking, hypothetical)
- Executive Functioning Ability



## Cognitive Skills

*"rather than talking about a stage of cognitive activity characteristic of adolescence,…it is more accurate to depict these advanced reasoning capabilities as skills that are …*

*employed by older children more often than by younger ones,*

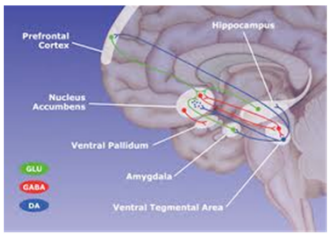
*by some adolescents more often than by others, and*

*by individuals when they are in certain situations (especially familiar situations) more often than when they are in other situations."*

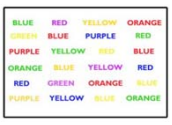
*- Lawrence Steinberg (2005)*

## Risk Taking, Decision Making, and Self Control

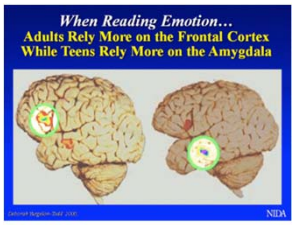
- Sensation Seeking
- Weighing costs and benefits
- Inhibiting Impulses
- "Hot Cognitions"




## The Stroop Test



## Social and Emotional Behavior




- Susceptibility and Importance of Peers
- Emotional sensitivity and processing of emotional information
- The "Reward Center" and the "Avoid Center"

## The Environment, Mental Illness, and Substance Use

- The greatest period of risk for the emergence of a mental health diagnosis is during adolescence
- There are differences in the brains of adolescents who have mental health diagnoses
- Adolescents' increased risk of alcohol and substance use could be related to brain development

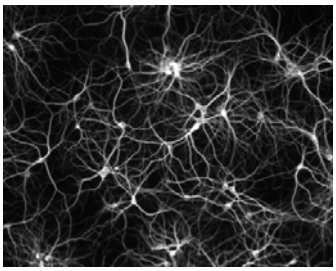
## Effect of Brain Development on Behavior

| | | |
|---|---|---|
| Ineffective levels of neurotransmitters | ⇨ | Problems with mood, attn/concentration, problem solving, & risk taking behaviors |
| Less reliance on frontal lobes in decision making | ⇨ | Impulsivity, "gut" reactions; problems ignoring distractions |
| Less efficient connections, such as those to/from memory centers of brain | ⇨ | Less reliance on experience and memory in decision making; more reliance on emotion |

**Adolescent Opportunities and Treatment Amenability**

Pruning:

Connections between neurons become more efficient with learning and experience



## Neuropsychology in Court

- Capacity to Waive Miranda (NCGS 7B-2101 )
  - IQ, age, experience with law enforcement
  - Time of day, level of stress, number of adults present
  - Level of emotional arousal (effect on decision making)
  - Short-term vs long term thinking
  - Effect of peers (protecting someone?)

## Neuropsychology in Court

- Transfer/Waiver (NCGS 7B-2203 )
  - Age, IQ, maturity, prior record, etc..
  - Decision making during alleged offense
  - Susceptibility to peers, emotional arousal
  - Level of planning versus impulsivity
  - Psychopathy Research: Caution!
  - Treatment needs and amenability

## Neuropsychology in Court

- Capacity to Proceed to Trial/Plea Bargain (NCGS 15A-1001)
  - Ability to weigh risks and benefits (how to plead)
  - Ability to consider hypothetical situations
  - Ability to delay gratification

## Neuropsychology in Court

- Legal Culpability
  - Age, IQ, maturity
  - Emerging mental health functioning
  - Alcohol/Substance Use
  - Consider possibility of misdiagnosis, effectiveness of treatment, consistency of treatment
  - Peer Influence

## Neuropsychology in Court

- Disposition/Sentencing (15A-1477c )
  - Age, maturity, IQ
  - Ability to appreciate consequences
  - Mental health functioning
  - Family/peer pressure
  - Likelihood that juvenile would benefit from rehabilitation in confinement
  - Treatment amenability (also history of treatment effectiveness, consistency)

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*Sample Case Material*

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**Client Name:** John Doe

**Case File Number:** xx JB xxxx

**Date of Birth:** 8/20/1997

**County:** Cumberland

**Evaluation Dates:** August 1, 5, 7, 2012

**Date of Report:** August 17, 2012

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**Charges:** Robbery With a Dangerous Weapon, Sexual Offense (with codefendants)

**Background Information:**

Family: Father incarcerated for past 5 years on drug related charges.
History of alcohol/substance abuse among mother – has abstained for past 7 ys.
No known family history of mental illness, history of abuse, neglect; no DSS.
No group home, although mother is currently entertaining the possibility because she is "overwhelmed" by client and client's older brother, who is also involved in legal system.

Academic: Client retained in 3rd grade. Has history of reading difficulties, problems paying attention. He is described as "hyper" and "class clown." He has prior suspensions for possession of marijuana, skipping classes, fighting, and cursing. No expulsions or placement in alternative school. No history of psychoeducational testing.

Goals: Be an attorney or basketball player. Plan: "I don't know – college I guess." Likes video games, "Hanging out"

Peers: Denies difficulties meeting people. Has "a lot" of "associates," and one "friend." Never involved in romantic relationship. Has associated with gang members but does not report details. Records indicate involvement in gang began two to three years ago. Has been involved in fights when others "disrespect" him.

Medical: No significant history reported. No head injuries or hospitalizations.

Mental Health: No prior inpatient hospitalizations. Symptoms: temper problems, arguing with adults, easily frustrated, poor concentration, easily bored. He leaves home late at night but no running away or lengthy absences. Periods of moodiness/irritability, according to mother. Diagnosis: Oppositional Defiant Disorder (per records). No history of animal cruelty or harm to others.

Outpatient Counseling: as part of probation in the past. This involved "anger management" and placement with a mentor. He did not participate in individual or family counseling, although he was referred to do so because his mother had difficulties with transportation. Medication: prescribed medication for "anger" and "attention." Noncompliant

Substances: Has experimented with alcohol. Daily use of cannabis. He reports history of selling cocaine. Never referred for or participated in treatment.

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Legal History: Assault, truancy, RWDW in past. Currently in detention. Has two infractions for not wearing clothing properly. No fights with staff/peers, according to staff.

**Test Results:**

Intelligence: Full Scale IQ = 71 Verbal Comprehension: 61; Perceptual Organization: 79; Working Memory: 94; Processing Speed: 78;

Academic Achievement: Word Reading: 51; Sentence Comprehension: 61

Personality Functioning: No evidence on testing of malingering/exaggeration/faking/minimization.

Moderate elevations on scales measuring anxiety, depression, and history of substance use. Interpersonally, he appears to be more remote and distrusting than others his age. He may view interpersonal relationships from a practical standpoint, attempting to determine how he may benefit from them rather than viewing them as a source of enjoyment. Although he reports having a good sense of himself and his goals, he most likely does not have an accurate impression of himself within the context of his abilities and environment.

Legal Competencies: No evidence of exaggeration of difficulties.

*Capacity to Proceed to Trial:* Has a good "factual" understanding of legal proceedings. "Rational" understanding and "capacity to assist" are limited in that he focuses on immediate/short-term gains rather than long-term possibilities. He would like to plead guilty (although evidence is quite limited in the case and against attny advice) so that he can be released and maybe so he is not 'ratting out' his friends. He is facing adult jurisdiction and if guilty, he will have to register as sex offender, have a record – etc… He dismisses this information – just wants to "get it over with."

*Miranda*: Reasonable *current* and *factual* understanding of rights. At the time, however, he thought "right to remain silent" means "you don't speak unless you have to." Prior to arrest, he had been using cannabis and had been involved in an altercation at school. He recalled feeling "tired." He was not taking medication at the time. He was questioned by three adult officers and one school official. Mother was not present. He stated he didn't know what to do – in prior cases he had not made a statement because he was with his mother and he wasn't questioned as much as in the current case (sexual assault). He reported he made a statement because it seemed "They already knew anyway." He also thought he would be able to go home if he made a statement.

*Transfer*: Low IQ, maturity: limited by decision making/problem solving, significant involvement with older/negative peers (impressionable). He places much more emphasis on current/short-term consequences than on long-term/future ("Impaired time perspective"). Has mental health/substance abuse/academic needs that have not been adequately or consistently addressed in the past. Misdiagnosis in the past (no developmental disability or depression noted).

*Treatment Planning:*Mental health treatment – medication, counseling, problem-solving/decision-making, family therapy….Substance abuse counseling, assessment of his academic needs…. Vocational counseling/training, gang prevention programming…mentor, group programs.

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| Overview of Adolescent Development | | | |
|---|---|---|---|
| Dimension | Major Changes | Effect on Behavior | Relevance to Legal Policy, Court |
| Physical | Growth spurt (height, weight, facial characteristics); development of sex characteristics.<br><br>Testosterone increases 10 fold in adolescence in boys(Adams, Montemayer, et al – Psychosocial dev't in adolescence)<br><br>African-American youths may go through puberty earlier than others (Herman-Giddens et al, 1997) | Early maturing youths are more likely to experience problem behaviors, perhaps because they are likely to associate with older peer groups.<br><br>Increase in aggression. | Adolescents who develop early physically may be at a disadvantage in court since their adult-like appearance may suggest to adults a higher capacity for decision making than is warranted. |
| Brain | Gray matter in the frontal lobe is overproduced, followed by a period of myelination | Inconsistent behavior/maturity<br><br>Some researchers suggest that adolescents are more likely to rely on "emotional" parts of the brain rather than the frontal lobes.<br><br>Poor decisions marked by failure to consider the consequences. This short-term thinking, combined with impulsivity, results in rather dangerous behaviors: Suicide (third leading cause of death among adolescents), drug use. | More interactions with the law.<br><br>Less likely to engage in logical decision making strategies when interacting with officers, attorneys, and other legal personnel. |
| Intellectual | The development of abstract thinking, and efficient and effective thinking mechanisms begin to develop (see brain, above)<br><br>"Raw" intelligence is quite childlike before age 16. By 17, intellectual functioning is similar to adults. | As adolescents develop, they are better able to think in terms of hypothetical situations, longer-term consequences (ages 16 and up); however, these gains are not consistent within a given individual or across all adolescents. Further, decision making abilities require additional skills and experiences. Therefore, there is likely continued difficulties in weighing options and problem solving. | As above.<br><br>Adolescents may be less likely to waive or invoke their rights *and* be more likely to acquiesce, particularly if they are susceptible to the influence of others due to disability or stress. |

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| | | | |
|---|---|---|---|
| Emotional | Identity - changes in the ways adolescents view themselves; more able to see themselves in psychological terms – to reflect on their personalities and to explain their motivations and behaviors.<br><br>Self-esteem: typically fluctuates but becomes more stable from about 13 yrs old on. Despite common wisdom, SE is likely to increase, if anything, over the course of middle and late adolescence (Steinberg/Sch). This is true for both delinquent and non delinquent youths.<br><br>Identity development takes place between late teens and early 20s.<br><br>Development of autonomy (12 yrs to 17 yrs) | Inconsistency in behaviors, desires, and thoughts about self.<br><br>Increase in risk-taking behaviors<br><br>More assertions of beliefs and less reliance on authority figures in later years. Many adolescents vacillate b/w childlike dependency and an exaggerated expression of confidence. | As above.<br><br>Inconsistency in responding to legal personnel and parents/guardians. Possibly having difficulty making decisions or making decisions impulsively. |
| Social | Increase in importance of peers and susceptibility to peer influence (peaks b/w 12 and 15 years and is followed by a decrease in late adolescence/ adulthood)<br><br>Emergence of interest in romantic relationships<br><br>Onset of sexual activity | Increase in peer related activities (phone, "hanging out," etc…)<br><br>Increased reliance on peers in making decisions.<br><br>Increase in risk taking situations with respect to sexual behavior | Gang involvement<br><br>"Group offending" (Zimring, 1998) is higher among adolescents than adults.<br><br>Following the group after arrest in making legal decisions. |

# Talking to Kids

August 2012

**"Initiating the Attorney-Client Relationship" is excerpted from *Juvenile Defender Notebook* and reprinted with the permission of the National Juvenile Defender Center. For more information, please contact the National Juvenile Defender Center at 202.452.0010 or at inquiries@njdc.info**

Chapter 2

# Initiating the Attorney-Client Relationship

Your relationship with your client is central to effective representation. Make every effort, from your first meeting on, to ensure that it is strong. Do not expect your client to trust you immediately; it is more likely that rapport will build over time as you demonstrate commitment to her case and respect her wishes. The recommendations in this chapter are meant to help you think about building a relationship with your client as you collect vital information during your early meetings with her. Take into account your personality and interpersonal style as you develop a method of getting to know your clients.

> [I]t is the obligation of juvenile defense counsel to maximize each client's participation in his or her own case in order to ensure that the client understands the court process and to facilitate the most informed decision making by the client.
>
> —*ACCD-NJDC Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems*, Preamble

### *What to consider before your first case*

- *Your client's neighborhood, environment, and background.* Each client will be unique, but there will most likely be commonalities among youth who end up in court in your jurisdiction. Think about how your client's upbringing—such as the sort of neighborhood she grew up in and the school she attends—affects how she thinks, speaks, and acts as well as how she relates to you.

- *How to communicate with your client.* Educate yourself about child and adolescent development. Books like the *Handbook on Questioning Children* and continuing legal education programs, such as the MacArthur Foundation's *Understanding Adolescents: A Juvenile Court Training Curriculum* (available at http://www.njdc.info/macarthur.php), are great places to start.[25]

## CONTENTS OF CHAPTER 2



## I. ETHICAL CONSIDERATIONS

### A. Legal advocacy vs. "best interests"

The rehabilitative focus of juvenile court can create confusion about the role of defense counsel. Defenders will find themselves tempted to focus on the perceived "best interest" of the child rather than on legal advocacy. You are obligated to keep in mind, though, that it is through counsel that the child exercises the most fundamental due process guarantee: the opportunity to be heard. In delinquency cases, all other perspectives are accounted for: community safety is represented by the prosecution, the parent's interests by him or his counsel, and the view of "best interests" by probation and child care agencies. Defense counsel's function is to articulate and advocate as zealously as possible for the expressed legal position and desires of the child, your *client*. The best decisions are made when all positions are fully articulated and tested via the adversarial court process.

The *Institute of Judicial Administration-American Bar Association Juvenile Justice Standards* state that the defense counsel's principal duty is to advocate, within the bounds of law, for the best outcome available under the circumstances, *according to the client's view of the matter.*[26] Similarly, the ABA *Model Rules of Professional Conduct* provide that so long as your client is not so incompetent as to be unable to adequately act in her own interest, your client must be accorded the prerogative of making decisions concerning the objectives of representation.[27] In that the *Model Rules* contemplate application to children as young as ages five or six,[28] delinquency clientele are conclusively within these critical decision-making guidelines.

In practice, advocating for your client's expressed interests, as opposed to your view of her best interests, means that you must allow her to make decisions. Although, you have the

expertise required to navigate the court process, predict possible outcomes of choices your client must make, give advice based on your evaluation of your client's situation, and speak for your client, she has fundamental control of her defense. At each and every stage of the case, you will use your knowledge to help her make informed decisions, but you must confer with her and abide by her decisions concerning the objective of representation.[29] In this regard, representing a child client is just like representing an adult. For example, sometimes a client will feel a strong desire to testify so she has had a chance to explain herself to the judge. Even if you think she will hurt rather than help her case, you must put her on the stand. Your role is to provide counsel and ensure that she understands the possible legal consequences of testifying in a particular case. Once she has decided to testify, regardless of how you feel about the decision, your role shifts and you must assist her in presenting herself well on the stand.



### Juvenile Justice Standards

The IJA/ABA Juvenile Justice Standards and rules of professional conduct provide guidelines for control and direction of the case.

As long as she is competent, the client has control over key decisions relating to the goals of the representation. The lawyer is responsible for determining and pursuing the legal strategies to achieve these goals.

The following guidelines are from the IJA/ABA Juvenile Justice Standards:

*The client, after full consultation with counsel, is ordinarily responsible for determining:*

- *the plea to be entered at adjudication;*
- *whether to cooperate in consent judgment or early disposition plans;*
- *whether to be tried as a juvenile or an adult, where the client has that choice;*
- *whether to waive jury trial; and*
- *whether to testify on his [or her] own behalf.*

*Decisions within the exclusive province of the lawyer, after full consultation with the client, include:*

- *what witnesses to call,*
- *whether and how to conduct cross-examination,*
- *what jurors to accept and strike,*
- *what trial motions should be made, and*
- *any other strategic and tactical decisions not inconsistent with determinations ultimately the responsibility of and made by the client.*[30]

## B. Conflicts of interest

Zealous advocacy includes giving each client your undivided loyalty. It is a violation of ethical rules to represent a client if you have a conflict of interest in her case. The ABA *Model Rules of Professional Conduct* state: "A lawyer shall not represent a client if ... the representation would be directly adverse to another client or there is a significant risk that the representation of a client would be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer."[31] As you are considering taking on a new case, ask yourself if you have learned anything from any previous or current client that could be useful in preparing the defense of this new client. If the answer is yes, then you have a conflict of interest and you should decline the new case. Common examples of conflicts of interest include: representing more than one person charged in relation to the same events, or representing a respondent in one case and her complaining witness or other witness in a different case. Even if you think that a conflict is more apparent than real, the mere appearance of a conflict is problematic because adolescents are quick to notice and react to perceived unfairness. For this reason, you should also consider whether you have a personal or professional relationship with someone that will compromise your zealousness on behalf of your client or inhibit your client's trust in you. Discuss concerns with your client openly and directly so that she can decide whether she still wants you to represent her.

If you perceive a conflict of interest between two potential clients, do not discuss the facts of the case with either client until you have tried to eliminate the conflict. Immediately seek the judge's permission to withdraw from the conflicting case. If there are few lawyers available, you may be pressured to represent co-respondents in the same proceeding. This is extremely problematic because one client's best defense may lie in suggesting that the other client committed the alleged offense. All jurisdictions have ethical rules addressing conflicts of interest. Cite these rules in arguing to the judge that another attorney should be appointed to represent the co-respondent. Remind the judge that a conflict of interest could be a reason for the case to be overturned on appeal. Research the procedures in your jurisdiction for appointing counsel so that you can help secure another attorney for the child. If the judge grants your request to withdraw, your ethical obligations include turning over any case files and information promptly to the child's new attorney.

Even if the judge declines your request to withdraw, you can proceed with representation *only* if you reasonably believe that you can provide competent counsel to each of your clients and if both clients give their informed, written consent to the shared representation.[32] If you proceed without informed consent, you risk disciplinary action for violation of ethical rules. Explain the nature of the conflict to each child in an individual conversation. Allow

each child to ask questions of you confidentially. If both clients grant their informed consent and you proceed with representation, make sure that the conflict and its resolution are reflected in the case record.

## II. TIPS FOR QUESTIONING CHILDREN



Before you focus on the content of your early conversations with your client, think about how you will approach your meetings with her. Take her age, background, and abilities or disabilities into account when you speak to her and ask her questions. Adolescents process and use language differently than adults. Adolescents, especially if they are under-educated or have mental disabilities, are prone to becoming confused by linguistic ambiguities or lengthy questions, have an immature understanding of time, and may have difficulty constructing narratives. They may also interpret language literally and be unable to handle abstractions well. Whenever you speak with children and adolescents, phrase your questions with care in order to elicit accurate information. Specific suggestions adapted from Anne Graffam Walker's *Handbook on Questioning Children* follow.[33]

**Suggestions for questioning children**

**General precepts:**

- *Aim for simplicity and clarity in your questions.* If the child uses simple words and short sentences, so should you.
- *Be alert for possible miscommunication.* If a child's answer seems inconsistent with prior answers or doesn't make sense to you, investigate the possibility that there is some problem 1) with the way the question was phrased or ordered, 2) with a literal interpretation on the part of the child, or 3) with assumptions the question makes about the child's linguistic/cognitive development or knowledge of the adult world.
- *Make sure you understand the child.* You cannot be embarrassed to ask your client to define slang terms. Very few adults are fully fluent in street slang, and it is important to know what the terms a child is using mean. Do not guess.

**Some specifics:**

- Break long sentences/questions into shorter ones that have one main idea each.
- Choose easy words over hard ones: use simple expressions like "show," "tell me about," or "said" instead of more formal words like "depict," "describe," or "indicated."
- Avoid legal jargon like "What if anything" or "Did there come a time."
- It is important that you and the children use words to mean the same thing, so run a check now and then on what a word means to each child. Although children generally are not good at definitions, you can still ask something like, "Tell me what you think a ___ is," or "What do you do with a ___?" or "What does a ___ do?" Do not expect an adult-like answer, however, even if the word is well known. The inability to define, for example, "wind" does not mean that the person does not know what wind is. Definitions require a linguistic skill.
- Avoid asking children directly about abstract concepts like what constitutes truth or what the difference is between the truth and a lie. In seeking to judge a young (under nine or ten) child's knowledge of truth and lies, ask simple, concrete questions that make use of a child's experience. E.g., "I forgot: how old are you?" (Pause.) "So if someone said you are ___, is that the truth, or a lie?" Young children equate truth with fact, lies with non-fact.
- Avoid the question of belief entirely ("Do you believe that to be true?").
- Avoid using the word "story." ("Tell me your story in your own words.") "Story" means both "narrative account of a happening" and "fiction." Adults listening to adults take both meanings into consideration. Children listening to adults, however, might well hear "story" as only the latter. "Story" is not only an ambiguous concept, it can be prejudicial.
- With children, redundancy in questions is a useful thing. Repeat names and places often instead of using strings of (often ambiguous) pronouns. Avoid unanchored "that's" and "there's." Give verbs all of their appropriate nouns (subjects and objects), as in "I want you to promise me that you will tell me the truth," instead of "Promise me to tell the truth."
- Watch your pronouns carefully (including "that"). Be sure they refer either to something you can physically point at or to something in the very immediate (spoken) past, such as in the same sentence, or in the last few seconds.

- In a related caution, be very careful about words whose meanings depend on their relation to the speaker and the immediate situation, such as personal pronouns (I, you, we), locatives (here, there), objects (this, that), and verbs of motion (come/go; bring/take).

- Avoid tag questions (e.g., "You did it, didn't you?"). They are confusing to children because a youth may lose track of what the subject is. Avoid also Yes/No questions that are packed with lots of propositions. (Example of a bad simple-sounding question, with propositions numbered: "[1] Do you remember [2] when Mary asked you [3] if you knew [4] what color Mark's shirt was, and [5] you said, [6] 'Blue'?" What would a "Yes" or "No" answer tell you here?) It does not help the fact-finder to rely on an answer if it's not clear what the question was.

- See that the child stays firmly grounded in the appropriate questioning time frame and situation. If you are asking about the past, be sure the child understands that. If you shift to the present, make that clear too. If it is necessary to have the child recall a specific time/date/place in which an event occurred, remind the child of the context of the questions. Do not use phrases like, "Let me direct your attention to." Try instead, "I want you to think back to...," or "Make a picture in your mind of when...," or "I'm going to ask you some questions about..."

- Explain to children why they are being asked the same questions more than once by more than one person. Repeated questioning is often interpreted to mean that the first answer was regarded as a lie or was not the answer that was desired.

- Be alert to the tendency of young children to be very literal and concrete in their language. "Did you have your clothes on?" might get a "No" answer; "Did you have your p.j.'s on?" might get a "Yes."

- Do not expect children under about age 9 or 10 to give "reliable" estimates of time, speed, distance, size, height, weight, color, or to have mastered any relational concept, including kinship. (Adults' ability to give many of these estimates is also commonly overrated.)

- Do not tell a child, "Just answer my question(s) yes or no." With their literal view of language, children can interpret this to mean that only a Yes or a No answer (or even "Yes or No"!) is permitted—period, whether or not such answers are appropriate. Under such an interpretation, children might think that answers like "I do not know/remember" and detailed explanations would be forbidden.

**Sentence-building principles for talking to children**

**Vocabulary:**

- Use words that are short (1-2 syllables) and common. For example, call it a "house" instead of "residence."
- Translate difficult words into easy phrases. Use "what happened to you" instead of "what you experienced."
- Use proper names and places instead of pronouns, e.g., "what did Marcy do?" instead of "what did she do?"; "in the house" instead of "in there."
- Use concrete nouns that can be visualized ("backyard") instead of abstract ones ("area").
- Use verbs that are action-oriented, such as "point to," "tell me about," instead of "describe."
- Substitute simple, short verb forms for multi-word phrases when possible. Try, for example, "if you went" instead of "if you were to have gone."
- Use active voice for verbs instead of the passive. For example, ask "Did you see a doctor?" instead of "Were you seen by a doctor?" Note: One exception is the use of the passive "get" ("Did you get hurt?"), which children acquire very early and is easier to process than "Were you hurt?"

**Putting the words together:**

- Aim for one main idea per question/sentence.
- When combining ideas, introduce no more than one new idea at a time.
- Avoid interrupting an idea with a descriptive phrase. Put the phrase (known as a relative clause) at the end of the idea instead. For example, "Please tell me about the man who had the red hat on" instead of "The man who had the red hat on is the one I'd like you to tell me about."
- Avoid difficult-to-process connectives like "while" and "during."
- Avoid negatives whenever possible.
- Avoid questions that give a child only two choices. Add an open-end choice at the end. "Was the hat red, or blue, or some other color?"

The bottom line: Keep it short and simple.

## III. INTERACTIONS WITH YOUR CLIENT

### A. Initial meeting and interview



Ideally, your initial meeting with your client (and possibly her parent) will take place in your office with ample time to get to know each other. In reality, you are more likely to meet your client just before a court appearance, with little time or privacy in which to hold a productive conversation—for your purposes or hers. You must be prepared to conduct a quick yet efficient initial interview with your client, remembering that establishing a good relationship with her is as important as collecting vital information about the case. Document A1 in Appendix A is a sample form that can help you collect the critical information you will need prior to a detention hearing. Please feel free to adapt this form for your own use. As you interview her, maintain a calm, even tone so as not to make your client feel anxious or rushed. You will conduct a more extensive interview later, during which you will have more time to gather additional information.

If you are truly rushed or there are complex issues you need time to address before you can adequately represent your client, *you should request a delay from the court.* If the judge will not grant a later call or continuance, state repeatedly for the record that you are not prepared and cannot effectively represent your client. See Chapter 7, page 133, for more detail. Of course, when considering whether to request a delay, always take into account the need to prevent your client from being detained any longer than is absolutely necessary.

If you get cases in advance of court proceedings, your first conversation should cover the same crucial areas as if you were rushed, but you will have time to address each issue thoroughly and ask more questions on additional topics. It is also a good practice to send a letter to each client when you are assigned to her case. Many attorneys use a form or standard letter to introduce themselves and their job, as well as to request that the client call to schedule a first meeting. Document A2 in Appendix A is a sample introductory letter you can use as a starting point.

Your first in-person conversation with your client is significant to the entire case. It will lay the foundation for a strong attorney-client relationship and, therefore, effective representation. Be sure to include these crucial steps:

#### 1. Introduce yourself and your role to your client

Tell your client who you are and what your job is, emphasizing that you work for her (and not her parent or the judge), are on her side, and will keep your conversations between just the two of you. Explain the attorney-client

privilege and emphasize how serious it is in the law and to you. Give her your card and tell her she can call you anytime. The encounter might open along these lines:

> *Hi, my name is _____. I'm your attorney. How are you doing?* [Pause, listen.] *Have you ever had an attorney before? No? Let me tell you a couple of things about having an attorney. First, our relationship will be different than any other you've had with an adult. I work for you, not your mom, not your dad, not the court – nobody but you. My job is to help you understand what's going on in court and help you decide what you want to do on this case. Then, I'll work in court and outside of court to help take care of this case. I don't tell you what to do, and I will only do what you want me to do. Do you have any questions about that?* [Pause, listen.] *The second thing I want to let you know is that everything you tell me is confidential, it's secret. Do you know what I mean by that? Would you tell me what you think it means in your own words?* [Pause, listen.] *Yeah, that's right. And there is a law that says no one can make me tell what you've said to me. That makes it so you and I can talk about anything, and you don't have to worry, it is just between us. I will not repeat it to anyone without your permission. Does this make sense?* [Pause, listen.] *Do you have any questions about what I just said?* [Pause, listen.] [At this point, hand your business card to your client. Document A12 in Appendix A is a camera-ready sample of an assertion of *Miranda* rights you can have printed on the back of your cards; if you choose to do so, you will want to explain its purpose.]

Your individual style will dictate the exact language you use, but the point is to convey absolute loyalty to your client. Your clients will often have poor self-esteem and come from low-income families. They may also be untrusting of adults as a result of many unfortunate experiences. The extra effort to build rapport will pay off in innumerable ways, not the least of which is avoiding eliciting mistruths or half truths which can waste time and lead into unproductive defense theories. Furthermore, the benefits of a demoralized child experiencing camaraderie and trust with a non-threatening adult may be enormous.

**2. Ask about your client**

Asking about your client's grade in school, likes and dislikes, favorite activities, and home situation gives her a chance to get comfortable talking to you. It also provides you with a chance to collect valuable information and to assess her cognitive level. (For example, she might mention a teacher she likes who will

be a useful ally later.) Use her answers to tailor your language, explanations, and questions to her capabilities. (For example, high school students who have studied government should know that the Constitution provides rights, which can help introduce your explanation of the right to counsel.) If you are pressed for time in your initial meeting, you may have no choice but to skip this step, but be sure to remember it when you next have a conversation with your client.



**3. Explain what is going on**

Your client probably understands little about the court process—even if she has been through it before. Part of gaining her trust is showing her that you care about her questions and concerns. Before you begin asking case-related questions of her, take a minute or two to briefly explain her situation and what you need to accomplish in this quick meeting. You may say something like:

> *We are about to go into court so the judge can decide whether you can stay at home between now and when he listens to longer arguments about your case. We will have more time later to talk about everything that happened to you and for me to answer all of your questions, but right now I have to get some information from you pretty quickly so I can explain things to the judge at this first hearing.*

**4. Ask for written permission for access to confidential information**

A central goal of your first meeting is to get written consent for the release of confidential information to you. The release is crucial to your investigation. School files, medical records, mental health evaluations, and other documents will help you not only in defending against the charges, but also in creating a disposition plan (see Chapter 11). It is important to send for these records as soon as possible because it can take time for other agencies to send the documents to you. For the information to be useful, you will need it as soon as possible. Because these documents contain confidential information, in most cases you will need written consent for the information to be released to you.

The rules vary as to whether it is the parent, the child, or both who have to sign a release of information, so you need to know the laws in your jurisdiction. Find out when it is necessary to have a parent's signature and when it is not, so you will be prepared if your client's parent is uncooperative or absent. Determine if your state takes into consideration the age of a child and the subject matter of the records. For example, a state may give a 16-year-old the authority to release school records or a 13-year-old the ability to consent to release of mental health information but require a parent's consent for collecting other documents.

A sample release of information form is included as Document A3 in Appendix A. Adapt that form to your state's laws and explain to the child and parent at your first meeting why it is important for you to get these records. You can reiterate the strength of the attorney-client privilege if they express concerns about how the information will be used. Give your client a copy of the release she has signed. (Note that the release of information form gives you permission to collect records but not necessarily to share them with others; see page 231 in Chapter 11 for information about laws governing sharing educational and medical records.)

**5. Conduct an interview about the case, in as much detail as you have time for**

If the parent has been present up to now, this is the time to ask him to give you and your client privacy. Explain that attorney-client confidentiality extends only to you and your client. Describe the risk of the parent being called to testify about this conversation. Tell him it is better for everyone if you talk to your client alone for a few minutes.

Begin this part of the conversation by asking your client's permission to take notes, explaining that you want to write things down to help you remember all the important information she tells you. Tell her specifically that you will not share your notes with anyone. As you listen, pay close attention to your client's personality, intelligence, and communication ability, as well as the facts she provides. These observations will help you recognize possible educational disabilities, mental health problems, and/or other issues addressed in later chapters of this guide.

If you have time, try letting your client tell her whole story first, without interruption, and then start over by asking questions about each part of her explanation. Ask questions while keeping in mind your time constraints, immediate concerns, and the tips for framing questions from earlier in this chapter. Begin with the crucial issues, such as:

- *What happened in this case?* Where did the incident take place, when did it happen, who was there, why was she arrested? If the client claims she was not present for the alleged incident, where was she, and how can she prove it? Reading through the police report with your client may help her articulate her version of the events.

- *Does your client have a prior record or any pending cases?* If so, what can she tell you about them? What were the offenses? What was the disposition? Is your client now on probation or parole? What are the conditions of probation or parole? Who is her probation/parole

officer? Does the probation/parole officer know about the current charge yet? How does your client think the probation/parole officer will react to the most recent charge?

- *Where is your client staying right now, and is the situation there okay?* Is there assaultive behavior at home, a current family crisis, lack of supervision, narcotics dealing by family members, etc.? Did the offense occur at home or while your client was on the run from home? If she does not want to stay where she is, does she have another place to stay? What about other family members or friends? Are there adults who could help supervise her, such as someone whose house she could go to after school? Can that person come to court to say he will take your client in, and will your client's parent agree to that arrangement?

- *Who does your client think will testify against and for her?* Make suggestions to help her think of possibilities and keep track of her answers in a witness chart, where you can keep—and readily relocate—contact and other information about each person as you collect it.

There are, of course, many more questions you will want to ask, some depending on the nature of the case and others as a result of your client's answers to these questions. Again, use your time wisely, reminding yourself and your client that you will have more time later. If you have time, ask:

- *Is the police report right about what happened?* Is anything missing? Is there other information that explains why the incident happened?

- *Will your client's parent come to this hearing?* If not, why? How can you contact the parent? Are there other relatives or adults who might be able to come if asked? Who are they, and how can they be reached?

- *Where does your client go to school?* Does she miss class? How often? Has she been in trouble at school? What are her grades? Is she receiving special education services? Does she participate in any extracurricular activities? Has she won any awards? Are there any teachers or administrators there who would say good things about her?

- *Does your client have a job?* Is it full-time or part-time? Has she ever worked before? When did she work? Are there any employers who can act as references?

- *Is there any other social information that can be used to support pre-adjudication release?* Does she participate in clubs, sports, or religious activities? How can she show that she is responsible (e.g., does she

babysit for her siblings while her parent is at work)? Does she have any hobbies?

- *Does your client have any substance abuse or medical problems?* Will a parent, probation officer, or detention center employee bring up these problems in court? Has your client ever been in treatment? Did she successfully complete treatment (even if now using drugs)? If treatment is incomplete, what supplemental services might be suggested?

- *Has your client participated in any counseling programs?* Is there a counselor who could serve as a reference?

- *What are your client's dreams/hopes for herself?* What does she want to do when she is an adult? Where does she see herself in five years? Ten? Twenty?

More detailed questions regarding particular situations appear below.

**6. Explain your client's proactive role during the case**

Take a couple of minutes to convey to your client how her future conduct will affect the outcome of her case, for better or for much worse. Initially, you can get that message across with a simple, generic description focused on the most important areas: 1) avoiding any further trouble with the police, 2) going to school, and 3) behaving well at home. This part of the conversation may be more productive if you include the parent; you can quickly surmise whether bringing in a parent could reduce your client's trust in you at this point. (Note that you may also want to consider having a private conversation with the parent; see Section IV of this chapter.) Find out what you can about your client's home situation and social behavior, but most importantly, emphasize the implications of your client's actions outside the courtroom. Again, while expressing these ideas in your own style, you may say something like:

> *Let's talk a few minutes about what you can do to help your case. Do you have any ideas about that? What kind of things do you think you could be doing that could help things out at this point? What do you think the judge will be watching for now?* [Pause, listen. Respond positively to her ideas. Build on and refer back to her ideas as you move forward.]
>
> *I think there are three main things that the judge looks at. First is your record. I see you have XX charges. It's really important that you don't get in trouble while this case is going on. If you do, the judge will take that as a sign that you think court is just a big joke, nothing important. And this will tick off the judge in a big way and make him decide to lock you up in detention. Getting in*

*trouble right now, while this case is going on, is a much bigger deal than getting in trouble when you don't have a case going on – Tell me you'll be careful...*[Pause, listen.] *It's going to mean that you're going have to watch not only what you are doing, but be careful about who you are hanging out with. Can you be careful about what your friends are doing, too?* [Pause, listen.] *Like, if you are at the mall and a friend starts shoplifting, you need to just get out of there. Right away. If you're out with friends and someone pulls out a blunt, you gotta leave, immediately. Don't try to talk them out of it, don't bother explaining things, just leave. If the guys roll up in a car and you're not sure it's their car, say no thanks to a ride. You just can't risk being near people who are doing something wrong, even if you weren't doing anything wrong. I know that is unfair, but it's the situation you're in at this point. What do you think will be the hardest thing about this?* [Pause, listen.]

*Second, judges look at school. You can't be messing up in school. Prosecutors go out of their way to find out about school problems because they know if a judge hears about it he'll want to lock you up. So, be on time. Don't miss any classes. No fights, no talking back to teachers – just don't get into trouble at school. We're going to talk in a few minutes about how things are going in school, but the main thing now is remember that you need to keep school as your focus.*

*Third, judges watch what is happening at home. Basically, if you're not doing what your parent says, a judge thinks, "Well, okay, I guess if home isn't working out then detention is where you should be staying." Try to follow the rules at home, help around the house, get along with your brother and sister. Your parent loves you, but when the judge asks him how you are doing, he has to tell the truth. Make it easy on him so he can say you're doing well, and that since this case you've been really getting it together. When a judge hears that, he's likely to think, "Okay now, I guess we don't need to think about detention if things can turn around like this at home."*

You should be listening for your client's good qualities, as well as red flags. Focus your client on her strengths and her positive potential, emphasizing how doing well in these three ways can make a huge impact on the outcome of the case. Discuss strategies for addressing any problems in these three areas and review the status of those remediation plans at each subsequent meeting with your client. She has to understand how important her behavior is while her case is in progress, and you should be prepared to work with her to find viable solutions as problems continue or arise. It may be easier to convince her of the significance of her role if you ask her to think about how her behavior must look to the judge. (Using this reasoning also helps make clear that what seems like

criticism does not come from you, but from concerns about the judge's perception.) Your assistance may include helping her obtain special education school services, family counseling, medical or social services, or other assistance. The many benefits of these strategies will become clear as the case progresses.

**7. Listen to your client and find out what she wants**

You must act on your client's expressed interests at every stage of the case. Before you enter the courtroom and speak on her behalf about anything, find out what her goals are for the hearing. Explain the possibilities for what you will say as well as how you will present the arguments and let her determine the best course of action.



## B. Further conversations

As early as possible, you will want to gather as much information as you can from your client. Depending on what you know—from her, the police report, or other sources—about the circumstances of the offense and arrest, you will engage your client in different lines of questioning. Your goals in gathering this information are to begin to determine what legal defense is appropriate in the case, consider the potential for meritorious suppression and other pre-adjudication motions, and identify possible witnesses for the prosecution and defense. (An explanation of how to process and consolidate this information appears in Chapter 6.) Remember to take time to explain to your client why you are asking questions and how her answers may help her case. See Chapter 6 for an overview of possible grounds for suppression and suggested questions associated with each legal issue. In any situation, ask whether your client was ill or under the influence of medication, drugs, or alcohol; if she was, her decision-making capabilities may have been compromised. (In the event that illegal drugs or alcohol caused the impairment, weigh the benefits and risks of introducing that information in court.) Then, research applicable law to determine whether there are grounds to exclude harmful evidence from court.

## C. Continued contact

*It is very important that you maintain regular contact with your client.* After your initial client interviews are complete, you should still meet with or talk to your client regularly, at least once every two weeks if the child is in the community and at least once every week if the child is detained. Regular contact with your client allows you to maintain your rapport and helps provide you and your client with deadlines for performing specific tasks. It also reminds your client of the pending case and her pre-adjudication obligations to the court.

It is a good policy to meet your client on her turf and preferably in her home, as long as you can meet in private when necessary. This strategy provides insight into your client's home situation and alleviates concerns about how or if she will come to meetings at your office. Be aware of any safety concerns related to traveling to an unfamiliar neighborhood and plan accordingly.



Though the substance of each conversation will differ, the fundamentals remain the same. Always:

- Show your client that you care about what she thinks and what happens to her,
- Keep your client informed about developments in her case,
- Let your client know of work you are doing on her case,
- Answer your client's questions plainly and clearly,
- Be timely and responsive to all your client's inquiries, and
- Keep your promises.[34]

> I learn more from spending one hour in a child's home than by spending five hours taking a social history from the child.
>
> —Juvenile defender

Be careful not to promise your client anything you are not absolutely sure you can deliver; you risk losing her trust if you fail her. In general, if you always keep in mind that you work for your client and act upon her expressed interests, these displays of respect and frequent consultations will become a natural part of the development of each case.

## IV. YOUR CLIENT'S PARENT

Interacting with your client's parent is a complicated issue unique to juvenile court. You must be clear at all times that you work for the child, but at the same time, you need to cultivate the parent's cooperation. Do what you can to work with or around the parent.

Ideally, the parent wants to be an ally. In some cases, though, he will be the complainant, or you will discover troubling information about his relationship with his child. Regardless of his willingness to help your client's case, be clear about how he can be involved and how he cannot. You have to be able to talk to your client alone, so you can be sure she is not altering anything she tells you for the parent's benefit. Similarly, you should talk to the parent alone so you can collect information free from any distortions designed to influence the child. You can also use these individual interviews to frame things for the benefit of each party. (For example, you could explain to the parent that your client's behavior,

though unacceptable, is typical for adolescents or explain to the child that her parent's nagging is a sign of concern for her.)

It will often become apparent during these interviews that there is a significant parent-child conflict. It could be a typical disagreement over curfew, sibling rivalry or perceived favoritism, or privacy boundaries and/or a more serious problem, such as neglect, abuse, or desire on the part of one or both parties to stop living together. Smoothing over relatively minor problems, on your own or with the help of a social worker, will benefit your client and her case. Encouraging a parent to enroll in counseling with her child or to enroll her child in desired counseling alone can also be helpful. If the parent was the complainant and counseling is successful, you may be able to bring a statement to the prosecutor that the parent no longer wants the case pursued, which could earn a dismissal or *nolle prosequi* (see Chapter 6, page 107). (Handling serious parent-child issues is more complicated and transferring a case to dependency court, for example, can be a significant step to a more appropriate resolution.)

> One of the ways I let my clients know they are in charge is by asking them for permission before sharing information or case documents, like a police report, with their parents. Whatever the client says, the point is made.
>
> —Juvenile defender

Let the parent know what impact his statements to the court, probation officer, and others will have. A parent may try to get help for his child by relating to the judge the details of difficulties at home without realizing he is actually encouraging the judge to order detention. Understand that the parent may be justifiably frustrated and let him vent to you, but help him figure out how to convey what he means to others in a way that is less harmful to his child. Do not advise the parent to lie, of course, but assist with framing the complaint: "There are some curfew problems" sounds much better than "She stays out all night. I don't know where she goes, who she's with, or what she's doing."

Further thoughts about dealing with parents at various points in the case, including strategies for winning over an uncooperative parent, are provided in Chapter 7 on page 137, as well as in other sections in which they are relevant.

Remember that you must continuously assess the child's comprehension of what you say and her ability to articulate her thoughts to you. If you are having trouble communicating with a client, consider whether that difficulty is indicative of a mental health problem or disability and whether these issues could mean she is incompetent to face adjudication. Chapter 3 addresses these difficult and complex issues.

# An Introduction to Procedural Justice

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**Article: Toward a Theory of Procedural Justice for Juveniles**

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**TEXT:**

## Introduction

The juvenile court has historically been a hybrid institution in terms of its purpose and procedures, incorporating aspects of both the civil and criminal court systems. In the late nineteenth century, the founders of the first juvenile courts in the United States were motivated by a desire to provide a forum--separate and discrete from that of adult criminal defendants--for the adjudication and disposition of child and adolescent offenders. The initial result was an informal system emphasizing the rehabilitation and remediation of wayward youth, with little focus on the court's fact-finding role vis-a-vis the alleged criminal offense and even less consideration given to the rights of the accused. As the decades passed and the juvenile court became increasingly punitive, child advocates challenged the informality of delinquency proceedings, and critical due process rights were ultimately granted to young offenders. In the 1960s and early 1970s, the United States Supreme Court held in a trio of foundational cases that juveniles have basic due process rights in delinquency proceedings and before transfer from juvenile to adult criminal court. Certain rights--including trial by jury--were not extended to juveniles, however, premised on the contention that the unique and beneficial aspects of juvenile court would be compromised if all the formalities of the criminal system were "superimposed" upon it. As the juvenile court system has expanded and the realities of limited resources and inadequate staffing have become apparent, the concern expressed by Justice Fortas in 1966 that juveniles were receiving "the worst of both worlds" continues to resonate.

The debate over how to weigh the potential benefits of juvenile court against the risks associated with the denial of due process rights has animated critical analysis of the juvenile justice system for the past forty years. Some courts and commentators have applied the contractual concept of quid pro quo ("something for something") when deciding whether a particular procedural protection, such as the right to a jury trial, is constitutionally mandated for juvenile offenders. It is suggested in these opinions--usually in explicit terms--that with the granting of each "new" right to juveniles, there is less of a need for a separate children's court. Alternatively, courts have denied specific procedural protections to juveniles when convinced that young offenders have received rehabilitative services, and not punitive treatment, in return. Other courts have moved away from a strict rendering of quid pro quo and toward a more flexible balancing of competing interests when determining whether to provide a particular procedural right to juveniles; in these cases, the decision often hinges upon the court's sense of what is required to achieve a "fundamentally fair" result. The question rarely posed, however, is whether weighing rehabilitative against punitive theories of delinquency court is the proper calculus.

Will certain procedural protections "spell the doom” of the juvenile court system, or should the analysis be focused on completely different factors?

In 2008, the Kansas Supreme Court held that juveniles have a constitutional right to a jury trial, bringing the total number of states that either provide jury trials to juveniles by right or allow them under limited circumstances to twenty. In re L.M. was premised on the contention that punitive legislation passed during the previous quarter-century had eroded the distinctions between the juvenile and criminal justice systems and thereby compromised the juvenile court's "benevolent, parens patriae character." After closely comparing the language and purpose of the state's juvenile and criminal codes, the Kansas court concluded that because of the similarities between the two systems, young offenders must be afforded the protection of trial by jury under the Sixth and Fourteenth Amendments. While In re L.M. is considered by many juvenile justice advocates to have been a clear victory for young offenders, its holding may also be seen as perpetuating the concept of quid pro quo, in which the rehabilitative ideal of juvenile court is directly juxtaposed against the due process protections provided to adults under the adversarial model. Yet, instead of concluding that the jury trial right would compromise the beneficial nature of juvenile court, the Kansas Supreme Court found that there was so little left to distinguish the juvenile system from the adult system that this right could no longer be denied. In this way, the decision may also be seen as taking a step toward the more radical notion that because of its shortcomings and ineffectiveness, the juvenile court system should be abolished as a separate procedural entity and replaced with a criminal court for minors.

This Article critically examines the ways in which courts have determined whether juveniles should be granted certain procedural rights, and it argues that rather than subscribe to the wooden concept of quid pro quo or utilize a subjective balancing approach, courts should allow empirical research evaluating adolescents' appraisals of the fairness of a decision-making process--also known as procedural justice--to inform the decision. Part I analyzes United States Supreme Court case law that has addressed this issue and discusses the recent Kansas Supreme Court case that rejected precedent, but fails to shift the juvenile justice paradigm.

Part II argues that social science research provides a useful perspective from which to analyze whether specific procedural rights should be granted to juveniles. The first section examines research on why people obey the law. The second section discusses the legal socialization of adolescents and its influence on patterns of reoffending. The third section suggests that when juveniles perceive that they have been treated fairly by law enforcement and the courts--a judgment shown not to be dependent upon the outcome of the case--they are less likely to recidivate.

Part III begins the task of applying procedural justice theory and related findings by social psychologists to the juvenile court, an analysis that has not previously been presented by legal scholars. The first section examines how the theory could reframe the debate over whether juveniles have a constitutional right to a jury trial. The second section applies the theory to the practice of allowing juveniles to waive counsel and admit to criminal charges at arraignment, which has been justified as enabling juveniles to receive treatment without the delay that often results from litigation of the charges. The third section applies the theory to the practice of allowing school-based actors such as teachers and administrators to serve as law enforcement without providing traditional due process protections to youth. The fourth and final section considers how procedural justice theory might affect the role of the parent in juvenile delinquency proceedings.

Part IV concludes by acknowledging the limits of procedural justice theory as applied to juveniles; it offers caveats and raises questions for moving ahead.

## I. From Quid Pro Quo to Subjective Balancing and Back

Perhaps because it was created to remedy the harsh and unforgiving manner in which the criminal court system dealt with young offenders, the juvenile court system during the first half of the twentieth century was notable for its procedural informality and lack of administrative oversight. As juvenile dispositions became more punitive, the quid pro quo exchange of rights for rehabilitation inevitably broke down, resulting in juveniles receiving neither effective treatment nor the procedural protections of adults. From 1966 to 1970, the United States Supreme Court entered the breach with a series of decisions that relied upon the Due Process Clause for their grounding. This Part discusses these decisions as well as the recent Kansas case in which the court utilized quid pro quo analysis to hold that juveniles do have a Sixth Amendment right to a jury trial.

### A.Defining Fundamental Fairness

During a four-year period beginning in 1966, the United States Supreme Court addressed important aspects of the juvenile delinquency process in three formative cases, each of which relied upon the Due Process Clause rather than the

Sixth Amendment for its holding. The first, Kent v. United States, held that before a juvenile's transfer to adult criminal court, she must be given an opportunity for hearing, counsel must be given access to relevant records, and the court must accompany its transfer order with a statement of reasons or considerations for its decision. While stopping short of mandating that all constitutional guaranties applicable to adult criminal defendants be applied to juveniles, the Court held that it would be "extraordinary" if society permitted children to be transferred to adult court without these basic protections.

The second and most comprehensive case of this period was In re Gault, widely celebrated by attorneys and advocates, which rejected the assertion that the substantive benefits of the juvenile court process "more than offset" the denial of due process rights to juveniles. Instead, upon holding that such due process rights as the right to counsel, the privilege against self-incrimination, and the opportunity for cross-examination of witnesses apply to juvenile delinquency proceedings, the Court stated that these protections may, in fact, be "more impressive and . . . therapeutic" for the juvenile than the long-assumed benefits of the juvenile system--namely, its informality and the benevolence and compassion of the judge. Citing a 1966 report on juvenile delinquency by sociologists Stanton Wheeler and Leonard Cottrell, the Court recognized that when harsh punitive measures come on the heels of "procedural laxness," a child may feel that she has been "deceived or enticed." As Wheeler and Cottrell have stated, "Unless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel."

The Court was careful to situate its decision, however, within the framework of due process balancing by concluding that the provision of basic due process protections to juveniles would by no means require that "the conception of the kindly juvenile judge be replaced by its opposite."

The third case in this trio, In re Winship, decided three years after Gault, held that because the Due Process Clause requires application of "essentials of due process and fair treatment," juveniles--like adults--are constitutionally entitled to proof beyond a reasonable doubt during the adjudicatory hearing. Again acknowledging that there is "no automatic congruence between the procedural requirements imposed by due process in a criminal case, and those imposed by due process in a juvenile case[]," the Court in Winship concluded without much explication that to afford juveniles the protection of the highest standard of proof would not "risk destruction of beneficial aspects of the juvenile process."

It is significant that the Court in each of these three cases arrived at the decision to provide procedural protections to juveniles based not on the specific Sixth Amendment guarantees of notice, confrontation, counsel, and trial by jury that are required for "all criminal prosecutions," but on the general language of the Due Process Clause of the Fourteenth Amendment. Some commentators have suggested that applying this more subjective or "interpretive approach" to the juvenile delinquency process means that as long as procedural mechanisms can be shown to be as "fair" as the Sixth Amendment's adversarial model, they too may satisfy constitutional requirements--even if demonstrably different.

On the heels of cases that relied on conceptions of "fairness" to grant procedural rights to juveniles, the United States Supreme Court rejected the notion that juveniles have a right to a jury trial in delinquency court. The Court was divided as to the basis of McKeiver v. Pennsylvania, however, as a plurality of justices agreed on the result based on policy considerations and the presumed negative impact of jury trials on juvenile court proceedings, while concurring justices determined that the touchstone should be both the Sixth Amendment and the concept of fundamental fairness as established by the Due Process Clause. Meanwhile, the McKeiver dissenters relied squarely on the Sixth and Fourteenth Amendments to conclude that juveniles who are prosecuted for criminal acts potentially triggering loss of liberty are entitled to the same protections as adults accused of crimes.

As suggested earlier, a critical part of the subtext underlying the decisions of Kent, Gault, Winship, and McKeiver is the matter of whether juvenile courts have the necessary resources to perform in a parens patriae capacity. Also explored is the question of whether the juvenile court system is performing so well in regard to rehabilitation and recidivism that due process safeguards afforded to adult criminal defendants may be justifiably withheld from young offenders. In the three United States Supreme Court cases that have extended due process protections to juveniles, these questions are answered in the negative, with the Court stating that the system has become sufficiently punitive and ineffective to warrant additional procedural protections for juveniles. In McKeiver, however, while the Court acknowledges that "the fond and idealistic hopes of the juvenile court proponents and early reformers" have not been realized, it qualifies its admission by contending that "this is to say no more than what is true of criminal courts in the United States. But failure is most striking when hopes are highest." More recently, the Kansas Supreme Court also answered these questions in the negative, rejecting McKeiver's reasoning not by shifting the paradigm but by applying traditional quid pro quo analysis.

**B.Kansas Fails to Shift the Paradigm**

Although the Kansas Supreme Court did not provide a detailed account of the facts of In re L.M. in its opinion, they are worth recounting for they are typical of juvenile cases that are tried before a judge--a significant number of which may be characterized by the insufficiency of the evidence presented, resulting from judges who fail to apply the beyond a reasonable doubt standard consistently and prosecutors who overcharge young offenders. Sixteen-year old L.M. was charged with one count of aggravated sexual battery, a felony under Kansas law, and one count of possessing alcohol as a minor, a misdemeanor. The testimony showed that L.M. met the victim, who was a decade his senior, late at night outside a bar where she had been drinking and arguing with her boyfriend. After the victim gave L.M. a cigarette and told him her name, he tried to kiss her and licked the side of her face. During the assault, L.M. had his arms around her, but did not grab or touch any other part of her body or touch any part of his own body. After the victim rejected his advances, L.M. let her go; she then waited outside her home for her boyfriend to return, as she did not have a key. Although the victim did not sustain any injuries and felt it unnecessary to report the incident, her boyfriend called the police. L.M. was subsequently taken into custody without incident; he was questioned by police into the early hours of the morning, showing signs of being intoxicated and confused.

L.M., who had never before been arrested, was held in a juvenile detention facility from the day of the incident, August 11, 2005, until his first trial date on January 5, 2006, when he was released pending a new trial date one week hence. On January 12, 2006, after his motion for a jury trial was denied and the case was tried before a judge, L.M. was convicted of aggravated sexual battery and again ordered detained until final disposition on February 7, 2006. The district court then sentenced him as a "Serious Offender I to a term of eighteen months in a juvenile correctional facility, but stayed the sentence and ordered L.M. to be placed on probation" until age twenty. Pursuant to Kansas law, L.M. was required to comply with the conditions of sex offender treatment and sex offender registration.

Although not addressed in any detail by the Kansas Supreme Court in its decision, the collateral consequences of L.M.'s juvenile adjudication for aggravated sexual battery were particularly punitive. In addition to the fact that juveniles generally are more likely to be subject to incarceration--and receive longer terms--than young adult offenders charged with the same crimes and the fact that juvenile delinquency adjudications can be used to enhance sentences in adult criminal court, L.M. faced repercussions resulting from the very nature of the offense charged. The Kansas Offender Registration Act contains public disclosure provisions that the Kansas Supreme Court had previously considered "punishment" for purposes of ex post facto analysis, giving credence to the argument that the community notification provisions would be particularly harmful to juveniles. Research on adolescent development also suggests that public notification inflicts a harm on juveniles that is disproportionate to the offense.

Rejecting McKeiver's contention that the benevolent parens patriae character of the juvenile justice system distinguishes it from the adult criminal system, the Kansas court based its holding recognizing a jury trial right for juveniles on the Sixth Amendment, rather than upon general notions of fairness and due process. The court held that since 1984, when Kansas adopted the United States Supreme Court's reasoning in McKeiver, the legislature had changed the language of the Kansas Juvenile Offender Code by "negating its rehabilitative purpose" and aligning its dispositional provisions with those of the criminal sentencing guidelines, thereby creating a juvenile court so similar to its adult counterpart that the jury trial right could no longer be discretionary. While acknowledging that most other state courts have declined to extend this constitutional right to juveniles, the majority remained "undaunted in its belief" that because the Kansas juvenile justice system was now patterned after the adult criminal system, McKeiver was no longer binding. In this way In re L.M. demonstrates that when the expansion of juveniles' rights is based solely on the Sixth Amendment, the most likely model will be adult criminal court, thereby failing to shift the juvenile justice paradigm. Alternatively, when an extension of rights is premised on procedural justice theory, the new model can more readily be drawn from outside the parameters of the criminal justice system.

While the Kansas decision establishes a bright line with its reasoning, practical factors--including the power of judicial precedent, fiscal constraints on the state's ability to provide juvenile jury trials upon request, and law makers' reluctance to appear "soft" on crime--have been paramount in the determinations of other jurisdictions. Some have clearly distinguished the terminology and purpose of their state's juvenile code from its criminal code, whether under due process, quid pro quo analysis or both. Others have definitively held that the Sixth Amendment does not mandate the right to a jury trial for juveniles. Courts and legislatures that choose instead to rely on subjective interpretations of due process when analyzing this issue will inevitably revisit the question of how best to define 'fairness.' Under what standard should it be determined that a specific procedural right is as fair as the adversarial model envisioned by the Sixth Amendment? Such a query may be answered -- at least in part -- by recent empirical research by social scientists.

## II. Evidence from the Social Sciences

Academic disciplines approach the study of crime and criminal behavior from differing perspectives. Sociology -- one of the many disciplines from which to choose -- considers broad-spectrum structural explanations for human behavior, with sociologists typically trained to focus on the question of why people break the law. Social psychologists, on the other hand, perhaps due to their reliance on surveys of the general population, are more likely to ask why people obey the law. The focus of this Part is on the latter rather than the former question, premised on the notion that in a world of limited resources, it is more pragmatic to examine the reasons why adolescents comply with the law, rather than dwell on the causes of their noncompliance. The discussion begins by examining social science research in the area of procedural justice theory, takes up an analysis of how children and adolescents develop ties to the law and legal actors and concludes by demonstrating a causal relationship between juveniles' perceptions of fairness and their likelihood of reoffending.

### A.Why Obey the Law?

Since the 1970s, preeminent social and behavioral scientists who study criminal procedure have examined a series of intersecting questions that relate to the central problem of which legal system--adversarial, inquisitorial, investigative, or a hybrid --is the most effective in reducing crime.The inquiry has been grounded in procedural justice theory, the notion that people are more likely to comply with law and policy when they believe that the procedures utilized by decision-makers are fair, unbiased, and efficient. Its proponents contend that procedural fairness plays a "key role" in people's willingness to cooperate with a wide range of decisions, from United States Supreme Court rulings to corporate drug-testing policies.The empirical research has focused on exploring why people are either satisfied or dissatisfied with a particular dispute outcome and whether there is a relationship between the type of process used and one's perceptions of systemic fairness; the finding that people care enormously about the process and greatly value the opportunity to "tell one's story," regardless of the outcome, has been replicated across a wide range of methodologies, cultures, and settings.

During the past two decades, researchers have continued to advance this work, applying procedural justice theory to a wide range of literatures, including law, medicine, business, education, and social work. The empirical studies of Tom Tyler, for instance, have explored the differences between the instrumental perspective on why people follow the law, which is dominated by deterrence literature linking human behavior to incentives and penalties (follow the law only if you are likely to get caught), and the normative perspective on this question, which relies both on personal morality (follow the law because it is right) and adherence to legitimacy (because we have confidence in the police and the courts, we should follow the law). By focusing on the extent to which normative factors influence compliance with the law separate and apart from deterrence, the work of Tyler and others has suggested that people obey the law when the rules and procedures are consistent with their personal values and attitudes; in other words, when people are personally committed to obeying the law, they voluntarily assume the obligation to follow legal rules, irrespective of the risk of punishment.

In subsequent empirical work, Tyler has explored the factors that contribute to the likelihood of deference to authority among a variety of ethnic groups. His results suggest that the behavior of and processes used by police officers and judges--if perceived to be fair and benevolent--can encourage voluntary acceptance of decisions made by legal authorities, which in turn can lead to lower rates of reoffending. While it is arguable whether his findings are consistent with human intuition, it is potentially useful to have multiple data sets demonstrating that treating people with dignity and respect makes them more likely to view procedures as fair and the motives behind law enforcement's actions as well-meaning. It is also of likely utility to have data showing that when people consider police and court procedures to be equitable and the motives of authorities trustworthy, they are more likely to obey the law.

Tyler references and builds upon the work of seminal figures in the fields of psychoanalysis, sociology, and economics to argue that social norms and values become part of a person's internal motivational system and guide behavior separate from the impact of the threat of power on human behavior, which relies instead upon a traditional system of incentives and sanctions. In this way, self-control replaces the need for control by others. According to Tyler, one's sense of obligation to a certain set of rules is the key element in the concept of legitimacy, as it leads to voluntary deference.

Of further significance to the argument here are the innumerable benefits gained through a procedural system that garners compliance that is voluntary and self-regulating. Empirical evidence in this area suggests that when forced compliance or coercive power is used on its own to shape behavior, it is costly in terms of staffing, time, and resources. When people defer to legal norms out of a sense of personal morality and legitimacy, however, fewer resources are required. Thus, procedural justice theory provides a savings in both human capital and material costs when it is used to

influence behavior, as the research confirms that people are more likely to police themselves if they believe that laws are fair, legitimate, and ought to be followed.

While the work of Tyler and others has focused primarily on adult populations, the influence of personal morality on behavior toward the law has also been examined in social science literature on child development and juvenile delinquency. Several studies have laid the groundwork for exploring whether children who are influenced by instrumental considerations of reward and punishment are more likely to break the law than those who are influenced by a sense of personal obligation, but the literature is thin and more research is needed. Thus, while it may be suggested that normative concerns relating to children's feelings of personal morality and legitimacy influence compliance with the law in many of the same ways as they do for adults, this connection has not yet been made.

**B.The Legal Socialization of Children**

Behavioral psychologists who have studied adolescent populations have generally focused on a question closely related to that of why people obey the law--what factors shape adolescent criminal behavior? While these researchers have agreed that children's compliance with the law is promoted by the processes of maturation and psychosocial development, some have recognized further that legal socialization is a process that is not static between childhood and adolescence but variable, changing over time and developing concurrently with a child's cognitive and moral maturation; it is profoundly affected by one's peers, family unit, and neighborhood culture; and it is interactive and integrative, a process in which children internalize information that is assimilated from their own experiences, from the attitudes and factual claims of others, and from the ways in which others react and respond to them. The core argument underpinning the literature in this area is that children develop an orientation toward the law and legal actors early in life, and that this orientation shapes their behavior towards authority from adolescence through adulthood.

Research in this area has shown that a myriad of factors combine to shape and influence the law-related behavior of children and adolescents, including institutional legitimacy, an obligation to obey the law from a normative perspective, legal cynicism, one's sense of whether it is acceptable to act outside the law and social norms, and the impact of moral ambiguity and disengagement, processes by which adolescents detach from the system of internal controls and moral values and become more open to illegal behavior. Additional factors shaping criminal behavior include the deterrent effect of punitive sanctions, in which punishment that is perceived to be "swift, certain, and severe" inhibits criminal activity, and the theory of rational choice, whereby behavior is determined by the weighing of the costs and benefits associated with violating the law. Research has suggested, however, that active adolescent offenders may be less sensitive to the threat of sanctions and rational choice theory than either adults or young people who have not previously engaged in criminal activity; the reasons are twofold--immaturity causes youth not only to underestimate the level of risk but also to downplay the threat of punishment that is oriented toward the future rather than the present. Intellectual and psychosocial deficits caused by developmental delays, mental illness, and drug dependency can also "impair or skew" rational calculations of risk and reward made by adolescents.

Not surprisingly, procedural justice also plays a significant role in the process of legal socialization, as social scientists have demonstrated that perceptions of fair treatment enhance children's evaluations of the law, while unfair treatment triggers negative reactions, anger, and defiance of the law's norms. Specifically, researchers have found that children's perceptions of fair procedures are based on the degree to which the child was given the opportunity to express her feelings or concerns, the neutrality and fact-based quality of the decision-making process, whether the child was treated with respect and politeness, and whether the authorities appeared to be acting out of benevolent and caring motives. In this way, procedural justice directly affects compliance with the law, while indirectly affecting whether one views the law as legitimate. The next step is to explore empirically whether a causal relationship exists between juveniles' perceptions of fairness and rates of recidivism.

**C. Recidivism and Adolescents' Perceptions of Fairness**

In recent decades, social scientists have focused their research more deliberately upon the question of whether a causal connection between procedural justice and rates of reoffending by juveniles may be shown through data analysis. A sampling of recent research in this area includes studies conducted among the following samples: children and adolescents ages ten through sixteen from two racially and socio-economically contrasting neighborhoods in Brooklyn, New York; serious juvenile offenders ages fourteen to eighteen in Phoenix, Arizona and Philadelphia, Pennsylvania; young male prisoners ages fifteen to twenty-four at a German detention center; Canadian youth ages fifteen to seventeen with cases pending in one of the large youth courts in Toronto, Ontario; and young people ages fourteen to sixteen enrolled in an Australian public high school with an ethnically and economically diverse population. The data from these studies, which have focused to varying degrees on the relevance of adolescents' views of the legitimacy of legal institu-

tions and legal actors, suggest a causal connection between procedural justice and recidivism that is not outcome-dependent. While all such studies have their limitations, a consistent trend based on multiple data sets may be seen.

Relevant to this work is social science research emphasizing a link between an adolescent's capacity to stand trial and her ability to take responsibility for her actions and thereby cooperate with rehabilitative services. The connection between a child's mental or emotional capacity and her sense of accountability relates not only to the criminal prosecution of young offenders, but also to the civil context when commitment or long term in-patient treatment is under consideration. Under these circumstances, evidence suggests that allowing adolescents to direct their own care enhances the ultimate effect and impact of therapy. Examining such issues from a therapeutic perspective highlights the importance of ensuring that juveniles have the opportunity for meaningful and knowing participation in the legal system, whether the threat to a minor's liberty comes from incarceration or institutionalization.

As stated earlier in the context of discussing In re Gault, sociologists and social psychologists acknowledged the connection between a juvenile's belief that she was fairly treated and the likelihood of her future compliance with the law and legal actors more than forty years ago. However, while the United States Supreme Court recognized the import of procedural justice theory and its potential impact on juveniles' recidivism rates in 1967, this connection has not been advanced in Supreme Court jurisprudence since Gault. While a handful of lower federal courts and some state courts have referenced the work of social scientists when determining whether juveniles should be granted specific due process protections, this is only one of many areas in which lawmakers and legal authorities would benefit from a fuller understanding of social psychology. The next Part demonstrates that having a deeper appreciation of the factors that motivate juveniles' deference to the law can better enable authorities to act in ways that encourage children's cooperation.

## III. Applying Procedural Justice Theory to Juvenile Court

Children's limited knowledge and understanding of the criminal justice system, which has been explored at great length in both social science research and legal scholarship, underscores the importance of creating a system that young offenders perceive as fair and impartial. This goal is further supported by empirical evidence suggesting a possible causal connection between procedural justice and lowered recidivism rates for juveniles. This Part begins the process of exploring how these findings can guide judges and lawmakers when they are evaluating procedural practices that impact juveniles.

### A. A Jury of One's Peers?

As discussed earlier, courts typically have not drawn on social science research generally, or procedural justice theory specifically, when determining whether to extend due process rights to juveniles. Instead, jurisprudence in this area has followed the traditional approach of considering the question in terms of quid pro quo exchanges of rights for treatment, or in terms of due process balancing that is not tethered to what is known empirically about child development, or a combination--or blurring--of the two. While some legal scholars have asserted that juveniles should have the right to a jury trial, their arguments--though well-meaning--have been premised on abstract notions of "fairness" rather than upon empirical data related to procedural justice theory. Likewise, others have contended that the jury trial right should not be extended to juvenile court, based on suppositions and anecdotal evidence regarding likely trial outcomes, rather than empirical findings related to adolescents' perceptions of the system and rates of reoffending.

To engage in a rigorous examination of how procedural justice theory could reframe this particular debate would require an interdisciplinary approach that most courts and lawmakers have thus far resisted or have failed to acknowledge as having potential value from a public policy perspective. Funding empirical studies that focus on the question of how juveniles perceive the jury trial right would be an apt starting point. Specific areas of inquiry could include an examination of whether young offenders denied the right believed that the juvenile justice system was fair; whether those with the right were satisfied with the handling of their cases; and whether the right to a jury trial appears to reduce recidivism. These findings could then be used to inform judges and lawmakers when deciding whether, and on what basis, to extend the jury trial right to juvenile offenders.

This is not to say, however, that such an examination would be easy or that it would clearly point in one direction or another. As stated earlier, social science data is limited in its utility. It is undeniable, however, that allowing such data to inform and potentially reframe the discussion can add much-needed texture and nuance. In addition, an empirical examination of whether jury trials heighten juveniles' perceptions of fairness, thereby lowering rates of reoffending, need not end there but can serve as the opening for considering other adjudicative options and procedural strategies for

juvenile court--from victim-offender mediation, restorative justice programs, and the therapeutic role that apology and remorse can play to waiving counsel, appearing pro se, and admitting at arraignment.

Further, given the informality of most juvenile courtrooms, an unanswered question is how much traction procedural justice theory can achieve in this setting. In a regime that functions largely by means of streamlined admissions and not protracted--or even contested--hearings, introducing notions of procedural justice in a meaningful way poses distinct challenges. Unless the delinquency court process can be retooled so that even those offenders with straightforward, readily resolved matters are given the space to experience procedural justice, the endeavor will not succeed. The values of procedural justice theory must be transparently communicated to all children and adolescents who find themselves under the jurisdiction of the juvenile court; this may, in fact, be the greatest hurdle to overcome.

**B.Waiving Counsel and Admitting at Arraignment**

If juveniles' perceptions of fairness are not outcome-dependent, as empirical studies have suggested, and if the opportunity for a young offender to speak in open court and be heard is a critical component to achieving a meaningful court experience, what of the oft-touted option of allowing children and adolescents to waive their right to counsel and admit to pending charges at arraignment? How might empirical data inform judges and law makers as to whether juveniles consider such a scheme to be fair, thereby increasing the likelihood of successful rehabilitation, or unfair, suggesting that reoffending rates would increase? Do young offenders perceive this to be a just balancing, as services could potentially be provided more quickly and a protracted adversarial process avoided? Or do juveniles view the summary imposition of such programs as punitive and lacking in beneficial value?

The current state of United States law on the right of juveniles to waive counsel in delinquency court is somewhat mixed. While In re Gault requires that every state provide counsel to juveniles accused of crime, at least at the adjudicatory phase, this does not mean that young offenders must accept legal representation, but only that they have the right to counsel if they request representation. Very few states require mandatory appointment of counsel in juvenile cases with no option for waiver. In these states, a juvenile may neither waive counsel nor represent herself even for the limited purpose of pleading guilty, as such are considered to be "intentional relinquishment" of known rights that are inapplicable to juveniles. In a substantial minority of states, waiver of counsel may only occur under limited circumstances, requiring a rigorous inquiry into the validity of the waiver or proof by clear and convincing evidence that the juvenile waived knowingly and intelligently and that the waiver was in her best interests. In the remaining majority of states, children may waive their right to counsel at any stage of the proceedings, as long as it is determined to be--based on a variety of criteria--voluntary, knowing, and intelligent.

As found in a review of legal scholarship on the juvenile's right to a jury trial, very few law review articles on the role of counsel in juvenile court are grounded in empirical evidence or reference the connections among perceptions of fairness, procedural justice theory and recidivism. Again, while there are many who argue against allowing juveniles to waive counsel, these well-intentioned critiques are generally premised on claims--whether corroborated or not--that children and their parents lack the ability to intelligently waive their rights, the assumption that lawyers for children invariably improve their clients' adjudicative outcomes, or a combination of the two. Similarly, those who contend that juveniles should be allowed to waive the right to counsel often do so based on abstract notions of adolescent autonomy without grounding in social science research.

Barry Feld is one of the few scholars who has conducted empirical work on the impact that counsel has on the adjudications and dispositions of juvenile clients. While he acknowledges the study's limitations, his findings and those of others suggest--somewhat surprisingly--that juveniles with counsel are more likely to be incarcerated and to receive other punitive sanctions than those without counsel. While the causes are difficult to determine conclusively, Feld surmises that the presence of juvenile defense lawyers may antagonize judges, and conversely, that judges may be more lenient towards juveniles who are not represented. Feld does not reason, however, that this justifies allowing juveniles to waive counsel; on the contrary, he argues that waiver should not be allowed and that a mandatory representation model would "wash out" the apparently negative effects of assistance of counsel. Recognizing that non-waivable counsel for all juveniles may not be realistic in practice, Feld suggests instead that a per se requirement of consultation with counsel prior to waiver be introduced or, in the alternative, a prohibition on removing a child from her home or incarcerating her without providing the advice of counsel.

The right to waive counsel and appear as a pro se defendant was established by the United States Supreme Court in Johnson v. Zerbst and Faretta v. California when it held that a criminal defendant has a constitutional right to waive counsel when the decision is made knowingly and intelligently. The Court has not directly ruled on whether this right extends to juveniles, but it has held that minors can waive their pre-trial right to counsel during interrogation under the

"totality of the circumstances" standard. Empirical research has shown, however, that juveniles are not as competent as adults to waive their right to counsel in a manner that is knowing and intelligent. Further, the "relative paucity" of appellate case law governing the waiver of counsel by juveniles is likely a reflection of the absence of counsel to preserve the issue for appeal in waiver cases as well as the general infrequency with which juvenile appeals are brought.

Thus, given the limited number of research studies in this specific area, it is difficult--if not impossible--to draw any definitive conclusions as to juveniles' perceptions of fairness vis-a-vis the right to waive counsel in juvenile court. Some of the unanswered questions include whether young offenders are more or less likely to be given a voice when they are represented by counsel, enabling them to participate meaningfully in juvenile court proceedings; whether judges and prosecutors are more or less sympathetic or empathetic to the unrepresented juvenile than to the one with a contentious--or incompetent -- attorney; and whether a juvenile's perceptions of the fairness of the process are dependent upon having the option to waive counsel and resolve the case pro se at the first court hearing. Suffice it to say, more research is needed in this area, which is arguably at the core of the juvenile justice system.

**C.Schoolhouse Justice**

Another area in which judges and law makers would benefit from review and consideration of empirical data on juveniles' perceptions of fairness and rates of reoffending is that of the administration of justice within educational institutions. There is a storied record of United States Supreme Court opinions recognizing that a critical function of the educational system is to instill, as stated in Brown v. Board of Education, "the very foundation of good citizenship" in its students. The Court has characterized teachers, administrators, and other school actors as serving as role models for their students, "exerting a subtle but important influence over their perceptions and values." The Court has also acknowledged that a vital part of this process involves respecting students' "fundamental rights," so as to ensure that students, in turn, learn "to respect their obligations to the State."

Much has changed in recent decades, however, and as school actors increasingly serve side-by-side with or in lieu of law enforcement, a vicious cycle has been perpetuated: when students are disciplined without meaningful process, they inevitably view their treatment as having been unfair and, as a result, are more likely to act out and reoffend because they do not respect the authority of their teachers and administrators. In determining whether and to what degree school officials should be allowed to infringe upon the privacy and due process rights of students, courts have relied upon a subjective balancing test, whereby fairness to the young person is weighed against the urgent need to maintain school discipline. Yet, few have asked whether this is the most effective--or efficient--standard by which to judge the procedures that we impose upon children and adolescents in educational settings. How do students themselves perceive the current framework for addressing violations of disciplinary regulations and state criminal statutes on school property? Are there fair and balanced ways of addressing such infractions that would promote both procedural justice and school safety? Which processes and procedures are most likely to result in improved student conduct, increased cooperation with teachers and administrators, and greater academic success?

Establishing the historical legal context of these issues provides a helpful frame for discussing their nuances. Until the late 1960s, our public educational institutions punished and disciplined students within the walls of their own buildings without the involvement of law enforcement or the courts, except in the most egregious and violent cases. In 1975, the United States Supreme Court decided Goss v. Lopez, holding by a slim majority that notice and an opportunity for "some kind of hearing" were required before a school could suspend a student, even for fewer than ten days. The right to counsel and the standard of "proof beyond a reasonable doubt" were not extended to these hearings, however, and the Goss dissenters warned that even the modest requirement of a barebones hearing could potentially undermine school discipline. During the 1990s, the era of the juvenile "super-predator" brought an increase in the criminalization of adolescent behavior, leading to more school-based arrests and resulting in greater numbers of suspensions and expulsions. Many schools, particularly in urban and low-income areas, became more prison-like, with an increased police presence and more institutional personnel dedicated to maintaining security. Such circumstances were further exacerbated by the relaxation of rules governing the confidentiality of juvenile court records and the proliferation of zero tolerance policies, allowing schools to become "direct feeders" of youth into juvenile and adult criminal courts.

A review of social science research on the perceptions of children and teenagers vis-a-vis their rights in the school setting reveals that the data is compelling but incomplete. Studies abound that illustrate that students of color are disproportionately punished in United States schools and subjected to the most punitive sanctions, including suspensions and expulsions. There are also studies that indicate that because American schools increasingly define and manage the problem of student misbehavior through the perspective of crime control, students who are repeatedly disciplined begin to view themselves as future criminals or prisoners on the "criminal justice 'track.'" Such studies recognize that antici-

patory labeling of students as prospective criminals can be a self-fulfilling prophesy, as research shows that frequently suspended students are more likely to face juvenile or adult incarceration. More research, however, is needed, particularly that which explores the impact of specific procedures and practices utilized by school administrators and law enforcement on students' perceptions of fairness.

**D.Home Rule**

A final area in which courts, lawmakers, and even parents would benefit from greater knowledge and appreciation of social psychology concerns the role of the parent in the juvenile justice system. Consistent with social science studies relevant to other areas impacting juveniles, the applicable data demonstrates that if a child or adolescent considers disciplinary measures within the home to be unfair, a pattern of behavior similar to that seen in other contexts will ensue: lack of respect for the authority figure, disengagement from the disciplinary structure, cynicism towards the system, and subsequent and continued rule-breaking. Research has shown that children typically perceive family decision making to be unfair when parents deny them the opportunity to express their views; when procedures are perceived to be inconsistent across situations or family members; and when parents are considered to be biased, underhanded, or dishonest. Additional fairness concerns stem from the child's perception that the parent's decision-making process is based on unreliable information, or the parent does not consider the child to be a valued member of the family. As seen in other areas, the empirical research demonstrates that adolescents care deeply about being treated with dignity and respect and having their voices heard during the family's decision making process, regardless of whether it affects the ultimate outcome. Studies have also shown that children who perceive their parents' disciplinary practices to be fair are more likely to internalize their family's values and beliefs. While extrapolations from such extralegal research may be made, unfortunately there is very little data specifically focused on how young offenders view the role typically assumed by adult family members in juvenile court, that of the party to whom judges and probation officers frequently defer and whom they resist evaluating critically.

The role of the parent in a juvenile case has been closely analyzed in legal literature, and the consensus is that it is fraught with tension and inherent contradictions. Most obviously, it is clear that from a therapeutic perspective, the "participatory and dignitary interests" of an accused child are highly likely to conflict with those of the child's parent in juvenile court. This is certainly the case when, as happens frequently, the parent is the alleged victim of the offense for which the juvenile is charged or has a relationship--familial, sexual, or otherwise--with either the alleged victim or another suspect in the investigation; the parent is repeatedly provided the opportunity to communicate directly with the judge, prosecutor, or probation officer, while the juvenile is allowed only to speak through her attorney; and the juvenile's attorney takes direction from the parent rather than the child as to the goals and objectives of the juvenile's case. Yet, admittedly, there are also instances in which the parent acts as the stooge for the juvenile, diverting responsibility for the child's crime to herself, covering for the child's negative behavior at home or at school, and interfering with or sabotaging candid communication between the juvenile and her lawyer in the name of "protecting" the child.

Further complicating matters is the reality that long-term damage to the parent-child relationship can result from both the process and the ultimate resolution of a juvenile delinquency proceeding. Excluding parents from the attorney-client dynamic, which is caused inadvertently as well as deliberately by defense counsel, can lead parents to disengage from their supportive roles altogether, leaving the parent-child bond more fractured than it had been before the family's involvement with the juvenile justice system. Likewise, frustrated or put-upon parents may insist that their rights and authority over their children are a form of compensation for the burdens of providing basic food, shelter, health care, affection, and education to their delinquent children, further splintering critical alliances. Similarly, parents may place blame wholly upon the child for alleged violations of juvenile court probation or post-release supervision out of a reasonable fear that they may face criminal charges for contempt of court or other punitive sanctions. Whatever the case, the circumstances are complex and the effects potentially profound.

Thus, while there is a fair amount of social science research exploring the perceptions that adolescents have of their parents as disciplinarians within the home environment, further studies examining how juveniles perceive the role of the parent in the context of delinquency court--both in theory and practice--are clearly warranted. Similarly, research on whether juveniles' attitudes and receptivity toward the court are predetermined by their judgments of disciplinary measures at home could be fruitful. Judges and law makers would be better equipped to outline the parameters of the parental role in juvenile court if they were informed by, among other factors, the child's perspective on these issues as seen through the lens of procedural justice theory.

**IV. Caveats and Questions for Moving Ahead**

**A. Which Model to Use?**

While sociologists have long recognized the importance of juveniles' believing that they have received procedural justice from the courts, this Article has demonstrated that the answer is not merely to superimpose adult due process standards onto delinquency proceedings, but it is something much more nuanced and challenging. There is first the difficult question of whether an adversarial or an inquisitorial model (or a hybrid of the two) would be more conducive to achieving an equitable juvenile justice system. Complicating this question, at least in terms of juvenile court systems in the United States, is the reality that an evidence-based determination of whether a juvenile committed an alleged offense is often a prerequisite to the state's providing a low-income family with rehabilitative and therapeutic services. While this does not mandate that juvenile court forever be modeled on an adversarial criminal justice system, addressing and separating out all the strands of the problem would require law makers and public policy experts to critically rethink and potentially restructure the current juvenile court model.

Further, juveniles adjudicated delinquent (as well as their parents) often consider services provided by the court--which are of varying quality and utility--to be burdens rather than benefits; this view is compounded by the knowledge that if the juvenile missteps, the punishment is likely an extension of the term of probation, detention, or commitment. As discussed previously, social science research has suggested that such deterrent structures are both less effective and less efficient than systems perceived by children and adolescents to be fair and unbiased. Again, resolving this question would require that law makers and juvenile justice advocates closely consider whether granting specific due process protections to juveniles would advance the goals of procedural justice theory.

There is also the critical question of how far--and in precisely which direction--to go. While there is a well-established movement devoted to applying the theory of therapeutic jurisprudence ("TJ") to juvenile court practice, legal scholars and social psychologists should distinguish and differentiate between TJ and procedural justice theory, both in the spirit of clarity and to avoid counter-productive "border disputes." According to the work of leading scholars in these areas, TJ is a discipline that examines the "therapeutic impact of the law on the various participants involved[,]" with the goal of promoting well-being. In the context of criminal defense practice, TJ emphasizes the importance of lawyers considering rehabilitative efforts on behalf of their clients and provides lawyers with practice tips on how to guide their clients along "a promising rehabilitative path." In regard to the juvenile justice system, TJ was developed to counter the paternalistic ideology of the traditional delinquency court and to encourage and facilitate the child's sense of individual autonomy, self-determination, and choice. Procedural justice theory is more of a touchstone or a guide that is focused on achieving legal processes that juveniles perceive as legitimate, premised on the recognition that when a child feels that the system has treated her fairly, she is more likely to accept responsibility for her actions and take steps towards reform.

Yet, there is more overlap between these two theories than contrast or tension. Suffice it to say that this Article's focus has been on juveniles' perceptions of fairness as they relate to the juvenile justice system as a whole and as determined by an examination of a well-developed body of data, rather than on models of advocacy or the therapeutic consequences of legal rules and procedures. Yet, the two disciplines of course are interconnected, as the quality (or lack thereof) of the attorney-client relationship inevitably influences whether the juvenile is impacted in a therapeutic manner, which in turn affects the child's perceptions of the adjudicatory process itself. Likewise, adherents of both TJ and procedural justice theory rely on empirical research by behavioral scientists, striving to "avoid a narrow doctrinal focus . . . and to influence legislators and administrators as well as the courts." In this way, both disciplines are "truly interdisciplinary." So, while this Article's focus has not been upon client-centered juvenile defense advocacy or children's mental health per se, its arguments rely upon the recognition that these values and goals are of great significance to determining whether a child feels that her experience was fair. Or, in other words, the enterprise of therapeutic jurisprudence is an important aspect--though just one aspect--of ensuring that juveniles receive procedural justice.

**B.Shortcomings and Limitations**

As with any body of social science research, particularly that which attempts to draw a causal connection between abstract human perceptions (i.e., fairness and legitimacy) and subsequent compliance with authority, there are inherent limitations regardless of whether the analysis is centered on adults or adolescents. A basic one is that there have been very few longitudinal studies on procedural justice theory. While it has been shown that ex ante assessments of the fairness of a decision-making process can be very different than ex post, the relevance of this phenomenon to procedural justice theory remains an open question. Another limitation stems from the fact that the focus of much procedural justice research is upon political power and authority rather than upon law-abiding behavior. In other words, most studies seek to mine the perceptions of the law held by individuals within the general population rather than those of individuals already actively engaged in criminal behavior. This can be a critical drawback, as offenders have more experiences within the system and presumably more and various kinds of outcomes than do non-offenders. Yet, studies have found

consistent procedural justice effects across race, gender, ethnicity, and socioeconomic status. In addition, studies specifically examining the impact of procedural justice on juvenile offenders have indeed been conducted; the hope is that with renewed interest in this data, more research will be funded and the sample sizes expanded, thereby enhancing the reliability of the results.

A further limitation is the narrow focus of procedural justice theory on the ways in which an individual's perceptions are influenced by her own experiences and interactions rather than upon the impact and effect of her peer group, neighborhood, and extended social network. Such factors are potentially significant because a major predictor of delinquent behavior by juveniles is the number and quality of their mentors and peers. Studies in this area generally utilize interviews conducted with or surveys completed by individual juveniles in which the questions are designed to assess the youth's feelings regarding her treatment by the defense lawyer, prosecutor, and judge; questions are also posed that are intended to determine the degree to which the young person feels the law and the courts are legitimate. As a result, such methods that focus on the individual's level of confidence either in her lawyer or in the system, without assessing the impact of peers or other external forces on the juvenile's perceptions, may have limited efficacy.

In addition to these methodological limitations, there are critics of procedural justice theory who have raised questions directed more squarely at the discipline's most basic assumptions. For instance, it has been asserted that when people experience a process to be fair, they can be led or manipulated into ignoring objectively unfair outcomes, particularly if the majority of outcomes experienced by a given group have been consistently negative. So, for instance, a narrow focus on the importance of providing juvenile offenders with the opportunity to have a "voice" may obscure a more global need to give them meaningful control over judicial decisions. Proponents of this concept of "false consciousness" argue that a preoccupation with due process diverts attention from broader questions of social inequality. Other critics have suggested that procedural justice has more legitimacy for adults than juveniles based on developmental status and competence; these commentators view juveniles as incapable of appreciating "fairness" in a way that is normatively reliable.

In sum, while there are clear limitations to the utility of applying procedural justice theory to juveniles, and while there are open questions regarding which procedural model to use for delinquency court, these should be considered as cautions rather than roadblocks. In other words, rather than restrict ourselves to suppositions based on abstract notions of fairness and subjective balancing or on unyielding quid pro quo calculations, why not make use of the empirical data being produced by experts in the social sciences? Why not be open to an interdisciplinary and multilayered analysis of whether to extend specific due process rights to juveniles, rather than one that is cabined by the same traditional approaches that have been used for decades by courts and legislatures? Regardless of one's perspective, all sides--judges, prosecutors, defense attorneys, victims, and juveniles themselves--stand to benefit.

**Conclusion**

Courts and legislatures have long been reluctant to make use of the data, findings, and recommendations generated by other disciplines when determining questions of legal procedure affecting juveniles, particularly when the research has been produced by social scientists. However, given the United States Supreme Court's recent invocation of developmental psychology in Roper v. Simmons, which invalidated the juvenile death penalty, there is reason to believe that such resistance is waning. In 2005 the Simmons Court found, inter alia, that based on research on adolescent development, "juveniles are not as culpable as adults and[, therefore], cannot be classified among the 'worst offenders,' deserving of" the ultimate penalty. In the 2009-10 Term, the Court will take up the arguably related question of the constitutionality of life imprisonment without the possibility of parole for juvenile offenders, making it likely that social psychology will play a role yet again in a Supreme Court decision.

Such developments may be viewed as paving the way for judges and law makers to utilize empirical research more consistently when determining whether due process rights should be extended to juveniles. By evaluating adolescents' appraisals of the fairness of courts and the law, social scientists have generated potentially invaluable data relating to recidivism rates and, thus, to the safety of our neighborhoods and communities. While research in these areas is incomplete and has its inherent limitations, that which exists can serve as yet another factor to inform decisions regarding jury trials, waiver of counsel, the school disciplinary process, and the role of the parent in juvenile court. It is not a stretch to suggest that children and adolescents would view the opportunity to have more information rather than less when crafting important juvenile court procedures to be the preferable--and fairer--choice.

# 2012 NEW JUVENILE DEFENDER TRAINING

Fairness Freaks:
An Introduction
to Procedural Justice

## Why do people obey the law?

- Q: What legal system is the most effective in reducing crime?
- A: One that is based on procedural justice theory:
  - People are more likely to comply with the law when they believe the procedures were fair, unbiased, and efficient.

## What do we know about children's attitudes toward the law?

- Children experience a process of "legal socialization"
- Their attitudes toward the law develop early
- This shapes their behavior toward authority from adolescence through adulthood.

## How does PJ theory affect a child's legal socialization?

- Fair treatment enhances a child's view of the law
- Unfair treatment triggers:
  - Negative reactions
  - Anger
  - Defiance

## What does "fairness" mean to a child in the context of court?

- An opportunity to speak
- A decision-making process based on facts
- Being treated with respect
- Authorities who act out of caring motives

- Remember: it is NOT outcome-determinative

## When children feel they have been treated fairly in court, they are less likely to recidivate.

- Based on empirical research
- The greater the child's capacity and competence, the greater her ability to take responsibility for her actions and cooperate with treatment.

## In re Gault (1967)

- The U.S. Supreme Court recognized these connections when they cited a 1966 report by sociologists Wheeler and Cottrell:
  - "Unless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel."

## The origins of the role of the juvenile defender

- In re Gault
  - Established the right to counsel for juveniles in delinquency court.
  - Any child "facing the awesome prospect of incarceration" needs "the guiding hand of counsel at every step in the proceedings against him."

## The impact of Gault

- With lawyers, juveniles became participants instead of spectators
- With lawyers, juveniles could:
  - challenge the facts,
  - insist upon procedural regularity,
  - determine whether there was a defense,
  - prepare and present a defense.
- ABA and IJA juvenile justice standards adopted in 1982

## ABA Model Rule of Professional Conduct 1.2(a):

- [A] lawyer **shall abide by** a client's decisions concerning the objectives of representation and…
- **shall consult with** the client as to the means by which they are to be pursued…
- In a criminal case, the lawyer **shall abide by** the client's decision, after consultation with the lawyer:
  - as to a plea to be entered,
  - whether to waive jury trial and
  - whether the client will testify.

## Model Rules 1.1 Competence, 1.3 Diligence

- A juvenile defense attorney provides competent, prompt, and diligent representation based in legal knowledge, skill, thorough presentation, ongoing training.
- Day-to-day activities are expansive, encompassing the obligations to investigate, to zealously protect the child's due process rights from arrest to the close of the case, to engage in dispo advocacy, and access ancillary services**.**

## ILJ/ABA Juvenile Justice Standards re Counsel to Private Parties

- Read
- Familiarize yourself
- Know the ethical rules

## 3.1 The nature of the relationship.

- (a) **Client's interests paramount**.
- However engaged, the lawyer's **principal duty** is the representation of the client's legitimate interests.
- Considerations of personal and professional advantage or convenience **should not influence** counsel's advice or performance.

## (b) Determination of client's interests.

- In general, determination of the client's interests in the proceedings, and hence the plea to be entered, is ultimately **the responsibility of the client** after full consultation with the attorney.
- Counsel for the respondent in a delinquency… proceeding should ordinarily **be bound by the client's definition of his or her interests** with respect to admission or denial of the facts or conditions alleged.
- It is appropriate and desirable for counsel **to advise the client concerning the probable success and consequences** of adopting any posture with respect to those proceedings

## 3.3 Confidentiality

- Counsel should seek from the outset to establish a **relationship of trust and confidence** with the client.
- The lawyer should explain that full disclosure to counsel of all facts known to the client is necessary for **effective representation**
- and at the same time explain that the lawyer's obligation of confidentiality **makes privileged the client's disclosures** relating to the case.

## 3.3 (d) Disclosure of Confidential Communications

- A lawyer may reveal confidences or secrets with the **informed and competent consent** of the client, but only after full disclosure of all relevant circumstances to them.
- If the client is a juvenile incapable of considered judgment…a lawyer may reveal such communications **only if it will not disadvantage the juvenile and will further rendition of** counseling, advice or other service to the client.

## 3.5 Duty to keep client informed.

- The lawyer has a duty to keep the client **informed of the development** in the case, and of the lawyer's efforts and progress with respect to all phases of representation.
- This duty may extend…to a parent whose **interests are not adverse** to the juvenile's, subject to the requirements of confidentiality.

## 9.3 Counseling prior to disposition.

- The lawyer **should explain to the client** the nature of the disposition hearing, the issues involved, and the alternatives open to the court.
- The lawyer should also **explain fully and candidly the nature, obligations, and consequences** of any proposed dispositional plan, including the meaning of conditions of probation, the characteristics of any institution…and the probable duration.
- Ordinarily, the lawyer **should not make or agree to** a specific dispositional recommendation **without the client's consent**.

## Part VIII. Standards for the Defense Attorney
## 8.2 Duties regarding detention

- It should be the duty of counsel for an accused juvenile to **explore promptly the least restrictive form of release**,
- the **alternatives** to detention,
- and the **opportunities** for detention review, at every stage of the proceedings where such an inquiry would be relevant.

## Hypotheticals

- Jonathan
- Randy
- Marcus

## Questions? Comments?

Contact me:
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# Assessments 101

August 2012

# Forensic Evaluations 101

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## First Contact

- Please spend at least 15 minutes
- Be specific about what you want to know
- Observations and interactions
- Data obtained
- Collaterals needed

## What Do You Need?

- Question
- Malingering
  - Dramatic behavior
  - Deliberateness and carefulness
  - Inconsistency
  - Rare symptoms
  - Discrepancies in behavior
  - Obvious symptoms and problems
- Lying about involvement vs. withholding of important information
- Role of psychologist

## Who/What Should Be Included?

- Juvenile
- Caretakers
- Professionals
  - Treating physicians
  - Treating mental health providers
  - Probation officers
  - Teachers
- Records

## Competency

- JACI
  - MCAT (CA)
  - FIT (R)
  - CAST-MR
  - ECST-R
- Children under 12
- Mental illness – reality testing
- Mental retardation or borderline intellectual functioning
- Learning disabilities
- Developmental disabilities
- Deficits in memory or attention

## What is Evaluated?

- Psychosocial Development
- Emotional Development
- Executive Functioning
- Intellectual Development
- Maturity

## Adaptive Behavior

- Can your client function?
  - Communication
  - Community Use
  - Functional Academics
  - Home Living
  - Health and Safety
  - Leisure
  - Self-Care
  - Self-Direction
  - Social
  - Work
- ABAS-II /Vineland Adaptive Behavior Scales

## Mental Health

- Disorders
  - Mood Disorders
  - Behavioral Disorders
  - Psychosis
  - Anxiety
- Objective Testing
  - MMPI-A
  - MACI
  - PIY

## Mental Health

- Screening Tools
  - RCMAS – 2
  - Children's Depression Inventory
  - Trauma Symptom Checklist
- Parenting Forms
  - CBCL
  - BASC-2
- Projectives
  - Rorschach
  - TAT/Roberts-2

## Cognitive Functioning

- Disorders
  - Learning
  - Mental Retardation
  - Developmental
  - AD/HD
- WASI
- WISC-IV/WAIS-IV
- WJ-III
- WRAT
- WMS

## Other features

- Hearing and vision
- Sleep deprivation
- Poor nutrition
- Cultural expectations
- Unwillingness to cooperate
- Parents causing problems

# Special Education and Disability Rights

August 2012

# *The Role of Juvenile Defenders in Dismantling the School-to-Prison Pipeline*[*]

**(Prepared for the 2012 Southern Juvenile Defender Conference, Jacksonville, FL, June 29-30, 2012)**

Jason B. Langberg[1] and Barbara A. Fedders[2]

"How did we get to this place? How did we become enemies of our own children? When did we start hating them?...America still eats its young."[3]

## Introduction

To fulfill their ethical responsibilities and comport with best-practice recommendations, juvenile defense attorneys should investigate and, when appropriate, incorporate relevant information from their clients' educational histories in their delinquency representation. This article explains why they should – and gives detailed suggestions for how they can – provide this form of holistic advocacy. We first provide a brief history of the increased imposition of law enforcement imperatives on public education. We then survey relevant rules of professional responsibility, professional standards, and practice guidelines. We analyze and find unavailing the justifications offered for juvenile defense attorneys to maintain one-dimensional focus on delinquency. We conclude with specific practice recommendations designed to equip attorneys to better represent their clients.

## Education on Lockdown: A Brief History

Following the "get tough on crime" movement (including the "War on Drugs," mandatory sentencing laws, "three strikes" laws, and "broken windows" policing); a handful of high-profile school shootings; and media-driven, irrational fears about juvenile crime and "super-predators,"[4] schools in the 1980s and 1990s became consumed by a "law and order" approach to managing behavior.[5] Law enforcement officers, metal detectors, surveillance cameras, and narcotics dogs rapidly became commonplace in schools across the nation. Additionally, on the heels of the Gun-Free Schools Act of 1994, which required local school districts to expel for a minimum of one year any student who brings a firearm to school,[6] school district leaders and

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[*]

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[3] Gloria Ladson-Billings, *America Still Eats Her Young*, *in* ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS 79-80, 84 (William Ayers, Bernardine Dohrn, & Rick Ayers eds., 2011).

[4] *See* Vincent Schiraldi and Jason Ziedenberg, *How Distorted Coverage of Juvenile Crime Affects Public Policy*, *in* ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS 114-124 (William Ayers, Bernardine Dohrn, & Rick Ayers eds., 2011).

[5] *See* ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW "ZERO TOLERANCE" AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 9-11 (2010), http://www.advancementproject.org/sites/default/files/publications/rev_fin.pdf.

[6] *See* 20 U.S.C.A. §§ 8921-23; 20 U.S.C.A. §§ 8921-8923 [§§ 8921 to 8923. Repealed. Pub. L. 107-110, Title X, § 1011(5)(c), Jan. 8, 2002]; Improving America's Schools Act of 1994, Pub. L. 103-382, 108 Stat 3518.

state lawmakers across the country enacted "zero tolerance" disciplinary laws and policies that required certain punishments for an enumerated set of offenses.[7]

Armed police officers are now commonplace in public schools around the country. According to the most recent national estimates, 17,000 law enforcement officers – often termed school resource officers (SROs) – are assigned permanently to schools.[8] In 2005, more than two-thirds of students around the country between the ages of 12 and 15 had security guards or police officers in their schools – an increase of 54% from 1999.[9] Data from three states exemplify this trend. During the 2008-09 school year in North Carolina, for example, 849 SROs were assigned to patrol public schools on a full-time basis – over a 249% increase from 1996.[10] As of 2008, the New York City Police Department employed more than 5,000 school safety agents in the public school system – 1,600 more than 10 years earlier – and supplied an additional 200 armed police officers to patrol schools.[11] The Los Angeles Unified School District maintains its own Police Department, which deploys 340 sworn officers and employs an additional 147 school safety officers and 49 "non-sworn" personnel.[12]

During this time of nationwide recession and nearly unprecedented levels of poverty and economic inequality, in which legislatures around the country have slashed essential social programs, school security budgets have remained high or increased.[13] Policymakers and educational administrators apparently believe that full-time police officers are essential to school safety.[14] Yet nationwide data and research indicate that this belief is unfounded. Incidents of violence and property crimes in schools are relatively rare, particularly when compared with the

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[7] *See* U.S. DEPT. OF EDUC. NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEPARTMENT OF EDUCATION RELEASES FIRST IN SERIES OF SCHOOL SAFETY REPORTS (1998), http://nces.ed.gov/pressrelease/safety.asp.

[8] *See* JOHANNA WALD & LISA THURAU, CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE, FIRST, DO NO HARM: HOW EDUCATORS AND POLICE CAN WORK TOGETHER MORE EFFECTIVELY TO PRESERVE SCHOOL SAFETY AND PROTECT VULNERABLE STUDENTS 1 (2010), http://charleshamiltonhouston.org/assets/documents/news/FINAL%20Do%20No%20Harm.pdf. (citation omitted).

[9] See ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW "ZERO TOLERANCE" AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 15 (2010), http://www.advancementproject.org/sites/default/files/publications/rev_fin.pdf (citation omitted).

[10] NORTH CAROLINA DEPARTMENT OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, CENTER FOR THE PREVENTION OF SCHOOL VIOLENCE, ANNUAL SCHOOL RESOURCE OFFICER CENSUS 2008-2009 7 (2009), http://www.ncdjjdp.org/cpsv/pdf_files/SRO_Census_08_09.pdf.

[11] ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW "ZERO TOLERANCE" AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 16 (2010), http://www.advancementproject.org/sites/default/files/publications/rev_fin.pdf (citation omitted).

[12] Los Angeles School Police Department, http://www.laspd.com (last visited May 4, 2012).

[13] *See* JASON LANGBERG ET AL., ADVOCATES FOR CHILDREN'S SERVICES, LAW ENFORCEMENT OFFICERS IN WAKE COUNTY SCHOOLS: THE HUMAN, EDUCATIONAL, AND FINANCIAL COSTS 1 (2011), http://www.legalaidnc.org/public/ACS/IssueBrief_Feb-11_SROs_Rev.pdf.

[14] *See* JASON LANGBERG ET AL., ADVOCATES FOR CHILDREN'S SERVICES, LAW ENFORCEMENT OFFICERS IN WAKE COUNTY SCHOOLS: THE HUMAN, EDUCATIONAL, AND FINANCIAL COSTS 1 (2011), http://www.legalaidnc.org/public/ACS/IssueBrief_Feb-11_SROs_Rev.pdf.

risk of victimization that children experience out of school.[15] Further, academic research on the efficacy of SROs in ensuring school safety is mixed; one study indicates some positive correlation between presence of police and decrease of crime, but others indicate either no impact or that a police presence actually *increases* crime.[16]

Not surprisingly, one immediate consequence of placing education "on lockdown"[17] is that law enforcement now involves itself in minor incidents formerly viewed as typical childish behavior and "teachable moments" from which students might grow, without suffering permanent, negative, long-term consequences.[18] A spike in school-based arrests and referrals to juvenile and criminal courts has been the result.[19] Shocking stories of children as young as six years old being suspended, handcuffed, arrested, and detained appear with some frequency.[20] In 2011, 43% of all delinquency complaints in North Carolina were school-based,[21] and the fourth most common delinquency complaint was "disorderly conduct at school."[22] In Florida, during

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[15] *See* AMANDA PETTERUTI, JUSTICE POLICY INSTITUTE, EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf.

[16] *See* AMANDA PETTERUTI, JUSTICE POLICY INSTITUTE, EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf.

[16] AMANDA PETTERUTI, JUSTICE POLICY INSTITUTE, EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf.

[17] ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK (2005), http://www.advancementproject.org/sites/default/files/publications/FINALEOLrep.pdf.

[18] *See* Bernardine Dohrn, *"Look Out Kid / It's Something You Did": Zero Tolerance for Children*, in ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS 89-94 (William Ayers, Bernardine Dohrn, & Rick Ayers eds., 2011); JOHANNA WALD & LISA THURAU, CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE, FIRST, DO NO HARM: HOW EDUCATORS AND POLICE CAN WORK TOGETHER MORE EFFECTIVELY TO PRESERVE SCHOOL SAFETY AND PROTECT VULNERABLE STUDENTS 1 (2010), http://charleshamiltonhouston.org/assets/documents/news/FINAL%20Do%20No%20Harm.pdf (citation omitted).

[19] *See* Matthew Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 JOURNAL OF CRIMINAL JUSTICE 280, 284 (2009); AMANDA PETTERUTI, JUSTICE POLICY INSTITUTE, EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS 13-16 (2011). http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf.

[20] *See* Russell J. Skiba & Kimberly Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practices*, *in* ZERO TOLERANCE: CAN SUSPENSION AND EXPULSION KEEP SCHOOLS SAFE?: NEW DIRECTIONS FOR YOUTH DEVELOPMENT 17, 21-25 (Russel J. Skiba & Gil G. Noam eds., 2001); William Ayers, Rick Ayers, and Bernardine Dohrn, *Resisting Zero Tolerance*, *in* ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS xii (William Ayers, Bernardine Dohrn, & Rick Ayers eds., 2011); BROOKS, K., SCHIRALDI, V., ZEIDENBERG, J., JUSTICE POLICY INSTITUTE, CHILDREN'S LAW CENTER, SCHOOL HOUSE HYPE: TWO YEARS LATER (2000), http://www.eric.ed.gov/PDFS/ED446164.pdf; ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE 3-6 (2000), http://advancementproject.org/sites/default/files/publications/opsusp.pdf.

[21] NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, DIVISION OF JUVENILE JUSTICE, 2011 ANNUAL REPORT 13 (2011), http://www.ncdjjdp.org/resources/pdf_documents/annual_report_2011.pdf.

[22] NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, DIVISION OF JUVENILE JUSTICE, 2011 ANNUAL REPORT 20 (2011), http://www.ncdjjdp.org/resources/pdf_documents/annual_report_2011.pdf.

FY 2010-11, the 16,377 school-related delinquency referrals accounted for 15% of all the cases handled by the Department of Juvenile Justice.[23] In Clayton County, Georgia, the number of school-based referrals to the juvenile justice system increased dramatically, from less than 100 per year in the 1990s to 1,400 per year in 2004.[24]

Along with a heightened risk of arrest and court referral, students were increasingly subject to suspension or expulsion for behaviors that once would have had less draconian consequences. Zero-tolerance policies are the primary reasons why.[25] Its proponents touted zero tolerance both as an effective mechanism for maintaining safety and order in schools through deterrence and removal of disruptive students, and as a method for ensuring that disciplinary measures were meted out on a fair and even-handed basis.[26] However, recent research belies these claims. Zero tolerance punishments have not worked as a deterrent to disruptive behavior,[27] and they have not contributed to improved student behavior or school safety.[28] What they have done is increased the numbers of suspensions and expulsions.[29] In 2006-07, over 3.3

[23] FLORIDA DEPARTMENT OF JUVENILE JUSTICE, DELINQUENCY IN FLORIDA'S SCHOOLS: A SEVEN-YEAR STUDY 3 (2011), http://www.djj.state.fl.us/docs/research2/2010-11-delinquency-in-schools-analysis.pdf.
[24] ADVANCEMENT PROJECT, STOP THE SCHOOLHOUSE TO JAILHOUSE TRACK, CLAYTON COUNTY, GEORGIA, http://www.stopschoolstojails.org/clayton-county-georgia.html (last visited June 17, 2012).
[25] *See* ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO-TOLERANCE AND SCHOOL DISCIPLINE (2000), http://www.advancementproject.org/sites/default/files/publications/opsusp.pdf.
[26] *See* CHRISTOPHER BOCCANFUSO & MEGAN KUHFELD, CHILD TRENDS, MULTIPLE RESPONSES, PROMISING RESULTS: EVIDENCE-BASED, NONPUNITIVE ALTERNATIVES TO ZERO TOLERANCE 1-2 (2011), http://www.childtrends.org/Files/Child_Trends-2011_03_01_RB_AltToZeroTolerance.pdf; REECE L. PETERSON & BRIAN SCHOONOVER, CONSORTIUM TO PREVENT SCHOOL VIOLENCE, FACT SHEET #3: ZERO TOLERANCE POLICIES IN SCHOOLS (2008), http://www.ncsvprp.org/resources_assets/CPSV-Fact-Sheet-3-Zero-Tolerance.pdf.
[27] *See* Linda M. Raffaele Mendez, *Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation, in* DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE, NEW DIRECTIONS FOR YOUTH DEVELOPMENT 31 (Johanna Wald & Daniel J. Losen eds., 2003); Russell J. Skiba & Kimberly Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practices*, in ZERO TOLERANCE: CAN SUSPENSION AND EXPULSION KEEP SCHOOLS SAFE?: NEW DIRECTIONS FOR YOUTH DEVELOPMENT 13 (Russel J. Skiba & Gil G. Noam eds., 2001);
[28] Linda M. Raffaele Mendez, *Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation, in* DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE, NEW DIRECTIONS FOR YOUTH DEVELOPMENT 31 (Johanna Wald & Daniel J. Losen eds., 2003); Russell J. Skiba & Kimberly Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practices*, in ZERO TOLERANCE: CAN SUSPENSION AND EXPULSION KEEP SCHOOLS SAFE?: NEW DIRECTIONS FOR YOUTH DEVELOPMENT 13 (Russel J. Skiba & Gil G. Noam eds., 2001).
[29] Russell J. Skiba & Kimberly Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practices, in* ZERO TOLERANCE: CAN SUSPENSION AND EXPULSION KEEP SCHOOLS SAFE?: NEW DIRECTIONS FOR YOUTH DEVELOPMENT 28-34 (Russel J. Skiba & Gil G. Noam eds., 2001); NATIONAL ASSOCIATION OF SCHOOL PSYCHOLOGISTS, ZERO TOLERANCE AND ALTERNATIVE STRATEGIES: A FACT SHEET FOR EDUCATORS AND POLICYMAKERS (2008), http://www.nasponline.org/educators/zero_alternative.pdf; ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO-TOLERANCE AND SCHOOL DISCIPLINE (2000), http://www.advancementproject.org/sites/default/files/publications/opsusp.pdf; Russell J. Skiba and R. L. Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, 80(5) PHI DELTA KAPPAN 372-376, 381-382 (1999).

million students were suspended and over 100,000 were expelled.[30] Suspension rates were particularly high in the South.[31] Contrary to the rhetoric around zero tolerance being applied consistently, the policies have had hugely disproportionate impacts on non-White students. Between the early 1970s and 1996 the suspension rate at least doubled for all non-Whites. The suspension rate for White students also increased, but not nearly as rapidly.[32]

**Table 1: Suspension and Expulsion Estimates for 2006-07[33]**

| State | Out-of-School Suspensions | Expulsions |
|---|---|---|
| Alabama | 75,088 | 1,303 |
| Florida | 291,819 | 1,122 |
| Georgia | 143,558 | 3,664 |
| Louisiana | 67,776 | 5,800 |
| Mississippi | 51,938 | 1,491 |
| North Carolina | 149,784 | 1,973 |
| South Carolina | 83,833 | 5,128 |

**Table 1: Suspension and Expulsion Estimates for 2006-07[34]**

| State | Suspensions Per 100 Public School Students | Rank Among All 50 States |
|---|---|---|
| Alabama | 10.113 | 8 |
| Florida | 10.459 | 4 |
| Georgia | 8.831 | 9 |
| Louisiana | 10.349 | 5 |
| Mississippi | 10.216 | 6 |
| North Carolina | 10.763 | 3 |
| South Carolina | 11.882 | 1 |

Suspension and expulsion are associated with increased mental health challenges, conflict with adults, academic failure and dropping out of school, substance abuse, and delinquent and

[30] U.S. Department of Education Office for Civil Rights, Civil Rights Data Collection, 2006 National and State Estimators, http://ocrdata.ed.gov/StateNationalEstimations/projections_2006 (last visited May 4, 2012).
[31] *See* CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN H-13 (2011), http://www.childrensdefense.org/child-research-data-publications/data/state-of-americas-2011.pdf.
[32] *See* DANIEL J. LOSEN & RUSSELL J. SKIBA, THE CIVIL RIGHTS PROJECT, SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 3 (2010), http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/suspended-education-urban-middle-schools-in-crisis/Suspended-Education_FINAL-2.pdf; U.S. Department of Education Office for Civil Rights, Civil Rights Data Collection, 2006 National and State Estimators, http://ocrdata.ed.gov/StateNationalEstimations/projections_2006 (last visited May 4, 2012).
[33] U.S. Department of Education Office for Civil Rights, Civil Rights Data Collection, 2006 National and State Estimators, http://ocrdata.ed.gov/StateNationalEstimations/projections_2006 (last visited May 4, 2012).
[34] CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN H-13 (2011), http://www.childrensdefense.org/child-research-data-publications/data/state-of-americas-2011.pdf.

criminal behavior.[35] The juvenile or criminal courts are often the next stop for suspended students.[36] Data from North Carolina provide an example of the close relationship between problems in school and involvement with the delinquency courts. In North Carolina, juveniles are assessed at detention center intakes for their risk of future offending and their individual needs to be addressed. In 2010, 44.6% had serious problems in school (e.g., suspension from school, expulsion, dropping out). Youth committed to the state's youth development centers (YDCs) are also assessed. Last year, 80.0% of those youth had serious problems in school, with an average of 36 days of suspension in the year prior to their commitment.[37]

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[35] *See* NEW YORK CIVIL LIBERTIES UNION, ANNENBERG INSTITUTE FOR SCHOOL REFORM & MAKE THE ROAD NEW YORK, SAFETY WITH DIGNITY: ALTERNATIVES TO THE OVER-POLICING OF SCHOOLS 9-11 (2009), http://www.nyclu.org/files/publications/nyclu_pub_safety_with_dignity.pdf; Simone Marie Freeman, *Upholding Students' Due Process Rights: Why Students Are in Need of Better Representation at, and Alternatives to, School Suspension Hearings*, 45 FAM. CT. REV. 638, 640 (2007); JANE CONOLEY, ET. AL, AMERICAN PSYCHOLOGICAL ASSOCIATION ZERO TOLERANCE TASK FORCE, ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS (2006), http://www.texasappleseed.net/pdf/ZTTF%20Report%20Final%20approved%20by%20BOD.pdf; ACTION FOR CHILDREN NORTH CAROLINA (FORMERLY THE NORTH CAROLINA CHILD ADVOCACY INSTITUTE) ONE OUT OF TEN: THE GROWING SUSPENSION CRISIS IN NORTH CAROLINA 5 (2005), http://www.ncchild.org/sites/default/files/Suspension_Report,_September_2005.pdf; ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO-TOLERANCE AND SCHOOL DISCIPLINE 9-11 (2000), http://www.advancementproject.org/sites/default/files/publications/opsusp.pdf; Eric Blumenson & Eva S. Nilsen, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L. Q. 65, 82-83 (2003); JUDITH A. BROWNE, ADVANCEMENT PROJECT, DERAILED: THE SCHOOLHOUSE TO JAILHOUSE TRACK 7 (2003), http://www.advancementproject.org/sites/default/files/publications/Derailerepcor_0.pdf; DAVID RICHART ET AL., BUILDING BLOCKS FOR YOUTH, UNINTENDED CONSEQUENCES: THE IMPACT OF ZERO TOLERANCE AND OTHER EXCLUSIONARY POLICIES ON KENTUCKY YOUTH, 8-9 (2003), http://www.cclp.org/documents/BBY/kentucky.pdf; NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., DISMANTLING THE SCHOOL-TO-PRISON PIPELINE 2-3 (2006), http://www.naacpldf.org/files/case_issue/Dismantling_the_School_to_Prison_Pipeline.pdf; American Academy of Pediatrics, Committee on School Health, *Out-of-School Suspension and Expulsion*, 112(5) PEDIATRICS 1206-07 (2003), http://www.cde.state.co.us/cdeprevention/download/pdf/1206.pdf; Alicia C. Insley, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1069-70 (2001); Gale M. Morrison, et al., *School Expulsion as a Process and an Event: Before and After Effects on Children at Risk for School Discipline*, in ZERO TOLERANCE: CAN SUSPENSION AND EXPULSION KEEP SCHOOLS SAFE?: NEW DIRECTIONS FOR YOUTH DEVELOPMENT 56-58 (Russel J. Skiba & Gil G. Noam eds., 2001); DANIEL J. LOSEN & RUSSELL J. SKIBA, THE CIVIL RIGHTS PROJECT, SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 3 (2010), http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/suspended-education-urban-middle-schools-in-crisis/Suspended-Education_FINAL-2.pdf.

[36] *See* National Juvenile Defender Center, *Juvenile Defender Delinquency Notebook* 8 (2006), http://www.njdc.info/2006resourceguide/start.swf (citation omitted); Joseph Tulman & Douglas Weck, *Shutting Off the School-to-Prison Pipeline for Status Offenders with Education-Related Disabilities*, 54 N.Y.L. SCH. L. REV. 875, 876-77 (2009/2010); Joseph Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD & FAM. ADVOC. 3, 28-29 (2003); Joseph Tulman, *The Best Defense is a Good Offense: Incorporating Special Education Law Into Delinquency Representation in the Juvenile Law Clinic*, 42 WASH. U. J. URB. & CONTEMP. L. 223 (1992).

[37] NORTH CAROLINA DEPARTMENT OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, 2011 ANNUAL REPORT 16 (2011), http://www.ncdjjdp.org/resources/pdf_documents/annual_report_2011.pdf.

This interaction among punitive laws, policies, and practices that lead students out of schools and into the juvenile and criminal systems is known as the school-to-prison pipeline.[38] Nationwide data make clear that the pipeline disproportionately affects students of color – particularly African-American students, male students, and students with disabilities. The U.S. Department of Education's Civil Rights Data Collection (CRDC) reveals that during the 2009-10 school year:

- Over 70% of students involved in school-related arrests or referred to law enforcement were Hispanic or African-American.
- African-American students represented 18% of students in the sample, but 35% of students suspended once, 46% of those suspended more than once, and 39% of students expelled.
- Across all districts, African-American students were over three and a half times more likely to be suspended or expelled than their White peers.
- While male and female students each represent about half the student population, males made up 74% of the students expelled.
- One in five African-American boys and more than one in ten African-American girls received an out-of-school suspension.
- Students covered under the Individuals with Disabilities in Education Act (IDEA) (i.e., students with disabilities who need special education services) are over twice as likely as their non-disabled peers to receive one or more out-of-school suspensions.[39]

## Holistic Advocacy: An Ethical Backdrop

Given the tremendous overlap between the education system and the juvenile and criminal systems, it is critical that juvenile defenders understand education law; obtain and investigate clients' education histories, as contained in their education records; and ensure their clients' educational rights and interests – as the client defines them – are respected.[40] Practicing in this way comports with ethical norms and best-practice mandates.

[38] *See* American Civil Liberties Union, What is the School-to-Prison Pipeline?, http://www.aclu.org/racial-justice/what-school-prison-pipeline (last visited May 4, 2012).

[39] In March 2012, the Office for Civil Rights of the United States Department of Education released its Civil Rights Data Collection (CRDC). The 2009-10 CRDC collected data from a sample of approximately 7,000 school districts and over 72,000 schools. Data Summary, U.S. Department of Education, Office for Civil Rights, Mar. 2012. http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf; *See also* Tamar Lewin, *Black Students Face More Discipline, Data Suggests*, NEW YORK TIMES, Mar. 6, 2012, http://www.nytimes.com/2012/03/06/education/black-students-face-more-harsh-discipline-data-shows.html.

[40] Given their roles, it is also imperative that court counselors, probation officers, prosecutors, and judges have similar knowledge.

The American Bar Association (ABA) Model Rules of Professional Conduct ("Model Rules"), which serve as the basis of the rules in effect in 49 states and the District of Columbia,[41] provide the ethical foundation for client-directed, holistic advocacy. The rules make clear that an attorney must be a zealous advocate and, as well, has a special responsibility for the quality of justice.[42] The rules further establish the important counseling role that an attorney must play, providing the client with an informed understanding of her legal rights and obligations and explaining their practical implications.[43] Finally, the rules create a mandate for client-directed representation by minors, absent diminished capacity.[44]

Standards issued jointly in 1980 by the Institute for Judicial Administration and the ABA supplement these rules by addressing the special challenges of representing minors.[45] They articulate a clear vision of the juvenile defender guided by her client's expressed interests, stating: "However engaged, the lawyer's principal duty is the representation of the client's legitimate interests."[46]

The National Juvenile Defender Center (NJDC) has provided standards for the role of juvenile defense counsel, which likewise spell out the importance for defenders of recognizing and litigating relevant educational issues. NJDC sets forth that a competent juvenile defender is one who knows the intricacies of special education law, familiarizes herself with appropriate educational placements, and works to ensure that the client is in an appropriate educational setting.[47] One of NJDC's "Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems" is that "the public defense delivery system advocates for the educational needs of clients." NJDC goes on to state:

> The public defense delivery system recognizes that access to education and to an appropriate educational curriculum is of paramount importance to juveniles facing delinquency adjudication and disposition. The public defense delivery system advocates, either through direct representation or through collaborations with

[41] The American Bar Association provides a list of states that have adopted the Model Rules, which is available at http://www.americanbar.org/groups/professional_ responsibility/publications/model_rules_of_professional_conduct/alpha_list_ state_adopting_model_rules.html.
[42] MODEL RULES OF PROF'L CONDUCT R. 1 cmt. (2004).
[43] MODEL RULES OF PROF'L CONDUCT R. 1 cmt. (2004).
[44] MODEL RULES OF PROF'L CONDUCT R. 1.14 (2004).
[45] IJA-ABA JOINT COMM'N ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES (1980).
[46] MODEL RULES OF PROF'L CONDUCT R. 3.1(a). *See also*, MODEL RULES OF PROF'L CONDUCT R. 3.1 (b)(i) ("In general, determination of the client's interests in the proceedings, and hence the plea to be entered, is ultimately the responsibility of the client after full consultation with the attorney."); MODEL RULES OF PROF'L CONDUCT R. 9.3(a) ("Ordinarily, the lawyer should not make or agree to a specific dispositional recommendation without the client's consent.").
[47] ROBIN WALKER STERLING, NATIONAL JUVENILE DEFENDER CENTER, ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT 5, 21 (2009), http://www.njdc.info/pdf/njdc_role_of_counsel_book.pdf.

> community-based partners, for the appropriate provision of the individualized educational needs of clients.[48]

Recognizing the critical role played by educational advocacy, some public defender offices have added education attorneys to their staffs.[49]

Attorneys who neglect or refuse to fully engage and work with their clients' educational histories typically cite two reasons as explanation. The first is that they are overwhelmed with high caseloads, and consequently, have insufficient time to attend to their clients' basic needs. In such an environment, working on educational issues may seem like a luxury the attorneys simply cannot afford.

The problem of appointed counsel overwhelmed by a high caseload and insufficient resources is serious and ongoing.[50] In some states, attorneys "practice" by meeting their clients for the first time at trial and pleading the client guilty to the charge.[51] In such jurisdictions, arguing for attorneys to do what seems like extra work when they neglect the basics of competent defense representation may seem an ill-conceived pipe dream.

Yet we submit that incorporating educational histories into delinquency representation is well worth the minimal investment of time. Obtaining and reading a client's educational history can point to avenues of relief for a client not otherwise obvious; more, it will assist an attorney in communicating and building an effective relationship with the client. As we have established, this work should be viewed as essential to even a minimal level of competent representation. When it is not possible because of high caseloads, deeper structural issues must be addressed, as the defenders may be providing *de facto* ineffective assistance of counsel.[52]

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[48] NATIONAL JUVENILE DEFENDER CENTER & NATIONAL LEGAL AID & DEFENDER ASSOCIATION, TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH PUBLIC DEFENDER DELIVERY SYSTEMS 3 (2008), http://www.njdc.info/pdf/10_Core_Principles_2008.pdf.

[49] *See e.g.*, Youth Advocacy Project (Boston, MA), http://www.youthadvocacyproject.org/; Public Defender Service (Washington, DC), http://www.pdsdc.org/PDS/CivilLegalServices.aspx; The Legal Aid Society (New York, NY), http://www.legal-aid.org/en/juvenilerights/juvenilepractice.aspx.

[50] *See* Steven N. Yermish, *Ethical Issues in Indigent Defense: The Continuing Crisis of Excessive Caseloads,* CHAMPION 22 (2009), http://www.nacdl.org/Champion.aspx?id=14650 (describing problem of high caseloads for defenders of indigent adults and juveniles); Jerry R. Foxhoven, *Effective Assistance of Counsel: Quality of Representation for Juveniles Is Still Illusory*, 9 BARRY L. REV. 99, 119 (2007) (noting national studies of juvenile defense that document caseloads as high as 1,500 cases per year in Virginia).

[51] *See* Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 773 (2010) (summarizing studies showing pervasiveness of substandard legal representation).

[52] *See* Donald Dripps *Criminal Procedure, Footnote Four, And The Theory Of Public Choice; Or, Why Don't Legislatures Give A Damn About The Rights Of The Accused?*, 44 SYRACUSE L. REV. 1079 (1993). *See also* Darryl K. Brown, *The Decline Of Defense Counsel And The Rise Of Accuracy In Criminal Adjudication*, 93 CAL. L. REV. 1585, 1590 (2005) ("Forty Years After *Gideon V. Wainwright*, This Political Limit On Defense Counsel Is A Fixed Component Of Criminal Justice; Underfunding Of Defense Counsel Will Not Change Except At The Margins."); Mary Sue Backus, *The Adversary System Is Dead, Long Live The Adversary System: The Trial Judge As The Great*

A second reason attorneys may not engage in this work is a belief, often unstated, that their clients need to be in the juvenile justice system because it is in their "best interests." In many jurisdictions, attorneys do not follow their clients' stated wishes, instead inserting their own judgment about what is best – even when that runs counter to their clients' expressed interests.[53] They view the juvenile justice system as a beneficent place that can provide structure, supervision, and services that would otherwise be unavailable.[54] Thus, they encourage clients to accept guilty pleas without adequately investigating cases, including obtaining and employing education records, so their clients can "get help."

Yet such a view is not supported by empirical research showing that juvenile justice involvement has a harmful impact on a client's future life chances. Specifically, several studies have demonstrated that prosecution and confinement do not reduce a young person's chances of re-offending; some data indicate that a young person who goes through the system will be more likely to reoffend than a young person charged with a similar crime who is simply left alone.[55] The reality that juvenile justice system involvement can harm more than help should buttress the ethical imperative for zealous, client-centered, holistic representation that includes educational advocacy.

In sum, understanding how clients have been served (or not served) in school systems is indispensable for an attorney to fulfill her counseling, advocacy, and justice-seeking roles. By doing so, the attorney can make appropriate arguments at the pre-trial, trial, and dispositional phases of the delinquency proceedings. What is more, she can identify ongoing educational needs that will require either advocacy within the educational system by the delinquency attorney or referrals to appropriate civil attorneys or lay advocates. Finally, by highlighting the link between draconian disciplinary policies and delinquency involvement – as well as the racially disproportionate impact that the school-to-prison pipeline has on youth of color, particularly African-American youth – the attorney serves the important and broad-ranging function of ensuring quality of justice and seeking improvement of the law.[56]

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*Equalizer In Criminal Trials*, 2008 MICHIGAN ST. L. REV. 945, 957 N. 52 (2008), citing David Cole, *No Equal Justice* 6-7 (1999) ("Providing Genuinely Adequate Counsel For Poor Defendants Would Require A Substantial Infusion Of Money, And Indigent Defense Is The Last Thing The Populace Will Voluntarily Direct Its Tax Dollars To Fund. Achieving Solutions To This Problem Through The Political Process Is A Pipedream.").

[53] *See* Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 773 (2010).

[54] *See* Tamar Birckhead, *Culture Clash: The Challenge Of Lawyering Across Difference In Juvenile Court*, 62 RUTGERS L. REV. 959, 979 (2010).

[55] *See* ANTHONY PETROSINO ET AL., CAMPBELL SYSTEMATIC REVIEWS, FORMAL SYSTEM PROCESSING OF JUVENILES: EFFECTS ON DELINQUENCY (2010), http://www.campbellcollaboration.org/news_/formal_processing_reduce_juvenile_delinquency.php (finding in comprehensive meta-analysis that juvenile system processing has no crime control impact and, in fact, appears to increase delinquency); Uberto Gatti et al., *Iatrogenic Effect of Juvenile Justice*, J. CHILD PSYCHOL. & PSYCHIATRY 991, 991-92 (2009).

[56] *See* MODEL RULES OF PROF'L CONDUCT R. 1 cmt. (2004).

## Practice Recommendations

### Step One: Obtaining Education Records: The Why and How

Juvenile defenders should gather their client's education records as soon as possible after being retained by a client or appointed to represent a client.[57] It is also recommended that a juvenile defender obtain clients' mental health records, medical records, and child welfare (i.e., abuse and neglect) records, if such records exist; however, discussion of such records is outside the scope of this article. It is essential that defenders collect all available records from the school system that serves the juvenile, rather than simply relying on information provided by clients, clients' family members, juvenile probation officers, and others.

The Family Educational Rights and Privacy Act (FERPA) is the federal law that enables juvenile defenders to access education records.[58] FERPA applies to all educational agencies and institutions that receive funding from the U.S. Department of Education, which includes virtually all public schools.[59] It gives parents and "eligible students" the right to review the student's education records maintained by the school.[60] "Eligible students" are students age 18 and older and students who have been emancipated.[61] A parent is defined as "a legal guardian or other person standing *in loco parentis* (such as a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the welfare of the child)."[62]

Education records are those records that are: 1) directly related to a student; and 2) maintained by an educational agency or institution or by a party acting for the agency or institution.[63] Attorneys should read state statutes and local school district policies to determine the extent of records that must be maintained.[64]

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[57] *See* Sue Burrell & Loren Warboys, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, *Special Education and the Juvenile Justice System* (2000), www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html; JOSEPH TULMAN & JOYCE MCGREE, UNIVERSITY OF D.C. SCHOOL OF LAW JUVENILE LAW CLINIC, SPECIAL EDUCATION ADVOCACY UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): FOR CHILDREN IN THE JUVENILE DELINQUENCY SYSTEM 4-2, 11-3 (1998), http://www.aecf.org/upload/PublicationFiles/JJ3622H5030.pdf.

[58] 20 U.S.C.A. § 1232(g) (2012); 34 CFR Part 99.

[59] *See* 20 U.S.C.A. § 1232g(a)(B) (2006); 34 C.F.R.§ 99.1 (2012); U.S. DEPT. OF EDUC., FAMILY POLICY COMPLIANCE OFFICE, FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) (2011), http://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html; U.S. DEPT. OF EDUC., FAMILY POLICY COMPLIANCE OFFICE, FERPA GUIDANCE FOR PARENTS 1 (2011), http:// www2.ed.gov/policy/gen/guid/fpco/ferpa/parents.html.

[60] 34 C.F.R. § 99.10(a) (2012).

[61] 20 U.S.C.A. § 1232h(c)(5)(B) (2006).

[62] 20 U.S.C.A. § 1232h(c)(6)(D) (2006).

[63] 34 C.F.R. § 99.3 (2012).

[64] *See* 20 U.S.C.A. 1232h(c)(1)(A) (2006); *See also*, N.C. GEN. STAT. § 115C-402(b) (2003); Wake County Public School System, Board Policy 6300(B) (2011), http://www.wcpss.net/policy-files/series/policies/6300-bp.html; Miami-Dade County Public Schools, School Board Policy 8330 (2011), http://www.neola.com/miamidade-fl/search/policies/po8330.htm.

Education records do not include records[65] of the law enforcement unit[66] of an educational agency or institution.[67] As such, the law enforcement unit may refuse to provide a parent with an opportunity to review law enforcement unit records, and it may disclose law enforcement unit records to third parties without the parent's prior written consent.[68] Records of a law enforcement unit do not include: 1) records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or 2) records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.[69] In other words, records created by SROs that are maintained by the school should be provided by the school, as should records created by SROs exclusively for purposes of suspension or expulsion. In addition, it might be useful to obtain the Memorandum of Understanding (MOU) that exists between the school system and local law enforcement agencies, as well as any local school district policies that relate to SROs.[70]

Juvenile defenders can review a client's education records from the client's school by obtaining written consent from the client's parent or guardian or the client, if she is an "eligible student."[71] The release must specify the records to be released, the reasons for such release, and to whom the records will be released (see Appendix C for a sample release).[72] The release should be sent to the principal of the client's school, along with a letter detailing the specific records being requested (see Appendix D for a sample letter). It is advisable to also send the release and request letter to the juvenile's guidance counselor and the school's record keeper, if one exists, because they are often the people who ultimately fulfill the request.

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[65] Records of a law enforcement unit means those records, files, documents, and other materials that are: 1) created by a law enforcement unit; 2) created for a law enforcement purpose; and 3) maintained by the law enforcement unit. 34 C.F.R. § 99.8(b)(1) (2006).

[66] A "law enforcement unit" means any individual, office, department, division, or other component of a school, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by the school to: enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any law against any individual or organization; or to maintain the physical security and safety of the school. The law enforcement unit does not lose its status as a law enforcement unit if it also performs other, non-law enforcement functions for the school, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceeding against a student. 34 C.F.R. § 99.8(a)(1) (2006).

[67] 34 C.F.R. § 99.3 (2011).

[68] U.S. DEPT. OF EDUC., FAMILY POLICY COMPLIANCE OFFICE, FERPA GUIDANCE FOR PARENTS 5 (2011), http:// www2.ed.gov/policy/gen/guid/fpco/ferpa/parents.html

[69] 34 C.F.R. § 99.8(b)(2) (2006).

[70] *See* NATIONAL JUVENILE DEFENDER CENTER, DEFENDING CLIENTS WHO HAVE BEEN SEARCHED AND INTERROGATED AT SCHOOL 14 (2009), http://www.njdc.info/pdf/defending_clients_who_have_been_searched_and_interrogated_at_school.pdf.

[71] *See* 20 U.S.C.A. § 1232g(b)(2)(A) (2006).

[72] *See* 20 U.S.C.A. § 1232g(b)(2)(A) (2006); U.S. DEPT. OF EDUC., FAMILY POLICY COMPLIANCE OFFICE, FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) (2011), http://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html; U.S. DEPT. OF EDUC., FAMILY POLICY COMPLIANCE OFFICE, FERPA GUIDANCE FOR PARENTS 2 (2011), http:// www2.ed.gov/policy/gen/guid/fpco/ferpa/parents.html.

The school must comply with a request for records within a reasonable period of time, but not more than 45 days after it has received the request.[73] However, schools often fulfill records requests more quickly, especially if emails are sent and calls are made to follow up on the request. Additionally, schools are not required to provide copies of records unless, for reasons such as great distance, it is impossible for parents or eligible students to review the records.[74] However, schools often provide copies of the records to attorneys who send requests, especially if the records can be scanned and emailed or faxed in order to save copying costs.

Schools sometimes refuse to share records that contain the personally identifiable information of other students. Though it is true that a parent only has the right to view information about her student, and not personally identifiable information about any other students contained in the same document,[75] schools can redact any identifying information about other students and release the redacted records.[76] Thus, juvenile defenders should ask for redacted records, if the school attempts to block access due to other students' privacy.

If a school refuses to comply with an adequate records request, the remedies are somewhat limited. There is no private right of action to enforce FERPA under a § 1983 action.[77] The primary method of redress is filing a complaint, on behalf of an eligible student or the client's parent, with the U.S. Department of Education's Family Policy Compliance Office.[78] Some school districts also have grievance policies that can be used to address violations of FERPA.[79]

The school may charge a fee for a copy of an education record,[80] unless the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records.[81] Therefore, if the client's family is indigent, the juvenile defender should request a waiver of copying fees, or alternatively, that the records be emailed or faxed. A school is not required to provide information that is not maintained or to

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[73] 34 C.F.R. § 99.10(b) (2011).
[74] *See* 34 C.F.R. § 99.10(d) (2011); U.S. DEPT. OF EDUC., FAMILY POLICY COMPLIANCE OFFICE, FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) (2011), http://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html.
[75] *See* 34 C.F.R. § 99.12(a) (2009).
[76] *See* U.S. DEPT. OF EDUC. FAMILY POLICY COMPLIANCE OFFICE, LETTER OF TECHNICAL ASSISTANCE TO SCHOOL DISTRICT RE: DISCLOSURE OF EDUCATION RECORDS CONTAINING INFORMATION ON MULTIPLE STUDENTS (10/31/03) (2003), http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/1031.html.
[77] *See Gonzaga University v. Doe*, 536 U.S. 273 (2002).
[78] *See* U.S. Department of Education, Family Policy Compliance Office, http://www2.ed.gov/policy/gen/guid/fpco/index.html.
[79] *See e.g.*, Wake County Public School System, Board Policy 6520 (2010), http://www.wcpss.net/policy-files/series/policies/6520-bp.html; School Board of Alachua County, Policy 5710, http://www.neola.com/alachua-fl/search/policies/po5710.htm.
[80] However, "[a]n educational agency or institution may not charge a fee to search for or to retrieve the education records of a student." 34 C.F.R. § 99.11(b) (2011).
[81] 34 C.F.R. § 99.11(a) (2011).

create education records in response to a request.[82] The school must respond to reasonable requests for explanations and interpretations of the records.[83]

Parents of students who require services from the school system due to identified disabilities (generally, this will be a child who has an Individualized Education Program, an "IEP") are specifically guaranteed access to their students' educational records under state and federal law.[84] Though these provisions, and the accompanying enforcement regulations, do not necessarily require more from the school than FERPA already does, noting these additional requirements could bolster a defender's request for records.[85]

**Step Two: Using Education Records in the Pre-Trial, Trial, and Dispositional Phases**

A client's records can provide a juvenile defender with valuable information that can aid in building and strengthening the attorney-client relationship; assist in assessing and litigating a client's competency; provide points for argument at a detention hearing; point out avenues for motions to suppress; help keep a client in juvenile court, rather than being transferred to adult court; suggest trial defenses; and offer help at disposition.[86]

**Client Interviewing**

A client's education records contain a storehouse of information that can assist an attorney in preparing a defense. First, the records can supplement or contradict the official police report in important ways. The records may reveal that the lawyer needs to ask about a search or interrogation that occurred at school. Attendance records could provide the basis for an alibi defense. Multiple disciplinary reports filed by a teacher who is a state's witness suggest

[82] *See* U.S. DEPT. OF EDUC., FAMILY POLICY COMPLIANCE OFFICE, FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) (2011), http://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html; U.S. DEPT. OF EDUC., FAMILY POLICY COMPLIANCE OFFICE, FERPA GUIDANCE FOR PARENTS 2 (2011), http://www2.ed.gov/policy/gen/guid/fpco/ferpa/parents.html.

[83] *See* 34 C.F.R. § 99.10(c) (2011).

[84] *See* N.C. GEN. STAT. § 115C-109.3 (2006); 34 C.F.R. § 300.613 (2009); Ga. Comp. R. & Regs. 160-4-7-.09 (2010); Fla. Admin. Code r. 6A-6.03311 (2008); La. Admin Code. tit. 28, pt. XLIII, § 502 (2008); Ala. Admin. Code r. 290-8-9-.08 (2011).

[85] 34 CFR § 300.626 (2007); NC 1505-2.17 (located in the North Carolina Department of Public Instruction, Exceptional Children Division, Policies Governing Services for Children with Disabilities (amended June 2010), http://www.dpi.state.nc.us/ec/policy/resources/).

[86] *See* Thomas Mayes and Perry Zirkel, *The Intersections of Juvenile Law, Criminal Law, and Special Education Law*, 4 U.C. DAVIS J. JUV. L. & POL'Y 125, 133-34 (2000); SUE BURRELL & LOREN WARBOYS, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE JUSTICE BULLETIN, SPECIAL EDUCATION AND THE JUVENILE JUSTICE SYSTEM (2000), www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html; ERIC ZOGRY, NORTH CAROLINA JUVENILE DEFENDER, ANNUAL JUVENILE DEFENDER CONFERENCE, SPECIAL EDUCATION INFORMATION CHECKLIST (2006),http://www.ncids.org/Juvenile%20Defender/Training%20Seminars/2006%20Juvenile%20Defender%20Conference/12%20Zogry%2004%20-%20special%20ed%20checklist.pdf.*See* Thomas Mayes and Perry Zirkel, *The Intersections of Juvenile Law, Criminal Law, and Special Education Law*, 4 U.C. Davis. J. L. & Pol'y 125 (2000).

bias that the attorney could explore on cross-examination. Information on the services the student is receiving at school can assist in negotiations and dispositional advocacy.

These records can also assist an attorney in devising an effective communication strategy with the client. A strong and trusting relationship is key to effective representation of child clients. Simply explaining lawyer-client privilege and expressed-interest advocacy will be insufficient for most children; a young person must experience that an attorney is on her side in order to believe it.[87] Thus, it is imperative for attorneys to spend time with their young clients in order to gain their trust. They must also effectively communicate with their clients, using language appropriate given the client's age and developmental level and explaining legal concepts through examples children can understand.[88]

If the client has language-processing problems, the attorney has an even greater need to speak clearly, slowly, and free of legal jargon. If the client has a long disciplinary history and negative interactions with school officials, the attorney will understand that she may have to work particularly hard to gain the child's trust. What is more, Individualized Education Programs (IEPs) should contain strategies for assisting the child in learning, which the attorney can adapt for her own work with the client.[89] The simple and straightforward act of an attorney taking the time to learn about her client's educational history can show that the child that the attorney cares (see Appendix D for a sample educational background interview form.) These concrete displays of concern will go a long way toward cementing the attorney-client relationship. In short, the child's educational history can be indispensable in forming an effective attorney-client relationship.[90]

**Competency**

Educational histories of clients can assist defenders in assessing and litigating a client's competency. The Supreme Court has recognized that the criminal trial of an incompetent defendant violates due process.[91] Competency requires that an adult criminal defendant have "sufficient present ability to consult with his lawyer with a reasonable degree of rational

[87] *See* Emily Buss, *The Role of Lawyers in Promoting Juveniles' Competence as Defendants*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 243, 260 (Thomas Grisso & Robert G. Schwartz eds., 2000)
[88] Laura Cohen & Randi Mandelbaum, *Kids Will be Kids: Creating a Framework for Interviewing and Counseling Adolescent Clients*, 79 TEMP. L. REV. 357, 384 (2006).
[89] *See* 20 U.S.C.A. § 1414(d).
[90] *See* Joseph Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD & FAM. ADVOC. 3, 42-44 (2003).
[91] *See Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (citation omitted); *Drope v. Missouri*, 420 U.S. 162, 171-172 (1975).

understanding;"[92] "rational as well as factual understanding of the proceedings against him;"[93] and the ability to "assist in preparing his defense."[94]

The Court has not expressly ruled on the applicability of the competency standard to juvenile court; however, in a majority of jurisdictions, the juvenile statutes reference competency and adopt the same standard for adults in delinquency cases.[95] Other states find juveniles incompetent only in a more limited set of circumstances, such as where there is a showing that the juvenile is mentally ill or mentally retarded.[96]

The question of the competency of the juvenile to proceed may be raised at any time by the prosecution, defense, or court.[97] When competency is questioned in court, the judge should order the juvenile to be evaluated by a qualified evaluator. Juvenile defenders should always seek funds to obtain an independent evaluation in order to have control over whether the court will see the evaluator's findings. After an evaluation, courts should conduct evidentiary hearings upon request of the defendant on the issue of incompetency.[98]

If a child is found incompetent to stand trial, she may be confined in a locked mental health facility when the court finds such confinement necessary for the client to become competent. In some jurisdictions, the competency statute mandates the initiation of civil commitment proceedings pursuant to a finding of incompetency.[99] Thus, the decision of a defender to pursue competency must be made carefully and after considering all positive costs and benefits to the juvenile. In jurisdictions in which confinement is likely, defenders must proceed cautiously. However, in circumstances in which a client obviously lacks the necessary competency, defenders may be ethically obligated to raise the issue.[100]

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[92] *Dusky v. U.S.*, 362 U.S. 402, 402 (1960).
[93] *Dusky v. U.S.*, 362 U.S. 402, 402 (1960).
[94] *Drope v. Missouri*, 420 U.S. 162, 171 (1975).
[95] Richard E. Redding & Lynda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y & L. 353, 368 (2001). *See e.g.*, N.C. GEN. STAT. § 7B-2401 (2011); NORTH CAROLINA JUVENILE DEFENDER MANUAL, Office of Indigent Defense Services 92, www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_07.pdf; *see also* LSA-Ch. C. Art. 832 (2012).
[96] *See* Richard E. Redding & Lynda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y & L. 353, 369 (2001). Even in those states in which statutes do not specifically provide for a claim of incompetency, there is little doubt that a state court would recognize such a claim. RANDY HERTZ, ET. AL., TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT 228 (2008). *See also* Richard E. Redding & Lynda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y & L. 353, 355 (2001). (noting that punitive legislative changes to juvenile courts render capacity to stand trial a constitutional requirement for juveniles).
[97] *See* Richard E. Redding & Lynda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y & L. 353, 362 (2001). *See e.g.*, FLA. STAT. ANN. § 985.19.
[98] *See Pate v. Robinson*, 383 U.S. 375 (1966).
[99] *See* RANDY HERTZ, ET. AL., TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT 230 (2008).
[100] Commentators differ on whether a defense attorney must raise competency issues absent the defendant's consent. Richard E. Redding & Lynda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y & L. 353, 362 n. 39 (2001).

A client's educational history can provide important insights into a client's competency. Intellectual, developmental, academic, and psycho-social evaluations, as well as work samples, report cards, and behavior write-ups, all may be relevant. They can also help inform the evaluator appointed by the court to explore competency.[101] Finally, they can help support or contest a claim of incompetency in an evidentiary hearing.

**Detention Hearings**

A juvenile may be held in detention, without bail, during the pendency of a case.[102] A client's records can be invaluable in preparing arguments to persuade the judge not to detain a client.[103] For example, counsel could argue against detention because it would disrupt special education or metal health services,[104] or argue that being in the community will facilitate proper evaluations.[105] Additionally, the client's records may provide insight into available community-based, less intrusive, more appropriate alternatives that can be offered to the court as providing both protection and supervision for the juvenile and protection of the public.[106] The records can also be used to argue against specific bases for detention. For example, one basis for detention is "[t]he juvenile has willfully failed to appear" for prior cases. "[107] Education records can provide counsel with information that could support an argument that the prior failure to appear was not willful. For example, a child with a learning disability may not have the requisite mental capacity to "willfully" fail to appear in a courtroom. Further, the records might show that a parent brought the child to school on the day of the default, which could also negate willfulness, or, at a minimum, provide useful information for a defender to present to a judge at a detention argument.

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[101] *See* JUVENILE DEFENDER DELINQUENCY NOTEBOOK, National Juvenile Defender Center 54 (Spring 2006), www.njdc.info/2006resourceguide/start.swf; NORTH CAROLINA JUVENILE DEFENDER MANUAL, Office of Indigent Defense Services, pp. 97-98, 109, www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_07.pdf; Joseph Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD & FAM. ADVOC. 3, 46-47 (2003).

[102] *See e.g.*, ALA.CODE § 12-15-128 (1975); FLA. STAT. ANN. § 985.255 (West 2011); N.C. GEN. STAT. § 7B-1903(b)-(c) (2011).

[103] *See* JOSEPH TULMAN & JOYCE MCGREE, SPECIAL EDUCATION ADVOCACY UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): FOR CHILDREN IN THE JUVENILE DELINQUENCY SYSTEM, 1-5 (1998), www.aecf.org/upload/PublicationFiles/JJ3622H5030.pdf.

[104] SUE BURRELL AND LOREN WARBOYS, SPECIAL EDUCATION AND THE JUVENILE JUSTICE SYSTEM, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE JUSTICE BULLETIN (July 2000), www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html.

[105] SUE BURRELL AND LOREN WARBOYS, SPECIAL EDUCATION AND THE JUVENILE JUSTICE SYSTEM, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE JUSTICE BULLETIN (July 2000) https://www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html; Joseph Tulman and Joyce McGree, Special Education Advocacy Under the Individuals with Disabilities Education Act (IDEA) for Children in the Juvenile Delinquency System 2-12 (1998), www.aecf.org/upload/PublicationFiles/JJ3622H5030.pdf.

[106] *See e.g.*, N.C. GEN. STAT. § 7B-1906(d); FLORIDA STAT. ANN. § 985.255 1 (West 2011).

[107] *See e.g.*, N.C. GEN. STAT. § 7B-1903(b)(3); FLORIDA STAT. ANN. § 985.255 1(i) (West 2011).

Defenders could also argue that a client who is disabled under the Americans with Disabilities Act and/or Section 504 of the Rehabilitation Act[108] ought to be entitled to release from detention if reasonable accommodation cannot be made in the facility but can be made for the client in the community. Failure to reasonably accommodate a disabled client in detention, a defender could argue, violates her rights under these federal statutes.[109]

**Suppression**

A juvenile client's education records may be helpful in arguments to suppress the fruits of illegal searches and seizures and interrogations, whether the case arose from an alleged incident in school or elsewhere.

Searches

Searches of juveniles may not be conducted in the absence of either probable cause or reasonable suspicion (depending on the location of the search and whether the seizure constitutes an arrest or a frisk among other factors), or the consent of the juvenile. If a juvenile consents to a search, neither probable cause nor reasonable suspicion in required. However, the state cannot establish a juvenile's consent merely by showing that the juvenile simply acquiesced to authority;[110] consent must be shown by a totality of the circumstances.[111]

The Supreme Court has held that the Fourth Amendment applies to searches by school officials, but requires only that such searches comport with a reasonableness requirement. School officials must possess reasonable grounds for believing that a search will turn up evidence that the student is violating the rules of the school or the law.[112] The searches must be justified at their inception and be reasonable in scope.[113]

State courts typically find that SROs are school officials and thus may conduct searches under reasonable suspicion.[114] Courts may hold school searches to the more stringent probable-

[108] The Rehabilitation Act of 1973, § 504, is codified at 29 U.S.C. § 794 (2000). Section 794(a) reads, in relevant part, as follows: "No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service."

[109] *See* Joseph Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System* , 3 WHITTIER J. CHILD & FAM. ADVOC. 3, 21-22 (2003).

[110] *See Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968).

[111] *See Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

[112] *See New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985).

[113] *See New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985).

[114] *See* NATIONAL JUVENILE DEFENDER CENTER, DEFENDING CLIENTS WHO HAVE BEEN SEARCHED AND INTERROGATED AT SCHOOL 8 (2009). *See e.g., Patman v. State*, 537 S.E.2d 118, 120 (Ga. 2000); *In re S.W.*, 614 S.E.2d 424, 428 (N.C. App. 2005).

cause standard when the search is more obviously conducted only for law-enforcement, rather than educational, purposes. When outside law enforcement personnel – or a school official acting clearly at their behest – conducts a search; when the search's purpose is to uncover criminal activity; and when the officer, rather than school officials, has initiated the search, probable cause may be required.[115]

Education records may be useful in multiple areas in a motion to suppress the fruits of a search. For one, they can help negating a state's claim that a student consented to a search. Schools frequently promulgate disciplinary codes requiring students to obey all orders from administrators.[116] Failure to do so can result in school discipline.[117] Defenders should obtain the disciplinary code for the school and consider attaching it to the written motion to suppress; the code may support an argument that such "consent" was not freely given but instead mere acquiescence to authority.[118]

Second, education records – particularly disciplinary records of the alleged incident – can assist a defender in arguing that a search should comport with probable cause rather than reasonable suspicion standards. For example, they can contain information regarding all the individuals who participated in a search, which may be a greater number than indicated in the official police report. They may reveal a greater extent of outside law enforcement involvement than is otherwise apparent.

These records may also contain statements from school witnesses that are inconsistent with those contained in the police report and, as such, can be used for impeachment.

Interrogations

Defenders can move to suppress statements taken from their clients on grounds that the questioning that led to the statements was not preceded by *Miranda* warnings, but should have

[115] *See* NATIONAL JUVENILE DEFENDER CENTER, DEFENDING CLIENTS WHO HAVE BEEN SEARCHED AND INTERROGATED AT SCHOOL 9 (2009), http://www.njdc.info/pdf/defending_clients_who_have_been_searched_and_interrogated_at_school.pdf; *M.J. v. State*, 399 So. 2d. 996, 998 (Fla. Dist. Ct. App. 1981)

[116] *See. e.g.*, Smith Middle School Student Handbook and Agenda 2010-2011 21, http://www2.chccs.k12.nc.us/education/page/download.php?fileinfo=U1RVREVOVF9BR0VOREFfMjAxMC5wZGY6Ojovd3d3MTAvc2Nob29scy9uYy9jaGFwZWwvaW1hZ2VzL2F0dGFjaC81NjE4Ny80NjU4XzU2MTg3X2F0dGFjaF85NTE4LnBkZg (“Students are expected to…Follow directions of all teachers/adults the first time they are given.”).

[117] *See e.g.*, Smith Middle School Student Handbook and Agenda 2010-2011 21, http://www2.chccs.k12.nc.us/education/page/download.php?fileinfo=U1RVREVOVF9BR0VOREFfMjAxMC5wZGY6Ojovd3d3MTAvc2Nob29scy9uYy9jaGFwZWwvaW1hZ2VzL2F0dGFjaC81NjE4Ny80NjU4XzU2MTg3X2F0dGFjaF85NTE4LnBkZg.

[118] *See Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968).

been;[119] that, if *Miranda* warnings were given, the juvenile's waiver was not knowing, voluntary, or intelligent considering the totality of the circumstances; and that the statements were not voluntary under the Due Process Clause of the Fourteenth Amendment.[120]

*Miranda* warnings are required when a juvenile is subject to custodial interrogation by law enforcement.[121] The Supreme Court has never expressly ruled on the question of whether school administrators conducting interrogations of juveniles constitute law enforcement. State courts have, for the most part, held that SROs are law enforcement and that questioning by them triggers *Miranda* protections if the circumstances otherwise constitute "custodial interrogation."[122] When SROs are present at, but do not conduct, interrogations of students, deferring instead to school administrators, the state will likely argue that *Miranda* protections do not apply. Defenders should argue that the questioning by school administrators was at the behest of the SROs or other law enforcement officials, and that *Miranda* should apply.

Education records can assist defenders in arguing that questioning by school officials should trigger *Miranda* protections. For one, disciplinary records regarding the incident may reveal circumstances suggesting the juvenile was in custody; they may also show that the SRO played more of a role in the questioning than otherwise apparent from the police report. Further, defenders should subpoena memoranda of understanding and other policies regulating the relationship between a school district and the police department. Such documents could show that the school authorities function as agents of the police in questioning juveniles.

Education records can also aid defenders in arguing that a waiver was not voluntary, knowing, or intelligent given the totality of the circumstances. They should contain information regarding learning disabilities, including language processing disorders, grades, and relationships with school authority figures, which may be relevant to their ability to comprehend warnings from police officers.

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[119] In a minority of jurisdictions, juveniles are entitled to an enhanced set of protections that supplement those of *Miranda* and require the opportunity to consult with a parent or guardian. *See* RANDY HERTZ, ET. AL., TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT 521-22 (2008).

[120] This is not meant to be an exhaustive list of all grounds for suppression of statements. For a thorough discussion of suppression issues surrounding statements in juvenile delinquency cases, *see* RANDY HERTZ, ET. AL., TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURTS 487-531 (2008).

[121] *See Miranda v. Arizona*, 384 U.S. 436, 476 (1966). The Supreme Court has not expressly recognized that the *Miranda* doctrine is applicable in juvenile court, but it has recognized the logic of extending the safeguards of adult court to juvenile confessional evidence. *See generally* Randy Hertz, et. al., TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURTS 487-88 (2008) (citation omitted).

[122] *See* NATIONAL JUVENILE DEFENDER CENTER, DEFENDING CLIENTS WHO HAVE BEEN SEARCHED AND INTERROGATED AT SCHOOL 8 (2009), http://www.njdc.info/pdf/defending_clients_who_have_been_searched_and_interrogated_at_school.pdf; *See e.g., State v. Scott*, 630 S.E. 2d 563, 565 (Georgia App. Ct. 2006).

School records, finally, can assist in making arguments that a statement was involuntary. The Supreme Court has recognized that personal characteristics are relevant in the voluntariness analysis.[123] Such characteristics may include youth, mental illness, mental retardation, limited intellectual ability, limited education, intoxication, and the effects of drugs. As in the case of the waiver of *Miranda* rights, a juvenile's education records relate to several of these factors.

**Transfer/Waiver**

In some jurisdictions, juvenile court judges have the discretion to decide whether to transfer, or waive, a juvenile to adult criminal court. Typically the judges are required by statute to consider factors such as whether the protection of the public and the needs of the juvenile will be served by transfer of the case to superior court by considering, among other factors, the juvenile's age, maturity, and amenability to treatment.[124]

A juvenile's records may provide valuable information about:

- mitigating factors, such as educational history, mental and emotional state, intellectual functioning, developmental issues, family history, and other factors that dispel negative images, such as criminal sophistication;
- witnesses who can provide helpful insight into the juvenile's character, such as teachers, counselors, psychologists, and other persons with a positive personal or professional opinion of the juvenile; and
- whether the juvenile has a disability or mental health condition that can only be addressed through services unavailable in juvenile facilities.

In those states that accord all decision-making power regarding a juvenile's transfer to the prosecutor,[125] the same information can be utilized in making arguments to the prosecutor to keep the juvenile in juvenile court.

**Negotiations**

In like fashion, a juvenile's education records can also be helpful during negotiations with juvenile probation officers and district attorneys. For example, a juvenile defense attorney could use the records to argue that:

- school-based special education services obviate the need for juvenile court proceedings;[126]

[123] *See Haley v. Ohio*, 332 U.S. 596 (1948).
[124] *See e.g.*, N.C. GEN. STAT. § 7B-2203(b)(2011); FLA. STAT. ANN. § 985.565(1)(b) (West 2011).
[125] *See e.g.*, FLA. STAT. ANN. § 985.56 (West 2011) (A child of *any age* who is charged with a *violation of state law punishable by death or by life imprisonment* is subject to the jurisdiction of the court as set forth in § 985.219(7) unless and until an indictment on the charge is returned by the grand jury).

- a juvenile's school-based delinquent conduct was a manifestation of her disability, and therefore, the charges should be dismissed or reduced because of lack of capacity, culpability, and/or *mens rea*; and
- disciplinary proceedings at school constitute sufficient punishment.

**Adjudicatory Proceedings**

The adjudicatory hearing is the hearing before a juvenile court judge to determine whether a juvenile is delinquent. Allegations in the petition must be proved beyond a reasonable doubt by the state. Counsel for the juvenile may cross-examine the state's witnesses and may present testimony and other evidence.[127]

School records can be used for a variety of purposes in adjudicatory hearings. Disciplinary reports could bolster a defense of duress, self-defense, or defense of another. Attendance records could support an alibi defense. Records could be used to impeach the in-court testimony of teachers, school administrators, and SROs. Records could also be used to show that:

- the student's behavior was found in a disciplinary hearing to be a manifestation of her disability; such a finding could negate a specific intent requirement for the delinquency charge;[128]
- the student has long-standing intellectual and/or developmental disabilities that might constitute an insanity defense;
- the case ought to be dismissed in the interest of justice because the juvenile's disability is so severe that it will render her compliance with court orders difficult, if not impossible;[129]

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[126] *See* SUE BURRELL AND LOREN WARBOYS,, SPECIAL EDUCATION AND THE JUVENILE JUSTICE SYSTEM, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE JUSTICE BULLETIN (July 2000), www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html; JOSEPH TULMAN AND JOYCE MCGREE, SPECIAL EDUCATION ADVOCACY UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) FOR CHILDREN IN THE JUVENILE DELINQUENCY SYSTEM, 1998, p. 2-9, www.aecf.org/upload/PublicationFiles/JJ3622H5030.pdf.

[127] *See In re Gault*, 387 U.S. 1 (1967); *In re Winship*, 397 U.S. 358 (1970).

[128] If a student with an individualized education program (IEP) is suspended for more than ten consecutive school days or a pattern of suspension accumulates to more than ten school days in a school year, the school must conduct a manifestation determination review (MDR). *See* 34 C.F.R. § 300.519. At the MDR, the IEP Team decides if the conduct in question was: 1) caused by, or had a direct and substantial relationship to, the child's disability; or 2) the direct result of the local educational agency's failure to implement the IEP. *See* SUE BURRELL AND LOREN WARBOYS, SPECIAL EDUCATION AND THE JUVENILE JUSTICE SYSTEM, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE JUSTICE BULLETIN (July 2000). Available at www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html; JUVENILE DEFENDER DELINQUENCY NOTEBOOK, NATIONAL JUVENILE DEFENDER CENTER 272 (Spring 2006). *See* JOSEPH TULMAN AND JOYCE MCGREE, SPECIAL EDUCATION ADVOCACY UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): FOR CHILDREN IN THE JUVENILE DELINQUENCY SYSTEM, 1998, p. 2-2, www.aecf.org/upload/PublicationFiles/JJ3622H5030.pdf.

- the school failed to provide the client with necessary services and interventions, the client's behavior was closely related to that failure, and the school filed a delinquency complaint against the client for the alleged misconduct (i.e., unclean hands defense) (e.g., a student is severely bullied for months; the student's parent reports the bullying to the school principal multiple times; the school fails to intervene; and the student assaults the bully).[130]

Even if these defenses are not successful, the presentation to the court of records during the adjudicatory hearing can prime the judge to be more sympathetic toward the client, and thus more lenient, at disposition. That is, a judge or jury might not find that the educational information negated proof beyond a reasonable doubt, but a judge may well find that the school's handling of a particular situation obviates the need for further punishment by the court.

**Dispositional Proceedings**

Following an adjudication of delinquency, the court proceeds to a dispositional hearing.[131] The purpose of dispositions in juvenile cases is, at least in theory, to design a plan to maintain public safety and rehabilitate the juvenile.[132] A client's education records can help the defender in the dispositional proceeding in a number of ways, including:

- countering the probation officer's account of the juvenile's educational history;
- arguing that rehabilitation and treatment will be better addressed in the community rather than in a locked placement, when the client is receiving, or should receive, the services mandated in an IEP;
- identifying appropriate character witnesses (e.g., a teacher, guidance counselor, or social worker);
- arguing against any terms of probation for which compliance will be unduly difficult for the client (e.g., a juvenile may not be able to remain on good behavior if she has a severe behavioral disability; a juvenile cannot attend school regularly if she is suspended; a juvenile may not be able to maintain passing grades if she has a severe learning disability and the school has not provided her with an adequate IEP); and
- communicating the juvenile's educational needs to a facility, if the juvenile is placed.

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[129] *See* Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, July 2000, www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html.

[130] *See Olmstead v. United States*, 277 U.S. 438, 483-85 (1928) (Brandeis, J., dissenting) ("a court will not redress a wrong when he who invokes its aid has unclean hands").

[131] *See e.g.*, North Carolina Juvenile Defender Manual, Office of Indigent Defense Services, p. 198. Available at www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_09.pdf.

[132] *See e.g.*, FLA. STAT. ANN. § 985.01(D) (2007) (noting purpose of juvenile court is "[t]o ensure the protection of society, by providing for a comprehensive standardized assessment of the child's needs so that the most appropriate control, discipline, punishment, and treatment can be administered consistent with the seriousness of the act committed, the community's long-term need for public safety, the prior record of the child, and the specific rehabilitation needs of the child, while also providing whenever possible restitution to the victim of the offense").

## Step Three: Advocating for Clients' Education Rights

Juvenile defenders can advocate for their clients' education rights in two primary ways. First, they can refer the client to a legal services provider or a lay advocacy organization (see Appendix F). Second, they can provide legal representation themselves in education matters, such as:

- requesting interventions designed to prevent or remedy academic failure;
- suspension or expulsion appeal hearings;
- IEP Team meetings;
- special education proceedings (e.g., a contested case hearing in administrative court);
- formal state complaints for violations of special education law;
- complaints to the U.S. Department of Education's Office for Civil Rights; and
- grievances against school officials for mistreatment. (See Appendix B)

Juvenile defenders should advocate for their clients' education rights not only because of the importance of education in a young person's life and the fact that fighting injustice is simply the right thing to do, but also because it will improve the quality of the representation in the delinquency case. "Going the extra mile" and advocating for a client in the school setting will go a long way toward gaining the delinquency client's (and the parent's/guardian's) favor and trust. Moreover, juveniles who are attending school and experiencing educational success will likely be viewed more favorably by prosecutors, juvenile probation officers, judges, and juries. Finally, a juvenile defender can use suspension hearings, meetings with school officials, and education-related proceedings as an opportunity to gather valuable information (e.g., cross-examining a principal in a suspension hearing, asking questions of IEP Team members, or subpoenaing a teacher in a case before an administrative law judge). It is also worth noting that juvenile defenders can win attorneys' fees in special education cases.[133]

## Conclusion

Children in delinquency court have stories that need to be heard, read, and re-told in a way that will make a difference in their defense and in their lives. Until juvenile defenders delve into the written documents created by the teachers, guidance counselors, principals, school social workers and psychologists, and other school officials who have encountered their clients, juvenile defenders will not know the whole story and will likely miss critical information about their clients' cases. They will also be unable to fulfill their crucial role in ensuring their clients' educational rights are honored, and that the scourge of the school-to-prison pipeline is ended.

[133] *See* 20 U.S.C.A. § 1415(i)(3)(B).

## Appendix A: Sources of Juveniles' Education Rights

Federal Law

United States Constitution
- First Amendment
- Fourth Amendment
- Fifth Amendment
- Fourteenth Amendment

Statutes
- Title VI of the Civil Rights Act of 1964
- Title IX of the Education Amendments of 1972
- Title II of the Americans with Disabilities Act of 1990
- Section 504 of the Rehabilitation Act of 1973
- Individuals with Disabilities Education Act (IDEA)
- McKinney-Vento Homeless Assistance Act

State Law

Alabama
- Code of Ala. § 16
- Ala. Admin. Code Chapter 290

Florida
- Fla. Stat. §§ 1000 - 1013 (*Florida Statutes, Title 28*)
- F.A.C. Title 6 (*Florida Administrative Code*)

Georgia
- O.C.G.A § 20 (*Official Code of Georgia*)
- Ga. Comp. R. & Regs. r. 160 (*Rules and Regulations of the State of Georgia*)

Louisiana
- La. R.S. §17 (*Louisiana Revised Statutes*)
- Louisiana Administrative Code, Title 28

Mississippi
- Miss. Code § 37
- CMSR 36 (*Code of Mississippi Rules, Agency 36*)

North Carolina

- N.C. Gen. Stat. § 115C (*NC General Statutes*)
- N.C. Admin. Code Title 16

South Carolina

- S.C. Code § 59 (*South Carolina Code of Laws*)
- S.C. Code Regs. Ch. 43 (*South Carolina Code of Laws, Regulations*)

Local Policies

Board of education policies

School policies

## Appendix B: Summary of Juveniles' Education Rights

Students attending public schools have the right to:

- Have their parents inspect and review their complete educational records
- Freedom of speech and expression, although it cannot be vulgar, lewd, threatening, or disruptive speech
- Freedom of religion, both to express religious views and also to be free from the establishment of religion by the school
- Freedom of assembly, including non-disruptive protests
- Freedom from discrimination based on race, national origin, gender, religion, or sexual orientation
- Remain silent when questioned by the police
- Freedom from unreasonable searches and seizures
- Due process when facing disciplinary suspension or expulsion

A student who has a disability and needs special education services has the right to:

- a free, independent educational evaluation, if the student's parent disagrees with the evaluation conducted by the school;
- a re-evaluation every three years;
- a free, appropriate public education, including special education and related services to meet the students' needs (even during a long-term suspension or expulsion);
- an Individualized Education Program (IEP) designed to meet their unique educational needs;
- an annual review of their IEP; and
- receive their education in the least restrictive environment (i.e., with their non-disabled peers to the maximum extent appropriate).

## Appendix C: Sample Education Records Release

Client's/Student's Name: _____

Social Security Number: _____ Date of Birth: _____

I request and authorize _____ and _____
(name of school) (name of school system)

to provide _____'s education records to _____
(client's name) (attorney's name)

or his/her staff.

Need for Disclosure: _____

_____
(e.g., investigation, representation)

I understand that:

- this authorization expires in one calendar year;
- this authorization may be revoked at any time, except to the extent that the holder of the information/records has already taken substantial action in reliance on the authorization;
- any further disclosure may be made only as provided by law;
- a photocopy of this form is as valid as the original;
- the information and records to be released are protected under Family Educational Rights and Privacy Act (FERPA); and
- my signature below authorizes release of all education records and information.

_____
Printed Name of Client

_____ _____
Signature of Client Date

_____
Relationship of Representative to Client (e.g., Mother, Father, Legal Guardian)

_____
Printed Name of Representative

_____ _____
Signature of Client's Representative Date

## Appendix D: Sample Education Records Request

[Date]

Via facsimile ([Fax Number of School]) and email ([Principal's Email Address])
[Name of Principal]
Principal
[Name of School]
[Address of School]
[City, State Zip]

**Re: [Name of Client]**

Dear Principal [Last Name of Principal],

I am an attorney and represent [Name of Client], a [Number] grade student at your school. I would like to review [Name of Client]'s cumulative file. In particular, I would like copies of any of the following that the school or school district has in its possession that relate to [Name of Student]:

- a complete academic transcript;
- level of achievement on all standardized tests, including all end-of-grade and end-of-course exams and State writing assessments, and any nationally-normed test the student has taken;
- attendance data;
- teacher or counselor ratings and observations;
- progress reports;
- records or reports of behavioral incidents, including referral forms, notices of in-school or out-of-school suspensions, or records from disciplinary proceedings;
- results of any benchmark tests the student has taken in current or already completed courses or grade levels;
- the results and raw data from any writing test the student has taken;
- any current or former Personal Education Plan;
- records of the student's involvement in any school-sponsored tutoring, drop-out prevention, or other enrichment program;
- any writing portfolio the student has completed or a teacher has maintained; and
- the coursework, graded assignments, and grade histories for core academic classes (Language and Math for grades 1 through 8, and English I, U.S. History, Algebra I, Civics/Economics, and Biology) the student has taken.

I also would like a copy of [Name of Client]'s confidential psychological file, if one exists, including:

- information regarding any special education services and testing, including any IEPs or student assistance plans, that have been in place for the student;
- documents pertaining to any home/hospital ("homebound") services that have been provided;
- the results of any testing or evaluations; and
- minutes of IEP meetings.

Finally, I would like a copy of [Name of Client]'s complete discipline records.

Enclosed is an authorization to release education records, signed by [Client's Name, if the juvenile is age 18 or older, or Mother/Father/Legal Guardian, if the juvenile is under age 18]. The authorization allows me to inspect and copy [Name of Client]'s records. [Mr. or Ms.] [Last Name of Mother/Father/Legal Guardian, if the juvenile is under age 18, or Last Name of Juvenile, if the juvenile is age 18 or older] is entitled to review these records pursuant to the Family Education Rights Privacy in Education Act (FERPA).

Feel free to fax the records to my office ([Fax Number]) or email me ([Email Address]) a scanned copy. I am also happy to come to the school to pick up copies of the records. If you have any questions or need additional information, please do not hesitate to call ([Phone Number]) or email ([Email]) me.

Sincerely,

[Your Name], Esq.

## Appendix E: Sample Interview Form

**Current school: _____ Current grade: ____**

**Current class schedule:**

| Class | Teacher | Days | Time |
|---|---|---|---|
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

**School staff who would be supportive of client:**

_____ _____

_____ _____

**School guidance counselor: _____**

**School social worker: _____**

**Mental health professionals:**

| | Name | Agency |
|---|---|---|
| Therapist | | |
| Psychologist | | |
| Psychiatrist | | |

**Disability/Disabilities:** _____ _____

_____ _____

**Medications:** _____ _____

_____ _____

**Individualized Education Program (IEP):** Yes No

**If yes:**
**Primary area of eligibility: _____**
Secondary area of eligibility (if applicable): _____
**Date by which next annual review due: _____**
**Date by which next evaluation due: _____**

**If no, has the student ever been evaluated to determine eligibility?** Yes No
**If yes, suspected disability: _____**
**If yes, date: _____**

**Behavior Intervention Plan (BIP):** Yes No

**Section 504 Plan:** Yes No

**Extra services at school (e.g., tutoring, counseling, special classes)**

_____ _____
_____ _____

**Extracurricular activities (e.g., sports, clubs, student government)**

_____ _____
_____ _____

**Schools:**

| Grade | School | Grade | School |
|---|---|---|---|
| 1 | | 7 | |
| 2 | | 8 | |
| 3 | | 9 | |
| 4 | | 10 | |
| 5 | | 11 | |
| 6 | | 12 | |

**Retention(s):**

| Grade | Reason(s) |
|---|---|
| | |
| | |
| | |

**Typical grades**
Circle one: All As As & Bs Bs & Cs Cs & Ds Ds & Fs All Fs

**Typical standardized testing scores**: _____

**Suspension(s)/Expulsion(s):**

| Type:<br>Short-Term/Long-Term/Expulsion | Reason(s) |
|---|---|
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**Unexcused absences during current school year (or previous school year, if summer): ____**

**Average absences per school year over last three full school years?**

| 0-10 | 11-20 | 21-30 | 31-40 | 41-50 | 51-60 | 61-70 | 71-80 | 81-90 | 91-100 | >100 |
|---|---|---|---|---|---|---|---|---|---|---|

**Other notes:**

| |
|---|
| |

## Appendix F: Legal Resources

Alabama
- AL Parent Education Center
- Legal Services AL

Florida
- Children and Youth Law Clinic, Univ. of Miami
- Community Legal Services of Mid-FL
- FL Children First
- FL Legal Services
- FL Rural Legal Services
- Gater TeamChild Juvenile Law Clinic
- Jacksonville Area Legal Aid
- Legal Aid Services of Broward and Collier County
- Legal Services of Greater Miami
- Legal Services of North FL
- Southern Legal Counsel
- Three Rivers Legal Services

Georgia
- ACLU of GA
- Atlanta Legal Aid Society
- Barton Child Law and Policy Center
- GA Legal Services Program
- GA Appleseed Center for Law and Justice

Louisiana
- Acadiana Legal Service Corporation
- Advocacy Center
- Families Helping Families
- Juvenile Justice Project of LA
- Southeast LA Legal Services

Mississippi
- ACLU of MS
- MS Center for Justice
- MS Center for Legal Services
- MS Coalition for Citizens with Disabilities
- North MS Rural Legal Services

North Carolina
- ACLU of NC
- Advocates for Children's Services (Legal Aid of NC)
- Council for Children's Rights
- Disability Rights NC
- Duke Children's Law Clinic
- Exceptional Children's Assistance Center
- NCCU Juvenile Law Clinic

South Carolina
- Family Resource Center for Disabilities and Special Needs
- SC Appleseed Legal Justice Center
- SC Legal Services

## Appendix G: Sample Motion for Funds for an Expert

In the Matter of J.G.

Docket Number 12-113

EX PARTE MOTION FOR FUNDS

NOW COMES the Juvenile, by and through his counsel, and respectfully moves this Honorable Court, pursuant to N.C.G.S. ' 7A-454, Article I of the North Carolina Constitution, and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, for an ex parte Order allowing him to retain the services of a competent and qualified physician, psychologist, psychiatrist, or specialist in children with learning and/or developmental disabilities, to assist counsel in the preparation of his defense.

As grounds for this Motion, the Juvenile alleges:

1) He is indigent and is represented in this matter by appointed counsel.

2) He faces charges of Assault on a Government Employee in the above-captioned case.

3) To prove its case, the State will need to introduce direct or circumstantial evidence regarding JG's state of mind at the time of the incident.

4) In Ake v. Oklahoma, 470 U.S. 68, 84 L.Ed. 2d 53 (1985) the United States Supreme Court determined that a Defendant was entitled to make his showing for the necessity of money for an expert's assistance ex parte 470 U.S. at 82, 84 L.Ed. 2d at 66.

5) The North Carolina Supreme Court reiterated the rule of Ake in State v. Ballard, 333 N.C. 515 (1993), in which the court reversed the defendant's murder conviction for failure of the

trial court to allow the defense to make an ex parte showing of the need for the assistance of an expert witness.

6) Privately employed counsel representing a non-indigent juvenile would not be required to reveal to the prosecution her employment of or consultation with an expert witnesses, except as required by the rules of discovery. Equal protection guarantees of the United States Constitution and of the North Carolina Constitution require that appointed counsel not be forced to reveal their thoughts, reasoning and strategy as to expert assistance to the State during a hearing on application to the court for funds for those experts.

7) Further, for the court to require an in-court showing of the need for expert assistance would pose a risk to the juvenile's privilege against self-incrimination and to confidential communications between attorney and client.

8) After speaking with the Juvenile and otherwise reviewing the case, counsel has reason to believe that an expert in the field of psychology, psychiatry and/or learning and developmental disabilities is crucial to the preparation of his defense. See Williams v. Martin, 618 F. 2d 1021 (4th Cir. 1980)(the obligation of the government to provide an indigent defendant with the assistance of an expert is firmly based on the Equal Protection Clause).

9) Without the funds to hire experts to conduct investigations necessary for the preparation of a defense, the Juvenile's constitutional rights to a fair trial and to present a defense are rendered meaningless. See, e.g., Westbrook v. Zant, 704 F.2d 1487, 1496 (11th Cir. 1983)(permitting an indigent defendant to introduce mitigating evidence has little meaning if the funds necessary for compiling the evidence is unavailable).

10) The Juvenile is entitled to expert assistance to assure him of his rights under the North Carolina Constitution, Article I, Sections 14, 23, and 27 as well as his rights under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution. These rights include that of effective assistance of counsel, to be confronted by the witnesses against him and to obtain witnesses in his favor, to present a defense, to due process, to equal protection, and to individual, reliable sentencing.

11) The Juvenile requests that the Court authorize him to spend up to $3,500 for the consultation with such an expert in this case.

Wherefore, the Juvenile, requests this Honorable Court enter an Order authorizing him to retain the services of a qualified expert for the preparation of his case and to expend no more than $3,500 for this purpose.

This the 1st day of April, 2012.

Respectfully submitted,

_____

Jane White, Esq.
101 Main Street
Yoursville, NC 27000
(919) 555-1212

## Appendix H: Sample Order for Funds for an Expert

In the Matter of J.G.

DOCKET NUMBER 12-113

This matter coming before the undersigned District Court Judge for hearing on the Juvenile's Ex Parte Motion for Funds to Hire an Expert, upon good cause shown, the accused is hereby authorized to retain at State expense an expert to assist in the evaluation of the evidence, and the preparation and presentation of the defense in this matter. Compensation for said services is not to exceed the sum of $3500 (thirty-five hundred dollars) without further authorization of this Court; however, this order does not prohibit application for additional funds if needed.

The Court further Orders that this Order be placed in the file of the Clerk of the Superior Court in this case under seal for purposes of appellate review.

This the 1st day of April, 2012.

The Honorable John B. Goode
District Court Judge

## Appendix J: Sample Memo to Expert from Lawyer

**PRIVILEGED ATTORNEY WORK PRODUCT**

**To:** Aaron Thompson

**From:** Daniel Smith

**CC:** Barb Fedders

**Date:** February 15, 2011

**Re:** **J.G. Priorities for your work as our expert**

Dear Aaron,

This memorandum is meant to coordinate your work as an expert witness in the case of JG. Per our prior discussions, we have agreed on a rate of $60/hour for your work. Given the total funding cap of $1200 from the court, this means that you can work a total of 20 hours on the case. Below we have provided details on the most important work and the time estimates for each task in the hopes that we can most effectively use the funds provided by the court. If you anticipate needing more than 20 hours to complete the tasks below, please contact me so that I can eliminate certain tasks in order to preserve enough hours for you to testify in court. If you need some simple task completed (e.g., making photocopies), please contact me to complete this task for you so that you can spend your time on more important work.

### Court Date

We have been trying to work with the Assistant District Attorney to reschedule the court hearing to accommodate your schedule. As of Friday, February 12, 2010, the ADA was still unwilling to move the court date. This means that we will have to argue our motion to continue on Wednesday, March 3, 2010, at 9:30 am, the currently scheduled court date. If we succeed, the hearing will take place on Tuesday, March 30, 2010, or Thursday, April 1, 2010. There is a slim possibility that the witnesses will be available on Thursday, March 4, 2010 and the judge will order the hearing for that next day. Although we think this is highly unlikely, we ask that you avoid scheduling any permanent conflict on that morning (between 9:00am and 12:30pm).

### Work Priorities

(1) Review JG's court, educational, and psychological records. [2-3 hours]
(2) Travel to wilderness camp to meet with JG and discuss charges, potential educational placements, and anything else you deem relevant [4 hours]
    a. To help make this meeting as productive as possible (by making JG as comfortable as possible), I will plan on coming with you. We can make this trip at a mutually convenient time the week of Monday, February 15 or the week of Monday, February 22.

(3) If possible, meet with JG's mom. [1 hour]
(4) Prepare a report of your insights regarding JG [2-3 hours]
(5) Prepare to be an expert witness by role playing direct and cross examinations. [2 hours]
(6) Attend court. [3-4 hours]

**Total Estimated Time =** 17 hours.

**Reimbursement**

As far as reimbursement for your work, please keep careful records of the time you spend on each task so that you can accurately bill the state. At the conclusion of your work for us, you will need to send two items to the state: (1) an invoice; and (2) a copy of the court order.

**Conclusion**

I am very much looking forward to working with you on this case. Please do not hesitate to be in touch if you have any questions or if there is anything I can assist you with.

Sincerely,

Daniel Smith
Certified Law Student
Juvenile Justice Clinic
UNC School of Law
102 Ridge Road
Chapel Hill, NC 27514

# THE ROLE OF THE JUVENILE DEFENDER IN DISMANTLING THE SCHOOL-TO-PRISON PIPELINE

Juvenile Defender Conference ■ UNC School of Government ■ August 17, 2012

## Agenda

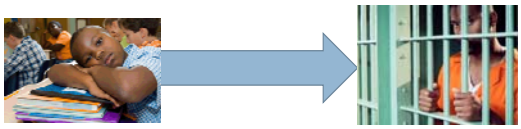
- Story sharing
- Overview of the school-to-prison pipeline
- Obtaining education records
- Using education records

## Story Sharing

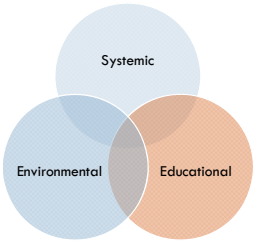
- I have had a case involving a referral from school to the delinquency system.
- I have requested and used a client's education records in delinquency representation.
- I have represented a delinquency client in a suspension hearing, IEP Team meeting, or otherwise done individual education advocacy for a client.

## Definition

- A system of laws, policies, and practices that pushes students out of school and into the juvenile and criminal systems

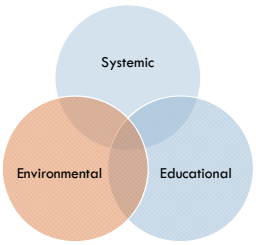


## Causes: Educational



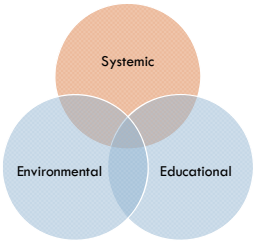

- Resource starvation
- Overcrowding
- Academic failure
- Over-policing
- Lack of training
- High-stakes testing
- Lack of services
- Suspension and expulsion

## Causes: Environmental




- Poverty
- Lack of parental support
- Unmet mental health needs
- Unmet medical needs
- Violence
- Abuse and neglect
- Food insecurity
- Housing instability
- Lack of adequate legal services

## Causes: Systemic

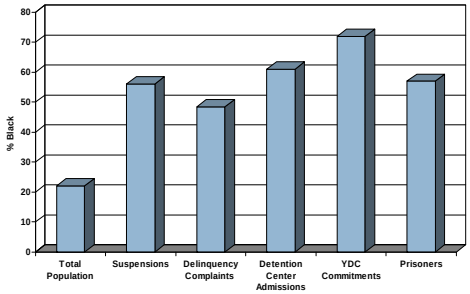



- Racism
- Classism
- Sexism
- Ableism
- Xenophobia
- Homophobia
- Culture of fear
- Culture of control

## Why: Ethical Duty

- The school-to-prison pipeline…
  - Disproportionately impacts students of color, students from low-wealth families, and students with disabilities
  - Compromises public safety
  - Is expensive
    - Policing
    - Incarceration
    - Lost economic productivity

## Why: Ethical Duty
## Racial Disparities



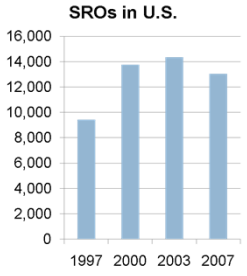

*All data from CY2011, exceptions suspensions, which are from school year 2010-11*

## Why: Ethical Duty
## Prison Industrial Complex

- NC ratio of spending per prisoner vs. spending per pupil = 3.85
  - Source: Children's Defense Fund (2007)
- 307 YDC commitments 5,240 detention center admissions in CY2011
  - Source: NC DJJ
- 10,586 juveniles on probation and 625 on post-release supervision in CY2010
  - Source: Public records request
- 38,381 prison inmates, 100,013 probations, and 3,505 parolees as of 8/14/12
  - Source: Division of Adult Correction
- 19,880 county jail inmates (2009)
  - Source: North Carolina Association of County Commissioners
- Average yearly cost of prison incarceration (FY 2010): $27,747
  - Source: NC Department of Public Safety
- The NC Jail Administrators' Association has a "Corporate Partner Program"
  - Source: www.ncjaa.org/corporate-partner-program

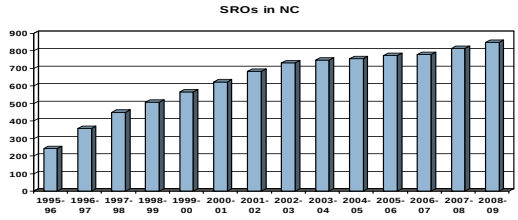
## Why: School Policing-U.S.

- National estimate by Nat. Ass'n of SROs (2010): 17,000




*Source: Bureau of Justice Statistics*

## Why: School Policing-NC




- 16,118 school-based delinquency complaints in CY2011
  - 43% of delinquency complaints filed

## Why: School Policing

- Expensive
  - E.g., in Wake Co., each SRO costs $80,000+/yr.
- Physical harm
  - TASERs, pepper spray, excessive force
- Emotional/psychological harm
  - Fear, intimidation, suspicion, control, alienation
- Educational harm
  - Undermine educators, missed "teachable moments"
- More court involvement for young people
  - Stigmatization, immigration problems, missed school, ineligibility for student loans, eviction from public housing, reduced employment opportunities

## Why: Best Practice

- NJDC's *Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems*
  - #9: "The public defense delivery system advocates for the educational needs of clients" and "recognizes that access to education and to an appropriate educational curriculum is of paramount importance to juveniles facing delinquency adjudication and disposition."

## Why: Professional Duty

- Model Rules of Professional Conduct
- Preamble
  - Article 2
    - Advisor
  - Article 4
    - Competent, prompt, and diligent
- Rule 1.1
  - Competence
- Rule 1.3
  - Diligence

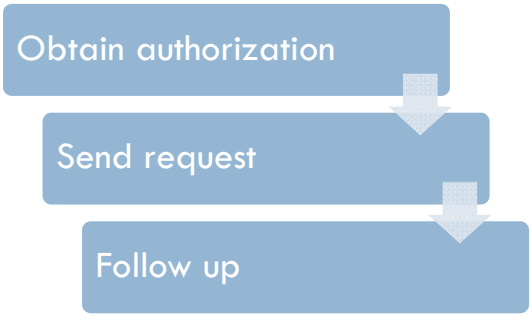
## How: Learn Education Law

- Continuing legal education
- Wrightslaw
- ABA publications
- Publications of education law organizations
- Education law text books
- Law review articles

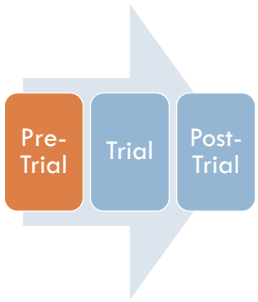
## How: Obtain Education Records

- Family Educational Rights and Privacy Act (FERPA)
- Ed records are those:
  - Directly related to student; and
  - Maintained by school system
- Ed records aren't those of law enforcement agency, unless:
  - Maintained by school system; or
  - Created exclusively for non-law enforcement purposes (e.g., suspension hearing)
- Protects students' records
  - Generally can't share personally identifiable info. about other students
- Provides access to students' records
- Parents and "eligible students" (over 18) have right to review records
- Requests for records must be fulfilled w/in 45 days
- Send signed authorization to principal
- Remedy for failure to provide: Complaint U.S. DOE's Family Policy Compliance Office

## How: Obtain Education Records

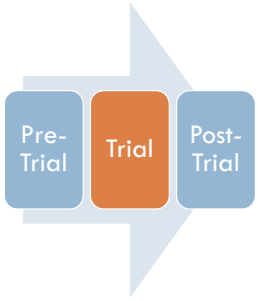


## How: Use Pre-Trial



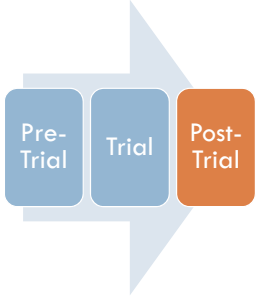

- Client interviewing
- Negotiation
- Capacity to proceed
- Custody hearings
- Suppression
- Transfer

## How: Use During the Trial




- Self-defense, defense of others, etc.
- Cross-examine and subpoena school officials
- Intent/ *mens rea*
- Insanity
- Dismissal in interest of justice
- Unclean hands for school-based complaint

## How: Use Post-Trial




- Disposition
  - Pre-disposition report
  - Identify witnesses
  - Diminished culpability
  - Avoid confinement
  - Avoid unrealistic probation terms
- Services in facilities

## How: Make Referrals

- ACLU of NC
- Advocates for Children's Services (Legal Aid of NC)
- Council for Children's Rights
- Disability Rights NC
- Duke Children's Law Clinic
- NCCU Juvenile Law Clinic

## How: Education Advocacy

- Academic failure
  - Request interventions
    - E.g., PEP
  - File grievance
- Special education
  - Request evaluation
  - Request services
  - Attend IEP Team meetings
  - File a petition for judicial review
  - File a state complaint
- Suspension and expulsion
  - Appeal
- Discrimination
  - File complaint with U.S. Dept. of Education, Office for Civil Rights
- Enrollment

## How: Education Advocacy- Special Education Law

- Evaluation
  - If parent suspects child has disability, request eval in writing
  - School must conduct eval, meet to discuss results, determine eligibility, and create IEP (if eligible) w/in 90 days
  - Eval must cover all areas of suspected disability
  - Examples of disabilities: attention deficit hyperactivity disorder (ADHD), oppositional defiant disorder (ODD), conduct disorder, specific learning disability
  - Parent generally must consent to eval
  - Parent has right to free, independent eval if disagree w/ WCPSS' eval
- Individualized Education Program (IEP)
  - Plan to meet individual needs of child
  - Includes placement, goals, services, accommodations, etc.
  - Child eligible to have IEP if:
    - Has physical or mental disability that interferes with learning; and
    - Needs specially designed instruction to make educational progress
  - Parent has right to be part of Team that creates and monitors IEP
    - Right to translation and interpretation, if needed

## How: Education Advocacy- Special Education Law

- Least Restrictive Environment (LRE)
  - Student must be educated with non-disabled peers to greatest extent appropriate
- Free and Appropriate Public Education (FAPE)
  - Student must get "special education" and "related services" that allow the student to:
    - Benefit from instruction provided under the IEP; and
    - Make "reasonable progress"
  - Student has right to FAPE even during long-term suspension or expulsion

## How: Education Advocacy- Special Education Law

- If student suspended for > 10 school days, must have:
  - Manifestation Determination Review (MDR)
    - IEP Team meets to decide if misbehavior was:
      - Caused by or directly and substantially related to disability; or
      - A direct result of school's failure to implement IEP
    - If either is the case, generally child can't be suspended
  - If the misbehavior was a manifestation, the IEP Team must create (still a good idea even if not a manifestation):
    - Functional Behavioral Assessment (FBA)
      - Determines causes of behavior problems
      - Identifies ways to prevent behaviors
    - Behavior Intervention Plan (BIP)
      - Identifies supports or strategies to improve behavior
      - Establishes steps to be taken when misconduct happens
      - Identifies consequences for misconduct

## How: Speak Up!

- Media
  - Press releases
  - Letters to the editor
  - Op-eds
  - Articles and stories about cases
- Social media
  - Twitter
  - Facebook
  - Blogs
- Presentations
  - Community meetings
  - Services providers
  - Student and parent groups
- Policy advocacy
  - State legislature
  - State board of education
  - Local board of education

- "Beneath the yoke of barbarism one must not keep silence; one must fight. Whoever is silent at such a time is a traitor to humanity." – Stefan Zweig
- "Silence encourages the tormentor, never the tormented." – Elie Wiesel
- "To tell the truth is to become beautiful, to begin to love yourself, value yourself. And that's political, in its most profound way." – June Jordan
- "We live in an age in which silence is not only criminal but suicidal…for if they take you in the morning, they will be coming for us that night." – James Baldwin
- "A time comes when silence is betrayal." – Martin Luther King, Jr.

## Review: To-Do List

- Learn education law
- Request education records
- Review education records
- Use education records
  - Pre-trial
  - During trial
  - Post-trial
- Advocate for client's educational needs or make appropriate referral
- Speak up

## National Resources

- Advancement Project
  - www.advancementproject.org/our-work/schoolhouse-to-jailhouse
- ACLU
  - www.aclu.org/racial-justice/school-prison-pipeline
- Charles Hamilton Houston Institute at Harvard
  - www.charleshamiltonhouston.org/Projects/Project.aspx?id=100005
- Civil Rights Project at UCLA
  - http://civilrightsproject.ucla.edu/research/k-12-education
- Dignity in Schools
  - www.dignityinschools.org/
- NAACP Legal Defense and Education Fund
  - www.naacpldf.org/case/school-prison-pipeline
- National Economic and Social Rights Initiative
  - www.nesri.org/programs/education
- Southern Poverty Law Center
  - www.splcenter.org/what-we-do/children-at-risk

## Contact Information

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- UNC School of Law
  - Juvenile Justice Clinic
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**Jason Langberg**

- Equal Justice Works Fellow/Push Out Prevention Project Director
- Legal Aid of NC
  - Advocates for Children's Services
- 919-226-0051 x 438
- jasonl@legalaidnc.org

# “Adultification” of Juvenile Proceedings

August 2012

# CHARACTERISTICS OF YOUTH
# SUPREME COURT QUOTES

**RECENT CASES ADDRESSING JUVENILES AND ADOLESCENT DEVELOPMENT:**

*Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the execution of juveniles violates the Eighth Amendment's ban on "cruel and unusual punishments").

*Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364 (2009) (holding that a strip search for prescription-strength ibuprofen violated Plaintiff's Fourth Amendment right to freedom from unreasonable searches and seizures).

*Graham v. Florida*, 130 S. Ct. 2011 (2010) (holding that the Eighth Amendment's ban on "cruel and unusual punishments" forbids sentencing juveniles to life-without-the-parole for nonhomicide offenses).

*J. D. B. v. North Carolina*, 131 S. Ct. 2394 (2011) (holding that a child's age is relevant to determining whether s/he was subjected to the sort of custodial interrogation that triggers *Miranda*'s warning requirements).

*Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding that the Eighth Amendment's ban on "cruel and unusual punishments" prohibits states from imposing mandatory sentences of life without the possibility of parole on juveniles).

**KEY THEMES RAISED IN THE CASES:**

**A. Youth must be treated differently from adults**

- *J.D.B.*, 131 S. Ct., at 2407: In short, officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult.

- *J.D.B.*, 131 S. Ct., at 2404: Given a history "replete with laws and judicial recognition" that children cannot be viewed simply as miniature adults, *Eddings*, 455 U. S., at 115-116, there is no justification for taking a different course here.

- *Graham*, 130 S. Ct., at 2026: No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles. As petitioner's *amici* point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.

- *Miller*, 132 S. Ct., at 2464 n. 5 (2012): The evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger. See, *e.g.*, Brief for American Psychological

Association et al. as *Amici Curiae* 3 ("[A]n ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court's conclusions"); *id.*, at 4 ("It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance"); Brief for J. Lawrence Aber et al. as *Amici Curiae* 12–28 (discussing post-*Graham* studies); *id.*, at 26–27 ("Numerous studies post-*Graham* indicate that exposure to deviant peers leads to increased deviant behavior and is a consistent predictor of adolescent delinquency") (footnote omitted)).

- *Miller*, 132 S. Ct., at 2458: None of what [*Graham* said about children[—about their distinctive (and transitory) mental traits and environmental vulnerabilities—]is crime-specific.

**B. Juveniles have "a lack of maturity and an underdeveloped sense of responsibility."** *Roper*, 543 U.S., at 569 (emphasis added).

- *Roper v. Simmons*, 543 U.S. at 569–70: "[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. These qualities often result in impetuous and ill-considered actions and decisions. " . . . In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent . . . .

- *Graham*, 130 S. Ct. at 2026: "[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." See Brief for American Medical Association et al. as *Amici Curiae* 16–24; Brief for American Psychological Association et al. as *Amici Curiae* 22–27. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults.

- *Graham*, 130 S. Ct. at 2032: "Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense."

- *J. D. B.*, 131 S.Ct. at 2403, citing William Blackstone,1 *Commentaries on the Laws of England*, *464–65 (1765): "The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them."

- *J. D. B.*, 131 S.Ct. at 2403: Time and again, this Court has drawn these common-sense conclusions for itself. We have observed that children "generally are less mature and responsible than adults," *Eddings*, 455 U. S., at 115-116; that they "often lack the experience,

perspective, and judgment to recognize and avoid choices that could be detrimental to them," *Bellotti* v. *Baird*, 443 U. S. 622, 635 (1979) (plurality opinion); that they "are more vulnerable or susceptible to . . . outside pressures" than adults, *Roper*, 543 U. S., at 569; and so on. See *Graham* v. *Florida*, 560 U. S. ___, ___ (2010) (slip op., at 17) (finding no reason to "reconsider" these observations about the common "nature of juveniles").

- *Miller*, 132 S. Ct. at 2464–65: "[Empirical] findings--of transient rashness, proclivity for risk, and inability to assess consequences--both lessen[ ] a child's 'moral culpability' and enhance[ ] the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'"

**C. "[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."** *Roper*, 543 U.S. at 569 (emphasis added).

- *Roper*, 543 U.S. at 569 The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . . This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment . . . ."

- *J . D. B. v. North Carolina*, 131 S. Ct. at 2398-99: "It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave."

- *J. D. B.*, 131 S. Ct. at 2403: "[W]e have observed that events that 'would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.'"

- *J. D. B.*, 131 S. Ct. at 2404–05, citing *Eddings v. Okla.*, 455 U.S. 104, 115 (1982) and *Roper*, 543 U.S., at 569: "Precisely because childhood yields objective conclusions like those we have drawn ourselves--among others, that children are 'most susceptible to influence,' and 'outside pressures,' --considering age in the custody analysis in no way involves a determination of how youth 'subjectively affect[s] the mindset.' "

- *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. at 275 (2009): "The reasonableness of [Savana Redding's] expectation [of privacy] (required by the Fourth Amendment standard) is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the[ir] exposure."

- *Miller*, 132 S. Ct. at 2468: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a

lesser offense if notfor incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors(including on a plea agreement) or his incapacity to assist his own attorneys. See, *e.g.*, *Graham*, 560 U. S., at ___ (slip op., at 27) ("[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings"); *J. D. B.* v. *North Carolina*, 564 U. S. ___, ___ (2011) (slip op., at 5–6) (discussing children'sresponses to interrogation).

**D. "The personality traits of juveniles are more transitory, less fixed."** *Roper*, 543 U.S. at 570 (emphasis added).

- *Roper*, 543 U.S. at 570: The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed . . . . These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult."

- *Roper*, 543 U.S. at 573 (citations omitted): It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. . . . As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others.

- *Roper*, 543 U.S. at 570: Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Johnson [ v. Texas*, 509 U.S. 350…], 368, 113 S.Ct. 2658[ (1993)]; see also Steinberg & Scott 1014 ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood").

- *Graham*, 130 S. Ct. at 2026: "[P]arts of the brain involved in behavior control continue to mature through late adolescence."

- *Graham*, 130 S. Ct. at 2026: "Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults."

- *Graham*, 130 S. Ct. 2029: "[I]ncorrigibility is inconsistent with youth."

- *Miller v. Alabama*, 132 S. Ct. at 2455, 2460 (2012) (citations omitted): "[A sentencing] scheme [that] prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' [ ] runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties."

# THE JOURNAL OF LAW IN SOCIETY

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## 2011–2012 Editorial Board



* Recipient of the Cynthia B. Faulhaber Endowed Scholarship.

# THE JOURNAL OF LAW IN SOCIETY

Volume 13 Fall 2011 Number 1

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## 2011 Symposium



## Notes

# THE DECRIMINALIZATION OF THE CLASSROOM: THE SUPREME COURT'S EVOLVING JURISPRUDENCE ON THE RIGHTS OF STUDENTS*

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## I. INTRODUCTION

Over the past two decades, schools increasingly have relied on police personnel and policing tactics to address school discipline issues.[2] This approach, which scholars have called the "criminalization of the classroom,"[3] is marked by a more frequent subjection of students to metal detectors and searches, an increase in referrals to the police and courts for school-based behaviors, and an increase in the numbers of

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1. Supervising Attorney, Juvenile Law Center. The author wishes to thank the students of the Wayne State *Journal of Law in Society* for putting together a thought-provoking symposium on these issues; L.T. Tierney, Xian Zhang, and Julia Melle for their research assistance; and Emily Keller and Robert Margolis for their thoughtful editing.

2. *See generally* A CENTURY OF JUVENILE JUSTICE 267 (Margaret K. Rosenheim et al. eds., 2002); *see also* ANTHONY PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (1970).

3. Josie Foehrenbach Brown, *Developmental Due Process: Waging a Constitutional Campaign to Align School Discipline with Developmental Knowledge*, 82 TEMP. L. REV. 929, 962 (2009).

police and security staff addressing discipline issues inside the schools.[4] Recent cases also show police interrogating youth at school for offenses unrelated to school or school discipline.[5] Policing tactics are particularly prevalent in schools serving low-income students of color. As one author described it: "many schools in low-income communities of color physically resemble prisons, with fortress-like layouts, metal detectors, video surveillance cameras, security check points, and drug-sniffing dogs."[6] Moreover, students of color are subjected to rates of suspension at three times the rate of white students, and are significantly overrepresented in expulsions, office referrals and corporal punishment. Research indicates that "black students are punished more severely for less serious and more subjective offenses."[7]

While schools have relied increasingly on policing tactics, research suggests that these approaches, as a general rule, may not be improving school safety.[8] Indeed, "[r]esearch has shown that such policies appear counterproductive, igniting student hostility toward school officials and eroding the sense of school connectedness critical to a student's academic success and behavioral improvement."[9] Additionally, the presence of police and metal detectors and the use of intrusive searches

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4. *See* Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOW. L.J. 343, 367-69 (2011) (citing other sources) ("Forty-one states require schools to report students to law enforcement for various misbehaviors on campus . . . . [L]arge numbers of youth are being referred for minor, not serious, offenses.").

5. *See, e.g.*, J.D.B. v. North Carolina, 131 S. Ct. 2394, 2396 (2011) (holding a child's age affects the custodial interrogation analysis when uniformed officers, investigators and school administrators interrogated a seventh-grader about off-campus home break-ins).

6. *See* Majd, *supra* note 4, at 368*; see also* Barry C. Feld, *T.L.O. and Redding's Unanswered (Misanawered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 **MISS.** L.J. 847, 884-886 (2011).

7. Russell J. Skiba, *Foreward* to KEEPING KIDS IN SCHOOL AND OUT OF COURTS i (2012), *available at* http://www.school-justicesummit.org/papers/papers.cfm (select "Download the Complete Journal Publication" hyperlink to download the entire collection of reports that comprise the publication).

8. *See* Am. Psychological Assoc. Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 854 (2008); Michael P. Krezmien et al., *Juvenile Court Referrals and the Public Schools: Nature and Extent of the Practice in Five States*, 26 J. CONTEMP. CRIM. JUST. 273, 274 (2010); Tary Tobin, George Sugai & Geoff Colvin, *Patterns in Middle School Discipline Records*, 4 J. EMOTIONAL & BEHAV. DISORDERS 82, 82-94 (1996); DANIEL J. LOSEN & RUSSELL J. SKIBA, So. Poverty L. Ctr., SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 10-11 (2010), http://www.splcenter.org/sites/ default/files/downloads/publication/Suspended_Education.pdf.

9. Brown, *supra* note 3, at 963.

may undermine students' own sense of safety within the school building.[10]

Historically, although the Supreme Court has recognized that students retain constitutional protections at school, it has deferred significantly to schools in matters relations to school discipline. The Court has recognized that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[11] This principle has been extended to the use of police power in schools.[12] When faced with specific questions regarding school policing, however, the Court has repeatedly authorized the school action, deferring to schools' authority to ensure school safety and impose school discipline.[13] Despite the research suggesting that school policing may not in fact make schools safer, the Court has addressed school policing cases as presenting a tension between safety and individual rights. As a result, with increased concerns about violence and drugs in schools, and believing that they are faced with "the choice between providing a safe learning environment or providing students with adequate constitutional protection, the Supreme Court has fashioned recent decisions to side with a safe learning environment."[14]

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10. *Id.* at 961 (noting that "such disciplinary responses are traumatic for children and families and result in a detrimental loss of learning time."); *see also* Dennis D. Parker, *Discipline in Schools After Safford Unified School District #1 v. Redding*, 54 N.Y.L. SCH. L. REV. 1023, 1027-30 (2009/2010).

11. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

12. *See generally* Goss v. Lopez, 419 U.S. 565 (1975); New Jersey v. T.L.O., 469 U.S. 325, 327-328 (1985) (finding that the Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 647 (1995); Bd. of Educ. v. Earls, 536 U.S. 822 (2002); Safford Unified Sch. Dist. No. #1 v. Redding, 129 S. Ct. 2633, 2637-38 (2009) (holding that an assistant principal's reasonable suspicion that a 13-year-old middle school student was distributing contraband drugs did not justify a strip search).

13. *See, e.g.*, *T.L.O.*, 469 U.S. at 325; *Vernonia Sch. Dist.*, 515 U.S. at 654-55. For a thoughtful discussion on the tension within the courts between recognizing schools as acting *in loco parentis* and rejecting that proposition, *see* Alysa B. Koloms, *Stripping Down the Reasonableness Standard: The Problems With Using In Loco Parentis to Define Students' Fourth Amendment Rights* 39 HOFSTRA L. REV. 169, 188 (2011); *see also Redding*, 129 S. Ct. at 2655 (Thomas, J. dissenting) (making a plea to return to the full deference to schools to act *in loco parentis,* beyond the reach of analysis as a government actor: "'[i]n the early years of public schooling,' courts applied the doctrine of *in loco parentis* to transfer to teachers the authority of a parent to 'command obedience, to control stubbornness, to quicken diligence, and to reform bad habits.' So empowered, schoolteachers and administrators had almost complete discretion to establish and enforce the rules they believed were necessary to maintain control over their classrooms") (internal citations omitted).

14. Koloms, *supra* note 13, at 191-192.

Two recent Supreme Court cases demonstrate a new approach: a Court willing to consider the reality of the adolescent experience and to bring that information to bear on the constitutional analysis on school policing. In *Safford Unified School District v. Redding*,[15] the Court considered whether a strip search of a student who was allegedly carrying prescription drugs in violation of school rules and Arizona state law was unconstitutional under the Fourth Amendment. In *J.D.B. v. North Carolina,*[16] the Court considered how the Fifth Amendment *Miranda*[17] protections should apply to a police interrogation in a school conference room of a seventh grader who allegedly engaged in a residential break-in off school grounds and not during school hours.[18] The holdings of these cases may not necessarily transfer wholesale to other school discipline contexts.[19] Nonetheless, the cases suggest that information about adolescent development – particularly how students experience and respond to authority figures – may guide the Court's analysis regarding policing in schools. The fact that the Court did not grant "unbridled discretion to school authorities in the name of establishing school safety" opens the door to a more nuanced analysis of the student's experience in other school climate cases as well.[20]

## II. A WEAKENED FOURTH AMENDMENT ON SCHOOL GROUNDS

In a series of cases – *New Jersey v. T.L.O.*, [21] *Vernonia School*

15. *Redding*, 129 S. Ct. at 2633.

16. *J.D.B.*, 131 S. Ct. at 2394.

17. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (establishing rights in the custodial interrogation setting to protect the Fifth Amendment right against self-incrimination).

18. The Court was faced with related issues in one other recent case. In *Camreta v. Greene*, 131 S. Ct. 2020 (2011), the Court considered whether it violated the Fourth Amendment prohibition on unreasonable seizures for a sheriff and a child protective services worker to interrogate a nine year old girl, at school, about allegations of abuse by her father. The Court did not reach the merits, however, determining instead that the case was moot.

19. Indeed the facts of both cases not only involved sympathetic plaintiffs, but also created the possibility of a relatively narrow ruling. In *Redding,* the plaintiff was a 13-year-old honor student pulled out of math class by a school administrator and subjected to a strip search for possession of ibuprofen; the search did not even turn up any pills. *Redding*, 129 S. Ct. at 2638, 2644. In *J.D.B.*, the plaintiff was a 13-year-old special education student with no prior juvenile justice involvement. Because the alleged offense was not violent and did not take place on school grounds, the Court was not faced with concerns about school safety. *J.D.B.*, 131 S. Ct. at 2394-96.

20. Parker, *supra* note 10, at 1027.

21. *See T.L.O.*, 469 U.S. at 325.

*District 47J v. Acton*,[22] and *Board of Education v. Earls*[23] – the Supreme Court established that Fourth Amendment rights apply to students – but in a context of great deference to the authority of school administrators, and scant attention to the experience of the students. In *T.L.O.,* a teacher had accused a student of smoking in the bathroom.[24] A search of the student's purse turned up marijuana cigarettes that were ultimately introduced as evidence in the student's delinquency adjudication.[25] The Court held that the Fourth Amendment does apply to searches by school officials,[26] but concluded that a more deferential test applied in schools than in other contexts. "Thus, school officials need not obtain a warrant before searching a student who is under their authority."[27] Additionally, rather than being bound by a probable cause standard, officials could engage in the search as long as the search was reasonable at its inception and reasonable in scope.[28] The Court underscored that "[a]gainst the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds."[29] Ultimately, this approach "allowed the state to introduce evidence against juveniles that would be inadmissible if seized from an adult under similar circumstances."[30]

In *Vernonia,* the Court extended its "reasonableness" test to a school search randomly drug testing student athletes absent suspicion.[31] The Court emphasized the school's duty to act *in loco parentis* (in the place of the parents) in light of its "custodial and tutelary" responsibility for children.[32] Underscoring that the school context deeply affected the "nature of those rights" to which children are entitled,[33] the Court balanced the nature of the intrusion against the school's interest in the search. While the Court recognized that the method of search, a urinalysis, was at least somewhat intrusive, it minimized that concern, noting, "school sports are not for the bashful."[34] The Court reaffirmed its commitment to allow schools to police students to create a better school

22. *See Vernonia*, 515 U.S. at 646.
23. *See Earls*, 536 U.S. 822.
24. *T.L.O*., 469 U.S. at 325.
25. *Id.*
26. *Id.*
27. *Id.* at 326.
28. *Id*. at 340-41.
29. *Id.* at 339.
30. Feld, *supra* note 6, at 898.
31. *Vernonia,* 515 U.S. at 651-652.
32. *Id.* at 655-56.
33. *Id.* at 656.
34. *Id.* at 657.

environment, noting that "the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted."[35] The Court explicitly recognized that the public school context reduced the student's constitutional protections:

> We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts. The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.[36]

Thus, the school context affected the Court's decision, but the interests of the administration, not the experience of students, most heavily influenced the Court's approach.

In an opinion authored by Justice Thomas, the Court further extended this reasoning once more in *Board of Education v. Earls*.[37] *Earls* raised the issue of a random drug testing policy applied to all students involved in extra-curricular activities. Plaintiffs Lindsay Earls, a member of the show choir, the marching band, the Academic Team, and the National Honor Society, and Daniel James, who wished to join the Academic Team, filed a Section 1983 suit against the school district to challenge the district's policy of requiring students who wished to participate in extra-curricular activities to consent to drug testing.[38] The Court reiterated the reasoning applied in *Vernonia,* and concluded that drug testing was constitutional under the Fourth Amendment.[39] The Court was unmoved by the argument that since "children participating in nonathletic extracurricular activities are not subject to regular physicals and communal undress they have a stronger expectation of privacy than the Vernonia athletes."[40] Instead, the Court emphasized its reliance "upon the school's custodial responsibility and authority."[41] Without any example or further explanation, the Court stated, "[i]n any event, students who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their

35. *Id.* at 662.
36. *Id.* at 665.
37. *Earls*, 536 U.S. at 825.
38. *Id.* at 826.
39. *Id.* at 822.
40. *Id.* at 823.
41. *Id.*

privacy as do athletes. Some of these clubs and activities require occasional off-campus travel and communal undress."[42] The assertion, without any support, that students participating in the National Honor Society or their school band might engage in "communal undress" suggests a Court with minimal interest in the day-to-day experience of students.[43]

This sequence of cases – *T.L.O., Vernonia,* and *Earls* – demonstrates a Court committed to supporting school authority. The cases give short shrift to arguments about how the students would perceive the searches and contain no references to research on adolescent development as it relates to the experience of being searched. The policing practices common in schools today derive, at least in part, from the Court's willingness to defer to schools to determine how best to manage and protect students in their care.[44] A key question now is how far that deference will extend.

## III. A CHANGING LANDSCAPE: THE DECRIMINALIZATION OF THE CLASSROOM

### *A.* Safford v. Redding*: The Limits on a "Reasonable Suspicion" Search*

In *Redding,* the Court grappled with the outer limits of "reasonable" school searches,[45] considering whether school administrators violated the Fourth Amendment rights of Savana Redding, a 13-year-old student, when they strip-searched her to look for prescription ibuprofen.[46] The search was conducted at the behest of the assistant principal by two female school staff members: the school nurse and an administrative assistant.[47] Staff required Savana to strip down to her bra and underpants, and then to pull her underclothes out and shake them to be sure that she was not hiding the pills, which were prohibited on school grounds.[48]

Prior to the search, school officials had found Savana's day planner, containing other items prohibited on school grounds – including a

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42. *Id.*

43. *See Earls*, 536 U.S. at 823.

44. *See* Feld, *supra* note 6, at 953 (remarking that "[m]inimal legal protection, increased surveillance, heightened police presence, and school officials' repudiation of common sense and judgment have fostered a school-to-prison pipeline that adversely affects all youths, especially students of color.").

45. *See Redding*, 129 S. Ct. at 2633.

46. *Id.* at 2637.

47. *Id.* at 2638.

48. *Id*.

cigarette, several knives, and a lighter.[49] Savana explained to officials that she had loaned the day planner to her friend Marissa a few days earlier.[50] Marissa, who was caught with prescription ibuprofen in her pocket, claimed she received the pills from Savana.[51] According to the Court, Marissa's statement that the pills came from Savana, along with the background of a suspected problem regarding the distribution of prescription drugs in the school, a report that Savanna had been "rowdy" at a school dance at which cigarettes and alcohol were found in the school bathroom, and another report that she had hosted a party at her house before the dance was "sufficiently plausible to warrant suspicion that Savana was involved in pill distribution."[52] The Court concluded that "[t]his suspicion . . . was enough to justify a search of Savana's backpack and outer clothing."[53]

Ultimately, however, the Court concluded that the intrusiveness of the search went too far, particularly in light of the relatively harmless nature of the contraband at issue.[54] Although Justice Thomas, in dissent, would have held that the only question was whether the contraband "could be concealed" in that location,[55] the Court engaged in a more nuanced analysis of the impact of the search on the student. The Court first recognized the importance of Savana's own subjective expectation of privacy and her feelings of vulnerability regarding the search."[56] Underscoring the reasonableness of her expectation of privacy, the Court observed that adolescents are particularly vulnerable to such intrusions.[57]

Although at oral argument, Justice Breyer had equated changing for gym class with being strip-searched,[58] the majority opinion, which

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49. *Id.* at 2638.

50. *Id.*

51. *Redding*, 129 S. Ct. at 2641.

52. *Id.*

53. *Id.*

54. While the Court noted that it would continue to defer to school officials about which items should be allowed on school grounds, *id.* at 2643, the fact that the pills at issue were merely ibuprofen and naproxen certainly weighed into the balancing test regarding the reasonableness of the intrusion. *See id.* at 2642-43. Justice Thomas, in his dissent, took issue with this approach to the balancing test, concluding that it is not the judiciary's place to second-guess the importance of the school rules. *Id.* at 2651-52 (Thomas, J., dissenting).

55. *Redding*, 129 S. Ct. at 2655 (Thomas, J., dissenting).

56. *Id.* at 2641.

57. *Id.* at 2641-42.

58. Justice Breyer further commented: "So what am I supposed to do? In my experience when I was 8 or 10 or 12 years old, you know, we did take our clothes off once a day, we changed for gym, okay? And in my experience, too, people did sometimes stick things in my underwear." When the courtroom burst into laughter, he attempted an explanation: "Or not my underwear. Whatever. Whatever. I was the one who did it? I

Breyer ultimately joined, recognized that changing for gym class could not be equated with being strip-searched when accused of wrongdoing:

> Changing for gym is getting ready for play; exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as so degrading that a number of communities have decided that strip searches in schools are never reasonable and have banned them no matter what the facts may be.[59]

Justice Ginsburg's influence was likely significant to the Court's understanding. After arguments, while the Court was still forming its opinion, Justice Ginsburg took the unusual step of speaking to the press. In her interview, Justice Ginsburg made clear that she played a role in educating her fellow Justices about the perspective of an adolescent girl: "[t]hey have never been a 13-year-old girl," Justice Ginsburg explained, "It's a very sensitive age for a girl," and "I didn't think that my colleagues, some of them, quite understood."[60] Ultimately, the Court did recognize that teenagers are particularly vulnerable to embarrassment when it comes to undressing, and that in light of the power dynamics of a required strip search by school officials, such searches could be uniquely intrusive.[61]

That a search might be conducted on a backpack did not automatically authorize such a search of a student's undergarments. "[T]he degradation its subject may reasonably feel, place[s] a search that intrusive in a category of its own demanding its own specific suspicions."[62]

> N]ondangerous school contraband does not raise the specter of stashes in intimate places, and there is no evidence in the record of any general practice among Safford Middle School students of

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don't know." *Justice Breyer's Pubic Undressing*, WASH. BRIEFS, Apr. 21, 2009, http://washingtonbriefs.com/ 2009/04/21/justice-breyers-public-undressing/.

59. *Redding*, 129 S. Ct. at 2642.

60. Neil A. Lewis, *Debate on Whether Female Judges Decide Differently Arises Anew*, **N.Y. TIMES**, June 3, 2009, http://www.nytimes.com/2009/06/04/us/politics/04 women.html. For an inquiry into the role of the student's sex in the analysis, *see generally* Laura Jarrett, *Excessively Intrusive in Light of Age or Sex?: An Analysis of Safford Unified School District No. 1 v. Redding and Its Implications for Strip Searches in Schools*, 33 HARV. J.L. & GENDER 403 (2010).

61. *See Redding*, 129 S. Ct. at 2641-43 (suggesting that the strip search of an adolescent is "categorically distinct").

62. *Id.* at 2643.

> hiding that sort of thing in underwear; neither Jordan nor Marissa suggested to Wilson that Savana was doing that, and the preceding search of Marissa that Wilson ordered yielded nothing. Wilson never even determined when Marissa had received the pills from Savana; if it had been a few days before, that would weigh heavily against any reasonable conclusion that Savana presently had the pills on her person, much less in her underwear.[63]

In establishing a limit to school searches, the Court thus considered not only adolescent development, but also the realities of students' day-to-day school experiences.

In dissent, Justice Thomas urged that the Court defer entirely to schools on matters of discipline.[64] He suggested that to do otherwise would place too much power in the hands of students.[65] According to Justice Thomas, "[b]y declaring the search unreasonable in this case, the majority has 'surrender[ed] control of the American public school system to public school students' by invalidating school policies that treat all drugs equally and by second-guessing swift disciplinary decisions made by school officials."[66] The better approach, Justice Thomas wrote, was a return to the common-law doctrine of *in loco parentis*.[67] Because the school is acting in the place of the parents, and parents are not government actors, he argued that the Constitution has no place in governing searches by school officials.[68] With no discussion of the legitimacy or appropriateness of parents strip-searching teenage children, nor any consideration of the distinct experience of a search at school, Justice Thomas concluded: "[t]here can be no doubt that a parent would have had the authority to conduct the search at issue in this case."[69]

Notwithstanding Justice Thomas's dissent, *Redding* stands in contrast to *T.L.O., Vernonia,* and *Earls.* The Court paid careful attention to the experience of adolescence, and allowed its understanding of adolescent development inform the Fourth Amendment analysis. The case therefore opens the door to analyzing the student experience in other school climate cases as well.

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63. *Id.* at 2642.
64. *See id.* at 2646 (Thomas, J., dissenting).
65. *Id.* at 2655.
66. *Id.*
67. *Redding*, 129 S. Ct. at 2655.
68. *Id.*
69. *Id.* at 2656. Thomas then continued on to underscore that the key here is the distinction between "superior and inferior" with respect to the parent and child relationship.

### *B.* J.D.B. v. North Carolina*: Scrutinizing Police Interrogations in Schools*

In *J.D.B. v. North Carolina,* the Supreme Court considered the extent to which age factored into the analysis of whether an individual is in custody under the Fifth Amendment pursuant to *Miranda*.[70] *J.D.B.* is not strictly a school policing case: external police rather than school staff interrogated J.D.B., a 13-year-old special education student regarding a neighborhood break-in that took place off school property and not during school hours.[71] However, school personnel played an important role in the case: two school administrators – an assistant principal and an administrative intern – remained present during the questioning.[72] In fact, "[t]he assistant principal urged J.D.B. to 'do the right thing,' warning J.D.B. that 'the truth always comes out in the end.'"[73]

The Court's opinion underscored that adolescents are different from adults; they think differently, respond to pressure differently, and therefore should be held to different legal standards. The Court recognized that juveniles are uniquely susceptible to the pressures of a custodial interrogation and may be particularly likely to give false confessions.[74] In fact, the Court went so far as to acknowledge the possibility that additional procedural safeguards beyond the *Miranda* warnings might also be necessary – although the Court did not face that issue in the case before it.[75]

The crux of the Court's opinion is its recognition that "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go."[76] The Court then discussed the implications of adolescence: "[a] child's age is far 'more than a chronological fact.' It is a fact that 'generates commonsense conclusions about behavior and perception.' Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge."[77]

Relying on a long line of cases that have recognized the differences between adolescents and adults in diverse factual contexts – from criminal culpability to reproductive choice to juvenile confessions – the Court concluded that juveniles are less mature than adults, lack

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70. *J.D.B.*, 131 S. Ct. at 2398.
71. *Id.* at 2399.
72. *Id.*
73. *Id*.
74. *Id.* at 2403.
75. *See id.* at 2401.
76. *J.D.B.*, 131 S. Ct. at 2403.
77. *Id.* (internal citations omitted).

experience, and are more susceptible to outside pressures. The Court underscored that "[d]escribing no one child in particular, these observations restate what 'any parent knows'—indeed, what any person knows—about children generally."[78] The Court noted that these distinctions, historically recognized by the law,[79] are supported by social science and cognitive science.[80]

While the question before the Court was whether age factors into the custody analysis, the school setting provided additional support for the majority's reasoning. The Court asked,

> [H]ow would a reasonable adult understand his situation, after being removed from a seventh-grade social studies class by a uniformed school resource officer; being encouraged by his assistant principal to "do the right thing"; and being warned by a police investigator of the prospect of juvenile detention and separation from his guardian and primary caretaker? To describe such an inquiry is to demonstrate its absurdity. Neither officers nor courts can reasonably evaluate the effect of objective circumstances that, by their nature, are specific to children without accounting for the age of the child subjected to those circumstances.[81]

The Court further emphasized the connection between the school setting and the age of the suspect:

> [T]he effect of the schoolhouse setting cannot be disentangled from the identity of the person questioned. A student—whose presence at school is compulsory and whose disobedience at school is cause for disciplinary action—is in a far different position than, say, a parent volunteer on school grounds to chaperone an event, or an adult from the community on school grounds to attend a basketball game.[82]

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78. *Id.* (internal citations omitted).
79. *Id.*
80. *Id.* at 2404 n.6.
81. *Id.* at 2405.
82. *J.D.B.*, 131 S. Ct. at 2405. In fact, while the majority holds the age analysis to be integrally linked to the school status analysis, the dissent would rely on school status alone as the basis for addressing the suspect's unique situation: "many of the concerns that petitioner raises regarding the application of the *Miranda* custody rule to minors can be accommodated by considering the unique circumstances present when minors are questioned in school." *Id.* at 2417 (Alito, J., dissenting).

Thus, while the opinion centered on the question of the suspect's age, it also revealed that the Court was willing to consider the perspective of a student in school, the impact of compulsory attendance rules, school discipline policies, and the unique authority of teachers and administrators. Although the case is limited to the question of police actions under *Miranda,* like *Redding,* it raises questions about the reach of the Court's reasoning about adolescent development and the school experience.

### *C. The Next Frontier: Policing by School Resource Officers*

One of the most pressing issues in school climate litigation is the role of school resource officers (SROs). These law enforcement personnel are placed inside of schools with the express purpose of preserving school safety. SROs maintain their general law enforcement duties, but they may also take on additional tasks, such as providing trainings, to promote a positive school environment.[83] When SROs are placed in schools, referrals to the juvenile justice system tend to increase, and more minor infractions, such as fighting or making threats, are charged as delinquent acts.[84] Critics suggest that, while the goal of placing law enforcement personnel in the schools is to promote safety, it may actually be creating a more hostile school environment. With the focus placed on punitive consequences rather than de-escalation or proactive teaching regarding behavior, students may respond to the more adversarial dynamic with frustration.[85]

Courts are divided on how to treat SROs; whether to apply the deferential standard typically due school personnel or to hold them to the more stringent standards typically applied to police. The Eleventh Circuit, for example, applied the *T.L.O.* test to a school seizure by an officer who handcuffed a nine-year-old girl, Laquarius Gray.[86] When the

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83. Feld, *supra* note 6 at 884.

84. *Id.* at 885-86 ("Assigning an SRO to a school increases the number of referrals to juvenile courts for minor offenses such as simple assaults and disorderly conduct.").

85. *See id.* at 884-88 (observing that School Resource Officers contribute to the "prison-like" atmosphere in many schools and increases the number of juvenile court referrals for minor offenses); Am. Psychological Assoc., *supra* note 8, at 854 (noting that the increased reliance on SROs and highly punitive consequences such as suspensions and expulsions correlates with negative school climate); Brown, *supra* note 3 at 961-63 (noting that overly harsh and developmentally inappropriate punishment of students by school officials can exacerbates student hostility and undermines student connectedness to the school, and can also result in trauma for families and loss of learning time); Losen, *supra* note 7, at 11 (suggesting that suspending students from school may reduce overall safety in the community because adolescents are left "unsupervised on the street").

86. Gray v. Bostic, 458 F.3d 1295, 1301 (11th Cir. 2006).

gym teacher called Laquarius aside for not participating in jumping jacks with the class, the SRO overheard Laquarius threaten to hit the gym teacher.[87] The SRO insisted on handling the matter, took the girl into the hallway, placed her in handcuffs, and told her "this is how it feels when you break the law" and "this is how it feels to be in jail."[88] Applying the *T.L.O.* test, the Court ultimately concluded that the seizure was unconstitutional. Although it was reasonable in its inception, it was unreasonable in its scope, because there was no real threat to anyone's safety.[89] A number of courts have specified that the *T.L.O.* reasonableness standard applies when the action at issue is initiated at the behest of the school, but when the action is initiated by law enforcement, the SRO must have probable cause.[90] The law on interrogations by SROs

87. *Id.* at 1300. The facts are not entirely clear. Laquarius admitted to saying something disrespectful and threatening to do something. The coach testified that she had threatened to hit her in the head. Laquarius denied that particular threat.

88. *Id.* at 1301.

89. *Id.*

90. *See, e.g.,* T.S. v. State, 863 N.E.2d 362, 371 (Ind. Ct. App. 2007) (SRO who had initially removed student from class and intended to bring him to dean's office, but upon discovering the student possessed drugs brought student directly to police station, had nonetheless acted "to further educationally related goals" and therefore acted reasonably within the meaning of the Fourth Amendment); *In re* Josue T., 989 P.2d 431, 437 (N.M. Ct. App. 1999) (concluding that a search of a student by an SRO was permissible where the SRO was in effect "the arm of the school official"); *In re* Angelia D.B., 564 N.W. 2d 682, 690-91 (Wis. 1997) (search by SRO is subject to a reasonableness, not probable cause, so long as search is conducted "in conjunction with school officials and in furtherance of the school's objective to maintain a safe and proper educational environment"); M. J. v. State, 399 So. 2d 996, 998 (Fla. Dist. Ct. App. 1981) ("[W]here a law enforcement officer directs, participates, or acquiesces in a search conducted by school officials, the officer must have probable cause for that search, even though the school officials acting alone are treated as state officials subject to a lesser constitutional standard for conducting searches in light of the in loco parentis doctrine.") (citations omitted); A.J.M. v. State, 617 So. 2d 1137 (Fla. Dist. Ct. App. 1993) (school resource officer paid by sheriff's office conducted search of students pursuant to principal's request and lacking probable cause to justify search; court adopts probable cause standard of *M.J.* and holds search unlawful); Patman v. State, 537 S.E.2d 118, 120 (Ga. Ct. App. 2000) ("Unlike a school official, a police officer [working a special detail in a high school] must have probable cause to search a suspect.").

The *M.J.* case did not involve a school resource officer, but rather a police officer called to the school then proceeded to work in conjunction with the school administrators. A later Florida case, *M.D. v. State*, held that:

> The only possible support for applying the probable-cause standard to a search by a school resource officer is a 1981 case, *M.J.* However, *M.J.* is distinguishable on the facts because the officer involved was an outside officer called to the school for the purposes of aiding in a search of a student. Here, the relevant officer participation involved a school resource officer, rather than an outside police officer, and a different standard applies.

is similarly unsettled. Many courts have held that the mere presence or participation of an SRO does not convert a school questioning into a custodial interrogation under *Miranda.*[91] Some courts, however, have asserted that questioning, even by a school official, can be a custodial interrogation when the information obtained is used for a delinquency adjudication.[92]

*Redding* and *J.D.B.* suggest that courts should consider the experience of the student being searched or interrogated. If a typical adolescent would feel threatened or humiliated, courts may infer that the intrusion is severe. In search cases, the intrusion may outweigh the benefits of the search, making it unreasonable under the *T.L.O.* standard. In interrogation cases, if a typical adolescent would feel coerced, that fact may weigh into the court's determination of whether the youth was in custody for *Miranda* purposes.

## IV. CONCLUSION

A host of constitutional questions related to the school climate remain open today; the Supreme Court has not fully settled the extent to which school police are governed by the Fourth and Fifth Amendments; whether drug-sniffing dogs may be permitted on public school grounds; and to what extent police – or school staff – can search students' lockers, desks, or even cars.[93] *Redding* and *J.D.B.* suggest that the Court may not always allow schools unfettered authority to impose disciplinary tactics. Rather, the Court may look to the experience of teenagers in school – through the lenses of social science, legal history, and common sense –

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> As noted by all of our sister courts, a search conducted by a resource officer placed in the school as a liaison is more akin to a search from a school official than from an outside police officer coming into the school to conduct a search, because a "school police officer is a school official who is employed by the district School Board.

*M.D. v. State*, 65 So. 3d 563, 566 (Fla. Dist. Ct. App. 2011) (internal citations omitted).

91. *See, e.g.*, In re W.R., 675 S.E.2d 342, 344 (N.C. 2009) (refusing to find that presence alone of SRO during questioning of student constituted a "custodial interrogation," where record gave no indication that student's statements were involuntary); State v. J.T.D., 851 So. 2d 793, 796 (Fla. Dist. Ct. App. 2003) (holding no *Miranda* warnings were required where school assistant principal questioned juvenile in presence of SRO); *Cf.* In re L.A.W., 226 P.3d 60, 64 (police detective who questioned juvenile in school regarding criminal complaint, and was not acting as an agent of the school, and properly read juvenile his *Miranda* rights, which juvenile properly waived).

92. State v. R.D.S., No. M2005-00213-COA-R3-JV, 2006 WL 3350699 at *6 (Tenn. Ct. App. 2006).

93. For more details on the wide array of unanswered Constitutional questions regarding school searches in the post-*Redding* era, *see* Feld, *supra* note 6.

and choose to impose some limits on the "criminalization of the classroom."[94]

94. Brown, *supra* note 3, at 962.

# STOLEN VALOR ACT: A CONSTITUTIONAL INSTRUMENT TO PROSECUTE "PUBLIC FRAUD"

NICHOLAS MULL[1]

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## I. INTRODUCTION

We are a Nation formed both by the pen and the sword – not in opposite – but in symbiotic bond. It was the rhetoric of Thomas Paine[2]

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# THE EIGHTH AMENDMENT EVOLVES: DEFINING CRUEL AND UNUSUAL PUNISHMENT THROUGH THE LENS OF CHILDHOOD AND ADOLESCENCE

Marsha Levick, Jessica Feierman, Sharon Messenheimer Kelley, Naomi E. S. Goldstein, Kacey Mordecai [a1]





***286** *Recent decisions by the United States Supreme Court striking the imposing of certain adult sentences on juveniles suggest a shift in the Court's traditional Eighth Amendment analysis of sentencing practices involving juveniles in the criminal justice system. Relying on settled research outlining the developmental differences between children and adults, the Court has modified its longstanding Eighth Amendment jurisprudence from one that hinged primarily on the nature of the sentence to a doctrinal approach that places greater emphasis on the age and characteristics of the offender upon whom the sentence is imposed. As the Court increasingly relies upon the principle that youth are different to inform its decisions involving children's constitutional rights, we suggest that the sentencing of juveniles as adults, as well as the conditions under which juvenile offenders are incarcerated, will face greater scrutiny. While adult crime may indeed warrant adult time, the punishment of juvenile crime--whether in the juvenile or adult justice systems--must yield to a different set of constitutional principles. In the Article that follows, we propose a distinct juvenile definition of cruel and unusual punishment that will produce divergent outcomes depending upon whether the litigant challenging the sentence or other aspects of his punishment is a juvenile or an adult.*

*We start with a historical overview of the American juvenile justice system, showing how the system has been transformed over time by both internal and external influences, and how the current wave of constitutional reform fits within that historical context. We then summarize the developmental and neuroscientific research establishing that youth are different in constitutionally relevant ways, to underscore how these differences and the underlying research are driving contemporary constitutional analysis. This review is followed by a discussion of Supreme Court case law involving challenges to sentencing practices and conditions of confinement under the Eighth Amendment. Finally, we summarize applicable international and human rights principles, as the Supreme Court has increasingly demonstrated its willingness to consider international law to inform its own independent judgment regarding the country's evolving, contemporary moral standards.*

## INTRODUCTION: LOOKING BACKWARDS, LOOKING FORWARD

Over 100 years ago, the first juvenile court was established in Cook County, Illinois. [1] The original purpose of the court was to separate juvenile offenders from adult offenders, to provide opportunities for rehabilitation and treatment, to create a more informal setting in which to adjudicate criminal conduct by children, and to limit the consequences of engaging in such ***287** conduct. [2] Within twenty-five years, almost every state in the country had established a juvenile justice system. [3] The basic premise of the juvenile court--that youth are different from adults, and uniquely capable of rehabilitation--would eventually be echoed in the Court's current Eighth Amendment jurisprudence, though now supported by contemporary behavioral and neuroscientific research in adolescent development, and with more robust procedural protections.

The early juvenile justice system left procedural due process behind, favoring informality over process and the best interests of the children over consideration for their rights. [4] Prior to 1966, the nation's juvenile courts functioned with little scrutiny from outsiders--either by members of the public or even appellate courts. [5] Except for two instances in which the Supreme Court acknowledged the particular vulnerability of youth with respect to police interrogations and confessions, [6] juvenile courts for the most part operated far outside constitutional boundaries.

In 1966, the Supreme Court decided Kent v United States. [7] Kent involved a challenge to transfer proceedings under the District of Columbia's Juvenile Court Act. For the first time in juvenile court history, the Court held that certain due process protections were required before a child could be removed from juvenile court jurisdiction to adult criminal court. [8] The Kent Court recognized the substantial consequences of criminal court prosecution for a juvenile, from significantly enhanced sentencing to other collateral consequences with potentially lasting impact. [9]

***288** Kent ushered in a period of profound change for the juvenile justice system. [10] One year after Kent, the Court decided In re Gault, [11] a landmark decision setting forth the Court's broadest statement at that time about the need to protect children's constitutional rights. Eschewing labels of civil versus criminal and rejecting the elevation of form over process, the Court was unequivocal in its view that courts which possess the power to strip children of their liberty, however benevolently intentioned, must operate within the mandates of the Due Process clause of the Fourteenth Amendment. [12] Gault was quickly followed by decisions requiring the state to prove delinquency charges against a juvenile on proof beyond a reasonable doubt [13] and extending the protections of the double jeopardy clause to juveniles. [14] Although the Court declined to extend the right to jury trial to juveniles in McKeiver v. Pennsylvania, [15] a case decided in 1971, the inexorable march toward a more constitutional juvenile court system was underway. [16] Throughout the next few years, every state amended its juvenile court act to ensure full compliance with the Court's constitutional mandates. [17]

This constitutionalization of the juvenile court was the dominant story in juvenile justice until the late 1980s and early 1990s, when increases in violent juvenile crime caused by the lethal combination of crack cocaine and guns [18] spread throughout the country. [19] The prominence ***289** accorded to images and stories about violent juvenile offenders sparked a new wave of juvenile justice "reform," one aimed at limiting the jurisdiction of juvenile court and expanding the jurisdiction of the adult criminal justice system over young offenders. Convinced that the country was headed toward a generation of increasingly violent teens, [20] legislators quickly enacted laws that sought to ensure that youth charged with the most serious offenses would be prosecuted as adults. [21] As yet another period of transformation swept over the juvenile court, concerns for due process and the constitutional rights of juvenile offenders were almost completely eclipsed by concerns for public safety, incapacitation and retribution--the latter being core attributes of the adult criminal justice system. [22] Whatever lingering fealty to principles of rehabilitation and treatment the juvenile court retained was now reserved for an increasingly dwindling number of juveniles charged with crimes. [23] At the same time, youthful offenders in the criminal justice ***290** system bore the full brunt of adult punishment, receiving not only lengthy term of years sentences, but sentences of life without parole and even death. [24]

As a result of this adultification of juvenile offending in the public discourse and, increasingly, in state legislation, researchers associated with the MacArthur Foundation's Research Network on Adolescent Development and Juvenile Justice began conducting studies and compiling research that demonstrated striking and highly relevant differences between children and adolescents on the one hand, and adults on the other. [25] In particular, this research highlighted key traits among juveniles that illustrated their reduced blameworthiness for their criminal conduct. [26] Specifically, researchers focused on three distinct qualities of adolescence--immaturity of judgment, susceptibility to negative peer pressure, and a capacity for change and rehabilitation based on the inherently transient nature of adolescence. [27] In 2005, this research took center stage before the United States Supreme Court when it was asked to review the constitutionality of the juvenile death penalty in Roper v. Simmons. [28]

Importantly, the notion that certain offenders might be less blameworthy for their criminal conduct had already found traction with the Court in 2003, when the Court reconsidered its prior caselaw upholding the death penalty for mentally retarded offenders. In Atkins v. Virginia, [29] the Court overruled Penry v. Lynaugh [30] and held that mentally retarded defendants were categorically less blameworthy for their criminal conduct, including murder, than unimpaired adult offenders. [31] They were thus ineligible for the death penalty. [32] Roper followed Atkins' blueprint in persuading the Court that all juveniles under the age of eighteen were likewise categorically less blameworthy than adults, and could not receive the most serious sentence ***291** available--a sentence of death reserved for the worst of the worst criminals. [33] The Court embraced the developmental research articulating the differences between juvenile and adult offenders, [34] and reversed its prior 1989 decision in Stanford v Kentucky [35] which had left the death penalty in place for sixteen- and seventeen-year-old juvenile offenders. [36]

Five years later, the Court was presented with another opportunity to consider the constitutional relevance of juvenile developmental traits in Graham v. Florida, [37] where petitioner challenged the constitutionality of a life without parole sentence for a juvenile convicted of a non-homicide offense. The Graham court echoed Roper in its reliance on developmental research as well as emerging neuroscientific research to ban the imposition of this adult sentence on juvenile offenders as violative of the Eighth Amendment. The Court reiterated its findings about the developmental characteristics of youth cited in Roper in support of its decision. [38] One year later, in J.D.B. v. North Carolina, [39] the Court extended the application of this research beyond sentencing cases, citing it once again to hold that a juvenile's age is a relevant factor in the Miranda custody analysis. [40] In a span of just six years, the Court handed down three decisions ***292** that have re-shaped our thinking about the rights of juvenile offenders under the Constitution. [41]

At the same time, the Court's decisions in Roper, Graham, and J.D.B. are juxtaposed with a largely contrary legislative mood that has persisted in treating juvenile offenders like adults. [42] Just as legislatures nationwide were embracing the now debunked premise that juvenile crime was synonymous with adult crime and should be punished accordingly, [43] the Supreme Court placed its own constitutional breaks on this trend. In Roper, Graham, and J.D.B., the Court made an abrupt turn, forcing a reexamination of juvenile and criminal justice policy and practices.

Through these cases, the Court has articulated a distinct view of children's legal status that heralds a novel Eighth Amendment jurisprudence for children. The Eighth Amendment has itself historically bent to "evolving standards of decency" as reflected in both objective indicia of those standards and the Court's own subjective analysis. [44] It now appears clear that the Court is taking cognizance of society's own evolving and disparate views of children and adults to break the Eighth Amendment into two strands: there will be different answers to the question of what constitutes cruel and unusual punishment depending on the age and characteristics of the litigant asking the question. We submit that this doctrinal development signals yet another period of reform in how we manage and treat juvenile offenders, suggesting a return to the early Twentieth Century view that kids are different--a view now fully backed by scientific research--while retaining the constitutional protection that children have had since Kent and Gault.

## *293 I. DEVELOPMENTAL IMMATURITY: RESEARCH ON ADOLESCENT DEVELOPMENT

Researchers in the field of developmental psychology use the concept of "developmental immaturity" to describe an adolescent's still-developing neurological, cognitive, behavioral, emotional, and social capacity. [45] Emerging research in this area indicates that developmental immaturity consists of four components distinguishing adolescents from adults: independent functioning, decision-making, emotion regulation, and general cognitive processing. [46]

Research documenting the differences between juveniles and adults suggests that developmental immaturity may necessitate different treatment of adolescents under the Eighth Amendment. Using the construct of developmental immaturity as a guide, the discussion that follows reviews four areas of functioning most relevant to our understanding of the application of the Eighth Amendment to adolescent sentencing and conditions: decision-making, impulsivity, vulnerability, and the transitory nature of adolescence.

### A. Decision-Making

Broadly, decision-making refers to the various cognitive, emotional, and social factors that influence how individuals process information and arrive at conclusions. Some core components involved in decision-making include the capacity to consider future consequences, weigh costs and benefits, and recognize risks. [47] As the evidence research below demonstrates, juveniles are less capable of making developmentally mature decisions than adults.

Recent research on adolescent decision-making suggests that youth are heavily influenced by social and emotional factors. [48] Adolescents are overwhelmingly more likely than adults to engage in risky behavior despite a similar ability to appraise risk. This can be explained, in part, through the psychosocial factors that are likely to influence decision-making, particularly among adolescents: 1) responsibility, which refers to acting independently and having a clear understanding of one's self; 2) perspective, which involves understanding multiple viewpoints of a situation; and 3) temperance, which is the ability to modulate impulsive thoughts and behaviors. [49] Empirical research on these factors reveals that psychosocial maturity continues to develop into early adulthood. [50] Thus, the evidence suggests that adolescents have pronounced deficits in areas that can influence how they act in high-risk or criminal contexts.

Adolescents' decision-making is also likely to be influenced by affective, or emotional, factors. Research has identified three different ways in which emotions can shape the decision-making process: 1) anticipated emotional outcomes; 2) anticipatory emotions; and 3) incidental ***294** emotions. [51] First, individuals may choose to perform particular behaviors in a given situation by evaluating the anticipated emotional outcomes of various behavioral options. Behaviors that seem likely to increase positive emotions tend to become more desirable, even if they carry with them a degree of risk. [52] Second, individuals' direct emotional responses to various behaviors also may guide their decision-making. [53] For instance, individuals tend to approach behavioral situations to which they have positive emotional responses and avoid those situations that evoke negative emotions. Finally, incidental, or background, emotions can influence judgments about the risk or desirability of certain behavioral options. [54] Because adolescence is a period of emotional instability, these emotional influences are particularly salient in adolescents' decision-making. [55]

Moreover, adolescent decision-making is characterized by sensation- and reward-seeking behavior, [56] which tends to intensify from childhood to adolescence before declining from late adolescence through the mid-20s. [57] This curvilinear trend in reward-seeking--peaking in adolescence before declining--may be partially based on adolescents' differing sensitivity to reward and punishment. Recent research suggests that while sensitivity to punishment develops in a linear manner (steadily increasing throughout adolescence), reward sensitivity follows a curvilinear, developmental path that parallels the reward-seeking pattern--peaking in adolescence before declining in adulthood. [58]

In sum, empirical research has revealed that juveniles have different decision-making abilities than adults in that they are less able to engage in psychosocially mature evaluations of situations and consequences of their decisions, and that they simultaneously have an increased sensitivity to the affective and reward components of behavior. This research suggests that, as a group, juveniles are less responsible and, therefore, may be less culpable for their decisions than adults. Although each juvenile develops at his or her own rate, and may respond uniquely to different contexts, these differences in decision-making processes broadly distinguish the functioning of adolescents, as a class, from that of adults.

**B. Impulsivity**

Impulsivity has been defined as “a predisposition toward rapid, unplanned reactions to internal or external stimuli without regard to the negative consequences of these reactions to the impulsive individuals or others.” [59] As mentioned above, one psychosocial factor likely to influence behavior is temperance, or the ability to regulate one's behavior and evaluate a situation ***295** before one acts. [60] In other words, impulsivity can be thought of as actions in the absence of formal decision-making. Because “impulsivity” describes behaviors with minimal or complete lack of forethought, it merits consideration in discussions of culpability.

Adolescents' tendencies to act impulsively are well documented in the psychological literature. Recent research demonstrates that impulsivity declines steadily throughout adolescence and early adulthood, with appreciable declines evident into the mid-twenties. [61] Greater levels of impulsivity during adolescence may be based on adolescents' weak future orientation and disinclination to consider or anticipate the consequences of decisions. [62] The tendency to choose small immediate rewards over larger delayed rewards declines steadily throughout adolescence. [63] Research also demonstrates significant age differences in planning ahead (e.g., adolescents are more likely to think that planning ahead is a “waste of time”); time perspective (e.g., adolescents are more likely to report that they “would rather be happy today than take their chances on what might happen in the future”); and anticipation of future consequences (e.g., adolescents are more likely to report that they “don't think it's necessary to think about every little possibility before making a decision”). [64] This focus on immediate benefits contributes to the high rates of impulsivity among adolescents that distinguishes adolescent and adult culpability.

### C. Vulnerability

Immaturity in independent functioning, decision-making, and emotional regulation can make adolescents particularly susceptible to risky decision-making, peer influence and adult coercion, and greater sensitivity to invasions of privacy. Consequently, in many legal contexts, adolescents are recognized as a vulnerable population. [65]

Adolescent vulnerability is well-documented in developmental research. First, research suggests that adolescents demonstrate lower levels of independent functioning, as manifested in their poor self-reliance and weak self-concept. [66] Poor self-reliance is evidenced in adolescents' difficulty demonstrating independence from peers and authority figures and their concomitant need for social validation. Weak self-concept can be seen in adolescents' difficulty recognizing personal strengths and weaknesses and developing individual values. [67] This murky sense of self can heighten adolescents' vulnerability through their reliance on others (either peers or adults) to ***296** guide their decision-making and behavior.

This compromised independent functioning can make adolescents particularly vulnerable to peer pressure and compliance with authority. According to Steinberg and Scott, “Peer influence affects adolescent judgment both directly and indirectly. In some contexts, adolescents make choices in response to direct peer pressure to act in certain ways. More indirectly, adolescents' desire for peer approval--and fear of rejection--affect their choices, even without direct coercion.” [68] Early research on direct peer pressure suggests that adolescents' tendency to choose an antisocial activity suggested by their peers over a prosocial activity of their own choosing peaks in early-to mid-adolescence and declines slowly into adulthood. [69] Adolescents are far more likely to take risks in the presence of peers, including instances without direct pressure or coercion. For example, in one study, adolescents took twice as many risks on a driving task when peers were present than when they were alone, running yellow lights at the risk of being hit by an unseen car. [70]

Also, youth tend to yield to the demands of authority figures, [71] complying with adults based on a blanket acceptance of their authority, rather than as a result of the youths' reasoning about an adult's request. [72] Thus, adolescents' decision-making skills can be further compromised when confronted with a demand or request by an authority figure.

In addition to cognitive characteristics that differentiate adolescents' functioning from that of adults, developmental immaturity is characterized by differences in the ability to regulate emotions. Adolescents tend to demonstrate difficulties recognizing and expressing feelings, managing their emotions, and coping with undesirable feelings. [73] This places adolescents at a disadvantage in high stress situations, and consistent or chronic exposure to stressful stimuli can, in turn, reduce adolescents' opportunities to develop successful emotional regulation abilities. [74] Factors such as childhood maltreatment, [75] maternal depression, [76] exposure to violence, [77] and economic deprivation [78] are associated with poor emotion regulation (i.e., emotion “dysregulation”) in children and adolescents. Empirical evidence also has shown that adolescents with poor emotion regulation often demonstrate both internalizing (e.g., depression and anxiety) ***297** and externalizing (e.g., aggressive behaviors) symptoms, [79] and rates of these symptoms and associated mental health diagnoses are elevated among youth involved in the justice system. [80]

Compared with adults, juveniles are particularly vulnerable to the influence and manipulation of others. Youths' underdeveloped sense of personal identity and independence, coupled with their compromised decision-making abilities, place them at-risk for susceptibility to direct and indirect coercion by peers and authority figures. Furthermore, juveniles have trouble regulating their emotions and have a heightened sensitivity to invasions of privacy--particularly when they have experienced economic or social disadvantages. Together, these findings suggest that juveniles, as a class, have unique needs for protection and guidance that are greater than and different from the needs of adults.

### D. Transitory Nature of Adolescence

Adolescence is inherently transitory; this period ultimately ends as do the deficits that are uniquely associated with developmental immaturity. As researchers Scott and Steinberg have explained, "The period is transitional because it is marked by rapid and dramatic change within the individual in the realms of biology, cognition, emotion, and interpersonal relationships. . . . Even the word 'adolescence' has origins that connote its transitional nature: it derives from the Latin verb adolescere, to grow into adulthood." [81]

As much of the research outlined above reveals, different components of developmental immaturity either peak in adolescence and then decline into early adulthood (e.g., reward-seeking), or steadily decline throughout childhood and adolescence (e.g., impulsivity). [82] In sum, as youth grow, so do their self-management skills and ability for long-term planning, judgment and decision-making, regulation of emotion, and evaluation of risk and reward. [83] Thus, many of the factors associated with antisocial, risky, or criminal behavior lose their intensity as individuals become more developmentally mature.

There is also empirical evidence directly relating the transitory nature of adolescence to delinquent and criminal behavior. The distinction between individuals who offend only during adolescence and those who persist in offending into adulthood is well established in the psychological literature. [84] One researcher estimated that "chronic" juvenile offenders (i.e., those with five or more arrests) account for only about six percent of the juvenile offender population. [85] A more recent study followed over one thousand serious male adolescent offenders (i.e., those who had committed felony offenses with the exception of less serious property crimes and misdemeanor weapons or sexual assault offenses) over the course of three years and revealed that ***298** only 8.7% of participants were found to be "persisters" in that their offending remained constant throughout the thirty-six-month period. [86] The vast majority of youth who engage in delinquent acts desist, and "the typical delinquent youth does not grow up to become an adult criminal." [87] In other words, not only are youth developmentally capable of change, research also demonstrates that, when given a chance, even youth with histories of violent crime can and do become productive and law abiding citizens, without any intervention.

Although the mere process of physiological and psychological growth will rehabilitate most adolescents, more than fifteen years of research on interventions for juvenile offenders has yielded rich data on the effectiveness of programs to reduce recidivism and cut costs, underscoring rehabilitation as a realistic goal for the overwhelming majority of juvenile offenders, including violent and repeat offenders. Examples of programs shown to be effective with violent and aggressive youth include Functional Family Therapy (FFT), Multidimensional Therapeutic Foster Care (MTFC), and Multi-Systemic Therapy (MST). [88] All three have been shown to reduce recidivism rates significantly, even for serious violent offenders. [89] Thus, many juvenile offenders have the potential to achieve rehabilitation and become productive citizens.

### E. Neurological Differences Between Youth and Adults

Recent research using advances in neuro-imaging has revealed that many of the components of developmental immaturity, reviewed above, have a neurological basis. First, brain-imaging research has revealed that the brain's frontal lobes are structurally immature into late adolescence, making them one of the last parts of the brain to fully develop. [90] Because the frontal lobes are primarily responsible for executive functions, their structural immaturity during much of adolescence is partially responsible for youths' deficits in response inhibition, planning ahead, and weighing risks and rewards. [91] Not only is this area of the brain underdeveloped in adolescence, research has shown that this area is less active in adolescents than it is in adults. [92] ***299** And, as adolescents move into early adulthood, increasing amounts of brain activity shift to the frontal

lobes. [93] Researchers understand these patterns to be linked to the steady decline of impulsivity throughout adolescence and into adulthood. [94] That is, decreased levels of impulsivity seem to coincide with increased levels of frontal lobe maturity.

Second, the limbic system changes during puberty and is particularly active in adolescent brains. [95] The limbic system is generally regarded as the socio-emotional center of the brain, and, therefore, its changes and activity level during this time are particularly relevant to the discussion of adolescent decision-making. [96] Far from acting in isolation, adolescents' underdeveloped frontal lobes and highly active and changing limbic systems interact. Therefore, while adolescents are still maturing, the frontal lobes are less able to exert control over behavior and emotions, making adolescents even more vulnerable to social and emotional cues in decision-making. [97]

Finally, the dopaminergic system, the system involved in the transmission of the chemical dopamine which plays an important role in processing rewards, is restructured during adolescence. [98] The dopaminergic system's connections to the limbic system and frontal lobes increase during mid- and late-adolescence and then decline. [99] These changes may lead to the increase in reward-seeking behavior and heightened responsiveness to rewards observed among adolescents.

Youths' developmental immaturity leads them to function differently than adults in independent functioning, decision-making, emotion regulation, and general cognitive processing. These differences have been observed in behavioral studies as well as studies documenting the neurological changes that take place during adolescence and early adulthood. Adolescents' resulting deficits in certain areas, such as decision-making and impulsivity, along with their heightened vulnerability and the inherently transitory nature of adolescence, suggest that they should be treated differently under the Eighth Amendment.

## II. GRAHAM V. FLORIDA AND ROPER V. SIMMONS: THE UNITED STATES SUPREME COURT EMBEDS ITS EIGHTH AMENDMENT ANALYSIS OF JUVENILE SENTENCES IN RESEARCH

On May 17, 2010, in Graham v. Florida, [100] the United States Supreme Court ruled that sentences of life without the possibility of parole imposed on juveniles convicted of non-homicide offenses violate the Cruel and Unusual Punishment clause of the Eighth Amendment. [101] In an opinion written by Justice Kennedy, the Court held that such a severe and irrevocable punishment ***300** was not appropriate for a less culpable juvenile offender. [102] In banning the sentence, Justice Kennedy underscored that case law, developmental research, and neuroscience all recognize that children are different from adults--they are less culpable for their actions and at the same time have a greater capacity to change and mature. [103] Justice Kennedy's opinion was rooted in the Court's earlier analysis in Roper v. Simmons, [104] which had held the death penalty unconstitutional as applied to juveniles. The Graham Court echoed the reasoning in Roper that three essential characteristics distinguish youth from adults for culpability purposes: youth lack maturity and responsibility; they are vulnerable and susceptible to peer pressure; and their characters are unformed. [105] Justice Kennedy reasoned:

> No recent data provide reason to reconsider the Court's observations in Roper about the nature of juveniles. As petitioner's amici point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of ‘irretrievably depraved character’ than are the actions of adults. [106]

The majority made clear in Graham and Roper that the constitutionality of a particular punishment for juveniles (i.e., whether it is cruel and unusual) is directly tied to prevailing research on adolescent development, and that juvenile status is central to the constitutional analysis.

### A. A New Look at Juvenile Sentencing

Together, Graham and Roper provide the framework for a novel, developmentally driven Eighth Amendment jurisprudence that should force a more rigorous examination of permissible sentencing options for juvenile offenders in the criminal justice system. [107] In Graham, the Court ***301** held that an indefinite sentence was inherently at odds with the transient nature of adolescence. Justice Kennedy explained:

> The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her some realistic opportunity to obtain release before the end of that term. [108]

In deciding challenges to sentencing practices under the Eighth Amendment, the Court applies a two-part test: it considers objective indicia--including both state legislation and sentencing practices, and it then brings its own judgment to bear on the issue. [109] The question of objective indicia depends, by definition, on external factors. Conversely, the notion that the Court must use its own judgment to determine whether a sentence conforms to the "'evolving standards of decency that mark the progress of a maturing society"' [110] has created the opening for the Court's unique treatment of juvenile offenders. [111] We therefore focus on this second prong of the ***302** analysis to examine the Court's exercise of its own judgment, in light of evolving standards, regarding the constitutionality of a particular punishment.

The Court's perception of proportionality is central to its judgment about whether a certain punishment is cruel and unusual. [112] The Court in Graham explained that cases addressing the proportionality of sentences "fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case." [113] Under the first classification, the Court considers the circumstances of the case in its determination whether the sentence is "unconstitutionally excessive." [114] Justice Kennedy directs courts to first compare "the gravity of the offense and the severity of the sentence." [115] In the rare case where this "'threshold comparison . . . leads to an inference of gross disproportionality,' the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." [116] If this comparative analysis "'validate[s] an initial judgment that [the] sentence is grossly disproportionate,' the sentence is cruel and unusual." [117]

The second, "categorical" classification of cases assesses the proportionality of a sentence as compared to the nature of the offense or the "characteristics of the offender." [118] In "categorical" cases, the Court may deem a particular sentence unconstitutional for an entire class ***303** of offenders, due to shared characteristics that make them categorically less culpable than other offenders who commit similar or identical crimes. [119] As part of this proportionality analysis, the Court has tied the legitimacy of any particular sentence to a determination of whether the sentence serves the acceptable purposes, or "legitimate goals," of punishment-- retribution, deterrence, incapacitation, and rehabilitation. [120] As demonstrated in Graham, a sentence disproportionate to the penological objectives it claims to serve will doom many adult sentences imposed on juveniles. It is this second strand of the Court's proportionality analysis, focused on the characteristics of the offender, which invites a distinctive application of the Eighth Amendment to juveniles.

As the Graham Court explained, "a sentence lacking any legitimate penological justification is by its nature disproportionate to the offense" and therefore unconstitutional. [121] Relying on developmental and scientific research, the Graham Court held that none of the four accepted rationales for the imposition of criminal sanctions was served by imposing a life without parole sentence on a juvenile. [122] The Court first rejected both retribution and deterrence as proffered rationales for the sentence, echoing its earlier holding in Roper that emphasized the reduced blameworthiness of juvenile offenders. [123] It then rejected

incapacitation as a justification for life without parole sentences, further underscoring the folly of making irrevocable judgments about youth:

> To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable. . . . Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset. A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity. [124]

The goal of rehabilitation was likewise rejected, as the Court found the punishment simply at odds with the rehabilitative ideal. [125] The Court stated, "By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society"-- a judgment inconsistent with a juvenile non-homicide offender's "capacity for change ***304** and limited moral culpability." [126]

In prohibiting the execution of juvenile offenders in Roper five years earlier, the Court expressly relied on many of the medical, psychological and sociological studies cited above, as well as common experience. This evidence showed, and the majority held, that children under age eighteen are "'categorically less culpable"' and more amenable to rehabilitation than adults who commit similar crimes. [127] The Court reasoned that because juveniles have reduced culpability, they cannot be subjected to the harshest penalty reserved for the most depraved adult offenders; punishment for juveniles must be moderated to some degree to reflect their lesser blameworthiness. [128]

As in Graham, the Roper Court stressed the incongruity of imposing a final and irrevocable penalty on an adolescent who had the capacity to change and grow. "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." [129] The Court underscored that the State was not permitted to extinguish the juvenile's "potential to attain a mature understanding of his own humanity." [130] It noted that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive" a sentence of life without parole for a non-homicide crime. [131] The Graham Court then expounded on this point:

These salient characteristics mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' Accordingly, 'juvenile offenders cannot with reliability be classified among the worst offenders.' A juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult."' [132]

Like Roper, the Court adopted a categorical ban on life without parole sentences for juveniles convicted of non-homicide offenses. Without a categorical rule, the Court noted that an "unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course . . . ." [133] Were the Court to allow a case-by-case assessment of culpability, courts might not "with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." [134] Juvenile nonhomicide offenders are "not sufficiently culpable to merit that punishment." [135] The categorical rule "gives all juvenile nonhomicide offenders a chance to ***305** demonstrate maturity and reform." [136]

Justice Kennedy's opinion in Graham is an expansive statement about constitutional limits on the wholesale extension of adult sentencing policies and practices to juvenile offenders. Given the sharp differences between juvenile and adult offenders, rote application of adult sentences will fail to pass constitutional muster. While the Court engaged in a routine Eighth Amendment analysis--considering objective indicia of national consensus but then applying its own independent judgment--it ultimately crafted a developmentally driven approach that broadened its prior case law that "death is different" [137] under the Eighth Amendment to include a further guiding principle that "kids are different."

Additionally, the Court's reluctance to impose adult sentences on juveniles derives from its growing belief that punishment for youth must be individualized. The Court made clear that the juvenile must be given an opportunity to demonstrate the capacity to change--not only at the time of sentencing, but even over the course of time as he or she matures. The Court explained:

> Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset. A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity. [138]

Interestingly, this idea of individualized assessment is already embedded in the Court's capital jurisprudence. The opportunity to show mitigation prior to the imposition of a sentence of death is central to the Court's case law assessing the constitutionality of various death penalty schemes. [139]

This well-developed jurisprudence on mitigation in death penalty cases has been understood to apply because of the extraordinary nature of the punishment. The Court has recognized that unique protections apply because "death is a punishment different from all other sanctions in kind rather than degree." [140] Graham, however, eliminated the "death is different" adult sentencing distinction--at least when juveniles are involved. This consequence of Graham was expressly noted by the dissent. [141] Under Graham and Roper, sentences that would be deemed ***306** appropriate for adult offenders would be unconstitutional for a child who committed like offenses. In the wake of these cases, courts should similarly look to mitigating factors that may justify a less harsh sentence whenever a child receives a sentence designed for an adult. [142] To ensure that sentences for juveniles are not unconstitutionally disproportionate, courts should evaluate mitigating factors including the juvenile's age, level of involvement in the offense, external or coercive pressures surrounding the criminal conduct, and other relevant characteristics. These factors should be considered in light of the juvenile's diminished capacity, increased impulsivity, and capacity for change or rehabilitation.

As Justice Frankfurter wrote over fifty years ago in May v. Anderson, [143] "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." [144] Today, adult sentencing practices that take no account of youth--indeed permit no consideration of youth--are unconstitutionally disproportionate as applied to juveniles. This approach builds upon recent Supreme Court jurisprudence that recognizes that juveniles who commit crimes--even serious or violent crimes--can outgrow this behavior and become responsible adults, and therefore courts cannot make judgments about their irredeemability at the outset. [145]

**B. A New Look at Juvenile Conditions of Confinement**

With the shift in focus from the constitutional procedural protections of the 1960s and 1970s to the harsher penalties of the 1980s and 1990s, the constitutional analysis of juvenile conditions cases also changed. The 1970s saw a spate of cases striking down juvenile conditions as unconstitutional, resting on the same premise as the juvenile court itself--juveniles deserved treatment

and rehabilitation. [146] The cases also recognized juveniles' unique vulnerability and the resulting trauma that harsh conditions could impose on them. [147] More recently, however, courts have rarely struck down conditions as interfering with the right to treatment. [148]

The reasoning of both Roper and Graham, however, may now create new opportunities in juvenile conditions cases. The underlying recognition that youth are more vulnerable, more susceptible to outside pressures, and more capable of change than their adult counterparts suggests that courts may be more protective of incarcerated juveniles. Harmful or deplorable ***307** conditions, which have been found constitutional in cases involving adults, may therefore be unconstitutional when imposed on juveniles--both because the impact of the harm is more significant for juveniles, and because the expectation of treatment and rehabilitation is higher.

1. Problems Facing Confined Youth

Whether in juvenile or adult institutions, confined juveniles face harsh conditions. One report, for example, identified maltreatment of youth in juvenile facilities in thirty-nine states, plus the District of Columbia since 1970, as evidenced by federal investigations, class-action lawsuits or authoritative reports. [149] Juveniles in these states faced excessive use of isolation or restraints, systemic violence, and physical and sexual abuse. [150] Moreover, such maltreatment has been documented in twenty-two states since 2000. [151] These numbers may reflect significant under-reporting because youth have little access to counsel, members of the media, or other ways of having their stories heard--and because youth may often fear retaliation if they report abuse.

In adult facilities, conditions may be even more dangerous for youth. Youth confined with adults are more likely to be physically or sexually abused, and to commit suicide than those in juvenile facilities. [152] In fact, suicide is the number one cause of death for juveniles in adult jails. [153] Attempts by facilities' staff to protect youth--generally by placing youth in isolation or administrative segregation, can cause even further damage:

> An individual held in solitary confinement for 23 hours a day typically begins to lose his sense of reality, and becomes paranoid, anxious and despondent, all of which can exacerbate existing mental health conditions. Given that many of the youth being held in adult jails have experienced some serious trauma in their lives or have undiagnosed or untreated mental illness, they are particularly vulnerable. [154]

Moreover, even under similar conditions, and without increased risk of abuse, youth are uniquely vulnerable to the trauma of incarceration in poor conditions. “From a developmental perspective, . . . juveniles need to be with family members and are perhaps more vulnerable to emotional harm from incarceration than adults.” [155] The harsh, and even potentially fatal, conditions for youth in ***308** both juvenile and adult facilities, and their unique vulnerability to harm, highlight the importance of the constitutional standard.

2. The Adult Standard: A Tough Bar

As applied to adult prisoners, the Supreme Court's Eighth Amendment jurisprudence calls for significant deference to prison officials. In early cases, the Court applied the Eighth Amendment to address sentencing rather than prison conditions. In 1910, for example, the Supreme Court held a sentence unconstitutional as applied to a defendant who had falsified documents regarding a small sum of money. [156] The defendant had been sentenced to a minimum of twelve years of prison with hard labor, followed by voting disqualification, ongoing surveillance and restrictions on his residency after his release., [157] The Court, observing that the sentence was highly disproportionate to the crime, concluded that it violated the Eighth Amendment. [158]

Since then, the Court has established that certain sentences violate the Eighth Amendment--the denial of citizenship, [159] the imposition of the death penalty without proper procedural protections, [160] or, as discussed above, the imposition of the death penalty [161] or life without parole to certain categories of less culpable individuals. [162]

In 1976, petitioners in Estelle v. Gamble asked the Court to consider whether the Eighth Amendment protects prisoners from harsh prison conditions--in that case the provision of inadequate medical care--even when the initial sentence imposed was constitutional. [163] The Court held that the Eighth Amendment did govern such behavior, concluding that "deliberate indifference to serious medical needs" by prison staff could constitute the "'unnecessary wanton infliction of pain' proscribed by the Eighth Amendment." [164] To hold to the contrary, the Court observed, would allow "the infliction of . . . unnecessary suffering," and would be "inconsistent with contemporary standards of decency . . . ." [165] Ultimately, however, the Court held that the Eighth Amendment had not been violated when prison doctors prescribed painkillers and rest for the prisoner's back pain, but did not seek an x-ray or take other steps to identify and treat his pain. Although an x-ray might have revealed a more accurate diagnosis, the failure to provide one was, at most, cause for a malpractice claim and did not constitute cruel and unusual punishment. [166] In Estelle, as a result, the Court established the possibility of Eighth Amendment claims for pure conditions cases, but also set a high bar for what would constitute such a violation. The Court further solidified this approach in Rhodes v. Chapman, holding that the double celling of prisoners did not violate the Constitution. [167] The Court concluded that, at most, double celling "inflicts ***309** pain," but concluded that it did not constitute the "unnecessary or wanton" infliction of pain that violates the Eighth Amendment. [168] "[T]he Constitution," the Court stated, "does not mandate comfortable prisons." [169] Thus, the prisoners' additional complaints regarding limited job and educational opportunities did not rise to the level of constitutional violations. [170] Scholars have noted that Rhodes initiated a line of cases curtailing the use of the Eighth Amendment to challenge prison conditions. [171] Indeed the Rhodes Court explicitly asserted that "[t]o the extent that such conditions are restrictive or even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." [172]

In subsequent cases, the Court further defined the standard for Eighth Amendment conditions cases--and established a uniquely high burden on prisoners seeking relief through the Eighth Amendment. In particular, the Court held that the Constitution was violated in conditions cases only if the prison official had a sufficiently culpable state of mind. [173] In 1994, in Farmer v. Brennan, the Court clarified the precise level of intent prison officials must demonstrate to warrant liability under the Eighth Amendment. Farmer involved a male-to-female transsexual prisoner's complaint that the prison had failed to protect her from assault by the male inmates with whom she was placed. [174] The Court clarified that "deliberate indifference" to the prisoner's need depended on both an objective and subjective component. [175] The harm to the prisoner must be objectively sufficiently serious, denying a prisoner "the minimal civilized measure of life's necessities . . . ." [176] It must also be based on the subjective state of mind of the prison official, which, Farmer clarified, must be more than mere negligence, though it could fall short of intent to harm. [177] The Court concluded that liability under the Eighth Amendment would apply when a prison official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." [178] Under this standard, "[i]nmates have the difficult task of exposing the prison official's state of mind." [179] Although not a complete bar to relief, this standard has imposed significant obstacles to establishing liability in adult prison conditions cases.

***310** As currently understood, the Fourteenth and Eighth Amendments require only freedom from unnecessary restraint and minimally humane conditions of confinement. Food, clothing, shelter and medical care must only be adequate enough to avoid harm. In the main, treatment or training is directed at little more than preserving the peace within the training school.

Moreover, to the extent that a violation of even these minimal standards occurs, federal judges are precluded from issuing sweeping corrective injunctions by the "hands off" doctrine. As early as 1974, the United States Supreme Court began to show great deference to prison administrators and to tell trial court judges to refrain from interfering with the day-to-day operations of prisons. [180]

The trajectory of adult Eighth Amendment cases, as a result, has established a high bar for prisoners alleging unconstitutional conditions.

In excessive use of force cases, deference to safety concerns makes the subjective standard even more stringent; the Court will not hold the behavior unconstitutional unless officials act "maliciously and sadistically." [181] In adult isolation cases, courts have also applied an extraordinarily high bar, holding, for example, that the mere infliction of "psychological pain" does not rise to the level of constitutional harm. [182] The recent Supreme Court case of Brown v. Plata, however, provides some hope for prisoners seeking redress through the Eighth Amendment. Affirming the lower court's order that prisoners be released to prevent overcrowding, Plata held that the overcrowding was so severe that it led to the violation of prisoners' rights to medical and mental health care and safe conditions. [183] Because overcrowding, rather than an individual correctional staff person's action, led to the conditions at issue, the Court did not touch upon the subjective inquiry. Instead, the Court simply concluded that "[j]ust as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society." [184] While this reasoning may be limited to overcrowding cases, it does open the door to arguments that focus on the effect on prisoners, rather than the intent of the officials. Because the Court not only addressed medical care, but also made significant mention of the highly troubling situation in which mentally ill inmates were held in administrative segregation for months at a time, Plata also opens the door to applying this analysis to a broader array of conditions. [185]

3. A New Juvenile Standard

The adult standard, although evolving, is still not appropriate for juveniles. As one scholar explained,

***311** The constitutional protection available to a child in detention should be more extensive than the protection against punishment applicable to an adult pre-trial detainee in a criminal case. After all, the state's purpose is different. The end result of a juvenile delinquency case is not simply punishment but, based upon state statute, some form of rehabilitation combined with protection of the public. Furthermore, on a practical level children differ from adults. Their needs are different. The injuries that can befall them in detention are both different and greater than adults. Public officials cannot rely upon the maturity of a child as they can an adult. [186]

The recognition in Roper and Graham that juveniles are categorically less mature in their decision-making capacity, more vulnerable to outside pressures including peer pressure, and have personalities that are more transitory and less fixed, [187] underscores that courts cannot simply apply the adult constitutional standard to juveniles. And, indeed, the Court has long explicitly recognized the need for tailoring the Constitutional analysis to youth, observing that "[l]egal theories and their phrasing in other cases readily lead to fallacious reasoning i[f] uncritically transferred to determination of a state's duty toward children." [188]

The Supreme Court has never squarely established the constitutional standard for juvenile conditions cases. [189] The Court has clarified, however, that a less deferential Fourteenth Amendment standard applies in situations in which punishment is not the primary goal. [190] For example, individuals confined for treatment purposes, such as those involuntarily confined to mental health facilities, "are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of

confinement are designed to punish." [191] Similarly, for adults in pre-trial detention not yet convicted of a crime, challenged conditions are unconstitutional under the Fourteenth Amendment if they amount to punishment. [192]

Applying a similar analysis, the majority of jurisdictions have therefore applied the Fourteenth rather than the Eighth Amendment to juvenile conditions cases. [193] This approach is further supported by the numerous Supreme Court cases applying a Fourteenth Amendment standard generally to challenged practices and policies of the juvenile justice system, in recognition of the system's uniquely rehabilitative and non-criminal nature. [194]

***312** Under both the Fourteenth and the Eighth Amendment analysis, however, there remains a significant lack of clarity on precisely how juvenile conditions should be assessed. For example, the Ninth Circuit has established that "the more protective fourteenth amendment standard" applies to juvenile justice cases, at least when the goal of the jurisdiction's juvenile justice system is rehabilitative rather than punitive, [195] but the court has not spelled out the contours of that right. Without significant discussion as to the standards applied, the Seventh Circuit held in Nelson v. Heyne that juveniles' Eighth Amendment right to be free from cruel and unusual punishment was violated when they were beaten and involuntarily administered drugs, but that their Fourteenth Amendment due process right was violated by the failure to provide them with treatment. [196] In contrast, the First Circuit has held that juveniles have no right to rehabilitation, but that their conditions of confinement must be analyzed under the Fourteenth Amendment. [197]

Whether under a Fourteenth or Eighth Amendment analysis, the standard for conditions cases applied to juveniles should be appropriately tailored to their developmental status, and not simply a reiteration of adult standards. To incorporate developmental status into the existing structure for conditions claims, a juvenile deliberate indifference standard would require courts to consider: (1) the seriousness of the harm in light of juvenile vulnerability; and (2) the intent of the correctional official in light of the heightened duty to protect juveniles.

***Assessing the Seriousness of the Harm in Juvenile Cases***

In establishing a constitutional violation under the Eighth or Fourteenth Amendment, courts must initially consider the seriousness of the harm. [198] In light of adolescent vulnerability, conditions may rise to this level in the juvenile context even when they do not for adults. As described in Section I of this Article, and recognized by the Supreme Court in both Roper and Graham, juveniles are both more vulnerable to pressures and more malleable than adults. This means that the effects of a harmful condition may take a unique toll on a juvenile, even when the same punishment is constitutional for an adult. For example, such practices as isolation or strip-searching may inflict heightened trauma on youth. Similarly, the failure to provide education and rehabilitation may be particularly harmful to a juvenile by depriving him or her of the opportunity for age-appropriate growth and development. Indeed, even before Roper, courts recognized that certain institutional conditions might be unconstitutional as applied to a juvenile even when they fall within constitutional bounds for an adult. [199]

***313** Since Roper and Graham, this argument carries even more weight. Recently, the United States District Court for New Jersey explicitly recognized that juvenile status may impact the protections owed to incarcerated individuals, and that isolation of youth may be unconstitutional even if it would be constitutional for adults. [200] This recognition of the unique harm to youth is consistent with developmental research on adolescent vulnerability, specifically in the areas of emotion regulation and independent functioning. [201] Harsh penalties imposed on juveniles are likely to evoke a range of negative emotions (e.g., anger, fear, distress) that adolescents cannot effectively regulate, thereby leading to psychological distress and potentially psychopathology. [202] Further, this type of treatment could undermine adolescents' developing sense of self by evoking a sense of powerlessness and challenging their bodily integrity. For youth who have experienced trauma, the vulnerability is even

further magnified.[203] Thus, the appropriate "seriousness of the harm" test for juveniles must account for the unique juvenile vulnerability to harm in confinement.

### *Assessing Official Intent in Juvenile Cases*

As described above, in adult cases the Court generally requires proof of the prison official's subjective intent to hold a prison condition unconstitutional: a finding that the prison official knew of or consciously disregarded an excessive risk of harm. Even under this standard, liability should attach for juveniles when it would not for adults; it is not unreasonable to expect that juvenile corrections staff understand--or are at least aware of--juveniles' unique vulnerability to harm and that they act accordingly.[204] Ultimately, however, the standard itself is inapt for juvenile offenders--an objective standard that imposes liability when the prison official disregards an obvious risk of harm better responds to adolescent developmental immaturity.[205] This heightened standard, whether the objective test or the heightened subjective test, is supported by the Supreme Court's acknowledgement in Graham and Roper that the Constitution must protect youth from harm even when it would not do so for adults.[206]

This approach is further supported by the literature on developmental immaturity. Adolescents' decision-making deficits, impulsivity, and overall vulnerability make them dependent on adults for rational decisions regarding their welfare. More specifically, adolescents' ***314** limited independent functioning and weak self-concept suggests that they may be less able to identify risks to their development and to protect themselves.[207] A heightened standard would appropriately protect youth from the risk of treatment that could harm youth and interfere with their development into healthy adults. For youth in the juvenile rather than criminal justice system, the explicit purposes of treatment and rehabilitation further support the heightened standard. To hold staff liable only if they consciously disregard a risk undermines the requirement implicit in a rehabilitative system that staff proactively engage youth.

## III. INTERNATIONAL LAW SUPPORTS DISTINCTIVE TREATMENT OF JUVENILE OFFENDERS

The United States Supreme Court has long recognized that international law informs the domestic law of the United States.[208] Specifically, the Supreme Court has consistently looked to international law and practice to interpret the broad language of the Eighth Amendment's cruel and unusual punishment clause. In 1958, the Court held that the Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,"[209] and went on to analyze the opinions of the "civilized nations of the world."[210] Since then, the Court has repeatedly found relevant to its Eighth Amendment analyses the laws, practices, and opinions of the world's countries, as well as the evolving attitudes of the global community as evidenced by international treaties and conventions.[211]

Recently, the impact of international law on the Court's opinions has been particularly evident in its death penalty and juvenile sentencing cases. In holding that the death penalty was unconstitutional for those with mental disabilities, the Court noted that, "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."[212] Three years later, in Roper v. Simmons, the Court held the death penalty unconstitutional for juveniles. To support its holding, the Court cited to the United Nation's Convention on the Rights of the Child (which is ratified by every nation in the ***315** world except the United States and Somalia), other "significant international covenants,"[213] and the practices of specific countries as evidence of "the overwhelming weight of international opinion against the juvenile death penalty."[214] In the 2010 case Graham v. Florida, the Supreme Court reiterated the importance of international practice when it used the fact that the United States was the only nation to maintain the practice of sentencing juvenile offenders to life in prison for non-homicide offences as support for declaring the practice unconstitutional.[215] In 2012, the Court will consider the constitutionality of imposing a life sentence without parole on juveniles in a murder case.[216] International law and

practice overwhelmingly oppose this practice, which will prove instructive if the Court continues its recent trend of reliance on international opinion.

**A. International Law and Juvenile Sentencing**

International law provides further support for a new look at other juvenile sentencing issues. Regarding the sentencing of youth in general, the Committee on the Rights of the Child, the oversight body of the Convention on the Rights of the Child, advocates for the proportionality of any disposition "not only to the circumstances and the gravity of the offense," but also to "the age, lesser culpability, circumstances and needs of the child, as well as to the various and particularly long-term needs of the society." [217] The Committee also reemphasizes that the detention or imprisonment of juveniles should only be used as a means of last resort. [218] Many of the non-child-specific treaties also advocate for special protection of children in conflict with the law throughout the judicial process. [219]

Further, many of the international treaties that the Supreme Court has relied on in the past specifically prohibit the imposition of a sentence of life without parole on juveniles. In addition to reminding states of the child's need for "special safeguards and care including appropriate legal protection," the Convention on the Rights of the Child explicitly bans the imposition of imprisonment without possibility of release for offenses committed by those under eighteen. [220] The International Covenant on Civil and Political Rights (ICCPR), part of the International Bill of Rights, [221] recommends that governments consider age and desirability of ***316** rehabilitation when sentencing juveniles, [222] and grants special protection to minors on account of their age. [223] The Human Rights Committee, the body responsible for overseeing the implementation of the ICCPR, has stated in its observations of United States compliance with the treaty that "the committee is of the view that sentencing children to life sentence without parole is of itself not in compliance with article 24(1) [the right to a child's measures of protection] of the Covenant." [224] International practice is equally disapproving of the practice. The United States is the only nation in the world that currently imposes life without parole sentences on juveniles. [225] Even in countries where the laws allowing the practice remain on the books, these sentences are not imposed. [226]

The United States also has a legal obligation to enforce international treaties it has ratified that forbid harsh sentencing practices for youth. The Supremacy Clause of the United States Constitution declares that treaties are "the supreme Law of the Land," [227] and by signing international treaties, all courts of the United States are bound to give effect to them. [228] Even if an international agreement is not self-executing and does not have the effect of law without necessary implementation, [229] the United States is still bound by international law to respect the "object and purpose" [230] of the treaty, pending implementation. Thus, the United States is required to respect the provisions of treaties it has signed, and their enforcement bodies' interpretations of the treaties, with respect to life without parole sentences for juveniles. The United States has ratified and must therefore honor the International Convention on Civil and Political Rights (ICCPR), [231] the Convention on the Elimination of all Forms of Racial Discrimination (CERD), [232] ***317** and the Convention Against Torture (CAT), [233] all of which support a prohibition against the use of harsh sentences for juveniles.

The treaties' oversight bodies issue periodic reports on the United States' compliance with the articles of the treaties. Like the Human Rights Committee, the Committee on the Elimination of All Forms of Racial Discrimination has stated that the persistence of the sentencing of juveniles to life without parole is incompatible with the United States' obligations under the CERD in light of the sentencing practice's disproportionate impact on youth of color. [234] The Committee Against Torture also stated that life imprisonment of children "could constitute cruel, inhuman or degrading treatment or punishment." [235]

International law and practice support sentences for juveniles that are proportional and mindful of the child's need for special safeguards and care and explicitly prohibit the imposition of life without parole sentences for juveniles.

**B. International Law and Juvenile Conditions**

Just as the Supreme Court has turned to international law in its decisions on questions of sentencing, it can, and should, do so for questions of conditions of confinement. International law underscores the unique protections confined juveniles need under the law. When contemplating treatment or punishment, Article 37 of the Convention of the Rights of the Child requires that every child deprived of his or her liberty "be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age." [236] Moreover, international treaties and conventions make clear that children must be ***318** treated differently than adults: the law specifically addresses children, [237] promotes the best interest of children, [238] and emphasizes the need to treat confined children differently from adults due to their age and future potential for rehabilitation and reintegration into society. [239] Notably, the United Nations Rules for Juveniles Deprived of their Liberty (JDLs), passed by resolution of the U.N. General Assembly in 1990, establish detailed "minimum standards" [240] for the protection of confined juveniles "with a view to counteracting the detrimental effects of all types of detention and to fostering integration in society." [241] These standards provide a good conceptual framework through which to view the special requirements necessary for juveniles in detention. International law standards also provide insights into some of the specific conditions youth face in confinement.

International law establishes that youth should be separated from adults and should be housed in conditions that best meet their needs. Article 37 of the Convention on the Rights of the Child (CRC) explicitly requires that "every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so," an obligation echoed throughout child-specific human rights instruments. [242] General Comment Number 10, issued by the Convention on the Rights of the Child's oversight body, the Committee on the Rights of the Child, further elaborated on the language of the Convention, stating that children who turn eighteen do not have to be immediately moved to an adult facility and should be allowed to remain in a children's facility if it serves the child's best interest. [243] Moreover, the JDLs provide a general guideline that reemphasizes the protection of children: "[t]he principle criterion for the separation of the different categories of juveniles . . . should be the provision of the best type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being." [244]

In contemplating the environment of the confined juvenile, international human rights conventions focus on the rehabilitative and developmental aims of detention. For example, the Committee on the Rights of the Child requires that children are provided with "a physical environment and accommodations which are in keeping with the rehabilitative aims of residential placement." [245] The Convention on the Rights of the Child reaffirms the child's right to privacy for children who are alleged or accused to have infringed the penal law. [246] The JDLs stress that ***319** the "possession of personal effects is a basic element of the right to privacy and [is] essential to the psychological well-being of the juvenile." [247]

International law also requires medical and mental health treatment for juveniles to support their reintegration into society. In addition to general provisions that guarantee access to adequate medical care for juveniles upon admission to facilities and throughout their stay, [248] the JDLs specify that juveniles must receive both preventative and remedial care, as well as the medical services required to "detect and . . . treat any physical or mental illness, substance abuse or other condition that may hinder the integration of the juvenile into society." [249]

The importance of family contact for confined juveniles is also explicitly recognized in international law. Article 37 establishes the child's "right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances." [250] The Committee on the Rights of the Child specifies "[e]xceptional circumstances that may limit this contact [with the family] should be clearly described in the law and not be left to the discretion of the competent authorities." [251] The JDLs require that detention facilities for juveniles be decentralized and be an appropriate size to facilitate access and contact between the juveniles and their families, at least once a week, but not less than once a month, because communication is "an integral part of the right to fair and humane treatment and is essential to the preparation of juveniles for their return to society." [252]

The Committee on the Rights of the Child is very specific on the use of restraints or force for juveniles. Restraint or force may only be used when the child poses an imminent threat of injury to him or herself or others, [253] when all other means have been exhausted, [254] and under close and direct control of a medical and/or psychological professional. [255] Restraints or force may never be used as a means of punishment. [256] The Committee on the Rights of the Child specifies that corporal punishment, placement in a dark cell, closed or solitary confinement, or "any other punishment that may compromise the physical or mental health or well-being of the child concerned" are strictly forbidden under Article 37. [257]

One of the few standards specifically addressing safety issues for staff states that "[t]he carrying and use of weapons by personnel should be prohibited in any facility where juveniles are detained." [258] This area is less developed in child-specific international human rights instruments, ***320** which tend to focus on the interests of the child, but an underlying theme seems to be that the best interests of the confined child carry particular weight. When many children are housed together, their interests should be balanced against the best interests of other youth.For example, children should be kept in a juvenile facility past the age of eighteen if such a decision is "not contrary to the best interests of the younger children in the facility." [259] Likewise, the use of restraint or force on a juvenile is only justified when the child poses an imminent threat to him or herself or others. [260] Consideration of the child's inherent dignity and the special needs of his or her age are always relevant. [261]

Human rights instruments place great importance on ensuring that institutional staff is aware of the special condition of juveniles. They require staff to know about relevant national and international legal standards related to the juvenile's confinement, including the causes of juvenile delinquency, adolescent development information, and strategies for dealing with children in conflict without having to resort to judicial proceedings. [262] The JDLs specify that personnel should attend "courses of in-service training, to be organized at suitable intervals throughout their career." [263] The Beijing Rules also emphasize that there is a "necessary professional competence" when "dealing with juvenile cases," which should be established and maintained. [264]

Human rights instruments extend beyond protecting children from harm; they also address the child's rehabilitative needs. Indeed, they recognize education for every child of compulsory school age as critical to the child's development and eventual return to society after release. [265] Education should be suited to the individual child's needs and abilities, and he or she should also be given vocational training in occupations that are likely to prepare him or her for future employment. [266] The JDLs go further by stating that education for children in detention should be integrated with the education system of the country so that reintegration is simpler after release. [267] The JDLs also specify that juveniles should be given the opportunity to perform remunerated labor. [268] Additionally, juveniles with learning difficulties have a right to a special education. [269] The instruments also specify that the juveniles have the right to a suitable amount of time for exercise and appropriate recreation. [270]

International human rights standards provide clear support for a unique Eighth Amendment juvenile standard in conditions of confinement cases. By highlighting the need for reintegration, rehabilitation, and the support of human dignity, and by

articulating juveniles' ***321** unique needs as they relate to conditions of confinement, international law clarifies the need for a more protective Eighth Amendment jurisprudence for juveniles.

## IV. CONCLUSION

Kids are different. As Justice Sotomayor wrote in J.D.B v North Carolina, a child's age "is a fact 'that generates commonsense conclusions about behavior and perception.'" [271] Noting the long history of legal distinctions between children and adults, Justice Sotomayor further observed: "Like this Court's own generalizations, the legal disqualifications placed on children as a class . . . exhibit the settled understanding that the differentiating characteristics of youth are universal." [272] How we sentence and punish children must yield to these differences. And while the Court has historically taken note of juvenile status in a broad array of civil and criminal contexts, [273] the Court's most recent decisions in Roper, Graham, and J.D.B. chart a course for a more pronounced doctrinal shift in our analysis of children's rights under the Constitution. The most severe sentences for children have been struck down, but the banning of these sentences raises larger questions about the constitutionality of any sentencing scheme that fails to take account of the commonsense differences between children and adults--differences confirmed by research. "The literature confirms what experience bears out." [274]

These differences also cannot be ignored when evaluating the conditions under which children are incarcerated. While the Constitution may tolerate the solitary confinement of adult inmates, for example, the isolation of children for weeks or months at a time recalls a Dickensian nightmare, which offends our evolving standard of decency and human dignity. Children's unique needs for educational services, physical and behavioral health services, and appropriate interactions with nurturing caregivers to ensure their healthy development raise special challenges--but also place special obligations on those responsible for their confinement. As recent Supreme Court case law has shown, children warrant unique protections under the Constitution. Both the sentences they receive, and the conditions under which they serve those sentences, must be tailored to their developmental status.

Footnotes

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1 The Juvenile Court Act of 1899, 1899 Ill. Laws 131. See also Dean John Champion, The Juvenile Justice System, Delinquency, Processing, and the Law 13 (5th ed. 1992). Although the first Juvenile Court Act was passed in Illinois, many commentators credit Judge Ben Lindsey of the Denver Juvenile Court for his visionary approach to juvenile justice and for having the greatest influence

on the development of the early juvenile court in this country. See H. Ted Rubin, Juvenile Justice, Policies, Practices and Programs 1-1 (2003).

2 Franklin E. Zimring, American Juvenile Justice 5-8 (2005); see also Catherine J. Ross, Disposition In A Discretionary Regime: Punishment And Rehabilitation In The Juvenile Justice System, 36 B.C. L. Rev. 1037, 1038 (1995) (explaining how discretion preserved flexibility in juvenile justice jurisprudence).

3 Juvenile Justice History, Cent er on Juvenile and Criminal Justice, http://www.cjcj.org/juvenile/justice/juvenile/justice/history/0 (last visited Feb. 6, 2012). "In 1899, the first juvenile court was finally established in Cook County, Illinois, and by 1925, all but two states had followed." Id. See also Howard N. Snyder & Melissa Sickmund, Juvenile Offenders and Victims: 1999 National Report 86 (1999), available at https:// www.ncjrs.gov/html/ojjdp/nationalreport99/chapter4.pdf (explaining that by 1925, all but two states had established a juvenile court).

4 Ross, supra note 2, at 1039.

5 Laurence Steinberg & Robert G. Schwartz, Developmental Psychology Goes to Court, in Youth On Trial: A Developmental Perspective on Juvenile Justice 9-31 (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter Youth on Trial].

6 Gallegos v. Colorado, 370 U.S. 49 (1962) (holding that the confession obtained from a fourteen-year-old boy, who had been held for five days without seeing his parents, a lawyer, or any other adult friend, was obtained in violation of due process); Haley v. Ohio, 332 U.S. 596 (1948) (holding that a murder confession by a fifteen-year-old boy after five hours of interrogation, starting at midnight, by police officers working in relays without advising him of his rights, and without the advice of friends, family or counsel, should have been excluded as involuntary in violation of due process). In Gallegos, the Court observed that an adolescent "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions.... Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had." Gallegos, 370 U.S. at 54. The Court also explained, "Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them." Haley, 332 U.S. at 601.

7 383 U.S. 541 (1966).

8 Id. at 561-62 ("[A]n opportunity for a hearing which may be informal, must be given the child prior to entry of a waiver order.... [T]he hearing must measure up to the essentials of due process and fair treatment.").

9 Id. at 550 (recounting that the juvenile defendant in Kent was originally sentenced to thirty to ninety years in prison).

10 Ross, supra note 2, at 1039 ("Beginning in 1966, the Supreme Court attempted to define a balance between the promise of the rehabilitative ideal, which appeared to demand and justify judicial discretion, and the claim for sufficient procedural protections under the Constitution to ensure fundamental fairness.").

11 387 U.S. 1 (1967).

12 Id. at 27-29.

13 In re Winship, 397 U.S. 358, 368 (1970).

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

15 403 U.S. 528, 545 (1971).

16 Ross, supra note 2, at 1040-41.
The juvenile courts that have resulted in most states are hybrids that reflect the series of compromises underlying their unique structure. They exist in a twilight, neither wholly bound by the constitutional norms of criminal procedure nor convincingly 'civil' and rehabilitative as envisioned by their founders. The post-Gault juvenile court is characterized by unresolved conflicts between the urge to allow judicial discretion where it serves the purposes of rehabilitation and demands for procedural protections; between the rehabilitative goal and societal demands for retribution; and between idealistic hopes and realistic disappointments.

Id.

17 See, e.g., The Juvenile Act, 42 Pa Const. Stat. §§ 6301-6365 (2008), available at http://www.pajuvdefenders.org/file/Juvenile_Act_2008.pdf.

18 Alfred Blumstein, Youth, Guns, and Violent Crime 39, available at http://futureofchildren.org/futureofchildren/publications/docs/12_02_03.pdf.
The increase in violence in the United States during the late 1980s and early 1990s was due primarily to an increase in violent acts committed by people under age 20. Similarly, dramatic declines in homicide and robbery in recent years are attributable primarily to a decline in youth violence.
The increase in youth homicide was predominantly due to a significant increase in the use of handguns, which converted ordinary teenage fights and other violent encounters into homicides.
Several other interrelated factors also fueled the rise in youth violence, including the rise of illegal drug markets, particularly for crack cocaine, the recruitment of youth into those markets, and an increase in gun carrying among young people.
Id.

19 Id.

20 John Dilulio is largely credited with creating the "super-predator" myth. Elizabeth Becker, As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets, N.Y. Times, Feb. 9, 2001, http://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html? pagewanted=all&src=pm.
Based on all that we have witnessed, researched and heard from people who are close to the action, ... here is what we believe: America is now home to thickening ranks of juvenile 'super-predators' - radically impulsive, brutally remorseless youngsters, including ever more pre-teenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs and create serious communal disorders.
Dilulio subsequently retracted this 'belief.' Id. See also William J. Bennett et al., Body Count: Moral Poverty and How to Win America's War Against Crime and Drugs 27 (1996); Lara A. Bazelon, Exploding the Superpredator Myth: Why Infancy is the Preadolescent's Best Defense in Juvenile Court, N.Y.U. L. Rev. 159 (2000) (arguing that rejections to the infancy defense are unfounded and unsupported by empirical data).

21 Youth On Trial, supra note 5, at 13-14; see also Patricia Torbet et al., Office of Juvenile Justice and Delinquency Prevention, State Responses To Serious and Violent Juvenile Crime xi (1996), available at https:// www.ncjrs.gov/pdffiles/statresp.pdf (reporting on the five major changes in the way that serious and violent juvenile offenders are being handled in the criminal justice system).

22 Graham v Florida, 130 S. Ct. 2011, 2028-30 (2010).

23 See Paul Holland & Wallace J. Mlyniec, Whatever Happened To The Right To Treatment?: The Modern Quest For A Historical Promise, 68 Temp. L. Rev. 1791, 1794 (1995).
While some of the most egregious abuses described in the pleadings and opinions of the 1970s have abated, many training schools remain ill-equipped to provide children living in them with the education, behavior modification, counseling, substance abuse treatment, and the mental and physical health care they need. The laws of most states still promise such care. In recent years, however, a wave of legislation increasing the severity with which children who break the law are treated has compromised that promise. Legislatures have introduced punishment into juvenile codes, authorized mandatory minimum commitments in the juvenile justice system, and expanded the possibilities for prosecuting children in criminal courts. Some juvenile courts now have the power to impose a criminal sentence as part of a juvenile disposition, with the criminal sentence stayed--either temporarily or permanently--depending upon the youth's performance during the course of the juvenile disposition.
Id.

24 At the time of the Supreme Court's decision in Roper v Simmons, 543 U.S. 551 (2005), in which the Court struck the juvenile death penalty under the Eighth Amendment, seventy-two children were being held on death row in the United States. Also, nineteen states allowed executions of people under age eighteen: Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho,

Kentucky, Louisiana, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, Pennsylvania, South Carolina, Utah, Texas and Virginia. Roper, 543 U.S. at 564.

25 The MacArthur Foundation formally convened the Research Network in 1995. Youth On Trial, supra note 5, at 3-4. The Foundation saw a need for "a scientific initiative that would address the implications of adolescent development for the construction of rational juvenile justice policy and law." Id. at 4. Led by distinguished Temple University Psychology Professor Laurence Steinberg, the Research Network brought a developmental lens to issues such as competence to stand trial, culpability, and the impact of different interventions. Id. at 4-5.

26 See generally Youth On Trial, supra note 5.

27 See generally Thomas Grisso et al., Juveniles' Competence to Stand Trial: A Comparison of Adolescents and Adults' Capacities as Trial Defendants, 27 L. & Hum. Behav. 333 (2003) (studying whether youths can pass the standard competency tests used in the criminal justice system); Laurence Steinberg & Elizabeth Cauffman, Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making, 20 L. & Hum. Behav. 249 (1996) (analyzing research to explore what constitutes psychosocial maturity); Laurence Steinberg & Elizabeth Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003) [hereinafter Steinberg & Scott, Less Guilty by Reason of Adolescence] (explaining that the lack of psychosocial maturity in juveniles makes them especially vulnerable to coercion and outside influences); Elizabeth S. Scott et al., Evaluating Adolescent Decision Making in Legal Contexts, 19 L. & Hum. Behav. 221 (1995) (explaining factors linked to teenage development that may affect decision making capabilities in adolescents).

28 543 U.S. 551 (2005).

29 536 U.S. 304 (2002).

30 492 U.S. 302 (1989).

31 Atkins, 536 U.S. at 318-20.

32 Id. at 321.

33 Roper, 543 U.S. at 568-70.

34 Id. at 569-70. See generally Erik H. Erikson, Identity: Youth and Crisis (1968) (describing and defining the notion of an identity crisis within the context of youth identities); Jeffrey Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Rev. 339 (1992) (explaining the underlying factors behind reckless behavior in adolescents); Steinberg & Scott, Less Guilty by Reason of Adolescence, supra note 27, at 1013 (exploring the research and theories behind concerns raised by the criminal culpability of children).

35 Stanford v. Kentucky, 492 U.S. 361 (1989).

36 Id. One year prior to Stanford, the Court handed down Thompson v. Oklahoma, 487 U.S. 815, 818-38 (1988), in which a plurality (including Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun) determined that "standards of decency" did not permit the execution of an individual who commits a crime while under the age of sixteen. Id. at 830.

37 130 S. Ct. 2011 (2010).

38 Id. at 2026 ("No recent data provide reason to reconsider the Court's observations in Roper about the nature of juveniles.").

39 131 S. Ct. 2394 (2011). In J.D.B. v North Carolina, the Court had the opportunity to review its concerns underlying its decision in Miranda v Arizona, 384 U.S. 436 (1966), in the context of the interrogation of a thirteen-year-old middle school student who was questioned in a closed-door school conference room by members of law enforcement and school administrators. Id. at 2399. In J.D.B., the Supreme Court ruled that a child's age was relevant to determining when a suspect has been taken into custody and is consequently entitled to a Miranda warning. Id. at 2046. Writing for the majority, Justice Sotomayor stated, "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its

inclusion in the custody analysis is consistent with the objective nature of that test." Id. Justice Sotomayor effectively characterized youth as an unambiguous fact that "generates commonsense conclusions about behavior and perception," id. at 2403, and said that such "conclusions" are "self-evident to anyone who was once a child himself, including any police officer or judge." Id.

40 Id. at 2406. Miranda v Arizona, 384 U.S. 436, 478-79 (1966), is the Supreme Court's seminal decision adopting a set of prophylactic warnings to be given to suspects prior to custodial interrogation by law enforcement. Specifically, the Miranda Court instructed that, prior to questioning, a suspect "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." Id. The Miranda warnings were adopted to protect the Fifth Amendment privilege against self-incrimination from the "inherently compelling pressures" of questioning by the police. Id. at 467. While any police interview has "coercive aspects to it," Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam), interviews which take place in police custody have a "heighte[ned] risk' that statements are not the product of the suspect's free choice." J.D.B. v North Carolina, 131 S. Ct 2394, 2401 (2011) (citing Dickerson v. United States, 530 U.S. 428, 435 (2000)). Miranda expressly recognized that custodial interrogation in an "unfamiliar ... police dominated atmosphere," Miranda, 384 U.S. at 445, creates psychological pressures "which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." Miranda, 384 U.S. at 467.

41 In its October 2011 Term, the Supreme Court granted certiorari in two cases challenging the imposition of a sentence of life without parole on juvenile offenders convicted of homicide offenses. Jackson v. Hobbs, 132 S. Ct. 548 (2011) (No. 10-9647); Miller v. Alabama, 132 S. Ct. 548 (2011) (No. 10-9646). Both Jackson and Miller were fourteen-years-old at the time of their offenses. Jackson v. Norris, No. 09-145, 2011 WL 478600, at *7 (Ark. 2011) (Danielson, J., dissenting); Miller v. State, 63 So. 3d 676, 682-83 (Ala. Crim. App. 2010). Jackson, whose case arose in Arkansas, was convicted of felony murder following the killing of a video store clerk by one of Jackson's co-defendants during the course of an attempted robbery. Jackson v. State, 359 Ark. 87, 89 (Ark. 2004). Miller, whose case arose in Alabama, was convicted of first degree murder. Miller, 63 So. 3d at 682. Both boys received mandatory life without parole sentences upon conviction under the applicable state laws, and the Alabama and Arkansas appellate courts rejected Petitioners' challenges to their sentences under the Eighth Amendment. See Miller v. State, 63 So. 3d 676 (Ala. Crim. App. 2010); Jackson v. Norris, No. 09-145, 2011 WL 478600 (Ark. 2011). In their challenges before the U.S. Supreme Court, Petitioners argue that the sentences are prohibited under Graham v. Florida. See Petition for Writ of Certiorari, Jackson v. Norris, 2011 Ark. 49 (Ark. 2011) (No. 10-9647), 2011 WL 5322575; Petition for Writ of Certiorari, Miller v. Alabama, 63 So. 3d 676 (Ala. Crim. App. 2010) (No. 10-9646), 2011 WL 5322568. In addition to challenging the sentences outright, Petitioners also assert that their young age at the time of the offense, as well as the mandatory nature of the sentence, compounds the constitutional infirmity of the sentence. See id. The cases will be argued in March 2012; a decision is expected by the end of the Court's term. Supreme Court of the United States October 2011 Term, Supreme Court of the United States (last updated Feb. 12, 2012), http://www.supremecourt.gov/oral_arguments/argument_ calendars/MonthlyArgumentViewer.aspx?Filename=MonthlyArgumentCalMar2012.html.

42 See Torbet et al., supra note 21, at xv (demonstrating that state legislatures toughened laws "targeting serious and violent juvenile offenders").

43 See Bennett et al., supra note 20, at 27 (arguing that youth labeled "superpredators" are capable of equally heinous crimes as adults).

44 Trop v. Dulles, 356 U.S. 86, 100-101 (1958).

45 See generally Kathleen Kemp et al., Characteristics of Developmental Immaturity: A Cross-Disciplinary Survey of Psychologists (Aug. 2010) (unpublished Ph.D. dissertation, Drexel University) (on file with Hagerty Library, Drexel University) (arguing that developmental immature contains the above characteristics).

46 Id. at viii.

47 Id. at 16.

48 See Dustin Albert & Laurence Steinberg, Judgment and Decision Making in Adolescence, 21 J. Res. on Adolescence 211, 217 (2011) (explaining that "socioemotional stimuli" has an impact on adolescent decision-making).

49 Elizabeth Cauffman & Laurence Steinberg, (Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults, 18 Behav. Sci. & L. 741, 744-745 (2000).

50 Id. at 752-53.

51 See Albert & Steinberg, supra note 48, at 216-17 (defining anticipated emotional outcomes, anticipatory emotions, and incidental emotions).

52 Id. at 217.

53 Id. at 217.

54 Id.

55 Steinberg & Scott, Less Guilty by Reason of Adolescence, supra note 27, at 1013.

56 Laurence Steinberg, A Dual Systems Model of Adolescent Risk-Taking, 52 Developmental Psychobiology 216, 217 (2010).

57 Id. at 219-20.

58 Elizabeth Cauffman et al., Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task, 46 Dev. Psychol. 193, 193 (2010).

59 Matthew S. Stanford et al., Fifty Years of the Barratt Impulsiveness Scale: An Update and Review, 47 Personality & Individual Differences 385, 385 (2009).

60 Cauffman & Steinberg, supra note 49, at 745.

61 Steinberg, supra note 56, at 220-21.

62 Laurence Steinberg et al., Age Differences in Future Orientation and Delay Discounting, 80 Child. Dev. 28, 29-30 (2009).

63 Id. at 28, 36.

64 Id. at 34-35.

65 See, e.g., Graham v. Florida, 130 S. Ct. 2011, 2034 (2010) (abolishing life without parole for juveniles convicted of non-homicide offenses); Roper v. Simmons, 543 U.S. 551, 575 (2005) (abolishing the death penalty for juvenile offenders); Richard E. Redding, Children's Competence to Provide Informed Consent for Mental Health Treatment, 50 Wash. & Lee L. Rev. 695, 697 (1993) (noting the traditional view that children cannot consent to treatment); Naomi E. Sevin Goldstein et al., Juvenile Offenders' Miranda Rights Comprehension and Self-Reported Likelihood of Offering False Confessions, 10 Assessment 359, 359 (2003) (discussing juveniles' Miranda comprehension deficits and vulnerability during interrogations).

66 Kemp et al., supra note 45, at 16.

67 Id. at 16.

68 Steinberg & Scott, Less Guilty by Reason of Adolescence, supra note 27, at 1012.

69 Thomas J. Berndt, Developmental Changes in Conformity to Peers and Parents, 15 Dev. Psychol. 608, 615 (1979).

70 Margo Gardner & Laurence Steinberg, Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study, 41 Dev. Psychol. 625, 629-30 (2005).

71 Lila Ghent Braine et al., Conflicts with Authority: Children's Feelings, Actions, and Justifications, 27 Dev. Psychol. 829, 834 (1991).

72 Id. at 835.

73 Kemp et al., supra note 45, at 28.

74 Liliana J. Lengua, The Contribution of Emotionality and Self-Regulation to the Understanding of Children's Response to Multiple Risk, 73 Child Dev. 144, 156 (2002).

75 Angeline Maughan & Dante Cicchetti, Impact of Child Maltreatment and Interadult Violence on Children's Emotion Regulation Abilities and Socioemotional Adjustment, 73 Child Dev. 1525, 1534 (2002).

76 Angeline Maughan et al., Early-occurring Maternal Depression and Maternal Negativity in Predicting Young Children's Emotion Regulation and Socioemotional Difficulties, 35 J. Abnormal Child Psychol. 685, 695 (2007).

77 Maughan & Cicchetti, supra note 75, at 1534-35.

78 Id. at 1540.

79 Jungmeen Kim & Dante Cicchetti, Longitudinal Pathways Linking Child Maltreatment, Emotion Regulation, Peer Relations, and Psychopathology, 51 J. Child Psychol. & Psychiatry 706, 712-13 (2010).

80 See Naomi E. Sevin Goldstein et al., Mental Health Disorders: The Neglected Risk Factor in Juvenile Delinquency, in Juvenile Delinquency: Prevention, Assessment and Intervention 85, 85 (Kirk Heilbrun, Naomi E. Sevin Goldstein, & Richard E. Redding eds., 2005).

81 Elizabeth S. Scott & Laurence Steinberg, Rethinking Juvenile Justice 31 (2008).

82 See, e.g., Steinberg, supra note 56, at 220-21.

83 Steinberg & Scott, Less Guilty by Reason of Adolescence, supra note 27, at 1011.

84 Terrie E. Moffitt, Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy, 100 Psychol. Rev. 674, 675 (1993).

85 Peter W. Greenwood, Responding to Juvenile Crime: Lessons Learned, 6 Future of Child. 75, 77-78 (1996).

86 Edward P. Mulvey et al., Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders, 22 Dev. Psychol. 453, 462 (2010).

87 Steinberg & Scott, Less Guilty by Reason of Adolescence, supra note 27, at 1015.

88 See Peter W. Greenwood, Changing Lives: Delinquency Prevention as Crime-Control Policy 70 (2006).

89 See Charles M. Borduin et al., Multisystemic Treatment of Serious Juvenile Offenders: Long-Term Prevention of Criminality and Violence, 63 J. Consulting & Clinical Psychol. 569, 573 (1995) (describing the effectiveness of MST in reducing recidivism rates even for serious offenders with histories of repeat felonies); J. Mark Eddy et al., The Prevention of Violent Behavior by Chronic and Serious Male Juvenile Offenders: A 2-Year Follow-up of a Randomized Clinical Trial, 12 J. Emotional & Behav. Disorders 2, 2-7 (2004) (describing reduced recidivism rates for violent and chronically offending youth who participated in MTFC); W. Jeff Hinton et al., Juvenile Justice: A System Divided, 18 Crim. Just. Pol'y Rev. 466, 475 (2007) (describing FFT's success with drug-abusing youth, violent youth, and serious juvenile offenders); Carol M. Schaeffer & Charles M. Borduin, Long-Term Follow-Up to a Randomized Clinical Trial of Multisystemic Therapy With Serious and Violent Juvenile Offenders, 73 J. Consulting & Clinical Psychol. 445, 449-452 (2005) (finding that the benefits of MST often extend into adulthood).

90 See Abigail A. Baird et al., Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents, 38 J. Am. Acad. Child & Adolescent Psychiatry 195, 197 (1999); Nitin Gogtay et al., Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood, 101 Proceedings Nat'l Acad. Sci. 8174, 8174 (2004).

91 Steinberg, supra note 56, at 217.

92 K. Rubia et al., Functional Frontalisation with Age: Mapping Neurodevelopmental Trajectories with fMRI, 24 Neuroscience & Biobehav. Revs. 13, 18 (2000).

93 Id.

94 Steinberg, supra note 56, at 217.

95 Rubia, supra note 92, at 18.

96 Albert & Steinberg, supra note 48, at 217.

97 Id. at 219.

98 See Steinberg, supra note 56, at 217.

99 Id.

100 Graham v. Florida, 130 S. Ct. 2011 (2010).

101 Id. at 2034.

102 Id. at 2027-28.

103 Id. at 2026.

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

105 Graham, 130 S. Ct. at 2026 (quoting Roper, 543 U.S. at 569-70).

106 Id. (citing Roper, 543 U.S. at 570) (internal citations omitted).

107 These decisions should also be read against the backdrop of a series of Supreme Court decisions over the last several decades in which the Court has repeatedly accorded children and youth distinct treatment under the Constitution. While the Court's consideration of juvenile status is particularly pronounced in cases involving children in the juvenile and criminal justice systems, the characteristics of youth have also led to a specialized jurisprudence under the First and Fourth Amendments, as well as the due process clauses of the Fifth and Fourteenth Amendments. See, e.g., J.D.B. v. North Carolina, 131 S. Ct. 2394, 2404 (2011) (determining that age of juvenile is relevant to a Miranda v. Arizona custody analysis under the Fourth Amendment). In civil cases, as well, the Supreme Court has frequently expressed its view that children are different from adults, and has tailored its constitutional analysis accordingly. Reasoning that "during the formative years of childhood and adolescence, minors often lack ... experience, perspective, and judgment," Bellotti v. Baird, 443 U.S. 622, 635 (1979), the Court has upheld greater state restrictions on minors' exercise of reproductive choice. Id. See also Hodgson v. Minnesota, 497 U.S. 417, 444 (1990); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 520 (1990). The Court has also held that different obscenity standards apply to children than to adults under the First Amendment in Ginsburg v. New York, 390 U.S. 629, 637 (1968), and has concluded that the state has a compelling interest in protecting children from images that are "harmful to minors." Denver Area Educ. Telecomms. Consortium, Inc. v. Fed. Commc'ns Comm'n, 518 U.S. 727, 743 (1996). Similarly, the Court has upheld a state's right to restrict when a minor can work, guided by the premise that "[t]he state's authority over children's activities is broader than over the actions of adults." Prince v. Massachusetts, 321 U.S. 158, 168 (1944). The Court's school prayer cases similarly take into account the unique vulnerabilities of youth, and their particular susceptibility to coercion. See Lee v. Weisman, 505 U.S. 577, 593 (1992) (observing that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."). See also Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311-12, 317 (2000).

108 See Graham v. Florida, 130 S. Ct. 2011, 2034 (2010).

109 See Graham, 130 S. Ct. at 2023 ("The analysis begins with objective indicia of national consensus."); id. at 2026 (quoting Roper, 543 U.S. at 575) ("In accordance with the constitutional design, 'the task of interpreting the Eighth Amendment remains our responsibility."). The Court has long recognized the independent role it plays in evaluating sentences under the Eighth Amendment. In Coker v Georgia, 433 U.S. 584, 597 (1977), where the Court held that a sentence of death was impermissible in cases of rape, the Court specifically acknowledged that the objective evidence, while important, did not "wholly determine" the issue, "for 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 under the Eighth Amendment." See also Enmund v. Florida, 458 U.S. 782, 797 (1982).
Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not.
Id.

110 Graham, 130 S. Ct. at 2021 (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

111 In Roper, Justice Kennedy specifically noted the Court's "rule" 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 under the Eighth Amendment."' 543 U.S. at 563 (quoting Atkins v. Virginia, 536 U.S. 304, 312 (2002)) (internal quotations omitted). Justice Kennedy wrote, "Last, to the extent Stanford [v. Kentucky] was based on a rejection of the idea that this Court is required to bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders, it suffices to note that this rejection was inconsistent with prior Eighth Amendment decisions." Roper, 543 U.S. at 574 (internal citations omitted). See also Graham, 130 S. Ct. at 2036 (quoting Roper, 543 U.S. at 575) (internal citations omitted) ("Community consensus, while 'entitled to great weight,' is not itself determinative of whether a punishment is cruel and unusual.... In accordance with the constitutional design, 'the task of interpreting the Eighth Amendment remains our responsibility."). In Thompson v. Oklahoma, the Court, in exercising its independent judgment to determine whether the imposition of the death penalty on juvenile offenders under the age of sixteen was unconstitutional under the Eighth Amendment, wrote, "[W]e first ask whether the juvenile's culpability should be measured by the same standard as that of an adult, and then consider whether the application of the death penalty to this class of offenders 'measurably contributes' to the social purposes that are served by the death penalty." 487 U.S. 815, 833 (1988).

112 As the Graham court wrote, "Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for the crime should be graduated and proportioned to [the] offense." 130 S. Ct. at 2021 (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).

113 Graham, 130 S. Ct. at 2021.

114 Id. In Solem v. Helm, 463 U.S. 277 (1983), the Court invalidated under the Eighth Amendment a life without parole sentence imposed on an adult offender following his conviction for a seventh non-violent felony, passing a bad check. This followed the Court's upholding a life with parole sentence imposed on an adult offender following the defendant's third conviction for a non-violent felony in Rummel v. Estelle, 445 U.S. 263 (1980) (defendant was convicted of obtaining money under false pretenses). The Court distinguished Solem, noting that the defendant's sentence was "far more severe than the life sentence we considered in Rummel v. Estelle," since it gave the defendant no chance for parole. Solem, 463 U.S. at 297.
After Solem, adult defendants have had difficulty sustaining a challenge to the proportionality of a term of years sentence under the Eighth Amendment. In Harmelin v. Michigan, a closely divided Court upheld a life without parole sentence for possession of a large quality of cocaine. The controlling opinion wrote that the Eighth Amendment contains a "narrow proportionality principle" that "does not require strict proportionality between crime and sentence," but instead "forbids only extreme sentences that are 'grossly disproportionate' to the crime." 501 U.S. 957, 997, 1001 (1991) (Kennedy, J., concurring in part and concurring in judgment). See also Ewing v. California, 538 U.S. 11 (2003) (upholding sentence of twenty-five years to life for the theft of a few golf clubs under California's "Three Strikes Law"); Lockyer v. Andrade, 538 U.S. 63 (2003) (upholding sentence of life in prison for two convictions of petty theft under California's "Three Strikes Law.").

115 Graham, 130 S. Ct. at 2022.

116 Id. (quoting Harmelin, 501 U.S. at 1005).

117 Id. (quoting Harmelin, 501 U.S. at 1005).

118 Id. (emphasis added).

119 Id. For other instances of the Court applying this sort of categorical approach, see, e.g., Kennedy v. Louisiana, 554 U.S. 407 (2008) (applying the approach for defendants convicted of rape where the crime was not intended to and did not result in the victim's death); Roper v. Simmons, 543 U.S. 551 (2005) (applying the approach to ban the death penalty for defendants who committed crimes before turning 18); Atkins v. Virginia, 536 U.S. 304 (2002) (applying the approach to ban the death penalty for defendants who are mentally retarded).

120 Graham, 130 S. Ct. at 2028.

121 Id.

122 Id. at 2030.

123 Id. at 2028-29.

124 Id. at 2029.

125 Id. at 2029-30.

126 Id. at 2030.

127 Roper v. Simmons, 543 U.S. 551, 567 (2005) (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).

128 Id. at 571.

129 Id. at 570.

130 Id. at 574.

131 Id. at 572-73.

132 Graham, 130 S. Ct. at 2026 (quoting Roper, 543 U.S. at 573, 569; Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (plurality opinion)).

133 Roper, 543 U.S. at 573.

134 Graham, 130 S. Ct. at 2032.

135 Id. at 2030.

136 Id. at 2032.

137 Ford v. Wainwright, 477 U.S. 399, 411 (1986).

138 Graham, 130 S. Ct. at 2029.

139 The Court has held that, in adult death penalty cases, “the fundamental respect for humanity underlying the Eighth Amendment requires that the defendant be able to present any relevant mitigating evidence that could justify a lesser sentence.” Sumner v. Shuman, 483 U.S. 66, 85 (1987). The sentencer must consider all mitigating evidence and allow for individualized sentencing that hypothetically takes into account the full context in which the crime occurred. See generally Jeffrey L. Kirchmeier, Aggravating and

Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme, 6 Wm. & Mary Bill Rts. J. 345 (1998) (arguing that the present capital sentencing scheme is paradoxical insofar as it is both arbitrary and mandatory).

140 Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976).

141 Graham, 130 S. Ct. at 2046 (Thomas, J., dissenting) ("Today's decision eviscerates that distinction [between capital and noncapital sentencing]. 'Death is different' no longer.").

142 Because youth are categorically less culpable than adults, courts should always treat their youth as a mitigating factor that may justify a lesser sentence. See, e.g., Roper, 543 U.S. at 553 (finding that youths' irresponsible conduct is not as morally reprehensible as that of an adult and that juveniles' own vulnerability and comparative lack of control over their immediate surroundings mean that they have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment). Other mitigating factors that courts typically consider may also be affected by a youth's age, immaturity, and development.

143 345 U.S. 528, 536 (1953).

144 Id. at 536 (Frankfurter, J., concurring).

145 Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

146 For a thoughtful discussion of the history of juvenile conditions cases and a more detailed consideration of how the courts protected a right to treatment, see Holland & Mlyniec, supra note 23.

147 See, e.g., Lollis v. N.Y. State Dep't of Soc. Servs., 322 F. Supp. 473, 482 (1970) (relying heavily on expert testimony that isolation would be uniquely damaging to an adolescent); see also Nelson v. Heyne, 491 F.2d 352, 357 (7th Cir. 1974).

148 Holland & Mlyniec, supra note 23, at 1801-1812.

149 Richard A. Mendel, The Annie E. Casey Found., No Place for Kids: The Case for Reducing Juvenile Incarceration 5-7 (2011).

150 Id.

151 Id. at 5.

152 Emily Ray, Comment, Waiver, Certification and Transfer of Juveniles to Adult Court: Limiting Juvenile Transfers in Texas, 13 Scholar 317, 320(2010).

153 Margaret Noonan, U.S. Dep't of Justice, Mortality in Local Jails, 2000-2007 9 (2010).

154 Terry F. Hickey & Camilla Roberson, Pretrial Detention of Youth Prosecuted as Adults, 44-Dec Md. B.J. 44, 48(2011).

155 Margaret Beyer, Juvenile Detention to "Protect" Children from Neglect, 3 D.C. L. Rev. 373, 373(1995); see also N.G. v. Connecticut, 382 F.3d 225 (2d Cir. 2004) (noting that a strip search would be uniquely damaging to a juvenile, but upholding some of the strip searches at issue). In her dissenting opinion, then Judge Sotomayor underscored the harm from such a search that would be "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, [and] repulsive." Id. at 239 (Sotomayor, J., dissenting in part) (quoting Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir. 1983)).

156 Weems v. United States, 217 U.S. 349, 382 (1910).

157 Id. at 364.

158 Id. at 382.

159 Trop v. Dulles, 356 U.S. 86, 103 (1958) (plurality opinion).

160 Furman v. Georgia, 408 U.S. 238, 283 (1972) (Brennan, J., concurring).

161 Roper v. Simmons, 543 U.S. 551, 575 (2005).

162 Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

163 Estelle v. Gamble, 429 U.S. 97 (1976).

164 Id. at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 182-83 (1976) (plurality opinion)).

165 Id. at 103.

166 Id. at 106.

167 Rhodes v. Chapman, 452 U.S. 337, 347-48 (1981).

168 Id. at 348 (emphasis added).

169 Id. at 349.

170 Id. at 348.

171 Holland & Mlyniec, supra note 23, at 1806.

172 Rhodes, 452 U.S. at 347.

173 Wilson v. Seiter, 501 U.S. 294, 297 (1991).

174 Farmer v. Brennan, 511 U.S. 825, 829 (1994).

175 Id. at 838.

176 Id. at 834 (quoting Rhodes, 452 U.S. at 347).

177 Id. at 835.

178 Id. at 837.

179 Christine Rebman, Comment, The Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences, 49 DePaul L. Rev. 567, 602 (1999). See also Higgins v. Corr. Med. Servs. of Ill., 178 F.3d 508 (7th Cir. 1999) (finding that medical staff did not "consciously disregard" the risk of harm when they failed to treat Plaintiff's dislocated shoulder--even though he had informed them that the shoulder had "popped out of joint" and a nurse testified that it was hanging "forward and lower than right"). The fact that the Plaintiff had not seemed to be in great pain convinced the court that the medical staff did not consciously disregard the risk.

180 Holland & Mlyniec, supra note 23, at 1807.

181 Substantive Rights Retained by Prisoners, 91 Geo. L.J. 887, 910 (2003).

182 See, e.g., Madrid v. Gomez, 889 F. Supp. 1146, 1263-64 (N.D. Cal. 1995) (recognizing, however, that isolation can violate the Eighth Amendment when it inflicts serious mental illness).

183 Brown v. Plata, 131 S. Ct. 1910, 1924-26 (2011).

184 Id. at 1928.

185 Id. at 1933; see also Erica Goode, Prisons Rethink Isolation, Saving Money, Lives & Sanity, N.Y Times, Mar. 10, 2012, http://www.nytimes.com/2012/03/11/us/rethinking-solitary-confinement.html? pagewanted=all.

186 Michael J. Dale, Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers, 32 U.S.F. L. Rev. 675, 702 (1998).

187 Graham v. Florida, 130 S. Ct. 2011, 2038 (2010) (quoting Roper v. Simmons, 543 U.S. 551, 569-70).

188 May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

189 See Ingraham v. Wright, 430 U.S. 651, 669 (1977) ("We find ... an inadequate basis for wrenching the Eighth Amendment from its historical context and extending it to traditional disciplinary practices in the public schools.").

190 See, e.g., Youngberg v. Romeo, 457 U.S. 307, 314-25 (holding as erroneous instructions given to the jury that the proper standard of liability was that of the Eighth Amendment in a case regarding the substantive rights of involuntarily committed mentally retarded persons).

191 Id. at 322.

192 See Bell v. Wolfish, 441 U.S. 520 (1979).

193 See, e.g., A.J. v. Kierst, 56 F.3d 849, 854 (8th Cir. 1995); Gary H. v. Hegstrom, 831 F.2d 1430, 1431-32 (9th Cir. 1987); H.C. ex rel. Hewett v. Jarrard, 786 F.2d 1080, 1084-85 (11th Cir. 1986); Alexander S. v. Boyd, 876 F. Supp. 773, 795-96 (D. S.C. 1995).

194 For example, in In re Gault, the Court applied the Fourteenth, rather than the Sixth Amendment to hold that juveniles have a right to counsel. 387 U.S. 1, 36 (1967) (quoting Powell v. State of Alabama, 287 U.S. 45, 69 (1953)) (observing that juveniles have more need than adults for "the guiding hand of counsel"). In McKeiver v. Pennsylvania, the Court underscored that the Fourteenth rather than the Sixth Amendment governed the functioning of juvenile court. 403 U.S. 528, 543 (1976) (holding that juveniles are not entitled to trial by jury). Failing to distinguish between juvenile and adult court, the Supreme Court explained, "chooses to ignore, it seems to us, every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates." Id. at 550. In Schall v. Martin, the Supreme Court applied the Fourteenth Amendment to a challenge to juvenile pre-trial detention practices, emphasizing the importance of the State's "'parens patriae interest in preserving and promoting the welfare of the child"' 467 U.S. 253, 263 (1984) (quoting Santosky v. Kramer, 455 U.S. 745, 766 (1982)).

195 Gary H., 831 F.2d at 1432.

196 Nelson v. Heyne, 491 F.2d 352, 357, 360 (7th Cir. 1974).

197 Santana v. Collazo, 714 F.2d 1172, 1177, 1179 (1st Cir. 1983).

198 Farmer v. Brennan, 511 U.S. 825, 878 (1994).

199 A.M. ex rel. J.M.K. v. Luzerne Cnty. Juvenile Detention Ctr., 372 F.3d 572 (3d Cir. 2004) (remanding to the lower court). The Juvenile Law Center represented A.M. in this matter.

200 Troy D. v. Mickens, No. 10-2092, 2011 WL 3793920, at *12 (D.N.J. Aug. 25, 2011). The court applied the same theory to the right to counsel at a parole hearing, noting that it may be needed to protect juveniles from harsh conditions. Id. at *8. The Juvenile Law Center currently represents Troy D., along with co-counsel Dechert LLP.

201 See, e.g., Cauffman & Steinberg, supra note 49, at 745.

202 Elizabeth Thompson Gershoff, Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review, 128 Psychol. Bull. 539, 542, 554 (2002).

203 For a broad discussion of the role of trauma in juvenile vulnerability, see Sandra Bloom, Creating Sanctuary: Towards the Evolution of Sane Societies 25-33 (1997).

204 While neither the Troy D. nor A.M. cases mentioned above, supra note 199-200, explicitly address this point, the issues they raise about treating juveniles differently from adults support such an interpretation.

205 This test has been applied outside the prison context in Fourteenth Amendment cases. See, e.g., Kennedy v. City of Ridgefield, 439 F.3d 1055, 1062 (9th Cir. 2006); Board v. Farnham, 394 F.3d 469, 478 (7th Cir. 2005); Christiansen v. City of Tulsa, 332 F.3d 1270, 1281 (10th Cir. 2003); see also Kaucher v. Cnty. of Bucks, 455 F.3d 418, 427-28 (3rd Cir. 2006) (recognizing that an objective deliberate indifference standard might apply under the Fourteenth Amendment).

206 See generally Graham v. Florida, 130 S.Ct. 2011 (2010); Roper v. Simmons, 543 U.S. 551 (2005).

207 See Kemp et al., supra note 45.

208 The Paquete Habana, 175 U.S. 677, 700 (1900) ("[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination").

209 Trop v. Dulles, 356 U.S. 86, 101 (1958).

210 Id. at 102.

211 See, e.g., Lawrence v. Texas, 539 U.S. 558, 576 (2003) ("[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct."); Atkins v. Virginia, 536 U.S. 304, 317 n.21 (2002) ("within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."); Thompson v. Oklahoma, 487 U.S. 815, 830-31 (1988) ("[t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community."); Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982) ("the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe."); Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) ("[i]t is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.").

212 Atkins, 536 U.S. at 317 n.21.

213 Roper v. Simmons, 543 U.S. 551, 576 (2005).

214 Id. at 578.

215 Graham v. Florida, 130 S. Ct. 2011, 2034 (2011).

216 See Supreme Court of the United States, Orders in Pending Cases (Nov. 7, 2011), available at http:// www.supremecourt.gov/orders/courtorders/110711zor.pdf (showing that Jackson v. Hobbs, 132 S. Ct. 548 (2011) (No. 10-9647), and Miller v. Alabama, 132 S. Ct. 548 (2011) (No. 10-9646), have been granted certiorari and will be heard by the United States Supreme Court). For a discussion of the facts of Miller and Jackson, see supra note 41.

217 Comm. on the Rights of the Child, General Comment No. 10 (2007): Children's Rights in Juvenile Justice, P 71, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007) [hereinafter CRC, General Comment 10].

218 Id. at P 70.

219 See, e.g., International Covenant on Civil and Political Rights, art. 14, P 4, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR] (specifying that procedures for juveniles should take account of their age and the desirability of promoting their rehabilitation).

220 Convention on the Rights of the Child art. 37, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter Convention on the Rights of the Child].

221 Office of the United Nations High Commissioner for Human Rights, http://www2.ohch.org/english/law/ (last visited Feb. 8, 2012).

222 ICCPR, supra note 219, at art. 14.

223 Id. at art. 24.

224 Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, P 34, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (Dec. 18, 2006).

225 Connie de la Vega & Michelle Leighton, Sentencing our Children to Die in Prison: Global Law and Practice, 42 U.S.F. L. Rev. 983, 985 (2008).

226 Id. at 990.

227 U.S. Const., art. VI, cl. 2.

228 Restatement (Third) of The Foreign Relations Law of the United States § 115(1)-(2) (1986).

229 Id. at § 111(3).

230 Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980) (recognizing the VCLT as jus cogens, a fundamental norm from which no derogation is permitted); Restatement (Third) of The Foreign Relations Law of the United States § 102 (1986). The United States considers "many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties." Vienna Convention on the Law of Treaties, U.S. Department of State, http:// www.state.gov/s/l/treaty/faqs/70139.htm (last visited Feb. 8, 2012).

231 See ICCPR, supra note 219, at art. 14, P 4 ("In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation."); Id. at art. 24, P 1 ("Every child shall have ... the right to such measures of protection as are required by his status as a minor."). In signing the treaty, the United States made significant reservations to the International Covenant on Civil and Political Rights including "[t]hat the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eights and/or Fourteenth Amendments to the Constitution of the United States"; and "[t]he United States reserves the right, in exceptional circumstances, to treat juveniles as adults." United States of America's Reservations to the ICCPR, The International Justice Project, http:// www.internationaljusticeproject.org/juvICCPR.cfm (last visited Feb. 25, 2012). The Human Rights Committee, the ICCPR's enforcement body, has stated that it views these reservations as "incompatible with the object and purpose of the Covenant." Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee: United States of America, P 279, U.N. Doc. CCPR/C/79/Add.50, (Oct. 3, 1995) [hereinafter CCPR Concluding Observations/Comments]. Notably, the United States also entered another reservation to the convention, which allowed the imposition of capital punishment "on any person ... including such punishment for crimes committed by persons below eighteen years of age." ICCPR, supra note 219, at art. 6, P 5. According to the Committee, this reservation also violated the object and purpose of the Covenant. CCPR Concluding Observations/Comments, at P 281. The reservation was effectively voided by the Supreme Court's decision in Roper v. Simmons, 543 U.S. 551 (2005), which held that imposing the death penalty upon juveniles under the age of eighteen violates the Eight Amendment.

232 See International Convention on the Elimination of All Forms of Racial Discrimination, art. 2(c), opened for signature Mar. 7, 1966, 660 U.N.T.S. 195, 5 I.L.M. 352 (entered into force Jan. 4, 1969) ("Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."); Id. at art. 5(a) ("States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in ... [t]he right to equal treatment before the tribunals and all other organs administering justice.").

233 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 165 U.N.T.S. 85 (entered into force June 26, 1987).

234 Comm. On the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, P 21, U.N. Doc. CERD/C/USA/CO/b (Feb. 2008).

235 Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture: United States of America, P 34, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

236 Convention on the Rights of the Child, supra note 220, at art. 37.

237 This analysis focuses on: the CRC, General Comment 10, supra note 217, issued by the Committee on the Rights of the Child; the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDLs), G.A. Res. 45/113, Annex, U.N. GAOR, 45th Sess., Supp. No. 49A, U.N. Doc. A/45/49/Annex (Dec. 14, 1990) [hereinafter JDLs]; and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), G.A. Res. 40/33, U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/RES/40/33 (Nov. 29, 1985) [hereinafter "The Beijing Rules" ].

238 See, e.g., Convention on the Rights of the Child, supra note 220, at art. 3.

239 See, e.g., JDLs, supra note 237, at P 3; CRC, General Comment 10, supra note 217, at P 85.

240 JDLs, supra note 237, at P 3.

241 Id.

242 Convention on the Rights of the Child, supra note 220, at art. 37; see also JDLs, supra note 237, at P 29 ("In all detention facilities juveniles should be separated from adults, unless they are members of the same family."); The Beijing Rules, supra note 237, at P 26.3 ("Juveniles in institutions shall be kept separate from adults ... ").

243 CRC, General Comment 10, supra note 217, P 86.

244 JDLs, supra note 237, at P 28.

245 CRC, General Comment 10, supra note 217, at P 89.

246 Convention on the Rights of the Child, supra note 220, at art. 40(2)(vii).

247 JDLs, supra note 237, at P 35.

248 See Convention on the Rights of the Child, supra note 220, at art. 25 (recognizing the right of a child to "treatment of his or her physical or mental health"); CRC, General Comment 10, supra note 217, at P 89 (providing that every child "shall receive adequate medical care throughout his/her stay in the facility ...").

249 JDLs, supra note 237, at P 51.

250 Convention on the Rights of the Child, supra note 220, at art. 37.

251 CRC, General Comment 10, supra note 217, at P 87.

252 JDLs, supra note 237, at PP 58-60.

253 CRC, General Comment 10, supra note 217, at P 87; see also JDLs, supra note 237, at PP 65-67 (prohibiting all disciplinary measures that constitute "cruel, inhuman or degrading treatment ... including corporal punishment").

254 CRC, General Comment 10, supra note 217, at P 89.

255 Id.

256 Id.

257 Id.

258 JDLs, supra note 237, at P 65.

259 CRC, General Comment 10, supra note 217, at P 86.

260 Id. at P 89.

261 See Convention on the Rights of the Child, supra note 220, at art. 37 (stating that "[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.").

262 CRC, General Comment 10, supra note 217, at P 97.

263 JDLs, supra note 237, at P 85.

264 The Beijing Rules, supra note 237, at Rule 22.1.

265 JDLs, supra note 237, at P 38; CRC, General Comment 10, supra note 217, at P 89.

266 CRC, General Comment 10, supra note 217, at P 89.

267 JDLs, supra note 237, at P 38.

268 Id. at P 45.

269 Id. at P 38.

270 Id. at P 47; CRC, General Comment 10, supra note 217, at P 89.

271 J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 674 (Breyer, J., dissenting)).

272 Id. at 2403-04.

273 See supra note 107 and accompanying text.

274 J.D.B., 131 S. Ct. at 2403 n.5.

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