

January 2016

# A Proposal to Allow the Presentation of Mitigation in Juvenile Court so that Juvenile Charges May be Expunged in Appropriate Cases

Katherine I. Puzone

*Barry University, Dwayne O. Andreas School of Law*

Follow this and additional works at: <http://digitalcommons.pace.edu/plr>



Part of the [Criminal Law Commons](#), and the [Juvenile Law Commons](#)

---

### Recommended Citation

Katherine I. Puzone, *A Proposal to Allow the Presentation of Mitigation in Juvenile Court so that Juvenile Charges May be Expunged in Appropriate Cases*, 36 Pace L. Rev. 558 (2016)

Available at: <http://digitalcommons.pace.edu/plr/vol36/iss2/5>

---

---

# A Proposal to Allow the Presentation of Mitigation in Juvenile Court so that Juvenile Charges May be Expunged in Appropriate Cases

Katherine I. Puzone<sup>1</sup>

*“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.”<sup>2</sup>*

Justice Kennedy writing for the majority in *Roper v. Simmons*

Many people believe that juvenile adjudications of delinquency are automatically expunged upon the youth reaching the age of majority. In reality, a juvenile adjudication of delinquency—especially for a felony—can significantly limit a teenager’s future ability to obtain student loans and scholarships, join the military, participate in athletics, become a firefighter or a law enforcement officer or obtain one of many jobs. As discussed herein, the majority of youth facing charges in delinquency court are suffering from severe socio-economic deprivation, are victims of emotional, physical or sexual abuse, or have serious mental health issues. Many youth caught up in the delinquency system are impacted by more than one of these factors, each of which places a teenager at significantly greater risk of engaging in delinquent behavior. Society tells these young people to “pull themselves up by their bootstraps,” but at the same time significantly limits their ability to do just that by labeling them felons—often violent felons—for the rest of their

---

1. Associate Professor of Law, Barry University Dwayne O. Andreas School of Law, J.D., *cum laude*, New York University School of Law, M. Phil. University of Cambridge, B.A. Trinity College.

2. *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

lives. This article argues that effectively foreclosing a young person's future based upon behavior that is linked to circumstances beyond their control violates the Eighth Amendment's proscription on cruel and unusual punishment. This article proposes an alternative framework that allows young people to have their juvenile records expunged if they fulfill certain criteria. This would benefit society as well as the young defendants, as it would lower the levels of adult recidivism.

This article proposes to add a new procedure in juvenile court that would recognize mitigation so that, in appropriate cases, the child's juvenile record can be expunged. This would allow courts to address cases in which the child suffers from a mental illness that does not rise to the level of an insanity defense but is mitigating enough that it would violate the Eighth Amendment for the child to be found guilty of a felony that would remain on her record for the rest of her life. Similarly, children living in environments that cause the child to be significantly more likely to engage in delinquent behavior would be eligible to have their juvenile records expunged. This article proposes that, upon a plea or adjudication of delinquency at trial, the court should hear evidence on relevant mitigation. If the judge finds that the child's behavior was significantly impacted by factors beyond her control including, but not limited to, mental health issues, child abuse and socio-economic factors, the child will be able to have her juvenile record expunged upon completing appropriate treatment and demonstrating improved behavior. This would refocus a system that has become increasingly punitive on the purported rehabilitative nature of juvenile court and allow children from disadvantaged backgrounds to lead productive adult lives unconstrained by mistakes they made as teenagers.

Youth prosecuted in juvenile court are not charged with crimes; rather, they are accused of having committed a delinquent act.<sup>3</sup> While children are not charged with crimes, they are prosecuted under the same criminal statutes as adults.<sup>4</sup>

---

3. In most states, the law provides that delinquent acts are not crimes. See *e.g.*, FLA. STAT. ANN. § 985.35(6) (West 2007); GA. CODE ANN. § 15-11-606 (West 2014); N.Y. FAM. CT. ACT § 380.1 (McKinney 2007).

4. See, *e.g.*, FLA. STAT. ANN. § 985.0301 (West 2015) (“(1) The circuit court

Therefore, defenses applicable to adults are the only defenses available to children. Over time, the juvenile system has become increasingly punitive and less rehabilitative.<sup>5</sup>

When a child suffers from a mental illness, raising an insanity defense is impractical for two distinct reasons. First, insanity is notoriously difficult to prove, and, in the vast majority of cases would not provide a successful defense. For example, Florida follows the well-known *M'Naughton* test for insanity.<sup>6</sup> Under *M'Naughton*, an accused is not criminally

---

has exclusive original jurisdiction of proceedings in which a child is alleged to have committed: (a) A delinquent act or violation of law.”).

5. While every state has a juvenile court system today, the role of juvenile court has changed over time. “At the dawn of the twentieth century, Progressive reformers applied the new theories of social control to the new ideas about childhood and created a social welfare alternative to criminal courts to treat criminal and noncriminal misconduct by youth.” Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 691 (1991). After several decades of reform, delinquency courts now closely resemble adult criminal courts. *Id.* Feld identifies three types of reform: jurisdictional, jurisprudential and procedural. *Id.* at 692. Recent years have seen an increasing desire of society to criminalize the conduct of children. As penalties have become more harsh and juvenile sanctions have become more like criminal sanctions, children do not receive the same protections adult criminal defendants do. “Although theoretically, juvenile courts' procedural safeguards closely resemble those of criminal courts, in reality, the justice routinely afforded juveniles is lower than the minimum insisted upon for adults.” *Id.* Feld argues:

The substantive and procedural convergence between juvenile and criminal courts eliminates virtually all of the differences in strategies of social control between youths and adults. As a result, no reason remains to maintain a separate juvenile court whose only distinction is its persisting procedural deficiencies. Yet, even with the juvenile court's transformation from an informal, rehabilitative agency into a scaled-down criminal court, it continues to operate virtually unreformed. The juvenile court's continued existence despite these changes reflects an ambivalence about children and their control, and provides an opportunity to re-examine basic assumptions about the nature and competence of young people.

*Id.* at 692-93.

6. See *Gurganus v. Florida*, 451 So. 2d 817, 820 (Fla. 1984).

It is well established in Florida that the test for insanity, when used as a defense to a criminal charge is the *McNaughton* Rule. Under *McNaughton* the only issues are:

responsible for his actions if, at the time of the offense, the defendant, by reason of a mental disease or defect, (1) does not know of the nature or consequences of his act; or (2) is unable to distinguish right from wrong. Given the very high bar set by *M'Naughton*, a child could be suffering from a serious mental illness that significantly impacted her behavior and her ability to form the requisite intent but the diagnosis does not rise to the level of the insanity defense because the child meets the minimal standard of understanding right from wrong and understanding the consequences of her actions.<sup>7</sup> As discussed in detail below, many at-risk children suffer from mental health issues or live in environments that contribute to negative behavior but neither of these factors can form the basis for an insanity defense if the child meets the *M'Naughton* standard. Second, if a child is adjudicated not guilty by reason of insanity, the child may be committed to a civil commitment facility indefinitely.<sup>8</sup> Juvenile court jurisdiction ends at 19, but civil commitment may extend well beyond that.<sup>9</sup> An adjudication of insanity will remain on the child's record and could preclude her from obtaining jobs and professional licenses in the future.<sup>10</sup>

---

1) the individual's ability at the time of the incident to distinguish right from wrong; and 2) his ability to understand the wrongness of the act committed.

7. For example, in *Gurganus*, the Florida Supreme Court upheld the trial court's exclusion of expert testimony on insanity since the defense experts could not opine definitively that the defendant (an adult) lacked the ability to distinguish right from wrong. *Id.* The Court ruled that the trial court erred, however, when it excluded evidence that the defendant's mental state along with his drug and alcohol consumption, negated his ability to form the specific intent required for a conviction of first-degree murder. *Id.*

8. See, e.g., FLA. R. JUV. PROC. 8.095(e) (West 2015). Upon a finding of not guilty by reason of insanity, the juvenile court must hold a hearing to determine if the child meets the statutory criteria for involuntary commitment to a residential psychiatric facility. See FLA. R. JUV. PROC. 8.095(e)(2) (West 2015).

9. If the child meets the criteria for hospitalization and is not released prior to her 19<sup>th</sup> birthday, a hearing must take place to determine if the child requires continued hospitalization. See FLA. R. JUV. PROC. 8.095(e)(2)(G) (West 2015). If continued hospitalization is deemed necessary, proceedings must be instituted under the adult civil commitment statute. *Id.* Thus, a child adjudicated not guilty by reason of insanity could remain committed to a residential psychiatric program well beyond the termination of jurisdiction of the juvenile court.

10. See Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C.

Many children in juvenile court suffer from serious mental illnesses that do not present a defense under the current system.<sup>11</sup> The only alternative to an insanity defense under current law is to argue that the child was unable to form the requisite intent due to her mental illness.<sup>12</sup> However, most crimes are general intent crimes and the state must meet a very low burden to prove intent.<sup>13</sup>

---

L. REV. 621, 632-33 (2005).

Mental health defenses are, at least ostensibly, designed to protect those lacking sufficient mental responsibility from being undeservedly convicted and punished. Yet the defenses carry consequences distinct from those accompanying other affirmative defenses. Defendants acquitted on the basis of the “insanity defense” are typically committed for an indefinite period of time to a mental hospital, and may in fact spend more time institutionalized than they would if convicted of the offenses charged. Furthermore, society attaches a stigma to mental health defenses that does not exist with other affirmative defenses; even after release, an acquitted defendant is subject to the social and economic opprobrium commonly associated with mental illness.

11. See Joseph B. 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, 3 (2003). Tulman cites a statement made on the floor of the U.S. Senate by Senator Paul Wellstone: “Of the 100,000 children who are arrested and incarcerated each year, as many as 50 percent suffer from a mental or emotional disturbance.” *Id.* at 7.

12. See, e.g., *Gurganus*, 451 So. 2d at 820.

13. See Wayne R. LaFave, *Intent and Knowledge*, in 1 SUBSTANTIVE CRIM. L. § 5.2(e) (1986) (footnotes omitted)

[T]he most common usage of ‘specific intent’ is to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime. Common law larceny, for example, requires the taking and carrying away of the property of another, and the defendant’s mental state as to this act must be established, but in addition it must be shown that there was an ‘intent to steal’ the property. Similarly, common law burglary requires a breaking and entry into the dwelling of another, but in addition to the mental state connected with these acts it must also be established that the defendant acted ‘with intent to commit a felony therein.’ The same situation prevails with many statutory crimes: assault ‘with intent to kill’ as to certain aggravated assaults; confining another ‘for the

In many juvenile cases, abuse and mental illness are mitigating in the sense that they provide an explanation for the conduct rather than a legal excuse.<sup>14</sup> “[A] substantial body of research has long supported the hypothesis that physical maltreatment, or abuse, leads to delinquency. Victims of abuse have also been shown to engage in violent offending.”<sup>15</sup> For example, the vast majority of girls in the juvenile justice system have been victims of abuse, including sexual abuse.<sup>16</sup> This very

---

purpose of ransom or reward’ in kidnapping; making an untrue statement ‘designedly, with intent to defraud’ in the crime of false pretenses; etc.

14. See Jennifer Wareham & Denise Paquette Boots, *The Link Between Mental Health Problems and Youth Violence in Adolescence, A Multilevel Test of DSM-Oriented Problems*, 39 CRIM. JUST. & BEHAV. 1003 (2012) (discussing the link between certain mental health diagnoses and delinquency); Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES GEN. PSYCHIATRY 1133, 1133 (2002) (study of juvenile detainees concluded that:

Nearly two thirds of males and nearly three quarters of females met diagnostic criteria for one or more psychiatric disorders. Excluding conduct disorder (common among detained youth), nearly 60% of males and more than two thirds of females met diagnostic criteria and had diagnosis-specific impairment for one or more psychiatric disorders. Half of males and almost half of females had a substance use disorder, and more than 40% of males and females met criteria for disruptive behavior disorders. Affective disorders were also prevalent, especially among females; more than 20% of females met criteria for a major depressive episode. Rates of many disorders were higher among females, non-Hispanic whites, and older adolescents. These results suggest substantial psychiatric morbidity among juvenile detainees. Youth with psychiatric disorders pose a challenge for the juvenile justice system and, after their release, for the larger mental health system.

15. Wareham & Boots, *supra* note 14, at 1005 (citing Timothy Brezina, *Adolescent Maltreatment and Delinquency: the Question of Intervening Processes*, 35 J. RES. CRIME & DELINQ. 71 (1998); Magda Stouthamer-Loeber et al., *Maltreatment of Boys and the Development of Disruptive and Delinquent Behavior*, 13 DEV. & PSYCHOPATHOLOGY 941 (2001)).

16. See *Unique Needs of Girls in the Juvenile Justice System*, PHYSICIANS FOR HUMAN RIGHTS, [http://www.women.ca.gov/portals/70/media/pdf/issues/women\\_girls\\_cjs/girls.pdf](http://www.women.ca.gov/portals/70/media/pdf/issues/women_girls_cjs/girls.pdf) (last visited Oct. 21, 2015); (65% incarcerated girls experienced PTSD symptoms at some point in their lives); Leo Sher, *Neurobiology of Suicidal Behavior in Post-Traumatic Stress Disorder*, 10 EXPERT REV.

often leads to a diagnosis of Post-Traumatic Stress Disorder and other mental illnesses.<sup>17</sup> A victim of sexual abuse is much more likely to react violently to a perceived threat than a child who does not suffer from PTSD.<sup>18</sup>

Take the example of the delinquent act of battery on a school employee. In many states, battery on a school employee is a felony.<sup>19</sup> It is not uncommon for children at alternative schools who have behavior issues and mental health issues to have multiple charges under this statute.<sup>20</sup> One child the author represented had five such charges. On its face, this sounds like the fourteen year-old child routinely beat up his teachers. A look at the facts proved otherwise. One charge was based on the child's touching a teacher's chest with his fingers when the teacher looked over his shoulder while the child was on a school computer. Another charge was based on the child lightly smacking a teacher's arm when she tried to move him during a lineup. Under applicable law, battery is considered a violent felony that can never be expunged.<sup>21</sup> A juvenile adjudication of delinquency for battery on a teacher would, therefore, limit the child's future access to student loans, preclude him from participating in college athletics, preclude him from many government jobs, preclude him from becoming a police officer or firefighter and possibly bar him from entering some branches of the military.<sup>22</sup> Additionally, studies have shown that the earlier

---

NEUROTHERAPEUTICS 1233 (2010) (48% were experiencing PTSD symptoms at time of study). Depression, trauma, anger, self-destructive behavior or other mental health disorders were a factor for 79% of girls in residential programs and 84% of girls in non-residential programs. *Id.*

17. See Martin H. Teicher, *Wounds that Time Won't Heal: The Neurobiology of Child Abuse*, 2 CEREBRUM: THE DANA FORUM ON BRAIN SCIENCE 1, 3 (2000).

17. See Martin H. Teicher, *Wounds that Time Won't Heal: The Neurobiology of Child Abuse*, 2 CEREBRUM: THE DANA FORUM ON BRAIN SCIENCE 1, 3 (2000).

18. *Id.*

19. See, e.g., FLA. STAT. ANN. § 784.081(2)(c) (West 2014), FLA. STAT. ANN. § 784.03 (West 2001); MASS. GEN. LAWS ANN. ch. 265, § 13(d) (West 2015).

20. See generally, Tulman, *supra* note 11.

21. See e.g., FLA. STAT. ANN. § 943.0581 (West 2010).

22. Under the guidelines of some athletic programs, if a child is arrested for any violent felony, possession of a weapon on school grounds, possession/sale of drugs on school grounds, or any other offense that can lead to expulsion from school, the child athlete may become ineligible to participate in the athletic program of the school including band and cheerleading. (For further information, call NCAA Academic and Membership Affairs 317-917-



---

---

a child enters the delinquency system, the more likely it is that she will acquire an extensive juvenile record.<sup>23</sup>

The current proposal would allow the judge to adjudicate the child delinquent of the charged act, but still find that, due to significant mitigation, she should be allowed to have her record expunged upon fulfilling certain criteria. This recognizes that the child could form the intent to commit the charged crime, but the response would be therapeutic rather than punitive. If the child completes an appropriate treatment program, the charge would not remain on the child's record into adulthood. The child would also be required to perform other appropriate juvenile sanctions such as community service. In this way, the child would learn to take responsibility for their actions, but the underlying trauma would be acknowledged in a way that allows the child to work towards a positive future.

This proposal is consistent with the theories of the

---

6008). The Army has a "waiver" process of an applicant who has received a conviction or juvenile adjudication for a serious offense, but waivers for serious offenses are rarely granted; the Navy and Marines require an explanation for all juvenile cases even if the case was nolle prosequ'd or non-filed, the Navy and Marines conduct a review to ensure that the dismissal was on the merits and not to facilitate enlistment into the Armed Forces. The Air Force has a waiver process similar to that used by the Army but also looks at the surrounding circumstances and the applicant's overall record. Federal law, 24 C.F.R. § 966.4 (2010) and some local rules state that no member of a family living in subsidized housing may engage in drug-related or violent criminal activity. The standard used in determining whether to evict is only preponderance of the evidence. A genuine addiction can be a defense to an eviction proceeding. The Higher Education Act, 20 U.S.C.A § 1091 (West 2014), provides that a person who is convicted of possession or sale of a controlled substance becomes ineligible to receive financial aid including work study for a set period of time depending on how many violations the child has. Many states deny scholarships to students with a felony conviction. *See, e.g.*, FLA. STAT. ANN. § 1009.531 (West 2014) (Bright Futures and Medallion scholarships not available to a student who has been convicted of a felony and has not been granted clemency).

23. *See* Gloria Danziger, *Delinquency Jurisdiction in a Unified Family Court: Balancing Intervention, Prevention and Adjudication*, 37 FAM. L. Q. 381, 386 (2003) ("[T]hose who began offending as young children were more likely to become violent offenders. . . . [T]he earlier a youth entered the juvenile justice system, the more likely he or she was to acquire an extensive juvenile court record.") (citing Howard N. Snyder., *Epidemiology of Official Offending, in* CHILD DELINQUENTS: DEVELOPMENT, INTERVENTION, AND SERVICE NEEDS, 25 (Rolf Loeber & David P. Farrington eds., 2001) and Howard N. Snyder et al., *Prevalence and Development of Child Delinquency*, CHILD DELINQUENCY BULLETIN (2003)).

---

---

Therapeutic Jurisprudence/preventive law model that focuses on rehabilitation rather than punishment. The theory of Therapeutic Jurisprudence is to “broaden the counseling mission, and . . . convert the practice of law into a helping and healing profession in ways that may make it a much more humanitarian tool.”<sup>24</sup>

Therapeutic Jurisprudence is inconsistent with current law and procedure in juvenile court. Because the collateral consequences of a felony conviction are lifelong,<sup>25</sup> children are advised to invoke their right to remain silent and have almost no role in the process. This proposal would allow the child to testify to the circumstances of her life and how it impacted her behavior without subjecting her to the equivalent of adult criminal consequences.

Originally, the goal of juvenile court was rehabilitation. That changed drastically over time,<sup>26</sup> and now, the relevant

---

24. Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 50 (1997).

25. See *supra* note 22.

26. See Tulman, *supra* note 11, at 3. Tulman cites a statement made on the floor of the U.S. Senate by Senator Paul Wellstone: “Of the 100,000 children who are arrested and incarcerated each year, as many as 50 percent suffer from a mental or emotional disturbance.” *Id.* at 7. Tulman summarizes the situation concerning children with education-related disabilities in the delinquency system very powerfully.

The substantive and procedural convergence between juvenile and criminal courts eliminates virtually all of the differences in strategies of social control between youths and adults. As a result, no reason remains to maintain a separate juvenile court whose only distinction is its persisting procedural deficiencies. Yet, even with the juvenile court's transformation from an informal, rehabilitative agency into a scaled-down criminal court, it continues to operate virtually unreformed. The juvenile court's continued existence despite these changes reflects an ambivalence about children and their control, and provides an opportunity to re-examine basic assumptions about the nature and competence of young people.

Feld, *supra* note 5, at 692-93. It is also well-documented that poor and minority children are substantially over-represented in the delinquency population. See Heidi M. Hsia et al., *Disproportionate Minority Confinement, 2002 Update*, U.S. DEP'T JUST., OFF. JUST. PROGRAMS, OFF. JUV. JUST. & DELINQ. PREVENTION 1 (2004), <https://www.ncjrs.gov/pdffiles1/ojjdp/201240.pdf>

Florida Statute provides that the purpose of the delinquency system is to first “protect the public” from acts of delinquency.<sup>27</sup> This article will argue that the punitive model has failed and that it is time to allow a procedure that recognizes the unique issues faced by juveniles with mental health issues, especially when those issues are the result of abuse.

The Supreme Court has recognized in a recent series of cases that the brains of even normal children function entirely differently than those of “normal” adults.<sup>28</sup> This article will

---

(“Although minority youth account for about one-third of the U.S. juvenile population, they comprise two-thirds of the juvenile detention/corrections population.”); see also Carl E. Pope et al., *Disproportionate Minority Confinement, A Review of the Research Literature from 1989 through 2001*, U.S. DEPT JUST., OFF. JUST. PROGRAMS, OFF. JUV. JUST. & DELINQ. PREVENTION, JUV. JUST. BULL. 1 (2006), [http://www.ojjdp.gov/dmc/pdf/dmc89\\_01.pdf](http://www.ojjdp.gov/dmc/pdf/dmc89_01.pdf). For excellent information about the realities of life for poor children, see NAT’L CTR. FOR CHILD. IN POVERTY, [www.nccp.org](http://www.nccp.org) (last visited Oct. 15, 2015).

27. FLA. STAT. ANN § 985.03(12) (West 2014).

28. The United States Supreme Court has decided three landmark cases recently that recognize the fundamental principle that children are different. See *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (holding that a child’s age must be taken into account in determining whether a child was in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966)); *Graham v. Florida*, 560 U.S. 48 (2010) (abolishing life without parole for children convicted of crimes other than homicide); *Roper v. Simmons*, 543 U.S. 551 (2005) (abolishing the juvenile death penalty). Each of these cases relied to a large extent on developing science demonstrating that children’s brains function in a fundamentally different way than do the brains of adults.

The substantive and procedural convergence between juvenile and criminal courts eliminates virtually all of the differences in strategies of social control between youths and adults. As a result, no reason remains to maintain a separate juvenile court whose only distinction is its persisting procedural deficiencies. Yet, even with the juvenile court’s transformation from an informal, rehabilitative agency into a scaled-down criminal court, it continues to operate virtually unreformed. The juvenile court’s continued existence despite these changes reflects an ambivalence about children and their control, and provides an opportunity to re-examine basic assumptions about the nature and competence of young people.

Feld, *supra* note 5, at 692-93. An amicus brief relied upon by the *Graham* court explains succinctly how children’s brains are different:

Research in developmental psychology and neuroscience—including the research presented to the Court in *Simmons*

---

---

argue that the lifelong consequences of a felony are disproportionate to the conduct of children who suffer from mental illness or live in extreme socio-economic deprivation so that the proposed procedure is required under the Eighth Amendment. In addition, due process is violated when a child is forced to choose between raising an insanity defense at trial, or taking a plea to a felony, both of which have lifelong negative consequences.

Recent Supreme Court cases have recognized the science underlying the common-sense notion that children are not “little adults.” Their brains function in a completely different manner than those of adults. In 2005, the Court abolished the juvenile death penalty and recognized the neuroscience underlying the

---

and additional research conducted since *Simmons* was decided—confirms and strengthens the conclusion that juveniles, as a group, differ from adults in the salient ways the Court identified. Juveniles—including older adolescents—are less able to restrain their impulses and exercise self-control; less capable than adults of considering alternative courses of action and maturely weighing risks and rewards; and less oriented to the future and thus less capable of apprehending the consequences of their often-impulsive actions. For all those reasons, even once their general cognitive abilities approximate those of adults, juveniles are less capable than adults of mature judgment, and more likely to engage in risky, even criminal, behavior as a result of that immaturity. Research also demonstrates that ‘juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,’ while at the same time they lack the freedom and autonomy that adults possess to escape such pressures. Finally, because juveniles are still in the process of forming a coherent identity, adolescent crime often reflects the ‘signature’—and transient—‘qualities of youth’ itself, rather than an entrenched bad character. Research has documented that the vast majority of youthful offenders will desist from criminal behavior in adulthood. And the malleability of adolescence means that there is no reliable way to identify the minority who will not.

Brief for the American Psychological Association, American Psychiatric Association, National Association of Social Workers, and Mental Health America as Amici Curiae Supporting Petitioners, *Graham v. Florida*, 560 U.S. 48 (2009) (Nos. 08-7412, 08-7621), 2009 WL 2236778, at \*3-4 (citations omitted); *Graham*, 560 U.S. at 48. As the science of juvenile brain development has advanced considerably, there have not been any corresponding major changes in delinquency court.

claim that those under the age of eighteen should not be subject to the ultimate punishment due to the fundamental immaturity of their brains.<sup>29</sup> Later cases, discussed in depth below, followed similar reasoning in abolishing life without parole for non-homicides for juvenile offenders<sup>30</sup> and in holding that juvenile offenders cannot be subjected to a mandatory life sentence even for homicide.<sup>31</sup>

Delinquency proceedings are proceedings in juvenile court in which children are charged with “delinquent acts”—the juvenile equivalent of an adult crime. In most states, the law provides that delinquent acts are not crimes.<sup>32</sup> While every state has a juvenile court system today, the role of juvenile court has changed over time; “[a]t the dawn of the twentieth century, Progressive reformers applied the new theories of social control to the new ideas about childhood and created a social welfare alternative to criminal courts to treat criminal and noncriminal misconduct by youth.”<sup>33</sup> After several decades of reform, delinquency courts now closely resemble adult criminal courts.<sup>34</sup> Barry Feld has identified three types of reform affecting the juvenile court system: jurisdictional, jurisprudential, and procedural.<sup>35</sup> Recent years have seen an increase in society’s desire to criminalize the conduct of children. While penalties have become harsher and juvenile sanctions have become more like criminal sanctions, juvenile courts are not required to provide children with the same protections afforded to adult defendants. According to Feld, “[a]lthough theoretically, juvenile courts’ procedural safeguards closely resemble those of criminal courts, in reality, the justice routinely afforded juveniles is lower than the minimum insisted upon for adults.”<sup>36</sup> Feld argues:

The substantive and procedural convergence

---

29. *Roper*, 543 U.S. at 551, 573-74, 578.

30. *Graham*, 560 U.S. at 48, 68-69, 80.

31. *Miller v. Alabama*, 132 S. Ct. 2455, 2482 (2012).

32. *See, e.g.*, FLA. STAT. ANN. § 985.35(6) (West 2007); GA. CODE ANN. § 15-11-606 (West 2014); N.Y. FAM. CT. ACT § 380.1 (McKinney 2007).

33. Feld, *supra* note 5, at 691.

34. *Id.*

35. *Id.* at 692.

36. *Id.*

between juvenile and criminal courts eliminates virtually all of the differences in strategies of social control between youths and adults. As a result, no reason remains to maintain a separate juvenile court whose only distinction is its persisting procedural deficiencies. Yet, even with the juvenile court's transformation from an informal, rehabilitative agency into a scaled-down criminal court, it continues to operate virtually unreformed. The juvenile court's continued existence despite these changes reflects an ambivalence about children and their control, and provides an opportunity to re-examine basic assumptions about the nature and competence of young people.<sup>37</sup>

Historically, youth in delinquency court were not afforded all of the protections given to adults facing criminal charges.<sup>38</sup> This was because juvenile court was seen as a way for the state to step in where children were engaging in socially unacceptable behavior, often due to lack of supervision at home.<sup>39</sup> Some have noted a distinct class element to early juvenile courts, arguing that such courts were a way for society to exercise control over

---

37. *Id.* at 692-93.

38. *See In re Gault*, 387 U.S. 1, 15 (1967).

The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but 'What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.' The child—essentially good, as they saw it—was to be made 'to feel that he is the object of (the state's) care and solicitude,' not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable.

39. William W. Booth, *History and Philosophy of the Juvenile Court*, FL. JUV. L. & PRAC. § 1.6 (2013).

“lower-class” youth.<sup>40</sup> A report submitted by the Cook County (Illinois) Bar Association to the Illinois state legislature in support of the creation of the first juvenile court stated that:

The fundamental idea of the Juvenile Court Law is that the State must step in and exercise guardianship over a child found under such adverse social or individual conditions as develop crime. . . . It proposes a plan whereby he may be treated, not as a criminal, or legally charged with a crime, but as a ward of the state.<sup>41</sup>

Over time, however, the courts, including the United States Supreme Court, began to recognize that the ideal of kindly juvenile judges who used their wide discretion to help at-risk children was far from the reality faced every day by children in delinquency court.<sup>42</sup> In the seminal case of *In re Gault*, the United States Supreme Court stated:

Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. In 1937, Dean Pound wrote: “The powers of the Star Chamber were a

---

40. *Id.*

Early juvenile law generally grew from citizen concern for children who, lacking parental control, discipline, and supervision, were coming before the criminal court for truancy, begging, homelessness, and petty criminal activity. There were distinct social phenomena that contributed to these problems, including a large population of children from broken families in the aftermath of the Civil War, latchkey children of parents who were unable to provide supervision during long work hours, lack of child care, and lack of free or compulsory education for children.

41. *Id.* at § 1.2.

42. In *Gault*, the Court traced the historical development of juvenile delinquency court and demonstrated that, as the consequences of a juvenile adjudication of delinquency became more severe, procedures similar to those used in adult criminal court were required by the Due Process Clause. *In re Gault*, 387 U.S. at 13-18.

---

trifle in comparison with those of our juvenile courts . . . . The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.<sup>43</sup>

The facts of *Gault* demonstrate just how dangerous giving any judge unbridled discretion can be. One afternoon in 1964, a fifteen-year-old named Gerald Francis Gault and a friend purportedly made a prank phone call.<sup>44</sup> As eloquently described by Justice Fortas, the calls “were of the irritatingly offensive, adolescent, sex variety.”<sup>45</sup> At the time of the “offense,” Gerald was on probation because he had been caught in the company of another teenager who stole a wallet.<sup>46</sup> Gerald was taken into custody while both of his parents were at work.<sup>47</sup> No notice was left for the parents, and no attempt was made to contact them to let them know that their son was in custody.<sup>48</sup> Upon learning of her son’s whereabouts from a neighbor, Gerald’s mother went to the detention home, where Gerald’s probation officer told her of her son’s alleged acts and informed her that there would be a hearing the next day.<sup>49</sup> The probation officer filed a petition in juvenile court that Gerald’s parents did not see until a federal habeas proceeding was brought.<sup>50</sup> The petition did not allege any factual basis for the court proceeding.<sup>51</sup> At the “hearing” the next day, the complainant was not present, and no transcript or written memorandum of the proceedings was created.<sup>52</sup> Gerald

---

43. *Id.* at 18-19.

44. *Id.* at 4.

45. *Id.*

46. *Id.*

47. *Id.* at 5.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 5.

52. *Id.*



was questioned by the judge but was not told that he had a right to remain silent.<sup>53</sup> A few days later, without explanation, Gerald was released.<sup>54</sup> Shortly thereafter, his parents were notified simply that there would be another hearing.<sup>55</sup> Once again, the complainant was not present, and Gerald testified without having been advised of his constitutional rights.<sup>56</sup> Gerald's mother specifically requested the presence of the complainant so that she could identify which of the two boys had actually made the lewd remarks.<sup>57</sup> At the hearing, a referral report was sent to the court by the probation officers, but was not sent to Gerald or his parents.<sup>58</sup> At the conclusion of the hearing, the judge committed Gerald to the State Industrial School as a juvenile delinquent until his twenty-first birthday, "unless sooner discharged by due process of law."<sup>59</sup> At no point were Gerald or his parents advised that he had a right to counsel.<sup>60</sup> In essence, Gerald was sentenced to six years in juvenile prison for a prank phone call without any notice of the charges, without having been able to cross-examine the complainant, without knowledge that he could remain silent, and without the advice of counsel.

In *Gault*, the Court reevaluated the juvenile justice system and held that many of the fundamental protections afforded to criminal defendants must be afforded to children facing charges in delinquency court. The Court noted the severe consequences of a juvenile adjudication of delinquency, and stated that "it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court."<sup>61</sup>

The Court held that due process requires that children be given notice of the charges against them,<sup>62</sup> that the Sixth and

---

53. *Id.*

54. *Id.* at 6.

55. *Id.* at 7.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 7-8.

60. *Id.* at 10.

61. *Id.* at 27-28.

62. *Id.* at 31-34.

Fourteenth Amendments require that children be advised of their right to counsel, that they be provided with counsel if they cannot afford counsel,<sup>63</sup> that the Fifth, Sixth, and Fourteenth Amendments require that children be able to confront and cross-examine the witnesses against them, and that children may invoke the right against self-incrimination.<sup>64</sup> The Court specifically rejected the argument that this right should not apply to children because confession is therapeutic.<sup>65</sup> A few

---

Due process of law requires notice of the sort we have described—that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding. It does not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet.

*Id.* at 33-34.

63. *Id.* at 36.

The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.

(footnote omitted) (quoting *Powell v. Alabama*, 287 U.S. 45, 61 (1932)).

64. *Gault*, 387 U.S. at 42-57. ("It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children."). *Id.* at 47. While the Court declined to rule on the child's argument that the Constitution requires appellate review of juvenile delinquency proceedings and the right to a transcript of such proceedings, most states provide for transcription of delinquency proceedings and appellate review of these proceedings. See, e.g., FLA. R. JUV. PROC. 8.830 (West 2015) (providing for written transcripts of all proceedings in delinquency court); FLA. STAT. ANN. § 985.534 (West 2007) (providing a right to appeal from an adjudication of delinquency).

65. *Gault*, 387 U.S. at 51.

It is also urged . . . that the juvenile and presumably his parents should not be advised of the juvenile's right to silence because confession is good for the child as the commencement of the assumed therapy of the juvenile court process, and he should be encouraged to assume an attitude of trust and confidence toward the officials of the juvenile process. This proposition has been subjected to widespread challenge on the basis of current reappraisals of the rhetoric and realities of the handling of juvenile offenders. In fact, evidence is accumulating that confessions by juveniles do not aid in

years later, the Court held that every element of the offense charged in a petition for delinquency must be proven to the trier of fact beyond a reasonable doubt.<sup>66</sup> However, a year later, the Court held that children are not entitled to a jury in delinquency proceedings.<sup>67</sup> In most states, a juvenile judge presides over all pretrial proceedings and the adjudicatory hearing.<sup>68</sup>

The Court's rationale in holding that children are not entitled to a jury in delinquency proceedings was based upon the notion that juvenile proceedings are supposed to be rehabilitative rather than punitive. The standard of due process required in juvenile delinquency proceedings, as developed in *Gault* and *Winship*, is "fundamental fairness."<sup>69</sup> Despite acknowledging the many flaws in the juvenile system as it existed at the time—and acknowledging that the juvenile system could impose the functional equivalent of prison on children—the Court held that a jury is not required in a delinquency proceeding. The Court explained:

Concern about the inapplicability of exclusionary  
and other rules of evidence, about the juvenile

---

‘individualized treatment,’ as the court below put it, and that compelling the child to answer questions, without warning or advice as to his right to remain silent, does not serve this or any other good purpose. . . . it seems probable that where children are induced to confess by ‘paternal’ urgings on the part of officials and the confession is then followed by disciplinary action, the child’s reaction is likely to be hostile and adverse—the child may well feel that he has been led or tricked into confession and that despite his confession, he is being punished.

*Id.* at 51-52.

66. *In re Winship*, 397 U.S. 358, 364-69 (1970) (noting that “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *Id.* at 364, and that such a right is applicable to children “during the adjudicatory stage of a delinquency proceeding[.]” *Id.* at 368).

67. *See* *McKeiver v. Pennsylvania*, 403 U.S. 528, 549-50 (1971) (holding that a jury is not constitutionally required in juvenile delinquency proceedings).

68. *See, e.g.*, FLA. R. JUV. PROC. 8.110(c) (West 2015) (“The adjudicatory hearing shall be conducted by the judge without a jury. At this hearing the court determines whether the allegations of the petition have been sustained.”).

69. *See* *McKeiver*, 403 U.S. at 543.

court judge's possible awareness of the juvenile's prior record and of the contents of the social file; about repeated appearances of the same familiar witnesses in the persons of juvenile and probation officers and social workers—all to the effect that this will create the likelihood of pre-judgment—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.<sup>70</sup>

While the primary purpose of juvenile court may at one point have been rehabilitation,<sup>71</sup> that is no longer the case today. The legislative intent for the juvenile justice system in most states<sup>72</sup> is to protect the public from acts of delinquency.<sup>73</sup> Preventing delinquency, strengthening the family, early intervention, and rehabilitation are often listed as secondary goals of the juvenile justice system.<sup>74</sup> It appears that Justice Fortas' warning in *Kent* over forty years ago is more applicable today than ever: “[T]here may be grounds for concern that the child receives the worst of both worlds: that he gets neither the

---

70. *Id.* at 550.

71. *See generally* Feld, *supra* note 5.

72. A few states, however, still prioritize the rehabilitation and care of the child. *See, e.g.*, LA. CHILD. CODE ANN. art. 801 (1992) (providing that each child facing delinquency proceedings receive the “care, guidance and control that will be conducive to his welfare . . . .”); NEB. REV. STAT. § 43-402 (1994) (providing for “individualized accountability and individualized treatment . . . .” in the delinquency system).

73. *See, e.g.*, COLO. REV. STAT. ANN. § 19-2-102 (West 1997) (“[T]he intent of this article is to protect, restore, and improve the public safety by creating a system of juvenile justice that will appropriately sanction juveniles who violate the law and, in certain cases, will also provide the opportunity to bring together affected victims, the community, and juvenile offenders for restorative purposes.”); FLA. STAT. ANN. § 985.02(3) (West 1997) (stating that legislative intent of the juvenile justice system is “to first protect the public from acts of delinquency.”); VT. STAT. ANN. tit. 3, § 3085c(c)(1)(A) (2013) (stating that a juvenile justice system should “[h]old juveniles accountable for their unlawful conduct.”); WIS. STAT. ANN. § 938.01(2) (West 2009) (“It is the intent of the legislature to promote a juvenile justice system capable of dealing with the problem of juvenile delinquency, a system which will protect the community, impose accountability for violations of law and equip juvenile offenders with competencies to live responsibly and productively.”).

74. *See* FLA. STAT. ANN. §§ 985.02(3)(a)-(d) (West 2014).

protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”<sup>75</sup>

As noted above, the United States Supreme Court has recently decided several landmark cases recognizing the fundamental principle that children are different from adults.<sup>76</sup> Each of these cases relied to a large extent on developing science demonstrating that children’s brains function in a fundamentally different manner than those of adults. As the *Roper* Court noted, teenagers are generally less mature, more prone to reckless behavior, and much more susceptible to negative influences than adults; the possibility of rehabilitation is also greater for teenagers than for adults.<sup>77</sup> An *amicus* brief relied upon by the *Graham* court explains succinctly how children’s brains are different. For example, even older adolescents “are less able to restrain their impulses and exercise self-control; less capable than adults of considering alternative courses of action and maturely weighing risks and rewards; and less oriented to the future and thus less capable of apprehending the consequences of their often-impulsive actions.”<sup>78</sup> Teenagers are much more likely to be influenced by negative peers and, because they are not adults, lack the autonomy to escape such influences even if they desire to do so.<sup>79</sup> Because a significant amount of juvenile criminal behavior is attributable to the transient characteristics of youth, research has shown that the vast majority of youthful offenders do not continue to engage in criminal behavior as adults.<sup>80</sup> Yet as the science of juvenile

---

75. *Kent v. United States*, 383 U.S. 541, 556 (1966).

76. *See J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2406 (2011) (holding that a child’s age must be taken into account in determining whether a child was in custody when “the child’s age was known . . . or would have been objectively apparent to a reasonable officer” for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966)); *Graham v. Florida*, 560 U.S. 48, 82 (2010) (abolishing life without parole for children convicted of crimes other than homicide); *Roper v. Simmons*, 543 U.S. 551, 578 (2004) (abolishing the juvenile death penalty).

77. *Roper*, 543 U.S. at 569-70.

78. Brief for the American Psychological Association, American Psychiatric Association, National Association of Social Workers, and Mental Health America as Amici Curiae Supporting Petitioners at 3-4, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621), 2009 WL 2236778, at \*4 (citations omitted).

79. *Id.*

80. *Id.*

brain development has advanced considerably, there have not been any corresponding major changes in the way cases are transferred from delinquency court to adult criminal court.

The Court has long recognized that cognitive functioning is relevant to an Eighth Amendment analysis of a particular punishment.<sup>81</sup> In the context of the death penalty, the Court specifically recognized that youth is a mitigating factor that must be considered by the sentencing jury.<sup>82</sup> In 1982, prior to the recent progress in developmental neuroscience, the Supreme Court recognized the fundamental, commonsense fact that children are different than adults.<sup>83</sup> The Court stated that “the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.”<sup>84</sup>

Further, in 2002, the Court expressly recognized the link between cognitive functioning and criminal culpability.<sup>85</sup> In holding that the Eighth Amendment bars the execution of the mentally retarded, the Court held that “[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses, [mentally retarded offenders] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.”<sup>86</sup> This holding provided the basis for the Court’s decision in *Roper*, which banned the juvenile death penalty.<sup>87</sup> In *Roper*, the Court recognized that developmental neuroscience has demonstrated that the brains of teenagers are fundamentally different from those of adults in ways that

---

81. *See, e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that the Eighth Amendment requires a capital sentencing jury to be allowed to consider “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”); *Gregg v. Georgia*, 428 U.S. 153, 163-64 (1976) (holding that, in order to comply with the Eighth Amendment, the jury must consider any mitigating circumstances). While *Lockett* and *Gregg* were capital cases, their recognition that the Eighth Amendment requires consideration of any relevant mitigating factors is applicable to the analysis that follows.

82. *See Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982).

83. *Id.* at 115-16.

84. *Id.* at 116.

85. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the Eighth Amendment bars the execution of the mentally retarded).

86. *Id.* at 306.

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

directly affect culpability,<sup>88</sup> noting that “[t]he susceptibility of juveniles to immature and irresponsible behavior means ‘their irresponsible conduct is not as morally reprehensible as that of an adult.’”<sup>89</sup> 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 impetuosity and recklessness that may dominate in younger years can subside.”<sup>90</sup> In *Graham*, the Court, relying on *Roper*, recognized that “[t]hese 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.’”<sup>91</sup>

In *Roper*, the Court relied on several scientific studies analyzing juvenile brain development.<sup>92</sup> Several professional associations wrote and submitted an *amicus* brief to the *Roper* court.<sup>93</sup> The *amicus* brief in *Roper* detailed the ways in which the brains of youth differ in structure and functioning from those of adults.<sup>94</sup> The authors explained that the regions of the brain associated with impulse control, regulation of emotions, risk assessment, and moral reasoning are among the last to develop, and often are not fully developed until the early to mid-twenties.<sup>95</sup> The authors also found that “[p]sychosocial maturity

---

88. *Id.* at 570 (noting that the personality traits of children are less formed than those of adults).

89. *Id.* (citing *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion)).

90. *Id.* (citation omitted).

91. *Graham v. Florida*, 560 U.S. 48, 68 (2010) (citing *Roper v. Simmons*, 543 U.S. 551, 573 (2004)).

92. *See Roper*, 543 U.S. at 569 (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

93. Brief of the American Medical Association, American Psychiatric Association, American Society for Adolescent Psychiatry, American Academy of Child & Adolescent Psychiatry, American Academy of Psychiatry and the Law, National Association of Social Workers, Missouri Chapter of the National Association of Social Workers, and National Mental Health Association as Amici Curiae Supporting Respondent at 4, *Roper v. Simmons*, 543 U.S. 551 (2004) (No. 03-633), 2004 WL 1633549, at \*1 [hereinafter *Roper Brief*].

94. *See id.*

95. *Id.* at \*4 (noting that the tests that formed the basis of its conclusions were performed on healthy adolescents and that those in the criminal justice

is incomplete until age 19.”<sup>96</sup> In a finding of particular relevance to youth involved in the juvenile justice system, the authors cited studies showing that “the deficiencies in the adolescent mind and emotional and social development are especially pronounced when other factors—such as stress, emotions, and peer pressure—enter the equation. These factors . . . operate on the adolescent mind differently and with special force.”<sup>97</sup>

Further, scientists confirm that “[a]dolescents’ behavioral immaturity mirrors the anatomical immaturity of their brains.”<sup>98</sup> Studies have shown that adolescents rely more than adults on the amygdala, the area of the brain associated with the primitive impulses of anger, aggression, and fear.<sup>99</sup> In contrast, adults tend to process similar information through the frontal cortex, a cerebral area associated with impulse control and good judgment.<sup>100</sup> The frontal and pre-frontal cortex, critical areas of the brain that control impulse, judgment, risk-taking, and weighing consequences, are among the last to develop and, often, are not fully developed until the mid-twenties.<sup>101</sup>

The picture below contains MRI images that demonstrate the structural changes that take place in the brain from ages five to twenty.<sup>102</sup> Researchers at the National Institutes of Health, the National Institute of Mental Health, and the University of

---

system often “suffer from serious psychological disturbances that substantially exacerbate the already existing vulnerabilities of youth, [such that] they can be expected to function at sub-standard levels”).

96. *Id.* at \*7 (“Adolescents ‘score lower on measures of self-reliance and other aspects of personal responsibility, they have more difficulty seeing things in long-term perspective, they are less likely to look at things from the perspective of others, and they have more difficulty restraining their aggressive impulses.’”).

97. *Id.* at \*7-8. “Stress affects cognitive abilities, including the ability to weigh costs and benefits and to override impulses with rational thought. But adolescents are more susceptible to stress from daily events than adults, which translates into further distortion of the already skewed cost-benefit analysis.” *Id.* at \*8.

98. *Id.* at \*11.

99. *Id.*

100. *Id.*

101. *Id.* at \*6-8.

102. Paul Thompson, *The Adolescent Brain—Why Teenagers Think and Act Differently*, EDINFORMATICS [http://www.edinformatics.com/news/teenage\\_brains.htm](http://www.edinformatics.com/news/teenage_brains.htm) (last visited Oct. 7, 2015) (depicting MRI images taken from time-lapse imaging tracking brain maturation from ages five to twenty).



California at Los Angeles conducted a decade-long study using magnetic resonance imaging to track the development of the brain.<sup>103</sup> The study concluded that “higher-order’ brain centers, such as the prefrontal cortex, don’t fully develop until young adulthood as grey matter<sup>104</sup> wanes in a back-to-front wave as the brain matures and neural connections are pruned.”<sup>105</sup> In the MRI scans below, red indicates more grey matter and blue indicates less grey matter.<sup>106</sup> As any adult can attest, teenagers lack the “brakes” that keep them from engaging in impulsive and reckless activities.<sup>107</sup> The “brakes” are located in the frontal lobe—the last part of the brain to develop.<sup>108</sup> Many other changes take place in the brain between birth and adulthood.<sup>109</sup>

---

103. *Id.*

104. Roper Brief, *supra* note 93, at \*18-20. One of the last parts of the brain to mature is the pre-frontal cortex. *Id.* at 16. This process is known as “pruning”; pruning of gray matter improves the functioning of the brain’s reasoning centers by establishing some pathways while extinguishing others, thereby enhancing brain functioning. *Id.* at \*18.

105. Thompson, *supra* note 102.

106. *Id.*

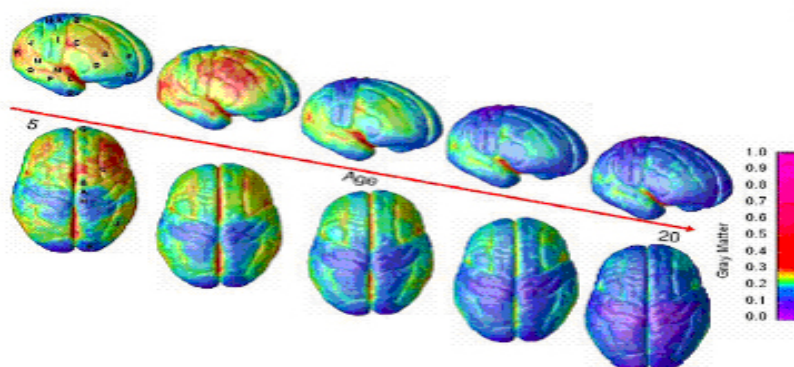
107. *Id.*

108. *Id.*

109. See Roper Brief, *supra* note 93, at \*15-17.

[T]he limbic system is more active in adolescent brains than adult brains, particularly in the region of the amygdala and that the frontal lobes of the adolescent brain are less active. . . [A]s teenagers grow into adults, they increasingly shift the overall focus of brain activity to the frontal lobes. . . . [T]he brain’s frontal lobes are still structurally immature well into late adolescence. The prefrontal cortex (which [is] associated with impulse control, risk assessment, and moral reasoning) is ‘one of the last brain regions to mature.’ . . . [Additionally,] [m]yelination is the process by which the brain’s axons are coated with a fatty white substance called myelin. . . . ‘The presence of myelin makes communication between different parts of the brain faster and more reliable. Myelination . . . continues through adolescence and into adulthood.

*Id.*



As noted above, these conclusions were drawn from studies performed on the brains of normal adolescents. Many of the youth facing charges in delinquency court are at-risk youth who are either in foster care or unstable, often violent homes<sup>110</sup>; if

---

110. See Tulman, *supra* note 11, at 7 (“Of the 100,000 children who are arrested and incarcerated each year, as many as 50 percent suffer from a mental or emotional disturbance.”). Tulman powerfully summarizes the situation concerning children with education-related disabilities in the delinquency system, noting that:

Poor educational performance among children in the delinquency system is, in significant part, a function of the high percentage of children in that system who have education-related disabilities and who, more particularly, have not received the benefit of appropriate, and effective special education services. Indeed, the majority of children in the juvenile delinquency system are children with education-related disabilities. The delinquency system disproportionately attracts children with education-related disabilities both because those children are more likely to engage in delinquent conduct than their non-disabled peers and because the adults responsible for educational and delinquency systems are more likely to label and treat children with education-related disabilities as delinquent.

Poor educational outcomes that are pervasive among children in the delinquency system constitute, in several respects, compelling evidence that school system and delinquency system personnel are failing to deliver appropriate educational services and failing to accommodate children with disabilities. The outcomes also, however, often reflect failure by school system and delinquency system personnel even to recognize education-related disabilities. These outcomes suggest, furthermore, that decision-makers guarding the gates to the delinquency system generally, and to incarceration facilities particularly, treat children with

they attend school at all, they attend alternative schools.<sup>111</sup> It is also well documented that poor and minority children are substantially over-represented in the delinquency population.<sup>112</sup>

In criminal law, the law not only punishes the alleged act, but also the state of mind, or intent, of the defendant. For example, in Florida, a premeditated murder committed in the course of certain enumerated felonies is a capital crime.<sup>113</sup> By contrast, a homicide that occurs during one of the enumerated

---

education-related disabilities differently than children who are not disabled. In vastly disproportionate numbers, children who are poor and who are members of racial and ethnic minority groups populate the delinquency system. The disproportionate numbers, moreover, reflect the harsh reality that society imposes unequal and discriminatory treatment upon poor children of color. Researchers and journalists have documented the disproportionate representation and disparate, discriminatory treatment of children based upon race and class. In contrast, disproportionate representation and disparate, discriminatory treatment within the delinquency system of children with disabilities has not been sufficiently studied and documented. Estimates of the correlation between delinquency and disabilities vary widely.

*Id.* at 4-5.

111. The term “alternative school” is used to describe schools where students are transferred for disciplinary reasons or because they have been suspended or expelled from mainstream schools. See Maureen Carroll, *Racialized Assumptions and Constitutional Harm: Claims of Injury Based on Public School Assignment*, 83 TEMP. L. REV. 903, 905-06 (2011).

In a typical disciplinary transfer case, the student has been involuntarily transferred from a mainstream school to an alternative program without the procedural safeguards that accompany formal expulsions. Many alternative schools used for this purpose have limited classroom instruction, strict disciplinary procedures, and no extracurricular activities. Often, the only students attending an alternative school are those placed involuntarily for disciplinary or remedial reasons. Students attending disciplinary programs face a dramatically higher risk of violence than those attending mainstream schools. Moreover, because of curricular differences, students returning to a mainstream school from an alternative program may be unable to advance to the next grade or to graduate with their peers.

*Id.*

112. See Hsia et al., *supra* note 26; see also Carl E. Pope et al., *supra* note 26.

113. FLA. STAT. ANN. § 782.04(1)(a) (West 2015).

felonies without any design to effect death is a second-degree felony with a maximum fifteen-year sentence.<sup>114</sup> There is no requirement in the law that courts evaluate a child's ability to form criminal intent before the child is transferred to adult court.

Many children facing charges in delinquency court are also in dependency proceedings, meaning that they have been abused, abandoned, or neglected by their parent(s).<sup>115</sup> Many other juvenile defendants have been victims of serious—often violent—physical, sexual, and emotional abuse.<sup>116</sup> This type of abuse has a direct impact on the functioning of the areas of the brain that control impulsive, risky, and unlawful behavior.<sup>117</sup>

Even before recent advances in neuroscience, psychologists recognized that adolescents do not form intent in the same manner as adults. As Dr. Marty Beyer, a leading expert in the area, explained: “[f]rom a psychological perspective, intention in children is a complex area, particularly considering their limited capacity to think ahead to the unforeseen long-term consequences of their immediate action.”<sup>118</sup> Critically, Dr. Beyer concluded “that from the standpoint of cognitive development, young people have diminished capacity to intend harm to others or anticipate harm as an unintended consequence of their actions.”<sup>119</sup> Teenagers often demonstrate a disconnect between their actions and the resulting consequence.<sup>120</sup> Many teenagers see their behavior as the only option in a certain situation, but fail to recognize their responsibility for putting themselves in the situation in the first place.<sup>121</sup> This “adolescent disconnect between one action and another goes to the heart of culpability

---

114. FLA. STAT. ANN. § 775.082(6)(d) (West 2014).

115. See generally Denise C. Herz et al., *Challenges Facing Crossover Youth: An Examination of Juvenile-Justice Decision Making and Recidivism*, 48 FAM. CT. REV. 305 (2010).

116. *Id.*

117. See *Understanding the Effects of Maltreatment on Brain Development*, CHILD WELFARE INFORMATION GATEWAY (2009), [https://www.childwelfare.gov/pubPDFs/brain\\_development.pdf](https://www.childwelfare.gov/pubPDFs/brain_development.pdf).

118. Marty Beyer, *Recognizing the Child in the Delinquent*, 7 KY. CHILD. RTS. J. 16, 18 (1999) (“Carrying a weapon and even using a weapon does not mean a child had adult intent to harm.”).

119. *Id.*

120. *Id.*

121. *Id.*

---

and results from an immature thought process (not anticipating unintended consequences; reacting to threat) and incomplete moral development . . . .”<sup>122</sup>

Abuse, trauma, and neglect further impact a young person’s ability to form intent, as these factors can significantly alter brain development.<sup>123</sup> This abuse includes emotional abuse.<sup>124</sup> After conducting extensive research, Dr. Martin Teicher concluded that “early maltreatment, even exclusively psychological abuse, has enduring negative effects on brain development.”<sup>125</sup> In an observation particularly relevant to the appropriate punishment for young offenders, Dr. Teicher explained:

Physical, sexual, and psychological trauma in childhood may lead to psychiatric difficulties that show up in childhood, adolescence, or adulthood. The victim’s anger, shame, and despair can be directed inward to spawn symptoms such as depression, anxiety, suicidal ideation, and post-traumatic stress, or directed outward as aggression, impulsiveness, delinquency, hyperactivity, and substance abuse.<sup>126</sup>

Some of the disorders strongly associated with child abuse are those that may cause unlawful behavior, such as borderline personality disorder or dissociative identity disorder.<sup>127</sup> Similarly, victims of child abuse may suffer from post-traumatic stress disorder (“PTSD”), the symptoms of which include “irritability or outbursts of anger” and “an exaggerated startle response.”<sup>128</sup> Dr. Teicher argues that “the trauma of abuse induces a cascade of effects, including changes in hormones and neurotransmitters that mediate development of vulnerable brain regions.”<sup>129</sup> Dr. Teicher and other scientists have

---

122. *Id.* at 18-19.

123. *See* Teicher, *supra* note 17.

124. *Id.*

125. *Id.* at 1.

126. *Id.* at 2.

127. *Id.* at 3.

128. *Id.* at 3.

129. *Id.* at 4.

identified “a constellation of brain abnormalities associated with child abuse,” including limbic irritability,<sup>130</sup> deficient development, differentiation of the left hemisphere,<sup>131</sup> deficient left-right hemisphere interaction,<sup>132</sup> and abnormal activity in the cerebellar vermis (the middle strip between the two hemispheres of the brain).<sup>133</sup> Of particular relevance here are the effects of abuse on the development of the hippocampus, which is involved in regulating memory and emotion.<sup>134</sup> Dr. Teicher’s findings demonstrate that child abuse has a direct impact on the ability of a youthful offender to form intent:

To be convicted of a crime in the United States, one supposedly must have the capacity to both know right from wrong and to control one’s behavior. Those with a history of childhood abuse may know right from wrong, but their brains may be so irritable and the connections from the logical, rational hemispheres so weak that intense negative (right-hemisphere) emotions may incapacitate their use of logic and reason to control their aggressive impulses. Is it just to hold people criminally responsible for acts they lack the neurological capacity to control?<sup>135</sup>

---

130. *Id.* at 4-5 (“*Limbic irritability* [is] manifested by markedly increased prevalence of symptoms suggestive of temporal lobe epilepsy (TLE) and by an increased incidence of clinically significant EEG (brain wave) abnormalities.”).

131. *Id.* at 5 (“[This process is] manifested throughout the cerebral cortex and the hippocampus, which is involved in memory retrieval.”).

132. *Id.* at 6. (“[This process is] indicated by marked shifts in hemispheric activity during memory recall and by underdevelopment of the middle portions of the corpus callosum, the primary pathway connecting the two hemispheres.”).

133. *Id.* (“[This] appears to play an important role in emotional and attentional balance and regulates electrical activity within the limbic system.”).

134. *Id.* (“Cells in the hippocampus have an unusually large number of receptors that respond to the stress hormone cortisol. Since animal studies show that exposure to high levels of stress hormones like cortisol has toxic effects on the developing hippocampus, this brain region may be adversely affected by severe stress in childhood.”).

135. *Id.*

While studies demonstrate that every child's brain develops differently, and that such development directly impacts the child's ability to form intent and, ultimately, the appropriate punishment for the child's offense, the decision about whether to transfer a case to adult court is often made by a prosecutor who knows only the facts of the crime. As shown below, the Eighth Amendment requires that all relevant factors—including cognitive functioning, brain development, child abuse and neglect, educational neglect, mental illness, and many others unique to each child's case—must be considered by a neutral trier of fact before a child is adjudicated delinquent of a serious offense with no opportunity to expunge her record in the future.

The concept of mitigation derives largely from the Supreme Court's Eighth Amendment jurisprudence in death penalty cases. The Court has described the concept of mitigation and its relevance in capital sentencing proceedings many times.<sup>136</sup> In

---

136.

[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques—probation, parole, work furloughs, to name a few—and various postconviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence. There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving

determining that differences in brain function preclude children from being executed and from serving life without parole for a non-homicide, the Supreme Court intent and, ultimately, the appropriate punishment for a child who is currently serving a life sentence.

A review of the Supreme Court's Eighth Amendment jurisprudence demonstrates that it violates the constitutional requirement of proportionality to adjudicate an abused or mentally ill child delinquent of a serious offense without giving them the opportunity to have that charge expunged from their record in the future. It is fundamental that "[a] punishment is 'excessive,' and therefore prohibited by the [Eighth] Amendment, if it is not graduated and proportioned to the offense."<sup>137</sup> The Court determines if a punishment is excessive by reviewing "currently prevailing standards of decency."<sup>138</sup> In

---

independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

*Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978); *see also* *Wiggins v. Smith*, 539 U.S. 510, 512-13 (2003).

The mitigating evidence counsel failed to discover and present here is powerful. *Wiggins* experienced severe privation and abuse while in the custody of his alcoholic, absentee mother and physical torment, sexual molestation, and repeated rape while in foster care. His time spent homeless and his diminished mental capacities further augment his mitigation case. He thus has the kind of troubled history relevant to assessing a defendant's moral culpability.

*Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse"); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (noting that consideration of the offender's life history is a "part of the process of inflicting the penalty of death"); *Lockett*, 438 U.S. at 606 (invalidating Ohio law that did not permit consideration of aspects of a defendant's background).

137. *Atkins v. Virginia*, 536 U.S. 304, 304 (2002) (citing *Weems v. United States*, 217 U.S. 349, 367 (1910)).

138. *Trop v. Dulles*, 356 U.S. 86, 99-101 (1958).



determining whether a punishment violates the Eighth Amendment, the Court looks at whether the punishment is consistent with “evolving standards of decency that mark the progress of a maturing society.”<sup>139</sup> In *Atkins*, the Court explained that “[p]roportionality review under such evolving standards should be informed by objective factors to the maximum possible extent, the clearest and most reliable of which is the legislation enacted by the country’s legislatures.”<sup>140</sup> However, it is important to note that the Court does not require state legislative action in order to determine that a punishment violates the Eighth Amendment: “[T]he Constitution contemplates that this Court will bring its own judgment to bear by asking whether there is reason to agree or disagree with the judgment reached by the citizenry and its legislators.”<sup>141</sup>

The exact scope of the constitutional phrase ‘cruel and unusual’ has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect. This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising. But when the Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character. The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

*Id.* (citation omitted).

139. *Id.* at 101.

140. *Atkins*, 536 U.S. at 304 (citations omitted).

141. *Id.* (citing *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

In *Eddings v. Oklahoma*,<sup>142</sup> the Supreme Court recognized that youth is a mitigating factor that must be taken into account at sentencing in a capital case:

All of this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.<sup>143</sup>

In 1989, the Supreme Court reversed a death sentence because the then-applicable jury instructions did not allow the jury to give effect to the compelling mitigating evidence presented of childhood trauma and intellectual disability.<sup>144</sup> The Court explained the concept of mitigation: “[E]vidence about the defendant’s background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.”<sup>145</sup> The court held that “the sentence imposed at the penalty stage

---

142. *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982).

143. *Id.* at 116.

Even the normal 16-year-old customarily lacks the maturity of an adult. In this case, Eddings was not a normal 16-year-old; he had been deprived of the care, concern, and paternal attention that children deserve. On the contrary, it is not disputed that he was a juvenile with serious emotional problems, and had been raised in a neglectful, sometimes even violent, family background. In addition, there was testimony that Eddings' mental and emotional development were at a level several years below his chronological age.

*Id.*

144. See *Penry v. Lynaugh*, 492 U.S. 302, 322-23 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002).

145. *Id.* at 319 (citing *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

should reflect a reasoned *moral* response to the defendant's background, character, and crime."<sup>146</sup>

In *Atkins*, the court followed its reasoning in *Penry I*, and held that the Eighth Amendment precluded the imposition of the ultimate penalty on the intellectually disabled. "Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct."<sup>147</sup> In *Roper v. Simmons*, the Court recognized that this reasoning was directly applicable to juvenile offenders and held that the imposition of the death penalty on offenders who were under 18 at the time of the crime violates the Eighth Amendment: The "differences [between adults and juveniles under 18 years of age] 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.'"<sup>148</sup> In language directly applicable to the argument that juvenile offenses should be expunged if they were the result of compelling mitigating circumstances, the Court stated in *Roper* that a "[juvenile's] own vulnerability and comparative lack of control over their immediate surroundings *mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.*"<sup>149</sup> The Court specifically noted that "[f]or 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."<sup>150</sup>

In 2010, the Supreme Court decided that juvenile offenders cannot be sentenced to life without the possibility of parole for a

---

146. *Id.*

147. *Atkins*, 536 U.S. at 306.

148. *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (citing *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion)).

149. *Id.* at 553. (emphasis added).

150. *Id.* at 570 (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

---

---

non-homicide crime.<sup>151</sup> The Court further elaborated on the difference between the culpability of juvenile and adult offenders:

*Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments. As compared to adults, juveniles have a ‘lack of maturity and an underdeveloped sense of responsibility’; they ‘are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure’; and their characters are ‘not as well formed.’<sup>152</sup>

In 2012, the Court continued this line of cases when it held that juvenile offenders cannot be subject to mandatory life imprisonment without parole even for a homicide.<sup>153</sup> “*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.”<sup>154</sup>

As one of the leading neurobiologists to study the behavior of adolescents has explained, the link between child abuse and delinquent behavior is well-documented.

[E]arly maltreatment, even exclusively psychological abuse, has enduring negative effects on brain development. We see specific kinds of brain abnormalities in psychiatric patients who were abused as children. We are also beginning to understand how these abnormalities may account directly for the personality traits and other symptoms that patients manifest. . . . Physical, sexual, and psychological trauma in childhood may lead to psychiatric difficulties that show up in childhood, adolescence, or adulthood.

---

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

152. *Id.* at 68 (citing *Roper*, 543 U.S. at 569-70).

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

154. *Id.* at 2458.

The victim's anger, shame and despair can be directed inward to spawn symptoms such as depression, anxiety, suicidal ideation, and post-traumatic stress, or directed outward as aggression, impulsiveness, delinquency, hyperactivity, and substance abuse.<sup>155</sup>

Other experts have documented the impact of toxic stress on the developing brain.<sup>156</sup> "Early experiences determine whether a child's developing brain architecture provides a strong or weak foundation for all future learning, behavior, and health."<sup>157</sup> Exposure to what experts describe as "toxic stress" often associated with abuse and socio-economic deprivation can have lifelong negative effects on a developing brain.<sup>158</sup> Psychologists describe toxic stress as follows:

Toxic stress, is associated with strong and prolonged activation of the body's stress response systems in the absence of the buffering protection of adult support. Stressors include recurrent child abuse or neglect, severe maternal depression, parental substance abuse, or family violence. Under such circumstances, persistent elevations of stress hormones and altered levels of key brain chemicals produce an internal physiological state that disrupts the architecture and chemistry of the developing brain.<sup>159</sup>

Studies of at-risk children conclude that "[c]urrent knowledge about brain and child development, as well as empirical data from cost-benefit studies, presents a compelling case for early public investments targeted toward children who

---

155. Teicher, *supra* note 17, at 1-2.

156. See HARVARD UNIVERSITY CTR ON DEV. CHILD, A SCIENCE-BASED FRAMEWORK FOR EARLY CHILDHOOD POL'Y: USING EVIDENCE TO IMPROVE OUTCOMES LEARNING, BEHAV., & HEALTH FOR VULNERABLE CHILD. (2007).

157. *Id.* at 2.

158. *Id.* at 9.

159. *Id.*

---

---

are at greatest risk for failure in school, in the workplace, and in society at large.”<sup>160</sup>

Studies on the impact of abuse and socio-economic deprivation on the brain development and behavior of at-risk youth support the argument that it is fundamentally unjust to hold these young people accountable for behavior that results, in large part, from factors that are beyond their control. Allowing youth who present significant mitigation to have juvenile charges expunged from their records if they complete appropriate programs and demonstrate improved behavior both benefits society and incentivizes positive behavior by the youth. The Supreme Court, in addressing the application of the death penalty and sentences of life without parole for juveniles, has recognized that the harshest punishments are not appropriate for those whose brains are still developing and who have no choice as to their living circumstances. The same reasoning applies to the lifelong consequences of a juvenile adjudication of delinquency. If a fourteen-year old follows her friends and participates in the burglary of a dwelling, all reasonable people can agree that serious consequences should follow. Under current law, if the youth completes probation and any required programs and does not get into further trouble, the felony will remain on her record for the rest of her life thus precluding many opportunities.

The Supreme Court found juvenile life without parole and the juvenile death penalty violative of the Eighth Amendment on proportionality grounds. The notion that the life of a teenager will be forever limited because of a split-second decision made at fourteen not only violates the Eighth Amendment, it harms society. Allowing youth who demonstrate compelling mitigating circumstances to expunge their records would incentivize positive behavior by at-risk youth and benefit society.

---

160. *Id.* at 28.