A Child in the Eyes of the Law: The Law Should Allow Judges to Weigh a Juvenile Defendant's Diminished Legal Culpability, to Provide Appropriate Due Process and to Order Effective Rehabilitation

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May 17, 2010

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Preface

> [Children] frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand reactions of others. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Atkins v. Virginia, 536 U.S. 304, 318 (2002).

Scope

When children are charged with committing a crime, the law inconsistently guides the trial judge's discretion in determining which procedural protections apply, the degree to which their legal culpability may be diminished and whether rehabilitation may be ordered. A few states recognize the fact that children are a special class deserving of protections not provided to adult defendants. Federal and state constitutions disagree over whether sex offender registration is cruel and unusual punishment.

Where Florida law orders Terrance Graham a sentence of life without the possibility of parole for his non-homocide crime, the Supreme Court rules the U.S. Constitution requires that young people serving life sentences must at least be considered for release. On May 17, 2010, Justice Kennedy announced, "[Florida] has denied him any chance to later demonstrate that he is fit to rejoin society based solely on a non-homicide crime that he committed while he was a *child in the eyes of the law*. This the Eight Amendment does not permit."[1]

Out of concern for public safety, the recent call for juvenile punishment represents a noticeable departure from the juvenile court's former rehabilitative goals. This paper explores where, how and why courts and lawmakers should change their juvenile justice policies to work

[1] Associated Press, May 17, 2010, quoting Justice Kennedy. Terrance Graham was implicated in armed robberies when he was 16 and 17. Graham, now 22, is in prison in Florida, which holds more than 70 percent of juvenile defendants locked up for life for crimes other than homicide.

with, rather than dispose of, our children in need of better decision-making skills. New scientific research allows our legislatures and courts to understand, appreciate and support the undeniable premise that young brains are different. This paper proposes the view that a juvenile's opportunity to become a productive member of society increases drastically with developmentally appropriate intervention rather than incarceration. Now is the time for lawmakers and judges to recognize a juvenile's diminished culpability, and to intervene in a way that allows the juvenile to achieve their every potential for positive change.

An understanding of how the human brain develops explains why adolescents make hasty decisions, why adolescents favor emotion over rational thought, and why short-term thrills trump adolescent's consideration of long-term consequences. In a criminal trial, the defendant's state of mind, and the degree of intent to bring about the completion of a criminal act are crucial considerations leading to their guilt or innocence as well as what form of intervention is most appropriate. This paper examines historical criminal protections developed through the United States Supreme decisions. During the late 1960's, the Court improved the chances for a juvenile to receive more procedural due process rights and increased the odds for treatment. Despite those additional rights, the states have recently chosen to punish the guilty juvenile, rather than to rehabilitate these impressionable young members of our society. The vast difference between adult brain functionality and juvenile diminished capacity signals a need for an appropriately separate due process for juveniles.

States attempting to provide their additional state constitutional protections find themselves constrained by federal mandates in the juvenile justice system. Federal preemption, Bills of Attainder and even ex post facto doctrines influence the juvenile defendant's bundle of rights. This is especially true where the states struggle to protect their young people from the

devastating, long-term stigma of sex registries. The wide disagreement among the states as to how to adjudicate an accused juvenile demonstrates the tension between the need for public safety, and the state interests in providing a new generation opportunities to become productive citizens. Public safety and appropriate interventions need not be mutually exclusive since both desirable results are achievable. Aided by the evidence that new research brings to the issues, this paper suggests various ways prosecutors, defense counsel, legislators and judges may bring about a more uniform and sensible consideration for the reduced culpability of children defendants.

The Fifth Amendment's Role in the Admissibility of a Child's Confession to a Crime

Children accused of committing crimes against society have a Fifth Amendment privilege against self-incrimination. In many juvenile criminal proceedings, a good part of the prosecutors evidence comes from the mouth of the juvenile himself or herself. [2] In Massachusetts, the procedural safeguard for juveniles under 14 requires that: a Miranda warning be given; a parent or an interested adult be present while those rights are given; the interested adult understood the warnings and had the opportunity to explain the rights to the juvenile so the juvenile understood the significance of any waiver; and the juvenile waived his or her rights knowingly and voluntarily. Failure to follow this required procedure renders a juvenile's confession inadmissible in a Massachusetts court.[3] Had Illinois applied this Massachusetts rule to an 8-year-old boy suspected of murdering an 11-year-old girl in Chicago, the criminal investigation and adjudication would have produced a more accurate and less expensive outcome.

[2] Hon. Jay Blitzman, Admissions and Confessions in Juvenile Proceedings, § I.10.1, Mass. Juvenile Court Bench Book, 2003.
[3] Commonwealth v. A Juvenile, 402 Mass. 275 (1988).

On July 27, 1998, an 11-year-old female, Ryan Harris, was murdered in the south side of Chicago. Police said she was struck in the head with a rock, sexually molested, and died from suffocation. [4] Two Chicago boys, aged 7 and 8, were charged with her murder. The police first thought the boys wanted to steal her bicycle, Ryan resisted, and the boys overpowered her. An August 14, 1998 *New York Times* article commented that, "juvenile justice experts say they know of no case in which younger children have been prosecuted for murder in the U.S. Police say the boys have confessed." Juvenile Court Judge Gerald T. Winiecki found probable cause to try the boys on the murder charges and ordered they be held overnight."[5]

Two days later, Judge Winiecki ruled that the boys could return home, provided they wear electronic monitoring devices and remain confined within their homes. Winiecki said he had no choice but to release them from custody because Illinois law prohibits defendants younger than 10 from being housed in a locked building. The following day, *Times* reporter Susan Sachs quoted Harvard Professor and child psychiatrist Dr. Robert Coles as saying that "Despite a lifetime of studying children, I am confounded by the implications of this case. What is to be done with children who may arrive at the age of reason, but do not operate with either rationality or moral reason?"[6]

New York Times Reporter Pam Belluck commented that lawyers who defend children accused of deadly crimes are in a quandary over how to defend them. She reported that unexplored legal grounds raise a host of difficult questions such as whether:

- a child understands the charges against them, or can assist in their own defense,

[4] Belluck, P., "Chicago Boys, 7 and 8, Charged in the Brutal Killing of a Girl, 11" New York Times 8/14/98 http://topics.nytimes.com/topics/reference/timestopics/people/h/ryan_harris/index.html
[5] Belluck, P., "Chicago Boys, 7 and 8, Charged in the Brutal Killing of a Girl, 11" New York Times 8/14/98, http://topics.nytimes.com/topics/reference/timestopics/people/h/ryan_harris/index.html
[6] Sachs, S.; "The Age of Reason; A Chilling Crime and a Question: What's in a Child's Mind?" New York Times 8/17/89, http://topics.nytimes.com/topics/reference/timestopics/people/h/ryan_harris/index.html

- the parent or counsel should prevail when they differ as to a child's best interest,
- a child should be held in juvenile detention centers if they are so young, and,
- a child can actually waive their Miranda rights in a knowing and voluntary way.

Judge Winiecki ordered psychiatric tests for both boys a week after their arrest. On September 9, 1998, prosecutors announced that all charges against both boys were dropped in light of new evidence of semen found on the victim's underwear. The semen could not reconciled to the boys' age, as neither boy had reached puberty. *Times* reporter Belluck added that this turn of events questioned the ability of [this and other] juvenile systems to be fair and accurate in their investigation of such young suspects.[7] Chicago police and prosecutors defended their handling of the Ryan Harris investigation and convened a new team of detectives to investigate Ryan's murder. Reports surfaced that the original detectives had failed to speak with three witnesses that claimed they had seen Ryan Harris with a strange man the night she disappeared.

On September 23, 1998, the *New York Times* identified Detective James Cassidy as a named defendant along with the Chicago Police in a lawsuit alleging false arrest. The civil suit alleged that the Chicago police lacked probable cause to arrest the two boys. Count II alleged they had failed to advise the boys of their constitutional rights to have counsel present during questioning. The suit specifically accused Detective Cassidy of coercing the boys' earlier confession. DNA test results later implicated a 29-year-old adult male, Floyd Durr, jailed on an unrelated rape charge, an indictment then issued against him for the murder of Ryan Harris. As Mr. Durr awaited trial during September 2005, the city of Chicago settled the wrongful arrest civil suit for $2 million.[8]

[7] Belluck, P., "Lawyers Struggle in Defense of Children in Deadly Crimes", New York Times, 8/19/98, http://topics.nytimes.com/topics/reference/timestopics/people/h/ryan_harris/index.html
[8] Ruethling, G., "City to Pay $2 Million in Wrongful Arrest" New York Times 9/20/05, http://topics.nytimes.com/topics/reference/timestopics/people/h/ryan_harris/index.html

After placing Elijah into custody, Chicago police interrogated him without an interested adult, although his mother was present in the police station. Instead of giving Miranda warnings to Elijah in the presence of his mother, Detective Cassidy and other officers held hands with 8-year-old Elijah and reminded him that "good boys don't lie." Instead of ensuring his mother understood the warnings so she could explain the significance of remaining silent until legal counsel could arrive, the Chicago police provided a Happy Meal to Elijah after he confessed to the murder of Ryan Harris.[9] Had the Chicago police and Judge Winiecki followed the Massachusetts rules regarding admissions and confession in juvenile proceedings, the prosecution would have borne the heavy burden of demonstrating the accused knowingly and voluntarily waived his Fifth Amendment right to remain silent beyond a reasonable doubt.

The Juvenile Advocates' Argument

Children's emotions trigger from different motivations. The interested adult rule in Massachusetts recognizes that children process their decisions differently than adults. Before a child's confession can become the product of a knowing and voluntary nature, the judge must first determine that both the child and his interested adult understand the significance of the privilege against self-incrimination and to have an attorney present during a custodial interrogation. Children do not cease to be children upon their commission of a crime. Children lack adult-like capacities to understand the charges against them. They are unable to think rationally about all the future consequences of their instantaneous decisions, and therefore lack the capacity to participate meaningfully in their defense. Because of the radical changes now taking place in the development of their brain, a child's immature decision-making is a

[9] Grisso, T. "Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Deliquency Cases." *New England Journal on Criminal and Civil Confinement* 32(3), Winter 2006, 3-14.

compelling reason to offer greater constitutional protections. Furthermore, if a child is found guilty, then rehabilitation, not punishment should be ordered.[10]

How Young Brains Differ from Adult Brains

To appreciate the issues of intent, legal culpability, and the state of the adolescent mind, one turns to the evidence found in recent scientific research. The evidence divides into two parts; studies that test adolescent cognitive capacities and social characteristics as compared to adults and tests probing why adolescents are not able to comprehend issues of law to the same degree as adults.[11] Within the past ten years, people in neuroscience have studied the adolescent brain using magnetic resonance imaging (MRI) technology.[12] These studies examine developmental progression throughout the span between pre-puberty to early adulthood. Initially, MRI technology was used to examine children of different ages in the form of "snapshots;" however, emerging studies have expanded the research where the same children are examined across time. While there is no way to predict the exact moment when the human brain achieves adult-like capacity, what is clear from this evidence is that the human brain continues to develop throughout adolescence.[13] Moreover, when a person reaches their mid-twenties their brain has fully developed and is then most capable to weigh the long-term consequences of one's actions.

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[10] American Bar Association. "Cruel and Unusual Punishment: The Juvenile Death Penalty / Adolescence, Brain Development and Legal Culpability." *Juvenile Justice Center.* January 2004.

[11] Grisso, T. "Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Deliquency Cases." *New England Journal on Criminal and Civil Confinement* 32(3), Winter 2006, 3-14.
[12] Grisso, T. "Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Deliquency Cases." *New England Journal on Criminal and Civil Confinement* 32(3), Winter 2006, 3-14.
[13] Id.

The Pruning and Myelination Process

As the human brain develops during puberty, two important changes restructure the brain in processes known to the scientific community as pruning and Myelination. Pruning sheds the unused parts of the brain, while Myelination then insulates the remaining neuronal connections in ways that permit enhanced conductivity. In short, these processes work in tandem and permit the brain to function more efficiently. These changes occur in both the prefrontal cortex, where rational thought occurs and in the central part of the brain, or limbic system, where emotions originate. [14] Because these changes occur during a person's formative years, scientists learn that the most active part of a teenager's brain is their limbic system. Until their prefrontal cortex fully develops, the teenager's most active brain activity occurs in the area responsible for generating emotion.

The Rear, Middle and Frontal Brain and Their Primary Responsibilities

MRI evidence teaches that human brains develop from the rear toward the front of the head. The rear is responsible for basic senses such as sight, hearing, and smell that develop almost immediately after birth. As a person reaches adolescence, the central part of the brain becomes noticeably active, remaining vibrant into their mid-twenties. This central area is awash in hormones during puberty. It generates emotions such as fear, anger, jubilance, rejection and affection.[15] The teen brain has not yet achieved adult-like control over their emotions.[16]

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[14] Sowell, E.R., "Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex," 21 Journal of Neuroscience 22: (2001)

[15] American Bar Association. "Cruel and Unusual Punishment: The Juvenile Death Penalty / Adolescence, Brain Development and Legal Culpability." *Juvenile Justice Center*. January 2004.

[16] Id. Dr. Steinberg adds, "Teens are acquiring the hardware in the their brains to function like adults -but they are not there yet."

Cutting Edge Technology: fMRI, Real-Time Brain Activity

Functional Magnetic Resonance Imaging (fMRI) is cutting-edge technology that shows neuronal activity in the teen brain at the moment a behavioral decision is being made. Such studies employ real-time examinations of brain activity while teens perform video game functions that require they delay their impulsive tendency while choosing their next move. In terms of a teen's ability to consider future consequences before taking present action, studies show that average 17-year-olds perform in more adult-like contemplation than those who are younger. The benefit here is that further fMRI studies would better define at what age a particular teen is able to forecast the accurate short and long-term consequences of their behavioral choices.[17]

The downside is that this technology cannot prove whether a certain 17-year-old behaved, on a relevant date and time, in such an adult-like fashion that adult-like punishment can be justified. For such evidence to be relevant, the teen would need to undergo brain activity testing at the critical moment of his behavioral decision. While this new technology may presently fall short of identifying criminal intent at a critical moment in time, it does explain how the human brain operates in general.[18]

Peer Influence Wanes as Adolescents Become Independent Thinkers

Psychological studies assess teenage peer influence, risk assessment and communicative skills near the time an adolescent commits a crime, and during trial. Teens are more influenced by what their peers will think than the future consequences of their actions.[19] Teens focus on the thrill of their risk-taking, their need to be popular among their peers and most often without any

[17] Grisso, T. "Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Deliquency Cases." *New England Journal on Criminal and Civil Confinement* 32(3), Winter 2006, 3-14.
[18] Id.
[19] Id.

regard for potentially serious long-term costs. When emotions run high, such as during those moments when formal charges are filed against them, inexperience and the threat of incarceration minimize their examination all the possibilities. For example, should a prosecutor offer the teen a choice of either probation or a trial, shallow thinking would overlook the real possibility of an acquittal. It is inaccurate to say that teens cannot recognize risk; rather, the difference between teens and adults is in how they weigh those risks.[20]

M'Naughten: Differentiating Right from Wrong as the Basis of Culpability

If knowledge of right from wrong is the court's basis to determine culpability, then the average 6 year old is probably as culpable as an adult is. Professionals in the juvenile courts, youth corrections facilities and detention centers understand that the teen population with whom they work is not "average." Where the average IQ of teens nationwide is 100, the average IQ of youth in detention centers is 85. Mental disorders nationwide in the general population ranged from 18-20%; however, it is about 60% among juveniles held in detention.[21]

Understanding the Words in a Miranda Warning Without the Implications

By the time a teen reaches 15, studies show there is little difference between them and adults in understanding the words used in a Miranda warning. For example, a 15-year-old understands that an attorney is present during questioning so the attorney may help. When juveniles are asked why their attorney needs to know everything that happened on the day of their arrest, a majority of defendants responded that their attorney needed this information so their attorney could explain their degree of fault to the judge. Thus, the child understood the attorney's help to be conditional on their innocence. For repeat offenders, those working in the juvenile justice system may presume the child knows their rights on this subsequent charge.

[20] Id. "Youths tend to value the thrill of risk taking…or are less capable of estimating the real degree of risk…"
[21] Grisso, T., "Double Jeopardy: Adolescent Offenders with Mental Disorders," (Chicago University Press, 2004.)

Justice is not served when one experienced child has all the necessary knowledge from his previous arrest while another child, as experienced, lacks an appreciation of a Miranda warning, plea bargaining or an arrest.[22]

Competency to Stand Trial: Which Court, What Competency, What Criteria?

Are teens less deserving of the due process rights afforded to adults? Which rights are among those an adolescent can understand? The debate over juvenile due process boils down to:

- Whether a teen must have adult-like competency in order to stand trial in an adult court;
- Whether a teen, found incompetent to stand trial, should be afforded time to grow up, receive guidance as to how they may assist in their defense or receive treatment, and,
- Whether the courts should consider using scientific evidence and available research, as did the *Roper* Court, in a competency determination.[23]

Are Adolescents As Competent as an Adult?

States disagree on the meaning of competency to stand trial, yet three approaches represent the current trend.[41] First, an approach that juvenile defendants tried in a juvenile court must have the same degree of competence, as would an adult tried in an adult court. This means that if the juvenile defendant can demonstrate mental illness or mental retardation, then the juvenile is incompetent to stand trial, even in a juvenile court. Yet if a juvenile defendant is found incompetent due to immaturity, he could still be found competent to stand trial, because a majority of states recognize only mental illness or retardation as factors of incompetence. In the second approach, where the juvenile courts lean more toward a rehabilitative than punitive approach, less capacity is required in order to be subject to the juvenile court's jurisdiction, given

[22] Grisso, T. "Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Deliquency Cases." *New England Journal on Criminal and Civil Confinement* 32(3), Winter 2006, 3-14.
[23] Id.

a better chance of receiving services. Last is the view that teens are competent enough to stand trial in juvenile court when they are as capable as their age peers.[24]

How the Supreme Court Views Juvenile Protections

Juvenile delinquency cases heard before 1965 were informal.[25] Before the U.S. Supreme Court decided Kent v. United States, 383 U.S. 541 (1966), In re Gault, 387 U.S. 1 (1967), and In re Winship, 397 U.S. 358 (1970), a juvenile's understanding of Miranda, competence to stand trial or legal culpability were not pressing issues. During this pro-rehabilitation era, constitutional protections were more of a secondary concern. Before this trilogy, due process rights were relatively unimportant since teens were merely dependants of their families.[26] Before 1966, transfer to an adult court, waiving constitutional rights, the capacity to participate in their defense, cross-examination of witnesses or asserting one's mitigating circumstances were not critical considerations. The first two cases changed the landscape of juvenile justice, standing for the proposition that youths are no less deserving of their constitutional protections than are adults.[27] *In re Winship* stands for the proposition that the 14th Amendment's Due Process Clause requires application of "essentials of due process and fair treatment" for juveniles, and established the standard of proof as beyond a reasonable doubt. The transition from the old and

[24] Id. "If courts are not willing to make per se rules (e.g., presuming incompetence below age thirteen), we in the forensic mental health professions have to greatly improve our assessment methods to provide reliable evidence for discretionary judicial decisions on a case by case basis."

[25] Birckhead, T.R. "Toward a Theory of Procedural Justice for Juveniles." *Buffalo Law Review*. December 2009, 1447-1513.

[26] Id.

[27] Id. "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."

informal juvenile court to the more modern and formal juvenile court blurs the differences between today's juvenile and adult criminal courts.[28]

Miranda, Competency to Stand Trial and Legal Culpability

Now that the Supreme Court had clarified that youthful offenders were entitled to certain constitutional protections, child advocates began their argument for certain rights. During the 1980's, amidst a highly publicized wave of juvenile violence such as school shootings in Columbine, Colorado and similar events, legislatures chose a zero tolerance approach, rationalizing that for sake of public safety; rehabilitation should be demoted to a secondary consideration. In light of widely publicized gunfire in schools, the time for a greater deterrent had arrived. During this turbulent time, three legal issues relevant to a young person's capacity prominently rose to the surface; the capacity to waive Miranda rights, competency to stand trial, and questions regarding the legal culpability of the juvenile.

Knowing, Voluntary and Intelligent Miranda Waiver

To be admissible evidence, a defendant's statements must typically be preceded by a knowing, voluntary and intelligent waiver of their rights to remain silent and have counsel present.[29] The test is the 'totality of the circumstances'; where each case weighs the nature of the situation and the characteristics of the suspect. When a young person without counsel or an interest adult hears the words, "You have the right to remain silent" it is at least plausible that the youth interprets this as a command from an authority figure that he must speak else he shows

[28] Grisso, T., Schwartz, R.G., "Youth on Trial: A Developmental Perspective on Juvenile Justice " *Juvenile Law Center,* 2000, adds, "During the past 20 years…Virtually every state has expanded the charges for which juvenile offenders can be tried as adults, lowered the age at which this can be done and increased the severity of punishment for juveniles convicted of a crime."

[29] Grisso, T. "Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Deliquency Cases." *New England Journal on Criminal and Civil Confinement* 32(3): Winter 2006, 3-14.

disrespect for authority. To the teen mind, the remainder of the Miranda incantation fortifies the fact that the child is in serious trouble, all the more reason for the teen to utter the words the officer desires to hear. Tom Grisso of the University of Massachusetts Medical School conducted a study of 400 delinquent youth and 200 criminal and non-criminal adults.[30] Over half of the youths clearly misunderstood one or more parts of the Miranda warning compared to 23% of adults who misunderstood at least one warning. Grisso explains that young people translate Miranda into themes they find consistent with authority figures, thus, excluding an assertion of their individual rights to say nothing at all.

Massachusetts Miranda Warnings for Juveniles

In Massachusetts, the failure to give Miranda warning renders a juvenile's confession or admission inadmissible.[31] Commonwealth v. A Juvenile, 402 Mass. 275 (1988). Miranda warnings are only necessary for custodial interrogations defined as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Commonwealth v. Bryant, 390 Mass. 729 (1984). Guided by the holding in Commonwealth v. Phillip S., 32 Mass. App. Ct. 720, 722, (1992) the test is how a reasonable person in the juvenile's position would have understood the situation. Such factors include the place of the interrogation, the existence of probable cause, whether the interview was aggressive or informal, whether the suspect was free to end the interview and whether the interview terminated with an arrest.[32] However, Massachusetts, following Connecticut case law, does not find it necessary to inform youths of the consequences of confessing to crimes that would allow for prosecution as an adult. In a 1991case, the Connecticut

[30] Id. at Sec. B. Research on Specific Legally-Relevant Capacities

[31] Blitzman, J., "Admissions and Confessions in the Juvenile Court." *Massachusetts Juvenile Court Bench Book.* 1(Part I: Delinquency/ Ch. I.10.3) 2003.

[32] Id. at § I.10.4

Courts found it "capacious enough" to allow a totality of the circumstances test for voluntariness.[33] State v. Perez, 591 A.2d 119, 124, 125 (1991).

Massachusetts also holds that a juveniles right to confer and have meaningful consultation between an older juvenile and an interested adult includes a "genuine opportunity to consult", if over 14, rather than a per se rule that a meaningful consultation actually takes place. Commonwealth v. MacNeil, 399 Mass 71, 79 (1987). The law in Massachusetts is that parents receive immediate notification by police whenever their child is arrested, and that questioning not commence until that parent has been notified.[34] Mass. Gen. Laws Ch. 119 § 67. Unlike most other states, if the juvenile has been previously arrested, this fails to create an automatic presumption of the knowledge and sophistication needed to under their Miranda rights. If the juvenile is over 14 but under 17, all that is needed is an actual opportunity for consultation where a mere offer to phone the juvenile's mother, without actually contacting the parent or guardian fails as a "genuine opportunity" for meaningful consultation.[35]

Competence to Stand Trial

The competence to stand trial refers to a defendant's capacity to participate in a meaningful way to their defense. In Tate v. Florida, 864 So.2d 44 (2003), a twelve year old tried some wrestling moves he saw on TV on a younger child who died. Tried for murder as an adult, the prosecutor offered to return the matter to the juvenile court's jurisdiction. A psychologist conducted an evaluation and advised the court that Tate's competence was questionable. This issue was not raised at trial, rather, Tate's mother simply rejected the plea agreement and Tate acquiesced. Tate was sentenced to life imprisonment. New counsel appealed yet he appealed, arguing that the issue of his competence to standard trial should have been raised during pretrial

[33] Id. at § I.10.6
[34] Id. at § I.10.8
[35] Id.

proceedings. The Florida Supreme Court agreed; reversed the conviction, and ordered a new trial.[36]

Had Tate been an adult, the focus on the defendant's competence would have included the defendant's mental retardation or mental illness. Very few states follow the policy in Massachusetts where developmental immaturity in juveniles is at least worthy of consideration in the determination of competency, just as an adult defendant's incapacity would be the product of a mental illness or retardation.[37] Immaturity by itself is not dispositive, yet it could and should be a factor in the judge's evaluation of competence in a juvenile defendant. As of this writing, no statutory or case law overtly acknowledges immaturity, by itself, as a viable basis for incompetence to stand trial.

Culpability

The culpability inquiry asks whether this juvenile defendant had the requisite intent at the time he committed the crime to justify his guilt. Some would argue that a snapshot into the brain of the adolescent in the very moments of his actions that accurately measure his intent, is plainly impossible. The question of culpability arises occasionally in cases of an insanity defense for juveniles, but it more frequently becomes an issue when transfers from juvenile to adult court is being determined.[38] This is especially true in capital cases. Among the items worthy of consideration here is the existence of any mitigating or aggravating factors. Are youths significantly different from adults in their ability to distinguish right from wrong? Can young brains weigh the potential future consequences of their action in the heat of the moment? What capacities does a child possess to resist impulses and pressure from their peers?

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[36] Grisso, T. "Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Deliquency Cases." *New England Journal on Criminal and Civil Confinement* 32(3), Winter 2006, 3-14.
[37] Id. Note however that, "…there is little formal law, statutes, or case law, acknowledging that immaturity may be a basis for incompetence to stand trial."
[38] Id.

In Roper v. Simmons, 543 U.S. 551 (2005), the majority of justices used or considered using developmental psychological evidence in support of their ruling that defendant's accused of crimes committed while juveniles will not be executed.[39] Dissenters such as Justice Scalia argued against the establishment of the per se rule, reasoning that judges or juries should be allowed the discretion to determine, on a case-by-case basis, whether the defendant possessed sufficient developmental capacities as would require a lesser sentence. The dissent is unpopular with those who would acknowledge that psychology and psychiatry are sciences capable of studying the capacities of youths in general. However, these sciences have developed no reliable or valid clinical method for concluding that a certain youth, on a particular day and time possessed a sufficient degree of maturity to suggest he be held as responsible as an adult.[40]

How the Constitutional Protections for Adults Compare to Juveniles

Since teens are not yet adults, lawmakers and judges should apply today's scientific evidence to ensure that today's juvenile defendant receives a fair trial, and if found guilty, that the defendant receive appropriate rehabilitation. Dr. Laurence Steinberg is a distinguished research contributor to the American Psychology Association for public policy. Dr. Steinberg succinctly describes the teen brain as a motorized vehicle with an excellent accelerator and a weak brake. He cautions that as teens acquire the hardware in their brain to function like an adult, teen's needs guidance in an enriched environment to optimize this opportunity to develop their brain. As teens navigate the murky waters of neurodevelopment changes between puberty and into their adulthood, the juvenile advocate should expect chaos, conflict, emotional peaks as well as risk taking and rule breaking. As the child seeks to find his own identity and declare his

[39] Id. at C. Per Se Rules Versus Judicial Discretion
[40] Id.

independence as a unique person, adults will do well to create favorable conditions for the teen to practice good decision-making skills helping them to realize their true potential.[41]

Transfer to Adult Court, Counsel, Confrontation and the Burden of Proof

In order for a juvenile to be tried in adult court, the teen should be given an opportunity for a hearing, his counsel must be granted access to relevant records and any transfer order must be accompanied with written findings for its decision. Kent v. United States, 383 U.S. 541 (1966). In 1967, the Supreme Court rejected the notion that substantive benefits of the juvenile court more than offset the denial of due process rights. Therefore, the right to counsel, the privilege against self-incrimination and the opportunity for cross-examination of witnesses apply to juvenile delinquency proceedings. In re Gault, 387 U.S. 1 (1967). In 1970, the Supreme Court again applied the Fourteenth Amendment, "...nor shall any state deprive any person of life, liberty or property, without due process of law." (XIV Amend), when it declared that to give juveniles the protection of the highest standard of proof does not risk destruction of the beneficial aspects of the juvenile process. In re Winship, 397 U.S. 358 (1970).

The Holding in Atkins v. Virginia

In 2002, the Supreme Court banned the execution of mentally retarded persons, citing the underdeveloped mental capacities as a major factor. Public policy acknowledges the concept of age appropriate behavior. For example, the law restricts the right to vote, to serve on a jury, to consume alcohol, to marry, to enter into contracts and to watch certain movies.[42] Society is comfortable with spending precious tax funds to promote the prevention of substance abuse and

[41] Chamberlain, L.B. " The Amazing Teen Brain: What Every Child Advocate Needs to Know." *American Bar Association/Child Law Practice* 28(2): April 2009, 17-24. Adding, "Encourage caregivers to teens an active role in discussing family rules, and consequences for their behaviors and to listen to how they evaluate risks and decide what is important."

[42] American Bar Association. "Cruel and Unusual Punishment: The Juvenile Death Penalty / Adolescence, Brain Development and Legal Culpability." *Juvenile Justice Center.* January 2004.

sex education in order to protect our young people during their vulnerable stage of life. When imposing sentences of life without parole, or when get-tough policies are fueled by publicity of youth crime, public policy abandons age appropriate solutions, preferring to then treat our children as fully functioning adults.

How Many Are Too Many Rights; Is a Separate Juvenile Court Necessary?

When there is no bright line reason for the separate existence of an adult criminal court and a juvenile court, the future existence of a separate juvenile court becomes questionable. When granting rights to a juvenile previously reserved to an adult (such as the right to trial by jury) the purpose of a separate juvenile court erodes away. Some courts now practice the quid pro quo, or trade-off, approach where the degree of constitutional rights given to a juvenile is tempered by the amount of rehabilitative services received. Other courts strive for a fair result by balancing the competing interests of each right given or withheld. Is the proper calculus weighing rehabilitative treatment against punitive deterrents toward future delinquency?[43] It is entirely possible that should the juvenile court provide all the due process protections available to adults, such a policy will spell the doom of the juvenile court, as we currently know it.

Trial by Jury, in 20 States

In 2008, Kansas became the 20th state to hold that juveniles have a constitution right to a jury trial. In the Matter of L.M., 286 Kan. 460 (2008).The Kansas Supreme Court found that during these past 25 years, punitive legislation eroded the distinctions between the juvenile and adult courts. In doing so, the juvenile court's benevolent parens patriae character had been compromised to the point where the Sixth and Fourteenth Amendments provide that youthful

[43] Birckhead, T.R. "Toward a Theory of Procedural Justice for Juveniles." *Buffalo Law Review*. December 2009, 1447-1513.

offenders must be accorded the protection of trial by jury.[44] In 1971, the Supreme Court said that jury trials are not necessary to achieve fundamental fairness in juvenile delinquency hearings because there is no reason to doubt that judges would not decide cases as fairly as would a jury. McKeiver v. Pennsylvania, 403 U.S. 528 (1971). However, states are free to offer jury trials if they so choose, or if their State Constitutions provide additional protections beyond those of the U.S. Constitution. Those who would argue the federal Constitution's 6th and 14th Amendments control, make their case on the basis that juveniles prosecuted for criminal acts potentially triggering their loss of liberty are entitled to the same protections as adults accused of similar crimes.[45]

L.M. was 16, charged with a felony count of aggravated sexual battery and a misdemeanor count of possessing alcohol as a minor. In exchange for the cigarette offered by the victim to L.M., L.M. tried to kiss her, licking her face instead. The victim suffered no injury, yet L.M. was arrested and questioned during the early morning hours despite his drunken state. Although L.M. was a first offender, he was held in a juvenile facility for 154 days until trial. L.M.'s motion for jury trial was denied. At his bench trial, L.M. was convicted on the felony charge and detained for an additional 31 days until his sentencing. L.M. was classified to be a "Serious Offender I" and sentenced to 18 months in a juvenile correctional facility. The District Court stayed the sentence and ordered that L.M. be placed on probation until age 20 and per Kansas law, ordered to register as a sex offender.[46]

Consequences of Sex Offender Registration for Adolescents

[44] Id. In re L.M., 186 P.3d at 170, "Because the juvenile justice system is no patterned after the adult criminal system, we conclude that the changes have superseded the Courts' reasoning and those decisions are no longer binding."
[45] Id. This is also known as the "fundamental fairness argument" found in Justice Douglas's dissent, McKeiver, 403 U.S. at 557-63.
[46] In re L.M. 186 P.3d at 165 (2008).

The consequences of requiring a juvenile to register as sex offender are far more devastating than for an adult. Sex offender registrations jeopardize the juvenile's employment, education, and housing opportunities. Some regard such public notification as constituting "government defamation by falsely labeling all sex offenders as potential future predators without sufficient due process", making a label such as 'dangerous predator' especially defamatory for juveniles.[47] In Doe v. Sex Offender Registry Bd., 428 Mass. 90, 105 (1998), the Supreme Judicial Court noted the label "sex offender" sweeps in persons whose crimes may have nothing to do with victimizing anyone, much less the vulnerable populations with which the statute is concerned. "A careful and individualized due process [inquiry] is necessary to sort sexual predators likely to repeat their crimes from large numbers of offenders who pose no danger to the public, but who are caught nonetheless in the statute's far-flung net of registration."

How Federal Sex Offender Registration Offends State Constitutions

Another way to crystallize the advocates' argument for greater protections during trial and meaningful rehabilitation is to examine youthful sex offender registration. In 2006, the federal Adam Walsh Protection and Safety Act (PL 109-248) established statewide sex offender registration and notification requirements. The law retroactively includes juvenile adjudications where the youthful offender was at least 14 years of age and the offense was found to be comparable to, or more severe than, aggravated sexual abuse.[48] In a classic example of the Supremacy Clause in action, this federal law leaves virtually no discretion to state judges or state

[47] Coffey, P., "The Public Registration of Juvenile Sex Offenders," Winter 2007, at 6, "The notion that public labeling will be productive in reducing risk for further sexual offending is inconsistent with decades of theoretical and research-based understanding of child development, delinquency, and social psychology."
[48] Joseph, A., "Report to the House of Delegates: Commission on Youth at Risk, " *American Bar Association Section of Criminal Justice Report 101A.* p. 3, February 2009.

Legislatures to decide the extent and duration of registration requirements, the information contained in those registries and the scope of community notification.[49] For the youthful offender, a failure to comply includes a criminal penalty. If the state fails to comply with the federal guidelines by July of 2009, the state risks forfeiture of certain federal funds as severe as a 10% reduction in Byrne grants, which total over $1 Billion for all 50 states. In 2006, the state taking the least in such grants received approximately $3 Million.[50]

One Size Fits All Offenders

The American Bar Association took the position in February 2009 that it is, "inappropriate to adopt a policy, pass a law, or sanction the practice of publicly indentifying and labeling individuals who are pre-teen to seventeen years of age, for lengths of time ranging from ten years to their entire lifetime as a 'sex offender' when such sexual conduct is the result of their first and only sexual offense." Report to the House of Delegates 101 A, p. 3, February 2009. The juvenile advocate here vehemently argues that to apply the same standard of punishment to the child as an adult summarily dismisses the major differences between youths and adults. In Frank E. Zimring's 2007 article, *The Predicate Power of Juvenile Sex Offending*, 90% of juvenile arrests for a sex offense are a one-time event. As evidence of a pedophilia disorder under the American Psychiatric Association diagnostic criteria, 92% of the incidents leading to an arrest of a juvenile for a sexual offense would be ineligible as credible evidence. A 2008 report from the U.S. Department of Justice reveals that recidivism rates among juvenile sex offenders fall between 3 and 7 percent.[51]

The Penalties Placed on the Youthful Offender

[49] 18 U.S.C. § 2250(a) (2007).
[50] 42 U.S.C. §§ 16294(a)(1) and 16925(a) (2007). Nearly 2.74 million was apportioned as the *minimum* grant for each state in fiscal year 2006.
[51] U.S. Department of Justice, "Juveniles Who Have Sexually Offended," http://www.ncjrs.gov/pdffiles1/ojjdp/184739.pdf

In terms of the penalty imposed, the loss of employment, housing, and education opportunities is the tip of the iceberg. Within the community, the risk is high for harassment, stigmatism and vigilantism. Once the community is notified, nearly all of the efforts toward rehabilitation and treatment evaporate for those forced to drop out of school.[52] In Roper v. Evans, 542 U.S. 551 (2005), the American Medical Association stated in their Amicus Brief, ". . . the adolescent mind works differently from ours. Parents know it. This Court has said it. Legislatures have presumed it for decades or more. And now, new scientific evidence sheds light on the differences." As the *Gault* Court reasoned in their promotion of juvenile rehabilitation in 1967, society's role is, "not to determine guilt or innocence, rather, to know what he is, how has he become what he is, and what had best be done now in his interest and the interest of the state to save him from his downward career."[53]

The Retroactive Impact

For those at or near the age of majority at the time of their sexual offense, a retroactive registration requirement for their past acts functions as a bill of attainder. A bill of attainder is a legislative act which inflicts punishment without judicial trial and includes any legislative act which takes away the life, liberty or property of a particular named or easily ascertainable person or groups of persons because the legislature thinks them guilty of conduct which deserves punishment. Cummings v. Missouri, 71 U.S. 277, (1867).[54] Under the Adam Walsh Act, the easily ascertainable groups of persons includes young males having consensual relations with

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[52] Freeman-Longo, R.E., "Revisiting Megan's Law and Sex Offender Registration: Prevention of Problem," American Probation and Parole Association, 9 (2000). http://www.app-net.org/revisitingmegan.pdf.

[53] In re Gault, 387 U.S. 1, 15-16 (1967), "thus, the idea of crime and punishment was to be abandoned and the focus shifted to rehabilitation."

[54] Saunders, T.M., "Defining Bills of Attainder", *Citizens for Change, America*, http://cfamerica.org/index.php?option=com_content&view=article&id=657. Last Accessed April 13, 2010, offers a more direct definition, "A Bill of Attainder is a law, or legal device used to outlaw people, suspend their civil rights, confiscate their property, or put them to death, or punish them without a trial."

underage females, charged with criminal sexual assault, sentenced to probation on condition they complete a rehabilitative diversionary program.

In 1979, the Supreme Court articulated three specific factors warranting a disparity between the constitutional rights of youths and adults: (i) the unique vulnerability of children, (ii) their inability to make critical decisions in an informed and mature manner and (iii) the importance of the parental role. Bellotti v. Baird, 443 U.S. 622 (1979).[55] On the one hand, the federal sexual offender registration requirements seem to fit the compelling purpose of protecting society from sexual predators. On the other hand, the registration mandate renders the *Belloti* factors moot, and ignores less restrictive means such as rehabilitation. Moreover, sex offender registration, as a one-size-fits-all, no-exceptions solution, directly conflicts with some state constitutions seeking to protect our nations' young people from cruel and unusual punishment.

Michigan Court of Appeals Takes a Stand

In what may be an enlightening November 2009 precedent, the Michigan Court of Appeals ruled that a male over 18 having a consensual sexual relationship with a 15-year-old female, a so-called "Romeo and Juliet" relationship, cannot be included on the Michigan sex offender registry on grounds that such a listing constitutes cruel and unusual punishment. People v. Dipiazza, 286 Mich.App. 137, 778 N.W.2d 264 (2009).

The Michigan Sex Offenders Registration Act, M.C.L.A. §§ 28.722, 28.762.14(3), was modified in 2004 ordering that youthful offenders complete a juvenile diversion program. Only those failing to complete the program are placed on the state's list. At trial, the lower court agreed with the tenets of the Adam Walsh Act, characterizing the registry requirement as "not

[55] These factors are included in what has become recognized as the "fundamental fairness argument."

punishment at all."[56] Recalling an earlier definition of bill of attainder, the issue becomes one of defining what constitutes a criminal penalty, whether registration is indeed such a penalty, and if it is, whether it rises to the level of being cruel and unusual in light of consensual relations and rehabilitation. The journey from black to white requires open-minded consideration of the gray in between. Whether rehabilitation is a less restrictive, and viable means of protecting the public requires objective consideration of the *Belotti* factors, state constitutional protections and a subjective individual inquiry.

The Michigan appeals court overturned the trial court finding of "no punishment at all", saying, "Here, the circumstances are not very grave. This defendant is the same person who married the girlfriend five years later. The penalty in this case is harsh. As a result of registering as a sex offender, the defendant has been unable to find employment. Defendant is required to register along with rapists and pedophiles. The [registry] does not describe his offense." . People v. Dipiazza, 286 Mich.App. 137, 778 N.W.2d at 272 (2009). The high court added, ". . .it is abundantly clear that there is no [meaningful] goal of rehabilitation in this case. Defendant never posed a danger to the public, or a danger of reoffending. Defendant is not a sexual predator. SORA's (Sex Offender Registration Act) labeling him to be a convicted sex offender works at an opposite purpose from securing employment and otherwise moving forward with his life plans." Id at 274.

The appeals court considered the following factors; (i) the gravity of Robert Dipiazza's offense, (ii) the harshness of his penalty to register as a sex offender for ten years, (iii) the penalty in comparison to those imposed by other states, and (iv) the lack of a rehabilitative goal to reach its conclusion that, under these circumstances, a ten-year inclusion on a list with rapists

[56] "State Appeals Court Limits Sex Offender Registry," *Citizens for Change America,* http://cfcamerica.org/index.php?view=article&catid=11%3Ateens-children&id=1106. Last Accessed April 13, 2010.

and pedophiles constituted "cruel or unusual punishment." M.C.L.A. Const. Art. 1 § 16. This recent event signals hope for fundamental fairness, and the important role the courts play in their advancement of that argument.

The Better Course of Action

This federal law thrust upon the states with a financial penalty should be challenged on grounds that this law is overbroad. It should be struck on grounds that it destroys opportunities to rehabilitate the youthful offender so that he may become a contributing member of society. A comprehensive assessment that carefully tailors available interventions is the better course of action for first-time or only-time offenders. Juvenile judges sit in the best position to weigh the juvenile's specific offense, his risk of re-offending, consider any prior delinquent acts and evaluate the individual's dangerousness to the community. The Adam Walsh Act's retroactive requirement and its prohibition of petitions to remove the registration requirement for up to 25 years should stimulate Congress and the states to re-examine and revise their laws since here, one size clearly does not fit all.[57]

How State Laws Inconsistently Treat the Rights of the Juvenile Defendant

On the one hand, a rigidly applied mandate for sex offender registration is a clear and unambiguous means to protect society. On the other hand, such a uniform approach overlooks mitigating circumstances to ensure the punishment fits the crime. In order to provide the juvenile defendant those rights which best fit their circumstances, and a fair trial, the states seem to

[57] Joseph, A., "Report to the House of Delegates: Commission on Youth at Risk, " *American Bar Association Section of Criminal Justice Report 101A*. p. 3, February 2009. "Resolved that the American Bar Association urges states to a) Apply the provisions of Public Law 109-248 prospectively only to adjudicated juveniles, so that they are not subjected to collateral punishment or other sanctions that would go beyond that originially handed down by the juvenile court after a delinquency adjudication; and, b) provide a remedy through which adjudicated persons may later apply for relief from sex offender registration and other related requirements after an appropriate period of supervision, treatment and lawful community adjustment."

legislate in a manner best described as one including their own fingerprint. When one does not necessarily have to guess at the meaning of the law, the foreseeable punishment may then have a desirable effect as a protective deterrent. In contrast, when justice is blind to the due process and rehabilitative needs of our children, society suffers. The following discussion examines a single state legislative session in 2005 illustrating how the states treat those bundle of rights accorded to the juvenile defendant before, during and after adjudication.[58] While some states recognize the child's diminished capacity, others appear to be adding to the amorphous state of the law today.

Pre-trial rights include the minimum age required for a child to face criminal charges, one's competency to stand trial, the transfer of cases from juvenile to adult court. Some states specifically declare the right to trial by jury is not within the juvenile's bundle of rights. Other states specifically allow the defendant his right to choose a jury or a judge, by right. Still others require special circumstances before any right to a jury attaches. The legislative activity suggests the states lack any type of uniform approach to one's post-adjudication rights in the contexts of aftercare and re-entry into society, incarceration, annulling the record, life sentences without parole and rehabilitation programs.

Minimum Age Required for Adjudication, Right to Counsel, Custodial Interrogation

Thirty-seven states have no statute specifying a minimum age before a child may be tried as a delinquent. Of the remaining thirteen states, North Carolina requires the accused to be at least 6 years of age. (See Exhibit "A")[59] Maryland, Massachusetts and New York each require the defendant be at least 7 years old. Arizona prefers the child to be 8 years of age before formal charges may be brought. Vermont, Texas, South Dakota, Mississippi, Louisiana, Kansas,

[58]Schmid, M., "Summary of 2005 State Juvenile Justice Legislation", *National Juvenile Defender Center,* 2005. http: www.njdc.info/pdf/njdc_2005legislation_summary.pdf.

[59] National Juvenile Defender Center at http://www.njdc.info/state_data_minimum_age.php. Last Accessed March 17, 2010.

Colorado Minnesota and Arkansas law requires a minimum age of 10. Interestingly, the vast majority of states define a child as being younger than 18, or some other age, without making any distinction between "children" facing delinquency proceedings, and those children falling under the jurisdiction of the juvenile court for other issues such as abuse, or neglect. In 2005, Colorado (HB1 1034) and Maryland (HB 802) passed positive legislation permitting multiple professionals, i.e., the court judge, the prosecutor and defense counsel leave to raise the issue of competency and request evaluations.

Montana passed a law (SB 146) providing that every juvenile alleged to be delinquent, regardless of their financial situation, should be appointed counsel for their defense. Several states considered laws addressing a child's waiver of his or her right to counsel. Illinois enacted a law (SB 1953) that prohibits a minor from waiving their right to counsel. Virginia restricts prohibitions against a juvenile's waiver of counsel, for felony cases only (HB 2670). Georgia tried unsuccessfully (in SB 135) to require that a child found within the jurisdiction of its adult court to have all charges brought against the accused within 180 days of his arrest. In terms of interrogation procedures, Arizona (HB 2614), Nebraska (LB 112), and Texas (SB 662) all considered a requirement that all custodial interrogations of juveniles be electronically recorded.

Transfer to Adult Criminal Court & Sentencing

Illinois, Michigan, Missouri, New Hampshire and Wisconsin all introduced, and all failed to pass, legislation changing the jurisdiction of their juvenile courts from under 17 years of age to under 18 years of age. Washington State enacted (HB 1187) a law that prohibits mandatory minimum sentences from applying to adjudicated offenders under the age of 18. In contrast, New York considered ten bills increasing the types of offenses eligible for transfer to adult criminal court, or increasing the sentence imposed on juvenile offenders found guilty of certain offenses.

A Juvenile Defendant's Right to a Jury Trial in a Delinquency Proceeding

Thirty states specifically declare by statute or case law that a person charged as a juvenile delinquent has no right to a trial by jury. (See Exhibit "B")[60] In nine of the twenty states who provide an absolute right to a trial by jury, exceptions include probation revocation cases where arguments are heard before a judge only. Eleven of those twenty states provide jury trials only when the juvenile risks confinement to an adult penal facility, or is found a habitual offender. During the 2005 legislative session, five states proposed new laws granting the right to a trial by jury under various scenarios, none of these proposals became law. In McKeiver v. Pennsylvania, 403 U.S. 528 (1971), the Supreme Court announced that jury trials are not constitutionally required in juvenile court hearings.

Incarceration and Youth Incarcerated for Life Without Parole

Vermont passed an act (HB 515) requiring the court to make written findings whenever a child is detained outside the home, that explains why no viable alternative exists. Tennessee introduced and yet failed to pass two similar bills (SB 1770 and HB 1292) discouraging juvenile detention in secure facilities, if possible. The Maryland legislature sent a bill to its governor that would require expeditious transfer of a juvenile found guilty to his assigned facility, limiting the amount of his post-trial time a juvenile potentially sits in a county jail. The Maryland governor vetoed this bill in 2005.

According to a study conducted by the Human Rights Watch, and with eleven states not reporting, there are 1,839 youth (under the age of 18), now incarcerated for life without the possibility of parole. (See Exhibit "C")[61] Six states, Pennsylvania, Michigan, Florida, California,

[60] Szymanski, L., (2008) Juvenile Delinquents' Right to a Jury Trial, *NJCC Snapshot,* 13(2). Pittsburgh, PA: National Center for Juvenile Justice.
[61] Study conducted by the Human Rights Watch, "The Rest of Their Lives: Life Without Parole for Child Offenders in the United States,"

Illinois and Colorado hold more than 900. Three states, Utah, New Jersey and Vermont hold zero. After *Roper*, effectively abolishing the juvenile death penalty, Colorado has repealed its life without parole statute. Michigan, Florida, California and Illinois, four of the six with the greatest population of such inmates are considering repealing their life without parole sentences.

In 1968, Kentucky decided life without parole for a 14-year-old convicted of rape violates its state constitution. Workman v. Commonwealth, 429 S.W.2d 374, 378 (1968).[62] Nevada held that life without the possibility of parole was cruel and unusual punishment for 13-year-old convicted of murdering his molesting perpetrator. Naovarath v. State, 779 P.2d 944, 949 (1989). "To adjudicate a thirteen-year-old to be forever irredeemable and to subject a child of this age to hopeless, lifelong punishment is not an acceptable response to childhood criminality, even when the criminality amounts to murder." Id at 947. In 2002, the Supreme Court of Illinois affirmed a decision to reduce a mandatory sentence of life without the possibility of parole imposed on a 15-year-old acting as lookout in the murder of two rival gang members[63], reasoning that imposing a life sentence on a child who had one minute to contemplate his involvement violated its state constitution. People v. Miller, 781 N.E.2d at 310 (2002).

Insanity Plea, Life Without the Possibility of Parole, Monitored Calls in Massachusetts

On January 19, 2007, 16-year-old John Odgren entered his Lincoln-Sudbury Regional High School on a school day at approximately 7:00 am. John then walked into a boy's bathroom, saw a male classmate he did not know, and for unknown reasons stabbed the boy three times. When police arrived at the school, Odgren said, "I did it. I did it." Odgren then said, "I don't want

[62]Massey, H.J., "Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After *Roper*," *Boston College Law Review*, (47) 1105: (2006)

[63] Id. at 1106.

him to die." [64]Later that day, John was arraigned in the adult criminal court on first-degree murder, bail was denied, and he was ordered to the correctional facility in Plymouth County. John's attorney timely served notice to the Assistant District Attorney that his client intended to rely on a defense of lack of criminal responsibility because of mental disease or defect. [65]

On February 9, 2007, the district attorney issued a subpoena duces tecum to the Plymouth County keeper of records seeking taped phone calls from John to his family while incarcerated. John's attorney challenged the request made directly to the prison for this information on grounds the subpoena violated the Massachusetts Rule of Criminal Procedure 17(a)(2), alleging the prosecution first required judicial approval to request such evidence from third parties. On October 15, 2009, the Supreme Judicial Court agreed with defense counsel, that (i) the Commonwealth was required to obtain recordings by seeking court approval, however, (ii) suppression of the recordings John had with his family was denied, on the court's finding the recordings did not unfairly prejudice the juvenile defendant.[66]

The prosecution accurately argued that John was given advance notice that his phone calls from prison would be subject to recording, as would his conversations with people who came to visit with him. John signed a document to that effect.The defense counsel's 4th Amendment argument that these were fruits of the tree poisoned by the violation of the defendant's reasonable expectation of privacy, fell on deaf ears, since the defendant had been given his notice of the facilities prerogative to record and monitor his conversations with family and friends. John was ultimately found guilty of m urder in the first degree, and despite his attorney's admirable effort to put forth a case based on John's history of autism and Asperger's, John was sentenced to life without the possibility of parole. As Kristina Chew asked in her May

[64] www.milforddaily news.com, April 29, 2010, Norman Miller Daily Staff Reporter
[65] Commonwealth v. Odgren, 455 Mass. 171, 174 (2009)
[66] Id at 228.

5, 2010 report from the Health Care Change Organization, "How much did Odgren understand about the documents he was signing regarding his phone calls and conversations being recorded and monitored?"[67]

Aftercare and Re-Entry

Five years ago, Virginia (HB 2245) was the only state to enact legislation that would provide for comprehensive aftercare for certain juvenile offenders.[68] The enlightened Virginia Department of Juvenile Justice is required to collaborate with other agencies to ensure juvenile's offenders re-entering the community have sufficient support. Comporting with the idea that the parents or foster parents should be included in the rehabilitative process, bills were introduced in Oklahoma (HB 1831) and Mississippi (HB 536/ HB 544) providing for a court's assessment of the home environment prior to the juvenile's release to ensure that such a return is in the child's best interest.

Sex Offender Registrations, Annulling the Record, Privacy & DNA Databases

Perhaps to show compliance with the Adam Walsh Act, Wisconsin law (AB 99) now provides that juvenile sex offenders are to be treated like adult sex offenders for registration purposes. Ten other states considered laws that would either require certain juvenile sex offenders to be included in the state's registries, or expand public access to juvenile sex offender records. During 2005, the majority of the bills considered by state Legislatures expanded the amount of information collected, stored and shared regarding juvenile offenders. No bills were introduced that would have enhanced a juvenile offenders protection of privacy. In fact, West Virginia enacted SB 585 to allow criminal court proceedings involving juvenile offenders to be open to the public. Rhode Island HB 5244) considered public disclosure of the identity of

[67] http://healthcare.change.org/blog/view/the_case_of_john_odgren, May 5, 2010.
[68] Schmid, M., "Summary of 2005 State Juvenile Justice Legislation", *National Juvenile Defender Center,* 2005. http: www.njdc.info/pdf/njdc_2005legislation_summary.pdf.

juvenile offenders found delinquent of two or more offenses. In November 2009, the Michigan Appeals Court broke new ground declaring that under certain circumstances, registration requirements rise to the level of cruel and unusual punishment, thus the stigma of sex offender runs afoul of the protections found in the Michigan State Constitution. People v. Dipiazza, 286 Mich. App. 137 (2009).

Community Based Diversion Programs & Rehabilitative Services

Florida passed legislation (SB 1978) reinstating a minimum-risk, non-residential level of commitment requiring the teen attend day treatment programs that had been repealed by its 2000 Legislature. Mississippi passed SB 2894 and SB 2366 that improved conditions at existing juvenile facilities and phased out their earlier boot camp programs. The new Mississippi laws require mental health screening and emphasize an individualized, rehabilitative treatment for youthful offenders with the use of the least-restrictive placement possible. Bills to increase individualized treatment plans with multidisciplinary collaboration for incarcerated youths were proposed in Massachusetts (SB 940), New Jersey (SB 711) and Wyoming (SF 39, enacted). Maine (LD 1376) passed a law providing for the appointment of a Guardian ad Litem for juveniles placed out of their home to insure they were receiving proper rehabilitative services.

In New Hampshire, non-profit agencies such as Family Mediation and Juvenile Services of Southern Rockingham County provide needs based interventions for teens and their parents when family strife or first time offenses occur. Acting in concert with the New Hampshire courts diversionary policy, first time youthful offenders are court ordered to attend informational seminars designed to suggest the teen re-evaluate the short and long-term consequences of their current behavior. The agency's volunteers are trained to facilitate group discussions of similarly situated persons in efforts to inform the teen of the likely outcomes among many behavioral

choices. Once the teen successfully completes the diversion program, the courts give weight to the accomplishment in mitigating the punishment.[69] In this way, the court system works with the arresting officer, teen and the teen's family to bring about an effective intervention.

Conclusions of the 2005 Legislative Session

The active nature of the states legislative efforts is both encouraging and discouraging toward the goal of individualized inquiry leading to adequate rights and meaningful rehabilitation for teen offenders. Movement is afoot to punish juvenile crime more severely by evidence of transfers to adult court and harsher sex offender penalties. Other legislation presents the hopeful view that juveniles respond well to rehabilitation, if and when the state provides access to appropriate and adequate treatment facilities. States that recognize that mental illness, substance abuse and competency to stand trial as important issues are now beginning to consider equal footing for consideration of the diminished brain capacities of children. When society guides lawmakers and judges to understand it is potentially less expensive, and probably more effective to treat rather than to jail a teen, society's safety needs are in balance with society's desire for a new generation of productive citizens.

How Lawmakers May Empower Trial Judges to Better Serve and Protect

In 2005, when the Supreme Court outlawed the death penalty for offenders younger than 18 at the time of their offense, the court centered its holding on criminal blameworthiness, turning on the offenders state of mind, as well as mitigating factors that lessen the degree of responsibility. Roper v. Simmons, 543 U.S. 551 (2005). This holding runs counter to the current nationwide trend toward harsher sentences. Proponents of the tougher laws argue that serious

[69] http://www.fmjs.org/index.php?option=com_content&task=view&id=12&Itemid=26, Last Accessed March 17, 2010.

crimes are adult offenses that demand adult punishment.[70] The holding in *Roper* sets up the view that when more can be learned about a defendant's culpability, more should be used to reach a just punishment.

Less Guilty by Reason of Adolescence, "Still a Child in the Eyes of the Law"

When the legal system considers both the harm caused and the blameworthiness of the offender, the courts consider mitigating factors such as impaired decision-making, circumstances of the crime and the individual's personal character suggesting a low risk of continued criminal behavior. As the Atkins Court points out, these do not exempt the person from punishment, rather, the punishment should be less that for others committing similar crimes. The question becomes whether developmental immaturity should be added to this list of mitigating factors.

While intellectual maturity reaches adult levels at 16 years of age, psychosocial development continues into early adulthood. Mature decision making involves weighing the long term consequences before committing the act. When a teen is given a choice between $100 today or $1,000 a year from now, the teen's immediate gratification trumps the more lucrative prize. Short-sighted decision making, poor impulse control, and vulnerability to peer pressure are strong indicators that teens lack the psychosocial maturity that constitutes adulthood. The tools needed to measure psychosocial immaturity are admittedly not well developed.[71] Brain imaging does not yet provide a proven means of distinguishing the mental state of a person at the moment a crime is committed. Instead, the research evidence informs lawmakers and judges alike that the maturing process follows a predictable pattern across virtually all teenagers.

Juveniles as a Special Legal Classification

[70] MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, "Less Guilty By Reason of Adolescence," *Issue Brief 3*: (2005).

[71] Id. at p.4

The starting point where teens and society are better served is the logical and efficient treatment of adolescents as a special legal category.[72] For the vast majority of first time offenders under the age of 18, it makes sense that the juvenile court hear the case to hold the accused accountable, and where a responsible society provides every opportunity for a young person to benefit from rehabilitation and treatment where appropriate. Where the smaller percentage of older or more violent recidivists have exhausted the resources and patience of the juvenile court, the danger to the community justifies their transfer to adult criminal court.

One tenet of the special legal category would be a requirement that an evaluation and determination of competence automatically precede the delinquency adjudication. Here, a consensus is reached that at some minimum age, the risk of incompetence is so great that an evaluation by trained professionals is warranted. When the juvenile satisfies the minimum chronological age, the legal team could collaborate to insure this defendant is truly competent to stand trial. For states reluctant to recognize incompetence by way of immaturity, the issue of whether there should be a less demanding standard for juveniles with mental illness, than for adults with a mental illness should be a permissible point of argument before a judge in a juvenile court.

The continuation of the separate and distinct juvenile court is justified on the grounds that it was never intended to become a mere clone of adult criminal court.[73] A more relaxed standard comports with demands of constitutional due process announced in McKeiver v. Pennsylvania back in 1971. To establish a way by which a juvenile defendant has a "basic understanding of the purpose of the proceedings" and where he would have "an ability to communicate rationally with

[72] Id.

[73] Grisso, T., Steinberg, L. et al, "Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants" *Law and Human Behavior*, 27(4): p.359, Aug. 2003

their counsel" are as constitutionally legitimate as they are practical. Such a policy is found in Virginia where the two prong due process standard reflects a common interest in the welfare of our youth, and the need for efficiency of the justice system without an excess burden on the court system.[74]

If the juvenile's evaluation indicates incompetence to stand trial in both the adult and juvenile court, restoring the juvenile to a point of competency should not be confused with the frequently criticized option as giving the juvenile time to grow up. Applying the District of Columbia standard, if the juvenile's incompetence stems from a deficient understanding, then a period of instruction on the matters they do not comprehend could "restore" the incompetent defendant. In Jackson v. Indiana, 406 U.S. 715 (1972), the Supreme Court held that due process requires the state to either restore the incompetent defendant within a reasonable period of time, or release him.[75] For the majority of youths subject to prosecution, the co-existence of lesser standard in the juvenile court and a higher standard for competence in the adult court would still produce a trial on the merits with little delay.

Include the Parent or Guardian in Rehabilitative Treatment

Courts should be empowered to order the juvenile and their parents into programs that teach skills for managing emotions and how to think more clearly when effectively solving problems. Such skills are crucial to the juvenile showing even a marginal promise to re-enter society in a productive manner. Such interventions are equally important to the families involved in a delinquency case as they are for a care and protection matter.[76] When the parent and child

[74] Va. Code Ann. Sect. 16.1-269.1 (A)(3)(2001).
[75] The Supreme Court also said that as to adults, "indefinite confinement of incompetent defendants is analogous to punishment without trial."
[76] Ford, J.D., et al, "Pathways From Traumatic Child Victimization to Delinquency: Implications for Juvenile and Permanency Court Proceedings and Decisions," *Juvenile and Family Court Journal*, Winter 2006.

collaborate toward the common goal of a better tomorrow, the shared goal respects the fact that those with the problem are so frequently those best situated to find solutions.

Court Ordered Evaluations Include a Proposed Corrective Course

Courts should also be given authority to order post adjudicative evaluations that address not only the evident behavioral, psychiatric and learning problems, but also the youth's intellectual, emotional and social strengths. With this accent on what works well, the ability to cope with past or ongoing stress includes a hopeful attitude, rather than a hopeless surrender. Mediators, juvenile probation officers and licensed drug and alcohol counselors are a wellspring of untapped talent in this regard.

Services

Juveniles entering the juvenile justice system should receive services[77] that help them cope with their emotions before the cyclical trappings of delinquency set in. Unlike adults, teens are more capable of positive change, and are particularly responsive to trained professionals whom they learn to trust. Ordering services or placements that specifically address information-processing skills can increase the juvenile's competency and help the juvenile to participate effectively in their trial. For defendant's who are themselves victims of another's abuse, courts should consider providing teens with safe places to experience and develop skills necessary to fully participate in healthy non-victimizing relationships. The goal shared by scientists, clinicians and judicial professionals is to develop a humane basis for the disposition of the matter than brings juvenile defendants before the court. Each delinquent youth who receives help in regulating their emotions and processing information is one more person who has the opportunity to be restored to the full status of a member of society.

[77] Id.

Trying Juveniles as Adults

In Commonwealth v. O'Brien, 423 Mass. 841, 846, (1996) the following eight factors balance the transfer of a juvenile to an adult criminal court: (1) the nature, circumstances, and seriousness of the alleged offense; (2) the child's court and delinquency record; (3) the child's age and maturity; (4) the family, school, and social history of the child; (5) the success or lack of success of any past treatment efforts of the child; (6) the nature of services available through the juvenile justice system; (7) the adequate protection of the public; and (8) the likelihood of rehabilitation of the child. These Massachusetts factors recognize that children are not adults, thus, teens are a protected class deserving of appropriately separate due process.

Conclusion

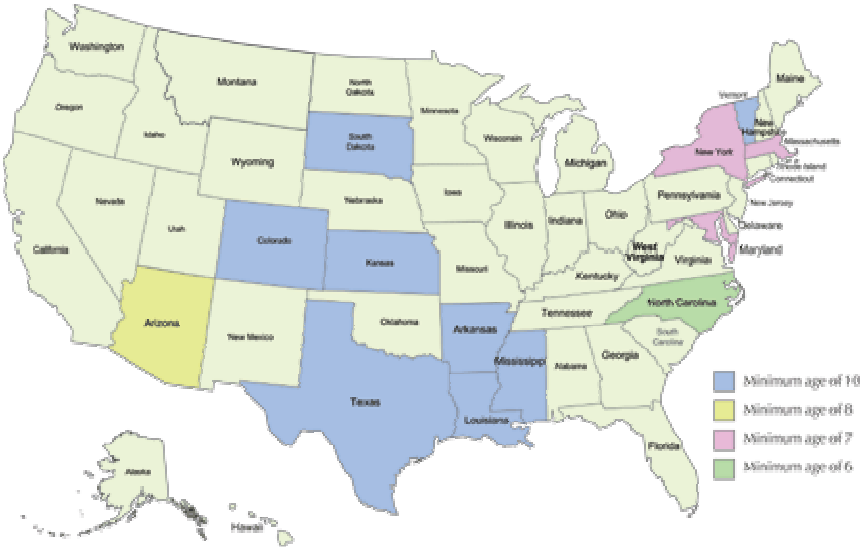
The scientific evidence proves that adolescents are different from adults in ways that should be included in an effective and fair juvenile justice policy. Despite its current shortcomings, the juvenile court is better equipped to respond to a teen than can the adult court. Raising the minimum age to 18 in order to be tried in adult court would keep hundreds of thousands of adolescents out of the adult system each year. This would single-handedly improve a young person's chance to successfully transition into a productive adult.

The separate juvenile justice system needs to be revamped so that trained evaluators may inform the juvenile judge as to the degree of a teen's competency to stand trial and to their culpability. Where services brighten the prospect of a more productive future, services should be ordered. When precious tax dollars are spent on incarceration, the viability of less costly rehabilitation should be deliberated. Where nonviolent offenders are treated in the community rather than locked up in jail, the public's safety is served and protected.

Lawmakers, judges, scientists, prosecutors, defense counsel, mediators, probation officers and licensed counselors are the policymakers who have this golden opportunity to collaborate with the federal and state governments treatment of our future adults. Once lessons are learned from past mistakes and scientific evidence is embraced for its value to the juvenile justice system, policymakers can simultaneously protect the nation's youth and serve the safety interests of society.

Exhibit "A"

MOST STATES FAIL TO SPECIFY A MINIMUM AGE FOR JUVENILE ADJUDICATION



Thirty-seven states have no statute specifying a minimum age under which a child may not be adjudicated delinquent. This map depicts the thirteen states that specify a minimum age for a delinquency adjudication.

Age 6: North Carolina
Age 7: Maryland, Massachusetts, New York
Age 8: Arizona
Age 10: Arkansas, Colorado, Kansas, Louisiana, Mississippi, South Dakota, Texas, Vermont

No Distinction between Delinquency Cases and Cases Regarding Abuse or Neglect
The majority of states simply define a child as being younger than 18 (or another age), without making any distinction between children facing delinquency proceedings and children under the jurisdiction of the court for abuse, neglect or other issues.

Minnesota's Court of Appeals (an intermediate appellate court) has set a minimum age of 10 for delinquency adjudications. Matter of Welfare of S.A.C., 529 N.W.2d 517 (1995).

Source:
National Juvenile Defender Center at http://www.njdc.info/state_data_minimum_age.php
Accessed:
March 17, 2010

Exhibit "B"

1,839 YOUTH INCARCERATED FOR LIFE WITHOUT PAROLE

3 states hold 0: Vermont, New Jersey and Utah
21 states hold 1-24
7 states hold 25-49
2 states hold 50-99 (Massachusetts and Iowa)
3 states hold 100-199 (Illinois, Missouri and California)
1 state holds 200-299 (Florida)
2 states hold over 300 (Pennsylvania and Michigan)

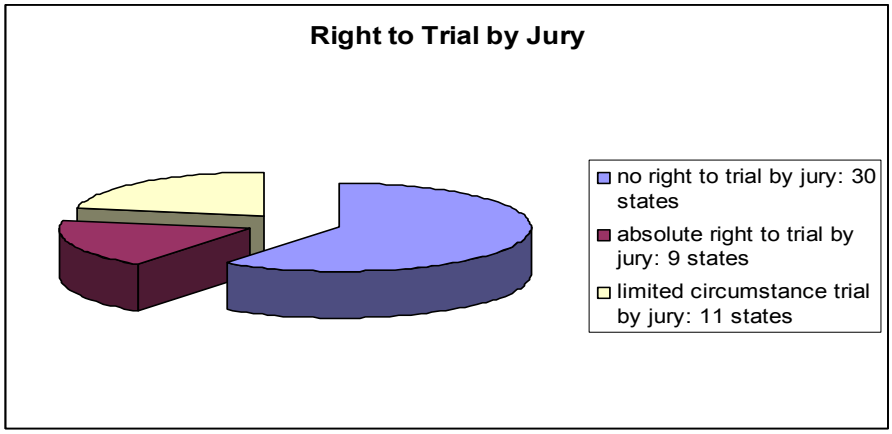
Data for 11 states is not reported or unavailable.

Source:
National Juvenile Defender Center at http://www.njdc.info/state_data_minimum_age.php
Accessed:
March 17, 2010

Note: This map is based on a study by the Human Rights Watch called The Rest of Their Lives: Life Without Parole for Child Offenders in the United States.

Exhibit "C"

JUVENILE DELINQUENTS RIGHT TO A JURY TRIAL



The Constitutional Standard:
In 1971, the United States Supreme Court held that **jury trials are not constitutionally required** in juvenile court hearings. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

At the end of the 2007 State Legislative Sessions

* 30 State jurisdictions specifically declare by statute or case law that a person charged as a juvenile delinquent has no right to a trial by jury

* 9 States "allow" jury trials for juveniles as a right. Exceptions include no right to jury for probation revocations in Michigan, Montana, New Mexico and Wyoming.

* 11 States provide jury trials in the juvenile court only under special circumstances: juveniles at risk of confinement to an adult penal facility, repeat offenders, and appeals.

Recent Legislative Events

None of the following proposals became state law:

1994 in Louisiana: Proposed jury by trial where confinement of 5 years or more could result, and only by a unanimous jury verdict.

1995 in Oregon: Proposed jury trials for all adolescents charged with delinquency.

1997 in Pennsylvania: A joint resolution proposed an amendment to their State Constitution "allowing" juvenile jury trials.

2000 in New Jersey: Jury trial for juveniles charged with specified sexual assault crimes, who were not competent to be tried as adults.

2007 in Wisconsin: Jury trials proposed for those recommended as a Serious Juvenile Offender, or, for those at risk of confinement beyond their reaching the age of majority.

Source: http://www.njdc.info/pdf/2008_right_to_jury_snapshot.pdf
Accessed:
March 17, 2010

Cite: Szymanski, L., (2008) Juvenile Delinquents' Right to a Jury Trial, *NJCC Snapshot,* 13(2). Pittsburgh, PA: National Center for Juvenile Justice.

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