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## Monkey Bars to Prison Bars: Problems Associated With Youth In Adult Correctional Facilities

James Sullivan

### Problems That Face Adolescents in Adult Facilities

As concern for juvenile crime became widespread throughout the 1980's and 1990's, state legislatures throughout the United States passed a series of "get tough" laws that sought to increase punishment for juvenile's that committed crimes. The new polices shifted the focus from individual rehabilitation and instead focused on offender accountability and punishment. The changes were drastic enough that many began to wonder if it was even necessary to maintain a separate juvenile court system.<sup>1</sup> History shows us that punishing youthful offenders has not always been so harsh.<sup>2</sup> The history of the juvenile court system began in Chicago in 1899 during the Progressive Era. This came about after people began to view youthful offenders not as criminals, but more like people that had simply lost their way.<sup>3</sup> The primary focus in establishing this separate criminal system was to focus its efforts on increasing the rehabilitative potential of the courts, protecting vulnerable children from adult prisoners, and save young people from the stigma of criminal conviction. The progressive nature of the juvenile system had many critics which questioned if the goal of rehabilitating youthful offenders was even achievable because it was too utopian in its mission. In the 1960's the structure began to unravel in disrepair as the

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<sup>1</sup> Butts, Mears. Reviving Juvenile Justice

<sup>2</sup> Lauues and Libertyes of Massachusetts (1648). Except in colonial times, where children over the age of five were treated either as small adults or property. A seven year old child could be sentenced in criminal courts. In 1648 in Massachusetts, a child who cursed his natural parents could be put to death.

<sup>3</sup> In the United States, the Progressive Era was a period of social activism and political activism that resulted in the the Seventh Amendment (direct election of Senators), the Eighteenth Amendment (prohibition), and the Nineteenth Amendment (women's suffrage). The Progressives sought to expose corruption by political bosses and corporations.

system became overwhelmed and the quality of the judicial staff began to dip. The Supreme Court took notice, and in 1967 in the case *In re Gault* stated that youth were entitled to the same due process rights as adults. Congress in 1974 passed the Juvenile Justice and Delinquency Act (“JJDA”) which sought to remove juveniles from the ordinary criminal process in order to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation.<sup>4</sup>

However, even with the JJDA and Congressional findings concerning the effects that prison has on youths, a wave of violent crimes in the 1980’s and 1990’s spurred a series of tough-on-crime legislation in the 1990’s, which shifted the focus of most state juvenile penal codes from rehabilitative in nature, to a more retributive focus.<sup>5</sup> This included adopting waiver laws which allowed judges and prosecutors to waive juveniles into adult court for certain crimes committed. By 1997, twenty-eight states had passed such laws. Furthermore, during the 1990’s, nearly every state with these laws already on the books either expanded the offense criteria for automatic transfer, lowered the minimum age at which offenders could be transferred, or both.<sup>6</sup> The wave of legislation that took over the country in the 1980’s and 1990’s as a result of the increase in

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<sup>4</sup> The Act, in pertinent part, was intended to: (1) keep kids out of adult jails and prisons (with limited exceptions); (2) requires states to reduce racial & ethnic disparities; (3) creates incentives for the use of programs that research has shown to work best; (4) refocuses attention on prevention programs intended to keep children from ever entering the juvenile or criminal justice systems

<sup>5</sup> In 1980, Congress found that among the adverse impacts of detaining juveniles in lockups and adult jails were a high suicide rate (the juvenile suicide rate in adult jails and lockups was more than five times that in juvenile detention facilities), physical, mental, and sexual assault, inadequate care and programming, negative labeling, and exposure to serious offenders and mental patients. As a result of a jail or lockup experience, juveniles often learned antisocial behavior from habitual criminals and had to fight for survival in an inmate culture characterized by rigid rules and psychological and physical terror. Congress responded by amending the JJDP Act in 1980 to require the removal of juveniles from adult jails and lockups. In 1988 and 1992, Congress focused attention on the disproportionately high number of minority juveniles arrested and confined in secure detention and correctional facilities. Data demonstrated that incarceration rates for minorities in many States were two to four times that of whites. The 1988 and 1992, reauthorizations of the JJDP Act, 1974, included provisions requiring States to gather additional data, analyze this issue, and provide an appropriate programmatic response where minority over representation was found to exist.

<sup>6</sup> Reviving Juvenile Justice in a Get-Tough Era. Jeffrey Butts

youth crimes resulted in a series of legislation that seemed rather draconian, and clearly missed the forest for the trees. Numerous studies have shown the effects that placing youthful offenders in adult facilities has on youth and the abuse that they are subjected to while they are incarcerated there.

Research has found that juveniles housed in adult prisons were five times as likely to be sexually assaulted in adult prison rather than in juvenile facilities are 36 times more likely to commit suicide than if confined in a facility for juveniles.<sup>7</sup> According to Bureau of Justice Statistics, youth under the age of 18 represented 21% of all substantiated victims of inmate-on-inmate sexual violence in jails in 2005, and 13 percent in 2006—disproportionately high since only one percent of jail inmates are juveniles.<sup>8</sup> Youth held in adult prisons are the hardest hit and easiest prey for sexual abuse. Placing juveniles in adult facilities has devastating consequences not only for the youth but also for the communities from which they came. Eighty percent are released before their 21st birthday, and 95 percent are released before they turn twenty-five years old. When they are released, they are coming back into society scarred by what they've experienced and are either traumatized by sexual assault, hyper-violent from being forced to learn how to fend off the threat.<sup>9</sup> These experiences take a toll on adolescent offenders.

### I. Mental Health Issues and Physical Abuse in Adult Facilities

Although the mental health needs of youths in the juvenile justice system are well documented, the mental health needs of youths are hard to document because adult prisons keep track of health issues of the prisoners, categorically. They do not keep separate records for the youthful offenders which makes addressing any health issues troublesome. Unfortunately, one

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<sup>7</sup> Linda Brutmyer: Testifying before Senate Judiciary Committee – her son was sentenced to adult prison for setting a trash bin on fire. After being raped repeatedly in jail, he hanged himself in his cell.

<sup>8</sup> Liz Ryan. There's No Excuse For Keeping Children in Adult Prison's.

<sup>9</sup> Parsell, T.J. When to Punish A Young Offender and When to Rehabilitate. NY Times, June 6, 2005.

mental health issue that is apparent is the issue of suicide. Suicide is the most problematic mental health issue facing these adolescents.

The Office of Juvenile Justice and Delinquency Prevention published a report in 1994 which found that when juvenile facilities had suicide screening at admission to the correctional facilities, the facility ended up with lower rates of suicide.<sup>10</sup> Additionally, they noted that suicide increased when youthful offenders were placed in isolation. This is troubling because youthful offenders are sometimes placed in isolation, simply to protect and isolate them from the adult people. In 1980, in another study that was funded by the Office of Juvenile Justice and Delinquency Prevention (“OJJDP”), Michael G. Flaherty, a researcher with the Community Research Forum at the University of Illinois surveyed the number of suicides in a thousand jails and juvenile detention centers.<sup>11</sup> The study found that the suicide rate of juveniles in adult jails is 7.7 times higher than that of juvenile detention centers. The survey also found that the juvenile institution suicide rate was lower than that of the general population.

According to the OJJDP, 79% of suicide victims that were youths had prior criminal offenses. Of those that had a prior history, most of their priors were for nonviolent offenses. One study found that 47 percent of juveniles in prisons (compared with 37 percent of youth in juvenile facilities) suffered violent victimization, including violence at the hands of staff. Sexual assault was five times more likely in prison, beatings by staff nearly twice as likely, and attacks with weapons were almost 50 percent more common in adult facilities. Additionally, the study found that youth were five times more likely to have answered yes to the question “has anyone

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<sup>10</sup> Peterson, P.L., Hawkins, J.D., Abbott, R.D., and Catalano, R.F. 1994. Disentangling the effects of parental drinking, family management, and parental alcohol norms on current drinking by black and white adolescents. *Journal of Research on Adolescence* 4:203–227.

<sup>11</sup> Michael G. Flaherty. *The Risks Juveniles Face When They Are Incarcerated With Adults*

attempted to sexually attack or rape you?” than those held in juvenile institutions.<sup>12</sup> This number is actually likely to be higher because many victims of sexual assault do not come forward to report such abuse.

Studies also suggest that typical male rapists in prison mostly target victims that are often young males who are nonviolent first time offenders who are smaller, weaker, and have no experience in the prison lifestyle.<sup>13</sup> Further evidence indicates that the typical male prison rapist chooses their victim on the basis of “the weakness and inability of the victim to defend himself.”<sup>14</sup> It seems like commonsense, that if you were to mix juvenile’s with adults in adult facilities that it would be obvious that the youth would be subject to physical and sexual violence. The problem of physical and sexual violence in prisons is so prevalent that it has become the subject of crude jokes made in Hollywood media<sup>15</sup> and late night comedy.<sup>16</sup> While these may seem funny in works of fiction, it really is no laughing matter and Congress has taken notice.

Beginning this year in 2013, the Prison Rape Elimination Act (the “Act”) requires that the states need to be certified that they are in compliance with the Act. The Act intends to limit the confinement of youths with adults. This is significant because according to the Bureau of Justice Statistics, youth under the age of 18 represented 21 percent of all substantiated victims of inmate-on-inmate sexual violence in jails in 2005, and 13 percent in 2006—disproportionately

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<sup>12</sup> Fagan, Jeffrey, Martin Forst and T. Scott Vivona. "Youth In Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy." *Juvenile and Family Court*, No. 2, 1989., p. 10

<sup>13</sup> Human Rights Watch, NO ESCAPE: MALE RAPE IN US PRISONS 63 (2001)

<sup>14</sup> Christopher D. Man & John P. Cronan, Fprecasting Sexual Abuse in Prisons: The Prison Subculture of Masculinity as a Backdrop for “Deliberate Indifference.” 92 *J. Crim. L. & Criminology* 127, 153 (Fall 2001/Winter 2002)

<sup>15</sup> Office Space (Mike Judge Production 1999). In a famous scene from the movie, character Michael Bolton while discussing the potential downfall of their criminal enterprise states “We get caught laundering money, we're not going to white-collar resort prison. No, no, no. We're going to federal pound me in the ass prison.”

<sup>16</sup> Jay Leno would often make jokes about White House advisor Karl Rove worrying about being raped if he went to prison.

high since only one percent of jail inmates are juveniles.<sup>17</sup>The Act imposes three requirements for incarcerated persons under the age of eighteen. First, inmates under eighteen should be placed in a housing unit where contact will occur with adult inmates in common spaces, sleeping quarters and shower area. Second, prisons must either prevent adults from seeing or communicating with youth, or provide direct staff supervision when the two are together. Third, prisons must make “best faith” efforts to avoid placing youthful inmates in isolation and provide exercise and any legally required special education services.<sup>18</sup> A unique aspect of this Act, that being that the states must comply with the Act, is that unintended or not, the Act may result in keeping youthful offenders completely segregated completely from the adult prison population.<sup>19</sup> Clearly, this is a step in the right direction towards protecting all prisoners from the horrors of sexual abuse, and this is particularly helpful to youth’s in adult prisons, because it carves out specific requirements to protect them from being abused by prisons.<sup>20</sup> It is not however, likely to be one hundred percent successful, as the Act says state compliance must be based on a “best faith” effort, which can be interpreted a number of different ways in the court room. Yet, it is still a promising step to protecting youthful offenders.

These measures go against what many proponents of trying youth as adults believe. They believe youths should be in adult prisons to deter them from committing crimes in the future. This argument has been debunked in study after study showing that this simply does not work. Research in several jurisdictions supports the idea that putting youths in adult prisons actually increases the likelihood that they will end up back in prison. A well-known study that compared

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<sup>17</sup> Liz Ryan. There’s No Excuse For Keeping Children in Adult Prison’s.

<sup>18</sup> Department of Justice. Prison Rape Elimination Act, 77 Fed. Reg. 119, 37107 (June 20, 2012) (codified at 28 CFR 115)

<sup>19</sup> Prison Rape Elimination Act Can Keep Children Out of Adult Jails. Liz Ryan HuffingtonPost.com

<sup>20</sup> Farmer v Brennan, 511 U.S. 825 (1994). Rape or sexual assault of prisoners by correctional officers violates the Eight Amendment

two different jurisdictions, one that tried youths as adults, and the other was tried in juvenile court was done by Columbia University researcher Jeffrey Fagan. In his study, he compared 15- and 16-year olds charged with robbery and burglary in four similar communities in New York and New Jersey. Both states had similar statutes for first- and second-degree robbery and first-degree burglary. However, in New York, 15 and 16 year olds' cases originated in criminal court, while in New Jersey they were adjudicated in juvenile court. The sample consisted of 400 robbery offenders and 400 burglary offenders randomly selected. Fagan examined the recidivism rates of offenders from each state after their release. He found that while there were no significant differences in the effects of criminal versus juvenile court processing for burglary offenders, there were substantial differences in recidivism among robbery offenders. Seventy-six percent of robbers prosecuted in criminal court were rearrested, as compared with 67% of those processed in juvenile court. A significantly higher proportion of the criminal group were subsequently reincarcerated (56% vs. 41%) and those that did reoffend did so sooner after their release.<sup>21</sup>

In Minnesota, Podkopacz and Feld (1996) found higher recidivism rates (as measured by adjudications or convictions for new offenses) for transferred juveniles (58%) than for non-transferred juveniles (42%) during a two year follow-up period following their release.<sup>22</sup> An earlier study (White, as cited in Howell, 1996) found that serious juvenile offenders handled in the criminal justice system recidivated 150% more than comparable offenders handled in

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<sup>21</sup> Fagan, Jeffrey, 1996. "The Comparative Advantage of Juvenile versus Criminal Court Sanctions on Recidivism among Adolescent Felony Offenders." *Law and Policy* 18:77-112; cited in "Bishop, Donna, "Juvenile Offenders in the Adult Criminal System," 27 *Crime and Justice* 81 (2000)

<sup>22</sup> Podkopacz, Mary Rasmussen and Barry C. Feld. "The End of the Line: An Empirical Study of Judicial Waiver." *The Journal of Criminal Law and Criminology* 86 (1996): 449-492.



the juvenile justice system.<sup>23</sup>

A 1996 Florida study authored by Northeastern University researcher Donna Bishop also found that juveniles transferred to the adult criminal system were not less likely to reoffend, but in fact often had higher rates of recidivism. This research compared the recidivism rates of 2,738 juvenile offenders transferred to criminal court in Florida with a matched sample of nontransferred juveniles.<sup>24</sup> Bishop and her colleagues found that although juveniles tried as adults were more likely to be incarcerated, and incarcerated for longer than those who remained in the juvenile system, they also had a higher recidivism rate. Within two years, they were more likely to reoffend, to reoffend earlier, committed more subsequent offenses, and the subsequent offenses that were committed were more serious when compared with the juveniles that were retained in the juvenile system. The authors concluded that "the findings suggest that transfer made little difference in deterring youths from reoffending. Adult processing of youths in criminal court actually increases recidivism rather than [having] any incapacitative effects on crime control and community protection."<sup>25</sup>

Other studies that were not specific jurisdictionally, also debunk the idea that adult prison will deter youth. One study by Redding and Fuller found that few violent juvenile offenders knew that they could be tried as adults; none thought it would happen to them, and few thought they would face serious punishment. Moreover, few reported thinking about the possibility of

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<sup>23</sup> Effects of Adjudicating and Sentencing Juveniles As Adults Research and Policy Implications .Richard E. Redding *Villanova University School of Law and Drexel University*

<sup>24</sup> Donna M. Bishop and others, "The Transfer of Juveniles to Criminal Court: Does It Make a Difference?," *Crime and Delinquency*, vol. 42 (1996)

<sup>25</sup> *Id.*

getting caught when they committed the offense.<sup>26</sup> Indeed, it seems that offenders generally underestimate the risk of arrest.<sup>27</sup> Juveniles' psychosocial immaturity, including their tendency to focus on the short-term benefits of their choices may reduce the likelihood that they will perceive the substantial risk of being arrested or punished as an adult.<sup>28</sup> While cognitive ability affects the decision making process, psychosocial maturity affects decision making outcomes. Steinberg states that there are four factors that are relevant to understanding differences in judgment and decision making, they are: (1) susceptibility to peer influence, (2) attitudes toward and perception of risk, (3) future orientation, and (4) the capacity to self-management. Steinberg notes that these factors are important because they influence adolescent values and preferences in ways that drive the cost-benefit analysis when making their decision making. To put it in other words, their psychosocial deficiencies hinders their decision making process, even if their cognitive processes are mature.

Furthermore trying juveniles does nothing to deter them from being repeat offenders. The tough on crime mentality which allows courts to try youths as adults only increases their chances to offend. Several studies have pinpointed reasons as to why this may be. In one study by Bazemore and Umbreit, they have identified several possible explanations for higher recidivism rates which include: the stigma associated with being labeled as a convicted felon, resentment by

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<sup>26</sup> Richard Redding. What Do Juvenile Offenders Know About Being Tried As Adults? Implications for Deterrence. The note examined juveniles' knowledge and perceptions of transfer laws and criminal sanctions. The note found that first, juveniles were unaware of the transfer law. Second, juveniles felt that awareness of the law may have deterred them from committing the crime or may deter other juveniles from committing crimes, and they suggested practical ways to enhance juveniles' awareness of transfer laws. Third, the juveniles generally felt that it was unfair to try and sentence them as adults. Finally, the consequences of committing their crime were worse than most had imagined, and the harsh consequences of their incarceration in adult facilities may have had a brutalizing effect on some juveniles

<sup>27</sup> Does Criminal Law Deter? A Behavioral Science Investigation. (Robinson and Darley, 2004)

<sup>28</sup> Redding, Richard. Juvenile Transfer Laws: An Effective Deterrent to Delinquency

juveniles for being tried as an adult, behavior learned while being incarcerated as adults, and the general lack of rehabilitative focus found in adult facilities.<sup>29</sup>

Being in adult facilities alone does not just increase the chance for being a recidivist. Simply the act of criminal court processing, even without criminal sentencing, increases the chance of being a recidivist.<sup>30</sup> The entire process itself creates resentment towards being tried as an adult; the youth offenders see it as unfair, which is also a big factor in the recidivism rates amongst youth. The concept of fairness weighs heavily on these youth, who generally feel that life has already dealt them a bad hand. Many of them consider their experience within the court to be a condemnation of them personally, rather than a condemnation of their behavior.<sup>31</sup> This is in stark contrast to youths who were sent to juvenile detention centers who described that they were provided with case management services as helpful in provided counseling, encouraging participation in programs, teaching the consequences of rule breaking.<sup>32</sup> Research indicates that youth who were in juvenile facilities felt that the facility staff cared about them, and taught them appropriate behavior and felt confident that they would not reoffend.<sup>33</sup> This is in stark contrast to juveniles in adult prisons who that felt they spent their time learning adult behavior and proving how tough they were. This should not really be a surprise to anyone considering that the wave of tough on crime legislation that passed as a result of increasing violent crimes. It seems that this legislation threw the baby out with the bathwater, in that many of the laws that were passed were

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<sup>29</sup> Bazemore, Gordon and Umbreit, Mark S (2001). *A comparison of four restorative conferencing models*.

<sup>30</sup> Fagan, Jeffrey. The Comparative Advantage of Juvenile vs. Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders, *Law and Policy*, Vol. 18 # 1 and 2, Jan/Apr. 1996.

<sup>31</sup> Bishop, D.M., and Frazier, C.E. 2000. The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court. A study regarding the recidivism of 2,738 juvenile offenders who were transferred to criminal court in Florida in 1987 was compared with that of a matched sample of delinquents who were retained in the juvenile system. Recidivism was examined in terms of rates of reoffending, seriousness of reoffending, and time to failure, with appropriate adjustments made for time at risk. By every measure of recidivism employed, reoffending was greater among transfers than among the matched controls.

<sup>32</sup> Id.

<sup>33</sup> Id.

for non-violent crimes. Regardless, it is important to note that the Supreme Court has in the past few decades taken notice that youthful offenders, even in the most heinous crimes imaginable, are notably different in their cognitive abilities and ability to process information.

## I. Adolescent Brain Development

It is clear that youth's ability to make and process decisions are different and not the same as adults. Society is aware of this and accepts it. This is why we have laws in place in which we do not allow children to drive until they are sixteen years old, purchase cigarettes, drink alcohol, vote, enter in a contract, and enlist until they are eighteen years old. The enactment of these laws, only shows that historically, society in the United States is aware that youth and adults are not on the same level of maturity and cannot handle varying degrees of responsibility. It seems obvious that this would extend to the criminal arena considering all the restrictions noted above. Yet, these long held beliefs regarding youth somehow fell through the cracks when state legislatures started sending them to adult prisons. This is the result of poor policy making considering we have all those laws in place to restrict youth ability to behave like adults. It is almost as if there were two separate legal realms, one for adults and one for youth, except when it comes to criminal culpability.

The issue of culpability and the differences between adults and youths have only recently in the past few decades become apparent to scholars and the judicial system. The Supreme Court has taken notice of these restrictions in finding that youthful offenders are on par with those that are developmentally disabled when it comes to issues of culpability. Furthermore, many scholars have argued that characteristics that reduce the culpability of mentally retarded offenders, mainly susceptibility to peer influences, a propensity to act impulsively without thinking about

consequences, and immaturity of judgment have relevance to the criminal responsibility of adolescents.

## II. Culpability on Par with Developmentally Disabled

The issue of the mental condition of an adolescent has been compared to those with adults with developmental disabilities. In *Atkins v. Virginia*, the Supreme Court found that defendants with developmental disabilities lacked the reasoning, judgment, and impulse control necessary to equate their moral culpability with that of ordinary adult criminal defendants.<sup>34</sup> Factors associated with crime, mainly mens rea, have been glossed over when it comes to dealing with juveniles. In dealing with sentencing, the Supreme Court noted in *Penry v. Lynaugh*, that “punishment is disproportionate by comparing ‘the gravity of the offense,’ understood to include not only the injury caused, but also the defendant’s moral culpability, with the ‘harshness of the penalty.’”<sup>35</sup> Further, the Supreme Court has viewed culpability on an individual basis in a number of crimes, including non-violent crimes such as drug crimes.<sup>36</sup> As noted above, the Supreme Court has stated that developmentally disabled persons may not have the same culpability as competent adults. Naturally, it seems that this line of reasoning should

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<sup>34</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002)

<sup>35</sup> *Penry v. Lynaugh*, 492 U.S. 302, 343 (1988). The Supreme Court determined executing the developmentally disabled was not “cruel and unusual punishment” under the Eighth Amendment. However, because Texas law did not allow the jury to give adequate consideration as a mitigating factor to Johnny Paul Penry’s developmental disability at the sentencing phase of his murder trial, the Court remanded the case for further proceedings. Eventually, Penry was retried for capital murder, again sentenced to death, and again the Supreme Court ruled, in *Penry v. Johnson*, 532 U.S. 782 (2001), that the jury was not able to adequately consider Penry’s developmental disability as a mitigating factor at the sentencing phase of the trial. Ultimately, Penry was spared the death penalty because of the Supreme Court’s ruling in *Atkins v. Virginia*, 536 U.S. 304 (2002), which, while not directly overruling the holding in “*Penry I*”, did give considerable negative treatment to “Penry” on the basis that the Eighth Amendment allowed execution of the developmental disability.

<sup>36</sup> See, e.g., *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring) (“[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.”); *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (recognizing defendant’s youthfulness as a mitigating factor);

extend to adolescent defendants, and it has. In *Roper v. Simmons*, the Supreme Court recognized that adolescents lack maturity and are less culpable than adults.<sup>37</sup> The Court stated that adolescents have an “underdeveloped sense of responsibility” which often results in impetuous and ill-considered actions and decisions. Additionally, for most teens, risky or antisocial behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood. Generally, adolescents lack the freedom that adults have to extricate themselves from a criminal setting this is an issue of mental development which should logically extend to adolescents. Inexperience, less education, and less intelligence make adolescents less able to evaluate the consequences of his or her conduct.<sup>38</sup>

Society in general has clearly taken this into consideration for years as adults do not trust adolescents with many privileges associated with being an adult such as driving a motor vehicle, voting in elections, enlisting, the right to enter into a contract, hold a job, and live on their own. This is even more restrictive than it is for persons who are considered mentally retarded, who are allowed to vote, in some cases drive, and enter into a contract. If we are to have these paternalistic norms in place to protect adolescents, it seems only natural to extend these to the criminal justice system. If not, then it would just be inconsistent. This inconsistency is important because the Atkin’s Court held that developmentally disabled persons lacked cognitive abilities in reasoning, judgment, and control of their impulses which would prevent them from acting with a level of moral culpability that characterizes the most serious adult crimes. Considering

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<sup>37</sup> *Roper v. Simmons*. 543 U.S. 551 (2005)

<sup>38</sup> *Thompson v. Oklahoma*. 487 U.S. 815. The *Thompson* Court emphasized that deserved punishment must reflect individual culpability and concluded that “[t]here is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults.”

that youth development and those with developmental disabilities are on par in terms of culpability, it seems that the Supreme Court has been approaching the youth culpability issue at a glacial speed. It may be due to the fact that only recently have scientific studies have been able to see that adolescent brains are not similar to adults and actually take much longer to mature than previously thought. While many scientific and psychological studies have been done on the cognitive abilities of development all disabled persons, only recently have studies been done on the adolescent brain.<sup>39</sup>

Recent advances in technology have led to discoveries in neuroscience that have altered long-held assumptions about the amount of time that is associated with brain maturation. In key ways, the adolescent brain does not look like that of an adult until a person is in their early twenties. A study by the Juvenile Justice Center examines research done at Harvard Medical School, and National Institute of Mental Health, and UCLA discovered that the teenage brain undergoes an intense overproduction of grey matter (the brain tissue that does the “thinking”).<sup>40</sup> Additionally, they were able to see that the area of the brain (frontal lobe) that is most related to decision making, planning, risk-assessment, judgment, and other factors generally associated with criminal culpability is also one of the last to fully mature.<sup>41</sup> Specifically, the prefrontal cortex which controls the “executive functions” of reasoning, advanced thought, and impulse control is the final area of the brain to mature.<sup>42</sup> Even more importantly, “[m]aturation,

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<sup>39</sup> This is mainly the result of recent advances in technology.

<sup>40</sup> American Bar Association (ABA): Juvenile Justice Center. *Adolescence, Brain Development and Legal Culpability*. 2004.

<sup>41</sup> Adolescent Brain Development Quick Reference Fact Sheet. At 5

<sup>42</sup> Paul Thompson, Ph.D., “Time-Lapse Imaging Tracks Brain Maturation From Ages 5 to 20,” National Institutes of Mental Health, and the University of California Los Angeles, May 2004; also, author interview with Robin Jenkins, Ph.D., June 2006.

particularly in the frontal lobes, has been shown to correlate with measures of cognitive functioning.”<sup>43</sup>

Studies using MRI’s to study the causes of ADHD and autism, has led to discoveries about adolescents’ cognitive development that have relevance to juvenile justice. Specifically, neuroscience has been able to specify four significant structural changes in the brain during adolescence that are particularly noteworthy in regards to how adolescents process information that may explain their proclivity toward impulsive behavior. These studies also show that contrary to previous beliefs, the adolescent brain takes much longer to mature than previously thought. New research indicates that the brain does not fully develop until a person is in their twenties.

Such “[n]eurobiological studies indicate that the cerebral cortex undergoes a dynamic course of metabolic maturation that persists at least until the age of eighteen. Younger, less cortically mature adolescents may be more at risk for engaging in impulsive behavior than their older peers for two reasons. First, their developing brains are more susceptible to the neurological effects of external influences such as peer pressure. Second, they may make poor decisions because they are cognitively less able to select behavioral strategies associated with self-regulation, judgment, and planning that would reduce the effects of environmental risk factors for engaging in such behaviors.”<sup>44</sup> This has even been associated with, for example, as to why adolescents engage in unprotected sex more often than adults. One study suggests that in assessing risk in this situation, adolescents will use information differently. They will look at the

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<sup>43</sup> PBS Frontline, *Inside the Teen Brain*. See *Interview with Jay Giedd*, online at [www.pbs.org/wgbh/pages/frontline/shows/teenbrain/](http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/).

<sup>44</sup> Staci Gruber & Deborah Yurgelun-Todd, *Neurobiology and the Law: A Role in Juvenile Justice?* 3 OHIO ST. J. OF CRIM. L. 321 (2006).



potential short-term benefits such as spontaneity and heightened sexual pleasure and see that they outweigh the potential costs associated with such activities such as pregnancy and infection.<sup>45</sup> Further, adolescents are very vulnerable to peer pressure and the influences of their peers. This is why you see nearly every clique in school. Young people tend to congregate in groups and conform to them. It is also another reason why many normal law-abiding youth may find themselves at a greater risk to commit crimes and why many arrests of teenagers involve two or more youths.<sup>46</sup>

A study by Franklin Zimring, for example, showed that sixty-four percent of robberies committed by people under age twenty-one were committed in groups while only thirty-nine percent of robberies committed by people twenty-one and older were committed in groups. Adolescent risk-taking and influence by peers like only makes this problem worse. Zimring notes that “the ability to resist peer pressure is another social skill that is a necessary part of legal obedience not fully developed in adolescents.”<sup>47</sup> The problem for adolescents is that it is much easier to conform than to withdraw from a social group, especially teenage cliques. Their urges and impulsivities to engage in criminal behavior in a group can be explained through behavioral psychology and recent advancements in the study of the brain.

Taking these factors into consideration, it is difficult to argue that the key component of a crime, specifically culpability, is not affected by these developments and that there should not be a difference for criminal punishment when it comes to an adolescent versus an adult. This has been noted by the Supreme Court in *Thompson v. Oklahoma*, where Justice Stevens noted that

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<sup>45</sup> Beyth-Marom R, Austin L, Fischhoff B, Palmgren C, Jacobs-Quadrel M. 1993. Perceived Consequences of Risky Behaviors: Adults and Adolescents. *Developmental Psychology* 29: 549-563

<sup>46</sup> Franklin E. Zimring, Kids, Groups and Crime: Some Implications of a Well-Known Secret, 72 *J. Crim. L. & Criminology* 867, 870.

<sup>47</sup> *Id.*

less culpability should attach to a crime committed by an adult and that it was “too obvious” and did not “require extensive explanation.”<sup>48</sup> The Court went on to explain that “inexperience, less intelligence and less education make a teenager less able to evaluate the consequences of his or her conduct while at the same time...more apt to be motivated by mere emotion or peer pressure than is an adult.”<sup>49</sup> In addressing the issue of culpability, the court stated taking these into account.<sup>50</sup> Proponents of keeping adolescents out of adult prisons, maintain that adolescents are mature enough.

Justice Scalia in his dissent in *Roper v. Simmons*, noting that the court has found minors mature enough to make the decision to get an abortion. This misses the point though. The concept of abortion has many preventative measures along the way such as using contraceptives and condoms for birth control. In this scenario there are preventive measures that can be taken to prevent a pregnancy that could plausibly lead to an abortion. For an adolescent to have an abortion, they have time to think it through. However, crime is different. There is a much different line of thinking about an abortion such as “can I raise this child?” versus the thought of committing a criminal act which would be “what happens if I get caught” or “will I be caught?” The two acts, abortion and criminal action, cannot be compared as Justice Scalia would like to think. They thought process in assessing raising a child or terminating a pregnancy is must different than thinking about committing a crime because crimes are generally more on impulse and not very forward thinking. The supporting scientific information cited in *Roper*, is just too strong for Scalia to simply cast it aside.

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<sup>48</sup> *Thompson v. Oklahoma*: The Supreme Court noted that adolescents are less culpable than typical adults because of diminished decision-making capacity

<sup>49</sup> *Id* at 835.

<sup>50</sup> *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*. Laurence Steinberg, Elizabeth Scott. Temple University UVA law

In *Roper*, the American Medical Association submitted an amicus curiae brief in the case stating that since “adolescent brains are not fully developed in the prefrontal regions.”<sup>51</sup> *Roper* also stated that adolescents are less able than adults to control their impulses and should not be held accountable “for their immaturity of their neural anatomy.”<sup>52</sup> Most parents know and scientific studies confirm, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more than in adults and are more understandable among the young. These qualities often result in ill-considered actions and poor decisions. The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.

This is further supported by the American Psychological Association (the “APA”), which stated in their amicus brief before the Supreme Court in *Miller v. Alabama*<sup>53</sup> and *Jackson v Hobbs*,<sup>54</sup> that juveniles experience changes that occur in the areas that are critical to “executive functions.” These functions include planning, motivation, judgment, decision-making, and calculating risks and rewards. The amicus brief goes on to note that early adolescence coincides with major changes in the incentive processing system of the brain, particularly the reward-processing areas. These observations, which have been seen in other species, note spikes in risk-

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<sup>51</sup> In *Roper v. Simmons*, the U.S. Supreme Court ruled, 5 to 4, that juveniles could not receive the death penalty as it violated the 8th Amendment’s prohibition against cruel and unusual punishment. The 8th Amendment of the United States Constitution is applied to the States, including Florida, through the 14th Amendment

<sup>52</sup> Rosen, Jeffrey. The Brain on the Stand. NY Times. March 11, 2007.

<sup>53</sup> *Miller v. Alabama*, 567 U.S. \_\_\_ (2012): Evan Miller, a 14-year-old from Alabama, was convicted of murder after he and another boy set fire to a trailer where they had bought drugs from a neighbor. He was given a life term with no parole. The Supreme Court held that the Eighth Amendment prohibits a sentencing scheme that requires life in prison without the possibility of parole for juvenile homicide offenders.

<sup>54</sup> At age fourteen, Petitioner Kuntrell Jackson was sentenced to life imprisonment without the possibility of parole for felony-murder when his cousin killed a shop attendant during a robbery. Arkansas law made a life-without-parole sentence mandatory, so neither Jackson’s age nor the fact that he was not the triggerman entered into the sentencing consideration. The Supreme Court held in *Jackson*, that the Eighth Amendment prohibits a sentencing scheme that requires life in prison without the possibility of parole for juvenile homicide offenders.

taking, reward-seeking, and peer-influenced behaviors among adolescents, and correlates with a normal aspect of brain development. This may explain why adolescents are less psychosocially mature than adults in ways that affect their decision-making in antisocial situations has lent scientific credibility to the argument that youths may need special treatment or should not be considered as culpable because of diminished responsibility.<sup>55</sup> This is partly because the frontal lobes of the brain mature later which may have functional effects that may influence behavior.

### III. Public Policy Issues

The Supreme Court has clearly established that there is a cognitive difference between youthful offenders and adults by adjudicating that the Eighth Amendment categorically prohibits punishments that enact a mismatch between the culpability of a class of offenders and the severity of the penalty. The debate over removing youths from adult prisons is clearly a weighty political and moral issue, especially when the crime committed is particularly heinous.<sup>56</sup> Yes, some youth should be imprisoned for longer sentences and transferred to adult facilities upon reaching the majority. But when an adolescent is arrested for possession of marijuana or assault,

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<sup>55</sup> Steinberg, L, and Cauffman, Imaturity of Judgement in Adolescence: Why Adolescents May Be Less Culpable Than Adults. Behavioral Sciences and the Law. Behav. Sci. Law 18: 741-76- (2000): This study examines the influence of three psychosocial factors (responsibility, perspective, and temperance) on maturity of judgment in a sample of over 1,000 participants ranging in age from 12 to 48 years. Participants completed assessments of their psychosocial maturity in the aforementioned domains and responded to a series of hypothetical decision-making dilemmas about potentially antisocial or risky behavior. Socially responsible decision making is significantly more common among young adults than among adolescents, but does not increase appreciably after age 19. Individuals exhibiting higher levels of responsibility, perspective, and temperance displayed more mature decision-making than those with lower scores on these psychosocial factors, regardless of age. Adolescents, on average, scored significantly worse than adults, but individual differences in judgment within each adolescent age group were considerable. study examines the influence of three psychosocial factors (responsibility, perspective, and temperance) on maturity of judgment in a sample of over 1,000 participants ranging in age from 12 to 48 years. Participants completed assessments of their psychosocial maturity in the aforementioned domains and responded to a series of hypothetical decision-making dilemmas about potentially antisocial or risky behavior. Socially responsible decision making is significantly more common among young adults than among adolescents, but does not increase appreciably after age 19. Individuals exhibiting higher levels of responsibility, perspective, and temperance displayed more mature decision-making than those with lower scores on these psychosocial factors, regardless of age. Adolescents, on average, scored significantly worse than adults, but individual differences in judgment within each adolescent age group were considerable.

<sup>56</sup> In *Roper*, the defendants broke into Mrs. Crook's home, bound her hands and covered her eyes. They drove her to a state park and threw her off a bridge.

does it really make sense to place them in adult prisons as punishment? Clearly it does not given the numerous studies showing the effects that this has on them, especially when they are in for minor crimes. This should not apply to every crime, however.

#### A. Reentry

While in prison, it is in the best interest of society to ensure that they are prepared to assimilate into society and not commit other crimes. In order to do so, several things should be taken into consideration. First, youthful offenders should have their juvenile record history expunged so that they can find gainful employment upon release. To further nurture their employability, juvenile offenders should be required to take GED courses. Studies show that youths that receive their GED were 46% less likely to be re-arrested upon release. Also, simply having a quality reading program was showing to reduce recidivism by 20%.<sup>57</sup> One problem with this however, is that some youths will not have completed the grade level to even qualify, let alone understand the material taught in GED courses. Accordingly, some youth's should be exposed to the necessary curriculum to bring them up to par. This may require bringing in some post-secondary education instructors, but will only benefit society in the long term. Without this education, these youths will not be able to find any gainful, legal employment and will likely end up being sucked back into a life of crime. For those who cannot meet the GED requirements, vocational school courses should be offered to provide an option for other juveniles who wish to pursue certain career options.<sup>58</sup>

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<sup>57</sup> A Comparative Analysis of Prevention and Delinquency: Mary Magee Quinn and Jeffrey Poirier, American Institutes for Research National Center on Education, Disability, and Juvenile Justice (EDJJ)

<sup>58</sup> More than one third of youths in correction facilities read below the fourth grade level.

Another way to help youthful offenders is to provide drug counseling for youths who are brought into jail for drug use and possession charges.<sup>59</sup> As discussed in this paper, youths are clearly vulnerable to peer pressure and engage in impulsive behavior. However, because of their vulnerability, they are also very amenable to rehabilitative therapy. Drug counseling will at least address the problem associated with their addiction. This could also be done in conjunction with behavioral therapy to address any anger and psychological disorders that could be addressed to explain their behavior.

### Conclusion

Adolescence is a period of development and consolidation of the social self, of one's identity and understanding of the self in relation to the social world.<sup>60</sup> Adolescents are dependent on living circumstances of their parents, families, and friends and hence are vulnerable to the influences of their peers and also to the impact of conditions well beyond their control. The Supreme Court in *Eddings v. Oklahoma* put us on notice that adolescents are different than adults "adolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults . . . because adolescents may have less capacity to control their conduct and to think in long-range terms than adults."<sup>61</sup>

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<sup>59</sup> I think this should be done for all persons who are incarcerated for drug usage but I digress.

<sup>60</sup> Coleman JC, Hendry L. *The Nature of Adolescence*. 2nd edn. Florence, KY: Taylor & Frances/Routledge; 1990.

<sup>61</sup> *Eddings v. Oklahoma*. 455 U.S. 104 (1982). Here, the Supreme Court decided whether the Eighth and Fourteenth amendments prohibit the imposition of a death sentence on an offender who was a juvenile at the time an offense was committed. The split decision held that the death penalty had been improperly imposed in this case. The focus of the majority decision was upon the failure of the trial court to consider the mitigating circumstances attending the commission of the crime, an obligation that the Court determined was clearly imposed in *Lockett v. Ohio*. As a result of the *Eddings* decision, State courts must now hear any mitigating circumstances offered by a juvenile defendant subject to the death penalty; however, the question of whether or not the execution of a juvenile is constitutional has not been determined. The Supreme Court may avoid the issue, leaving the problem for each legislature to decide. While many hold the view that juveniles must be held accountable for their crimes and be deterred by appropriately severe penalties, this should not include capital punishment, since such a disposition completely ignores the basic commitment of the juvenile justice system to the rehabilitation and positive

The typical characteristics of youth in general and youthful offenders, mainly impulsive behavior and recklessness, are in some sense, literally hard-wired into the adolescent brain and are not aberrant symptoms of moral weakness or depraved moral character. Regardless of whether some people believe that youthful offenders are just as culpable as adult offenders, there are clear neurological explanations for the difficulties adolescents have in: cognitive functioning; exercising mature judgment; controlling impulses; weighing the consequences of actions; resisting the influences of peers, and in generally becoming more responsible. This is apparent in anyone who has lived through their teenage years and to every parent who has a teenager. This is partially the result of the fact that recent studies have shown that the portion of the brain most associated with “executive decision making” develops last in adolescents. Since adolescent brains take years to mature, they are more susceptible to their environment but they are also more malleable and amenable to reform their behavior. The Supreme Court even noted in *Roper* that juveniles do typically outgrow their behavior as the “impeccuousness and recklessness” of youth subside in adulthood.<sup>62</sup> Therefore, an emphasis of the judicial response to their deviant behavior should be on reform instead of the strict punitive focus of the adult criminal justice system.

“the corrupting influence of criminal associations in prison with the feelings of bitterness, hatred, and desire for revenge that are endangered by inhumane treatment in a backward prison may well produce a net loss in crime preventing. Whatever feelings of intimidation are produced on the prisoner by the severity of his punishment may be outweighed by the deterioration of his character in prison. His punishment may contribute to the effect on others, but in the process he is lost to society.”<sup>63</sup>

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development of deviant juvenile offenders. Modern standards dictate that some alternative sentence be implemented for juveniles who have committed particularly heinous crimes.

<sup>62</sup> *Id.* at 570.

<sup>63</sup> Minokin, Robert, and Weisberg, Kelly. *Child, Family and State: Problems and Materials on Children and the Law*. Third Edition, (1995).

The wave of legislation that took over the country in the 1980's and 1990's as a result of the increase in youth crimes resulted in a series of legislation that was rather draconian and misguided, clearly missed the forest for the trees. Jeffery Fagan, a professor of law and public health at Columbia University, noted that the adult prisons expose the vulnerability of youth offenders. He writes: "during the years when the transition from adolescence to adulthood occurs, when social skills and cues are learned, these youth will know little else other than the institutional world. The social rules and norms learned are those that prevail in the institution, including the reciprocal cycle of victimization and retaliation."<sup>64</sup> Specially, he notes that: (1) 85% more likely to be re-arrested for violent crimes; (2) 44% more likely to be re-arrested for felony property crimes; (3) 26% more likely to end up back in prison; and (4) 35% more likely to be re-arrested for drug offenses.<sup>65</sup>

The policy implications of these developmental issues with respect to court jurisdiction remain controversial, especially because of the variations in adolescent cognitive and social development for which chronologic age is not a precise marker. Some youth are clearly more mature than others and this has been made by opponents of keeping youth's out of adult prisons. But they are missing the big picture. The studies that document the development of the adolescent brain are relatively new and scientifically demonstrate that the thought process of adolescents in terms of cognitive thinking, decision making, and risk taking are different. Given these studies, it is not fair to categorize all youthful offenders as morally depraved miscreants that have no chance of being rehabilitated. Yes, there are some offenders who are complete

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<sup>64</sup> Stack, Barbara White. "Is this Justice?: A Reform Movement Crumbles." 19 March 2001. (children are not simply mini-adults. Their physical, emotional and cognitive development is incomplete. They are more willing to take risks and less able to consider consequences. The report raised the question of whether it was fair, then, to hold children accountable in the same way society does adults.)

<sup>65</sup> Kristin Rhodes. *The Criminal Prosecution of Juveniles: A Philosophical Reappraisal of Adolescent Agency*



monsters (*Roper* provides several examples), but it does society no good to throw youthful offenders in adult prisons for crimes such as drug possession and in some cases even assault.<sup>66</sup> Yes, adolescents are cognitively different than adults, but their mental development eventually morph's into adulthood, it just takes years for this to happen. Considering the law recognizes that youths are different (restrictions on voting, alcohol, ability to contract, etc,) and science recognizes it, than the criminal justice system needs to as well. Fortunately, it appears that they are starting to realize this.

Recent developments such as PREA and the Supreme Court's recognition of the "evolving standards of decency" show promising signs that the wave of tough on crime legislation meant to punish youths as adults is retreating. Psychological studies and recent advances in brain scanning show that the developing adolescent brain is much different than that of an adult in a number of ways including how it assess risk. As noted, these studies show that the adolescent brain matures much slower, meaning that decisions made during these years are not as informed as an adult. Such characteristics of youth offenders are not hardwired and should not be viewed as some sort of entrenched train of thought. Not all offenders are morally depraved villains as they were portrayed in the 80's and 90's. Many of them are simply misguided and trying to make their way through their teens. Punishing them as adults does not provide any benefit to society if they are being subject to the abuse by adult prisoners which only scars them and makes them more prone to ending up back in jail living a perpetual life of crime. Fortunately for society's sake, Congress has taken notice of these problems and the recent

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<sup>66</sup> Scalia, J, in his dissent, notes that in their *amici* brief, the States of Alabama, Delaware, Oklahoma, Texas, Utah, and Virginia offer additional examples of murders committed by individuals under 18 that involve truly monstrous acts. In Alabama, two 17-year-olds, one 16-year-old, and one 19-year-old picked up a female hitchhiker, threw bottles at her, and kicked and stomped her for approximately 30 minutes until she died. They then sexually assaulted her lifeless body and, when they were finished, threw her body off a cliff. They later returned to the crime scene to mutilate her corpse.

scientific studies establishing the psychological and physical difference's in adolescent brain development will help establish better policies in treating youthful offenders.