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BRIDGING THE GAP: AN INTERDISCIPLINARY APPROACH TO JUVENILE JUSTICE POLICY

C. Antoinette Clarke*

INTRODUCTION

The rigid system of classifying juvenile offenders as either children or adults is a poor method of dealing with the complexities of adolescent crime. We can address this inadequacy by integrating the rapidly emerging knowledge about the structure and function of the human brain and the formal properties of adolescent decisionmaking into the law's focus on human thought and behavior.

There are several reasons why actors in our justice system should embrace child development principles. Childhood is an intense period of rapid development, which culminates in the tasks of identity formation and social integration. No stage in human development, except infancy, results in such a rapid and dramatic change as adolescence. The development of tasks in adolescence is exquisitely sensitive to environmental influences—whether peer, educational, familial, or social. To further complicate matters, adolescent years are characterized by a struggle for autonomy from the same adults upon whom adolescents still depend. These changes are accompanied by rapid neurobiological concomitants, which are reflected in cognitive, emotional, and abstract reasoning, as well as changes in moral development.

Unfortunately, many officials dealing with juvenile offenders have essentially no training in childhood development. Judges, prosecutors, and public defenders are routinely faced with offenders who are psychologically different from their adult counterparts. As a result, there are paradoxical consequences of developmentally inappropriate sanctions for youth crime. There is the very real risk that a punitive approach to youth crime can do more harm than good to a child who is still in the process of neurobiological, psychological, social, and moral development.

The application of a biological and psychosocial understanding of behavior to problems of law has, until recently, been slow to gain ac-

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Legal scholarship often focuses on the technical issues of drafting, interpretation, and application; it is as much a field of literary study as a science of behavior. Over the past century, significant steps have been made to look beyond these internal concerns, and the study of law has expanded to include approaches informed by a variety of other disciplines, including the social sciences.

Integrating science into law and policy presents special challenges for policymakers, because science and law diverge in their basic orientations. Good science often moves forward by leaving certain questions open, by entertaining a number of possible hypotheses, and by recognizing the contingent nature of scientific truth. In contrast, law aims to define and close questions by providing yes or no answers based on limited information. The cultivated uncertainty that is a scientific virtue is anathema to legal decisionmakers. To fully integrate law with biology and the social sciences, we must take not only an interdisciplinary approach but a cross-cultural one.

From a developmental perspective, a child's interaction with the justice system is a key opportunity for society to demonstrate its true values and clearly articulate its expectations. If their experiences with social authorities seem thoughtless, impersonal, or indifferent, children will not learn to internalize personal responsibility for their actions. The predictability and consistency of adult attention and responsiveness is often what is most important to children. Complications develop when punishment is applied thoughtlessly to youth in a manner that does not foster positive development, but rather forestalls it. Thus, decisionmakers in the justice system, including the juvenile delinquency courts, should focus on the developmental, emotional, and social needs of the individual offender, rather than the characteristics of the individual offense. In short, the system should be offender-driven, not offense-driven.

The hallmark of juvenile justice should be the rehabilitative ideal that has seemingly been lost in the adult system. If juveniles are still in the process of developing proper judgment and moral reasoning, the response to the faulty exercise of those less-than-developed skills should be guidance and support. Some youth may need more guidance and direct intervention than others, but the emphasis must be on helping the juvenile develop into a responsible adult. As many


parents and teachers know, designing constructive sanctions for wrongdoing can be challenging, but they are worthwhile because they increase the developmental, educational, and social yield. Children should become more mature and responsible as a result of constructive sanctions.

This Article takes an interdisciplinary approach to the current methods for controlling and correcting youth crime. Part II provides a brief survey of psychological, neurobiological, and sociological research on child development. Special attention is paid to those developmental factors that can affect an adolescent’s choice to break the law. Part III discusses the current punitive approach to juvenile offending—“adult time for adult crime”—and the harmful effect such treatment has on the child’s positive development. Part IV suggests ways in which this new evidence about child development can be applied in the juvenile court in the areas of adjudication, disposition, and correction.

II. PSYCHOLOGY, NEUROSCIENCE, AND CHILD DEVELOPMENT

Criminal law demands that we restrain ourselves from performing certain actions that may otherwise seem pleasurable or attractive. Some of us are more easily inhibited than others, and we punish those who are not limited by adequate inhibitions. The law’s approach to the question of human motivation and decisionmaking has customarily been based upon rather crude working assumptions about individuals: persons of competent mental capacity are free to choose their actions, act rationally, act in their own best interests, and can foresee the consequences of their actions. But these assumptions do not provide an entirely accurate guide to human behavior. If young offenders have not reached the developmental stage where their inhibitory mechanism has fully developed, their actions are less a sign of personal failure and more a sign of youthful inability.

New research indicates that earlier presumptions about the physical and moral development of our children are incorrect. Child development can roughly be divided into three broad spheres: psychosocial, intellectual, and neurological. In each of these areas, research is uncovering the realities of the nature of development and adolescence that affect a young person’s capacity to use sound judgment, make good choices, and control behavior. The portions of the brain respon-

3. See infra notes 6–44 and accompanying text.
4. See infra notes 45–78 and accompanying text.
5. See infra notes 79–84 and accompanying text.
sible for judgment and inhibition, as well as the social processes that lead to the development of morality and responsible decisionmaking, develop at a later stage in life than was previously thought. Experts have realized that experiences in this later stage can have an impact on a child's physical and social maturation. These new understandings of the developing brain and its impact on psychosocial development lead to the conclusion that children should not be subject to the same sorts of punishment that are appropriate for adult offenders, and that a retooling of our approach to adolescent offenders is warranted.

A. Psychosocial Development

Psychosocial researchers and scholars have examined the differences between adolescents and adults that may be relevant to criminal responsibility. Research suggests that certain developmental factors characteristic of adolescence contribute to immature judgment in ways that are likely to affect criminal choice.

According to Professors Elizabeth Cauffman and Laurence Steinberg, "[W]e cannot claim that adolescents 'ought to know better' if, in fact, the evidence indicates that they do not know better, or, more accurately, cannot know better, because they lack the abilities needed to exercise mature judgment." Their research suggests that adolescents view long-term consequences as less important than short-term consequences and thus see many risks as inconsequential. This is due, in part, to their uncertainty about the future, which leads them to discount the severity of risks. During the teen years, youths seek more novel and intense sensations, and social status among peers becomes an important factor in decisionmaking. Youths do not fully mature until they have developed their own identity: "To the extent . . . that maturity of judgment goes hand in hand with a consolidation of a


sense of identity, research . . . suggests that most individuals would not be expected to display consistently mature judgment until the age of eighteen, at the earliest."10 As Cauffman and Steinberg note, "[G]ains in self-esteem and identity consolidation continue during the transition into one’s twenties."11 They identify three broad categories of psychosocial factors that affect decisionmaking: responsibility (self-reliance, clarity of identity, and healthy autonomy), perspective (the ability to understand the complexity of a situation), and temperance (the ability to limit impulsivity and evaluate situations before acting).12 These factors undergo significant developmental changes over the course of adolescence. During this time, children learn to think deductively, to think about hypothetical situations, to think simultaneously in multiple dimensions, to think abstractly, and to think about the process of thinking (metacognition).13

Professors Elizabeth Scott and Thomas Grisso have also identified a number of psychosocial factors that influence an adolescent’s ability to make judgments, such as conformity to peers, perception of risk, and temporal perspective.14 According to their research, pressure to conform to peers peaks around age fourteen.15 They also note that the greater inclination of adolescents to take risks may arise out of a lesser awareness of the risks, a different assessment of the probabilities behind risks, and differing values attached to the outcomes.16 Peer pressure and ostracism also play a role in the cost-benefit analysis. Temporally, adolescents weigh short-term benefits or consequences more heavily than long-term benefits, which results in taking long-term risks for short-term benefits.17 They suggest that this may be the result of both uncertainty about the future and different perceptions of time-spans.18 They further argue that delinquent behavior decreases in late adolescence, indicating that these factors are not just individual traits, but are instead a part of the development of children.

10. Id. at 1776–77.
11. Id. at 1778.
12. See id. at 1764–65 (arguing for “a developmental approach to the definition of maturity of judgment”).
15. Id. at 162.
16. Id. at 163.
17. Id. at 164.
18. Id.
through adolescence and into adulthood. They note that this should serve to reduce culpability for youthful offenders:

If youthful choices to offend are based on diminished ability to make decisions, or if the choices (or the values that shape the choices) are strongly driven by transient developmental influences, then the presumption of free will and rational choice is weakened. Psychology, in providing evidence that developmental psychosocial factors may shape decision-making well into adolescence, lends support to the intuitive conclusion that immature offenders are less culpable than their adult counterparts.

B. Intellectual Development

"Social learning" theories emphasize the acquisition of learned moral behavior. Under these theories, children learn morality by being rewarded or punished for their behavior. They also learn by observing behavior in others and the reactions such behavior elicits. They model their behavior after the behavior of others—whether adults or peers. Moral behavior is learned like other behaviors and skills, and it results in increasing conformity with the standards expected by society. Accordingly, these theories seem to contemplate a more extended period during which morality develops.

"Cognitive developmental" theories focus on a child’s developmental ability to reason morally, to think about moral problems, and to make moral decisions. Psychologist Jean Piaget found that, for children younger than ten, the intention of an actor is not the true measure of fault; rather, it is how much harm occurs. It is only in older children that motives and intentions play a role in assessing fault. An ability to understand the mental states of others requires experience with other people, and this understanding implies a cognitive aspect. Psychologist Lawrence Kohlberg shows that this moral development continues throughout the teenage years and even into early adulthood. Kohlberg found that children progress from what
he called the "preconventional" stage to the "conventional" and "postconventional" stages of moral reasoning. In order to avoid punishment, they avoid breaking rules; they ignore motive and focus solely on the consequences of the act. Their next concern at this stage is "naive instrumental hedonism," or "individualism, instrumental purpose, and exchange," in which children are focused on following the rules only when it is in their interest. This includes an appreciation of awards and a recognition that there is more involved in moral judgment than simply the magnitude of the consequences of the act.

Children at the conventional stage recognize that there are societal rules and a social order. At this stage, the intentions, motives, and perspectives of others play a role in moral reasoning. In the "mutual interpersonal expectations, relationships, and interpersonal conformity" substage, the child's focus is on avoiding disapproval. This is a step beyond simply avoiding punishment and living up to what is expected of the child. Here, motives become important. At the "authority maintaining" or "social system and conscience" substage, the stress shifts to adhering to rules and accepting and fulfilling duties within the context of the social system. While some children may reach Kohlberg's postconventional or principled stage, this is more likely to be reached as a young adult, rather than during adolescence. It is at this time that the individual has developed an understanding of the nature of laws and rules. They are now seen as the result of a social contract that all individuals must uphold because of shared responsibilities and duties. At this stage, the individual recognizes the relative and sometimes arbitrary nature of rules, but also understands that certain principles and values, such as justice and human dignity, must be preserved at all costs. Again, the cognitive

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Moral Stages]; Lawrence Kohlberg, Stage and Sequence: The Cognitive-Developmental Approach to Socialization, in HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH 347 (David A. Goslin ed., 1969) [hereinafter Kohlberg, Stage and Sequence].

28. Each stage has two sub-stages, which are given different titles in Kohlberg's works. Cf. Kohlberg, Moral Stages, supra note 27; Kohlberg, Stage and Sequence, supra note 27. For a full discussion of these stages, see Bukatko & Daehler, supra note 21, at 544-46.


30. Id.

31. Id.

32. Id.

33. Id.

34. Id.


36. See Bukatko & Daehler, supra note 21, at 545.
aspects of development are clear. Childhood experiences and the observation of others play a role in a child's ability to reason about moral issues. In learning how to act in a society, how violations are punished, how rules come to be, and how to understand themselves in the context of society, children will learn from their interactions with others.

It is axiomatic that as experiences accrue, so too will the skills that help the child to achieve adult capabilities. This fundamental truth supports a less punitive approach to antisocial behavior in children.

C. Neurobiology

Cognitive neuroscience, which relates brain activity to human thought and behavior, also contributes to our understanding of adolescent decisionmaking. Researchers have determined that maximum brain changes, previously thought to occur early in life, actually occur much later in the prefrontal cortex, the part of the brain that governs judgment and self-control. Neurologist Elizabeth Sowell notes the significance of these areas of the brain for human behavior: "[T]he frontal lobes are essential for such functions as response inhibition, emotional regulation, planning and organization. Many of these aptitudes continue to develop between adolescence and young adulthood." This development takes time:

Over a span of roughly ten to twelve years, the adolescent brain, through a series of sometimes subtle and sometimes breathtakingly dramatic shifts, is transformed from child to adult. The gray matter of an adolescent's frontal lobes grows denser and then abruptly scales back, molding a leaner thinking machine. The teenage brain fine-tunes its most human part, the prefrontal cortex, the place that helps us cast a wary eye, link cause to effect, decide "maybe not"—the part, in fact, that acts grown-up.

Thus, the physical development process takes place not only during childhood and the teen years, but into the twenties as well. As other studies have confirmed, the "[m]ore complex 'executive' functions of prefrontal cortex such as reasoning, motivation, and judgment appear to develop gradually during childhood and adolescence . . . continuing

38. Sapolsky, supra note 2, at 233–38; Linda Patia Spear, Neurobehavioral Changes in Adolescence, 9 CURRENT DIRECTIONS PSYCHOL. SCI. 111, 111 (2000).
during the adult years." The recognition of differences in the neurobiological development of the brain regions responsible for judgment comports with developmental hypotheses found in the non-neurological study of intellectual and psychosocial maturation by scientists such as Kohlberg, Scott, Grisso, Cauffman, and Steinberg.

Thus, the teenage years constitute a critical period, and there should be great concern over environmental influences and a recognition that what is experienced during this period will affect a child's development. According to Dr. David Fassler of the American Psychiatric Association's Council on Children, Adolescents and Their Families, "As science continues to show how behavior and brain structure dance in tandem—anatomy influences emotions and experiences, and emotions, and experiences, in turn, alter the fundamental architecture of the brain—we do have to be even more concerned ... about certain kinds of experiences teenagers may have." In other words, experiences cause physical changes in the brain, and those physical changes will affect the way people react to future stimuli.

One of the main tasks of the brain, particularly of the prefrontal cortex, is to inhibit actions. As the brain develops through childhood and adolescence, it is this very inhibition machinery that is being fine-tuned. What can we expect of adolescents if that inhibition machinery, the prefrontal cortex, is not yet fully tuned? Children, including teenagers, may simply not be as capable at inhibiting behavior as adults. Coupled with a biological inability to understand the consequences of their actions, it has now become clear that adolescents are far less capable of choosing to obey the law than was previously thought. While the brain may be sufficiently developed for many tasks in early childhood, when it comes to inhibition and understanding the consequences vital to moral reasoning, the wiring for the task is not yet complete.

Scientific evidence supports the idea that most adolescents are less mature than adults in ways that distinguish a teenager's decision to offend, and scholars have argued for changes in juvenile justice. The identity of the young person on whom punishment is to be imposed is amorphous and undefined. Children do not have the same capacity to control their behavior or make rational decisions as adults. They lack

42. STRAUCH, supra note 40, at 212.
43. According to Cauffman and Steinberg, "Our impression is that if the theoretical links between psychosocial characteristics and maturity of judgment can be experimentally validated, one might justify a general distinction between adolescents sixteen and younger and those seventeen and older." Cauffman & Steinberg, supra note 9, at 1788.
foresight and are prone to make decisions without careful deliberation, often not fully understanding the consequences of their actions. While they may be able to distinguish right from wrong in an abstract sense, other influences drive them to behave in ways inconsistent with that understanding.

The social cost of youth crime can be minimized by policies that ameliorate the impact of punishment on the future lives and prospects of young offenders. The social cost of incarcerating individuals who would soon outgrow their delinquency is nothing less than a waste of lives. This is not to suggest that those who commit offenses as juveniles should simply be left to their own devices; it does, however, cry out for intervention and rehabilitation rather than simple incarceration or other forms of retribution. Cauffman and Steinberg suggest that society recognize three categories of offenders: "juveniles, who should not be adjudicated in adult court; adults, who should; and youths, who may or may not be developmentally appropriate candidates for adult trial and sanctioning, depending on their characteristics [such as maturity and amenability to treatment] and circumstances."4

With all due respect to such noted researchers, I submit that their categories do not go far enough to protect youth and opportunity. My suggested policy changes are outlined in Part IV.

III. PUNITIVE JUVENILE JUSTICE AND ITS CONSEQUENCES

There is a well-developed body of literature that criticizes the increasingly severe treatment of juveniles and argues that society should be more willing to take their immaturity into account when deciding how they should be treated.45 While a full survey of that research is beyond the scope of this Article, a brief summary of the legal treatment of juveniles and the consequences of such treatment will prove illustrative.

In the first part of the eighteenth century, the common-law infancy defense controlled the disposition of juvenile offenders. Under this defense, children under the age of seven were legally incapable of criminal behavior, those between the ages of seven and fourteen were

44. Steinberg & Cauffman, supra note 8, at 414.
45. See, e.g., Cauffman & Steinberg, note 9, at 1789 (arguing that “distinctions must be drawn between younger and older adolescents”); Scott & Grisso, Evolution, supra note 14, at 137–41 (suggesting a juvenile justice policy that is formulated in a developmental framework); Steinberg & Cauffman, supra note 8, at 390 (arguing that adolescent development should be considered when adjudicating young offenders as adults); Kim Taylor-Thompson, States of Mind/States of Development, 14 STAN. L. & POL’Y REV. 143, 145 (2003) (proposing a juvenile system “that acknowledges rather than ignores the contributions made by developmental research”).
presumed to lack the capacity to establish the mental elements of a crime, and children over the age of fourteen were presumed to have sufficient mental capacity to be criminally liable.46 Thus, while the common law protected young children and adolescents, teenagers faced severe punishment and even death.47

The late nineteenth century brought about reform in the treatment of juveniles. The creation of separate juvenile courts "was a product of the social reform movement of that period."48 The new juvenile system "reflected the late 19th century understanding of the nature of crime and a new recognition of psychological differences between youths and adults, which was emerging from the 'new' science of psychology."49 This progressive approach defined the offenses of children as acts of delinquency rather than crimes. Juveniles came to be viewed as having different competencies than adults, and therefore needed to be adjudicated in a different type of venue. The malleability of youth and their potential for change was a reason to award a second chance and the prospect of rehabilitation.50 Despite those instances, it was clear that the courts recognized children as being something other than miniature adults.

Recently, the pendulum of reform has swung back in the other direction. Motivated by increasing juvenile crime rates and a loss of faith in rehabilitation, states have increased the punishment faced by many young offenders and have eroded the boundary between the adult and juvenile justice systems.51 Advocates for tougher policies argue that young criminals represent a serious threat to public safety that can only be contained if they are punished as adults.52 Disenchantment with juvenile courts also played a role, as critics claimed that excessive leniency toward young offenders contributed to the youth crime problem.53 Their reforms are embodied in several legislative strategies under which juveniles facing criminal charges are increasingly treated like adults.

47. See Victor L. Streib, DEATH PENALTY FOR JUVENILES 72–94 (1987) (citing instances from the colonial era through the 1930s in which children who were as young as ten at the time of their crimes were executed); Victor L. Streib, Executing Juvenile Offenders: The Ultimate Denial of Juvenile Justice, 14 STAN. L. & POL'Y REV. 121, 129 (2003).
48. Scott & Grisso, Evolution, supra note 14, at 141.
49. Id.
50. Id. at 142–43.
51. See generally Grisso, supra note 6.
52. Id.
53. Id.
The first of such reforms is that the age at which a juvenile can be subject to adult criminal proceedings ("waiver" or "transfer") has been lowered in most states; in many jurisdictions, pre-teens can be tried as adults and sentenced to prison.\(^{54}\) In addition, the range of felonies that can result in adult prosecution has been substantially broadened to include not only serious violent crimes, but also less serious felonies such as drug crimes.\(^{55}\) In some states, prosecutors have substantial discretion to decide, without judicial approval, whether young offenders will be adjudicated in juvenile or criminal court.\(^{56}\) Under legislative waiver statutes, criminal court jurisdiction is triggered automatically, based solely on the child's age and the offense, with no individualized evaluation of amenability to treatment or immaturity.\(^{57}\)

Lawmakers have also responded to criticism of the juvenile system by narrowing the gap between juvenile court dispositions and criminal sentences ("blended sentencing" or "extended juvenile jurisdiction").\(^{58}\) Dispositional jurisdiction for serious crimes has been extended into adulthood in many states, and incarceration that begins in juvenile detention can be completed in adult prisons.\(^{59}\) Juvenile crimes were traditionally viewed as the mistakes of wayward youth and records were customarily sealed, but today youthful transgressions often carry adult consequences. In some states, juveniles who commit sex offenses against minors are subject to statutory registration requirements, under which they are publicly identified and permanently labeled as sex offenders.\(^{60}\)

To understand the full import of the decision to subject juvenile offenders to adult punishment, it is necessary to not only consider the impact on the individual youth, but also the impact on society at large, which must deal with the aftermath of that decision. One of the ap-


\(^{55}\) Id.

\(^{56}\) While the exact number of juveniles prosecuted as adults each year is unknown since legislative and prosecutorial waivers are hard to track, at least one estimate places the number as high as 200,000. See Howard N. Snyder & Melissa Sickmund, *Nat'l Ctr. for Juvenile Justice, Juvenile Offenders and Victims: 1999 National Report* 106 (1999), available at http://www.ncjrs.gov/html/ojjdp/nationalreport99/chapter4.pdf.

\(^{57}\) Sickmund, *supra* note 54, at 6–10.


parent assumptions of proponents of transfer and blended sentencing is that juveniles will be “scared straight” by the symbolic action of removal from juvenile court.61 Extensive empirical research, however, has shown that waiver does not generate either specific or general deterrent effects; it actually increases recidivism rates in juveniles.62 A study comparing juveniles tried in adult courts with juveniles retained by juvenile courts found that “[t]he transfer group recidivated at a higher rate than the nontransfer group” among “all seven classes of offense[s]” studied.63 Furthermore, a review of research indicates that the increased recidivism is unrelated to either sentence type or length; hence, “the mere fact that juveniles have been convicted in criminal rather than juvenile court increases the likelihood that they will reoffend.”64

Youths convicted of violent crimes are likely to be incarcerated, and their sentences are likely to be served in adult correctional facilities.65 They will also serve far longer sentences than they would in the juvenile system.66 Juvenile inmates adjust poorly to prison life, which generates not only troubling experiences for youths as a group, but also gives rise to concomitant administrative and social costs.67 Young people in adult prisons are at greater risk of both sexual and violent victimization than both older inmates and comparable youths in juvenile facilities.68 Suicide rates for this group “greatly exceed the rate for the general youth population” and are “several times higher than the rate for youths in juvenile detention centers.”69 In addition,


63. Bishop et al., Transfer, supra note 61, at 245–48; Bishop et al., Transfer, supra note 61, at 185.

64. Bishop et al., Transfer, supra note 61, at 185.

65. Thirty-one states routinely house juveniles with adults, while five others mix the two groups in some of their facilities. Id. at 252. Only six states have never housed juveniles with inmates age eighteen or older. BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 241 (1999); see also Bishop & Frazier, Consequences, supra note 61, at 252.

66. Feld, supra note 65, at 232; Bishop & Frazier, Consequences, supra note 61, at 234–35 & tbl.7.3.


68. See Martin Forst et al., Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy, 40 JUV. & FAM. CT. J. 1, 9–10 (1989).

juveniles in adult prisons are much less likely to receive academic instruction or mental health treatment than their counterparts in the juvenile system. These factors are likely to impact long-term success rates.

While incarcerated, juveniles will be surrounded by adult criminals who are characteristically "older, stronger, more seasoned and more violent" than the population in juvenile facilities. The prison setting may therefore foster significant opportunity for the criminal socialization of developing youths by more experienced adult offenders. Opportunities for negative socialization are increased because juveniles are "approximately twice as likely to be problem inmates than the group of young adult inmates." Inmates with poor disciplinary records are less likely to receive work benefits or to earn credit for good behavior, both of which can reduce the length of incarceration. Consequently, actual prison stays for young offenders tend to be longer than stays for other inmates with comparable sentences.

The consequences of treating juveniles as adults go far beyond the actual prison sentence. The most dramatic illustration of the impact on youth occurs after the juvenile is released. Criminal convictions create a social stigma that greatly impedes the chances for reform after incarceration. In most states, a convicted felon may not receive social services, participate in a jury, hold elective office, or even vote. But the effects on long-term employment opportunities may have the most immediate negative impact. Unlike juvenile delinquency adjudications, criminal convictions must be reported on employment applications. Disclosure of a felony record mortgages "opportunities and prospects for stable employment in life," which is particularly problematic since "job stability is central in explaining adult desistance from crime." The overall impact is that "[w]hile most youths who engage in delinquency will desist by early adulthood

70. Id. at 253–54.
71. Donna M. Bishop, Juvenile Offenders in the Adult Criminal Justice System, 27 CRIME & JUST. 81, 139 (2000).
72. Bishop & Frazier, Consequences, supra note 61, at 257.
73. McShane & Williams, supra note 67, at 266.
74. Id.
75. Bishop & Frazier, Consequences, supra note 61, at 260.
as they move into jobs and marriages that give them a sense of place and purpose, many of those who enter the criminal justice system will carry the stigma of a criminal conviction," which will permanently circumscribe their opportunities.78

It has become clear that exposure to the adult criminal system is toxic to juvenile development. In light of the enormous risks to the individual child and the high costs to society, it is imperative that decisionmakers exercise caution when dealing with adolescent offenders. The consequences of an ill-advised waiver or application of blended sentencing are so grave that the use of such sanctions must be reexamined.

IV. Recommendations for “Bridging the Gap”

Law, of course, seeks to punish harmful behavior. With adult offenders, it is not unreasonable to say that retribution is the primary motivation for arrest and prosecution. When the offender is a juvenile, however, other goals must be considered. Fostering the positive social development of children and encouraging healthy personal, social, and moral maturation are somewhat broader goals than simply punishing, controlling, or deterring antisocial behavior, but they are no less compelling. The interdependence of positive development and behavior control should not be ignored—we do so at the expense of our youth.

Of course, youth must accept personal responsibility for their behavior. This corresponds to the developmental goal of encouraging children to control their impulses, to consider the impact of their behavior on others, and to accept responsibility for their own actions. We cannot and should not simply stand and wait for delinquents to outgrow their delinquent tendencies. But the psychological effects of retribution-motivated sanctions demand an alternative to the current punitive approach. Indeed, every phase of the justice process—from adjudication to disposition to correction—can be informed by the current developmental research.

A. Adjudication

My first proposal is to extend juvenile court jurisdiction to age twenty-five. Although policymakers frequently draw age boundaries between childhood and adulthood, it is impossible to point to a particular age at which youths attain adult capabilities. The changes associated with the three spheres of development (psychosocial, intellectual,

78. Bishop & Frazier, Consequences, supra note 61, at 264.
and neurological) do not occur simultaneously, and even within these spheres, different capacities develop at different rates. Additionally, there is a great deal of individual variability among youths at any given age and in all spheres of development. Children cross the line into adulthood at different ages for different purposes. Children of elementary school age may be deemed adults for purposes of assigning criminal responsibility but are subject to municipal curfews. Some seniors in high school cannot vote but can marry without either parental or judicial approval. Childhood is a category with amorphous boundaries, so setting the "age of majority" at eighteen for purposes of criminal responsibility is somewhat arbitrary. Because we need not arrive at a single, definitive age of adulthood for all purposes, setting a later age for criminal responsibility and adult sanctions would reflect the developmental realities that make adult punishment for juvenile criminal behavior inappropriate.

If the brain is not fully developed until the early twenties, then there is every reason to lengthen juvenile court jurisdiction to include older teens and young adults, and to target the time at which they are likely to have outgrown antisocial tendencies. By expanding the jurisdiction of the juvenile court into the mid-twenties, we can continue to offer guidance for as long as possible. At the very least, it would reduce the number of transfers to adult court simply because the offenders were too close to their eighteenth birthdays for the court to bother trying to rehabilitate them.

My second proposal is to set up a three-tier classification system within the juvenile court. The categories are as follows:

- Persons in need of supervision (young children aged 5 to 10)
- Juveniles (middle children aged 11 to 14)
- Youthful offenders (older children aged 15 to 21)

One major conceptual problem with juvenile justice is the binary nature of the system: you are either a child or an adult. But there are enormous differences in emotional development between a twelve-year-old and a nineteen-year-old. There are also vast differences among children of the same age. It is difficult for society to accept that older teens deserve the wrist-slapping treatment they get in the juvenile courts when they appear so close to being adults. Understanding principles of child development can help guide the design and implementation of more effective interventions. By further dividing the classification of "children," we can help ensure that sanctions are appropriate to the age and developmental level of the child. For
example, the canons of the infancy defense, which focus on the ability to formulate a criminal scienter, can be applied to persons in need of supervision. For juveniles, we can focus on their competence to stand trial and to assist in their own defense. Studies have shown that "competence-related abilities improve with age during adolescence," and researchers have suggested "dual standards of competency." For youthful offenders, maturity of judgment and potential for growth should be the focus of the juvenile justice system. Treatment options for youthful offenders should assist in the transition to adulthood and job-readiness.

My third proposal is to eliminate waiver and blended sentencing. Since juveniles differ from adults, they should not be subjected to a criminal trial in adult criminal courts or adult sentencing. The research in child development shows that children differ from adults in ways that are important to criminal justice. If the portions of the child's brain that are involved in morality, judgment, and the inhibition of impulses are simply not developed, it is difficult to attribute moral fault in the same way that it is attributed to an adult. The retribution behind some uses of adult punishment seems inappropriate and unfair if a child is too young to be capable of the moral reasoning and self-control expected of adults. The perception of gross unfairness or indifference can further alienate children and cause them to lose respect for the social system represented by the court. Any perceived lack of fairness can lead to increased negative behavior, as the "[f]ailure to set clear expectations for children's behavior, inconsistent discipline, excessively severe or aggressive discipline, and poor monitoring and supervision of children [has been shown to] predict later delinquency."

This potential harm is rarely part of a discussion on choosing between sanctioning alternatives, and it is especially problematic in the context of child development. Failures during critical windows of a child's development can have lifelong consequences because of the profound impact that early experiences have on the child's world view. A child who is subjected to a callous environment for a significant duration of time is likely to make generalizations about the rest

79. For an excellent examination of the infancy defense, see Taylor-Thompson, supra note 45 and Bazelon, supra note 46.
80. For an excellent examination of the impact of developmental research and children's capacity to stand trial, see Elizabeth S. Scott & Thomas Grisso, Developmental Incompetence, Due Process, and Juvenile Justice Policy, 83 N.C. L. REV. 793 (2005).
81. Id. at 822, 832.
82. See NAT'L RES. COUNCIL & INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE 78 (Joan McCord et al. eds., 2001).
of the world—many of them negative. The principle of *primus non nocere* is especially important when dealing with children.

"Adult time for adult crime" simply does not serve the child's best interests. Society's desire for retribution and accountability by subjecting youth to adult punishment comes at a high cost—the risk to the child from negative influences while in prison and the risk to the child's future opportunities as a result of the prison experience. If we want to aid our children in developing their youthful mistakes, we must eliminate both waiver to adult court and blended sentencing.

**B. Disposition**

We need to eliminate the incarceration of juveniles for anything other than harm to persons. Normal child and adolescent development requires a stable environment. Thus, it is unlikely that institutional treatment, retraining, or punishment is effective in reducing delinquency. It is even possible that the effects of incarceration—alienation, stigmatization, and "contamination" by other offenders—will do more to hinder positive development.

We will still need to incarcerate some juvenile offenders. It is beyond question that children are capable of performing acts that cause society great harm. We can often prevent those harms only through incarceration or some other form of strict supervision. We must recognize, however, that the juvenile who must be incarcerated should also be allowed to proceed in his or her development to the point where incapacitation is no longer required. While we may feel confident in concluding that a particular adult will always be a danger, that

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84. Little information exists evaluating the efficacy of detention: No responsible business concern would operate with as little information regarding its success or failure as do nearly all of our delinquency-prevention and control programs. It is almost impossible to count on one hand the number of true experiments in which alternative techniques are compared; the number of systematic, though nonexperimental, evaluations is not a great deal larger. We spend millions of dollars a year in preventive and corrective efforts, with little other than guess work to tell us whether we are getting the desired effects. William E. Wright & Michael C. Dixon, *Community Prevention and Treatment of Juvenile Delinquency: A Review of Evaluation Studies,* 14 J. Res. Crime & Delinq. 35, 55 (1977) (quoting Stanton Wheeler et al., *Juvenile Delinquency—Its Prevention and Control,* in *Delinquency and Social Policy* 428, 440 (Paul Lerman ed., 1970)).
conclusion is far less reasonable when we are dealing with an adolescent who is still in the process of judgmental and moral development.

The initial impact of incarceration will be profound, but the impact of this sanction diminishes dramatically over time as children become desensitized. Sooner or later, most children will give in to what others expect of them. Children may begin to identify with some of their more delinquent peers in detention. Thus, long periods of detention are counterproductive and can have seriously undesirable side effects, prompting a recurring complaint from parents: "My child never even thought of doing that until he was locked up with those other children."

From a developmental perspective, prolonged detention is also problematic because children are undergoing developmentally important phases of life in institutional settings. Children are adapting to incarceration and an institution, not to the community from which they came and to which they must return. Thus, if we are to preserve youth and opportunity while protecting society, we must be cautious in our use of incarceration as a sanction. If we reserve incarceration for only the most serious offenses, such as injury to persons, then we can avoid the unnecessary negative effects of incarceration on those youths who engage in the most common antisocial behaviors associated with the teen years: drug use, theft, and property destruction.

We must provide sentencing discounts or mitigation for those circumstances most likely encountered by juveniles—namely, peer influence (especially when dealing with gang-related offenses), bullying, and other identity issues. Showing juveniles that the realities of their life experiences are being taken into consideration by the people in a position to affect their lives will improve their perception of the process, as well as their chances of gaining the maturity and insight that we hope to impart.

We must aim for dispositional alternatives to incarceration that will encourage healthy moral development. For example, volunteer service at a senior citizen center is better for a child than picking up litter off the highway (unless, of course, the offense is littering). A youth convicted of driving while intoxicated might be ordered to volunteer in an emergency room. A constructive sanction for graffiti vandals is ordering them to adopt a piece of property and holding them strictly responsible for maintaining it and keeping it graffiti-free. This type of individualized and nuanced sanction is developmentally constructive because the offenders have a chance to experience the sensation of maintaining their assigned property. They will learn what it feels like to be at the mercy of vandals and experience the victimization of hav-
ing his property vandalized. Moreover, they learn the inconvenience and cost involved in cleaning up after someone else who has little regard for the rights of others. We want to teach empathy, accountability, and compassion, while allowing the impact of guilt and shame to mold future behavior.

Wherever possible, these sanctions should be community-based rather than institutional, and should build on the child's family and community relationships. Both risk and need factors are to be taken into account. For example, time with antisocial peers should be minimized, and the child should be exposed to positive peer environments and other social elements. This will give children a genuine opportunity to contribute to family, school, and community, while taking responsibility for the harm they have caused.

C. Corrections

Juveniles should never be housed with adults. If incarceration is necessary, young people should be housed only with other young people, segregated by age and severity of offense. There are many negative effects associated with incarcerating children with adults, including an increased risk of criminal socialization. If we are interested in preserving and protecting youth and their future opportunities, we can never house children alongside adults.

We must also provide vocational training for youthful offenders over sixteen. Vocational training provides the youth an opportunity to enhance the development of personal competence and self-esteem. In addition, we should strive for providing them with practical skills that would enable them to support themselves after they are released. Whatever the child may be suited for—even if it is vocational training—can be taught just as easily as social studies or science, and job-readiness upon release from incarceration will go a long way in preventing recidivism.

V. Conclusion

The view of delinquent youth that originally fueled the creation of a separate system of justice for children in the early 1900s is still true today. These offenders are children, and what they have done cannot and should not change that essential fact. Punitive juvenile justice policy, which treats adolescent offenders as adults, ignores this essential fact, and can harm a child's positive development. These suggestions for sanctioning criminal behavior while promoting positive development can be reduced to broader affirmative principles: focus
on the offender and not the offense; fortify the child’s strengths, competence, and self-control; build on existing relationships; keep sanctions realistic by setting clear expectations that are within the child’s reach; and provide latitude for mistakes.

The problem of juvenile crime does not lend itself to simple solutions. We, as a society, have been struggling with the treatment of youth crime for more than a hundred years. But courts have also acknowledged that the state has a compelling interest in the physical and psychological well-being of its youth.\textsuperscript{85} New models are needed not only for the juvenile court, but for the departments of probation, mental health, social service, and education. These departments need to work together, and all participants must appreciate the value of fostering positive child development along with controlling and deterring antisocial behavior. Law and science came together a century ago for the protection and preservation of youth. It is time to do so again.

\textsuperscript{85} See, e.g., Interactive Digital Software Ass’n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003); Am. Amusement Mach. Ass’n v. Kendrick, 244 F.3d 572 (7th Cir. 2001) (accepting the state’s interest in the health and well-being of children); Video Software Dealers Ass’n v. Webster, 968 F.2d 684 (8th Cir. 1992) (recognizing a compelling state interest, but refusing to declare unconstitutional statute limiting distribution of violent video games to minors).