

BARRY FELD: AN INTELLECTUAL HISTORY OF A JUVENILE COURT REFORMER

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INTRODUCTION

The article of Professor Barry Feld's that provides the foundation for this special issue of the *Nevada Law Journal—My Life in Crime: An Intellectual History of the Juvenile Court*¹—chronicles the transformation of the juvenile justice system over the course of the past five decades. Feld is certainly the right person to tell this story. He is perhaps the leading scholar in juvenile justice of his generation. And, probably more than any other scholar, his scholarship has had a direct impact on juvenile court practice.² He has been a prosecutor, law professor, researcher, commission member, and scholar. He was among the most radical critics of juvenile justice for most of his career, loudly calling for its abolition when most advocates for children were too afraid of what might happen if juvenile court were abolished.³

In this response to his article, I will tell a different—but closely related—story. I will look at the transformation that Feld himself went through in his views of the juvenile justice system. This is a story that allows us to glean some important insights about the nature of the juvenile justice system and why it evolved in the ways it did. By looking at the juvenile court's history through the lens of its foremost chronicler, we can see the extent to which the court has been shaped by judges', lawyers', legislators', and scholars' assumptions about adolescents and their families.

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¹ Barry C. Feld, *My Life in Crime: An Intellectual History of the Juvenile Court*, 17 NEV. L.J. 299 (2017).

² Columbia law professor Elizabeth Scott would certainly be included in this group. See generally Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137 (1997).

³ See generally BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* (1999) [hereinafter *BAD KIDS*]; Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68 (1997) [hereinafter *Abolish the Juvenile Court*].

I. THE PRE-*GAULT* ERA

For two-thirds of the twentieth century, juvenile justice, the remarkable Progressive invention, was allowed to flourish as legislators and policymakers wished. The Progressives imagined a new way of attending to the needs of young people who got into trouble with the law. They envisioned and created a justice system unlike any that had come before it. This new system, focused on the needs of the young people, was incompatible with existing conceptions of formality, rules, and rights. Federal courts, and the Supreme Court of the United States in particular, gave juvenile justice a free ride.

Juvenile justice differentiated from all other justice systems in two broad ways. First, courts were allowed to act without any procedural constraints. Under the Progressive intervention, juveniles accused of being delinquent were brought before “courts” presided over by judges who possessed virtually unchecked power to act as they saw fit. In most juvenile courtrooms, no lawyers appeared—neither prosecutors nor defense counsel. Probation officers or other court personnel filed the document that placed the matter on the court’s docket. Judges had full access to everything in the file that was written up about the accused, including the interview the child had with the probation officer, the police, and others, as well as social and other information that may have been obtained from family members, teachers, or others in the community. Judges would read these files, interrogate the children before them, and fashion an order in each case according to the judge’s sense of what was best for the child and for society.

If the procedural freedom seemed broad, juvenile courts possessed even more discretion when it came to the dispositional phase of proceedings. Judges were entirely free to impose any sentence they preferred on any child, regardless of the act that brought them to court with only one limitation: the sentence ended when the child reached the age of majority, usually twenty-one years of age.⁴ Thus it was from the beginning of juvenile court until 1967.

II. THE *GAULT* CASE

When Barry Feld was studying for his first semester exams in law school in December 1966, a lawyer from the American Civil Liberties Union was arguing in the Supreme Court seeking to rein in the lawlessness of juvenile court.⁵ In the Supreme Court, Norman Dorsen, Gerald Gault’s lawyer, challenged Gault’s juvenile delinquency adjudication in an Arizona juvenile court.⁶ So many unacceptable things happened in Gault’s case that Dorsen must have

⁴ See Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 825 (1988).

⁵ *In re Gault*, 387 U.S. 1 (1967).

⁶ *Id.* at 3–4.

felt like he had been invited to a smorgasbord overflowing with amazing choices.

Gault never had a trial.⁷ Neither he nor his parents were even informed of the charges brought against him.⁸ For that matter, even years after the proceeding, the judge was never quite sure what law Gault was supposed to have broken.⁹ No witness with personal knowledge of what Gault allegedly did was ever produced.¹⁰ The judge interrogated Gault without warning him of the consequences of answering his questions.¹¹ No record of the proceeding was ever made.¹² To top everything off, the court sentenced Gault to serve up to six years in the Arizona training school.¹³ It never became very clear what crime Gault even could have been said to have committed. But the closest analogue the juvenile court judge was able to come up with was a petty misdemeanor that was punishable by a maximum term of two months for an adult.¹⁴

Dorsen strategically chose to challenge Gault's adjudication exclusively on procedural due process grounds. In his brief, he asked the Court to hold that the Constitution requires that juveniles be provided with at least six procedural protections: the rights to (1) notice, (2) counsel, (3) remain silent, (4) confrontation and cross-examination of adverse witnesses, (5) a recorded record of the proceedings, and (6) an appeal.¹⁵ Securing these rights for juveniles would revolutionize juvenile court practice, as both Dorsen and the Justices of the Court understood.

Progressives had a strongly negative view of how the procedural rules applied in criminal court. Criminal courts, the Progressives believed, were "restrained by antiquated procedure, saturated in an atmosphere of hostility, trying cases for determining guilt and inflicting punishment according to inflexible rules of law."¹⁶ They were "limited by the outgrown custom and compelled to walk in the paths fixed by the law of the realm," and dominated by "prosecutors, and lawyers, trained in the old conception of law [who] stag[ed] dramatically, but often amusingly, legal battles, as the necessary paraphernalia of a criminal court."¹⁷ They sought to replace this by a process freed from the "primitive prejudice, hatred, and hostility toward the lawbreaker" that was om-

⁷ *See id.* at 7.

⁸ *Id.* at 5, 7.

⁹ *Id.* at 8.

¹⁰ *See id.* at 5–6.

¹¹ *Id.* at 43–44.

¹² *Id.* at 5.

¹³ *Id.* at 7–8.

¹⁴ *Id.* at 8–9.

¹⁵ *Id.* at 10.

¹⁶ *See* HERBERT H. LOU, JUVENILE COURTS IN THE UNITED STATES 1–2 (1927), as reprinted in SAMUEL M. DAVIS ET AL., CHILDREN IN THE LEGAL SYSTEM 859 (4th ed. 2009).

¹⁷ *Id.*

nipresent in criminal court.¹⁸ The Progressives designed juvenile court “to administer justice in the name of truth, love, and understanding.”¹⁹

As the Supreme Court explained:

The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society’s duty to the child could not be confined by the concept of justice alone. They believed that society’s role was not to ascertain whether the child was “guilty” or “innocent,” but “What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.”²⁰

During the oral argument, Justice Tom Clark asked Dorsen, “if [he wins], what would be left of juvenile court system?”²¹ Dorsen answered “the best part.”²² He meant, of course, the sentencing phase of juvenile justice. Dorsen’s answer was brilliant because it sealed his victory by letting the Justices know that juvenile court could survive whatever limits the Court might impose on how juvenile courts reached the sentencing phase. But his response could also be the subject of a long law review article. Recall that Gault was sentenced to a term of up to six years in the Arizona training school for an offense that the legislature deemed worthy of a maximum sentence of two months of imprisonment for an adult. Actually, what happened to Gerald Gault is even worse than any of this thus far suggests. Not only was he denied a trial, Gault was denied a sentencing hearing, too. The Supreme Court described what happened after the juvenile court determined that Gault was guilty:

At this June 15 hearing a “referral report” made by the probation officers was filed with the court, although not disclosed to Gerald or his parents. This listed the charge as “Lewd Phone Calls.” At the conclusion of the hearing, the judge committed Gerald as a juvenile delinquent to the State Industrial School “for the period of his minority [that is, until 21], unless sooner discharged by due process of law.” An order to that effect was entered. It recites that “after a full hearing and due deliberation the Court finds that said minor is a delinquent child, and that said minor is of the age of 15 years.”²³

The entire sentencing hearing took no more than a few minutes. The judge made no inquiry into Gault’s needs, nor into the strengths or deficiencies of his parents and family. The Court was disappointed, but left it at that. In Justice Fortas’s words:

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Gault*, 387 U.S. at 15 (quoting Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119–20 (1909)).

²¹ Norman Dorsen, *Forward* to DOUGLAS J. BESHAROV, *JUVENILE JUSTICE ADVOCACY: PRACTICE IN A UNIQUE COURT*, at xvii (1974).

²² *Id.*

²³ *Gault*, 387 U.S. at 7–8.

[O]ne would assume that in a case like that of Gerald Gault, where the juvenile appears to have a home, a working mother and father, and an older brother, the Juvenile Judge would have made a careful inquiry and judgment as to the possibility that the boy could be disciplined and dealt with at home, despite his previous transgressions.²⁴

Sadly, however, “except for some conversation with Gerald about his school work and his ‘wanting to go to . . . Grand Canyon with his father,’ the points to which the judge directed his attention were little different from those that would be involved in determining any charge of violation of a penal statute.”²⁵

In the state court proceedings, Gault’s lawyers argued “that it was error for the Juvenile Court to remove Gerald from the custody of his parents without a showing and finding of their unsuitability.”²⁶ But Dorsen did not make this argument in the Supreme Court.

It would be a fair question to pose to law students: which is worse? Being convicted of a crime without the right to remain silent, or being sentenced to loss of liberty thirty-six times longer than could have been imposed on an adult *and* without any meaningful inquiry into the need for the sentence? Many surely would conclude that the combination of unfettered power to deprive a guilty juvenile of liberty with the complete absence of a requirement to make meaningful inquiry into the propriety or need for the sentence are, by far, the more serious shortcomings. As Emily Buss explains, “In finding Gerald Gault’s treatment unconstitutional, the Court neither challenged the substantive goals of the juvenile justice system nor argued for its abolition.”²⁷ Rather, it meant to protect and advance the system’s distinct “substantive benefits,”²⁸ insisting only that infusing adult procedural protections onto the adjudicative part of juvenile court was “compatible with the goals of the juvenile justice system and because these goals were not being achieved without these rights.”²⁹

Professor Buss explains that what should be unique about juvenile justice, would be requiring “a meaningful engagement between decisionmaker and child, an engagement that the child would experience as a conversation rather than as litigation, and that would communicate the concern and interest the state took in the child.”³⁰ Professor Buss complains, “*Gault* reduced the analysis of children’s due process rights to the simple-minded question of adult rights or no rights. And in the many cases considering accused juveniles’ due process rights since *Gault*, the Court has adhered to this narrow and nonsensical framing.”³¹

²⁴ *Id.* at 28.

²⁵ *Id.* at 28–29.

²⁶ *Id.* at 10.

²⁷ Emily Buss, *The Missed Opportunity in Gault*, 70 U. CHI. L. REV. 39, 42 (2003).

²⁸ *Gault*, 387 U.S. at 21.

²⁹ Buss, *supra* note 27.

³⁰ *Id.*

³¹ *Id.* at 43.

One of the more interesting features of the *Gault* decision is that, even though the record made no mention of the conditions of the placement facilities, Justice Fortas chose to characterize them in ways that supported the Court's decision to impose procedural protections on the trial phase of the proceedings.³² As Justice Fortas wrote:

The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a “receiving home” or an “industrial school” for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes “a building with whitewashed walls, regimented routine and institutional hours . . .” Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and “delinquents” confined with him for anything from waywardness to rape and homicide.³³

Professor Feld's early work as a criminologist studying juvenile facilities in Massachusetts—a few years after *Gault*—fully corroborates the Court's characterization. In Feld's words,

I lived in and studied the Massachusetts training schools for two years . . . visited training schools in several other states[] . . . [and] concluded that despite rehabilitative rhetoric and modest efforts to provide treatment in institutions, these correctional facilities were custodial youth prisons whose primary virtue was that they were not as harmful or destructive as adult prisons and jails.³⁴

It's nice, of course, to be candid about what juvenile justice was able to deliver. But did the *Gault* court imply that *if* the facilities to which young Gault had been sent were capable of treating and rehabilitating young offenders, that it would *then* be constitutionally acceptable to deprive Gerald of his liberty when he committed no act of wrongdoing? Was the Court really saying in 1967 that it was because of the recognized failures of juvenile justice to help young people that the Constitution must constrain the procedures for adjudicating wrongdoing? That's an awfully thin reed on which to stand a young person's liberty interests. A more robust stance would make clear that even when the treatment features of juvenile justice worked exceedingly well, juveniles have a constitutionally protected right not to be deprived of their liberty without due process of law. *Gault's* gratuitous criticism of the substance of juvenile justice undermined its focus on the liberty rights of children. And when the Burger Court replaced the Warren Court, it didn't take very long for Justice Rehnquist, writing for the Court, to denigrate the liberty interests of children by explaining that children “are always in some form of custody.”³⁵

³² *Gault*, 387 U.S. at 27.

³³ *Id.* (footnotes omitted) (citations omitted).

³⁴ Feld, *supra* note 1, at 305.

³⁵ *Schall v. Martin*, 467 U.S. 253, 265 (1984).

In all events, of the two parts of juvenile justice—the adjudicative and dispositional phases—*Gault* ignored the second entirely and purportedly radically changed the first by insisting that the rudiments of due process would be faithfully adhered to in all juvenile courts. *Gault* specifically held that there must be notice of charges, the right to counsel, the right to remain silent, and the right to confront witnesses against them.³⁶ Anyone with even the slightest familiarity with juvenile or criminal justice would immediately agree that, of all these rights, the right to counsel is paramount. If a young person appears in juvenile court without counsel, it will hardly matter whether he is given notice of the charges. His right to remain silent will functionally be rendered irrelevant along with his right to confront witnesses. Why is that so? Because without counsel, the juvenile is entirely ill-equipped to participate in the proceedings. Without counsel, the juvenile will almost certainly plead guilty to one or more of the charges. There won't be a hearing; there won't be witnesses; no defense will be raised. In other words, without counsel, juvenile proceedings would look little different than the proceeding conducted in Gerald Gault's case.

III. THE “DUE PROCESS REVOLUTION”

So, what happened in the years and decades after *Gault*? As Professor Feld explains, the majority of juvenile courts continued to function for decades after *Gault* was decided the same way they did for most of the century.³⁷ Juvenile after juvenile appeared in court without counsel. One technical difference between the pre and post-*Gault* years is that before *Gault*, the concept of counsel was not even considered. After *Gault*, juvenile court judges persuaded juveniles and their families to waive their “right” to counsel and to proceed without legal representation. Professor Feld's own work in the late 1980s showed that, in the jurisdictions he studied, a majority of juveniles went unrepresented in juvenile court.³⁸ State courts also employed ingenious methods to assure that juveniles from poor families who were supposed to benefit from the constitutional right to free, court-assigned counsel never were assigned a lawyer. In Florida, for example, “indigency rules . . . were so strict that having \$5 in the bank made a family ineligible for appointment counsel.”³⁹ Moreover, as Wally Mlyniec ex-

³⁶ *Gault*, 367 U.S. at 33, 41, 55, and 57.

³⁷ See Feld, *supra* note 1, at 320.

³⁸ See Barry C. Feld, *Justice by Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration*, 82 J. CRIM. L. & CRIMINOLOGY 156, 184–85 (1991); Feld, *supra* note 4, at 907–08; Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185 (1989); see also AM. BAR ASS'N, JUVENILE JUSTICE CTR., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (1995) (documenting deficient representation in juvenile courts around the country).

³⁹ Wallace J. Mlyniec, *In re Gault at 40: The Right to Counsel in Juvenile Court—A Promise Unfulfilled*, 44 CRIM. L. BULL., no. 3, 2008, at 6 (citing PATRICIA PURITZ & CATHRYN

plained, “Florida parents had to pay a \$40 fee just to apply for an indigency determination.”⁴⁰

Even worse than the juveniles who were never represented by lawyers, many who were represented got the wrong kind of lawyer—a lawyer who felt free to advocate for the outcome the lawyer believed was best for the client.⁴¹ Ellen Marrus, writing as late as 2003 in defense of a strong client-centered advocacy model for accused delinquents, felt the need to characterize her views as “somewhat radical.”⁴²

The picture is not all bad on the legal representation front. Even if a majority of juveniles continued to appear in juvenile court unrepresented by counsel, a cadre of juvenile defenders came onto the scene in the late 1960s in most major cities, including New York, Boston, Philadelphia, Chicago, District of Columbia, Los Angeles, among many others. These juvenile defenders represented their clients as well as public defenders represented indigent adult defendants in criminal court. In these localities, the juvenile defenders fought hard for their juvenile clients, seeking to “win” cases whether or not their clients were factually guilty. But to say the picture was not all that bad risks placing the emphasis on the wrong accent. *Gault* changed practices in too few juvenile courts in the United States. In those fiefdoms that continued to look like the courts in the pre-*Gault* era, juvenile judges practiced in accordance with the proverbial judge’s insistence that “the Constitution doesn’t apply in my courtroom.”

Thus far, the reader might reasonably wonder, was *Gault* really an important decision after all? Unquestionably, the answer is “yes.” *Gault* had a profound effect on the legal profession and law schools, as Professor Feld’s career as a scholar and law teacher in juvenile justice attests, and it led to the teaching and study in law school of an entire new field—whether it was called juvenile justice or, more broadly, “children’s rights.” As much as anything, *Gault* marked the beginning of the modern Children’s Rights Movement.⁴³ It also created a cadre of children’s lawyers (an even larger number of whom represent children in neglect and abuse proceedings than in delinquency cases),

CRAWFORD, NAT’L JUVENILE JUSTICE CTR., FLORIDA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 33 (2006)).

⁴⁰ *Id.*

⁴¹ See Elyce Zenoff Ferster et al., *The Juvenile Justice System: In Search of the Role of Counsel*, 39 *FORDHAM L. REV.* 375, 384–85 (1971); Richard Kay & Daniel Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, 61 *GEO. L.J.* 1401, 1410–11 (1973); Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 *MD. L. REV.* 288, 326 n.204 (2003) (reporting “[r]ecently” in 2003 that “students taking my Children’s Rights course at the University of Houston Law Center informed me that several attorneys had told them that they saw themselves more as guardian ad litem than as an attorney representing a client charged with a criminal offense.”).

⁴² Marrus, *supra* note 41, at 360.

⁴³ See MARTIN GUGGENHEIM, *WHAT’S WRONG WITH CHILDREN’S RIGHTS* 7–8 (2005).

resulting in the United States having more children's lawyers than any country in the world.⁴⁴

But, limiting the subject to *Gault's* impact on juvenile justice, what has been asserted thus far is that it had little impact on the way juvenile courts functioned in a majority of the United States. In those jurisdictions that continued to function without lawyers, *Gault* manifestly did not matter very much. And in the rest, where juvenile defenders appeared every day, the "junior court" status of juvenile court meant the disadvantages of practice that the Supreme Court allowed to survive the *Gault* revolution reduced the value of lawyers. In particular, because few jurisdictions permit jury trials, and because the Court held that jury trials in juvenile court is not constitutionally required,⁴⁵ judges who sit as sole fact-finders in contested evidentiary hearings are permitted to learn prejudicial information about the accused that, though technically inadmissible at trial, cannot be forgotten by the judge.⁴⁶ As a result, these judges are highly prone to convict even when the facts are manifestly insufficient when a rigorous reasonable doubt standard is applied.⁴⁷ All of this, and more, led Barry Feld to conclude that juvenile court in the post-*Gault* world is "a scaled-down, second-class criminal court for young people."⁴⁸

It is important to recall that *Gault* explicitly meant only to impact the adjudicative part of juvenile justice. It left untouched the dispositional part. This meant that into the 1970s, '80s, and '90s, juveniles continued receiving sentences considerably longer than adults could have received for the same infractions. It also meant that the conditions in the facilities to which juveniles were sent did not have to live up to their rehabilitative ideals. But, the cadre of juvenile lawyers that law schools started producing meant there was a new force to challenge conditions of confinement for sentenced delinquents. Many lawsuits were brought in the 1970s and '80s that secured federal rulings condemning various practices, such as placing juveniles into solitary confinement, hogtying and physically abusing them, depriving them of food, imposing physical beatings, administering psychotropic drugs solely to control behavior, and other sadistic practices that should never be inflicted on adults, no less children.⁴⁹

⁴⁴ Whether that, by itself, has helped children very much is also worthy of its own article. See generally Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 NEV. L.J. 805 (2006).

⁴⁵ *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

⁴⁶ Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 571-73 (1998).

⁴⁷ *Id.* at 564-65.

⁴⁸ *Abolish the Juvenile Court*, *supra* note 3, at 68.

⁴⁹ See *Nelson v. Heyne*, 491 F.2d 352, 354 (7th Cir. 1974) (citing routine beatings administered by staff members); *Pena v. N.Y. State Div. for Youth*, 419 F. Supp. 203, 207 (S.D.N.Y. 1976) (citing solitary confinement, hogtying, and administration of drugs for punishment); *Morales v. Turman*, 364 F. Supp. 166, 170 (E.D. Tex. 1973) (finding that staff members routinely administered physical beatings, including blows to the face, and used tear gas); *Lollis v. N.Y. State Dep't of Soc. Servs.*, 322 F. Supp. 473, 475-76 (S.D.N.Y. 1970) (citing solitary confinement).

IV. THE 'GET-TOUGH' YEARS

As we have seen, *Gault* did not halt state practices of punishing children more severely than what is possible for adults. Indeed, the greatest change in juvenile justice in the last two decades of the twentieth century was the extent to which an ever-growing number of juveniles started receiving adult punishments.

This change was not the result of court decisions. Juveniles became eligible for adult sentences as a result of legislatures lowering the age of persons eligible for adult criminal court and sentences. As a result, juveniles who once had to be prosecuted in juvenile court were now either ineligible for juvenile court or, for the first time, eligible for adult criminal court. A mere eleven years after *Gault* was decided, the New York legislature amended its laws to make it possible to prosecute juveniles as young as thirteen in adult criminal court.⁵⁰ Over the next two decades, every state followed New York's lead, either by making it easier to transfer juveniles from juvenile to adult criminal court, or by initiating prosecutions in adult criminal court directly, thereby bypassing juvenile court entirely.⁵¹

We can debate whether and to what extent *Gault* acted as a catalyst for these changes. But the procedural revolution in the courthouse was dwarfed by the changes made at the legislative level throughout the United States. In the pre-*Gault* era, juvenile judges had virtually unlimited discretion to deal with young offenders as they saw fit. By the mid-1990s, juvenile judges were considerably less involved in deciding whether to prosecute juveniles as juveniles and whether to sentence them as juveniles. Those decisions were largely turned over to prosecutors who were vested with the final authority to choose the level of charge to bring against a young person, as well as the court in which the matter would be handled.⁵²

A number of factors contributed to the changing sentencing schemes for juveniles beginning in the 1980s. Disappointment with juvenile justice came from the left and the right. Calls for shifting focus from the offender to the offense, and for determinate instead of indeterminate sentences, were made by those who believed juvenile justice meted out too harsh sentences and those who believed it was too soft. Barry Feld was among the progressives who sup-

⁵⁰ Act of July 20, 1978, ch. 481, 1978 N.Y. Laws 11.

⁵¹ See Franklin E. Zimring & Stephen Rushin, *Did Changes in Juvenile Sanctions Reduce Juvenile Crime Rates? A Natural Experiment*, 11 OHIO ST. J. CRIM. L. 57, 60 (2013) (“[F]orty-seven states across the country passed various legislative measures in the 1990s designed to deter youth violence by enhancing criminal penalties on juvenile offenders. These new laws took three primary forms: (1) forty-five states expanded juvenile eligibility for adult criminal court proceedings, (2) thirty states expanded sentencing authority in juvenile cases, and (3) forty-seven states removed traditional confidentiality provisions by making previously sealed juvenile records more open to public scrutiny.”).

⁵² See Franklin E. Zimring, *The Power Politics of Juvenile Court Transfer: A Mildly Revisionist History of the 1990s*, 71 LA. L. REV. 1, 10 (2010) (arguing that this transfer of power has been a leading characteristic of juvenile justice reform over the past twenty-five years).

ported these changes.⁵³ One of the principal goals Professor Feld hoped to achieve by shifting attention away from the offender to the offense, and by limiting a judge's discretion when imposing punishment, was to reduce racial disparity in the severity of punishment. But Feld never anticipated how harsh the sentencing laws would become after the moral panic caused by "super predator" rhetoric.⁵⁴

Perhaps above all else, Professor Feld has been a trenchant critic of racism in our criminal and juvenile justice systems.⁵⁵ His proposed method of mitigating, if not eliminating, racial disparity in sentencing in the 1980s was reminiscent of the support for the federal sentencing guidelines in the same period.⁵⁶ That experiment didn't work out any better than it did for juveniles. We now live in an era of mass incarceration and of prisons disproportionately filled with people of color.⁵⁷

Recall that *Gault* did not constrain the legislative choice to sentence juveniles to indeterminate sentences unrelated to the severity of the crime that brought them before the court. Although *Gault's* lawyer chose not to raise the issue, a sound legal argument against imposing grossly higher punishments on children than may be imposed on adults can be framed on constitutional grounds. But what arguments can be made when states choose merely to subject children to the *same* punishment that states impose on adults? Whatever those arguments may be, won't they need to come close to arguing that states *must* maintain a juvenile justice system, at least in the sense that states must treat children differently than adults? This is an extremely important point. No one in the long history of juvenile justice through the end of the twentieth century took seriously the idea that states are obliged to treat children differently than adults. Rather, juvenile justice, the Progressives' invention, was widely understood to be grounded in sound social policy. A policy that wise legislators should want to support, not one they were required to have.

⁵³ See, e.g., Feld, *supra* note 4.

⁵⁴ John DiLulio is responsible for the term "super-predator" which meant to characterize remorseless adolescents involved in murder, rape, and drugs. John J. DiLulio Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23, <http://www.weeklystandard.com/the-coming-of-the-super-predators/article/8160> [<https://perma.cc/PY76-LY7Y>].

⁵⁵ See BAD KIDS, *supra* note 3.

⁵⁶ Under the Sentencing Reform Act of 1984, Congress established the United States Sentencing Commission and charged it with the task of designing a sentencing structure that would avoid "unwarranted sentencing disparities among defendants with similar records who ha[d] been found guilty of similar criminal conduct . . ." Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 991, 98 Stat. 1837, 2018 (1984) (codified as amended 28 U.S.C. § 991(b)(1)(B)); see Matthew C. Lamb, *A Return to Rehabilitation: Mandatory Minimum Sentencing in an Era of Mass Incarceration*, 41 NOTRE DAME J. LEGIS. 126, 126–27 (2014) ("Mandatory minimum sentencing promised an egalitarian form of sentencing by requiring judges to impose a mandatory sentence regardless of race or class.").

⁵⁷ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

With this understanding, the critical question many wondered in the early days after *Gault* was how much more would the Supreme Court interfere with the way states chose to run their juvenile courts before legislators would rebel and abandon the effort. This fear was articulated very clearly in Justice Blackmun's plurality opinion in *McKeiver v. Pennsylvania*, which ended with this sentiment: "If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it."⁵⁸

Thus, it appeared unlikely that courts would find anything unconstitutional about the country's universal trend to shrink the number of juveniles served by the juvenile justice system. Two substantial barriers seemed to prevent courts from striking down legislative judgments that juveniles ought to be punished the same as adults. Most significantly, the Court has long accorded great deference to states to define what sentences are appropriate for criminals. Based on principles of federalism and the separation of powers, federal courts are constrained from "intrud[ing] upon the administration of justice by the individual States."⁵⁹ Justice Kennedy's concurring opinion in *Harmelin v. Michigan* aptly summarizes the principle: "[r]eviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes."⁶⁰ In addition to this very substantial barrier, forbidding states from punishing children indistinguishably from adults comes very close to requiring states to maintain a juvenile justice system, something that not very long ago seemed preposterous.

By the end of the twentieth century, juvenile justice was in shambles. As a result of legislative changes in every state, prosecutors now held the power to decide whom to punish as adults. By 2005, that meant that as many as 250,000 juveniles were being tried, sentenced, and incarcerated as adults throughout the United States each year.⁶¹ And, of course, giving this amount of discretion to

⁵⁸ *McKeiver v. Pennsylvania*, 403 U.S. 528, 551 (1971); see also *In re Winship*, 397 U.S. 358, 376 (1970) (Burger, C.J., dissenting) ("My hope is that today's decision will not spell the end of a generously conceived program of compassionate treatment intended to mitigate the rigors and trauma of exposing youthful offenders to a traditional criminal court; each step we take turns the clock back to the pre-juvenile-court era. I cannot regard it as a manifestation of progress to transform juvenile courts into criminal courts, which is what we are well on the way to accomplishing. We can only hope the legislative response will not reflect our own by having these courts abolished.").

⁵⁹ See *Medina v. California*, 505 U.S. 437, 445 (1992) (quoting *Patterson v. New York*, 432 U.S. 197, 201-02 (1977)); see also *Ex parte United States*, 242 U.S. 27, 42 (1916) ("[T]he authority to define and fix the punishment for crime is legislative . . . [and] the right to relieve from the punishment fixed by law and ascertained according to the methods by it provided, belongs to the executive department.").

⁶⁰ *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Solem v. Helm*, 463 U.S. 277, 290 (1983)).

⁶¹ NEELUM ARYA, CAMPAIGN FOR YOUTH JUST., STATE TRENDS—LEGISLATIVE VICTORIES FROM 2005 TO 2010: REMOVING YOUTH FROM THE ADULT CRIMINAL JUSTICE SYSTEM 3

local prosecutors virtually guaranteed that children from poor families of color would be the most likely to get the book thrown at them.⁶²

V. TWENTY-FIRST CENTURY BREAKTHROUGHS

In *My Life in Crime*, Professor Feld divides juvenile justice into three eras – the Due Process era, the Get Tough era, and “the contemporary reaffirmation that Kids are Different.”⁶³ I have thus far briefly discussed the first two. I trust the reader will agree that recounting them doesn’t offer much enthusiasm for using law to improve the conditions of disempowered people. The good news is that the contemporary era contains lots of very good news for those who are disappointed with most of what happened to juvenile justice in the United States over the past fifty years.

The current era began with the Supreme Court’s 2005 decision, *Roper v. Simmons*, which forbids executing someone for a crime committed before the person was eighteen years old.⁶⁴ In 2010, the Court extended this ruling in *Graham v. Florida*, by forbidding states from sentencing all juveniles to life without parole for non-homicide offenses.⁶⁵ Rounding out this trilogy, the Court’s decision in the 2012 case *Miller v. Alabama* prohibited mandatory life without parole sentences of all persons who commit any crime while under the age of eighteen.⁶⁶

These three great cases, which combined rank as perhaps the most important juvenile justice cases ever decided, stand for a constitutional principle few knew existed only a few short years ago: juveniles may not be punished as if they are adults, even when they’ve committed the most heinous of crimes. Sandwiched between them, in 2011 the court also decided *J.D.B. v. North Carolina*, which also broke ground once thought impregnable, ruling that the Constitution requires special rules applicable to children when they are interrogated by police.⁶⁷ These four cases lay the groundwork for the next generation of juvenile advocates to insist that juveniles be given discounts and special protections because they are different from adults in ways that legislatures and courts have a duty to recognize.

Barry Feld spent much of his career making such arguments, as he has shown in *My Life in Crime*. If I went too far in my earlier discussion suggesting

(2011), http://www.campaignforyouthjustice.org/documents/CFYJ_State_Trends_Report.pdf [<https://perma.cc/BN68-4U9L>].

⁶² See, e.g., Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81, 100–04, 110–11 (2000); Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the “Crack Down” on Youth Crime*, 84 MINN. L. REV. 327, 329–31, 358 (1999).

⁶³ Feld, *supra* note 1, at 302.

⁶⁴ *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

⁶⁵ *Graham v. Florida*, 560 U.S. 48, 82 (2010).

⁶⁶ *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012).

⁶⁷ *J.D.B. v. North Carolina*, 564 U.S. 261, 281 (2011).

how miserable the first two eras of juvenile justice have been in the years following *Gault*, I meant especially to contrast them with the current era, which is full of brightness and hope. Virtually from the beginning of his career, Feld has argued that children deserve a discount for their youth when it comes to punishing them for misbehavior, and they require special procedures designed to ensure that their rights are respected and protected against overreaching by state officials.⁶⁸ In his words, juveniles deserve “substantive justice,” which “requires a rationale to sentence younger offenders differently, and more leniently, than older defendants, a formal recognition of youthfulness as a mitigating factor in sentencing.”⁶⁹ That is precisely what *Miller* now requires as a constitutional principle.⁷⁰ And, Feld has long advocated for “procedural justice” which “requires providing youths with full procedural parity with adult defendants and additional safeguards to account for the disadvantages of youth in the justice system.”⁷¹ This is quite close to what *J.D.B.* says,⁷² and we can look forward to the Court building on that case through the work of Professor Feld. How wonderful that, as he retires after a brilliant career, he can look back on it as filled with true meaning because, at last, the Supreme Court heard and agreed with him.

VI. THE REAL LEGACY OF THE WARREN COURT’S CRIMINAL AND JUVENILE JUSTICE REVOLUTION

Law professors with expertise in juvenile justice are at risk of suffering from two closely related phenomena. First, they may pay too much attention to what the Supreme Court says, at the expense of carefully monitoring how the system operates on the lives of young people. Second, they may pay far closer attention to the workings of juvenile court than they do to the workings of criminal court. That can lead to the conclusion that juvenile court is so flawed that it needs to be abandoned. The call for abandonment is based on a grass-is-greener mentality. Knowing just how bad things are in my world, they surely must be better elsewhere.

Barry Feld never made the first mistake. Throughout his long career, he has been a realist who looked carefully at the wider picture of juvenile justice in which legislatures, the police, and prosecutors play an outsized role in how juvenile justice actually works. Not only did he pay careful attention to these non-court actors, he advised legislators and proposed legislation intended to improve juvenile justice. But Feld very likely fell prone to the second error. He got to know juvenile court exceptionally well. But he did not study nearly as carefully the goings-on in criminal court. The more he saw and knew about ju-

⁶⁸ See *Abolish the Juvenile Court*, *supra* note 3.

⁶⁹ *Id.* at 97 (emphasis omitted).

⁷⁰ *Miller*, 132 S. Ct. at 2475.

⁷¹ *Abolish the Juvenile Court*, *supra* note 3, at 97.

⁷² *J.D.B.*, 564 U.S. at 281.

venile court, the less he liked the system to which he devoted his life's work. But he was naïve in imagining that things were sufficiently rosier in criminal court that it made good sense to send all juveniles there. He simply assumed that professionals responsible for the operation of criminal court would not have permitted criminal court to descend to the depths he saw from his study of juvenile court.

Twenty years ago, the late Bill Stuntz brilliantly brought to life just how limited the powers of the Supreme Court really are when it comes to insisting upon a fundamentally fair process for criminal justice.⁷³ In *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, Stuntz made plain that most students of the law falsely believe that the Supreme Court gets to set the rules of procedure.⁷⁴ “Most talk about the law of criminal procedure,” he wrote, “treats that law as a self-contained universe.”⁷⁵ The reasoning for most people is straightforward:

The Supreme Court says that suspects and defendants have a right to be free from certain types of police or prosecutorial behavior. Police and prosecutors, for the most part, then do as they're told. When they don't, and when the misconduct is tied to criminal convictions, the courts reverse the convictions, thereby sending a message to misbehaving officials.⁷⁶

But Stuntz responded:

The picture is, of course, wrong. Criminal procedure's rules and remedies are embedded in a larger system, a system that can adjust to those rules in ways other than obeying them. And the rules can in turn respond to the system in a variety of ways, not all of them pleasant.⁷⁷

Thus it was that the criminal process revolution wrought by the Warren Court ended up leading to the opposite of what almost everyone expected, undoubtedly including the Justices who participated in the revolution. Instead of fairer trials resulting from expanded confrontational rights,⁷⁸ opportunities to challenge dubious confessions⁷⁹ and eyewitness identifications,⁸⁰ not to mention the all-important right to a court-assigned lawyer⁸¹ and a jury trial,⁸² we ended up with practically no trials at all.⁸³ Instead of more acquittals, we ended up with virtu-

⁷³ See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

⁷⁴ See *id.* at 3–4.

⁷⁵ *Id.* at 3.

⁷⁶ *Id.*

⁷⁷ *Id.* at 3–4.

⁷⁸ *Pointer v. Texas*, 380 U.S. 400, 407–08 (1965).

⁷⁹ *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *Malloy v. Hogan*, 378 U.S. 1, 6–7 (1964).

⁸⁰ *Stovall v. Denno*, 388 U.S. 293, 297 (1967).

⁸¹ *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963).

⁸² *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

⁸³ Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. TIMES (Aug. 7, 2016), http://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html?_r=0 [<https://perma.cc/TAJ9-DZUK>] (noting that New

ally no acquittals. Instead of fewer people losing their liberty, we ended up with mass incarceration.⁸⁴

How could this have happened? Very easily, it turned out. As Stuntz explained it:

As courts have raised the cost of criminal investigation and prosecution, legislatures have sought out devices to reduce those costs. Severe limits on defense funding are the most obvious example, but not the only one. Expanded criminal liability makes it easier for the government to induce guilty pleas, as do high mandatory sentences that serve as useful threats against recalcitrant defendants. And guilty pleas avoid most of the potentially costly requirements that criminal procedure imposes. These strategies would no doubt be politically attractive anyway, but the law of criminal procedure makes them more so. Predictably, underfunding, overcriminalization, and oversentencing have increased as criminal procedure has expanded.⁸⁵

The legislative branch was responsible for most of these changes. By substantially increasing the budgets of law enforcement, adding new crimes to the books, and increasing the penalties for felony convictions, legislatures ended up with considerably more power than the Supreme Court in reshaping criminal justice and, even more remarkably, constitutional criminal procedure (something many thought belonged to the exclusive province of the Supreme Court). Add to that the maximum terms of imprisonment defendants risk when daring to challenge the charges in court and the consequence of ever increasing maximum sentences assigned for convictions, and the system was brilliantly re-framed from one that provides defendants with an opportunity to test the government's case, to one in which all that is done is negotiating the length of punishment that courts will impose.⁸⁶

The executive branch also contributed more than its share to rendering iconic Supreme Court decisions virtually irrelevant. Local police decisions to employ a broken windows campaign meant that an unprecedented number of poor people were stopped and frisked by the police, creating the highest level

York Southern District Federal District Court Judge Jesse Furman has presided over one criminal trial in his more than four years on the bench). Trials are a rarity in federal and most state criminal courts today. *See, e.g.*, SPANGENBERG GROUP, STATUS OF INDIGENT DEFENSE IN NEW YORK: A STUDY FOR CHIEF JUDGE KAYE'S COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES 142 (2006) (finding more than 319,000 cases were filed in New York City's Criminal Court in 2004, and there were a total of 727 trials altogether (280 by jury and 447 by bench)).

⁸⁴ *See* Laura Cohen, *When the Law is Guilty: Confronting the Mass Incarceration Crisis in the United States*, 66 RUTGERS L. REV. 841, 842 (2014) ("At the end of 2012, 2.2 million people were doing time in adult prisons or jails throughout the United States.") (citing HUMAN RIGHTS WATCH, NATION BEHIND BARS: A HUMAN RIGHTS SOLUTION 5 (2014)).

⁸⁵ Stuntz, *supra* note 73, at 4.

⁸⁶ 97 percent of federal criminal defendants waive all trial rights and plead guilty. *United States v. Booker*, 543 U.S. 220, 289 (2005) (Stevens, J., dissenting in part); *see also* Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2008 (1992) (stating that 90 percent of cases are resolved by guilty pleas).

of court filings in American history.⁸⁷ Along with an astonishing rise in state court felony filings (more than doubling between 1978 and 1990, for example),⁸⁸ came an even larger growth ratio of cases handled by assigned defense lawyers, with many public defenders expected to represent between two and four hundred clients at a time.⁸⁹ As a consequence, innocent defendants ended up worse off than before the criminal procedure revolution.

This is the sad fate of the Warren Court criminal procedure victories. No doubt this fate was aided by the rightward turn of the Burger and Rehnquist Courts, particularly in their refusal to take seriously the responsibility of courts to ensure that a defendant is able to secure effective legal representation.⁹⁰ The bottom line is inarguable: more than forty-five years after the Warren Court revolution, it is impossible to brag about the fairness of America's criminal justice system as it impacts the fate of people unable to purchase private legal representation.⁹¹ Stuntz's analysis turns popular belief on its head: "Ever since the 1960s," he wrote, "the right has argued that criminal procedure frees too many of the guilty. The better criticism may be that it helps to imprison too many of the innocent."⁹²

Going further, Stuntz explained that much of the Warren Court's impetus for constitutionalizing criminal procedure and imposing meaningful restraint on local actors in the criminal justice system was to mitigate or eliminate racial discrimination.⁹³ The Warren Court used the incorporation clause of the Four-

⁸⁷ See generally K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271 (2009); George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC, Mar. 1982, at 29, http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/?single_page=true [<https://perma.cc/S83E-BQBK>].

⁸⁸ Stuntz, *supra* note 73, at 9.

⁸⁹ See David A. Simon, *Equal Before the Law: Toward a Restoration of Gideon's Promise*, 43 HARV. CIV. RTS.-CIV. LIBERTIES. L. REV. 581, 590 (2008) (stating that one public defender in Minnesota resigned from his job after being obliged in the previous year to handle a caseload of 135 felony cases, 53 gross misdemeanors, 343 misdemeanors, 136 probation violations, and 60 miscellaneous cases); see also Martin Guggenheim, *The People's Right to a Well-Funded Indigent Defender System*, 36 N.Y.U. REV. L. & SOC. CHANGE 395, 404 (2012) (describing one county in New York in the early 2000s in which each public defender had an average caseload of 1,000 misdemeanor and 175 felony cases per attorney per year).

⁹⁰ See *Strickland v. Washington*, 466 U.S. 668, 700-01 (1984). As Gary Goodpaster wrote, *Strickland* "appears primarily designed to help reviewing courts deal efficiently with these claims rather than seriously address the potential injustice problems caused by incompetent trial counsel." Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 67 (1986).

⁹¹ A report by the American Bar Association in 2004 concluded that "thousands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation." AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE*, at iv (2004).

⁹² Stuntz, *supra* note 73, at 5.

⁹³ *Id.*

teenth Amendment to constrain local actors from unfairly depriving poor black men of their liberty.⁹⁴ Here, again, the Court overestimated its capacity and underestimated the ingenuity of other actors in the criminal justice system. In Stuntz's words, "defendants' rights address only one form of discrimination, and it is probably the least important form that the system engages in."⁹⁵ The enormous discretion accorded the legislature to set the limits of sentences, to authorize mandatory minimum sentences, and to add new crimes to the books, combined with the even broader discretion accorded to the police and prosecutors to determine who to arrest, what to charge, and what sentence to seek, overwhelm most of what the Court was able to accomplish.⁹⁶ As Stuntz put it, "[i]f one is looking for race discrimination in the administration of criminal justice, these are the places to find it. And the law of criminal procedure has almost nothing to say about them."⁹⁷

What's important about this history as it applies to adults is how well it tracks the history of juvenile justice, too. Franklin Zimring has long insisted that students of juvenile justice in the United States in the last three decades of the twentieth century are looking in the wrong place if they study what the Supreme Court has done.⁹⁸ Like Stuntz, Zimring insists that the real story of juvenile justice practice over the past fifty years was written by legislators, the police, and the prosecutors. Indeed, Zimring explains that, of all the professional actors who lost authority in the post-*Gault* world, judges stand out the most.⁹⁹ Once legislators lowered the age of criminal responsibility, changed the rules by which persons under eighteen could be prosecuted as adults, and substantially increased the penalties once they were convicted, the result was sure to become an unprecedented high rate of incarceration for young people. And once schools enforced zero tolerance policies, shunting young people to criminal court for acts that a generation earlier were handled outside of courts, more young people than ever before in American history were arrested and prosecuted as criminals.¹⁰⁰

Some may criticize *Gault* for theoretically making it too difficult to adjudicate guilty delinquents because they are entitled to crafty defense lawyers to help them win on technicalities, but the post-*Gault* world bears few of these

⁹⁴ See Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 67 (2010).

⁹⁵ Stuntz, *supra* note 73, at 50.

⁹⁶ See *id.* at 50–51.

⁹⁷ *Id.* at 51.

⁹⁸ See Franklin E. Zimring, *Levels of Government, Branches of Government, and the Reform of Juvenile Justice*, 46 TEX. TECH L. REV. 1, 2 (2013) ("[S]tate and local government has always been, and will always remain, the main arena of juvenile justice policy in the United States.").

⁹⁹ See Zimring, *supra* note 52, at 3–4.

¹⁰⁰ See CHILDREN'S DEF. FUND, CRADLE TO PRISON PIPELINE FACT SHEET (2009), <http://www.childrensdefense.org/library/data/cradle-to-prison-pipeline-overview-fact-sheet-2009.pdf> [https://perma.cc/WB49-3BG4].

hallmarks. The scheme was rigged by actors that proved to be more important than the Court, creating an arrangement in which very few trials would ever take place; an ever-growing number of young people would be charged and prosecuted in adult criminal court (in which few trials would ever take place); and an all-time high number of young people would serve adult-like sentences in adult prisons, on a scale unimaginable a generation earlier.¹⁰¹

There always will be limits to what we can expect from courts when it comes to protecting the rights of the accused, regardless of their age. That said, Professor Stuntz identified an important role courts might begin undertaking that would provide at least some relief. To rein in state power and vindicate the rights of poor people accused of crime, Stuntz argued that courts must become involved substantively with the law of sentencing, and find a way to prevent over-sentencing and the needless deprivation of liberty.¹⁰² This is precisely what has come to pass in juvenile justice through the Supreme Court's trilogy decisions in *Roper*, *Graham*, and particularly *Miller*. The Court's extension of regulating the sentencing of juveniles, even outside of the death penalty, opens hope for the future; a future both Professor Feld and I hope will be brighter than the first fifty years after *Gault* has been. Nonetheless, even if the Supreme Court were to be filled with nine Justice Sotomayors, the plight of poor black adolescents would nonetheless still remain in the hands of legislatures, the police, and prosecutors (along with school administrators, foster care officials, and other low level bureaucrats) to a much greater degree than anything the Court has to say about the matter.

VII. BARRY FELD 2.0

Perhaps the most remarkable part of what Professor Feld has written in *My Life in Crime* might be missed by someone who hasn't been around for as long as he and I have. During this long journey of trying to reform juvenile justice and to treat young offenders well, there were two camps of juvenile advocates. The main camp, of which I was a part, pressed to maintain a separate juvenile court. We found it challenging at times to insist that juvenile court survive, as even we disliked so much about it.¹⁰³ A small number of stout advocates, led by Professor Feld, disagreed. They (he) argued that the best thing we could do is blow up juvenile court and leave it in the ashes of history as a failed Progressive experiment.

Here's vintage Barry Feld writing in 1997 as the strong defender of juvenile rights he has always been. Because juvenile court, he wrote, "provides

¹⁰¹ See Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 108 (2010) (finding that "an estimated 200,000 youth are prosecuted, sentenced, or incarcerated as adults across the United States").

¹⁰² Stuntz, *supra* note 73, at 66.

¹⁰³ See, e.g., Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 174 n.66 (1993).

young offenders with neither therapy nor justice,” and because juveniles deserve all of the procedural protections afforded adults by the criminal justice system, “[n]o compelling reasons exist to maintain separate from an adult criminal court, a punitive juvenile court whose only remaining distinctions are its persisting procedural deficiencies.”¹⁰⁴ Feld had trouble identifying sound arguments for continuing the Progressive experiment. To those who objected that criminal courts are well known to have high caseloads, ineffective lawyers, and assembly-line justice,¹⁰⁵ Feld’s response was “these shortcomings equally characterize juvenile courts as well.”¹⁰⁶ Feld’s conclusion was that, by the 1980s, “few juvenile court proponents even attempt any longer to defend the institution on its own merits, but only to justify it by comparison with criminal courts, which they contend are worse.”¹⁰⁷

Feld has long put his finger on the heart of the juvenile justice puzzle. His call for the abolition of a separate juvenile court stemmed from several separate considerations. A staunch advocate for equal procedural justice for children, Feld straightforwardly believed that the best system designed to protect the rights of adults should be employed for children, too. This diminishes the risk that children will be parties to a second-class justice system; something observers of juvenile court have long claimed to be the case. Feld found that juvenile “judges impose haphazard, unequal, and discriminatory punishment on similarly situated offenders without any effective procedural or appellate checks.”¹⁰⁸ And, he insisted that “[a]s long as the mythology prevails that juvenile court intervention constitutes only benign coercion and that . . . children should not expect more, youths will continue to receive the ‘worst of both worlds.’”¹⁰⁹ In the 1990s, Feld characterized juvenile court as *conception*: “Combining social welfare and penal social control[s],” Feld explained, “only ensures that the court performs both functions badly.”¹¹⁰ An unsparing, clear eyed observer of juvenile justice in the United States, Professor Feld wrote in 1999 that “[m]ost people tolerate an intolerable juvenile justice [system] because they believe that it will affect only other people’s children—children of other colors, classes, and cultures—and not their own.”¹¹¹

For more than two decades, Feld called for the abolition of juvenile court, believing that young people would be treated more fairly in a court that plays by the same rules used for adult defendants while also maintaining a commit-

¹⁰⁴ *Abolish the Juvenile Court*, *supra* note 3, at 68–69.

¹⁰⁵ *See, e.g.*, Rosenberg, *supra* note 103, at 173; H. Ted Rubin, *Retain the Juvenile Court? Legislative Developments, Reform Directions, and the Call for Abolition*, 25 CRIME & DELINQ. 281, 296 (1979).

¹⁰⁶ *Abolish the Juvenile Court*, *supra* note 3, at 96.

¹⁰⁷ *Id.*

¹⁰⁸ BAD KIDS, *supra* note 3, at 293.

¹⁰⁹ *Id.* at 294 (citation omitted).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 330.

ment to recognize that children are less blameworthy than adults, thus ensuring that they would be treated like kids when it came to sentencing. Now he no longer is so sure. He now appreciates that the politics of crime and race in the United States could not produce the type of social welfare or justice systems that are required to protect children from gross injustices.¹¹²

Channeling Stuntz, I want to take this a step further. Instead of the shibboleth that juvenile court is inferior to the real criminal court, invariably cutting corners and denying the accused procedural justice, it turns out that in many cities in the United States, it's the last remaining criminal trial court that actually conducts trials. What other court remains in the United States that doesn't tax an accused by adding ten to sixty years in prison for insisting on taking a case to trial? There are many clinics taught in law schools today that chose juvenile court as the venue for teaching students trial skills because trials actually occur there. There is no denying that juvenile court has built-in features that render it less fair than an ideal system, such as the absence of jury trials and the common practice of judges presiding over trials in which they have learned highly prejudicial, technically inadmissible facts that virtually eliminate the opportunity for the accused to be tried before a neutral trier of fact. But at least they have trials.

So, at the end of his career, Feld has capitulated in a remarkable way. What he writes in 2016 is opposite from his views twenty years earlier. He has rejoined the corps of juvenile advocates who always feared the excesses of criminal court. Feld now believes "simply deflecting youths from the criminal justice system avoids its more destructive consequences and shields them from life-altering punishment and collateral consequences."¹¹³ I think he could go further and concede, "maybe, just maybe, it's not as unfair by comparison as I once thought." But, either way, welcome back, Barry.

¹¹² Feld, *supra* note 1, at 320.

¹¹³ Feld, *supra* note 1, at 329.

