

# MY LIFE IN CRIME: AN INTELLECTUAL HISTORY OF THE JUVENILE COURT

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## INTRODUCTION

My professional career has spanned three of the four eras of juvenile justice in the United States: the Due Process Revolution of the 1960s and 1970s; the Get Tough Era of the 1980s and 1990s; and the more recent academic and judicial recognition that Kids Are Different. I focused on juvenile justice administration when few legal scholars or criminologists appreciated that the intersection of youth policy and crime policy raised many interesting and challenging questions. I have had opportunities to work with professional organizations and law reform groups to promote policy reforms and learned from those who labor in the trenches about the practical problems they confront. Those collaborations have informed my research agenda and I have learned from them how to use academic research to influence policy and practice.

A young scholar does not know the course of his or her career, where their research will lead, what its impact will be, or what intellectual themes will emerge. From the vantage point of a career spanning more than four decades and in retrospect, I can identify three themes in my scholarship: culpability, competence, and equality. For the juvenile court, culpability and competence implicate issues of ends and means, or substance and procedure.<sup>1</sup> Substantive law defines

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<sup>1</sup> BARRY C. FELD, BAD KIDS 118–19 (1999) [hereinafter FELD, BAD KIDS], cited in *In re Jerrell C.J.*, 699 N.W.2d 110, 134 n.44 (Wis. 2005) (Abrahamson, C.J., concurring); Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 142 (1984) [hereinafter Feld, *Criminalizing Juvenile Justice*], cited in *Commonwealth v. Brown*, 26 A.3d 485, 496 n.7 (Pa. Super. Ct. 2011), *In re Welfare of D.S.S.*, 506 N.W.2d 650,

rights and duties or legal goals. Procedural law defines the process through which to achieve those entitlements or objectives. In the context of juvenile courts, the ends and means—substance and procedure—represent the goals of judicial intervention and methods to achieve them. Culpability focuses on youths' mental state at the time of the crime, criminal responsibility, and penal consequences. To what extent is a youth responsible for the consequences of his actions? To what degree is he or she at fault and their conduct blameworthy? Substantive goals raise issues of diversion, treatment, and punishment, reduced culpability or diminished responsibility, and appropriate interventions or deserved consequences. Substantive questions arise when juvenile courts detain and sentence delinquents, transfer them to criminal court, and sentence them as adults. Why and how do we respond to youths' criminal misconduct as we do? Recent advances in developmental psychology and neuroscience inform policies about appropriate interventions, waiver to criminal court, and sentencing as adults.

Competence involves the ability to do something successfully or efficiently. In the context of juvenile courts, it focuses on youths' capacity to employ rights, ability to understand and participate in the legal process, and decision-making capacities. Procedural issues involve youths' competence to stand trial, ability to waive or invoke *Miranda* rights, capacity to exercise their right to counsel, and right to obtain a jury trial. Can delinquents measure up to adult legal performance standards or do they require additional procedural safeguards to offset their developmental limitations? In light of juvenile courts' procedural deficiencies and youths' developmental limitations, how reliable are delinquency convictions?

Questions of equality address issues of race and gender in juvenile justice administration. Black youths have always experienced a different justice system than white youths.<sup>2</sup> During the second-half of the twentieth century the issue of race has had two distinct and contradictory influences on juvenile and criminal justice policy. During the 1950s and 1960s, the Supreme Court's Due Process Revolution imposed national legal and equality norms on the recalcitrant Southern states, which still adhered to a segregated Jim Crow legal regime.<sup>3</sup> Beginning in the 1970s, conservative Republican politicians pursued a Southern strategy to appeal to white voters' racial animus: they used issues such as crime and welfare

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653 (Minn. Ct. App. 1993); see also ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 69 (2008).

<sup>2</sup> See generally FELD, *BAD KIDS*, *supra* note 1; GEOFF K. WARD, *THE BLACK CHILD-SAVERS* (2012).

<sup>3</sup> MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 2 (2d ed. 1994); LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 490 (2000); Barry C. Feld, *Race and the Jurisprudence of Juvenile Justice: A Tale in Two Parts, 1950–2000*, in *OUR CHILDREN, THEIR CHILDREN* 122, 129 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005) [hereinafter Feld, *Race and the Juvenile Jurisprudence*]; Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash,"* 87 *MINN. L. REV.* 1447, 1463–73 (2003) [hereinafter Feld, *Race, Politics, and Juvenile Justice*], cited in *United States v. Pena*, 268 F. Supp. 2d 65, 66 n.1 (D. Mass. 2003); Barry C. Feld, *The Politics of Race and Juvenile Justice: The "Due Process Revolution" and the Conservative Reaction*, 20 *JUST. Q.* 765, 765 (2003) [hereinafter Feld, *The Politics of Race*].

as code-words for race to gain electoral advantage, and advocated get tough policies, which ultimately affected juvenile and criminal justice policies throughout the nation.<sup>4</sup> The racialization of juvenile justice policy has led to a disproportionate impact of punitive policies on minority youths, especially young black males.

Historically, juvenile courts' responses to girls have differed from their responses to boys.<sup>5</sup> Industrialization brought more young women to cities and exposed them to the hazards of prostitution and sexual exploitation.<sup>6</sup> During the Progressive era, Victorian sensibilities and concerns about female sexuality encouraged regulation of girls for waywardness, incorrigibility, and sexual precocity.<sup>7</sup> More recently, policy makers have recast girls' acting-out behavior as violent conduct.<sup>8</sup> Despite changes in practices over time—the different expectations and social construction of gender in different periods—the juvenile justice system's responses to girls have differed from those to boys.<sup>9</sup>

As an institution, the juvenile court is situated at the nexus of two domains: youth policy and crime policy. How should society respond when the kid is a criminal and the criminal is a kid? Over the past century, two contending visions of youth have influenced policies toward young offenders. On the one hand, policy makers may characterize youths as children—immature, innocent, vulnerable and dependent. On the other hand, they may characterize them as quasi-adults—mature and responsible. Despite the seeming contradiction between these polar characterizations, I argue that judges and legislators selectively choose between the two constructs—immature versus responsible—to maximize social control of young people. States treat juveniles like adults when formal equality results in practical inequality and use special juvenile court procedures when they provide an advantage to the state. These competing conceptions—immaturity and incompetence versus maturity and competence—affect legal responses to their misdeeds and strategies of social control.<sup>10</sup>

Strategies of crime control mark the second idea shaping juvenile justice policy. When people violate the criminal law, legal scholars and criminologists typically differentiate between retributivist and utilitarian, or consequentialist,

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<sup>4</sup> Feld, *Race, Politics, and Juvenile Justice*, *supra* note 3, at 1451.

<sup>5</sup> See generally STEVEN L. SCHLOSSMAN, *LOVE AND THE AMERICAN DELINQUENT* (1977); JOHN R. SUTTON, *STUBBORN CHILDREN* (1988); Barry C. Feld, *Girls in the Juvenile Justice System*, in *THE DELINQUENT GIRL* 225 (Margaret A. Zahn ed., 2009) [hereinafter Feld, *Girls in the Juvenile Justice System*]; Barry C. Feld, *Violent Girls or Relabeled Status Offenders? An Alternative Interpretation of the Data*, 55 *CRIME & DELINQ.* 241 (2009) [hereinafter Feld, *Violent Girls*].

<sup>6</sup> DAVID B. WOLCOTT, *COPS AND KIDS* 29, 40–41 (2005).

<sup>7</sup> Feld, *Girls in the Juvenile Justice System*, *supra* note 5.

<sup>8</sup> *Id.* at 227–36; Feld, *Violent Girls*, *supra* note 5, at 242.

<sup>9</sup> See generally Feld, *Girls in the Juvenile Justice System*, *supra* note 5; Feld, *Violent Girls*, *supra* note 5.

<sup>10</sup> See generally FELD, *BAD KIDS*, *supra* note 1; SCOTT & STEINBERG, *supra* note 1; Feld, *Criminalizing Juvenile Justice*, *supra* note 1.

sanctions—deterrence, incapacitation, or rehabilitation.<sup>11</sup> Theories of punishment reflect underlying assumptions about whether peoples' behavior is deliberately chosen or the product of antecedent forces—free will versus determinism. Juvenile courts' historic claims to rehabilitate young offenders elicit the traditional dichotomy between treatment and punishment. Treatment-oriented interventions focus on offenders—what antecedent forces caused them to act as they did and what interventions can ameliorate those conditions, reform them, and improve their life chances. Punishment-oriented strategies focus on the offense committed and impose sanctions to denounce the act, alter the offender's calculus, or reduce its likelihood of reoccurrence. The juvenile court's founders recognized that children were not autonomous beings—they were more dependent on their families and communities than adults, they were less able to escape the criminogenic environments in which they lived, their behavior was more determined than chosen, and they should be treated rather than punished.

Although Progressive reformers proffered rehabilitation as the primary justification for a separate juvenile court, diversion from the criminal process provided a second rationale at its inception and the court's diversionary function still prevails. Regardless of juvenile courts' ability to provide rehabilitative programs that improve children's lives, simply deflecting youths from the criminal justice system avoids its more destructive consequences. Diversion constitutes a passive alternative to criminal courts that does less harm.<sup>12</sup> Although juvenile courts then and now seldom achieve their rehabilitative goals, they still shield youths from life-altering criminal punishment and collateral consequences. The competing conceptions of childhood—immaturity and incompetence versus maturity and competence—and differing strategies of crime control—treatment or diversion versus punishment—affect the substantive goals and procedural means that juvenile courts use to regulate offending youths, and have varied throughout the history of the juvenile court, and among and within states.

This article describes the trajectory of my career over the three eras of juvenile justice—the Due Process era, the Get Tough Era, and the contemporary reaffirmation that Kids Are Different. Part I examines changes associated with the Supreme Court's requirement that juvenile courts provide delinquents some procedural safeguards. Part II examines the Get Tough Era and states' emphases on youths' adult-like culpability and adoption of punitive policies. Part III reviews the Supreme Court's recent jurisprudence of youth, reaffirmation that children are different, and limits on harsh punishment for youths. It concludes with a reflection on the limits of juvenile justice reform to improve the life chances of young people.

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<sup>11</sup> WAYNE R. LAFAYE, CRIMINAL LAW 3–4, 26–36 (5th ed. 2010). See generally MICHAEL TONRY, THINKING ABOUT CRIME 63–84 (2004).

<sup>12</sup> Franklin E. Zimring, *The Common Thread: Diversion in Juvenile Justice*, 88 CAL. L. REV. 2477, 2483–84 (2000) [hereinafter Zimring, *The Common Thread*]; Franklin E. Zimring, *The Common Thread: Diversion in the Jurisprudence of Juvenile Courts*, in A CENTURY OF JUVENILE JUSTICE 142, 144–45 (Margaret K. Rosenheim et al. eds., 2002).

## I. THE DUE PROCESS REVOLUTION AND RETHINKING REHABILITATION

On May 15, 1967, I was a first-year law student studying for final exams when the Supreme Court decided *In re Gault*<sup>13</sup> and unbeknownst to me, changed my life. At that time, law schools did not offer courses on juvenile justice because prior to *Gault* there was no law of juvenile justice. Generic state statutes creating juvenile courts provided vague substantive goals—treatment and rehabilitation—and minimal procedural limitations on judges’ discretion.<sup>14</sup> Psychology, criminology, and sociology departments focused more on delinquency—why do adolescents commit crimes—than on justice administration—how states process young offenders. Schools of social work focused primarily on intervention and treatment of youths rather than juvenile justice administration.

During the summer after my second year of law school in 1968, I worked for the General Counsel of the Office of Economic Opportunity (“OEO”) in Washington, D.C. Along with the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, OEO reflected the country’s commitment to social, racial, and economic justice—a brief window when America waged a War on Poverty rather than its subsequent war on poor people.<sup>15</sup> During the mid-1960s, race riots rocked American cities as Blacks reacted violently to decades of segregation, deprivation, and alienation.<sup>16</sup> “In 1964, a white police officer in Harlem shot and killed a fifteen-year-old black youth and set off the largest race riot since World War II.”<sup>17</sup> The following summer, five days after President Johnson signed the 1965 Voting Rights Act, the Watts district of Los Angeles exploded in riot and television viewers watched Blacks battle police and loot stores.<sup>18</sup> Thirty-eight riots in 1966 and 164 riots in 1967 raised fears of a national

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<sup>13</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>14</sup> Roscoe Pound, *Foreword to the First Edition of PAULINE V. YOUNG, SOCIAL TREATMENT IN PROBATION AND DELINQUENCY*, at xv, xiv (2d ed. 1952) (arguing juvenile court judges should be exceptionally well-qualified—even while acknowledging they seldom were—because court procedures were so minimal and judicial discretion was so great. “The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts and courts of domestic relations.”); Paul W. Tappan, *Treatment Without Trial*, 24 SOC. FORCES 306, 306, 309 (1946) (criticizing juvenile courts as hybrid judicial case-work agencies, and condemning “informal, unofficial probation supervision or institutional remand before a hearing is held, and [] hearings in which there is no determination as to guilt of an offense, where personality factors and the ‘total situation’ determine adjudication.” Tappan objected that juvenile courts either presumed guilt or ignored proof of guilt and left complete discretion “in the hands of judicial and probation personnel unhampered by statutory definitions or limitations, undirected save by a very general principle of treating, reforming, rehabilitating.”).

<sup>15</sup> See ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME* 49–54 (2016).

<sup>16</sup> See POWE, *supra* note 3, at 274–76.

<sup>17</sup> Feld, *Race and the Juvenile Jurisprudence*, *supra* note 3, at 135.

<sup>18</sup> THOMAS BYRNE EDSALL & MARY D. EDSALL, *CHAIN REACTION* 49–50 (1992); ANDREW HACKER, *TWO NATIONS* 25 (1992); REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 203–06 (N.Y. Times ed. 1968).

race war.<sup>19</sup> In 1968, the assassination of Martin Luther King, Jr. provoked another spate of urban riots.<sup>20</sup> President Lyndon Johnson established the National Advisory Commission on Civil Disorders—the Kerner Commission—in response to the riots.<sup>21</sup> The Commission attributed the riots to the nation’s history of racial discrimination in employment, education, social services, and housing.<sup>22</sup> It warned that the country was moving “toward two societies, one black, one white—separate and unequal.”<sup>23</sup> It cautioned that the historical legacy of segregation and discrimination and continuation of current policies would “make permanent the division of our country into two societies: one, largely Negro and poor, located in the central cities; the other, predominantly white and affluent, located in the suburbs.”<sup>24</sup> When I was a child in the 1950s, I attended segregated public schools in Washington, D.C. Coming of age in the 1960s heightened my awareness of issues regarding race, poverty, inequality, and crime. Despite the opportunity to pursue a conventional legal career, I decided instead to seek a graduate degree that would better enable me to address those issues.

I did not read *Gault* until three years after it was decided, when I was a graduate student working on a Ph.D. in sociology at Harvard University where I studied with Dr. Lloyd Ohlin.<sup>25</sup> Dr. Ohlin was an architect of the War on Poverty and had recently concluded his role as associate director of the President’s Commission on Law Enforcement and Administration of Justice, which examined criminal and juvenile justice administration against the backdrop of rising crime rates in the 1960s.<sup>26</sup> Along with Professor James Vorenberg, who had served as Executive Director of the President’s Crime Commission, Dr. Ohlin ran the Harvard Law School Center for Criminal Justice.<sup>27</sup> One of the Center’s major research projects was a study of changes in the Massachusetts Department of Youth Services (“DYS”). In the early 1970s, Dr. Jerome Miller, Director of the Massachusetts Department of Youth Services, closed the training schools and replaced them with community-based services for most delinquent youths and with a few small, secure facilities for serious and violent youths.<sup>28</sup> Under Ohlin’s direction,

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<sup>19</sup> NICHOLAS LEMANN, *THE PROMISED LAND* 190 (1992); REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, *supra* note 18; POWE, *supra* note 3, at 275–76.

<sup>20</sup> See LEMANN, *supra* note 19, at 191; POWE, *supra* note 3, at 275–76.

<sup>21</sup> See Nicholas deB. Katzenbach, *Forward to PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967).

<sup>22</sup> REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, *supra* note 18.

<sup>23</sup> *Id.* at 1.

<sup>24</sup> *Id.* at 22.

<sup>25</sup> See generally RICHARD A. CLOWARD & LLOYD E. OHLIN, *DELINQUENCY AND OPPORTUNITY* (1960). Lloyd Ohlin was one of the leading criminologists of his generation, and his research and writing provided the intellectual framework for the 1960s War on Poverty.

<sup>26</sup> See deB. Katzenbach, *supra* note 21.

<sup>27</sup> See *id.*

<sup>28</sup> See generally ROBERT B. COATES ET AL., *DIVERSITY IN A YOUTH CORRECTIONAL SYSTEM* (1978); BARRY C. FELD, *NEUTRALIZING INMATE VIOLENCE* (1977) [hereinafter FELD, *NEUTRALIZING INMATE VIOLENCE*]; JEROME G. MILLER, *LAST ONE OVER THE WALL* (1991).

I studied several different juvenile training schools and concluded that these institutions were youth prisons of dubious quality rather than the benign therapeutic facilities that Progressive reformers promised.<sup>29</sup> I lived in and studied the Massachusetts training schools for two years prior to their closing, and visited training schools in several other states. Based on my research and experience, I 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. Analysts described the closure of the training schools as “the most sweeping reforms in youth corrections in the United States since the establishment of juvenile reformatories in the 19th century and juvenile courts in the 20th century.”<sup>30</sup>

The 1970s were a decade of great intellectual ferment and change for those who studied criminal and juvenile justice administration.<sup>31</sup> In 1971, the American Friends Service Committee published *Struggle for Justice*, which provided a left-wing critique of the prevailing ideology of rehabilitative treatment, individualized discretion, and indeterminate sentencing.<sup>32</sup> In 1972, Marvin Wolfgang published his seminal *Delinquency in a Birth Cohort*, which identified different patterns of delinquency among youths and provided impetus for subsequent decades of research on criminal careers.<sup>33</sup> The finding that a small-subset of chronic offenders accounted for most of the serious delinquency within the cohort offered an intellectual rationale for selective incapacitation sentencing policies. In 1974, Robert Martinson published *What Works?*, which critically analyzed correctional treatment programs’ efficacy, questioned their theoretical and scientific bases, and concluded that “[w]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.”<sup>34</sup> Martinson’s conclusion undermined the rehabilitative foundation of the juvenile court and fostered pessimism about the efficacy of treatment among practitioners and criminologists that lasted for decades. In 1976, Andrew von Hirsch published *Doing Justice* and he and other scholars advocated retributive sentencing principles—just deserts—as an alternative to the then-prevailing rehabilitative model.<sup>35</sup> Cumulatively, this research shifted the legal and criminological paradigm from rehabilitation to retribution, from an emphasis on offenders to one focused on offenses.

<sup>29</sup> FELD, NEUTRALIZING INMATE VIOLENCE, *supra* note 28, at 131–38.

<sup>30</sup> JAMES C. HOWELL, PREVENTING AND REDUCING JUVENILE DELINQUENCY 200 (2003).

<sup>31</sup> *See generally* DAVID GARLAND, THE CULTURE OF CONTROL (2001).

<sup>32</sup> *See generally* AM. FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE (1971).

<sup>33</sup> *See generally* MARVIN E. WOLFGANG ET AL., DELINQUENCY IN A BIRTH COHORT (1972).

<sup>34</sup> Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 25 (1974).

<sup>35</sup> ANDREW VON HIRSCH, DOING JUSTICE 49–55 (1976); *see also* DAVID FOGEL, “. . . WE ARE THE LIVING PROOF . . .” 260–66 (2d ed. 1979); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 11–14 (1976).

By the 1970s, Supreme Court decisions and the initial successes of The Civil Rights Movement supported a broader egalitarian ethos as women, gays and lesbians, and other social movements used similar strategies and rhetoric in pursuit of equality.<sup>36</sup> Advocates of “children’s liberation” challenged the social construction of childhood dependency and proposed greater legal and political equality with adults.<sup>37</sup> In the mid-1970s, the American Bar Association (“ABA”) and Institute of Judicial Administration sponsored the Juvenile Justice Standards Project, which published twenty-three volumes of standards and commentary relating to every aspect of the juvenile justice system.<sup>38</sup> The ABA standards responded to the Supreme Court’s due process decisions, eschewed juvenile courts’ *parens patriae* ideology and rehabilitative ideal, and endorsed a just deserts framework of determinate and proportional sanctions for delinquents and procedural parity with adults, including mandatory appointment of counsel and the right to a jury trial.<sup>39</sup> I was co-reporter of the volume *Rights of Minors*, which examined “whether and to what extent a minor should be treated as an adult.”<sup>40</sup> Although the legal rights of minors vary with the issue and context—e.g., intra-family disputes, access to medical treatments and abortion, contracts, employment, and the like—I approached the inquiry with a presumption of legal equality between children and adults, and examined to what extent children differ and require special legal protections. It provided my first foray into the developmental differences between adolescents and their elders that should inform youth policy.

I joined the University of Minnesota Law School faculty in 1972 and taught criminal law, criminal procedure, and juvenile justice. While on leave from teaching in 1974 and 1978, I worked as an assistant county prosecutor in the criminal trial division and in the juvenile court division. The contrast between the procedural safeguards afforded to adult criminal defendants and those given to delinquents made a profound impression. In criminal felony cases, I tried cases in open court in front of a jury with zealous public defenders in a newly constructed county government center. By contrast, I prosecuted delinquents in “King Arthur’s Court”<sup>41</sup>—a judicial fiefdom dominated by one judge who had presided for several decades and who conducted informal proceedings in a dark renovated courthouse that had previously served as the county morgue. The substantial differences between the legal procedures, the quality of personnel, and the outcomes in the two systems strongly affected my critical views of the procedural deficiencies of juvenile justice.

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<sup>36</sup> Feld, *Race, Politics, and Juvenile Justice*, *supra* note 3, at 1496–97.

<sup>37</sup> See generally RICHARD FARSON, *BIRTHRIGHTS* (1974); JOHN HOLT, *ESCAPE FROM CHILDHOOD* (1974).

<sup>38</sup> See, e.g., INST. OF JUDICIAL ADMIN. & AM. BAR ASS’N, *JUVENILE JUSTICE STANDARDS*, at v–ix (1980).

<sup>39</sup> See generally *id.*

<sup>40</sup> *Id.* at 2.

<sup>41</sup> See, e.g., CHARLES E. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* 345–46 (1978).



My first book, *Neutralizing Inmate Violence: Juvenile Offenders in Institutions*, emerged from my research in Massachusetts and comparatively evaluated ten different correctional programs in the training schools.<sup>42</sup> In the mid-1970s, the Minnesota Commissioner of Corrections convened a Serious Juvenile Offender Committee to consider whether the state should construct a secure facility to treat serious young offenders—in those days, primarily chronic burglars and car thieves. The Committee concluded that youths who required long-term secure confinement needed more robust procedural safeguards than juvenile courts provided, and thus should be transferred to criminal court. I wrote a legislative position paper for the Commissioner of Corrections that morphed into my first article on waiving juveniles to criminal court, *Reference of Juvenile Offenders for Adult Prosecution*.<sup>43</sup> In 1978, transfer of youths to criminal court was a relatively minor policy issue that had received minimal attention from legal scholars or criminologists. Written against the backdrop of intellectual and criminological changes in the 1970s, I argued that the statutory criteria—amenability to treatment and dangerousness—raised some of the most fundamental substantive issues of juvenile justice.<sup>44</sup> Is anyone amenable to treatment? If so, are there clinical tools with which to validly distinguish amenable from non-amenable youths? Can clinicians or judges accurately predict a youth’s future dangerousness? I argued that the uncertain efficacy of juvenile interventions and the inherent subjectivity of clinical discretion led to inconsistent outcomes and racial and geographic disparities in waiver decisions. Drawing on principles of just deserts and selective incapacitation, I proposed that the legislature should use various combinations of present offense and prior records—seriousness and persistence—as criteria to exclude older youths from juvenile court jurisdiction rather than to rely on amorphous judicial assessments of their amenability or predictions of dangerousness.<sup>45</sup>

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<sup>42</sup> See generally FELD, NEUTRALIZING INMATE VIOLENCE, *supra* note 28.

<sup>43</sup> Barry C. Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515 (1978) [hereinafter Feld, *Reference of Juvenile Offenders*], cited in *Deel v. Jago*, 967 F.2d 1079, 1090 (6th Cir. 1992), *State v. Behl*, 564 N.W.2d 560, 568 (Minn. 1997), *In re K.G.*, 295 N.W.2d 323, 326 n.4 (N.D. 1980), *Hidalgo, Jr. v. State*, 983 S.W.2d 746, 754 n.15 (Tex. Crim. App. 1999), *Oklahoma ex rel. Coates v. Johnson*, 597 P.2d. 328, 333 n.10 (Okl. Crim. App. 1979) (Cornish, J. concurring).

<sup>44</sup> See generally *id.* at 526–46.

<sup>45</sup> *Id.* at 572–78. I have subsequently recanted my support for exclusive reliance on offense criteria and concluded that “a judicial hearing conducted in juvenile court, guided by relatively objective substantive offense criteria and subject to rigorous appellate review, probably constitutes the least bad solution to the intractable sentencing problems posed by serious young offenders.” Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, in THE CHANGING BORDERS OF JUVENILE JUSTICE 83, 127–28 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) [hereinafter Feld, *Legislative Exclusion of Offenses*].

In 1979, the Minnesota Supreme Court in *In re Dahl* extensively quoted my criticism of the waiver criteria and invited the legislature to provide clearer standards.<sup>46</sup>

Unfortunately, the standards for referral adopted by present legislation are not very effective in making this important determination. . . .

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 . . . Due to these difficulties in making the waiver decision, many juvenile court judges have tended to be overcautious, resulting in the referral of delinquent children for criminal prosecution on the erroneous, albeit good faith, belief that the juveniles pose a danger to the public. Accordingly, a reevaluation of the existing certification process may be in order.<sup>47</sup>

Other courts have relied on my critique of the prediction literature and the limits of judicial and clinical prognostication to invalidate judges' flawed speculation about future dangerousness.<sup>48</sup> The 1980 Minnesota legislature responded

<sup>46</sup> *In re Dahl*, 278 N.W.2d 316, 318–19 (Minn. 1979).

<sup>47</sup> *Id.* The Court relied heavily on my analysis of the problem:

“Like the quest to determine who may be amenable to treatment, efforts to identify the currently or potentially dangerous have entailed social science research as well as judicial inquiry. The irresistible conclusion of this research is that identification of the dangerous ‘presupposes a capacity to predict future criminal behavior quite beyond our present technical ability.’

“In this regard, one of the leading scholars on the prediction of dangerousness concludes that [t]he ability to predict which juvenile will engage in violent crime, either as adolescents or as adults, is very poor.

“The conclusion of Wenk and his colleagues that “there has been no successful attempt to identify, within . . . offender groups, a subclass whose members have a greater than even chance of engaging again in an assaultive act” is as true for juveniles as it is for adults. It holds regardless of how well trained the person making the prediction is—or how well programmed the computer—and how much information on the individual is provided. More money or more resources will not help. Our crystal balls are simply very murky, and no one knows how they can be polished.”

*Id.* (quoting Feld, *Reference of Juvenile Offenders*, *supra* note 43, at 541). The Court went on to substantially quote my critique of the waiver criteria:

“. . . Thus, ‘[t]he conclusion to emerge most strikingly from these studies is the great degree to which violence is overpredicted . . . Of those predicted to be dangerous, between 65 percent and 99 percent are *false positives*—that is, people who will not, in fact, commit a dangerous act . . . Violence is vastly overpredicted whether simple behavioral indicators are used or sophisticated multivariate analyses are employed and whether psychological tests are administered or thorough psychiatric examinations are performed.’

“The tendency to overpredict dangerousness raises profound moral questions with which society must deal in its treatment of both juvenile and adult offenders. In the context of assessing dangerousness for purposes of parole release, for example, how many false positives—people who would not offend again if released—are we willing to continue to incarcerate in order to ensure that those relatively few but unidentifiable individuals who actually would offend are not released? To what extent are we willing to permit judicial speculation about future violence in the waiver context if to do so means that large numbers of juvenile ‘false positives’ may be prosecuted as adults?”

*Id.* at 319 (quoting Feld, *Reference of Juvenile Offenders*, *supra* note 43, at 542) (alteration in original).

<sup>48</sup> See, e.g., *Deel*, 967 F.2d at 1090 (citing Feld, *Reference of Juvenile Offenders*, *supra* note 43, at 566–71, in a discussion of low recidivism rates of delinquents); *United States ex rel. Martin v. Strasburg*, 513 F. Supp. 691, 711 (S.D.N.Y. 1981) (citing Feld, *Reference of Juvenile*

to the Court's invitation in *Dahl*.<sup>49</sup> It amended the juvenile code purpose clause to emphasize the “integrity of [] substantive criminal law” and used present offense/prior record criteria to create a presumption for waiver, but ultimately retained the traditional discretionary approach to judicial waiver.<sup>50</sup> In a subsequent article, *Dismantling the Rehabilitative Ideal*, I responded to the statutory changes, criticized the legislature's presumptive waiver strategy, and argued that it would not limit judicial discretion.<sup>51</sup> Minnesota courts relied heavily on my

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*Offenders*, *supra* note 43, at 543, for a description of what is involved in statistical prediction); *Id.* at 709 n.31 (“In view of the uncertainties and inconsistencies typically associated with social science research, the clear-cut superiority of actuarial methods over clinical methods is startling.” (quoting Feld, *Reference of Juvenile Offenders*, *supra* note 43, at 543)); *United States v. J.D.*, 525 F. Supp. 101, 103 (S.D.N.Y. 1981) (“It therefore seems to evince a commitment to what has been called the ‘rehabilitative ideal,’ which underlay the creation of the juvenile justice system, and which has as its premise ‘a societal consensus that youthful law violators should be treated differently from adult offenders because juveniles are both less responsible for their delicts and more responsive to nonpunitive intervention.” (quoting Feld, *Reference of Juvenile Offenders*, *supra* note 43, at 516)); *State v. Buelow*, 587 A.2d 948, 955 (Vt. 1990) (“[B]ecause judicial waiver statutes typically give judges broad discretion in making transfer decisions, such statutes invite abuse of discretion and discriminatory application, thus undermining the fairness of the judicial process.” (quoting Feld, *Reference of Juvenile Offenders*, *supra* note 43, at 520)); *Behl*, 564 N.W.2d at 568 (citing Feld, *Reference of Juvenile Offenders*, *supra* note 43, at 563–64, for a discussion of automatic classification of juveniles); *In re K.G.*, 295 N.W.2d at 326 n.4; *State v. D.W.C.*, 256 S.E.2d 894, 898 (W. Va. 1979) (citing Feld, *Reference of Juvenile Offenders*, *supra* note 43, at 614, for the idea that “the transfer decision should be keyed to the particular background of the individual” with the emphasis on consideration of a juvenile's prior record); *Hidalgo, Jr.*, 983 S.W.2d at 754 n.15; *In re J.L.B.*, 435 N.W.2d 595, 603 (Minn. Ct. App. 1989); *Johnson*, 597 P.2d at 333 n.10 (summarizing the discussion of, and suggestion for, a rational predictive basis for certification found in Feld, *Reference of Juvenile Offenders*, *supra* note 43).

<sup>49</sup> MINN. STAT. § 260.125 (1980) (current version at MINN. STAT. § 260B.125 (2016)); Barry C. Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the “Rehabilitative Ideal,”* 65 MINN. L. REV. 167, 192–97 (1980) [hereinafter Feld, *Juvenile Court Legislative Reform*].

<sup>50</sup> Feld, *Juvenile Court Legislative Reform*, *supra* note 49, at 192–97, cited in *State v. McFee*, 721 N.W.2d 607, 613 (Minn. 2006), *In re K.C.*, 513 N.W.2d 18, 22 (Minn. Ct. App. 1994).

<sup>51</sup> See generally Feld, *Juvenile Court Legislative Reform*, *supra* note 49.

critical analyses of the new statute to decide subsequent waiver cases.<sup>52</sup> Empirical and legal analyses and criticism of waiver statutes, policies, and practices became one staple of my scholarship over the next three decades.<sup>53</sup>

In 1979, the Minnesota Sentencing Guidelines Commission promulgated and in 1980, Minnesota adopted determinate sentencing guidelines (“Guidelines”).<sup>54</sup> The Guidelines reflected a “modified just deserts” framework and combined retributive just deserts policies with selective incapacitation based on prior

<sup>52</sup> See, e.g., *McFee*, 721 N.W.2d at 613 (“This legislation reflects ‘a fundamental philosophical departure from the previous rehabilitative purpose of the juvenile justice system to much more explicitly punitive and social control purposes.’ ” (quoting Feld, *Juvenile Court Legislative Reform*, *supra* note 49, at 192)); *In re D.F.B.*, 433 N.W.2d 79, 80–81 (Minn. 1988) (discussing the change in attitude toward juveniles the 1980 amendment reflected); *In re K.A.A.*, 410 N.W.2d 836, 840 n.7 (Minn. 1987); *In re J.F.K.*, 316 N.W.2d 563, 564 (Minn. 1982); *In re Givens*, 307 N.W.2d 489, 490 n.1 (Minn. 1981); *People v. Peterson*, 48 Cal. Rptr. 2d 318, 321 (Cal. Ct. App. 1995) (citing Feld, *Juvenile Court Legislative Reform*, *supra* note 49, at 233, 237, to show contrast between the Minnesota and California juvenile systems); *In re K.C.*, 513 N.W.2d at 22 (“Professor Feld cogently asserts that the ‘particular cruelty’ standard is ‘an inherently vague grant of discretion,’ comparing its language to that of death penalty statutes struck down by the United States Supreme Court.” (quoting Feld, *Juvenile Court Legislative Reform*, *supra* note 49, at 220)); *In re T.L.J.*, 495 N.W.2d 237, 240 (Minn. Ct. App. 1993) (“A leading commentator on juvenile law asserts that the prima facie case shifts only the burden of production, not the burden of persuasion.” (citing Feld, *Juvenile Court Legislative Reform*, *supra* note 49, at 215)); *In re J.L.B.*, 435 N.W.2d at 601 (citing Feld, *Juvenile Court Legislative Reform*, *supra* note 49, at 206, in discussion of the policy ramifications of the 1980 amendment); *In re D.F.B.*, 430 N.W.2d 475, 478 (Minn. Ct. App. 1988); *State v. Little*, 423 N.W.2d 722, 724 (Minn. Ct. App. 1988) (citing Feld, *Juvenile Court Legislative Reform*, *supra* note 49, at 233, to refute one of Little’s arguments); *In re S.R.L.*, 400 N.W.2d 382, 384 (Minn. Ct. App. 1987); *In re D.S.F.*, 416 N.W.2d 772, 776 (Minn. Ct. App. 1987).

<sup>53</sup> See generally, e.g., BARRY C. FELD, CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION 523 – 713 (4th ed. 2013) [hereinafter FELD, JUVENILE JUSTICE ADMINISTRATION]; Barry C. Feld, *Bad Law Makes Hard Cases: Reflections on Teen-Aged Axe-Murderers, Judicial Activism, and Legislative Default*, 8 L. & INEQ. 1 (1989) [hereinafter Feld, *Bad Law*]; Barry C. Feld, *Delinquent Careers and Criminal Policy: Just Deserts and the Waiver Decision*, 21 CRIMINOLOGY 195 (1983) [hereinafter Feld, *Delinquent Careers*]; Feld, *Legislative Exclusion of Offenses*, *supra* note 45; Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471 (1987) [hereinafter Feld, *Juvenile Waiver Statutes*], cited in *Deel*, 967 F.2d at 1089; Marcy R. Podkopacz & Barry C. Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness and Race*, 14 L. & INEQ. 73 (1995); Marcy R. Podkopacz & Barry C. Feld, *The Back-Door to Prison: Waiver Reform, “Blended Sentencing,” and the Law of Unintended Consequences*, 91 J. CRIM. L. & CRIMINOLOGY 997 (2001) [hereinafter Podkopacz & Feld, *The Back-Door to Prison*]; Marcy R. Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. CRIM. L. & CRIMINOLOGY 449 (1996) [hereinafter Podkopacz & Feld, *The End of the Line*].

<sup>54</sup> Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978–2003*, in CRIME AND JUSTICE 131, 131 (Michael Tonry ed., Vol. 32, 2005) [hereinafter Frase, *Sentencing Guidelines*]. See generally, Richard S. Frase, *Sentencing Policy and Criminal Justice in Minnesota: Past, Present, and Future*, COUNCIL ON CRIME & JUST. (Jan. 14, 2015) [hereinafter Frase, *Sentencing Policy*], <https://web.archive.org/web/20150114224505/http://www.crimeandjustice.org/councilinfo.cfm?pid=52> [https://perma.cc/W8Q8-LCQB].

record.<sup>55</sup> Under the Guidelines, judges imposed presumptive sentences based on combinations of present offense seriousness and prior record.<sup>56</sup> On the Guidelines' grid, an offender's prior criminal history score and seriousness of the present offense determined whether or not a judge would sentence an offender to prison and for how long.<sup>57</sup> In testimony prior to the Guidelines' promulgation, I presented the Commission with the emerging research on delinquent and criminal careers and persuaded it to include some juvenile prior convictions as part of adults' criminal history score.<sup>58</sup> The Guidelines included felony convictions of youths sixteen and seventeen years of age.<sup>59</sup> Unlike adult convictions, it took two juvenile felony convictions to equal one point in the criminal history score.<sup>60</sup> The Commission gave more limited effect to prior delinquency adjudications than it did to adult convictions because of concerns about the procedural inadequacies of juvenile courts.

Although Minnesota's juvenile courts adopted county rules of procedure in the aftermath of *Gault*, it was not until 1983 that the Minnesota Supreme Court promulgated its first set of statewide, uniform rules of procedure.<sup>61</sup> In 1984, I published a 135-page law review article—*Criminalizing Juvenile Justice*—in which I systematically compared and contrasted the Court's rules of procedure for juvenile court with those of adult criminal procedure.<sup>62</sup> My critique of the juvenile court rules developed the thesis that

in every instance in which the Minnesota Supreme Court had the opportunity to provide juveniles with greater procedural safeguards than those afforded adult criminal defendants and to recognize the special characteristics of youth, the court chose not to furnish the safeguards but to treat juveniles just like adult criminal defendants. Conversely, in every instance in which the court had an opportunity to treat juveniles at least as well procedurally as adult criminal defendants, it adopted juvenile court procedures with *less* effective safeguards.<sup>63</sup>

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<sup>55</sup> Frase, *Sentencing Guidelines*, *supra* note 54, at 133. *See generally* Feld, *Delinquent Careers*, *supra* note 53; Frase, *Sentencing Policy*, *supra* note 54.

<sup>56</sup> *See generally* Richard S. Frase, *Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 CORNELL J. L. PUB. POL'Y 279 (1993); Richard S. Frase, *Purposes of Punishment Under the Minnesota Sentencing Guidelines*, 13 CRIM. JUST. ETHICS 11 (1994); Frase, *Sentencing Guidelines*, *supra* note 54; Frase, *Sentencing Policy*, *supra* note 54.

<sup>57</sup> MINN. SENT'G GUIDELINES COMM'N, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY § 4.A, at 79 (2016).

<sup>58</sup> *See generally* Feld, *Race, Politics, and Juvenile Justice*, *supra* note 3.

<sup>59</sup> Frase, *Sentencing Guidelines*, *supra* note 54, at 165.

<sup>60</sup> *See id.*

<sup>61</sup> Feld, *Criminalizing Juvenile Justice*, *supra* note 1, at 165.

<sup>62</sup> *See generally id.*

<sup>63</sup> *Id.* at 168; *see also* State v. Burrell, 697 N.W.2d 579, 593 n.4 (Minn. 2005) (citing Feld, *Criminalizing Juvenile Justice*, *supra* note 1, at 177–80, for “noting that Georgia, Indiana, Louisiana, and Pennsylvania are among states that have experimented with per se rules and that a few other states equate a juvenile's request for a parent with a request for an attorney.”); People v. Hana, 504 N.W.2d 166, 170 n.24, 171 n.32, 180 (Mich. 1993) (“The waiver of juvenile court jurisdiction is ‘a sentencing decision that represents a choice between the punitive

In short, the Court's rules treated juveniles just like adults when formal equality resulted in practical inequality and used special juvenile court procedures when they provided an advantage for the state. For example, the Court used the adult legal standard—"knowing, intelligent, and voluntary [] under the totality of the circumstances"<sup>64</sup>—to gauge juveniles' waivers of *Miranda* rights and the right to counsel at trial even though youths' developmental limitations increased the likelihood of improvident decisions. Conversely, the Court denied delinquents the right to a public and jury trial that adults enjoy and thereby made it easier to convict delinquents than to convict adult criminal defendants based on the same evidence.<sup>65</sup>

While writing *Criminalizing Juvenile Justice*, I realized that the standard that courts use to gauge juveniles' waivers of *Miranda* rights applied to waivers of the right to counsel at trial as well. Filling in some footnotes on juveniles' waivers of counsel, I discovered there was almost no research about rates of representation, delivery of legal services, and the impact of lawyers in juvenile courts.<sup>66</sup> In the mid-1980s, the Office of Juvenile Justice and Delinquency Prevention sponsored a Visiting Scholar residency at the National Center for Juvenile Justice where I collected and analyzed the available data on juveniles' access to and the impact of counsel in delinquency proceedings. In a series of articles and a book,

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disposition of adult criminal court and the 'rehabilitative' disposition of the juvenile court.' " (citing Feld, *Criminalizing Juvenile Justice*, *supra* note 1, at 269)); *McIntyre v. State*, 526 A.2d 30, 40 (Md. 1987) (citing Feld, *Criminalizing Juvenile Justice*, *supra* note 1, for "rais[ing] serious doubts about juveniles' intellectual and psychological capabilities to comprehend constitutional rights"); *Commonwealth v. Brown*, 26 A.3d 485, 495–96 (Pa. Super. Ct. 2011) ("First, the minority view disregards the practical results of a juvenile transfer hearing, which has been described by one commentator as 'a sentencing decision that represents a choice between the punitive disposition of adult criminal court and the 'rehabilitative' disposition of the juvenile court.' " (quoting Feld, *Criminalizing Juvenile Justice*, *supra* note 1, at 269)); *In re D.S.S.*, 506 N.W.2d 650, 653 (Minn. Ct. App. 1993) ("Some scholars suggest, however, that a juvenile's right to counsel may have little meaning because juveniles do not fully understand their procedural rights." (citing Feld, *Criminalizing Juvenile Justice*, *supra* note 1, at 174–75)); *In re Robert M.*, 576 A.2d 549, 551 (Conn. App. Ct. 1990); *In re D.S.F.*, 416 N.W.2d 772, 776 (Minn. Ct. App. 1988) (citing Feld, *Criminalizing Juvenile Justice*, *supra* note 1, at 168–69, 275, for "suggesting that abolition of the juvenile court's jurisdiction over criminal and noncriminal misconduct may be desirable, based on observation that children in juvenile court face a punitive system and at the same time are denied fundamental procedural benefits of jury trials and a secure right to counsel."); *In re D.A.H.*, 360 N.W.2d 676, 678 n.1 (Minn. Ct. App. 1985) (discussing Feld, *Criminalizing Juvenile Justice*, *supra* note 1, at 243–66, for commentary on juries in juvenile cases); *In re L.K.W.*, 372 N.W.2d 392, 402 (Minn. Ct. App. 1985) (citing Feld, *Criminalizing Juvenile Justice*, *supra* note 1, for a discussion of modern juvenile justice debates); *In re J.P.L.*, 359 N.W.2d 622, 625 (Minn. Ct. App. 1984) ("Combining the suppression hearing with the trial on the merits is . . . a highly prejudicial practice that increases the likelihood of erroneous determinations of guilt." (quoting Feld, *Criminalizing Juvenile Justice*, *supra* note 1, at 273)).

<sup>64</sup> Feld, *Criminalizing Juvenile Justice*, *supra* note 1, at 169 (quotations omitted).

<sup>65</sup> *See id.* at 243–66.

<sup>66</sup> *Id.* at 189–90 nn.160–63.

*Justice for Children: The Right to Counsel and Juvenile Courts*,<sup>67</sup> I reported that in three of the six states that reported data on rates of representation, the majority of juveniles appeared in juvenile courts without a lawyer.<sup>68</sup> I also reported that youth represented by counsel received more severe sentences than did those without counsel—i.e., lawyers are an aggravating factor in sentencing.<sup>69</sup> I proffered three hypotheses to explain the perverse finding that lawyers increased a delinquent’s likelihood of receiving a more severe, out-of-home placement than unrepresented youths. First, I hypothesized that juvenile defense lawyers were incompetent and prejudiced their clients’ outcomes.<sup>70</sup> Second, I conjectured that juvenile court judges prejudged cases and assigned counsel when they anticipate more severe dispositions, although they still incarcerated many unrepresented youths.<sup>71</sup> Third, I suggested that judges punished youths who insisted on formal procedures (or gave leniency to those who “thr[ew] themselves on the mercy of the court”).<sup>72</sup> I likened the presence of counsel in juvenile courts to the “trial penalty” that adult criminal defendants pay for not pleading guilty.<sup>73</sup> Finally, I reported that rates of representation varied substantially in urban, suburban, and rural juvenile courts within a state and resulted in “justice by geography.”<sup>74</sup> Social structure and context strongly influenced the administration of justice.<sup>75</sup> For example, judges adjudicated the majority of youths in the rural counties without a lawyer present because the youths had waived counsel.<sup>76</sup> I identified a relationship between procedural formality and sentencing severity. Controlling for other variables, judges sentenced youths tried in more formal courts more severely than did those tried in procedurally informal courts.<sup>77</sup>

<sup>67</sup> See, e.g., BARRY C. FELD, *JUSTICE FOR CHILDREN* (1993) [hereinafter FELD, *JUSTICE FOR CHILDREN*].

<sup>68</sup> Barry C. Feld, *In re Gault Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 *CRIME & DELINQ.* 393, 393 (1988); see also FELD, *JUSTICE FOR CHILDREN*, *supra* note 67, at 54–55; Barry C. Feld, *Justice by Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration*, 82 *J. CRIM. L. & CRIMINOLOGY* 156, 206–10 (1991) [hereinafter Feld, *Justice by Geography*]; 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, 1221 (1989) [hereinafter Feld, *Right to Counsel*], cited in *United States v. Farhad*, 190 F.3d 1097, 1107 n.2 (9th Cir. 1999) (Reinhardt, J., concurring), *In re J.A.J.*, 545 N.W.2d 412, 417 n.5 (Minn. Ct. App. 1996) (Crippen, J., concurring).

<sup>69</sup> See FELD, *JUSTICE FOR CHILDREN*, *supra* note 67, at 98–106; Feld, *Right to Counsel*, *supra* note 68, at 1330–34.

<sup>70</sup> Feld, *Right to Counsel*, *supra* note 68, at 1330–31.

<sup>71</sup> *Id.* at 1332–33.

<sup>72</sup> *Id.* at 1333–34.

<sup>73</sup> See generally *id.* See also Barry C. Feld & Shelly Schaefer, *The Right to Counsel in Juvenile Court: The Conundrum of Attorneys as an Aggravating Factor at Disposition*, 27 *JUST. Q.* 713, 718 (2010) [hereinafter Feld & Schaefer, *Conundrum of Attorneys*].

<sup>74</sup> See Feld, *Right to Counsel*, *supra* note 68, at 1318–22; see also Feld, *Justice by Geography*, *supra* note 68, at 206–10.

<sup>75</sup> Feld, *Justice by Geography*, *supra* note 68, at 160–62.

<sup>76</sup> See *id.* at 185–86.

<sup>77</sup> *Id.* at 198–206.

When I published this research, it garnered media attention and provided impetus for the Minnesota Supreme Court to create a study commission on Legal Representation of Juveniles.<sup>78</sup> The committee recommended mandatory appointment of counsel or stand-by counsel for all delinquents.<sup>79</sup> However, different counties funded their public defender systems from different budgets—courts, prosecution, or defense—and the committee could not estimate either the costs of the current legal services delivery systems or estimate what it would cost to provide a full representation system.<sup>80</sup> As a result, the legislature did not act.<sup>81</sup>

Subsequent replications of my research on delivery of legal services by lawyers and criminologists in other jurisdictions have strongly corroborated my findings that many, if not most, delinquents do not receive assistance of counsel, that lawyers are an aggravating factor in sentencing, and that geographic context strongly influences justice administration.<sup>82</sup> After law reform efforts in Minnesota in the mid-1990s to improve delivery of legal services in juvenile courts, I conducted pre- and post-implementation studies. While Minnesota made some progress in providing counsel for delinquents, those same findings—attorneys as an aggravating factor in sentencing and justice by geography—still prevailed a decade later.<sup>83</sup>

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<sup>78</sup> See MINN. SUPREME CT. TASK FORCE, RACIAL BIAS IN THE JUDICIAL SYSTEM 108 (1993); Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 987–88 (1995) [hereinafter Feld, *Violent Youth and Public Policy*]. See generally, e.g., Patricia Lopez Baden, *Legislature OKs Juvenile Crime Bill; Violent Youths Could Get Adult Penalties*, STAR TRIB., Apr. 30, 1994, at 1B; Kevin Diaz, *Juvenile Justice System Takes Verbal Beating*, STAR TRIB., Mar. 26, 1993, at 1B; Mike Kaszuba, *Juvenile-Code Revision Appears in Trouble*, STAR TRIB., Feb. 20, 1986, at 1B; Mike Kaszuba, *Revised Juvenile Code Passed by Senate Panel*, STAR TRIB., Feb. 18, 1986, at 2B; Sam Newlund, *Juvenile Code Reform Moves in Legislature After Fine-Tuning*, STAR TRIB., Feb. 11, 1986, at 1B; Dane Smith, *DFLers Target Crime Committed by Juveniles in New Crime Package*, STAR TRIB., Dec. 1, 1993, at 1B.

<sup>79</sup> Feld, *Violent Youth and Public Policy*, *supra* note 78, at 994.

<sup>80</sup> *Id.* at 994–95.

<sup>81</sup> *Id.* at 995.

<sup>82</sup> See U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-95-139, JUVENILE JUSTICE: REPRESENTATION RATES VARIED AS DID COUNSEL'S IMPACT ON COURT OUTCOMES 13, 15, 24 (1995); Timothy M. Bray et al., "Justice by Geography": *Racial Disparity and Juvenile Courts*, in OUR CHILDREN, THEIR CHILDREN 270, 270–272 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005); George W. Burruss, Jr. & Kimberly Kempf-Leonard, *The Questionable Advantage of Defense Counsel in Juvenile Court*, 19 JUST. Q. 37, 48–55 (2002); Lori Guevara et al., *Race, Gender, and Legal Counsel: Differential Outcomes in Two Juvenile Courts*, 6 YOUTH VIOLENCE & JUV. JUST. 83, 83–84 (2008); Lori Guevara et al., *Race, Legal Representation, and Juvenile Justice: Issues and Concerns*, 50 CRIME & DELINQ. 344, 344–47 (2004); *State Assessments*, NJDC, <http://njdc.info/our-work/juvenile-indigent-defense-assessments/> [<https://perma.cc/AM53-4FSP>] (last visited Jan. 3, 2017).

<sup>83</sup> Feld & Schaefer, *Conundrum of Attorneys*, *supra* note 73, at 731–37; Barry C. Feld & Shelly Schaefer, *The Right to Counsel in Juvenile Court: Law Reform to Deliver Legal Services and Reduce Justice by Geography*, 9 CRIMINOLOGY & PUB. POL'Y 327, 347–51 (2010) [hereinafter Feld & Schaefer, *Law Reform to Deliver Legal Services*].



In 1992, Congress reauthorized the Juvenile Justice Delinquency Prevention Act (“OJJDP”) and added a provision on “Access to Justice” to improve the delivery of legal services.<sup>84</sup> In addition to my own statement and testimony, several witnesses who appeared before Congress referred to my research on inadequate representation of youths in delinquency proceedings to bolster the case for adding the amendment on access to justice.<sup>85</sup> The OJJDP reauthorization funded research by the General Accounting Office (“GAO”) to replicate my findings.<sup>86</sup> The GAO report confirmed that juvenile courts in several states adjudicated many unrepresented delinquents and that justice administration varied with geographic context.<sup>87</sup> The OJJDP reauthorization also provided funds to the American Bar Association (“ABA”) to improve access to and quality of lawyers in juvenile courts.<sup>88</sup> The ABA published *A Call for Justice*, which decried the inadequate delivery and poor quality of legal services in juvenile courts.<sup>89</sup> Over the past two decades, the ABA and subsequently the National Juvenile Defender Center have conducted in-depth assessments of the delivery of legal services and performance of counsel in juvenile courts in twenty-one states.<sup>90</sup> Those reports consistently document the inadequate resources and poor quality of justice afforded to delinquents.<sup>91</sup>

The inadequate quality of procedural justice and poor performance of counsel reflected, in part, most law schools’ failure to provide courses or clinics on juvenile justice. The curricular deficiency mirrored law faculties’ disinterest in the field. Although a few law professors published juvenile justice casebooks in the 1970s and 1980s,<sup>92</sup> by the 1990s those books were out of print or out of date. The absence of off-the-shelf teaching materials deterred many faculty who were

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<sup>84</sup> Act of Nov. 4, 1992, Pub. L. No. 102-586, § 2(g)(6)(b)(5)(B), 106 Stat. 4982, 4998–99 (mandating a study of juvenile access to counsel and submission of recommendations for improving access to counsel); *Juvenile Justice in America, Focusing on the Status of the Juvenile Court System: Hearing Before the S. Subcomm. on Juvenile Justice of the Comm. on the Judiciary*, 102d Cong. 163, 165 (1992) (statement of Barry C. Feld, Ph.D., University of Minnesota Law School) [hereinafter *Juvenile Justice in America*].

<sup>85</sup> See, e.g., *Juvenile Justice in America*, *supra* note 84, at 6 (statement of Hon. Frank Orlando (ret.), Nova University).

<sup>86</sup> U.S. GEN. ACCOUNTING OFFICE, *supra* note 82, at 13.

<sup>87</sup> See *id.* at 15.

<sup>88</sup> AM. BAR ASS’N JUVENILE JUSTICE CTR. ET AL., *A CALL FOR JUSTICE 4* (1995) [hereinafter *A CALL FOR JUSTICE*]; Am. Bar Ass’n Presidential Working Grp., *America’s Children at Risk: A National Agenda for Legal Action*, 27 FAM. L.Q. 433, 446 (1993).

<sup>89</sup> *A CALL FOR JUSTICE*, *supra* note 88.

<sup>90</sup> *State Assessments*, *supra* note 82.

<sup>91</sup> See *id.*

<sup>92</sup> See generally, e.g., SANFORD J. FOX, *CASES AND MATERIALS ON MODERN JUVENILE JUSTICE* (2d ed. 1981); SANFORD J. FOX, *THE LAW OF JUVENILE COURTS IN A NUTSHELL* (2d ed. 1977); FRANCIS B. MCCARTHY ET AL., *JUVENILE LAW AND ITS PROCESSES* (2d ed. 1989); FRANK W. MILLER ET AL., *THE JUVENILE JUSTICE PROCESS* (3d. 1985).

not juvenile justice specialists from offering courses. I published *Cases and Materials on Juvenile Justice Administration*<sup>93</sup> and *Juvenile Justice Administration in a Nutshell*<sup>94</sup> as a service to the field to enable more law schools to offer courses and to train future lawyers to represent children. I received the American Bar Association's Livingston Hall Award for my career-long efforts to improve delivery and quality of legal services in juvenile courts.<sup>95</sup>

## II. THE GET TOUGH ERA

In the mid-1980s, I sensed the increasingly punitive directions of juvenile justice policies. I assessed whether the retributive just deserts sentencing policies, which increasingly dominated the criminal justice system, were spilling over into the juvenile justice system as well. In two of my most cited law review articles, I examined states' adoption of offense criteria to govern waiver decisions and juvenile court sentencing practices. In *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, I surveyed states' increased use of offense criteria to govern juvenile judges' sentencing decisions—determinate and mandatory minimum sentencing statutes, parole release and corrections guidelines, and empirical evaluations of sentencing practices.<sup>96</sup> Even before we fully appreciated the impact of get tough policies, I argued that juvenile courts' sentencing practices were becoming increasingly punitive and elevating offense factors over consideration of the offender.<sup>97</sup> The pronounced shift from treatment to punishment eroded justifications to provide delinquents with fewer procedural safeguards than adult criminal defendants received.<sup>98</sup>

In *The Juvenile Court Meets the Principle of Offense: Legislative Changes in Juvenile Waiver Statutes*, I surveyed when and how states amended their waiver statutes to use offense criteria—legislative offense exclusion and prose-

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<sup>93</sup> See generally BARRY C. FELD, *CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION* (2000). This book is now in its fourth edition, which was published in 2013.

<sup>94</sup> See generally BARRY C. FELD, *JUVENILE JUSTICE ADMINISTRATION IN A NUTSHELL* (3d ed. 2014). Professor Weijian Gao translated the second edition of the *NUTSHELL* into Chinese, which was published in 2011.

<sup>95</sup> *Livingston Hall Juvenile Justice Award*, AM. B. ASS'N, [http://www.americanbar.org/groups/criminal\\_justice/awards/hall.html](http://www.americanbar.org/groups/criminal_justice/awards/hall.html) [<https://perma.cc/3QJ5-6SWM>] (last visited Dec. 28, 2016).

<sup>96</sup> 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, 838–50 (1988) [hereinafter Feld, *Juvenile Court Meets the Principle of Offense*]; see also *United States v. Johnson*, 28 F.3d 151, 160 (D.C. Cir. 1994) (relying on Feld, *Juvenile Court Meets the Principle of Offense*, *supra*, at 849–50 tbl.1, in discussing the wide discretion exercised by juvenile court judges); *In re Richard A.*, 946 A.2d 204, 210 (R.I. 2008) (relying on Feld, *Juvenile Court Meets the Principle of Offense*, *supra*, at 824–25, in discussing the different goals of the adult and juvenile criminal justice systems).

<sup>97</sup> See Feld, *Juvenile Court Meets the Principle of Offense*, *supra* note 96, at 850–79.

<sup>98</sup> See *id.* at 902–15.

cutorial direct file—to reduce judicial discretion and to emphasize the seriousness of the offense over considerations of the offender.<sup>99</sup> Again, the timing and direction of change strongly indicated an increasingly punitive stance toward serious young offenders.<sup>100</sup>

By the early-1990s, Minnesota and the nation were deep in the throes of the Get Tough Era. Rising youth crime rates and murders committed with guns prompted punitive legislative responses.<sup>101</sup> Gun and gang violence led the media to describe Minnesota's largest city as "Murderopolis."<sup>102</sup> After a juvenile court judge declined to waive a sixteen-year-old youth who axe-murdered four members of his family for criminal prosecution, a public and legislative outcry ensued.<sup>103</sup> In reaction, the Minnesota Supreme Court, Governor, and Legislature created a commission—the Juvenile Justice Task Force—to recommend procedural and substantive changes in Minnesota's waiver law and many other aspects of juvenile justice administration.<sup>104</sup>

<sup>99</sup> See Feld, *Juvenile Waiver Statutes*, *supra* note 53, at 503–19; see also Deel v. Jago, 967 F.2d 1079, 1089 (6th Cir. 1992) (discussing Ohio's waiver criteria); People v. Hana, 504 N.W.2d 166, 169 n.21 (Mich. 1993); *In re A.L.*, 638 A.2d 814, 817 (N.J. Super. Ct. App. Div. 1994) (citing Feld, *Juvenile Waiver Statutes*, *supra* note 53, at 471, in a general overview of judicial waiver); *In re J.L.B.*, 435 N.W.2d 595, 603 (Minn. Ct. App. 1989).

<sup>100</sup> See Feld, *Juvenile Waiver Statutes*, *supra* note 53, at 517.

<sup>101</sup> Feld, *Violent Youth and Public Policy*, *supra* note 78, at 975–82.

<sup>102</sup> *An Oversight Hearing on Reduced Federal Funding For Law Enforcement and the Rise in Violent Crime: Hearing Before the S. Comm. on Democratic Policy*, 190th Cong. 2 (July 10, 2006) (statement of Timothy Dolan, Chief of Police, Minn. Police Dpt.). See generally, e.g., Kevin Diaz, *Family, Friends Shocked that Man Slain for Bicycle*, STAR TRIB., Oct. 7, 1993, at 1B; Conrad deFiebre, *15-Year-Old Fired Shots, 3 Others Say—Two Clerks Were on Floor in Store, Charges Allege*, STAR TRIB., June 10, 1992, at 1B; Tatsha Robertson, *Police Arrest Three Suspects in Shooting at Mall of America*, STAR TRIB., Feb. 25, 1993, at 1B; James Walsh & Bill McAuliffe, *Man, 3 Juveniles Held in St. Paul Slayings—2 Store Clerks Killed During Holdup*, STAR TRIB., June 9, 1992, at 1A.

<sup>103</sup> Feld, *Bad Law*, *supra* note 53, at 73. The juvenile court judge found sixteen-year-old David Brom "amenable to treatment." *In re D.F.B.*, 430 N.W.2d 475, 480 (Minn. Ct. App. 1988). He was a B+ student with no prior record and no previous treatment exposure, but was suffering from clinical depression. *Id.* at 480–81. The judge's decision provoked a public and political outcry. See Tom Krattenmaker, *The Rochester Ax Murders*, STAR TRIB., July 17, 1988, Sunday Magazine, at 12; Bill McAuliffe, *Court Rules Brom Should Be Tried as Adult in Ax Murders*, STAR TRIB., Oct. 18, 1988, at 1A. The Minnesota court of appeals, *In re D.F.B.*, 430 N.W.2d at 483, and the Supreme Court, *In re D.F.B.*, 433 N.W.2d 79 (Minn. 1988), reversed the judge's decision, emphasized the seriousness of his crimes, and ordered him tried as an adult. My article provided a case study of the types of evidence judges consider in judicial waiver hearings, as well as an empirical evaluation of waiver practices throughout the state. It again identified the role of "justice by geography" in judges' waiver decisions. Despite appellate court decisions to the contrary, I argued that the juvenile court judge's decision to retain jurisdiction over the youth was the correct result given the statutory criteria. I used the article to reiterate my earlier criticism of the law, and to tell the legislature "I told you so"—the earlier amendments would not control judicial discretion. See Feld, *Juvenile Court Legislative Reform*, *supra* note 49.

<sup>104</sup> *Minnesota Supreme Court Advisory Task Force on the Juvenile Justice System: Final Report*, 20 WM. MITCHELL L. REV. 595, 597–98 (1994); see also Feld, *Violent Youth and Public Policy*, *supra* note 78, at 997–98.

I served on the Task Force, which met for two years, brought in juvenile justice consultants and experts, collected data on current practices, held public hearings, and conducted focus group meetings with justice system stakeholders. The Task Force recommended a comprehensive package of procedural and substantive reforms that the legislature unanimously enacted that fostered a convergence between juvenile and criminal courts.<sup>105</sup> Based on my Task Force experiences, I wrote *Youth Violence and Public Policy* as a case study of the process of law reform and to provide a legislative history for courts interpreting the statute.<sup>106</sup> The new law used offense criteria, such as those I had proposed in 1978 in *Reference of Juvenile Offenders*, to create a presumption to waive serious offenders to criminal courts.<sup>107</sup> It included blended sentencing provisions—Extended Jurisdiction Juvenile Prosecution (“EJJ”)—to provide a longer delinquency sentence in lieu of waiver to criminal court for the “less bad of the worst.”<sup>108</sup> It expanded the use of delinquency convictions to enhance adult criminal sentences.<sup>109</sup> It mandated appointment of counsel or stand-by counsel for youths charged with a felony and those who faced out-of-home placement.<sup>110</sup>

I then served as co-reporter for the Minnesota Supreme Court to write rules of juvenile court procedure to implement the far-reaching statutory changes.<sup>111</sup> Despite efforts to write clear and strong rules, my subsequent evaluations of several provisions of the new law questioned whether the reforms accomplished what the legislature intended.<sup>112</sup> For example, the blended-sentencing provision, which the legislature intended to provide an alternative to waiver, instead had a net-widening effect that resulted in more youths in prison. Judges continued to transfer the same numbers and types of youths whom they waived previously

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<sup>105</sup> See Feld, *Violent Youth and Public Policy*, *supra* note 78, at 1121–28.

<sup>106</sup> See generally *id.* This piece has garnered judicial attention. See *State ex rel. D.J.*, 817 So. 2d 26, 29 (La. 2002) (citing Feld, *Violent Youth and Public Policy*, *supra* note 78, in review of the juvenile justice system); *In re C.B.*, 708 So. 2d 391, 395 (La. 1998); *State v. Behl*, 564 N.W.2d 560, 571 n.1 (Minn. 1997); *State ex rel. C.F.*, No. 2007-C-0027, 2007 WL 7712768, \*4 (La. Ct. App. 4 Cir. Feb. 12, 2007); *In re C.D.N.*, 559 N.W.2d 431, 434 (Minn. Ct. App. 1997) (citing Feld, *Violent Youth and Public Policy*, *supra* note 78, for the importance of juvenile access to juries); *State v. Robert K. McL.*, 496 S.E.2d 887, 891 n.4 (W. Va. 1997) (discussing Feld’s change in attitude towards automatic waiver in *Violent Youth and Public Policy*, *supra* note 78, at 151); *In re L.B.K.*, No. C8-95-2504, 1996 WL 250563, \*1 (Minn. Ct. App. May 14, 1996) (citing Feld, *Violent Youth and Public Policy*, *supra* note 78, in discussing the Minnesota Juvenile Justice Task Force and recommendations).

<sup>107</sup> See Feld, *Reference of Juvenile Offenders*, *supra* note 43; Feld, *Violent Youth and Public Policy*, *supra* note 78, at 1024–37.

<sup>108</sup> Feld, *Violent Youth and Public Policy*, *supra* note 78, at 1038–50.

<sup>109</sup> *Id.* at 1057–67.

<sup>110</sup> *Id.* at 1108–21.

<sup>111</sup> MINN. SUPREME CT. ADVISORY COMM., *THE MINNESOTA RULES OF JUVENILE PROCEDURE: FINAL REPORT* (1995).

<sup>112</sup> See generally Feld, *Criminalizing Juvenile Justice*, *supra* note 1; Feld & Schaefer, *Conundrum of Attorneys*, *supra* note 73; Feld & Schaefer, *Law Reform to Deliver Legal Services*, *supra* note 83; Podkopacz & Feld, *The Back-Door to Prison*, *supra* note 53; Podkopacz & Feld, *The End of the Line*, *supra* note 53.

and used the blended sentencing provisions to impose longer sentences on youths whom they previously sentenced as ordinary delinquents.<sup>113</sup> As a result of probation revocations of delinquency sanctions, the numbers of youths going to prison through the back-door nearly doubled.<sup>114</sup> Similarly, although the statute and court rules clearly mandated appointment of counsel for all youths charged with felonies, rates of representation changed only modestly, the adverse effect of lawyers on delinquents' sentences actually increased, justice by geography remained, and judges still removed unrepresented youths from their homes.<sup>115</sup>

I wrote my multi-prize winning book *Bad Kids: Race and the Transformation of the Juvenile Court* in the late-1990s during the height of the Get Tough Era.<sup>116</sup> As a due process liberal, it reflected my despair over the punitiveness of delinquency sanctions, the denial of basic procedural safeguards, and the disproportionate impact of those harsh policies on minority youth. It addressed three questions. First, what has happened to the juvenile court? It answered that it has been transformed from a nominally rehabilitative welfare agency into a scaled-down, second-class criminal court that provides neither therapy nor justice. Second, *Bad Kids* asked how this transformation has occurred. It answered that the public and policy makers have two competing cultural and legal conceptions of youth people—as vulnerable and dependent versus responsible and almost adult-like—and judges and legislators selectively choose between these alternative formulations to maximize social control of young people.<sup>117</sup> At the end of the twentieth century, get tough lawmakers primarily emphasized youths' "adulthood"—e.g., "old enough to do the crime, old enough to do the time."<sup>118</sup> Finally, *Bad Kids* asked why this transformation has occurred. It answered that the racial and structural transformation of American cities that accompanied the Great Migration of Blacks from the rural South to the urban North fueled the politics of race and crime and encouraged conservative politicians to use coded appeals to Whites' racial animus to crack down on youth crime.<sup>119</sup>

During the 1950s and 1960s, social structural changes, which began several decades earlier, impelled the Supreme Court to reexamine criminal and juvenile justice practices because of concerns about racial discrimination and civil

<sup>113</sup> See Podkopacz & Feld, *The Back-Door to Prison*, *supra* note 53, at 1062–65.

<sup>114</sup> See *id.* at 1057–62.

<sup>115</sup> See generally Feld & Schaefer, *Law Reform to Deliver Legal Services*, *supra* note 83; Podkopacz & Feld, *The Back-Door to Prison*, *supra* note 53.

<sup>116</sup> FELD, *BAD KIDS*, *supra* note 1; see also *Past Award Recipients*, ACJS, [http://www.acjs.org/page/Past\\_Awards](http://www.acjs.org/page/Past_Awards) [<https://perma.cc/YZF8-PX3P>] (noting Barry C. Feld as the 2001 Outstanding Book Award recipient) (last visited Dec. 28, 2016); *ASC Award Winners*, ASC, <https://www.asc41.com/awards/awardWinners.html> [<https://perma.cc/U76R-XZVG>] (noting Barry C. Feld as the 2002 recipient of the Michael J. Hindelang Book Award) (last visited Dec. 28, 2016).

<sup>117</sup> See FELD, *BAD KIDS*, *supra* note 1, at 107–08.

<sup>118</sup> See *id.* at 189–208, 239.

<sup>119</sup> See *id.* at 79–81.

rights.<sup>120</sup> The Great Migration increased the urbanization of Blacks and the proportion living outside of the South, and forced Congress and the Court to address racial inequality and denial of civil rights.<sup>121</sup> The Warren Court's school desegregation, criminal procedure, and juvenile justice due process decisions reflected a broader shift in constitutional jurisprudence to protect individual rights and the civil rights of racial minorities.<sup>122</sup>

The second period of juvenile justice policy changes emerged in response to *Gault*'s formalization of juvenile court procedures in 1967 and culminated in the get tough legislation of the late-1980s and early-1990s.<sup>123</sup> Although protecting minorities' liberty interests provided the impetus for the Warren Court's focus on constitutional safeguards, granting delinquents some procedural protections precipitated the transformation of the juvenile court into a wholly-owned subsidiary of the criminal justice system and legitimated the imposition of punitive sanctions that fell disproportionately heavily on minority offenders.<sup>124</sup> In the 1970s, many industries closed with massive job losses, especially among less skilled workers.<sup>125</sup> In the 1980s, crack cocaine and gun violence had a devastating impact on the inner cities reeling from deindustrialization.<sup>126</sup> Conservative politicians manipulated and exploited public fears to wage a succession of Wars on Crime, on Drugs, and subsequently on Youths.<sup>127</sup> They enacted harsh and punitive changes to juvenile and criminal laws that disproportionately affected black residents of the inner cities already disadvantaged by job loss, segregation, poverty, and social isolation.<sup>128</sup>

In *Bad Kids*, I proposed to abolish juvenile courts, to try young offenders in criminal courts with enhanced procedural safeguards, to develop a separate sentencing system—a Youth Discount—that formally recognized youthfulness as a mitigating factor, and to provide young offenders with resources and room to reform.<sup>129</sup> Many of those ideas reflect Scandinavian countries' responses to young offenders, which deals with younger children exclusively through their child welfare system and with older adolescent offenders in modified criminal courts, which give judges the option to commit youths to the child welfare system

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<sup>120</sup> Feld, *Race, Politics, and Juvenile Justice*, *supra* note 3, at 1450–51.

<sup>121</sup> *Id.* at 1462–67.

<sup>122</sup> *See id.* at 1468–70, 1474–79.

<sup>123</sup> *See id.* at 1480–94.

<sup>124</sup> *See id.* at 1493–94.

<sup>125</sup> *See id.* at 1508–12.

<sup>126</sup> *See id.* at 1517–23.

<sup>127</sup> *See generally id.* at 1538–52.

<sup>128</sup> In several post-*Bad Kids* articles, I develop more fully the themes of the politics of race. *See generally, e.g.,* Feld, *Race and the Juvenile Jurisprudence*, *supra* note 3; Feld, *Race, Politics, and Juvenile Justice*, *supra* note 3; Feld, *The Politics of Race*, *supra* note 3; Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. & FAM. STUD. 11 (2007) [hereinafter Feld, *Unmitigated Punishment*].

<sup>129</sup> FELD, *BAD KIDS*, *supra* note 1, at 327–30.

or to impose mitigated punishment in the adult system.<sup>130</sup> In the two decades since I wrote *Bad Kids*, I have realized that the politics of crime and race in the United States could not produce the type of social welfare or justice systems that serve the children of Norway, Denmark, or Sweden. Equally importantly, we have learned much more about adolescent developmental psychology and neuroscience and why policies to protect children in the United States require a separate juvenile justice system.

### III. RECOGNIZING THAT CHILDREN ARE DIFFERENT

In response to the punitive excesses of get tough politicians, the John D. and Catherine T. MacArthur Foundation funded a Network on Adolescent Development and Juvenile Justice (“Network”).<sup>131</sup> From 1995 to 2005, the Network conducted research on adolescent developmental psychology and neuroscience.<sup>132</sup> The research centered on changes in youths’ thinking and behavior to provide an evidence-based rationale for juvenile justice policy.<sup>133</sup> It centered on three broad themes: adolescents’ competence to exercise legal rights; youths’ criminal culpability and deserved punishment; and their treatment responsiveness and potential for change.<sup>134</sup> In addition to numerous articles and books by individual members, the Network published three books focused on adolescent competence, culpability, and racial disparities in juvenile justice administration, to each of which I contributed a chapter.<sup>135</sup>

The research on culpability focused on how youths’ immature judgment—risk perception, time frame, and appreciation of consequences—impulsivity, and limited self-control distinguished them from adults and rendered their bad choices categorically less blameworthy.<sup>136</sup> A trilogy of Supreme Court decisions

<sup>130</sup> See generally Barry C. Feld, *Juvenile Justice Swedish Style: A Rose By Another Name?*, 11 JUST. Q. 625 (1994); Carl-Gunnar Janson, *Youth Justice in Sweden*, in 31 YOUTH CRIME AND YOUTH JUSTICE 391 (Michael Tonry & Anthony N. Doob eds., 2004); Britta Kyvsgaard, *Youth Justice in Denmark*, in 31 YOUTH CRIME AND YOUTH JUSTICE, *supra*, at 349.

<sup>131</sup> *About Us*, MACARTHUR FOUND., <https://www.macfound.org/about/> [<https://perma.cc/HF3K-SZKD>] (last visited Dec. 28, 2016).

<sup>132</sup> See *Juvenile Justice*, MACARTHUR FOUND., [https://www.macfound.org/programs/juvenile\\_justice/strategy/](https://www.macfound.org/programs/juvenile_justice/strategy/) [<https://perma.cc/NPP2-DKZJ>] (last visited Dec. 28, 2016).

<sup>133</sup> See generally, e.g., NAT’L RESEARCH COUNCIL OF THE NAT’L ACADEMIES, *REFORMING JUVENILE JUSTICE* (2013); SCOTT & STEINBERG, *supra* note 1; *Bringing Research to Practice in the Juvenile Justice System*, MACARTHUR FOUND. RES. NETWORK: ADOLESCENT DEV. & JUV. JUST., <http://www.adjj.org> [<https://perma.cc/PF52-PFAD>] (last visited Dec. 28, 2016).

<sup>134</sup> See *Juvenile Justice*, *supra* note 132.

<sup>135</sup> See generally Barry C. Feld, *Juveniles’ Waiver of Legal Rights: Confessions, Miranda, and the Right to Counsel*, in YOUTH ON TRIAL 105 (Thomas Grisso & Robert G. Schwartz eds., 2000); Feld, *Legislative Exclusion of Offenses*, *supra* note 45; Feld, *Race and the Juvenile Jurisprudence*, *supra* note 3.

<sup>136</sup> Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 114–20 (2013) [hereinafter Feld, *The Youth Discount*] (reviewing research on developmental psychology and neuroscience).

that limited states' authority to impose the same punishments on children as adults reflected the Justices' appreciation of youths' diminished criminal responsibility and reduced culpability. *Roper v. Simmons* categorically prohibited states from executing youths for crimes committed as juveniles.<sup>137</sup> *Graham v. Florida* categorically prohibited states from imposing life without parole sentences on youths convicted of non-homicide offenses.<sup>138</sup> *Miller v. Alabama* prohibited mandatory life without parole sentences for youths who commit murder.<sup>139</sup> In all three cases, the Court emphasized that immaturity, impulsivity, susceptibility to peer influence, and transitory personality development warranted less severe sentences for juveniles than those imposed on adults.<sup>140</sup> The Court's jurisprudence of youth echoed arguments I have made for more than a quarter-century for a Youth Discount—a categorical use of age as a proxy for reduced culpability and shorter sentences based on diminished responsibility.<sup>141</sup>

The MacArthur Foundation's research on competence focused on youths' ability to understand and exercise legal rights such as *Miranda* and counsel, and whether they possessed the minimum proficiency required to stand trial.<sup>142</sup> The Court's jurisprudence of youth in *J.D.B. v. North Carolina* reflected its appreciation of juveniles' developmental differences from those of adults.<sup>143</sup> *Miranda* held that if police question a suspect who is in custody, they must administer the cautionary warning and *J.D.B.* posed the issue “whether the *Miranda* custody analysis includes consideration of a juvenile suspect's age.”<sup>144</sup> The Court concluded that age was an objective factor that affected how a person would feel

<sup>137</sup> See generally *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>138</sup> See *Graham v. Florida*, 560 U.S. 48, 109 (2010) (citing Feld, *Unmitigated Punishment*, *supra* note 128, at 69–70, for its comment on juvenile life without parole sentences).

<sup>139</sup> See generally *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

<sup>140</sup> See generally Feld, *The Youth Discount*, *supra* note 136.

<sup>141</sup> See generally FELD, *BAD KIDS*, *supra* note 1, at 315–21; Barry C. Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J. L. ETHICS & PUB. POL'Y 9 (2008), *cited in* *State v. Null*, 836 N.W.2d 41, 62 (Iowa 2013), *State v. Bruegger*, 773 N.W.2d 862, 877 n.4 (Iowa 2009); Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. LAW & CRIMINOLOGY 68, 121–33 (1997); Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111 (2003) [hereinafter Feld, *The Constitutional Tension Between Apprendi and McKeiver*], *cited in* *Welch v. United States*, 604 F.3d 408, 432 (7th Cir. 2010) (Posner, J., dissenting), *Gonzales v. Tafoya*, 515 F.3d 1097, 1111 (10th Cir. 2008), *Jones v. Roberts*, No. 06-3100-SAC, 2006 WL 2989237, at \*5 (D. Kan. Oct. 19, 2006), *In re Jonathon C.B.*, 958 N.E.2d 227, 269 (Ill. 2011), *Bruegger*, 773 N.W.2d at 870–71 n.1, *State v. Brown*, 879 So. 2d 1276, 1282 (La. 2004), *State v. Hand*, No. 25840, 2014 WL 4384131, at \*2 (Ohio Ct. App. Sept. 5, 2014), *People v. Mazzoni*, 165 P.3d 719, 722 (Colo. App. 2006); Feld, *Juvenile Waiver Statutes*, *supra* note 53, at 520–28.

<sup>142</sup> See generally Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003).

<sup>143</sup> See generally *J.D.B. v. North Carolina*, 564 U.S. 261 (2011).

<sup>144</sup> *Id.* at 268.



restrained.<sup>145</sup> “[O]fficers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child’s age. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult.”<sup>146</sup> The MacArthur research documented a sharp decline in youths’ adjudicative competence, ability to understand rights, or capacity to participate in the legal system by those fifteen-years of age or younger.<sup>147</sup>

For the past decade, my research has focused again on youths’ competence to exercise legal rights or to make a “knowing, intelligent, and voluntary waiver” of *Miranda* rights and the right to counsel. In the mid-2000s, I conducted preliminary research in one county on youths’ competence to exercise *Miranda* rights.<sup>148</sup> Subsequently, in *Kids, Cops, and Confessions*, I expanded that research

<sup>145</sup> *Id.* at 271–72; see also BARRY C. FELD, *KIDS, COPS, AND CONFESSIONS* 41–42 (2013) [hereinafter FELD, *KIDS, COPS, AND CONFESSIONS*].

<sup>146</sup> *J.D.B.*, 564 U.S. at 279–80.

<sup>147</sup> See FELD, *KIDS, COPS, AND CONFESSIONS*, *supra* note 145, at 46–59; Grisso et al., *supra* note 142, at 356.

<sup>148</sup> Two articles I wrote discussing this research have garnered judicial attention. See generally Barry C. Feld, *Juveniles’ Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26 (2006) [hereinafter Feld, *Juveniles’ Competence to Exercise Miranda Rights*], cited in *In re S.W.*, 124 A.3d 89, 112 n.16 (D.C. 2015) (“To summarize, developmental psychological research assessing several domains of legal and adjudicative competence consistently indicates that adolescents as a class are at a significant disadvantage in the interrogation room . . . compared with adults. For youths fifteen years of age and younger, these disabilities emerge clearly in the research.” (quoting Feld, *Juveniles’ Competence to Exercise Miranda Rights*, *supra*, at 57–58)), *In re H.V.*, 252 S.W.3d 319, 335 (Tex. 2008) (citing Feld, *Juveniles’ Competence to Exercise Miranda Rights*, *supra*, at 99, for the assertion that children fifteen and under often do not understand *Miranda* warnings), *In re Andrew*, 895 N.E.2d 166, 171 (Ohio 2008) (O’Connor, J., dissenting) (citing Feld, *Juveniles’ Competence to Exercise Miranda Rights*, *supra*, at 99, for the proposition that children over sixteen understand *Miranda* to the same extent as adults), *In re J.T.M.*, 441 S.W.3d 455, 468 (Tex. App. 2014) (Rodriguez, J., dissenting); Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219 (2006) [hereinafter Feld, *Police Interrogation of Juveniles*], cited in *In re Miah S.*, 861 N.W.2d 406, 414 n.26 (Neb. 2015), *State v. Moore*, 864 N.W.2d 827, 851 n.10 (Wis. 2015) (Abrahamson, C.J., dissenting) (“Police complete nearly all interrogations of juveniles and adults in less than one or two hours. By contrast, they extract the vast majority of false confessions only after interrogating suspects for six hours or longer.” (quoting Feld, *Police Interrogation of Juveniles*, *supra*, at 308)), *State ex rel. A.W.*, 51 A.3d 793, 799 n.3 (N.J. 2012) (citing Feld, *Police Interrogation of Juveniles*, *supra*, at 236–37, in discussing the Reid method), *Reza v. State*, 163 So. 3d 572, 578–79 n.6 (Fla. Dist. Ct. App. 2015) (citing Feld, *Police Interrogation of Juveniles*, *supra*, in asserting that juveniles are particularly susceptible to unfair police interrogations due to immaturity and vulnerability), *In re Elias V.*, 188 Cal. Rptr. 3d 202, 215 (Cal. Ct. App. 2015) (“Confronting innocent people with false evidence—laboratory reports, fingerprints or footprints, eyewitness identification, failed polygraph tests—may cause them to disbelieve their own innocence or to confess falsely because they believe that police possess overwhelming evidence. Innocent suspects may succumb to despair and confess to escape the rigors of interrogation in the naïve belief that later investigation will establish their innocence rather than seek to confirm their guilt.” (quoting Feld, *Police Interrogation of Juveniles*, *supra*, at 313)).

to four counties—two urban, two suburban.<sup>149</sup> *Kids, Cops, and Confessions* is only the second empirical study of what happens in the interrogation room since *Miranda* and the first to examine how the police question older delinquents charged with felonies.<sup>150</sup> Although developmental psychologists doubt youths' competence to exercise *Miranda* rights, the law equates juveniles with adults and police interrogate them just like adults.<sup>151</sup> I concluded that police are trained to question suspects one way and they interrogate all suspects—adults and juveniles, blacks and whites, boys and girls—using the same protocol.<sup>152</sup>

As juvenile courts became more formal and punitive, I have questioned whether their procedural safeguards can assure the validity and reliability of delinquency adjudications. In *In re Winship*, the Court required states to prove delinquency—a criminal violation—“beyond a reasonable doubt,” rather than by lower civil standards of proof.<sup>153</sup> However, in 1971, a plurality of the Court in *McKeiver v. Pennsylvania* denied delinquents a constitutional right to a jury trial.<sup>154</sup> *McKeiver* assumed that delinquents received treatment rather than punishment, although the Court did not review any factual record to support that assumption.<sup>155</sup> Rather, the Court simply asserted that juvenile courts are not criminal courts.<sup>156</sup> Regardless of the validity of *McKeiver*'s reasoning then, subsequent decades of get tough legislative amendments have clearly eroded juvenile

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<sup>149</sup> See FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 145, at 51–54. In 2015, the Academy of Criminal Justice Sciences gave *Kids, Cops, and Confessions* its Outstanding Book Award. *Past Award Recipients*, *supra* note 116.

<sup>150</sup> See generally Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J. L. & PUB. POL'Y 395 (2013); Barry C. Feld, *Cops and Kids in the Interrogation Room*, in INVESTIGATIVE INTERVIEWING 35 (Ray Bull ed., 2014); Barry C. Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 L. & SOC'Y REV. 1 (2013) [hereinafter Feld, *Real Interrogation*]; Barry C. Feld, *Questioning Gender: Police Interrogation of Delinquent Girls*, 49 WAKE FOREST L. REV. 1059 (2014) [hereinafter Feld, *Questioning Gender*].

<sup>151</sup> See Feld, *Real Interrogation*, *supra* note 150, at 5; Feld, *Questioning Gender*, *supra* note 150, at 1063.

<sup>152</sup> See FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 145, at 226–27; Feld, *Questioning Gender*, *supra* note 150, at 1099.

<sup>153</sup> *In re Winship*, 397 U.S. 358, 368 (1970); Feld, *Criminalizing Juvenile Justice*, *supra* note 1, at 157.

<sup>154</sup> See *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); see also Feld, *Criminalizing Juvenile Justice*, *supra* note 1, at 160; Feld, *The Constitutional Tension Between Apprendi and McKeiver*, *supra* note 141, at 1111.

<sup>155</sup> See *McKeiver*, 403 U.S. at 547; Feld, *The Constitutional Tension Between Apprendi and McKeiver*, *supra* note 141, at 1149–50. See generally Feld, *Criminalizing Juvenile Justice*, *supra* note 1; Feld, *Juvenile Court Meets the Principle of Offense*, *supra* note 96 (arguing that legislative purpose clauses, sentencing statutes, judges' sentencing practices, conditions of confinement, and treatment outcomes provide indicators of whether juvenile court interventions are for treatment or punishment).

<sup>156</sup> *McKeiver*, 403 U.S. at 541, 545 (arguing that juvenile courts are not criminal courts within the meaning of the sixth and fourteenth amendments).

courts' rehabilitative foundation.<sup>157</sup> The inferior quality of justice in juvenile courts is even more problematic when states use delinquency adjudications to enhance subsequent adult criminal sentences and to impose other collateral consequences.

*Apprendi v. New Jersey* ruled that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum, *other than the fact of a prior conviction*, must be submitted to a jury and proved beyond a reasonable doubt.”<sup>158</sup> The Court reasoned that a jury, rather than a judge at a sentencing hearing, must find any facts on which a trial court based an enhanced sentence.<sup>159</sup> The Court exempted the *fact of a prior conviction* because criminal defendants enjoyed the right to a jury trial and proof beyond a reasonable doubt when the state obtained the prior conviction.<sup>160</sup> *Apprendi* emphasized the jury's role to find facts, to uphold *Winship's* standard of proof beyond a reasonable doubt, and to assure the validity and reliability of convictions.<sup>161</sup> Because of the procedural differences between juvenile and criminal courts, federal and state courts are sharply divided over whether *Apprendi* allows judges to use delinquency convictions obtained without access to a jury to enhance criminal sentences.<sup>162</sup> While

<sup>157</sup> See generally Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution That Failed?*, 34 N. KY. L. REV. 189 (2007).

<sup>158</sup> *Apprendi v. New Jersey*, 530 U.S. 465, 466 (2000) (emphasis added).

<sup>159</sup> *Id.* at 499–501; see also Feld, *The Constitutional Tension Between Apprendi and McKeiver*, *supra* note 141, at 1120–21.

<sup>160</sup> See Feld, *The Constitutional Tension Between Apprendi and McKeiver*, *supra* note 141, at 1133–34.

<sup>161</sup> See *Apprendi*, 530 U.S. at 499–500.

<sup>162</sup> See Feld, *The Constitutional Tension Between Apprendi and McKeiver*, *supra* note 141, at 1195–222; see also *Welch v. United States*, 604 F.3d 408, 432 (7th Cir. 2010); *Gonzales v. Tafoya*, 515 F.3d 1097, 1111 (10th Cir. 2008) (“Because juvenile waiver is a form of sentencing decision that represents a choice between the punitive sentences in criminal courts and the shorter, nominally rehabilitative dispositions available to juvenile courts, it increases the maximum penalties that juveniles face.” (quoting Feld, *The Constitutional Tension Between Apprendi and McKeiver*, *supra* note 141, at 1216)); *Jones v. Roberts*, No. 06-3100-SAC, 2006 WL 2989237, at \*5 (D. Kan. Oct. 19, 2006) (“[T]he use of prior delinquency convictions to enhance adult sentences has a long lineage.” (quoting Feld, *The Constitutional Tension Between Apprendi and McKeiver*, *supra* note 141, at 1184)); *In re Jonathon C.B.*, 958 N.E.2d 227, 269 (Ill. 2011) (citing and quoting Feld, *The Constitutional Tension Between Apprendi and McKeiver*, *supra* note 141, at 1154, at length for questioning whether “*McKeiver's* factual predicate—that the sanctions that juvenile courts impose are not ‘punishment’—has been superseded by the new reality of juvenile justice . . . that changes in States’ juvenile codes have fostered a substantive, punitive convergence with criminal courts.”); *State v. Bruegger*, 773 N.W.2d 862, 870–71 n.1 (Iowa 2009); *State v. McFee*, 721 N.W.2d 607, 612 (Minn. 2006) (citing Feld, *The Constitutional Tension Between Apprendi and McKeiver*, *supra* note 141, at 1140–42, in “noting that similarities between criminal prosecutions and juvenile adjudications is what led Supreme Court to create procedural protections in *Winship* and *Gault*.”); *State v. Brown*, 879 So. 2d 1276, 1282 (La. 2004) (citing Feld, *The Constitutional Tension Between Apprendi and McKeiver*, *supra* note 141, at 1112, in discussing the *Apprendi* Court’s reasoning); *State v. Hand*, No. 25840, 2014 WL 4384121, at \*2 (Ohio Ct. App. Sept. 5, 2014); *People v. Nguyen*, 54 Cal. Rptr. 3d 535, 547 n.7 (Cal. Ct. App. 2007); *People v. Mazzoni*, 165 P.3d 719, 722 (Colo. Ct. App. 2006) (“[T]he use of prior delinquency convictions to enhance adult

*McKeiver* found non-jury delinquency conviction constitutionally adequate to impose rehabilitative dispositions,<sup>163</sup> those convictions clearly would *not* be adequate to inflict a punitive sentence in the first instance.

The denial of a jury adversely affects rules of evidence, timing of suppression hearings, and appointment of counsel, and raises questions about the reliability of convictions.<sup>164</sup> In addition to direct penalties—institutional confinement and enhanced sentences as juveniles or as adults—extensive collateral consequences follow from delinquency convictions. Although state policies vary, delinquency convictions may follow youths for decades and affect future housing, education, and employment opportunities.<sup>165</sup> Upon arrest, states may enter juveniles' fingerprints, photographs, and DNA into databases accessible to law enforcement and other agencies.<sup>166</sup> Some states' get tough reforms opened delinquency trials and juvenile records to the public. Media access to court proceedings, information available to the public, and print or televised reports on the Internet can create a permanent and easily accessible record of a youth's delinquency. Even if not released to the public, criminal justice agencies, schools, childcare providers, the military, and others may have access to juvenile court records automatically or by petition to the court.<sup>167</sup> Delinquency convictions may affect youths' ability to obtain professional licensure, to receive government aid, to join the military, to obtain or keep legal immigration status, or to live in public housing.<sup>168</sup> Youths applying to college must acknowledge arrests, suspensions, or expulsion, which may adversely affect their admission, and delinquency adjudications may make them ineligible for scholarships or federal grants.<sup>169</sup> Juveniles convicted as adults suffer all the disabilities imposed on criminals; those found guilty of a felony may lose the right to serve on a jury or to vote even before they are eligible to register.<sup>170</sup> The response to juvenile sex offenders is among the most onerous collateral consequences of delinquency adjudication.<sup>171</sup> In *An American Travesty*, Franklin Zimring argues that despite developmental differences between juveniles and adults, states' sex offender laws assume that "adolescent and adult sexual behavior should be judged by the same standards of

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sentences has a long lineage." (quoting Feld, *The Constitutional Tension Between Apprendi and McKeiver*, *supra* note 141, at 1184)).

<sup>163</sup> See generally *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

<sup>164</sup> See generally Feld, *Criminalizing Juvenile Justice*, *supra* note 1, at 229–43.

<sup>165</sup> See NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 133, at 3; ASHLEY NELLIS, *A RETURN TO JUSTICE* 61–63 (2016).

<sup>166</sup> FELD, *JUVENILE JUSTICE ADMINISTRATION*, *supra* note 53, at 369–76.

<sup>167</sup> NELLIS, *supra* note 165, at 63–65; James B. Jacobs, *Juvenile Criminal Record Confidentiality*, in *CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE* 149, 149–68 (Franklin E. Zimring & David S. Tanenhaus eds., 2014).

<sup>168</sup> NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 133, at 127; NELLIS, *supra* note 165, at 61–62.

<sup>169</sup> See NELLIS, *supra* note 165, at 62, 65–67.

<sup>170</sup> See *id.* at 61.

<sup>171</sup> See *id.* at 69–71.

culpability, clinical significance, and indications of future danger to the community.”<sup>172</sup> Applying laws created to punish adults who sexually exploit children to adolescents engaged in consensual underage sex, is an instance of “the felonization of adolescent sex [] based on an invalid analogy with adult behavior.”<sup>173</sup>

More recently, while writing about students’ Fourth Amendment search and seizure rights, I realized that the same punitive changes in juvenile justice policies occurred in schools and fuel the school-to-prison pipeline.<sup>174</sup> Again, the Court used a different and lower standard to govern juveniles’ right to be free from unreasonable searches and seizures than it uses for adults. *T.L.O. v. New Jersey* authorized school officials to search students under a lower Fourth Amendment standard than that required to search adults—i.e., reasonable suspicion rather than probable cause.<sup>175</sup> As a result, evidence that would be inadmissible against an adult in a criminal proceeding can be used to convict delinquents under the lower standard. Second, the presence of police in schools—School Resource Officers (“SROs”)—has increased greatly and they search students under the lower Fourth Amendment standard even when engaged in law enforcement activities.<sup>176</sup> Schools rely increasingly on technology, metal detectors, and drug-canines, and heightened surveillance, which increase the likelihood of finding wrongdoing.<sup>177</sup> Third, schools adopted zero-tolerance policies for student deviance with punitive and exclusionary consequences. In the wake of school shootings in the 1990s, Congress passed the Gun-Free Schools Act of 1994 and school officials adopted broader zero-tolerance policies toward criminal and school misconduct.<sup>178</sup> Finally, high-stakes testing regimes give schools financial incentives to rid themselves of under-performing students. This confluence of laws and policies has fueled the school-to-prison pipeline with a disparate impact on urban minority youths, which reinforces disproportionate minority confinement in the juvenile justice system.

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<sup>172</sup> FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY 14 (2004).

<sup>173</sup> *Id.* at 125.

<sup>174</sup> See generally Barry C. Feld, *T.L.O. and Redding’s Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 MISS. L.J. 847 (2011) [hereinafter Feld, *Few Rights and Fewer Remedies*], cited in *State v. Lindsey*, 881 N.W.2d 411, 428 (Iowa 2016), *In re T.A.S.*, 713 S.E.2d 211, 223 n.9 (N.C. Ct. App. 2011).

<sup>175</sup> See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); Feld, *Few Rights and Fewer Remedies*, *supra* note 174, at 857–62.

<sup>176</sup> See Feld, *Few Rights and Fewer Remedies*, *supra* note 174, at 884–85.

<sup>177</sup> *Id.* at 884–85, 885 n.187.

<sup>178</sup> See Gun-Free Schools Act of 1994, Pub. L. No. 89-10, §§ 8921–23, 108 Stat. 3907.

## CONCLUSION

This is an opportune time to adopt more rational and humane juvenile justice policies.<sup>179</sup> The dramatic drop in juvenile crime since the 1990s reduces its political salience. Continuing public support for delinquency prevention and treatment belies politicians' emphases on get tough policies. Advances in developmental psychology and neuroscience heighten the understanding of children's behavior and increase prospects to change it. The proliferation of sophisticated youth advocacy groups creates pressures on courts and legislatures to implement evidence-based and best-practices guidelines. Finally, states' fiscal constraints make get tough policies a costly luxury.

Despite these opportunities, I am dubious that real reforms will occur. During the Get Tough Era, political leaders and policy makers forgot that delinquents are children and differ from adults in competence and culpability. Juveniles are substantially less competent than adults to exercise or waive legal rights. States continue to use the adult waiver standards with which to measure juveniles and posit a functional equality that severely disadvantages most youths. These policies are especially problematic in a juvenile system that has become increasingly legalistic, complex, and punitive. The denial of a jury trial and collateral consequences of delinquency convictions compound those inequities.

Over the past few decades, states have transferred more and younger juveniles to criminal court for prosecution as adults. Get tough politicians' sound bites—"adult crime, adult time" or "old enough to do the crime, old enough to do the time"—characterize youths as criminally responsible and advance policies that fail to recognize youthfulness as a mitigating factor in sentencing. The Court in *Roper*, *Graham*, and *Miller* finally called a halt to states' most draconian excesses. It acknowledged that adolescents differ in qualities of judgment, self-control, appreciation of consequences, and preferences for risks that diminish their responsibility and reduce their culpability. But states' judicial and legislative responses to these decisions evince little concession to the mitigating qualities of youth—e.g. a forty-year mandatory minimum term before eligibility for parole consideration and life without parole.

The cumulative consequence of punitive policies inflicts the most severe adult sentences on black youths and disproportionately confines children of color in the juvenile justice system. For more than a century, juvenile courts have discriminated between "our children" and "other people's children." Progressive reformers had to choose between initiating social structural reforms to alter conditions that contribute to criminality—poverty, inequality, and discrimination—or to apply band-aids to children damaged by those adverse circumstances. Social class and ethnic antagonisms caused them to avoid broad structural changes

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<sup>179</sup> See Donna M. Bishop & Barry C. Feld, *Trends in Juvenile Justice Policy and Practice*, in *THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE* 898, 921 (Barry C. Feld & Donna M. Bishop eds., 2012).

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and instead to “save children.” A century later, we face the same policy choices and continue to evade our responsibilities to “other people’s children.”

The prevalence of violent crime in certain urban areas is a reflection of power, politics, and social inequality. Concentrated poverty and racial isolation are the cumulative consequences of public policies that amplify crime and violence within inner-city minority communities—segregated areas of concentrated poverty. As long as the public and politicians identify long-term poverty and its associated problems—unemployment, drug abuse, criminality, and illegitimacy—as a condition of Blacks that is separate from the American mainstream, then policy makers can evade the government’s responsibility to address them. The political and public association of urban black males with crime has fostered punitive incarceration policies rather than efforts to expand employment and educational opportunities to prevent crime.

Although public policies and political economy contribute both to racial inequality and the skewed distribution of crime, politicians manipulate and exploit racially tinged perceptions of young offenders for electoral advantage. The transformation of the juvenile court into an explicitly punitive agency to control “other people’s children” is an instance of politicians’ exploiting the connection between race and youth crime. Politicians and the public view juvenile courts’ clients as young criminals of color and refuse to commit resources necessary to improve their life conditions or to create a juvenile system that provides real justice.

The primary virtue of the juvenile court today is that it is not a criminal court. Although Progressive reformers proffered rehabilitation as the primary justification for a separate juvenile court, diversion from the criminal process provided a second rationale at its inception and the court’s diversionary function still prevails.<sup>180</sup> Regardless of juvenile courts’ inability to rehabilitate children, simply deflecting youths from the criminal justice system avoids its more destructive consequences and shields them from life-altering punishment and collateral consequences.

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<sup>180</sup> See Zimring, *The Common Thread*, *supra* note 12, at 2487.

