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Virginia Renews Its Faith in Second Chances

by The Honorable Jerrauld C. Jones and Prof. Julie E. McConnell

On January 1, 1995, in the early morning hours, 17-year-old A.M. committed a crime in Virginia that would change his life forever. Tragically, he and two co-defendants took a man's life. He will live the rest of his life regretting that day and working to become a better person.

Something else significant happened on January 1, 1995—Virginia's legislation to abolish discretionary parole went into effect. (*See* Va. Code § 53.1-165.1.) If he had committed the crime one day earlier, A.M. would have been eligible for parole years ago. Under the new law, however, any person sentenced to a term of incarceration for a felony offense committed on or after that date would not be parole eligible. This was only the beginning of Virginia's get tough on crime era. In A.M.'s case, it meant that he received a mandatory death-in-prison sentence.

Juvenile Legal System Conformed to Adult Legal System

In response to a perceived rise in youth crime rates across the country and inflammatory public rhetoric about juvenile offenders, Virginia's elected officials next moved to conform Virginia's juvenile legal system to the adult criminal legal system. The General Assembly commissioned three studies focused on the

philosophy and procedures for youth. First, Governor George Allen created a Governor's Commission on Juvenile Justice Reform, whose final report favored opening juvenile trials and records to the public and easing procedures for the transfer of juveniles to adult courts. (*Governor's Commission on Juvenile Justice Reform, Final Report* (Dec. 20, 1995).) A second group, the Virginia Commission on Youth, established a Juvenile Justice System Task Force. (*Report of the Virginia Commission on Youth on the Study of Juvenile Justice System Reform*, H. Doc. No. 37, Va. Gen. Assembly (1996).) This study and

was the controlling version of the legislation as it was the last passed and signed.

To accomplish the apparent goal of trying more children as adults, the Virginia legislature removed more and more discretion from juvenile court judges and put it in the hands of prosecutors. The Code allowed prosecutors to more easily try youth in circuit court rather than juvenile court, based on the child's age and the gravity of the charged offense. The new legislation significantly reduced judicial discretion over the transfer decision by mandating transfer for the most serious crimes and

Sensationalized media reports stoked public outrage over juvenile "superpredators," even though crime in this cohort had actually decreased.

its recommendations focused more on prevention and early intervention than on court procedures and open trials. The third study, conducted by the Joint Legislative Audit and Review Commission (JLARC), resulted in a report that intended to provide an accurate picture of the operation of the juvenile justice system in the Commonwealth. (*Report of the Joint Legislative Audit and Review Commission, Juvenile Delinquents and Status Offenders: Court Processing and Outcomes*, S. Doc. No. 14, Va. Gen. Assembly (1996).)

General Assembly Bills Refocus System on Accountability. The Governor's Commission and the Commission on Youth Studies reached different conclusions and made generally conflicting recommendations, with the impartial JLARC study essentially supporting the conclusions of the Commission on Youth. As a result, legislators introduced two sets of bills in each house of the General Assembly in 1996. Shortly before considering the recommendations, a compromise resulted in two bills, enacted effective July 1, 1996, that sought to refocus the juvenile justice system on accountability and longer sentences for youthful offenders, making it easier to try young people as adults. (*See* Act of Apr. 6, 1996, ch. 755, 1996 Va. Acts 1315; Act of Apr. 17, 1996, ch. 914, 1996 Va. Acts 2209.) Chapter 914

increasing prosecutorial authority to try youths as adults in a wide range of other felonies without judicial review. (*See* Andrew Block & Kate Duvall, <https://DontThrowAwayTheKey.wordpress.com/2009/11/17/Dont-Throw-Away-the-Key-Reevaluating-Adult-Time-for-Youth-Crime-in-Virginia>.) The legislature also reduced the age at which children could be treated as adults from 15 to 14, enacted zero tolerance in schools, such that children were routinely expelled for minor delinquent offenses, and created open hearings for certain offenses. Devastatingly, the General Assembly also mandated that any felony adjudication, whether in juvenile court or adult court, would become a permanent part of the record of any child 14 or older.

Serious Juvenile Offender Statute Mandates Judicial Reviews of Sentences. In addition to streamlining the process for trying more and younger youths as adults, the General Assembly also passed the Serious Juvenile Offender Statute, which provides both juvenile and circuit court judges the authority to sentence juvenile offenders to determinate sentences up to the age of 21. (*See* Va. Code § § 16.1-272, -285.1, -285.2.) The law also allows circuit court judges to sentence these young peo-

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ple to serve an adult sentence after the juvenile sentence. This type of sentence is referred to as a blended sentence. Significantly, the law also mandates judicial reviews of these sentences on the second anniversary of the sentence and every year thereafter until the youth turns 21. (Va. Code § 16.1-269.1(A)(B)&(C).) This provision is one of the few bright spots in the Code section. It serves as an incentive for young people to make the most of their time in a juvenile correctional center in the hope that the court will suspend their adult Department of Corrections sentence. Under the Serious Offender Review statute, the court has the discretion to suspend the rest of the sentence if

can kill, rape, maim without giving it a second thought.” (See Carroll Bogart & Lynnell Hancock, *Superpredators: The Media Myth That Demonized a Generation of Black Youth*, The Marshall Project (Nov. 20, 2020).) DiIulio warned that “by the year 2000, an additional 30,000 young ‘murderers, rapists, and muggers’ would be roaming America’s streets, sowing mayhem.” (John DiIulio, *The Coming of the Super-Predators*, Weekly Standard (Nov. 27, 1995).) Shockingly, he blamed the criminal conduct of this small slice of the juvenile cohort on moral poverty, which is “the poverty of being without loving, capable, responsible adults who teach you right from wrong.” (*Id.*)

Despite the sensationalized theory of rampant juvenile criminals that overwhelmed the media in the 1990s and led

If the Court had convicted A.M. in 1996, he could have been sentenced as a serious offender and sent to a juvenile facility until he turned 21. He then could have been sent to the Department of Corrections for any additional time the court felt was appropriate. And if he had done well during his incarceration in the juvenile correctional center, the court could have suspended all or part of his adult department of corrections sentence.

Parole Rarely Granted

In recognition of how misguided the punitive and unforgiving nature of the juvenile legal system has become, in 2020, 24 years after the “superpredator” hysteria fueled a rejection of the notion that children are capable of rehabilitation, the Virginia General Assembly agreed that offenders such as A.M. who have used their time in prison to rehabilitate themselves should be given a second chance and allowed to return to society. The bill does not automatically grant parole; it simply creates the opportunity for people charged for crimes they committed when under 18, and who have served more than 20 consecutive years in prison, to seek parole. Parole provides the opportunity to recognize that these men and women are more than the worst thing they ever did and help them re-enter society, rebuild their communities, and reconnect with their loved ones. But parole is still rare in Virginia. Between January and October of 2020, the Parole Board granted parole 5% of the time, according to a Capital News Service analysis of Parole Board decisions. Over the past six years, the Board granted parole in only about 6% of the more than 17,000 cases it considered. The percentage of parole requests approved jumped from around 3% in 2014-2016 to 13.5% in 2017. (*Virginia Denies Vast Majority of Parole Requests*, Data Shows, Virginia Capital News Service, Dec. 18, 2019, <https://Patch.com/virginia/richmond/Virginia-Denies-Vast-Majority-Parole-Requests-Data-Shows>.)

Unfortunately for young people like A.M. and many others sentenced in the “superpredator” era, it is not automatic that the court sends a juvenile to a correctional center first. In most of the cases that fall under the new parole bill, the court sentenced the young person directly to adult prison, many when they were

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The Virginia legislature reduced judicial discretion by mandating transfer for the most serious crimes and increasing prosecutorial authority to try youths as adults.

the young person has been rehabilitated. (See Va. Code § § 16.1-285.2.)

The 1995 and 1996 Code revisions altered the Commonwealth’s traditional adherence to the model of giving the juvenile court exclusive jurisdiction over offenders who are minors and permitting transfer to an adult court pursuant to judicial discretion through a defined legislative framework. Regardless of the jurisdictional or procedural approach, the decision to treat a juvenile offender as an adult is a “critically important question” of the utmost gravity. (*Kent v. United States*, 383 U.S. 541, 553 (1966) (the first case involving the juvenile court decided by the Supreme Court of the United States).) This high level of concern must govern every aspect of the defense, prosecution, and adjudication of a juvenile offender case.

The “Superpredator” Era

In 1995, Virginia and much of the rest of the country adopted the theory espoused by Princeton University professor and political scientist John DiIulio, in a November 1995 Weekly Standard cover story, that society was facing a wave of “superpredators,” which he defined as “young juvenile criminal[s] who [are] so impulsive, so remorseless that [they

to the over policing of children, juvenile crime had actually decreased by the end of the decade. Media outlets began running stories recognizing that the “superpredators” failed to appear in the late 1990s. Even the creator of the superpredator rhetoric admitted that the theory was wrong. Though the superpredator theory turned out to be a myth (and a racist trope), the term was tragically successful in establishing harsher juvenile laws and producing unintended consequences for many youths, particularly those of color. (See www.TheMarshallProject.org/2020/11/20/Superpredator-the-Media-Myth-That-Demonized-a-Generation-of-Black-Youth.) As of 2001, “one of every three black boys born in that year could expect to go to prison in his lifetime, as could one of every six Latinos—compared to one of every 17 White boys.” (The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, Apr. 19, 2018, citing to Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 supp. 3 The Prison J. 87S, 88S (Sept. 2011).)

Arrested and sentenced during the height of this “superpredator” paranoia, A.M. was committed directly to the Virginia Department of Corrections for a crime he committed when he was only 17.

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only 14-, 15-, or 16-years-old. The individuals currently coming up for parole under the juvenile parole legislation were sentenced between 1995 and 2001, at the apex of the “superpredator” era.

Miller Court’s Recognition of Juveniles’ Constitutional Difference for Purposes of Sentencing

A.M. is not the same person today as he was at 17. What was once his vulnerability—susceptibility to peer pressure and toxic environmental circumstances—is now his strength and purpose in life. At the time of his admittedly serious crimes, A.M.’s traumatic childhood heavily influenced his behavior. He was highly susceptible to peer pressure; his violent surroundings deeply impacted him.

Today, A.M. is a fully rehabilitated, contributing member of society who

4. Adolescents are less able than adults to assist in their defense and properly evaluate plea options; and
5. Because the adolescent brain is yet to fully form, adolescents have tremendous potential for rehabilitation. (*Miller*, 570 U.S. at 470-78.)

A.M. had an almost perfect prison record. He did exactly what the *Miller* Court predicted would often be the case; he grew out of his criminogenic mindset and embraced pro-social values, enabling him to become a rehabilitated and productive adult. Even though he had no reason to believe he would ever see the outside of his prison walls, he worked on becoming a better person. He taught himself another language, became a religious leader, found love, helped teach re-entry skills to those incarcerated with him, developed a sense of remorse, and nurtured his familial relationships. In recognition of this incredible progress, the

cause hearing. If the court finds probable cause, the juvenile court must then review a transfer report prepared by the Court Service Unit, pursuant to Va. Code § 16.1-269.2, and hold a transfer hearing, pursuant to Va. Code § 16.1-269.1, to determine whether to keep the case in the juvenile court or send it to the circuit court for trial as an adult.

As part of their re-examination of Virginia’s criminal legal system, the legislature clarified the following:

1. Mental health and intellectual disability evidence are admissible during the guilt phase of a trial when it is relevant to intent (Va. Code §. 19.2-271.6);
2. Plea agreements will not limit post-conviction review through the Serious Offender process (Va. Code § 16.1-285.2(E)); and
3. Judges have the discretion to suspend mandatory time when a child is being tried in circuit court. (Va. Code § 16.1-272(A) (3).)

Before these changes, children being tried as adults were subject to the same mandatory minimums as adults. The legislature also enacted several measures that essentially require the court and the prosecutor to consider mitigating circumstances, such as the child’s emotional development, trauma history, involvement with the foster care system, disability, or mental illness, before determining whether the child will be tried as an adult. (*See, e.g.*, Va. Code § 16.1-272.) 16- and 17-year-olds charged with aggravated malicious wounding or murder still fall under the mandatory process for trial as an adult once the juvenile court makes a finding of probable cause, but if a 16- or 17-year-old is charged with most of the other violent or significant felonies, the Commonwealth can only move to try them as adults after reviewing a CSU report about the child’s history and a risk assessment. If the Commonwealth still intends to try the young person as an adult, it must provide written notice and the court must find probable cause before the case can be certified to circuit court. (*See* Va. Code § 16.1-269.1(C)&(D) and § 16.1-269.2(B).)

Judges Have Discretion. Significantly, judges, rather than prosecutors now have discretion over whether 14- and 15-year-olds charged with violent and serious felonies will be tried as adults.

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Though the superpredator theory turned out to be a myth (and a racist trope), the term was tragically successful in establishing harsher juvenile laws and producing unintended consequences for many youths, particularly those of color.

exemplifies the U.S. Supreme Court’s rationale in *Miller v. Alabama*. In *Miller*, the Supreme Court held that mandatory life sentences without parole for juveniles violate the Eighth Amendment’s prohibition on “cruel and unusual punishments.” (*Miller v. Alabama*, 567 U.S. 460, 471 (2012).) Specifically, the Court held that juveniles’ culpability in criminal matters differs from adults and that juveniles “are constitutionally different from adults for the purposes of sentencing.” (*Id.*) The *Miller* Court recognized five factors that make juveniles, even those that commit serious and violent offenses, less culpable and more capable of change than adults:

1. Adolescent brains are not fully mature in regions related to impulse control, planning ahead, and risk avoidance;
2. Adolescents cannot extricate themselves from negative family or social environments and are more vulnerable than adults to negative influences such as abuse and neglect;
3. Adolescent brains have enhanced susceptibility to peer pressure;

Parole Board granted A.M. parole. He is one of only a handful of juvenile offenders the Parole Board has granted parole since the legislation went into effect on July 1, 2020. (Va. Code § 53.1-165.1(B).)

A New Era

Additionally, in the 2020 and 2021 General Assembly sessions, the legislature began to look at other ways to address some of the damage done in the “superpredator” era. The legislature re-examined those policies that streamlined the trial of children as adults and returned discretion to juvenile court judges for 14- and 15-year-old offenders. (*See* Va. Code §16.1-269.1(A) (B)&(C).) Under Va. Code § 16.1-269.1, 14- and 15-year-olds are no longer automatically certified as adults for murder or aggravated malicious wounding once the Juvenile and Domestic Relations Court has made a finding of probable cause. If the prosecutor provides written notice of her intent to try a 14- or 15-year-old child as an adult, the court must first hold a probable

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(See Va. Code § 16.1-269.1(A)&(B).) If the Commonwealth's Attorney provides written notice of her desire to transfer the case to the circuit court for trial of the defendant as an adult, the juvenile court judge must first find probable cause, then review a transfer report, and finally, decide whether to transfer the case to the circuit court or retain jurisdiction in the juvenile court. If the juvenile court judge decides to retain the case, the defendant is entitled to request that the case be transferred to another juvenile court judge for trial. If the juvenile court finds probable cause and certifies the case for trial in the circuit court, such certification divests the juvenile court of jurisdiction as to the charge and any ancillary charges. (See Va. Code § 16.1-269.1(D).)

Changes in Sentencing. Several other important changes have transformed the landscape regarding the sentencing of youth. Circuit courts are now required, at sentencing, to consider the evidence regarding the child's exposure to adverse childhood experiences (ACEs),¹ early childhood trauma, experience with any child welfare agency, and the differences between youthful and adult offenders.

1. The original ACE Study was conducted at Kaiser Permanente from 1995 to 1997 with two waves of data collection. Over 17,000 Health Maintenance Organization members from Southern California receiving physical exams completed confidential surveys regarding their childhood experiences and current health status and behaviors. These seven experiences, which the researchers subsequently expanded to a list of 10, occurred in the homes of children across the country. Researchers found a graded relationship between how many ACEs an individual experienced in childhood and subsequent negative health outcomes in adulthood; meaning, the more ACEs a child experienced, the more physical health problems they had as adults. ACEs include: physical abuse, mental illness in the home, emotional abuse, emotional neglect, sexual abuse, family or domestic violence, substance abuse in the home, separation from a parent, or having a household member be incarcerated. Subsequent research has found ACEs are associated with a variety of negative outcomes, including poor physical and mental health, victimization, and justice system involvement. Additionally, researchers have identified other childhood experiences that should be considered ACEs as they are also highly correlated with negative outcomes in adulthood, such as the following: peer bullying/violence, poverty, experiencing racism, experiencing/witnessing community violence, experiencing parental or sibling incarceration, and foster care involvement.

(See, e.g., Va. Code § 16.1-272.) Circuit courts are no longer required to impose mandatory minimum sentences on youth being tried as adults. (*Id.*) Evidence of a defendant's "mental condition at the time of the alleged offense, including expert testimony, is now deemed relevant, is not evidence concerning an ultimate issue of fact, and shall be admitted if such evidence (i) tends to show the defendant did not have the intent required for the offense charged and (ii) is otherwise admissible pursuant to the general rules of evidence." (See Va. Code § 19.2-271.6.) The defendant must show that the condition existed at the time of the offense and that it satisfies the diagnostic criteria for:

- (i) A mental illness;
- (ii) A developmental disability or intellectual disability; or

Over the past six years, the Board granted parole in only about 6% of the more than 17,000 cases it considered. The percentage of parole requests approved jumped from around 3% in 2014-2016 to 13.5% in 2017.

- (iii) Autism spectrum disorder as defined in the most recent edition of the *Diagnostic and Statistical Manual of Mental Disorders* of the American Psychiatric Association. (*Id.*)

Further, defense counsel may request expert assistance through an ex parte hearing, if the court deems it appropriate to hold the hearing in this fashion. (See Va. Code § 19.2-266.4. See also Va. Supreme Court Rule 2:702(a)(ii).) An attorney will only be allowed to proceed ex parte if the court is satisfied that confidentiality is necessary. A risk that trial strategy may be disclosed unless the hearing is ex parte shall be sufficient grounds to establish a need for confidentiality.

Changes Increase Successful Reintegration Into Society. The legislature went further and eliminated a presumption against bail that had traditionally been applied to violent offenses (Va. Code § 19.2-120, -124) and created degrees of the offense of robbery so that a child who forcefully grabs another child's bike will not be treated the same as a child who uses a gun to take that same bike. (Va. Code § 19.2-58.) A bill also passed that

requires parents to be notified when a child will be interrogated. (Va. Code § 16.1-247.1.) Additionally, the General Assembly finally supported discovery reform. (See Va. Supreme Court Rule 3A:11.) Defendants in Virginia will now receive police reports and witness lists. In further recognition of the ineffectiveness and inequity of lengthy sentences and the damage caused by permanent criminal records, the legislature is creating a system for the expungement of certain offenses after the punishment has been served, started the process of legalizing marijuana possession for adults (and reformed the penalties for children), streamlined the restoration of voting rights, and has expanded good time opportunities. Many of these changes will increase the opportunity for offenders to successfully re-enter society as productive citizens who can participate in

democracy and find better employment opportunities.

The Role of Zealous Representation

In this new era of recognition of the differences between youth and adults, attorneys must be prepared to present evidence of the impact trauma and mental health can have on adolescent brain development and behavior. Additionally, advocates must understand what recent decisions of the United States Supreme Court have recognized—an evolving understanding of the perception that children are different in significant ways from adults. Three of these decisions highlight the justifications for treating juvenile defendants, including those tried as adults, differently from adult defendants. These decisions also condemn the practice of automatically subjecting juvenile defendants to the most severe adult punishments. (See **Graham v. Florida**, 560 U.S. 48, 74 (2010) (holding that life sentences for non-homicide offenses are unconstitutionally harsh for

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juveniles); **Miller v. Alabama**, 567 U.S. 460, 473 (2012) (holding that mandatory life sentences are unconstitutionally harsh for juveniles); **Montgomery v. Louisiana**, 136 S. Ct. 718 (2016) (holding that **Miller** rule must be applied retroactively.) In a fourth case, the Court held that an interrogating officer must take the suspect's age into account when determining whether or not a reasonable person would believe that he or she was in custody, thus triggering the requirement for **Miranda** warnings. (See **J.D.B. v. North Carolina**, 564 U.S. 261, 272-77 (2011) (holding that age must be considered in determining whether a child would have understood whether he was free to leave during interrogation without **Miranda** warnings).)

these decisions is uncertain, it is clear the Supreme Court has recognized that children are developmentally different from adults in ways that should influence their treatment in court and by the police. Essentially, a sentencing hearing for a juvenile facing a possible lengthy sentence should involve a robust presentation of evidence regarding the attributes of youth and the individual child's trauma history.

Mitigating Factors of Youth Must be Taken Into Account When Determining Punishment. In issuing these recent decisions, the Court relied on earlier decisions emphasizing the unique qualities of youth defendants. (See **Eddings v. Oklahoma**, 455 U.S. 104, 115-16 (1982) (recognizing that "youth is more than a chronological fact," and minors "generally are less mature and responsible

is reduced because the characteristics of adolescents—"their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment." (**Miller**, 567 U.S. at 472.)

The Court originally held in **Miller** and later in **Montgomery** that unless a juvenile offender is proven to be permanently incorrigible, that offender cannot be sentenced to life without parole. (**Montgomery**, 136 S. Ct. at 734 ("Miller did bar life without parole...for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.")) In assessing permanent incorrigibility, the courts were to consider factors including the juvenile's "immaturity, impetuosity, and failure to appreciate risks and consequences[;] the family and home environment that surrounds him[;] the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him[;] the ability of the young defendant to participate in his defense or negotiate with prosecutors; and "the possibility of rehabilitation." (**Miller**, 567 U.S. at 477-78.)

Recently, however, in **Jones v. Mississippi**, 593 U.S. (2021), the Court concluded that **Montgomery** and **Miller** do not require a finding a child is incapable of rehabilitation before a life sentence can be imposed. Justice Sotomayor dissented, in an often sharply worded opinion that was joined by Justices Stephen Breyer and Elena Kagan. She accused the majority of "distort[ing] **Miller** and **Montgomery** beyond recognition. The dissenters argued that **Montgomery** and **Miller** did impose a finding of incorrigibility and require a vigorous interrogation of a defendant's potential "to separate those juveniles who may be sentenced to life without parole from those who may not." (**Jones v. Mississippi**, 593 U.S. (2021).)

The Supreme Court did affirm precedent requiring sentencing judges to consider youth and its attendant mitigating factors before sentencing a child to life without parole. Therefore, **Miller** and **Montgomery** still require a sentencing court to consider at a minimum, the five factors mentioned above known as the **Miller** factors, that make juveniles, even juveniles that commit serious offenses, less culpable than adults.

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When punishment fails to account for the mitigating factors associated with youth, the punishment is disproportionately punitive and may violate the Eighth Amendment.

Juveniles Have Diminished Culpability and Greater Prospects for Reform. What these four decisions share is a clear recognition that children are different from adults in a range of ways and we must not overlook those differences. The Eighth Amendment decisions have much in common and have generally found that "juveniles have diminished culpability and greater prospects for reform." (**Miller**, 567 U.S. at 471.) "[I]n imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult." (*Id.* at 477.) "[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." (**Graham**, 560 U.S. at 68.) Relying on both the obvious fact that children behave differently than adults and research that confirms the role of brain development, the Court has mandated that courts consider the primary attributes that distinguish juvenile offenders from adults. (**Miller**, 567 U.S. at 471-72.)

These decisions of the Court, and decisions from across the country that have followed, provide new tools for creative and effective advocacy on behalf of child clients. While the long-term impact of

than adults"); **Bellotti v. Baird**, 443 U.S. 622, 635 (1979) (plurality opinion) ("[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."); **Gallegos v. Colorado**, 370 U.S. 49, 54 (1962) (noting that a juvenile "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions"); **Haley v. Ohio**, 332 U.S. 596, 599 (1948) (plurality opinion) ("That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.") Thus, when punishment fails to account for these universally mitigating factors of youth, the punishment is disproportionately punitive and may violate the Eighth Amendment. (See **Miller**, 567 U.S. at 470; **Graham**, 560 U.S. at 72-73.) As a result of these fundamental differences, the Court has held that the traditional penological justifications for punishment do not apply with equal force to juvenile defendants. (**Graham**, 560 U.S. at 71.) First, "the case for retribution is not as strong with a minor as with an adult." (*Id.*) Similarly, the value of deterrence

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The **Jones** ruling diverges from the Court's jurisprudence over the past decade, which meaningfully strengthened constitutional protections for children facing life without parole, rooted in the recognition that children are developmentally different from adults and uniquely capable of positive change. The decision in **Jones** is out-of-step with the actions of state legislatures rapidly abandoning death in prison as a sentencing option for children. Ten years ago, only five states banned life without parole for children. Today, at least 31 states ban life without parole for children or have no one serving the sentence, and that number continues to grow, with more states considering

similar legislation. This practice should be banned across the country. Additionally, states should consider whether children truly have the capacity to understand their rights during police encounters and interrogation. Perhaps it is time to ban consent as a basis for either a search or an interrogation.

We must reimagine the vast footprint of the juvenile legal system. We are far too focused on supporting punishment and accountability than on the essential qualities of a healthy family, such as comprehensive prenatal care, affordable housing, excellent educational opportunities, trauma-informed evidence-based prevention/early intervention programs, alternatives to suspension and expulsion, accessible after-school and summer activities, access to high-quality daycare and healthcare, and mental health care. Involvement in the juvenile legal system only exacerbates the inequities and extreme challenges so many families face.

The historical structures of racism are embedded in our courts, schools, and communities. We must recognize and remediate the history of race in juvenile courts and policing. The lived experiences of youth of color demonstrate that racism and bias are baked into the foundations of the juvenile legal system, with devastating consequences for young people. The historical structures of marginalization and poverty are also embedded into our courts, schools, and communities. This reality is a significant contributor to why society so uncritically embraced the "superpredator" theory. We need to change the lens we use to examine the behavior of court-involved youth to endeavor to reach the root causes of delinquent and criminal behavior. And once we understand the root causes, the court, our communities, and our schools need the resources to respond with evidence-based interventions and preventive solutions. In every case of a young person who committed a serious crime, there were always warning signs and missed opportunities. Virginia has made significant progress in the last two years, but we have so much more work to do. We must remain ever vigilant, especially when it comes to our children. They deserve nothing less. ■

system until we recognize that many offenses that are referred to court should never have been referred in the first place. There are excellent examples of diversionary programs, such as restorative justice, that keep cases out of court entirely. Every school could benefit from diversionary programs in school that address conflict without sending it to court, where it is rarely resolved in a way that reaches the root causes of the situation. Additionally, as many other countries have done, we should provide counsel for any child facing interrogations, ban law enforcement from lying to children during interrogations, and require the recording of any interrogation.² On July 15, 2021, in recognition of the susceptibility of children to falsely confess,³ Illinois became the first state to ban the practice of lying to

Ten years ago, only five states banned LWOP for children. Today, at least 31 states have a ban or have no one serving the sentence, and that number continues to grow, with more states considering similar legislation this year.

similar legislation this year. (<https://CFSY.org/States-That-Ban-Life-Without-Parole-LWOP-Sentences-for-Children>.) Indeed, Maryland and Ohio just recently banned life without parole for children.

Jones will undoubtedly result in uneven and arbitrary impositions of life without parole on children, based more on geography and the race of the defendant than their culpability and capacity for change. This decision from the Court further highlights the need for state legislatures and Congress to pass legislation to ban life without parole and other extreme sentences for children. Virginia is at the forefront of this new era. Codifying the requirement that courts consider the attributes of youth in every matter before the court will help guarantee that children are treated more equitably in court.

Recognition and Remediation of Bias in Juvenile Legal System

There is still much work to do. We will never truly reform the juvenile legal

children during interrogation. (<https://InnocenceProject.org/Illinois-First-State-to-Ban-Police-Lying>; see also www.NYULawReview.org/issues/volume-92-number-5/The-Right-to-Remain-a-Child-the-Impermissibility-of-the-Reid-Technique-in-Juvenile-Interrogations.) Oregon and New York are considering

² S.E. Rap & D. Zlotnik, *The Right to Legal and Other Appropriate Assistance for Child Suspects and Accused*, 26 Eur. J. Crime, Crim. L. & Crim. Just. 110, 120 (2018) (citing ECtHR, *Salduz v. Turkey*, par. 55, 60, no. 3691/02 (27.11.2008)). United Nations Convention on the Rights of the Child (CRC) art. 37(d), Sept. 2, 1990, 1577 U.S.T.S. 3. The United States is one of only three countries that have not ratified the CRC. www.Humanium.org/en/convention/Signatory-States.

³ Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 Yale L.J. 259, 315-16 (1993); See also Saul Kassir, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 Am. Psychologist 215, 218-21 (2005) (noting the Reid Technique emphasizes three psychological processes— isolation, confrontation, and minimization—that increase risks of false confessions).