

REPORT

I. INTRODUCTION: ABA Policies on Youth in the Criminal Justice System

The American Bar Association has a long history of recognizing that youth under 18 who are involved with the justice system should be treated differently than those who are 18 or older.

The ABA's overall approach to juvenile justice policies has been and continues to be to strongly protect the rights of youthful offenders within all legal processes while insuring public safety. Central to this ABA premise is the understanding that youthful offenders have lesser culpability than adult offenders due to the typical behavioral characteristics inherent in adolescence. It is understood that they can and do commit delinquent and criminal acts that have an impact on public safety, but these actors nonetheless are developmentally different. They are not adults and do not have fully-formed adult characteristics.

Juvenile Justice Standards

In 1979 and 1980, the American Bar Association *adopted as policy* 20 volumes of Standards that were developed over the prior decade by the Institute of Judicial Administration-American Bar Association Joint Commission on Juvenile Justice Standards.

Jurisdiction and age is addressed in the volume "Standards Relating to Juvenile Delinquency and Sanctions," where ABA policy set the 18th birthday as the age for criminal court jurisdiction, with younger offenders falling under the jurisdiction of the juvenile court.

2.1 Age

The juvenile court should have exclusive original jurisdiction in all cases in which conduct constituting an offense within the court's delinquency jurisdiction is alleged to have been committed by a person

A. not less than ten and not more than seventeen years of age at the time the offense is alleged to have been committed ...¹

Although the Standards set age 18 as the age when criminal court jurisdiction begins, they recognize exceptions. These appear in "Standards Relating to Transfer Between Courts," which declare that no person under 15 should ever be tried in criminal court, and that criminal courts should only have jurisdiction over youths 15-17 years of age when a juvenile court waives jurisdiction.²

¹ IJA-ABA Juvenile Justice Standards Annotated: A Balanced Approach, ed. By Robert E. Shepherd, Jr., p. 147. 1996. (American Bar Association).

² *Id.* at 285.

Youth in the Criminal Justice System

Despite the clarity of ABA policy, states vary in the way youths under 18 are defined (juvenile versus adult) and in the way that youths move between the juvenile and criminal justice systems. All states allow certain juveniles to be tried in criminal court or face adult sanctions; most states have multiple ways to impose adult sanctions on offenders who are under 18.³ These include judicial waiver that is discretionary (45 states), presumptive (15 states) or mandatory (15 states); concurrent jurisdiction (15 states); and statutory exclusions for particular crimes (29 states). Fifteen states allow juvenile courts to impose blended sentences that include adult criminal sanctions; 17 states allow criminal courts “to impose sanctions otherwise available only to offenders handled in juvenile court.”⁴

Fifteen states give both juvenile and criminal court original jurisdiction in specified cases, giving prosecutors discretion to file in either court.⁵

The vast majority of states are in accord with ABA policy in setting 17 as the upper age of juvenile court jurisdiction. However, 13 states set the upper age at 15 or 16.⁶

Nearly 2 million 16- and 17- year-olds live in these 13 states. If these youth are referred to criminal court at the same rate that 16- and 17- year-olds elsewhere are referred to juvenile court, then a large number of youth younger than 18 face trial in criminal court because they are defined as adults under state laws. In fact, it is possible that more youth younger than 18 are tried in criminal court in this way than by all other transfer mechanisms combined.⁷

Despite ABA policy that sets 15 as the age below which no juvenile should be transferred to criminal court, even when transfer (or waiver) is done by a judge, only New Mexico uses that age. Twenty-three states have no minimum age for criminal court jurisdiction for juveniles charged with specified offenses. Two states set 10 as the minimum age, two set 12, six set 13, and 16 set 14.⁸

In those jurisdictions that try youth as adults in criminal court—with a few exceptions discussed below-- juveniles are exposed to the same sentences that adults receive.

³ See Snyder, Howard N., and Sickmund, Melissa, 2006. *Juvenile Offenders and Victims: 2006 National Report*. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, at 110-11.

⁴ *Id.*

⁵ *Id.*, at 113.

⁶ Until June of 2007, three states—Connecticut, New York and North Carolina—set 15 as the upper age. Ten states set 16 as the upper age limit: Georgia, Illinois, Louisiana, Massachusetts, Michigan, Missouri, New Hampshire, South Carolina, Texas and Wisconsin. National Center for Juvenile Justice, 2007. *State Juvenile Justice Profiles*. www.ncjj.org/stateprofiles. In June, 2007, Connecticut raised the age of juvenile court jurisdiction, setting 17 as the upper age limit; Rhode Island lowered the upper age of juvenile court jurisdiction to 16, but in October, 2007, repealed the earlier change. Today, then, two states set 15 as the upper age limit, and 10 set 16 as the upper age limit.

⁷ Snyder and Sickmund, note 3, *supra*, at 114.

⁸ *Id.*

ABA Policies Treat Juveniles in Criminal Court Differently Than Adults

The net result of state policies described above is that “at least two hundred thousand American youth under the age of eighteen are tried as adults each year.”⁹

The ABA’s Criminal Justice Section responded to this phenomenon in 1997 by creating a Task Force on Youth in the Criminal Justice System.¹⁰ The Task Force report was published in 2001¹¹ and its guiding principles were *adopted by the ABA as policy* in 2002.¹²

“Youth” were defined in the Task Force report as “those persons under the age of eighteen involved in the criminal justice system.”¹³

The Task Force declined to examine the various ways that states use to try youths under 18 as adults. Rather, the Task Force elected to respond to the reality described above, that most states in minor or major ways depart from the IJA-ABA Standards, and that those jurisdictions needed to incorporate principles of adolescent development when doing so.¹⁴ The report’s many

⁹ *YOUTH IN THE CRIMINAL JUSTICE SYSTEM: Guidelines for Policymakers and Practitioners*. 2001. (American Bar Association), at 1. See also *THE CONSEQUENCES AREN’T MINOR: The Impact of Trying Youth as Adults and Strategies for Reform*. 2007. (Campaign for Youth Justice), at 6.

¹⁰ The Task Force was chaired by Hon. Johanna L. Fitzpatrick, Chief Judge of the Court of Appeals of Virginia. Vice-Chair was Norman K. Maleng, King County Prosecuting Attorney, Seattle, Washington. The Task Force was comprised of CJS members, with liaisons coming from the ABA CJS Juvenile Justice Committee, the ABA Judicial Division, National Association of Pretrial Service Agencies, National Legal Aid and Defender Association, and the United States Department of Justice.

¹¹ *YOUTH IN THE CRIMINAL JUSTICE SYSTEM: Guidelines for Policymakers and Practitioners*. 2001. (American Bar Association).

¹² The Association adopted the following recommendation:

RESOLVED, That the American Bar Association supports the following principles derived from the 2001 Report of the Task Force on Youth in the Criminal System of the Criminal Justice Section, *Youth in the Criminal Justice System: Guidelines for Policymakers and Practitioners* concerning youth in the criminal justice system:

1. youth are developmentally different from adults and these differences should be taken into account;
2. pretrial release or detention decisions regarding youth awaiting trial should reflect their special characteristics;
3. if detained or incarcerated, youth should be housed in institutions or facilities separate from adult institutions or facilities at least until they reach the age of eighteen;
4. youth detained or incarcerated should be provided programs which address their educational, treatment, health, mental, and vocational needs;
5. youth should not be permitted to waive the right to counsel without consultation with a lawyer and without a full inquiry into the youth’s comprehension of the right and their capacity to make the choice intelligently, voluntarily and understandingly. Stand-by counsel should be appointed if the right to counsel is voluntarily waived;
6. judge should consider the individual characteristics of the youth during sentencing; and
7. collateral consequences normally attendant to the justice process should not necessarily apply to all youth arrested for crimes committed before age eighteen; and

FURTHER RESOLVED, That the ABA opposes, in principle, the trend toward processing more and younger youth as adults in the criminal justice system and urges policymakers at all levels to take the previously mentioned principles into account in developing and implementing policies involving youth under the age of eighteen.

¹³ *Id.* at 5.

¹⁴ *Id.* at 1-3.

recommendations were organized into three categories: the pre-trial stage, the trial stage, and corrections. The recommendations in all three areas were framed in the context of seven “general principles,” three of which serve most directly as springboards for the recommendation for sentence mitigation and periodic review of sentences that is the subject of this report:

1. *Youth are developmentally different from adults, and these developmental differences need to be taken into account at all stages and in all aspects of the adult criminal justice system.*
6. *Judges in the adult criminal justice system should consider the individual characteristics of the youth during sentencing.*
7. *The collateral consequences normally attendant to the adult criminal justice process should not necessarily apply to all youth arrested for crimes committed before the age of eighteen.*¹⁵

The proposed recommendation builds on the Task Force report, making explicit what the Task Force implied. Although the Task Force did not specifically propose changes to *statutory* schemes, it made clear that developmental differences should be taken into account “in all aspects of the adult criminal justice system.” It specifically called for judges to take developmental differences into account at sentencing. It specifically called for reduction of collateral consequences for youths convicted as adults.

ABA Policy on Sentencing of Juveniles

In addition to adopting policy that calls for taking into account developmental differences when youths are tried as adults, the ABA has addressed two types of sentences for youths who are tried as adults: the Association has opposed the death penalty for juveniles, and it has opposed sentences of life without parole for juveniles.

The ABA was a very early leader in the effort to end the death penalty for offenders under age eighteen. The CJS Juvenile Justice Committee first considered this issue in 1981 and drafted a resolution to abolish this practice. This Section’s resolution progressed through the ABA deliberation process and was officially adopted by the ABA House of Delegates in August 1983, predating the major Supreme Court rulings on this issue by several years. This 1983 ABA Resolution was cited and relied upon by the Supreme Court in subsequent rulings on this issue.¹⁶

In addition the ABA, through its 1991 policy endorsing the United Nations Convention on the Rights of the Child, has policy opposing Life Without the Possibility of Parole (LWOP)

¹⁵ *Id.* at 7.

¹⁶ *Stanford v. Kentucky*, 492 U.S. 361, 388 (1989) (Brennan, J., dissenting), and *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988).

for juvenile offenders.¹⁷

II. ADOLESCENT DEVELOPMENT AND SENTENCE MITIGATION

Very serious delinquent and criminal offenses of youthful offenders often result in visceral demands for the harshest punishments. These punitive demands may lead us to forget that no matter how adult-like the offense may be, the youthful offender is not an adult. This Resolution on Sentencing Mitigation for Youthful Offenders proposes that sentences for youthful offenders recognize that key fact and not simply impose an adult sanction upon a child. First, this principle recognizes that youthful offenders are less culpable than adult offenders, simply because of the innate characteristics of their youthfulness. This basic premise was recognized once again by the United States Supreme Court in *Roper v. Simmons*.¹⁸ That Court also expressly approved of key mitigating considerations in sentencing youth offenders, all of which suggest the appropriateness of less harsh punishments.¹⁹ *Roper* rested on the following principles:

- A. Youthful offenders are “categorically less culpable than the average criminal;”
- B. Youthful offenders have a tendency to conform, a lack of maturity, and an underdeveloped sense of responsibility;
- C. Youthful offenders are more vulnerable or susceptible to negative influences and outside pressures including peer pressure; and
- D. The characters of youthful offenders are not as well formed and their personality traits are more transitory, less fixed.

This Resolution recommends, therefore, that juvenile and criminal sentences for youthful offenders be generally less punitive than they are for adult offenders convicted of committing the same offenses.

Second, deterrence applies differently to adolescents than it does to adults. Youths recognize risks differently than adults, and they weigh them differently: “[T]he same

¹⁷ Article 37 of the Convention states that “Neither capital punishment nor life imprisonment without possibility of parole shall be imposed for offenses committed by persons below 18 years of age . . .” United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U. N. T. S. 3, 28 I. L. M. 1448, 1468-1470 (entered into force Sept. 2, 1990). In addition, the ABA has long had policies against mandatory sentencing in the criminal justice system. In 1974, the ABA adopted a resolution opposing, “in principle, legislatively imposed mandatory minimum prison sentences . . .” The Criminal Justice Standards urge legislatures to authorize sentencing courts to impose a range of available sanctions, specifying maximum but not mandatory minimum sentences. See Standards on Sentencing, 18-3.11, 18-3.21.

¹⁸ 543 U.S. 551, 567 (2005).

¹⁹ *Simmons*, 543 U.S. at 569-570.

characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.”²⁰

The very youthfulness of juvenile offenders is well established as grounds for imposing less severe punishments upon them, even when they commit the most serious of crimes. Indeed, this principle of lesser juvenile culpability undergirds the earliest juvenile court systems.²¹ As juvenile rights and responsibilities have been adjudicated over the last century, this premise typically has been assumed.

The United States Supreme Court has long accepted the assumption of lesser culpability for juvenile offenders and the premise that youth by itself mitigates even for the most serious crimes.²² The Court confirmed this basic premise on March 1, 2005 in a landmark juvenile sentencing case, *Roper v. Simmons*, observing once again that there is "sufficient evidence that today our society views juveniles . . . as 'categorically less culpable than the average criminal.'"²³ The *Simmons* Court identified three distinct reasons why juvenile offenders cannot be reliably classified as among the worst offenders:

First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Johnson, supra*, at 367, 125 L. Ed. 2d 290, 113 S. Ct. 2658; see also *Eddings, supra*, at 115-116, 71 L. Ed. 2d 1, 102 S. Ct. 869 ("Even the normal 16-year-old customarily lacks the maturity of an adult"). It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 *Developmental Review* 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. See Appendixes B-D, *infra*.

²⁰ *Simmons*, 543 U.S. at 571.

²¹ See Illinois Juvenile Court Act of 1899, 1899 Ill. Laws 131.

²² See e.g. *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) ("Even the normal 16-year-old customarily lacks the maturity of an adult").

²³ *Simmons*, 543 U.S. at 567.

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures including peer pressure. *Eddings, supra*, at 115, 71 L. Ed. 2d 1, 102 S. Ct. 869 ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage"). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. See Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1014 (2003) (hereinafter Steinberg & Scott) ("[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting").

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. See generally E. Erikson, *Identity: Youth and Crisis* (1968). These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." *Thompson, supra*, at 835, 101 L. Ed. 2d 702, 108 S. Ct. 2687 (plurality opinion). Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. See *Stanford*, 492 U.S., at 395, 106 L. Ed. 2d 306, 109 S. Ct. 2969 (Brennan, J., dissenting).²⁴

In *Simmons*, the Court said: a) teens under 18 are different; b) there may be some exceptions to that rule, but no one can tell for certain who those exceptions are; c) in the context of death, we will make an absolute rule barring execution of those under 18. Justice O'Connor argued that states should be able to make exceptions for the rare, obviously different case.

The proposed policy is grounded in a different syllogism. The recommendation says: a) teens under 18 are different; b) there may be some exceptions to that rule; and c) even though no one can tell for certain who those exceptions are, governmental entities are free to craft exceptions to the general rule. Thus, the resolution is consistent with Justice O'Connor's dissent, while

²⁴ *Simmons*, 543 U.S. at 569-570.

recognizing the general proposition that adolescents are different (even if they, like Christopher Simmons, committed a horrible crime).

Both the Court's logic and that of the recommendation are supported by an increasingly large body of scientific research. Teens are both less culpable, and they are more likely to change, than their adult counterparts. Psychologists attribute the differences between adolescents to both cognitive factors (children think differently than adults) and psychosocial factors (children lack developed social and emotional capabilities).²⁵ Research shows that adolescent thinking is oriented to the present and largely overlooks consequences or implications.²⁶ Other research shows that children tend to make decisions based on emotions, such as anger or fear, to a much greater extent than do adults.²⁷ This is particularly true in stressful situations.²⁸

The MacArthur Foundation's Research Network on Adolescent Development and Juvenile Justice has produced a body of literature that confirms differences between adolescents and juveniles that are relevant for sentencing policy and practice. A recent Network Issue Brief observed:

The legal system has long held that criminal punishment should be based not only on the harm caused, but also on the blameworthiness of the offender. How blameworthy a person is for a crime depends on the circumstances of the crime and of the person committing it. Traditionally, the courts have considered several categories of mitigating factors when determining a defendant's culpability. These include:

- Impaired decision-making capacity, usually due to mental illness or disability,
- The circumstances of the crime—for example, whether it was committed under duress,

²⁵ See Elizabeth Cauffman and Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 742 (2000).

²⁶ See, e.g., William Gardner and Janna Herman, *Adolescent's AIDS Risk taking: A Rational Choice Perspective*, in ADOLESCENTS IN THE AIDS EPIDEMIC 17, 25-26 (William Gardner, et al. eds.; 1990) ("Gardner"); Marty Beyer, *Recognizing the Child in the Delinquent*, 7 KENTUCKY CH. RTS. J. 16 (Summer 1999); Meghan M. Deerin, *The Teen Brain Theory*, CHICAGO TRIBUNE, Aug. 12, 2001, at C1; Catherine C. Lewis, *How Adolescents Approach Decisions: Changes over Grades Seven to Twelve and Policy Implications*, 52 CHILD DEVELOPMENT 538, 541-42 (1981).

²⁷ See Thomas Grisso, *What We Know About Youth's Capacities*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 267 (Thomas Grisso and Robert G. Schwartz, eds., 2000).

²⁸ See Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 153, 155nn107-108 (2003) ("Taylor-Thompson"); Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, in 15 SUMMARY OF CRIMINAL JUSTICE 27 (2000).

- The individual's personal character, which may suggest a low risk of continuing crime.

Such factors don't make a person exempt from punishment—rather, they indicate that the punishment should be less than it would be for others committing similar crimes, but under different circumstances.

Should developmental immaturity be added to the list of mitigating factors? Should juveniles, in general, be treated more leniently than adults? A major study by the Research Network on Adolescent Development and Juvenile Justice now provides strong evidence that the answer is yes.²⁹

More recently, neuroscientists using magnetic resonance imaging have provided a physiological basis for these adolescent behaviors. There are dramatic differences between the brains of adolescents and those of adults.³⁰ Studies show that the brain continues to develop into the twenties, and this is particularly true of physiological developmental processes relating to judgment and impulse-control.³¹ Researchers have found that the parts of the brain in the frontal lobe associated with regulating aggression, long-range planning, abstract thinking and, perhaps, even moral judgment are not sufficiently developed in adolescents to support these functions. These parts of the brain are not fully developed until adulthood.³² Because they lack frontal lobe functions, adolescents tend to make

²⁹ MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, ISSUE BRIEF 3: Less Guilty by Reason of Adolescence, 2006. Available at http://www.adjj.org/downloads/6093issue_brief_3.pdf.

³⁰ See Jeffrey Arnett, "Reckless Behavior in Adolescence: A Developmental Perspective," *Developmental Review*, vol. 12, (1992), p. 339; Jay N. Giedd, et al., "Brain Development During Childhood and Adolescence: A Longitudinal MRI Study," *Nature Neuroscience*, vol. 2 (1999), p. 681; Kenneth W. Kwong, et al., "Dynamic Magnetic Resonance Imaging of Human Brain Activity During Primary Sensory Stimulation," *Proceedings of the National Academy of Science*, vol. 89 (1992), p. 5675.

³¹ Gur RC, Ragland JD, Moberg PJ, Bilker WB, Kohler C, Siegel SJ, Gur RE. Computerized Neurocognitive Scanning II: The Profile of Schizophrenia. *Neuropsychopharmacology*, 2001, 25, 777-788. Sharma, T., & Harvey, P. (Eds.), *Cognition in Schizophrenia*. Oxford University Press: Oxford, G.B., 1999. Yakovlev PL, Lecours AR (1967) The myelogenetic cycles of regional maturation of the brain. In: *Regional development of the brain in early life* (Minkowski A, eds), pp 3-70. Oxford: Blackwell. Matsuzawa J, Matsui M, Konishi T, Noguchi N, Gur RC, Bilker W, Miyawaki T. Age-related volumetric changes of brain gray and white matter in healthy infants and children. *Cerebral Cortex*. 2001, 11, 335-342.

³² See Bruce Bower, "Teen Brains On Trial: The Science Of Neural Development tangles With The Juvenile Death Penalty," *Science News Online*, vol. 165, no. 19 (May 8, 2004); Elkhonon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind*, (New York: Oxford University Press, 2001), p. 434; Allan L. Reiss, et al., "Brain Development, Gender and IQ in Children: A Volumetric Imaging Study," *Brain*, vol. 119 (1996), p. 1768; Elizabeth R. Sowell, et al., "Mapping Continued Brain growth and Gray matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation," *Journal of Neuroscience*, vol. 21 (2001), p. 8821.

decisions using the amygdala, a part of the brain associated with impulsive and aggressive behavior.³³

In *Simmons*, the Court took the diminished culpability of juveniles under the age of eighteen into account in concluding that the two penological justifications for the death penalty applied to them with lesser force than to adults. The Court reasoned that the reduced culpability of juvenile offenders requires a correspondingly lower severity of punishment to meet retributive aims. Similarly, it recognized that the lower likelihood that juvenile offenders engage in the kind of cost-benefit analysis that attaches weight to the possibility of such a harsh sentences, reduced the deterrent value of harsh sentences.³⁴

Moreover, as the *Simmons* Court also recognized, the relative importance of rehabilitative aims are increased when considering the treatment of juvenile offenders because the rehabilitative potential of youth is intrinsically greater:

The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside." *Johnson, supra*, at 368, 125 L. Ed. 2d 290, 113 S. Ct. 2658; see also Steinberg & Scott 1014 ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood").³⁵

³³ See Jan Glascher and Ralph Adolphs, "Processing of the Arousal of Subliminal Emotional Stimuli by the Human Amygdala," *Journal of Neuroscience*, vol. 23 (2003), p. 10274; National Juvenile Defender Center, *Adolescent Brain Development and Legal Culpability*, 2003. The recommendation does not depend on brain research for its viability, nor is it an argument for an age even higher than 18; rather, it emphasizes that teens at 16 and 17 are nowhere near full maturity. The brain research merely reinforces the powerful body of knowledge about adolescent development cited by the Supreme Court in *Roper*.

³⁴ *Simmons*, 543 U.S. at 571-72.

³⁵ *Simmons*, 543 U.S. at 570.

This consideration applies with equal force to all sentences for juvenile offenders, from the death penalty and life in prison without parole to much less severe sentences.

Statutory Law Issues

Among the states, recognition of developmental differences is illustrated by the varying ways that state laws approach imposition of Life Without the Possibility of Parole (LWOP) as a sentence for youthful offenders, imposed either on a discretionary or a mandatory basis. While many states do not differentiate between an adult and a juvenile for this particular sentence, there seems to be a growing trend among state laws toward modifying it as it applies to juveniles. To begin with, in two states LWOP is not an authorized sentencing disposition, and therefore no juveniles would be subject to a sentence of life without parole.³⁶ (These two states do, however, allow for lengthy terms-of-years punishments.)

Several states have begun to treat juveniles differently than adults in sentencing, even for violent crimes, many recognizing the difficulties in sentencing children, while still considering the maturity and developmental differences that are unique to these offenders. Although these jurisdictions are a minority among the States, three states plus the District of Columbia specifically disallow LWOP for offenders under age eighteen³⁷ and one state specifically disallows LWOP for offenders under age sixteen.³⁸ Additionally, in May 2006, Colorado passed legislation forbidding LWOP for a person younger than eighteen.³⁹ Therefore, six states, plus the District of Columbia expressly forbid sentencing a juvenile (either sixteen or eighteen) to life without parole. Taken with the two states where LWOP is not an authorized disposition for any offender, nine jurisdictions forbid this sentence for juveniles.

Although the majority of states permit LWOP for juveniles, in several of the states that generally impose mandatory or discretionary life sentences without parole on adults, the legislature affords special consideration for juvenile offenders. In Montana, a statutory mandatory minimum does not apply if the offender was under the age of eighteen at the time of the crime.⁴⁰ Oregon also gives special consideration to juveniles, providing that there are no

³⁶ Neither Alaska nor New Mexico authorizes life without parole as a punishment. *See* Alaska Stat. § 12.55.125 (2005) (allows a term of years up to ninety-nine years, but no LWOP); N.M. Stat. Ann. § 31-21-10 (2006) (offenders serving life sentences are eligible for parole after thirty years).

³⁷ District of Columbia, Kansas, New York, and Texas. *See* D.C. Code § 22-2104(a) (2006) (“provided that, no person who was less than 18 years of age at the time the murder was committed shall be sentenced to life imprisonment without release.”); Kan. Stat. Ann. § 21-4622 (2005) (provides that if the defendant was “less than 18 years of age at the time of the commission thereof, the court shall sentence the defendant as otherwise provided by law, and no sentence of death or life without the possibility of parole shall be imposed hereunder.”); N.Y. Penal Law § 125.27(1)(b) (2006) (that defendant be aged eighteen or older at the time of the offense is an element of the crime of first degree murder); Tex. Fam. Code Ann. § 54.04(d)(3)(A) (2006) (provides blended sentencing and states that if the child offender is convicted of a capital, aggravated first degree, or aggravated controlled substance felony, the offender can be held for up to forty years after transfer from the youth facility).

³⁸ Indiana disallows a child under sixteen to be sentenced to life without parole. Ind. Code § 35-50-2-3(b)(2) (2006) (providing that a person “at least sixteen (16) years of age but less than eighteen (18) years of age at the time the murder was committed may be sentenced to life imprisonment without parole.”).

³⁹ *See* 2006 Colo. Legis. Serv. Ch. 228 (H.B. 06-1315) (West).

⁴⁰ *See* Mont. Code Ann. § 46-18-222 (2005).

mandatory minimums when sentencing for juveniles waived from juvenile court, although LWOP does remain an authorized disposition.⁴¹ Additionally, in Kentucky there are no restrictions on parole for juveniles.⁴²

Of special notice is Colorado, whose legislature recently passed an amendment whereby if a person is convicted as an adult, parole is possible after serving forty years.⁴³ In this Act, the legislature recognizes that LWOP for children results in an “irredeemable loss to society,” and that children are developmentally different than adults and should be treated as such.⁴⁴ Although the legislation recognizes that persons younger than eighteen commit serious crimes, it states,

because of their level of physical and psychological development, juveniles who are convicted as adults may, with appropriate counseling, treatment services, and education, be rehabilitated to a greater extent than may be possible for adults whose physical and psychological development is more complete when they commit the crimes that result in incarceration.⁴⁵

The legislature concludes stating,

[T]he general assembly finds, therefore, that it is not in the best interests of the state to condemn juveniles who commit class 1 felony crimes to a lifetime of incarceration without the possibility of parole. Further, the general assembly finds that it is in the interest of justice to recognize the rehabilitation potential of juveniles who are convicted as adults of class 1 felonies by providing that they are eligible for parole after serving forty calendar years of their sentences.⁴⁶

This act amends the former Co. Stat. § 18-1.3-401(4) to allow parole after forty years for a juvenile convicted as an adult.⁴⁷

There are other instructive exceptions to “adult time” for youths tried as adults. While New York State, for example, tries 13-15 year-olds as adults for enumerated crimes, age in that state is a mitigating factor.⁴⁸

⁴¹ See Or. Rev. Stat. § 163.150 (2005) (punishment mandatory sentence of death, LWOP or life upon a conviction of aggravated murder), *but see* Or. Rev. Stat. § 161.620 (2005) (providing no mandatory minimums for juveniles waived from juvenile court, except mandatory 30 year minimum for aggravated murder and discretionary 5 year minimum for use of a firearm during commission of a felony).

⁴² See Ky. Rev. Stat. Ann § 640.040 (Baldwin 2005) (“No youthful offender shall be subject to limitations on probation, parole or conditional discharge as provided for in KRS 533.060.”).

⁴³ 2006 Colo. Legis. Serv. Ch. 228 (H.B. 06-1315) (West).

⁴⁴ See *id.* at § (1)(2).

⁴⁵ See *id.* at § (1)(b), (c).

⁴⁶ *Id.* at § (2).

⁴⁷ *Id.*

⁴⁸ See generally, Butterfield, *All God's Children: The Bosket Family and the American Tradition of Violence* (1996); Corriero, *Judging Children as Children: A Proposal for a Juvenile Justice System* (2006).

III. ADOLESCENT DEVELOPMENT AND ELIGIBILITY FOR PAROLE CONSIDERATION

As the *Simmons* Court observed, “the character of a juvenile is not as well formed as that of an adult.”⁴⁹ The literature on brain development reinforces this point.

Thus, a fundamental characteristic of youthful offenders, certainly as compared to adult offenders, is their potential for growth and maturation into non-threatening, productive citizens.⁵⁰ This growth potential for youthful offenders counters the instinct to sentence them to long terms of incarceration, including life in prison without parole, essentially to “lock ‘em up and throw away the key.” Whatever the appropriateness of parole eligibility for forty-year-old career criminals serving several life sentences, quite different issues are raised for fourteen-year-old first time offenders sentenced to prison. They may have committed essentially the same acts and have been convicted of the same offenses, but 14-year-olds, certainly as compared to forty-year-olds, are almost certain to undergo dramatic personality changes as they age from adolescence to middle-age. Sentences for such offenders should not conclude today what kind of adults these adolescents will be many years from now. As any parent knows, predicting what teenagers will become by next week, let alone when they are grown adults, is nearly impossible. That key decision should wait to be made until adolescents have reached adulthood and can be assessed more accurately at that stage of their lives. If they have evolved into promising and non-threatening adults, strong consideration should be given to various forms of release on parole for those juvenile offenders.⁵¹

The recommendation would require states to give parole consideration to youths sentenced as adults at a reasonable point in their sentences.

IV. MITIGATION, SENTENCE RECONSIDERATION AND PUBLIC SAFETY

Criminal sentencing rests on five familiar pillars: specific deterrence, general deterrence, retribution, rehabilitation and incapacitation.⁵² They operate in different ways with respect to public safety.

For the reasons set forth above in the discussion of *Simmons*, adolescent development, and culpability, it is clear that those five considerations should operate differently when the person sentenced was under 18 at the time of the offense. Deterrence—which is intended to have

⁴⁹ See text for footnote 23, *supra*.

⁵⁰ A striking account of an adolescent’s capacity for change is Ishmael Beah’s, *A Long Way Gone: Memoirs of a Boy Soldier*, 2007. (Sarah Crichton Books / Farrar, Straus and Giroux). Beah was a 13-year-old child soldier in Sierra Leone who was involved in barbarous acts. Rescued by UNICEF at age 16, Beah went through an intense period of rehabilitation, came to the United States, was adopted, attended Oberlin College, and at age 26 published his memoir.

⁵¹ See generally Victor Streib and Bernadette Schrempff, *Life Without Parole for Children*, 21(4) (ABA) CRIM. JUST. ____ (Winter 2007).

⁵² Packer, Herbert, *The Limits of the Criminal Sanction*. 1968. (Stanford University Press).

a direct impact on public safety-- obviously operates differently on adolescents.⁵³ Retribution is, at its core, about an offender's blameworthiness; it has an attenuated relationship to public safety. (A first-time murderer may deserve a long sentence even if he or she represents little risk to the public.) Rehabilitation is very much tied to public safety, and one consideration for sentencing and for parole will be the likelihood of rehabilitation in the first instance, and whether rehabilitation has occurred in the second. Because youthful offenders are not fully formed, as a class they have a high probability of rehabilitation. Incapacitation is clearly connected to public safety, but adolescents' changeability suggests that the duration of confinement should be subject to review.

This recommendation leaves it to each jurisdiction to calculate the right balance among the goals, proportionality, and reconsideration of the sentences of youthful offenders.

V. CONCLUSIONS

All of these lines of analysis lead to the conclusion that sentences authorized and implemented for offenders under age eighteen should incorporate several well established mitigating considerations unique to the youthfulness of such offenders.⁵⁴ Their crimes may be the same as those of adults, but these offenders simply are not adults and should not be sentenced as if they were.⁵⁵ Sentences should take into consideration both the nature and circumstances of the offense and the character and background of the offenders. This approach leads naturally to recognizing the unique mitigating circumstances of young offenders.

At its core, Anglo American criminal law is about punishment-- about the intentional infliction of harm on persons who have committed blameworthy acts. We punish because we believe such harm is morally deserved by a particular individual for a particular act. To do this, the criminal law needs to make sense as a language of moral desert, punishing only those who deserve condemnation, punishing the guilty only to the extent of their individual moral desert, and punishing the range of variously guilty offenders it apprehends in an order that reflects their relative blameworthiness. . . . To the extent that institutions of criminal and juvenile justice make punishment decisions about young law violators, they must be servants of the moral obligations of penal proportionality. .

⁵³ See text connected to footnote 19, *supra*.

⁵⁴ In 2006, the ABA launched the Initiative for Youth at Risk, which addresses a variety of issues, including those affecting youthful offenders. Indeed, the Youth at Risk initiative, like ABA justice policy, recognizes developmental differences between youths and adults.

⁵⁵ The public appears to agree with this sentiment. In a January, 2007 poll by Zogby International, the public strongly agreed that youth crime is a major problem, but "most of the American voting public things that giving young people the help they need to mature, learn, and overcome the mistakes of youth is key to enhanced public safety." Focus, Views from the National Council on Crime and Delinquency, February, 2007, at 2. http://www.nccd-crc.org/nccd/pubs/zogby_feb07.pdf.

. . [D]esert is a measure of fault that will attach very different punishment to criminal acts that cause similar amounts of harm.⁵⁶

The other characteristic of young offenders is the understanding that they will change significantly as they grow into adulthood. A fifteen-year-old today will be a quite different person when he or she is age thirty or thirty-five. To decide today whether or not that fifteen-year-old offender should continue to be imprisoned on into those adult years and even into old age is to assume extra-human powers to predict human behavior generations into the future. That crucial decision to release or not release offenders on parole should be made at the time such release is being contemplated and not decades earlier. This conclusion leads to the principle that youthful offenders should be eligible for parole consideration at reasonable points during their sentences, even in those jurisdictions that do not provide parole eligibility for adult offenders.

Respectfully submitted,

Stephen Saltzburg
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⁵⁶ Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility* in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 267 (Thomas Grisso and Robert G. Schwartz, eds., 2000).