

RETHINKING YOUTH RELEASE: AN ANALYSIS OF THE SOUTH CAROLINA BOARD OF JUVENILE PAROLE IN THE CONTEXT OF THE EVOLVING LANDSCAPE OF REFORMS OF JUVENILE RELEASE AUTHORITIES

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The history of juvenile courts depicts a fluctuation of approaches to youth sentencing, from rehabilitative to punitive. Recently, based on increasing research on adolescent nature of offending, harms of incarceration, counterproductive effects of prolonged incarceration and studies on recidivism, many states have engaged in a meaningful reform of their juvenile justice codes, with emphasis on reducing lengths of commitments. Some of these reforms curtailed the discretion of judges to order indefinite sentences and some translated into creation of guidelines for juvenile parole boards that reflect the evidence-based research.

This Article contributes to three streams of academic discourse. First, it identifies the evolving laws on youth sentencing: from offender-based to offense-based. Second, it fills an important gap in research on a study of juvenile parole boards. Over the years there has been significant research on adult parole boards and release decision for youth charged as adults. Yet, there is no existing analysis of juvenile release authorities. By examining the South Carolina Board of Juvenile Parole and comparing it to other juvenile parole boards, the Article contributes to research on the juvenile release mechanism. Third, it creates a model for existing juvenile parole boards to reform their policies and become evidence based. The Article argues that juvenile parole boards must follow science and they must revise their policies based on the data they collect and evidence-based research.

I. INTRODUCTION.....976

II. PILLARS OF THE DEVELOPMENTAL APPROACH TO JUVENILE JUSTICE LAWS.....982

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A.	<i>A Brief History of Juvenile Justice System and Youth Sentencing in America</i>	982
1.	<i>Historical Context of Youth Sentencing</i>	982
2.	<i>State Legislatives Reforms</i>	988
B.	<i>Understanding Adolescents' Crime Through Developmental Psychology and Brain Science Lens</i>	991
1.	<i>Developmental Psychology and Adolescent Brain Science</i>	991
2.	<i>Effect of Disability, Trauma and Victimization on Adolescents' Behavior</i>	994
3.	<i>The Supreme Court's Recognition of Developmental Science</i>	996
C.	<i>Behind Bars: Unraveling the Impact of Incarceration</i>	999
1.	<i>Harmful Effects of Incarceration</i>	999
2.	<i>Counterproductive Outcomes of Incarceration</i>	1005
3.	<i>Pathways to Desistance</i>	1009
III.	JUVENILE PAROLE BOARDS IN AMERICA.....	1011
A.	<i>South Carolina Juvenile Justice System</i>	1011
1.	<i>Philosophy of the S.C. Juvenile Justice System</i>	1011
2.	<i>An Analysis of the SC Release System</i>	1011
3.	<i>The Unconstitutional Realities Within SCDJJ Facilities</i>	1015
4.	<i>Recidivism Among South Carolina Youth</i>	1018
B.	<i>Lessons Learns from Other States</i>	1019
1.	<i>Colorado Juvenile Parole Board</i>	1019
2.	<i>Utah Youth Parole Authority</i>	1020
3.	<i>A Few Words About California</i>	1023
IV.	GUIDANCE AND RECOMMENDATIONS.....	1025
A.	<i>Decisionmaking Process for Paroling Authorities</i>	1025
B.	<i>Restatement of Law</i>	1027
C.	<i>Recommendations</i>	1029
V.	CONCLUSION.....	1031

I. INTRODUCTION

The first juvenile court focused on youth rehabilitation, with emphasis on guidance, education, and counseling.¹ A deep paternalism and solicitude toward young people shaped the rhetoric of the legal reformers of the late

1. See *infra* II.A.

nineteenth and early twentieth centuries, the Progressive Era. The Progressives viewed the state as a benevolent super-parent endowed with the responsibility and authority to safeguard children and foster their growth into productive adults.² With the rise of research on adolescents' development, the reformers started to recognize that adolescents were emerging from childhood but were not fully formed adults.³ They grouped them with younger children and advocated paternalistic policies.⁴ The sentences were offender-based,⁵ and the courts had unlimited discretion to sentence both young children and adolescents to indeterminate sentences lasting for the duration of minority.⁶ Because the courts focused on rehabilitating the young person, the needs of the child were of more importance than the crime they committed.⁷ A convergence of the juvenile court with the adult court and thus more punitive dispositions for young people came in 1960s, after the U.S. Supreme Court recognized in *In re Gault* that young people were entitled to many of the same constitutional protections as adults.⁸ The shift to offense-based sentencing followed in 1970s, when retribution displaced rehabilitation.⁹ The next two decades witnessed rising crime rates among adolescents and thus even more push towards very punitive measures in the juvenile justice system.¹⁰ Determinate and mandatory minimum sentences became more popular than indeterminate sentences, and judges' dispositional discretion was curtailed.¹¹ The duration of youth sentences was directly related to the offense and agencies used offense-based administrative or parole-release guidelines to establish length of stay.¹²

Over the last ten years, various state, local, and tribal authorities have initiated substantial efforts to reform their juvenile justice systems.¹³ This

2. ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 62–67 (2008).

3. *Id.* at 63–64 (2008) (“At the turn of the twentieth century, psychologists began to study adolescence as a developmental stage and to recognize that during this period individuals were emerging from childhood but were not fully formed adults”).

4. *Id.* at 64 (“In short, the paternalistic rhetoric of the Progressives did not distinguish adolescents from younger children in describing the vulnerability, dependency, and innocence of youth”).

5. “Offender-based” means that the sentencing court intends to focus on addressing the needs of the offender. “Offense-based” means that the court uses the offense committed as the driving factor for sentencing the offender.

6. BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 34–45 (1999) [hereinafter *Bad Kids*].

7. *Id.*

8. *See In re Gault*, 387 U.S. 1 (1967).

9. *Bad Kids*, *supra* note 6, at 4–5.

10. *Id.* at 5.

11. *Id.* at 12.

12. *Id.*

13. *See infra* II.A.2.

includes minimizing the reliance on juvenile detention and out-of-home placement, addressing racial and ethnic disparities more attentively, exploring methods to involve affected families in the decision-making process, and extending the age at which juvenile court jurisdiction concludes.¹⁴ These transformations reflect an increased recognition of the inefficacy of punitive measures and a growing understanding of adolescent development.¹⁵ Many call it the “children are different” era, following the line of Supreme Court cases prohibiting capital punishment for children,¹⁶ requiring consideration of youth as mitigating factor in sentencing,¹⁷ limiting life without the possibility of parole sentences for children committing the most severe offenses,¹⁸ and establishing a reasonable child standard for purposes of interrogation.¹⁹ Many states have moved away from punitive approaches and have embraced evidence-based practices that prioritize community-based alternatives, rehabilitation, and addressing the underlying issues that contribute to delinquency.²⁰ These reforms are based on a body of empirical research that calls into question the effectiveness of the juvenile justice intervention, such as incarceration,²¹ and incorporate evidence-based research on adolescent development,²² recidivism,²³ and desistance from crime.²⁴ Because of these reforms, most states have reinforced the traditional, rehabilitative approach in handling most delinquency adjudications.²⁵ At the same time, there has been a reduction in the use and length of confinement as a response to delinquent behavior.²⁶ This shift is grounded in evidence suggesting that prolonged

14. *Id.*

15. NATIONAL RESEARCH COUNCIL, IMPLEMENTING JUSTICE REFORM: THE FEDERAL ROLE (2014).

16. *Roper v. Simmons*, 543 U.S. 551, 578 (2005); Elizabeth S. Scott, “*Children are Different*”: *Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 72 (2013).

17. *Miller v. Alabama*, 567 U.S. 460, 476 (2012).

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

19. *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011).

20. *See infra* II.A.2

21. *See infra* II.C.1.

22. *See infra* III.B.2.

23. *See infra* II. C.2.

24. *See infra* II.C.3.

25. Melissa D. Carter, *Bending the Arc toward Justice: The Current Era of Juvenile Justice Reform in Georgia*, 54 GA. L. REV. 1133, 1133 (2020) (examining a national return to the rehabilitative ideal) (“The present era of juvenile justice system reform preserves the developmental approach and restores the rehabilitative ideal while striking a better balance between state interests and the rights of individual children.”).

26. *Id.* at 1167 (“States are now instituting major systemic reforms designed to reduce reliance on institutional confinement in favor of less restrictive approaches that respond to the developmental needs of youth and respect their individual rights.”).

confinement tends to heighten the risk of reoffending rather than diminishing it.²⁷

South Carolina is an example of a state that stubbornly refuses to pay attention to science and continues to follow rigorous and retributive offense-based sentencing schemes from the 1990s. The glimpse of hope came in 2019 when the legislators passed Act No. 268 of 2016 raising the age of a child to eighteen.²⁸ Following that, the President of the Senate appointed a Senate Select Committee on Raise the Age and assigned the Committee to look at the impact of implementation of the law on the juvenile justice system.²⁹ The Committee held numerous visits of the South Carolina Department of Juvenile Justice (SCDJJ) sites, reviewed materials, researched pertinent issues, and met with stakeholders on several occasions to discuss a bill drafted by Senator Gerald Malloy, proposing a comprehensive reform of South Carolina juvenile justice system.³⁰ The Committee held a public hearing to review the bill's draft and voted on its provisions.³¹ The Committee then filed it during the 2020 session.³² The bill, known as the Juvenile Justice Reform Act of 2020, aimed at reforming the South Carolina Children's Code to reflect that the juvenile justice system should follow a rehabilitative model, with detention and incarceration being a last resort.³³ If passed, it would drastically reduce the length of stay of young people in youth prisons and allow for post-disposition representation and regular judicial review hearings for incarcerated youth.³⁴ The Juvenile Justice Reform Act of 2020 was originally

27. *See infra* II.C.2.

28. S. Res. 916, 121st Sess. (S.C. 2015–2016).

29. SOUTH CAROLINA SENATE SELECT COMMITTEE ON RAISE THE AGE REPORT TO THE SENATE 4 (2020).

30. *Id.* at 4 (“The Committee held seven meetings between June and December 2019, and visited DJJ and community resource sites. The Committee researched issues, reviewed materials, and met with or discussed issues and concerns with stakeholders regarding the implementation of Raise the Age. Many of the issues and concerns were incorporated into the draft bill.”).

31. *Id.* (“On December 11, 2019, the Committee held a public hearing to review the draft bill and vote on the provisions of the draft bill the Committee would file during the 2020 session.”).

32. *Id.*

33. *Id.* at 16–17 (expressing a goal to implement the least restrictive environment language for any disposition. Reasoning that “[t]he less money DJJ spends on incarceration, the more it can spend on those services.”).

34. The Juvenile Justice Reform Act of 2020 (currently Senate Bill 278) is a far-reaching bill addressing numerous aspects of the South Carolina Juvenile Justice System. It has 49 sections and covers, among others, issues related to diversion programs, fines, fees and restitution, length of probation, commitment for secure evaluations, determinate and indeterminate commitments, incarceration of status offenders, sex offender registry, solitary confinement, right to counsel, length and eligibility for pre-trial detention, incarceration of children with a severe mental illness, minimum age for waiver of children to adult court,

filed in December 2019 as SB 1018. It was re-filed in January 2020 as SB 53, and again in January 2023 as SB 278.³⁵

Legislative changes are not the only way a state can reform its sentencing system. In the example of South Carolina, the South Carolina Board of Juvenile Parole (Board) is the releasing authority.³⁶ The Board also creates guidelines that establish the length of time youth stay at SCDJJ facilities.³⁷ The current guidelines are offense-based and reflect the punitive schemes of 1990s.³⁸ The Board then has authority to reform its guidelines, policy and procedure to embrace evidence-based practices and reflect the evidence-based research on adolescent development, harms of incarceration, and recidivism.³⁹

South Carolina is one of five states in the United States that relies on a governor-appointed release authority mechanism.⁴⁰ States vary significantly in their mechanisms in which they release youth sentenced to indeterminate sentences. According to the data compiled by the National Center for Juvenile Justice in 2016, twenty-two states entrusted their power to decide when a committed youth is to be released from incarceration to the community to the agency or institution to which the youth has been committed.⁴¹ In ten states,

expungement of youth records, school-to-prison pipeline, collateral consequences of juvenile justice involvement at schools, timely graduation of justice-involved children, Children's Bill of Rights, and SCDJJ data reporting. S. 278, 125th Sess. (SC 2023).

35. S. 278, 125th Sess., (S.C. 2022); S. 1018, 123rd Sess. (SC 2019); S. 53, 124th Sess. (SC 2020).

36. See *infra* section II.A.2.

37. *Id.*

38. The South Carolina Board of Juvenile Parole was created in 1981 as a part of the Youth Services Act to function as the sole releasing authority of youth who had been committed to SCDJJ. *SC Board of Juvenile Parole*, <https://djj.sc.gov/sc-board-juvenile-parole> [<https://perma.cc/JM39-GT5N>]. On November 27, 2023, the author sent a FOIA request to the Director of the Board, Toni Vanlue, asking, among others, about the guidelines for youth release (when they were created; based on what research; when they were updated). On December 27, 2023, the Director responded by saying that FOIA does not require their agency to create new records, conduct research, analyze data, or answer questions, and therefore the Board closed the request. The author sent another FOIA request on January 3, 2024, asking for, among others, any evaluations of the guidelines. As of February 3, 2024 the Board was still processing the FOIA request.

39. See generally *id.*

40. In 2004, J. Wesley Frendle reported that there were six juvenile parole boards. See *infra* note 47. Since then, California has transformed their juvenile justice system and created a judicial review for incarcerated youth in lieu of their juvenile parole board. *Division of Juvenile Justice (DJJ) CAL. DEP'T OF CORR. & REHAB.*, <https://www.cdcr.ca.gov/juvenile-justice/> [<https://perma.cc/L49J-KY2F>]; On July 15, 2016, Illinois granted the release decision to the Department of Juvenile Justice (rather than the Prisoner Review Board) with some exceptions, effective Jan. 1, 2017. S. 2777, 99th Gen. Assemb., Reg. Sess. (Ill. 2016). The New York Board of Parole oversees release of adolescents tried in an adult court. Youth tried in delinquency courts are not subject to the authority of the Board of Parole.

41. *Juvenile Justice Services*, JJGPS, <http://www.jjgps.org/juvenile-justice-services#release-decision> [<https://perma.cc/EUX4-ZDPS>] (follow "Release Decision" link to see the map).

the court has sole authority to decide the release.⁴² The data reflects that, in 2016, eleven states allow for shared discretion between the agency and the court, and eight states entrust parole boards to make the release decisions.⁴³

There has been substantial research done on adult parole boards, their decision-making, and constitutionality of their approach to youth sentenced in adult courts.⁴⁴ Publications on youth parole boards or other youth release authorities are scarce.⁴⁵ As long as indeterminate sentences remain common, there is a need for understanding how the length of those sentences is actually decided and in many states, that would mean understanding release authorities and parole guidelines. Also, policymakers need to comprehend how the various release mechanisms work, so they can make an intelligent choice between them.

This Article attempts to fill in the gap by analyzing the South Carolina Board and juxtaposing it by an overview of other states' parole boards and release authorities. Considering the complexity of the subject, this Article marks the beginning of what will be a series of research papers on youth sentencing and various release mechanisms. The biggest limitation of this Article is that it does not discuss the discriminatory aspect of sentencing and release process in South Carolina or elsewhere. It is the author's position that racial discrimination has been evident in every stage of the juvenile justice process from the inception of the juvenile justice system to now. The subject is of such importance that it needs to be distinguished in a separate Article.⁴⁶

42. *Id.*

43. *Id.*

44. See, e.g., Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373 (2014); Gerard Glynn & Ilona Vila, *What States Should Do to Provide a Meaningful Opportunity for Review and Release: Recognize Human Worth and Potential*, 24 ST. THOMAS L. REV. 310 (2012); Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1 (2011).

45. The only existing overview of juvenile parole boards is a summary of the six juvenile parole boards that were in place in 2004. Julie Wesley Frenkle, *An Overview of Juvenile Parole Boards in the United States*, NMSC JUV. COMM. (Aug. 2004).

46. Rovner points out that “for a decade, incarceration disparities between Black and white youth have remained stubbornly high. As of 2021, Black youth were 4.7 times as likely to be placed (i.e., detained or committed) in juvenile facilities as their white peers, according to nationwide data collected in October 2021 and recently released. This disparity has hardly changed over the past decade.” Joshua Rovner, *Black Disparities in Youth Incarceration*, THE SENTENCING PROJECT (Dec. 12, 2023), <https://www.sentencingproject.org/fact-sheet/black-disparities-in-youth-incarceration/> [<https://perma.cc/CSY6-3ZBG>]; see also, e.g., *Bad Kids*, *supra* note 6, at 714 (“[I]ndividualized discretion is often synonymous with racial disparities in sentencing.”); Robin Walker Sterling, *A Broken Shield: A Plea for Formality in the Juvenile Justice System*, 13 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 237, 251–52 (2013) (collecting studies showing prevalence of implicit biases in judgments of children in the juvenile justice system); MICHAEL TONRY, SENTENCING MATTERS 180 (1996) (“There is, unfortunately,

Part I of this Article outlines the juvenile justice system's history of sentencing and examines the legislative reforms various states have enacted in the last decade, with specific focus on upper limits of incarceration and release authorities. It explains the science on adolescent psychology, brain, and effect of trauma and victimization on young people's behavior. It also presents extensive research on harms and counterproductive outcomes of prolonged youth incarceration. Part II describes the South Carolina Juvenile Justice System, its philosophy, the unconstitutional conditions of the SCDJJ facilities, lack of focus on youth rehabilitation, and the strikingly high numbers of youth recidivism in the state. It also points out to other states that either have a juvenile parole board or have reformed their parole system altogether and shows their evidence-based approach to youth sentencing. Part III offers new approaches to the decision-making process for paroling authorities based on research and science. The Article concludes with suggestions for future reforms to the South Carolina Board of Juvenile Parole and other boards nationwide.

II. PILLARS OF THE DEVELOPMENTAL APPROACH TO JUVENILE JUSTICE LAWS

A. *A Brief History of Juvenile Justice System and Youth Sentencing in America*

1. *Historical Context of Youth Sentencing*

The history of juvenile crime policy over the course of the last three centuries is a narrative about the transformation of the law's view of young offenders.⁴⁷ Prior to the establishment of a distinct juvenile justice system, children who committed crimes were often treated similarly to adult offenders.⁴⁸ There was little recognition of the differences between children and adults in terms of culpability and development.⁴⁹ The Progressive Movement at the turn of the twentieth century played a significant role in shaping the juvenile justice system.⁵⁰ Reformers such as Judge Julian Mack viewed youths involved in crime first and foremost as children and advocated

no way around the dilemma that sentencing is inherently discretionary and that discretion leads to disparities.”).

47. Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 *FUTURE OF CHILDREN* 15 (2008) [hereinafter *Adolescent Development*].

48. *Id.*

49. *Id.* at 15.

50. Barry C. Feld, *The Transformation of the Juvenile Court*, 75 *MINN. L. REV.* 691, 691 (1991) [hereinafter *Transformation of Juvenile Court*].

for a more rehabilitative and child-focused approach.⁵¹ In fact, those children were viewed as no different from children who were subject to parental abuse and neglect.⁵² The establishment of the first juvenile court in Chicago in 1899 is often considered a landmark event.⁵³ This court, led by Judge Mack, aimed to provide a more informal and rehabilitative process for young offenders.⁵⁴ The focus was on the best interests of the child, and the court aimed to act as a benevolent parent rather than an adversarial system.⁵⁵ The idea was to address the root causes of juvenile delinquency rather than simply punish young offenders. The founders of the juvenile court advocated against assigning criminal responsibility to the offenses of children.⁵⁶ According to them, children were not criminally responsible because they lacked the capacity for reasoning, moral understanding, and judgment on which attributions of blameworthiness rest.⁵⁷

During the first half of the twentieth century, the prospect of rehabilitating youth offenders gained momentum. The system expanded across the United States, and various states established juvenile courts with a focus on individualized treatment and support services.⁵⁸ The emphasis was on education, counseling, and guidance.⁵⁹ The courts had full discretion

51. *Adolescent Development*, *supra* note 47, at 16–17.

52. *Id.* at 16. Judge Mack proposed in a *Harvard Law Review* in 1909 that a juvenile offender should be treated “as a wise and merciful father handles his own child.” Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

53. *Bad Kids*, *supra* note 6 at 55.

54. *Id.* at 63–64; Horace M. Kallen, *Julian William Mack, 1866–1953*, in AMERICAN JEWISH YEARBOOK 38 (“Judge Mack served on the Circuit Court of Cook County for eight years. Three of those, from 1904 to 1907, he presided over Chicago’s famous Juvenile Court.”).

55. *Adolescent Development*, *supra* note 47, at 16.

56. Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 553 (2000) [hereinafter *Legal Construction*]. Very early in its development, common-law doctrine reflected the view that children should not be held to the same standard of conduct as adults. See Lara A. Bazelon, *Exploring the Superpredator Myth: Why Infancy Is the Preadolescent’s Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 159–161 (2000) (citing sources discussing origins of infancy defense dating back to Roman era); see also ELLEN RYERSON, *THE BEST-LAID PLANS: AMERICA’S JUVENILE COURT EXPERIMENT* 36–37 (1978).

57. *Legal Construction*, *supra* note 56, at 554 (As Ben Lindsay, an early judge of the Denver Juvenile Court, declared, “Our laws against crime [are] as inapplicable to children as they would be to idiots.”); see also Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE*, 294, 326–27 (Thomas Grisso & Robert G. Schwartz eds., 2000).

58. Nicole Scialabba, *Should Juveniles Be Charged as Adults in the Criminal Justice System?*, AMERICAN BAR ASSOCIATION (Oct. 3, 2016), <https://www.americanbar.org/groups/litigation/resources/newsletters/childrens-rights/should-juveniles-be-charged-adults-criminal-justice-system/> [https://perma.cc/SYT4-LAMW].

59. See *Adolescent Development*, *supra* note 47.

regarding the disposition of the cases.⁶⁰ The indeterminate dispositions had no set limit that could continue for the duration of minority.⁶¹ When courts committed children to indeterminate sentences, the institutions would have the releasing authority.⁶² Those dispositions rejected limits on the length of disposition based on what the child did. Each child was different, and dispositions addressed their future needs, and their offense did not limit the duration or intensity of intervention.⁶³ The Progressives' assumptions about youth and the rehabilitative vision of juvenile court prevailed at least in theory until the 1960s with a shift in the juvenile justice system to focus on due process rights for youth offenders.⁶⁴ In the seminal case of *In re Gault*, the U.S. Supreme Court ruled that young people were entitled to many of the same constitutional protections as adults, including the right to legal representation and the right to confront their accusers.⁶⁵ The Due Process Revolution of the Civil Rights was the time when the "flexibility" and "informality" that were once championed as hallmarks of the rehabilitative mission of the early juvenile courts came under attack.⁶⁶ The Supreme Court in *Kent v. United States* and again in *In re Gault*, concluded that juvenile court was the "worst of both worlds," providing neither the individualized rehabilitation promised to youth, nor the procedural rights afforded to adults.⁶⁷ The Court was clearly concerned about the wide discretion the judges exercised at sentencing and the absence of "careful, compassionate, individualized treatment"—exactly what the discretion at disposition hearings was supposed to facilitate.⁶⁸ Yet, the Court decided not to rule on the dispositional process and thus it ignored the *substance* of juvenile law, the "unique sentencing or dispositional powers accorded to [juvenile court] judges."⁶⁹ Despite the intention of the Supreme

60. Josh Gupta-Kagan, *Beyond "Children Are Different": The Revolution in Juvenile Intake and Sentencing*, 96 WASH. L. REV. 425, 433 (2021).

61. BARRY C. FELD, *THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, AND THE CRIMINALIZING OF JUVENILE JUSTICE* 106 (2015) [hereinafter *Evolution of the Juvenile Court*].

62. See Gupta-Kagan, *supra* note 60, at 445.

63. *Transformation of Juvenile Court*, *supra* note 50, at 702.

64. Kris Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 391 (2013).

65. See *In re Gault*, 387 U.S. 1, 41, 57 (1967).

66. Henning, *supra* note 64, at 391. ("[The] proponents of due process complained that the rhetoric of rehabilitation was a mask for punishment imposed without necessary procedural safeguards.").

67. *In re Gault*, 387 U.S. at 18 n.23 (quoting *Kent v. United States*, 383 U.S. 541, 556 (1966)).

68. Gupta-Kagan, *supra* note 60, at 439.

69. *Id.* at 440 (citing Martin Guggenheim, *The Due Process Revolution in Juvenile Court—New York and the Early Years After Gault*, in *RIGHTS, RACE, AND REFORM: 50 YEARS OF CHILD ADVOCACY IN THE JUVENILE JUSTICE SYSTEM* 79 (Kristin Henning, Laura Cohen & Ellen Marrus eds., 2018) (emphasis in original)).

Court not to change the therapeutic nature of juvenile courts, decisions like *Gault*, along with subsequent judicial, legislative, and administrative changes, have led to a convergence of the juvenile court with adult criminal courts.⁷⁰ Subsequent Supreme Court decisions⁷¹ transformed the juvenile court from its original progressive vision as a social welfare agency into a component closely tied to the criminal justice system.⁷² And, as Fled asserts, “ironically, *Gault* and *Winship*’s insistence on greater criminal procedural safeguards in juvenile courts may have legitimated more punitive dispositions for young offenders.”⁷³

In the 1970s, just deserts and retribution displaced rehabilitation and became the driving factor in juvenile sentencing.⁷⁴ Deserts-based sentences concentrate on an offender’s prior conduct rather than practical factors such as rehabilitation, deterrence, or confinement.⁷⁵ In contrast, determinate sentences apply penalties that look back, considering the nature of the offense, the level of culpability, or the individual’s criminal history.⁷⁶ In *The Struggle for Justice*, the American Friends Service Committee contended that indeterminate sentences provided excessive discretion to judges, resulted in racial disparities, and violated proportionality norms.⁷⁷ They advocated for shorter fixed sentences and the elimination of parole.⁷⁸ Conservatives argued that indeterminate sentences led to premature release of dangerous offenders, making crime a focal point in their political agenda.⁷⁹ Their emphasis on personal and justice system accountability challenged the legitimacy of the welfare state and government programs.⁸⁰ Liberals, critical of the perceived inefficacy of rehabilitation, struggled to present coherent alternatives to tough-on-crime proposals and eventually, they joined the law-and-order movement to avoid being labeled as soft on crime.⁸¹ Adopting offense-based sanctions allowed conservative politicians to openly endorse punitive measures and enact strict laws.⁸²

70. Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 72–73 (1997).

71. See *In re Winship*, 397 U.S. 358, 367 (1970); *Breed v. Jones*, 421 U.S. 519, 528–29 (1975).

72. FELD, *supra* note 61, at 73.

73. *Id.*

74. *Id.* at 106.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 107.

80. *Id.*

81. *Id.*

82. *Id.*

Amid concerns about rising crime rates, the 1980s and 1990s witnessed a push towards more punitive measures in the juvenile justice system.⁸³ This era also saw a rise in the use of incarceration for youth offenders.⁸⁴ Many states adopted laws allowing for the transfer of juveniles to adult criminal court for certain offenses.⁸⁵ More than 250,000 youth were transferred to adult courts per year during these legal reforms.⁸⁶ States also required juvenile court

83. See *Adolescent Development*, *supra* note 47, at 17. The new generation of reformers went beyond rejecting the paternalistic characterization of youth offenders. Some, like John DiIulio, seemed to view youth involved in crime as more culpable and dangerous than adult criminals. DiIulio, a University of Pennsylvania criminologist, predicted in 1995 that the new century would bring a juvenile crime wave far worse than the 1990s. John DiIulio, *The Coming of the Super-Predators*, WASHINGTON EXAMINER (Nov. 27, 1995), <https://www.washingtonexaminer.com/magazine/1558817/the-coming-of-the-super-predators/> [<https://perma.cc/BB88-XNVG>]. DiIulio later expressed regret for the hyperbole and acknowledged that the prediction had not come to pass. Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. TIMES (Feb. 9, 2001), <https://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html> [<https://perma.cc/49TM-WULS>].

84. Youth confinement rates peaked in 1994–1995 (381 youth per 100,000 young people ages 10 to majority). See *Youth Incarceration in the United States*, ANNIE E. CASEY FOUND., (Dec. 14, 2021), <https://www.aecf.org/resources/youth-incarceration-in-the-united-states> [<https://perma.cc/6P2L-TZNY>]. That led to the United States being the lead country in the world for youth incarceration. A 2020 United Nations report revealed that the United States youth confinement rate is 11 times higher than the rate for Western Europe, 11 times higher than Asia, 1 time higher than Eastern Europe, 7 times higher than Oceania, 4 times higher than Canada and Mexico, and 3 times higher than South America. MANFRED NOWAK, GLOBAL STUDY ON CHILDREN DEPRIVED OF LIBERTY (2019), <https://omnibook.com/global-study-2019/liberty/page-001.html>. [<https://perma.cc/7X5Z-NAVS>].

85. Some states lowered the age of judicial transfer to allow for criminal prosecution of teens as young as fourteen and less. Some lawmakers broadened the range of transferrable offenses to include a long list of various crimes. And some created automatic transfer statutes, under which many youths are categorically treated as adults when they are charged with crimes. See Patricia Torbet et al., *State Responses to Serious and Violent Juvenile Crime*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (July 1996), <https://ojjdp.ojp.gov/library/publications/state-responses-serious-and-violent-juvenile-crime> [<https://perma.cc/3SJ4-UHKN>]. Many of the states have not reformed these laws. In 47 states in 2019, the juvenile court judge had the authority to waive juvenile court jurisdiction and transfer the case to criminal court for at least some cases. For a full report on transfer laws, see Charles Puzanchera, Sarah Hockenberry, & Melissa Sickmund, *Youth and the Juvenile Justice System: 2022 National Report*, NATIONAL CENTER FOR JUVENILE JUSTICE (Dec. 2022), <https://ojjdp.ojp.gov/publications/2022-national-report.pdf> [<https://perma.cc/GCQ2-6FW2>].

86. *Adolescent Development*, *supra* note 47, at 4. Scott also notices that even contemporary advocates for criminal punishment implicitly agree that children, because of their immaturity, are less blameworthy than adults. In arguing that young offenders be held to adult standards of criminal responsibility, they make the problem disappear at least at a rhetorical level by simply describing young offenders as adults and not children. See *Adolescent Development*, *supra* note 47, at 18; see also Alfred S. Regnery, *Getting Away with Murder: Why the Juvenile Justice System Needs an Overhaul*, 34 POL'Y REV. 65, 68 (1985) (“There is no

judges to impose determinate sentences or mandatory sentences based on age, offense and prior record.⁸⁷ That and the transfer laws deemphasized treatment in favor of personal and justice system accountability.⁸⁸ States' departments of corrections used offense-based administrative or parole-release guidelines to determine length of stay.⁸⁹ Offense-based sanctions were to be proportional to the offense and have retribution and deterrence as their goal.⁹⁰ "Blended sentencing" also became popular.⁹¹ Judges would mix together the adult and juvenile sentence methods to "provide for longer sentences for serious crimes than otherwise would be available to the juvenile court, or to increase the

reason that society should be more lenient with a 16-year-old first offender than a 30-year-old first offender."); Virginia Ellis, *Lungren to Seek Lower Age for Trial as Adult*, L.A. TIMES (Jan. 15, 1993) (quoting California Attorney General Dan Lungren: "[I]f you commit an adult crime, you'd better be prepared to do adult time."), <https://www.latimes.com/archives/la-xpm-1993-01-15-mn-1448-story.html> [<https://perma.cc/F275-FWQV>]; Jon R. Sorensen, *Pataki Plan on Juvenile Offenders Includes Longer Sentences in Adult Jails*, BUFFALO NEWS (Dec. 10, 1995), at A16 (quoting New York Governor Pataki: "Adult crime should mean adult time.") https://buffalonews.com/news/pataki-plan-on-juvenile-offenders-includes-longer-sentences-in-adult-jails/article_0fd45f16-50ae-5db2-922e-50ab1d3cdd06.html. [<https://perma.cc/J6PQ-B662>].

87. *Evolution of the Juvenile Court*, *supra* note 61, at 108; Feld also references the Twentieth Century Fund Task Force report, *Confronting Youth Crime*, that in 1978 recommended determinate and mandatory minimum sentences for violent young offenders. He also mentioned that in 1980, the American Bar Association's Juvenile Justice Standards Relating to Juvenile Delinquency and Sanctions recommended that juvenile court judges' authority be "rigorously limited in type and duration according to the age and prior record of the juvenile and the seriousness of his or her offense." *Id.* at 137.

88. As stated by Feld, "[C]umulatively, they reflect an inversion of juvenile justice jurisprudence and practice—from rehabilitation to retribution, from offender to offense, and a shift of discretion from judges to prosecutors." *Id.*

89. In 1998, Feld wrote:

A number of states' departments of corrections have adopted administrative security classification and release guidelines that use offense criteria to specify proportional or mandatory minimum terms of institutional confinement. . . . The Arizona legislature required its department of corrections to adopt length of confinement guidelines; the agency created five categories based on the seriousness of the commitment offense and specified mandatory minimum terms that range in length from three to eighteen months to govern juvenile release decisions. Minnesota's department of corrections adopted determinate length of stay guidelines based on the present offense and other risk factors, such as the prior record and probation or parole status. Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965 (1995).

90. *Evolution of the Juvenile Court*, *supra* note 61, at 137.

91. John D. Elliott & Anna M. Limoges, *Deserts, Determinacy, and Adolescent Development in the Juvenile Court*, 62 S.D. L. REV. 750, 753–54 (2017); see *Juvenile Offenders and Victims: 2014 National Report*, NAT'L CTR. FOR JUVENILE JUST., 105–106 (2014), <https://www.ojjdp.gov/ojstatbb/nr2014/> [<https://perma.cc/ZR3V-ESYQ>], for a detailed description of blended sentencing.

rehabilitative sentencing options available to criminal courts.”⁹² Also, judges’ discretion became curtailed as legislatures created and expanded offense-based rules for sentencing,⁹³ including offense-specific parole release guidelines,⁹⁴ and minimum offense-specific juvenile court sentences.⁹⁵ Feld points out that the same jurisprudential shifts from offender to the offense and from treatment to punishment that contributed to changes in transfer policies have had an impact on sentencing scheme for serious delinquent offenders.⁹⁶

Despite the fact that the number of violent offenses committed by youth has decreased drastically since the 1990s,⁹⁷ juvenile court dispositions today include more incarceration and for longer periods—extending well into adulthood under some statutes.⁹⁸ The legislators continue to give judges wide discretion to sentence youth to indeterminate periods of time up to a specified ceiling prescribed by the legislature, the juvenile-court judge, or the state juvenile-justice agency.⁹⁹ Given the complexity of the dispositional statutes, it is difficult to be precise about the number of states that allow for strictly indeterminate manner of sentencing versus the ones that have only determinate options for dispositions.¹⁰⁰ In many instances, judges can sentence youth to either a determinate sentence or an indeterminate one, with the latter usually reserved for the most serious offenders. Moreover, thirteen states “blend” the contingent criminal sentence with the traditional juvenile disposition based on the underlying delinquency finding.¹⁰¹

2. State Legislatives Reforms

From 2013 to 2018, eight states—Georgia, Hawaii, Kansas, Kentucky, South Dakota, Tennessee, Utah, and West Virginia—passed expansive legislation to impose offense-based limits on judges’ power to order severe

92. *Evolution of the Juvenile Court*, *supra* note 61, at 239.

93. Gupta-Kagan, *supra* note 60, at 433.

94. *Id.* at 137.

95. *Id.* at 442.

96. *Abolish the Juvenile Court*, *supra* note 70, at 82.

97. By 2020, the number of violent crime arrests involving youth reached a new low, 78% below the 1994 peak, and half the number ten years earlier. See CHARLES PUZZANCHERA, TRENDS IN YOUTH ARRESTS FOR VIOLENT CRIMES (Aug. 2022), <https://ojjdp.ojp.gov/publications/trends-in-youth-arrests.pdf> [<https://perma.cc/5E9P-SY57>].

98. *Adolescent Development*, *supra* note 47, at 117.

99. See Elliott & Limoges, *supra* note 91, at 758.

100. Alaska, Georgia, Michigan, Virginia, and Washington focus mainly on determinate sentencing for youth. Thirteen other states allow for either option and the rest, which constitutes the majority of the states’ statutes, provide for an indeterminate sentencing for youth.

101. RESTATEMENT OF THE LAW - CHILDREN AND THE LAW § 14.11 cmt. c (Tentative Draft No. 4, 2022).

punishments.¹⁰² These reforms were designed to counteract the rise in incarceration rates for minor offenses that occurred during the tough-on-crime era.¹⁰³ Most of those states enforced upper limits on the length of stay a child can be sentenced to in a juvenile court.¹⁰⁴

Georgia, through its 2013 reform, prohibited residential placement for status offenses and most misdemeanors and limited placement length for youth adjudicated for felonies (up to eighteen months for Class B Designated Felony, up to sixty months for Class A Designated Felony) and allowed for periodic reviews and modifications of the confinement orders.¹⁰⁵

Kansas's 2016 juvenile justice reform used a different mechanism to limit the maximum length of time youth could be incarcerated.¹⁰⁶ Kansas's statute places offenses into several categories, based on which a child's minimum and maximum sentencing range is calculated.¹⁰⁷ Through the reform, the legislatures established case length limits and shifted some offenses to less severe categories and reduced the maximum lengths for most categories.¹⁰⁸ For instance, for misdemeanors, up to twelve months; for low-risk and moderate-risk offenders adjudicated for a felony, up to fifteen months; and for high-risk offenders adjudicated for a felony, up to eighteen months.¹⁰⁹

Kentucky's 2014 reform's bill S.B. 200 created upper limits on the lengths of commitments that the state Department of Juvenile Justice could impose: for misdemeanors, commitments could not exceed twelve months; and for low level felonies, commitments could not exceed eighteen months.¹¹⁰ It also limited the length of out-of-home placement and length of supervision based on the seriousness of the offense and risk of reoffending.¹¹¹ The new law requires that the Department of Juvenile Justice (DJJ) develops case plans

102. Gupta-Kagan, *supra* note 60, at 447; *see also* Julie Wertheimer, *States Commit to Comprehensive Juvenile Legal System Reforms*, PEW (Dec. 15, 2023), <https://www.pewtrusts.org/en/research-and-analysis/data-visualizations/2023/states-commit-to-comprehensive-juvenile-legal-system-reforms>. [<https://perma.cc/Q8ZE-SSVK>].

103. Gupta-Kagan, *supra* note 60, at 453.

104. *Id.* at 455.

105. GA. CODE ANN. §§ 15-11-601, 602 (2014).

106. *Kansas' 2016 Juvenile Justice Reform*, PEW CHARITABLE TRS. (June 2017), 11–12, https://www.pewtrusts.org/-/media/assets/2019/06/pspp_kansas_2016_juvenile_justice_reform_brief_v2.pdf [<https://perma.cc/L8KK-PQP6>].

107. *See id.*

108. *See* KAN. STAT. ANN. § 38-2369 (2021).

109. *Juvenile Justice System; SB 367*, KAN. LEG. RSCH. DEP'T. (2016), https://www.kslegislature.org/li_2016/b2015_16/measures/documents/summary_sb_367_2016.pdf [<https://perma.cc/TS3J-G349>].

110. KY. REV. STAT. ANN. § 635.060(4)(b)(1)–(2) (2021).

111. *Kentucky's 2014 Juvenile Justice Reform*, PEW CHARITABLE TRS. at 8 (JULY 2014), <https://www.pewtrusts.org/-media/assets/2014/07/psppkyjuvenilejusticereformbriefjuly2014.pdf> [<https://perma.cc/UB97-N2SU>].

using evidence-based tools that evaluate each youth's risk level and the seriousness of the offense.¹¹² It also places restrictions on the duration for which youth can be placed in out-of-home facilities by DJJ, as well as the overall duration for which the youth may be committed.¹¹³

Utah's 2017 reform created a presumptive maximum of six months, unless the child re-offends in that time or more time is necessary to complete a specific treatment program.¹¹⁴ This limit is based on the offense for which a child is convicted—that six-month limit only applies to children convicted of relatively low or moderate severity offenses, while convictions like murder, aggravated sexual assault, aggravated kidnapping, and felonies involving the use of a weapon are not subject to that limit.¹¹⁵

South Dakota 2015 Juvenile Justice Reform limited the use of placement to youth adjudicated for the most serious offenses and decreased confinement length to up to three months.¹¹⁶ Moreover, the new law established specialized teams within the court system to help judges identify appropriate community-based alternatives to commitment for at-risk youth.¹¹⁷

West Virginia passed Senate Bill 393 in 2015 which diverted youths who had committed low-level, nonviolent crimes from locked detention facilities to community-based alternatives and limited placement to youth who have been assessed as high risk and prohibited placement in residential facilities for status offenses.¹¹⁸ The law also drastically reduced the time of confinement by a requirement that a transition back into the community begin within 30 days of admission to a placement facility and end no later than three months after admission.¹¹⁹

These states change long-standing juvenile justice practice by limiting indeterminate sentences and imposing determinate limits. They did so to limit the length of sentences and impose offense-specific *maximum* sentences.

112. *Id.* at 7.

113. *Id.* at 8.

114. Monica Diaz, *Juvenile Disposition Guidelines*, UTAH SENTENCING COMM'N, at 15 (2020) <https://justice.utah.gov/wp-content/uploads/Juvenile-Guidelines-2020-Final.pdf> [<https://perma.cc/B5BK-RFPV>].

115. *Id.*

116. S.D. CODIFIED LAWS § 26-8C-9 (2016).

117. S.D. CODIFIED LAWS § 26-8C-5 (2016).

118. *Implementing Juvenile Justice System Change in West Virginia*, CRIME & JUST. INST. at 1 (Mar. 2019), <https://www.crj.org/assets/2019/03/WV-2019-Implementing-JJ-System-Change-FINAL.pdf> [<https://perma.cc/TK9Q-UKSW>].

119. *West Virginia's 2015 Juvenile Justice Reform*, PEW (May 12, 2016), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/05/west-virginias-2015-juvenile-justice-reform> [<https://perma.cc/JP8Z-Y44R>].

B. Understanding Adolescents' Crime Through Developmental Psychology and Brain Science Lens

1. Developmental Psychology and Adolescent Brain Science

The core principle of the foundation of any legitimate system of state punishment is the concept of penal proportionality.¹²⁰ The principle of proportionality—that penalties be proportionate in their severity to the gravity of the actor's criminal conduct—seems to be a basic requirement of fairness is always discussed in the context of the actor's blameworthiness.¹²¹ When analyzing the appropriate punishment for adolescents' crimes, it is necessary then to examine whether and in what ways the immaturity of adolescents is relevant to their blameworthiness.¹²² In order to answer this question, it is paramount to highlight the developmental capacities and processes that are relevant to adolescent criminal choices, and the conditions and circumstances that reduce culpability in criminal law.¹²³

Adolescence is a prolonged period of stressful development marked by physical, emotional and social changes.¹²⁴ None is more important than the increasing use of the peer group as a critical reference for exploration of social roles, opposite-sex relationships, and changing relations with parents and other adults.¹²⁵ Psychologists agree that most adults have better reasoning skills than preadolescent children.¹²⁶ Many also argue that by mid-adolescence, teens' capacities for understanding and reasoning in making

120. RICHARD J. BONNIE ET AL., CRIMINAL LAW (1997).

121. Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUST., 55, 55 (1992), <https://www.jstor.org/stable/1147561> [<https://perma.cc/5443-SCEW>].

122. Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1010 (2003) [hereinafter *Less Guilty by Reason of Adolescence*]. Steinberg and Scott's piece on the appropriateness of death penalty was a seminal work, highlighting the diminished responsibility of adolescents and thus not deserving death penalty.

123. *Id.*; see *Adolescent Development*, *supra* note 47, at 15–33. It is worth mentioning that the emphasis here is not on an excuse of adolescent wrongdoing. The public debate oftentimes assumes that the only alternative to adult punishment of youth is no punishment at all, or a slap on the hand. Conversely, I follow the argument of the researchers who show that the developmental immaturity of adolescence mitigates culpability and justifies more lenient and appropriate punishment, but that is not a basis for excuse. *Less Guilty by Reason of Adolescence*, *supra* note 122, at 1010.

124. Beatrix A. Hamburg, *Early Adolescence: A Specific and Stressful Stage of the Life Cycle*, in COPING AND ADAPTATION 101, 110 (G.V. Coelho et al. eds., 1974).

125. *Id.* at 103; see generally PATRICIA A. ADLER & PETER ADLER, PEER POWER: PREADOLESCENT CULTURE AND IDENTITY (1998) (analyzing the importance of peer culture as a shared system of reference and basis for further interaction among pre-adolescents).

126. Baruch Fischhoff, *Risk Taking: A Developmental Perspective*, in RISK-TAKING BEHAVIOR (J. Frank Yates ed., 1992); L. Furby & R. Beyth-Marion, *Risk-Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1, 29 (1992).

decision come close to adults.¹²⁷ However, adolescent judgment and their actual decisions may be different from those of adults because of adolescents' psychosocial immaturity.¹²⁸ The differences in social and emotional maturity are assumed to reflect differences in competence due to differences in developmental status (independent of experience), differences in experience (independent of developmental status), or some combination of both.¹²⁹ Mature judgments are the product of an interaction between cognitive and psychosocial factors, with competent decision-making potentially undermined by deficiencies in either domain.¹³⁰ There are many psychosocial factors and scientists researching the domain of adolescent decision-making in legal context tend to group them in three categories overarching dispositions: (1) *responsibility* (i.e., healthy autonomy, self-reliance, and clarity of identity); (2) *temperance* (i.e., the ability to limit impulsivity, avoid extremes in decision-making, and to evaluate a situation thoroughly before acting, including seeking the advice of others when appropriate); and (3) *perspective* (i.e., being able to acknowledge the complexity of a situation and to frame a specific decision within a larger context).¹³¹ Those factors are not fixed abilities and need to be considered in a social context.¹³²

Among the psychosocial factors that are most relevant to understanding differences in judgment and decision making, and thus shedding light on the nature of adolescents crime are (1) susceptibility to peer influence, (2) attitudes toward and perception of risk, (3) future orientation, and (4) the capacity for self-management.¹³³ As indicated in numerous studies, there is

127. Scott, Steinberg and many others have argued that one should question whether age differences in decision-making disappear by mid-adolescence, mainly as capacities may be manifested in the real-world settings in which choices about criminal activity are made. Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 *LAW & HUM. BEHAV.* 221, 223 (1995); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision-Making*, 20 *LAW & HUM. BEHAV.* 249, 250 (1996).

128. Steinberg & Cauffman, *supra* note 127, at 251.

129. *Id.* at 250.

130. *Id.* at 251.

131. *Id.* at 252.

132. *Id.*

133. Cognitive capacities shape the process of decision-making, yet psychosocial immaturity can affect decision-making outcomes. *Less Guilty by Reason of Adolescence*, *supra* note 122, at 1012. Therefore, to the extent that adolescents are less psychosocially mature than adults, they are likely to be deficient in their decision-making capacity, even if their cognitive processes are mature. *Id.*; Scott et al., *supra* note 127, at 221–24; Steinberg & Cauffman, *supra* note 127, at 249–72. For an extensive overview of the differences in adolescent judgment and decision-making see Elizabeth Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 304 (Thomas Grisso & Robert G. Schwartz eds., 2000); Franklin E. Zimring,

evidence suggesting that at least some of the differences between adults and adolescents have neuropsychological and neurobiological underpinnings.¹³⁴ In fact, studies of brain development during adolescence, and of differences in patterns of brain activation between adolescences and adults, show that the most important developments during adolescence happen in regions that are implicated in processes of long-term planning, the regulation of emotion, impulse control, and the evaluation of risk and reward.¹³⁵ It is not difficult to see how psychosocial immaturity can contribute to adolescent choice to get involved in crime.¹³⁶

Let's take for instance a scenario adapted from Scott and Grisso.¹³⁷ A young person is hanging out with his friends, when one of them suddenly suggests that they rob a person who is passing by to get money to buy drugs. The adolescent does not engage in a deliberative process of decision-making but "chooses" to go along, even if he has mixed feelings about it. He believes that his position in a group will suffer if he declines to participate. That is a

Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 279–83 (Thomas Grisso & Robert G. Schwartz eds., 2000); Jason Chein et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry*, 14 DEV. SCI. F1 (2011); Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEV. PSYCH. 625 (2005); Laurence Steinberg & Katherine Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEV. PSYCH. 1531 (2007); Ashley R. Smith et al., *Peers Increase Adolescent Risk Taking Even When the Probabilities of Negative Outcomes Are Known*, 50 DEV. PSYCH. 1564 (2014).

134. *Less Guilty by Reason of Adolescence*, supra note 122, at 1013.

135. Linda Patia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCI. AND BIOBEHAV. REV. 417 (2000). Steinberg and Scott say that "patterns of development in the prefrontal cortex, which is active during the performance of complicated tasks involving long-term planning and judgment and decision making, suggest that these higher order cognitive capacities may be immature well into adolescence." *Less Guilty by Reason of Adolescence*, supra note 122.

136. Many researchers emphasize the importance of context in adolescent decision-making. Even though adolescents tend to have cognitive maturity of adults at about age sixteen, the context in which decision-making occurs can play a significant role in a youth's ability to make a mature and reasoned decision. When decision-making is unhurried and time is allotted to assess objective information and/or consult with more knowledgeable individuals, youth are more likely to make mature and reasoned decisions similar to that of adults. See Jeffrey A. Fagan, *Context and Culpability in Adolescent Crime*, 6 VA. J. SOC. POL'Y & L. 507 (1999). However, in situations that elicit impulsivity, that are typically characterized but high levels of emotional arousal or social coercion, or that do not encourage or permit consultation with an expert who is more knowledgeable or experienced, adolescents' decision-making, at least until they have turned 18, is likely to be less mature than adults'. Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, 64 AM. PSYCH. 583, 592 (2009).

137. See E. Scott & T. Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 166 (1997).

negative consequence to which he attaches a lot of weight. A more mature person may think of options to withdraw himself from this situation and avoid negative consequences. Yet, an adolescent lacks experience in similar circumstances. He makes the decision very quickly, and he has difficulty considering consequences. Moreover, the “adventure” of the possibility of obtaining some money from it is appealing. As scientists point out, these immediate and concrete rewards, along with the reward of peer approval, carry more weight than the abstract and, in their minds, the remote possibility of being caught by the police.¹³⁸ The long-term costs associated with being adjudicated for a serious crime is the last thing the young person considers.¹³⁹

2. *Effect of Disability, Trauma and Victimization on Adolescents’ Behavior*

Other factors that can play a role in adolescents’ crime are disability, trauma, and victimization. Disabilities may magnify the developmental immaturity adolescents’ display in legal contexts.¹⁴⁰ The term disabilities as it is used here refers to mental health disorders, cognitive, developmental and other learning disabilities that can impede a youth’s development, negatively influence decision-making capacities, and contribute substantially to behavioral problems.¹⁴¹ Disabilities may help explain the use of poor judgment that leads to the commission of an illegal activity.¹⁴² Thus, youth with disabilities can be more likely to be involved in the juvenile justice

138. *See id.*

139. *See id.*; *see also* B.J. Casey et al., *The Adolescent Brain*, 1124 ANNALS OF THE N.Y. ACAD. OF SCI. 111, 122 (2008) (“[A]dolescents may be capable of making informed choices about their future (e.g., terminating a pregnancy) but do not yet have full capacity to override impulses in emotionally charged situations that require decisions in the heat of the moment.”).

140. DANIEL P. MEARS & LAUDAN Y. ARON, ADDRESSING THE NEEDS OF YOUTH WITH DISABILITIES IN THE JUVENILE JUSTICE SYSTEM: THE CURRENT STATE OF KNOWLEDGE 33 (Nov. 2003), <https://www.urban.org/sites/default/files/publication/59476/410885-Addressing-the-Needs-of-Youth-with-Disabilities-in-the-Juvenile-Justice-System.PDF> [<https://perma.cc/G4X-YMDF>].

141. *See generally id.* at 23 (“[A] disability can be thought of as the outcome of an interaction between impairments, or functional limitations, and behavioral/performance expectations of socially defined rules.”).

142. *See id.* at 32–33 (explaining situational factors can deemed as “risk” factors that contribute to delinquency) (“Some crime theories and research suggest that criminal behavior is more likely when certain situational conditions are present.”); *see also* Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youth, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 33, 45–50 (Thomas Grisso & Robert G. Schwartz eds., 2000).

system or multiple systems.¹⁴³ When disability overlaps with other identities associated with higher rates of discipline or justice involvement, such as race and lower socioeconomic status, it can increase the risk of system involvement.¹⁴⁴

Trauma and victimization, similar to disabilities, also influence normative development.¹⁴⁵ Studies show an association between trauma and antisocial behavior¹⁴⁶ and cumulative trauma being a predicative of delinquency.¹⁴⁷ Longitudinal research also suggests that maltreatment in early childhood is predictive of engagement in the kind of serious delinquency that involves youth in the juvenile justice system.¹⁴⁸

143. Matthew Saleh & LaWanda Cook, *Serving Justice-Involved Youth with Disabilities*, VOCATIONAL REHAB. YOUTH TECH. ASSISTANCE CTR. 1 (June 2020), file:///C:/Users/lewisik/Downloads/SSRN-id4251561.pdf [https://perma.cc/88C6-V8TJ].

144. *Id.*

145. See Michelle Evans-Chase, *Addressing Trauma and Psychosocial Development in Juvenile Justice-Involved Youth: A Synthesis of the Developmental Neuroscience, Juvenile Justice and Trauma Literature*, 3 LAWS 744, 749–50 (2014) (“Trauma has been implicated as a barrier to the healthy development of self-regulation, a process under dramatic development during adolescence and one that matures on a predictable developmental timeline while at the same time being responsive to experience, particularly during the late adolescent period.”); see also Patricia K. Kerig & Stephen P. Becker, *From Internalizing to Externalizing: Theoretical Models of the Processes Linking PTSD to Juvenile Delinquency*, in POST-TRAUMATIC STRESS DISORDER (PTSD): CAUSES, SYMPTOMS, AND TREATMENT 33, 33–78 (Silvia J. Egan ed., 2010).

146. Stephen P. Becker & Patricia K. Kerig, *Posttraumatic Stress Symptoms Are Associated with the Frequency and Severity of Delinquency Among Detained Boys*, 40 J. CLINICAL CHILD & ADOLESCENT PSYCH. 765, 765 (2011).

147. Tina Maschi, *Unraveling the Link Between Trauma and Male Delinquency: The Cumulative Versus Differential Risk Perspectives*, 51 SOC. WORK 59 (2006).

148. Evans-Chase, *supra* note 145 at 745–49 (“The Centers for Disease Control (CDC) have termed a specific set of traumatic circumstances occurring before the eighteenth birthday as adverse childhood experiences (ACE). These circumstances include abuse (emotional, physical, or sexual), neglect (emotional or physical), and household dysfunction (mother treated violently, household substance abuse, household mental illness, parental separation or divorce or an incarcerated household member). Additional experiences common to operational definitions of childhood trauma include childhood poverty and out-of-home placement in foster care, institutions, juvenile hall/detention or state youth authority facilities, residential treatment, orphanages, group care facilities, or within the child welfare system. Proximal outcomes associated with childhood traumas/ACEs include increased risk of depression, substance use disorders, personality and conduct disorders, ADHD, delinquency and anxiety. Youth who experience ACEs have been found to be two- to 44 times more likely (depending on the type of trauma) to get into fights, perpetrate dating violence, carry a weapon, bully, harm themselves, have suicidal ideation, or attempt suicide.”); see also Stephen A. Cernkovich et al., *Predicting Adolescent and Adult Antisocial Behavior Among Adjudicated Delinquent Females*, 54 CRIME & DELINQUENCY 3 (2008); Candice Feiring et al., *Potential Pathways from Stigmatization and Internalizing Symptoms to Delinquency in Sexually Abused Youth*, 12 CHILD MALTREATMENT 220 (2007); Bill Henry & Terrie E. Moffitt, *Neuropsychological and Neuroimaging Studies of*

3. *The Supreme Court's Recognition of Developmental Science*

Even before the seminal case of *Roper v. Simmons*, the Supreme Court pointed to the immature judgment of youth in prohibiting the death penalty on youth whose offenses occurred before their sixteenth birthday. In *Thompson v. Oklahoma*, Justice Stevens emphasized that:

[L]ess culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis of this conclusion is too obvious to require extensive explanation. Inexperience, less education and less intelligence make a teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.¹⁴⁹

Seven years later, the Court held in *Roper v. Simmons* that it is unconstitutional to impose capital punishment for crimes committed while under the age of eighteen, because it violates the Eighth Amendment's prohibition against cruel and unusual punishment.¹⁵⁰ The Court's decision appeared to be based, in part, on the developmental science used to mitigate

Juvenile Delinquency and Adult Criminal Behavior, in HANDBOOK OF ANTISOCIAL BEHAVIOR 280 (David M. Stoff, James Breiling & Jack D. Maser eds., 1997); Jennifer E. Lansford et al., *Early Physical Abuse and Later Violent Delinquency: A Prospective Longitudinal Study*, 12 CHILD MALTREATMENT 233 (2007); Joshua P. Mersky & Arthur J. Reynolds, *Child Maltreatment and Violent Delinquency: Disentangling Main Effects and Subgroup Effects*, 12 CHILD MALTREATMENT 246 (2007); Carolyn Smith & Terence P. Thornberry, *The Relationship Between Childhood Maltreatment and Adolescent Involvement in Delinquency*, 33 CRIMINOLOGY 451 (1995); Anna Stewart et al., *Transitions and Turning Points: Examining the Links Between Child Maltreatment and Juvenile Offending*, 32 CHILD ABUSE & NEGLECT 51 (2008); Kimberly A. Tyler et al., *A Longitudinal Study of the Effects of Child Maltreatment on Later Outcomes Among High-Risk Adolescents*, 37 J. YOUTH & ADOLESCENCE 506 (2008); Cathy Spatz Widom et al., *An Examination of Pathways From Childhood Victimization to Violence: The Role of Early Aggression and Problematic Alcohol Use*, 21 VIOLENCE AND VICTIMS 675 (2006); Cathy Spatz Widom & Helene Raskin White, *Problem Behaviours in Abused and Neglected Children Grown Up: Prevalence and Co-Occurrence of Substance Abuse, Crime and Violence*, 7 CRIM. BEHAV. AND MENTAL HEALTH 287 (1997); Becker & Kerig, *supra* note 146.

149. *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988).

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

the culpability of adolescents.¹⁵¹ Writing for the majority, Justice Kennedy stated:

First, as any parent knows, and as the scientific and sociological studies . . . 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.” . . . The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . . 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.¹⁵²

The Court further explained that “juveniles have less control, or less experience with control, over their own environment.”¹⁵³ Given these characteristics, the Court went on to observe that “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”¹⁵⁴ The Court has continued to recognize the significance of developmental research in three other cases since *Roper*: *Graham v. Florida*, 560 U.S. 48 (2010), *J.D.B. v. North Carolina*, 564 U.S. 261 (2011), and *Miller v. Alabama*, 567 U.S. 460 (2012).

In 2010, the Court held in *Graham* that juvenile offenders could not be sentenced to life imprisonment without parole for non-homicide offenses.¹⁵⁵ *Graham* reaffirmed *Roper*’s holding that juveniles have lessened culpability and are therefore less deserving of the most serious forms of punishment.¹⁵⁶

151. *Id.* at 569–71. Specifically, citing studies relied upon by such Amici as the American Medical Ass’n and the American Psychological Ass’n. See Brief of the American Medical Ass’n et al. as Amici Curiae in Support of Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1633549 and Brief for the American Psychological Ass’n, and the Missouri Psychological Ass’n as Amici Curiae Supporting Respondent *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1636447.

152. *Roper*, 543 U.S. at 569–70.

153. *Id.* at 569.

154. *Id.* at 573.

155. *Graham v. Florida*, 560 U.S. 48, 74 (2010).

156. *Id.* at 74–75. In *Roper*, that deprivation resulted from an execution that brought life to its end. Here, though by a different dynamic, the same concerns apply. Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation.

Graham specifically noted the developments in both behavioral and brain research to support its conclusions: "...developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence."¹⁵⁷

In 2011, the Court held in *J.D.B.* that law enforcement must consider the age of the suspect in their Miranda custody analysis.¹⁵⁸ Writing for the majority, Justice Sotomayor stated: "[S]o long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test."¹⁵⁹ Justice Sotomayor effectively characterized youth as an unambiguous fact that "generates commonsense conclusions about behavior and perception,"¹⁶⁰ and she noted that such conclusions are "self-evident to anyone who was a child once himself, including any police officer or judge."¹⁶¹ Significantly, *J.D.B.* extended the Court's application of developmental research beyond the sentencing issues addressed in *Graham* by noting that youth often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave.¹⁶² In addition, *J.D.B.* established the presumption of a "reasonable child" standard.¹⁶³ In 2012, the Court held in *Miller* that "mandatory life without parole for those under the age of eighteen at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments'" and that "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."¹⁶⁴ *Miller* reaffirmed the holdings of *Graham* and *Roper*, while potentially extending them by focusing on individualized determinations: "a sentence misses too much if it treats every child as an

157. *Id.* at 68.

158. *J.D.B. v. North Carolina*, 564 U.S. 261, 277 (2011).

159. *Id.*

160. *Id.* at 272 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting)).

161. *Id.* Responding to the dissent's concern about "gradations among children of different ages," *id.* at 279, Justice Sotomayor wrote: "Just as police officers are competent to account for other objective circumstances that are a matter of degree such as the length of questioning or the number of officers present, so too are they competent to evaluate the effect of relative age." *Id.*

162. *Id.* at 272.

163. See Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the Miranda Custody Analysis: Can a More Reasoned Justice System for Juveniles Be Far Behind?*, 47 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 501 (2012).

164. *Miller v. Alabama*, 567 U.S. 460, 465, 489 (2012). For developmental studies supporting the Court's rationale, see Brief for the American Psychological Association et al. as Amici Curiae Supporting Petitioners at 6-30, *Miller v. Alabama*, 567 U.S. 460 (2012), (Nos. 10-9646, 10-9647), 2012 WL 174239.

adult,” and “[m]andatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them immaturity, impetuosity, and failure to appreciate risks and consequences.”¹⁶⁵ In all these cases, the Court acknowledged the importance of considering immaturity when applying constitutional protections to adolescents.¹⁶⁶ The Court also demonstrated its receptivity to grounding constitutional principles in well-settled developmental and scientific research.¹⁶⁷

C. *Behind Bars: Unraveling the Impact of Incarceration*

1. *Harmful Effects of Incarceration*

The justification for incarcerating young people ranges from rehabilitation and punishment to deterrence from future offending.¹⁶⁸ Incarceration is also supposed to support the major task of adolescent development of achieving both social autonomy and social integration.¹⁶⁹ Researchers argue to the contrary. As discussed in Part I.B adolescence is a period of growth in psychosocial maturity where young people show improvements in temperance, perspective, and responsibility.¹⁷⁰ Although younger youth struggle with showing sophistication in these areas, temperance, perspective and responsibility grow steadily across the adolescent years.¹⁷¹ Variations in social context contribute to the development

165. *Miller*, 567 U.S. at 477.

166. *See id.* (“Mandatory life without parole for a juvenile precludes consideration of his . . . immaturity . . .”); *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (“Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”); *J.B.D. v. North Carolina*, 564 U.S. 261, 273 (2011) (“The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.”); *Graham v. Florida*, 560 U.S. 48, 73 (2010) (“A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity.”).

167. *See Miller v. Alabama*, 567 U.S. 460 (2012); *Roper v. Simmons*, 543 U.S. 551 (2005); *J.B.D. v. North Carolina*, 564 U.S. 261 (2011); *Graham v. Florida*, 560 U.S. 48, 73 (2010).

168. Ian Lambie & Isabel Randell, *The Impact of Incarceration on Juvenile Offenders*, 33 CLINICAL PSYCH. REV. 448, 449 (2013).

169. *Id.* at 450.

170. Julia Dmitrieva et al., *Arrested Development: The Effects of Incarceration on the Development of Psychosocial Maturity*, 24 DEV. & PSYCHOPATHOLOGY 1073, 1073 (2012).

171. Kathryn C. Monahan et al., *Trajectories of Antisocial Behavior and Psychosocial Maturity from Adolescence to Young Adulthood*, 45 DEVELOPMENTAL PSYCH. 1654 (2009). Kathryn C. Monahan et al., *Psychosocial (Im)maturity from Adolescence to Early Adulthood: Distinguishing Between Adolescence-Limited and Persistent Antisocial Behavior*, 25 DEV. & PSYCHOPATHOLOGY 1093 (2011). These researchers show evidence that there is major variability in the degree and rate of development of psychosocial maturity across adolescence

of these qualities.¹⁷² Researchers have shown that “exposure to positive parent-child relationships, prosocial peers, and nurturing schools and extracurricular context are each linked to greater psychosocial maturity during adolescent years.”¹⁷³ Thus, the goals of many juvenile correctional facilities often conflict with the successful development of psychosocial maturity.¹⁷⁴ The example given by the researchers is that incarcerated people need to obey the rules without questioning, even when some of the rules do not make sense or are unfairly enforced.¹⁷⁵ Extensive and rigid rules are the hallmarks of the environment of the secured facilities. Young people who live in such social contexts may lose the ability to cope with the demands of an outside world that lacks rigid structure.¹⁷⁶ Consider, for example, research conducted by Kilgore and Meade on a boot camp-like correctional facility and the effectiveness of their methods to teach boys self-discipline and thus reduce their reoffending. They found out that boys were not prepared to avoid further arrest because they have not acquired self-discipline skills.¹⁷⁷ The extremely structured environment (which removes all decision-making opportunity) seems to be counterproductive to such a goal.¹⁷⁸ As pointed out by Lambie and Randell, there are few opportunities for young people to learn new ways of forming and maintaining appropriate social and sexual relationships in a structured environment.¹⁷⁹ Lambie and Randell suggest that “[i]t is only possible for a young person to reliably ‘grow out’ of deviance if he or she develops alternative, more adaptive coping resources and strategies.”¹⁸⁰ Such

and young adulthood, with some youth showing greater or faster gains and others exhibiting little or very slow growth in maturity over time.

172. Dmitrieva et al., *supra* note 170, at 1073.

173. *Id.*; see also Laurence Steinberg et al., *Reentry of Young Offenders from the Justice System: A Developmental Perspective*, 2 YOUTH VIOLENCE & JUV. JUST. 21, 26 (2004).

174. Dmitrieva et al., *supra* note 170, at 1074; Rehabilitation is often one of the stated purposes of the juvenile justice system, yet the punitive “adult time for adult crime” climate continues and thus many juvenile justice facilities are places designed mainly (or exclusively) for punishment and incapacitation.

175. Carl Kummerlowe, *Coping with Imprisonment: A Long-Term’s View*, in LONG-TERM IMPRISONMENT: POLICY SCIENCE AND CORRECTIONAL PRACTICE 41, 42 (Timothy J. Flanagan ed., 1995).

176. John Irwin & Barbara Owen, *Harm and the Contemporary Prison*, in THE EFFECTS OF IMPRISONMENT 90, 100 (Alison Liebling & Shadd Maruna eds., 2005).

177. Deborah Kilgore & Susan Meade, “*Look What Boot Camp’s Done for Me: Teaching and Learning at Lakeview Academy*,” 55 J. CORRECTIONAL EDUC. 170, 183 (June 2004).

178. *Id.*

179. Lambie & Randell, *supra* note 168, at 541.

180. *Id.*; see also, Jodi Lane et al., *Adult Versus Juvenile Sanctions: Voices of Incarcerated Youths*, 48 CRIME & DELINQUENCY 431, 450–51 (2002) (“[Y]ouths in this study believed that life skills (e.g., GED program, training in job skills, reentry programs) and counseling (help with problems and personal behavior management) were the program components that were the most effective in helping them change their attitudes and behaviors.”).

adaptive resources are not reliably or effectively taught to youth inmates and the acquisition of such skills is limited by the nature of the social context.¹⁸¹

What's more, if young people in incarcerated settings are discouraged from expressing concerns, this may obstruct their coping efforts, such as seeking social support, which then could interfere with adjustment.¹⁸² Additionally, incarceration separates youth from their parents at a time in development when young people still heavily depend on their families for the acquisition of their coping skills and well-being.¹⁸³ At the same time, adolescents perceive their relationships with friends to be more and more important, and incarcerated adolescents are placed in social contexts where their only peer group is composed of other anti-social youth.¹⁸⁴ Moreover, research shows that incarceration inhibits opportunities for successful pro-social development because it restricts autonomy, and therefore it limits the young person's options for social interaction, prevents integration, and disrupts community contact.¹⁸⁵ The reinforcement of societal norms and expectations is severely limited in carceral settings and the opportunities for youth to model adaptive interpersonal interactions, such as conflict resolution, or practice of interpersonal skills and relationship management are very constrained.¹⁸⁶ Considering the difficulty of practicing pro-social forms of behavior while incarcerated adolescents become more and more detached from adaptive law-abiding society.¹⁸⁷ It is also important to point out that the high rate of psychological disorders among adolescent offenders¹⁸⁸ may render incarcerated adolescents even more vulnerable to the stresses of incarceration.¹⁸⁹ Furthermore, an increase in aggressive behavior among confined youth has also been linked to incarceration.¹⁹⁰ Youth prisons are

181. Lambie & Randell, *supra* note 168, at 451.

182. *Id.*; see also, Elizabeth P. Shulman & Elizabeth Cauffman, *Coping While Incarcerated: A Study of Male Juvenile Offenders*, 21 RSCH. ON ADOLESCENCE 818, 825 (2011).

183. Dmitrieva et al., *supra* note 170, at 1073; see Marianne Helsen et al., *Social Support from Parents and Friends and Emotional Problems in Adolescence*, 29 J. YOUTH & ADOLESCENCE 319, 332 (2000); see Joan M. Patterson & Hamilton I. McCubbin, *Adolescent Coping Style and Behaviors: Conceptualization and Measurement*, 10 J. ADOLESCENCE 163, 182 (1987), <https://onlinelibrary.wiley.com/doi/epdf/10.1016/S0140-1971%2887%2980086-6> [<https://perma.cc/W7J5-SNSF>].

184. See Helsen et al., *supra* note 183.

185. Dmitrieva et al., *supra* note 170; see also Mark W. Lipsey, *The Effects of Community-Based Group Treatment for Delinquency: A Meta-Analytic Search for Cross-Study Generalizations*, in *DEVIANT PEER INFLUENCES IN PROGRAMS FOR YOUTH: PROBLEMS AND SOLUTIONS*, (Kenneth A. Dodge, Thomas J. Dishion & Jennifer E. Lansford eds., 2006).

186. Laurence Steinberg et al., *Reentry of Young Offenders from The Justice System: A Developmental Perspective*, 2 YOUTH VIOLENCE & JUV. JUST. 21, 29 (2004).

187. Lambie & Randell, *supra* note 168, at 451.

188. PEW CHARITABLE TRUSTS, *supra* note 111.

189. See *id.*

190. Lambie & Randell, *supra* note 168, at 452.

dangerous places.¹⁹¹ Several researchers confirmed that exposure to violence and male-modeled antisocial behavior is a risk factor for the development of sexual and non-sexual aggression and delinquency in youth offenders¹⁹² and others showed that contact with other aggressive inmates increases an individual's aggressive behavior.¹⁹³

191. Reports of violence and abuse at youth prisons are numerous. In 2011, Annie E. Casey Foundation identified 52 lawsuits since 1970 that resulted in a court-sanctioned remedy in response to allegations of systemic problems with violence. Richard A. Mendel, *No Place for Kids: The Case for Reducing Juvenile Incarceration*, ANNIE E. CASEY FOUNDATION (2011), <https://assets.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf> [<https://perma.cc/4PDG-JJAX>]; see Richard A. Mendel, *Maltreatment of Youth in U.S. Juvenile Correctional Facilities: An Update*, ANNIE E. CASEY FOUND. (2015), <https://assets.aecf.org/m/resourcedoc/aecf-maltreatmentyouthuscorrections-2015.pdf> [<https://perma.cc/5MKT-Z3YL>] [herein after Mendel 2015]. For examples of state facilities that are plagued by routine violence, see Mary Jo Pitzl, *Audit Rips Child-Welfare Agency, Cites Serious Issues*, AZCENTRAL.COM (July 2, 2015), <https://www.azcentral.com/story/news/arizona/politics/2015/07/02/arizona-department-child-safety-audit/29598661/> [<https://perma.cc/LY8R-GMUN>]; see also John P. Vivian et al., *Assaults in Juvenile Correctional Facilities: An Exploratory Study*, 30 J. CRIME & JUST. 17 (2007); see also Alan Judd, *Georgia's Juvenile Prisons: Assaults by Guards, Strip Searches, Chaos*, ATLANTA JOURNAL-CONSTITUTION (Nov. 17, 2019), <https://www.ajc.com/news/crime-law/violence-permeates-youth-prisons/7YRQTDEnIT20hGVEnjybp/> [<https://perma.cc/LM8E-WA48>]; see also Emily Michot & Matias Ocnor, *Dark Secrets of Florida's Juvenile Justice System: A Miami Herald Investigation*, MIAMI HERALD (Oct. 10, 2017), <https://www.miamiherald.com/news/special-reports/florida-prisons/article177987926.html> [<https://perma.cc/A8S9-KM9M>]; see also Patrick Marley, *Probe of Lincoln Hills Intensified with New Incidents, Schimel Says*, MILWAUKEE JOURNAL SENTINEL (Jan. 11, 2016), <https://archive.jsonline.com/news/statepolitics/probe-of-lincoln-hills-intensified-with-new-incidents-schimel-says-b99649691z1-364913241.html/> [<https://perma.cc/4R52-UGPH>]; see also Kelli Johnson & Edie Surtees, *DOJ Opens Statewide Investigation into Abuse of Youth in Texas' Juvenile Facilities*, TEXAS APPLESEED (Oct. 13, 2021), <https://www.texasappleseed.org/press-releases/doj-opens-statewide-investigation-abuse-youth-texas%E2%80%99-juvenile-facilities> [<https://perma.cc/X4UL-HHAA>]; see also DEP'T OF JUST., INVESTIGATION OF SOUTH CAROLINA DEPARTMENT OF JUVENILE JUSTICE'S BROAD RIVER ROAD COMPLEX (2022) <https://www.justice.gov/crt/case-document/file/1495151/download> [<https://perma.cc/C82B-NJEU>].

192. Lambie & Randell, *supra* note 168, at 452; John A. Hunter, *Developmental Pathways in Youth Sexual Aggression and Delinquency: Risk Factors and Mediators*, 19 J. FAM. VIOLENCE 233, 239 (2004); A. Shahinfar et al., *The Relation Between Exposure to Violence and Social Information Processing Among Incarcerated Adolescents*, 110 J. ABNORMAL PSYCH. 136 (2001).

193. Lambie & Randell, *supra* note 168, at 452; Carolyn M. Anderson, & Andrew S. Rancer, *Relationship Between Argumentativeness, Verbal Aggressiveness, and Communication Satisfaction in Incarcerated Male Youth*, 87 PRISON J. 323, 339 (2007). However, Lambie and Randall found that contact with antisocial peers did not solely predict increased aggression upon release, suggesting that other variables are also likely to be involved in such a relationship. Michelle Little, *A Social Development Model of Incarceration on Juvenile Offenders' Social Network Support, Exposure to Antisocial Peers, Aggressive Offending and Psychological Adjustment* (2006) (Ph.D. dissertation, Temple University).

The prevalence of abuse within youth prisons causes many youths to experience significant levels of victimization.¹⁹⁴ In 2011, Mendel compiled extensive evidence showing that youth corrections institutions in the U.S. “expose confined youth to unacceptable levels of danger and, maltreatment. It documented widespread physical abuse, excessive use of force by facility staff; an epidemic of sexual abuse; rampant overreliance on isolation and restraints; unchecked youth-on-youth-violence; and frequent violence against staff.”¹⁹⁵ “Among youth in secure corrections facilities or camp programs, 42 percent said they were somewhat or very afraid of being physically attacked, while 45 percent reported that staff ‘use force when they don’t really need to,’ and 30 percent said that staff place youth into solitary confinement or lock them up alone as discipline.”¹⁹⁶ Excessive and unwarranted isolation of confined youth remains widespread in many correctional facilities¹⁹⁷ despite the growing consensus that isolation of youth is harmful and counterproductive.¹⁹⁸

194. *No Place for Kids* compiled extensive evidence showing that America’s youth corrections institutions expose confined youth to unacceptable levels of danger and, maltreatment. It documented widespread physical abuse, excessive use of force by facility staff; an epidemic of sexual abuse; rampant overreliance on isolation and restraints; unchecked youth-on-youth-violence; and frequent violence against staff. Mendel, *supra* note 191.

195. Mendel, *supra* note 191, at 6. According to the report, systemic or recurring maltreatment had been documented in 14 states since 2011 (plus seven additional states with some evidence of systemic maltreatment); 29 states plus the District of Columbia since 2000; in 37 states plus the District of Columbia and Puerto Rico since 1990; and in 43 states plus the District of Columbia and Puerto Rico since 1970. *Id.* at 20.

196. *Id.* at 7. The examples of heinous abuses are numerous: use of pepper spray, hog-tying, pole-tying, strip search, sexual abuse, excessive shackling. *Id.* at 9–19.

197. *Id.* at 24–28.

198. In December 2018, Congress passed and President Trump signed the First Step Act, which prohibited solitary confinement of children in the federal system, and sharply limited room confinement. First Step Act (FSA), Pub. L. No. 115-391, 132 Stat. 5194. This action reflects the consensus view that solitary confinement can cause serious psychological, physical, and developmental harm to children including trauma, depression, anxiety, and increased risk of suicide and self-harm. Research shows that more than half of all suicides in juvenile facilities occurred while young people were held in isolation. *Council of Juvenile Correctional Administrators Toolkit: Reducing the Use of Isolation*, CJA-CCAS (Mar. 2015), <http://www.stopsolitaryforkids.org/wp-content/uploads/2016/04/CJA-Toolkit-Reducing-the-use-of-Isolation.pdf> [<https://perma.cc/7D4H-52EX>].

National and international experts agree that solitary confinement of children should be banned. A number of international instruments and human rights organizations have declared that the solitary confinement of children violates human rights laws and standards prohibiting cruel, inhuman or degrading treatment and called for the practice to be banned, including the *United Nations Guidelines for the Prevention of Juvenile Delinquency* (the Riyadh Guidelines), the Committee on the Rights of the Child, the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (the Beijing Rules), and the Inter-American Commission on Human Rights. Based on the harmful physical and psychological effects of solitary confinement

Incarceration does not only have immediate negative effects on youth, but it also carries long-term consequences. Researchers have documented associations of cumulative incarceration during adolescence and early adulthood with worse physical and mental health later in adulthood.¹⁹⁹ Others also found that youth involved in the justice system face greater risk for early death than community youth.²⁰⁰ Moreover, mortality rates for these youths increase as youth involvement in the justice system becomes more protracted and severe.²⁰¹ What is important to notice, considering that racial and ethnic disparities in incarceration are vast,²⁰² black male youth face higher risk of early mortality than their white male counterparts. Youths' incarceration also impedes their success in education and employment.²⁰³ Studies point out that

and the particular vulnerability of children, the Office of the U.N. Special Rapporteur on Torture has repeatedly called for the abolition of solitary confinement of persons under age 18. HUMAN RIGHTS WATCH & ACLU, *GROWING UP LOCKED DOWN* 20 n.46. As stated by Professor Simkins and her colleagues, "Behind problematic youth behavior is a combination of immature thinking and identity, learning disabilities, and trauma. And, as a result of isolation, the very behaviors that are the cause for placement in isolation, are exacerbated. Sandra Simkins et al., *The Harmful Use of Isolation in Juvenile Facilities: The Need for Post-Disposition Representation*, 38 WASH. U. J.L. & POL'Y, 241, 261 (2012).

201. Elizabeth S. Barnert et al., *How Does Incarcerating Young People Affect Their Adult Health Outcomes?*, 139 PEDIATRICS NO. 2, at 4 (2017) <https://publications.aap.org/pediatrics/article/139/2/e20162624/60093/How-Does-Incarcerating-Young-People-Affect-Their> [<https://perma.cc/VN8Q-ZN6Z>].

200. Youth incarcerated in correctional facilities were 2–5 times more likely to die prematurely than those who were not confined. Matthew C. Aalsma et al., *Mortality of Youth Offenders Along a Continuum of Justice System Involvement*, 50 AM. J. PREVENTIVE MED. 303, 306 (2016).

201. *Id.*

202. The 2019 Census of Juvenile in Residential Placement found that the post-adjudication placement rate for black youth was 3.6 times the rate for non-Hispanic white youth. M. Sickmund et al., *Easy Access to the Census of Juveniles in Residential Placement*, OJJDP (2022). As of October 2019, youth facilities (including 1,510 detention centers, residential treatment centers, group homes, and youth prisons) held 36,479 youths. Of these youths, 41% were black, even though black American constitute only 15% of all youth in the U.S. C. Puzanchera, A. Sladky, & W. Kang, *Easy Access to Juvenile Populations: 1990-2019*, NAT'L CTR. FOR JUV. JUST., <https://www.ojjdp.gov/ojstatbb/ezapop/> [<https://perma.cc/NGK8-FQXV>]. Youth of color are also incarcerated disproportionately at the correctional phase of the juvenile court process—after they are adjudicated delinquent (found guilty of an offense). Research finds that the disparities in correctional confinement are due primarily to the cumulative impact of large disparities in early stages of justice system involvement (arrest, formal processing in court, and detention). RICHARD MENDEL, *WHY YOUTH INCARCERATION FAILS: AN UPDATED REVIEW OF THE EVIDENCE* (2022), <https://www.sentencingproject.org/reports/why-youth-incarceration-fails-an-updated-review-of-the-evidence/#executive-summary> [<https://perma.cc/88AD-GYQ7>] [hereinafter *WHY YOUTH INCARCERATION FAILS*].

203. Mendel, *supra* note 191. Incarcerated youth is often characterized by significant learning, behavioral, and cognitive problems and research points out that incarcerated youth often receive a more fragmented and inferior education than that of their peers in the community. Lambie & Randell, *supra* note 168, at 454.

incarceration reduces the likelihood that young people will graduate high school.²⁰⁴ Furthermore, youth incarceration reduces college enrollment and completion and lowers employment and earnings opportunities in adulthood.²⁰⁵

2. Counterproductive Outcomes of Incarceration

Research indicates that a significant proportion of youth incarcerated in correctional facilities continue to engage in criminal activity as adults.²⁰⁶ States recidivism data show that youth who are released from secure confinement experience higher rates of recidivism.²⁰⁷ Mendel, in his updated

204. Mendel brings up a 2008 study where, using data from a nationally representative survey that tracked more than 7,000 youth, it found that incarceration before age 17 reduced the likelihood of teens graduating from high school by 26 percent—a far higher rate than for youth who were arrested and involved in juvenile court but not incarcerated. Mendel, *supra* note 191. See also Randi Hjalmarsson, *Criminal Justice Involvement and High School Completion*, 63 J. URB. ECON. 613 (2008); see also E. Jason Baron et al., *Pretrial Juvenile Detention*, NBER Working Paper No. 29861 (2022), https://www.nber.org/system/files/working_papers/w29861/w29861.pdf [<https://perma.cc/Z72E-LRUE>]; Anna Aizer & Joseph J. Doyle, Jr., *Juvenile Incarceration. Human Capital and Future Crime: Evidence from Randomly-Assigned Judges*, NBER Working Paper No. 19102 (2013), <https://www.nber.org/papers/w19102> [<https://perma.cc/ZG54-W3EQ>]; ARINA GERTSEVA & CARL MCCURLEY, EDUCATION OUTCOME CHARACTERISTICS OF STUDENTS ADMITTED TO JUVENILE DETENTION, ERDC (2019), file:///C:/Users/lewisik/Downloads/Education-Outcome-Characteristics-of-Juvenile-Detention.pdf. [<https://perma.cc/D64R-867G>].

205. Mendel, *supra* note 191; see also Elizabeth K. Anthony et al., *Coming Back Home: The Reintegration of Formerly Incarcerated Youth with Service Implications*, 32 CHILD. & YOUTH SERVS. REV. 1271, 1273 (2010); DIANA BRAZZELL ET AL., FROM THE CLASSROOM TO THE COMMUNITY: EXPLORING THE ROLE OF EDUCATION DURING INCARCERATION AND REENTRY (2009), <https://files.eric.ed.gov/fulltext/ED508246.pdf> [<https://perma.cc/W7JQ-TNLR>].

206. See, e.g., Brenda B. Benda et al., *Recidivism Among Adolescent Serious Offenders: Prediction of Entry into the Correctional System for Adults*, Crim. 28 JUST. & BEHAV. 588, 594 (2001); MICHAEL E. EZELL & LAWRENCE E. COHEN, DESISTING FROM CRIME: CONTINUITY AND CHANGE IN LONG-TERM CRIME PATTERNS OF SERIOUS CHRONIC OFFENDERS (2005); see generally Robert J. Sampson & John H. Laub, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 41 CRIMINOLOGY 301 (2003); Marguerite Q. Warren & Jill L. Rosenbaum, *Criminal Careers of Female Offenders*, 13 CRIM. JUST. & BEHAV. 393, 401 (1986); John D. Wooldredge, *Differentiating the Effects of Juvenile Court Sentences on Eliminating Recidivism*, 25 J. RSCH. CRIME & DELINQUENCY 264, 293 (1988).

207. Mendel, *supra* note 191, at 10. Recidivism, a term meaning commission of a new offense by an individual known to be an offender, and particularly after having been sanctioned by the justice system, is typically measured in terms of an action taken by the police, a prosecutor, or a juvenile or criminal court judge. Alfred Blumstein & Richard C. Larson, *Problems in Modeling and Measuring Recidivism*, 8 J. RSCH. IN CRIME & DELINQUENCY 124 (1971). A white paper published by the Council of Juvenile Correctional Administrators (CJCA) describes the need to standardize the definition of juvenile recidivism across states. P. W.

review of the evidence why youth incarceration fails, points to a comprehensive state-by-state review of recidivism data from 2011 which found that seventy to eighty percent of youth who left residential correctional programs were rearrested within two or three years of release.²⁰⁸ The review indicates that forty-five to seventy-two percent of those young people were adjudicated (found to be delinquent in juvenile court) or convicted (in adult court) for new offenses within three years of release.²⁰⁹ Several states have provided more recent data on their recidivism outcomes for youth who have been incarcerated. Mendel compared these data to the one from 2011 and concluded that “three of the states (Delaware, Texas, and Virginia) have seen recidivism worsen in recent years, two states saw no change (Colorado and Illinois), and five states have seen some improvement (Arizona, Florida, Georgia, Louisiana, and Maryland).”²¹⁰

Other studies confirm that compared to probation and other community alternatives, incarceration most often results in higher rates of recidivism.²¹¹

HARRIS ET AL., A CJA WHITE PAPER: DEFINING AND MEASURING RECIDIVISM (2009), <https://www.doc.ks.gov/juvenile-services/committee/documentation/6-2017/CJCA/view> [<https://perma.cc/DKX8-ZLFA>]. The varying ways in which recidivism is defined and measured in programs, services, and agencies makes it challenging to use the data in a meaningful way. CJA explains the uses and misuses of recidivism data while laying out recommendations for standardizing definitions and measures as well as how recidivism data are useful for program and system development. *Id.*

208. Mendel, *supra* note 191, at 12.

209. *Id.*

210. WHY YOUTH INCARCERATION FAILS, *supra* note 202, at 12. It is important to be cognizant of the pitfalls of comparing recidivism rates among states, as not all states have the same methodologies for analyzing recidivism nor is there even a standard definition of recidivism. Some states use reconviction as their standard measure, others use recommitment. Some states only consider new charges recidivist events, not including violations of probation. Other states further require offenders to be originally incarcerated on a felony charge or resented to a specific minimum time for that offender to be considered a recidivist. *See* HARRIS ET AL., *supra* note 207.

211. WHY YOUTH INCARCERATION FAILS, *supra* note 202, at 12. Examples listed by Mendel include New York State, where “89% of boys and 81% of girls released from state youth correctional facilities in the early 1990s were arrested as adults by age 28. Among the boys, 65% were convicted of felonies, and 71% were incarcerated as adults by age 28.” *Id.* Mendel further cites, “A study in South Carolina found that 82% of boys born in 1967 who were incarcerated as juveniles were later imprisoned or placed on probation as adults.” *Id.* See more studies on South Carolina recidivism in Part III.

According to Mendel, “A long-term study of youths in Seattle, published in 2015, found that those incarcerated during adolescence were nearly four times more likely to be incarcerated in adulthood than comparable peers who were not incarcerated (controlling for delinquent conduct, gang membership, peer delinquency, and other relevant risk factors). *Id.*

Mendel also cites:

What's more, it has been shown that longer lengths of confinement do not reduce recidivism.²¹²

Myner et al. argued that incarceration did not serve as a deterrent for juvenile offenders. [They] discovered that the longer the length of the initial incarceration, the greater the number of subsequent reconvictions. To explain this finding, they surmised that youths may be learning criminal behavior from other delinquent juveniles, and additionally, that labeling delinquents may perpetuate criminal behavior. Similarly, the Virginia Poverty Law Center reviewed Virginia's juvenile offender population and asserted that incarcerating youths beyond the point of rehabilitation may make youth more dangerous than they were when initially incarcerated and may impede successful community reintegration following release.²¹³

In Ohio, a 2014 evaluation of community alternatives to incarceration funded through the RECLAIM Ohio program showed that youths who were assessed as having a low or moderate risk for rearrest who remained in the community were one-tenth as likely to be incarcerated for a future offense as comparable youths placed in juvenile correctional facilities. Among youth assessed as high-risk, those served by community programs were one-third as likely to be incarcerated for subsequent offenses. Youths assessed as low or moderate risk of rearrest who remained in the community were less than half as likely as those placed in juvenile facilities to be adjudicated for a subsequent felony.

Id. Mendel also notes, "An exhaustive 2015 study in Texas showed that adjudicated youth who were allowed to remain in the community on probation were 30% less likely to be arrested for a subsequent offense than comparable youth sent to state corrections facilities." *Id.* at 13.

212. See R. D. Saake, *Probation Camp Schools and Recidivism* (1972) (PhD. Dissertation, University of Southern California), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/probation-camp-schools-and-recidivism#1-0> [<https://perma.cc/YS22-VL9P>]; Jeffrey Fagan, *Separating the Men from the Boys: The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, in *SERIOUS, VIOLENT, AND CHRONIC JUVENILE OFFENDERS: A SOURCEBOOK* 238, 250–51 (James C. Howell et al. eds., 1995).

213. Kristin Parsons Winokur et al., *Juvenile Recidivism and Length of Stay*, 36 *J. CRIM. JUST.* 126, 127 (2008). They examined the relationship between the length of first confinement and number of subsequent convictions among a sample of male youth offenders. Juley Myner et al., *Variables Related to Recidivism Among Juvenile Offenders*, 42 *INT'L J. OF OFFENDER THERAPY & COMPAR. CRIMINOLOGY* 65, 65 (1998). That premise is supported by several theories that suggest that prisons operate as "schools of crime." For example, a social learning theory suggests that the negative impact of prison can be explained through reinforcement,

Winokur et al. examined data from the “Florida Department of Juvenile Justice of 16,779 juveniles released from commitment programs to the community or aftercare between July 1, 1998, and June 30, 2000, were examined in this study.”²¹⁴ Their study showed that “the shortest lengths of stay within this security level resulted in decreased chances for recidivism. Intermediate periods of confinement and very long stays were associated with high probability of recidivism. In comparison, the probability of future adjudication or conviction for high-risk commitments with seventeen to twenty months of treatment was similar to the probability of those receiving one to four months of services.”²¹⁵

Lovins looked at 5,603 youth released from Ohio Department of Youth Services (DYS) between 2003 and 2006 to test his hypothesis that length of stay of youth in secure facilities is associated with future recidivism.²¹⁶ The results of his study were conclusive that “longer stays in DHS [were] positively correlated with future reincarceration.”²¹⁷ Furthermore, the results suggested “that additional time at DHS result[ed] in higher recidivism rates.”²¹⁸

As stated by the National Research Council, “confinement of juveniles beyond the minimum amount needed to deliver intensive services effectively is not only wasteful economically but also potentially harmful, and it may

imitation, differential association and adoption of antisocial definitions. See Ronald L. Akers et al., *Social Learning and Deviant Behavior: A Specific Test of a General Theory*, 44 AM. SOCIO. REV. 636, 636 (1979).

A labeling theory says that those who are sentenced to prison for longer periods of time will recidivate at a higher rate than those who are given a lesser sentence. Tannenbaum argued that as a young person receives punishment from the juvenile justice system (they are labeled delinquent), they begin to perceive themselves as deviant. As they adopt this new image, they will tend to gravitate to those people who are accepting of this new image, which then is reinforced by engaging in delinquent behavior. See FRANK TANNENBAUM, *CRIME AND THE COMMUNITY* 456 (1938). See also Caroline Warren, *The Negative Effect of Criminal Labeling on Community Reentry in the Harrisonburg Area* (2022) (Honors Project, Bridgewater College), https://digitalcommons.bridgewater.edu/cgi/viewcontent.cgi?article=1342&context=honors_projects [<https://perma.cc/J3VY-NLHX>].

214. Winokur et al., *supra* note 213, at 126.

215. *Id.* at 136.

216. Brian Lovins, *Putting Wayward Kids Behind Bars: The Impact of Length of Stay in a Custodial Setting on Recidivism* 52 (Jan. 22, 2013) (Ph.D. dissertation, University of Cincinnati).

217. *Id.* at 107.

218. *Id.* “[F]or each month a youth remained longer in DHS the probability of being reincarcerated increased by .7 percentage points.” *Id.* at 107. “[T]hose youths who remained in DHS for five years were 79.4 percent more likely to be reincarcerated than those youths who were released in the first month, while controlling for individual level characteristics of the youths.” *Id.* at 111. “[Y]ouths who stayed one month or less had a 34 percent predicted probability of being re-incarcerated compared to those who stayed 60 months who had a 61 percent chance of being reincarcerated. *Id.* at 100.

impede prosocial development.”²¹⁹ In fact, researchers have confirmed that “there is little benefit from increased deterrence connected with either placement out of the community or longer stays in institution.”²²⁰ In a rigorous study of how serious youth offenders respond to placement and longer stays out of community, Loughran et al. confirmed that the effect of incarceration on future rearrest raises the likelihood of recidivism.²²¹ The “Pathways to Desistance” study, a longitudinal examination of 1,354 children sentenced in two large metropolitan areas, investigated the influence of varying lengths of incarceration on the future recidivism rates of serious juvenile offenders.²²² Notably, after a child had been in institutional care for three months, the researchers observed “no marginal benefit” to public safety in keeping them there for extended periods.²²³ This research presupposes a rehabilitative objective; limiting the duration of incarceration is advocated because it ceases to serve a purpose in aiding children in avoiding future offenses. Conversely, a more punitive approach would justify prolonged incarceration based on retributive principles.

3. *Pathways to Desistance*

With longer sentences, adolescents become more deeply immersed in the criminal justice system and move further from prosocial involvement in society.²²⁴ That limits the opportunity for the individual to “age out” of their delinquent behavior.²²⁵ The age-crime curve indicates that the prevalence of delinquent behavior is at its highest by later adolescence (ages seventeen-eighteen) and then it decreases.²²⁶ Elliott conducted research on serious violent offending among adolescents in 1994 during the era when adolescents’

219. NAT’L RSCH. COUNCIL, IMPLEMENTING JUVENILE JUSTICE REFORM; THE FEDERAL ROLE 21 (2014), <https://nap.nationalacademies.org/read/18753/chapter/1#vi> [<https://perma.cc/2MV2-8LVJ>].

220. Thomas A. Loughran et al., *Estimating A Dose-Response Relationship Between Length of Stay and Future Recidivism in Serious Juvenile Offenders*, 47 CRIMINOLOGY 699, 715 (2009).

221. *Id.*; Lambie & Randell, *supra* note 168, at 451.

222. *See* Loughran et al., *supra* note 220, at 707.

223. *Id.* at 704.

224. Lambie & Randell, *supra* note 168, at 451.

225. *Id.*

226. Magda Stouthamer-Loeber et al., *Desistance from Persistent Serious Delinquency in the Transition to Adulthood*, 16 DEV. & PSYCHOPATHOL. 897, 897 (2004); *see* David P. Farrington, *Age and Crime*, in CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 189 (Michael Tonry & Norval Morris eds., 1986).

crime rates were at their peak.²²⁷ His data supported the maturational reform hypothesis that the transition into responsible adult roles leads to desistance from crime and violent behavior.²²⁸ In 2004 Stouthamer-Loeber et al. showed that about one-third of their sample of adolescents of the Pittsburgh Youth Study engaged in some form of serious delinquent behavior.²²⁹ Many of them naturally grew out of this behavior as part of their maturation process.²³⁰ In 2010, Mulvey et al. extended prior research by examining patterns of anti-social behavior in serious offenders after court involvement in order to obtain a better understanding of how adolescents reduce their offending behavior over time.²³¹ Two years after being adjudicated for a serious offense, most of the youth (73.8%) reduced their offending to low or zero involvement in offending behavior.²³² For those youth who self-reported the lowest level of offending, placement in an institution raised their level of self-reported offending after release from institutional placement.²³³ The authors concluded that most serious offenders are not necessarily “bad actors” destined for adult criminal activity.²³⁴ Most serious offenders demonstrate low or zero involvement in criminal activity years after court involvement.²³⁵ Moreover, for youth who have been adjudicated for a serious offense, but demonstrate overall low levels of offending, incarceration or placement in residential treatment facilities has the potential to increase recidivism.²³⁶ As Lambie and Randell noticed, “Incarceration may, therefore, interfere with the

227. Jeffrey Butts & Jeremy Travis, *The Rise and Fall of American Youth Violence: 1980 to 2000*, URBAN INST. 5 (Mar. 2002), <https://www.urban.org/sites/default/files/publication/60381/410437-The-Rise-and-Fall-of-American-Youth-Violence.PDF> [<https://perma.cc/J9GU-ENCX>].

228. Delbert S. Elliott, *Serious Violent Offenders: Onset, Developmental Course, and Termination*, 32 CRIMINOLOGY 1 (1994), <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1745-9125.1994.tb01144.x>

229. See Stouthamer-Loeber, *supra* note 226, at 897.

230. See *id.* at 913 (“The prevalence of serious delinquency decreased at ages 17-19. Less than half of those who were persistent serious delinquents in adolescence continued to commit serious offenses in early adulthood.”).

231. Edward P. Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 DEV. & PSYCHOPATHOLOGY 453, 453 (2010). Data used in this analysis/article drew from a larger study called the “Pathways to Desistance” in which 1,354 serious offenders are interviewed over a seven-year period. Mulvey et al., *supra* note 233, at 1.

232. Mulvey et al., *supra* note 231, at 470.

233. *Id.* at 471.

234. *Id.* at 470.

235. *Id.*

236. See *id.* at 471. The researchers found a surprising result showing that both the persisters and desisters “did not differ in many aspects of their involvement with the court system during the follow-up period. That is, despite the fact that these groups spent equivalent time in institutional care and went to the same types of institutions, their subsequent patterns of offending differed substantially.” *Id.*

reestablishment of a prosocial lifestyle and limit the likelihood of positive outcomes.”²³⁷

III. JUVENILE PAROLE BOARDS IN AMERICA

A. *South Carolina Juvenile Justice System*

1. *Philosophy of the S.C. Juvenile Justice System*

In South Carolina, the Children’s Code governs juvenile procedure, including intake, pre-trial detention, probation, and commitment decisions. The Children’s Code’s purpose clause says that “it shall be the policy of this State to concentrate on the prevention of children’s problems as the most important strategy which can be planned and implemented on behalf of children and their families.”²³⁸ “For children in need of services, care, and guidance the State shall secure those services as are needed to serve the emotional, mental, and physical welfare of children and the best interests of the community, preferably in their homes or the least restrictive environment possible.”²³⁹ But the Code does not discuss juvenile justice directly.²⁴⁰

2. *An Analysis of the SC Release System*

South Carolina is an example of a state where legislators have not limited the judges’ discretion in imposing a lengthy sentence and where neither the judge nor the agency has the power to release youth from custody after an indeterminate order was issued.²⁴¹

In South Carolina, youth adjudicated delinquent may be sentenced to a determinate or an indeterminate commitment²⁴² and sent to a placement or a secure long-term incarceration at the SCDJJ.²⁴³ The mission of SCDJJ is to “impact and transform young lives, strengthen families, and support safer

237. Lambie & Randell, *supra* note 168, at 451.

238. S.C. CODE ANN. § 63-1-20(C).

239. S.C. CODE ANN. § 63-1-20(D).

240. South Carolina Juvenile Justice Reform Act of 2020 includes reforms to the purpose clause adding language on accountability and rehabilitation of the children. *See* S. 278, 125th Sess. (S.C. 2023). It also recognizes that placing children in state custody is associated with recidivism and has negative impacts on a child. *Id.* It states that “[w]henver the court places children in state custody or requires children to participate in community-based interventions, every effort shall be made to ensure these removals or interventions are supported by researched evidence and are mindful of and influenced by research into the effects of trauma, mental health disorders, and other factors on children’s development and rehabilitation.” *Id.*

241. Other than youth committed on misdemeanor or status offenses. *See infra* note 254.

242. *See* S.C. CODE ANN. § 63-19-1410(A)(5).

243. *See* S.C. CODE ANN. § 63-19-1440(A).

communities through targeted prevention and rehabilitation.”²⁴⁴ The Agency’s vision is for youth to “discover their strengths and abilities and become productive and successful citizens contributing to a safer South Carolina.”²⁴⁵

The determinate commitment is for up to ninety days.²⁴⁶ If a youth receives an indeterminate commitment, they will be held for an indefinite period of time, up to the age of twenty-two, or until sooner released by the releasing entity.²⁴⁷ There is no opportunity for a judicial review of juvenile cases in South Carolina.²⁴⁸ Upon an indeterminate commitment, a youth is given a time range or “guideline,” determined by the Board (for all felonies, select misdemeanors, probation violation for felony offenses, and parole revocation for the cases in which the Board granted parole) or SCDJJ’s Internal Release Authority (for most misdemeanors, all status offenses, probation violation for misdemeanor offenses, contempt of court commitments for status offenses, and parole revocation for youth for whom SCDJJ Release Authority granted parole).²⁴⁹ Pursuant to S.C. Code § 63-19-610(A), the Board is composed of seven members appointed by the Governor with the advice and consent of the Senate. The *South Carolina Board of Juvenile Parole: Policy and Procedure (Policy)* says that the “Board members are encouraged to attend training related to Juvenile Justice, Parole and Aftercare.”²⁵⁰ The *Policy* also imposes the duty on the Director to “prepare and maintain on an annual basis a training manual outlining orientation and annual training.”²⁵¹ The Board members “shall receive a minimum of eight hours of relevant training and education annually.”²⁵² The Board members have to attend quarterly meetings and an annual meeting in July, where the Chairperson is to “encourage the Board to continue to pursue goals to ensure the efficient operation of the parole process, to stay abreast of the changing community philosophy regarding parole and the juvenile justice system and

244. *The Agency*, SCDJJ, <https://djj.sc.gov/agency> [<https://perma.cc/EEY2-P27H>].

245. *Id.*

246. S.C. CODE ANN. § 63-19-1440(B). Although it is not codified in the Juvenile Justice Code, customarily, the determinate commitments are usually suspended to alternative placements. Children’s length of stay in placement varies based on the offense they committed and can change based on their participation in a program. SOUTH CAROLINA DEPARTMENT OF JUVENILE JUSTICE POLICY AND PROCEDURE 419.

247. S.C. CODE ANN. § 63-19-1440(D).

248. South Carolina Juvenile Justice Reform Act of 2020, *supra* note 34, adds a provision to the Juvenile Justice Code stating that a child may request a review hearing within six months of commitment to SCDJJ. S. 278, 125th Sess., Section 33(B) (S.C. 2023).

249. *See* S.C. CODE ANN. § 63-19-1810.

250. SOUTH CAROLINA BOARD OF JUVENILE PAROLE: POLICY & PROCEDURE, Administration 2 of 10.

251. *Id.* at 5 of 10.

252. *Id.*

to review Board policy and procedure.”²⁵³ The Board members partake in a Budget Committee, Legislative Committee, and Policy and Policy and Procedures/Guideline Committee.²⁵⁴ The Guideline Committee is responsible for “f) periodic reviews of guidelines; g) approving assignment of criminal offenses to appropriate categories and; h) making category changes.”²⁵⁵ The Board should also “permit, encourage, and utilize internal research as well as research conducted by outside professionals.”²⁵⁶

Guidelines are calculated based on the severity of the youth’s offenses and the history of his or her previous offenses.²⁵⁷ Guidelines can run anywhere from twelve to eighteen months up for minor offenses to thirty-six to fifty-four months for more serious offenses, such as armed robbery, arson, kidnapping, burglary 1st degree, or murder.²⁵⁸ The Board ultimately has jurisdiction to keep youth detained until they reach twenty-two years of age.²⁵⁹ The Board holds monthly parole hearings and inspects the records of each committed youth at least quarterly if a youth is not identified as a violent offender by statute, but the appearances in front of the Board begin only when “the board determines that an appropriate period of time has elapsed since the child’s commitment.”²⁶⁰ In a youth is considered a violent offender, the “board may waive the quarterly review . . . until the child reaches the minimum parole guidelines.”²⁶¹ When a youth reaches their minimum guidelines, they can be present at their parole hearings.²⁶² Youth is allowed to be represented by a legal counsel at the parole hearings,²⁶³ but their remarks are limited to fifteen minutes and five minutes for taking testimony from individual witnesses.²⁶⁴ After reaching the minimum guidelines, youth’s case is reviewed by the Board on quarterly basis, unless the youth is considered a violent offender (as defined in S.C. Code §16-1-60), when the hearings take place once every six months after reaching the minimum guidelines.²⁶⁵

The Board receives reports from SCDJJ treatment provider, an aftercare provider, and a school guidance counselor regarding every youth being

253. *Id.* at 6 of 10.

254. *Id.* at 6–7 of 10.

255. *Id.*

256. *Id.* 7 of 10.

257. *SC Board of Juvenile Parole*, S.C. DEP’T JUV. JUST., <https://djj.sc.gov/sc-board-juvenile-parole> [<https://perma.cc/BJJ5-FH3Y>].

258. *Id.*

259. *Id.*

260. S.C. CODE ANN. §§ 63-19-1820(A)(1), (A)(2)(a).

261. S.C. CODE ANN. § 63-19-1820(A)(2)(b).

262. S.C. CODE ANN. § 63-19-1820(A)(2)(b).

263. *Id.* at 14 of 24.

264. *Id.*

265. S.C. CODE ANN. § 63-19-1820(A)(2)(b).

reviewed.²⁶⁶ All reports, other than the one from the educational setting, should include recommendations for the youth's release.²⁶⁷ "The granting or denial of parole . . . rests solely in the discretion of the Board."²⁶⁸ The youth can appeal of denial of parole within fourteen days following the hearing.²⁶⁹ The appeal is heard by the Board.²⁷⁰

The Board takes several factors into consideration when making their decision about releasing youth: "institutional behavior, community acceptance, history of adjudications, progress towards treatment goals, and appropriate placement."²⁷¹ "There is a presumption that a juvenile will not be released before reaching the minimum guideline date[], but] [f]actors may overcome this presumption [if the youth shows] superior progress . . . and outstanding institutional behavior."²⁷² "There is [also] a presumption a juvenile will be released upon reaching the maximum guideline date."²⁷³ That presumption can be overcome if the youth displays, among others, "lack of progress . . . , lack of remorse, . . . or release of the juvenile would depreciate the seriousness of the delinquent act[s]."²⁷⁴

"The status of parole has been granted as a privilege from the Board to the juvenile to serve a portion of his/her commitment outside of the correctional facility."²⁷⁵ "The paroled juvenile at all times remains under the legal authority of the Board while on parole and may be returned to custody upon any violation of the law or upon any violation of his/her conditional release agreement."²⁷⁶ "A juvenile's parole may be revoked for violations of standard or special conditions established by the Board."²⁷⁷ Youth has a right to a preliminary hearing within ten days after their incarceration for parole revocation.²⁷⁸ "The purpose of a preliminary hearing is . . . to determine whether probable cause exists to believe that a juvenile has committed an act of inappropriate behavior prior to actual release or has violated conditions that

266. *SC Board of Juvenile Parole*, SCDJJ, <https://djj.sc.gov/sc-board-juvenile-parole> [<https://perma.cc/ZH7Q-M4DZ>].

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*; see the definitions of variables guiding presumptions at *id.*

275. *Id.* at 23 of 24. The most common type of release granted is conditional release. There is also an unconditional release, when youth is not subject to any supervision and temporary release when youth is released to the community or an alternative facility for a specific period of time. *Id.* at 16 of 24.

276. *Id.* at 23 of 24.

277. SOUTH CAROLINA BOARD OF JUVENILE PAROLE: POLICY & PROCEDURE, Revocation/Rescission [hereinafter Revocation/Rescission], 3 of 6.

278. *Id.* at 4 of 6.

warrant the revocation/rescission of parole..²⁷⁹ “[T]here is no right to counsel at a preliminary hearing, [yet] counsel will be allowed . . . if . . . retained by . . . the juvenile.²⁸⁰

3. *The Unconstitutional Realities Within SCDJJ Facilities*

South Carolina overwhelmingly relies on confinement of youth. Every year at least fifteen percent of the cases processed in family court end up on a commitment status (that is about 400–500 youth per year).²⁸¹ The most frequent offenses associated with the commitment to SCDJJ are probation violations (29%), gun charges (10%), and armed robbery (3%).²⁸² Committed youths are incarcerated at a youth prison called the Broad River Road Complex (BRRC).²⁸³ Unfortunately, SCDJJ has long failed to meet its fundamental obligation to keep those whom it detains at BRRC safe.

In 1995, a group of law firms and civil rights organizations representing children incarcerated in various SCDJJ facilities successfully sued the Agency.²⁸⁴ They testified that the conditions at SCDJJ deprived youth of their statutory rights and violated their constitutional rights to due process, equal protection, and freedom from cruel and unusual punishment.²⁸⁵ The court agreed that the children’s rights were violated and issued an injunction requiring SCDJJ to submit a remedial plan and implement policy changes to meet minimally acceptable standards at its facilities.²⁸⁶ Despite the consent decree stemming from this lawsuit, violence in SCDJJ facilities continued.

In 2017, a South Carolina Legislative Audit Council audited SCDJJ and reported that the unsafe and unconstitutional conditions successfully challenged by the *Alexander S.* plaintiffs had only worsened since the decree’s expiration.²⁸⁷ Soon after, in February 2020, after a lengthy investigation, the U.S. Department of Justice (DOJ) concluded that “there is reasonable cause to believe . . . that . . . conditions at the BRRC . . . violate the Fourteenth Amendment,” because “South Carolina Department of Juvenile

279. *Id.* at 4–5 of 6.

280. *Id.* at 5 of 6.

281. S.C. DEP’T JUV. JUST., FY 2020–2021 DATA RESOURCE GUIDE, at 6 (2020), <https://dc.statelibrary.sc.gov/server/api/core/bitstreams/26400f8f-522b-424d-acbe-edfc16481051/content> [<https://perma.cc/23R7-NQZU>].

282. *Id.* at 11.

283. *Id.* at 16.

284. *Alexander S. v. Boyd*, 876 F. Supp. 773, 778 (1995).

285. *Id.* at 796.

286. *Id.* at 804–05.

287. MARCIA A. LINDSAY ET AL., A LIMITED REVIEW OF THE S.C. DEPARTMENT OF JUVENILE JUSTICE AND FOLLOW UP TO OUR JANUARY 2017 AUDIT, at 1 (2021), <https://lac.sc.gov/sites/lac/files/Documents/Legislative%20Audit%20Council/Reports/A-K/DJJ-2021.pdf> [<https://perma.cc/9BLT-SCL6>].

Justice . . . fails to keep young people reasonably safe from excessive force by staff at the BRRC,” “harms young people” by using “prolonged and punitive isolation,” and inadequately trains and prepares BRRC staff to keep youth safe.²⁸⁸

Since 2020, the abuses at BRRC have grown only more flagrant—and the danger to the youth there more acute.²⁸⁹ Per the 2021 Legislative Audit Council, SCDJJ’s secure facilities failed to meet federal and internal standards for supervision of youth.²⁹⁰ The DOJ’s reports from February 5, 2020, and April 14, 2022, concluded that SCDJJ: “(i) failed to reasonably protect children from youth-on-youth violence; and (ii) seriously harms children by using prolonged isolation for punitive purposes. . . . [And] failed to keep the children in its custody reasonably safe from excessive force by staff.”²⁹¹

Despite SCDJJ entering into an Agreement with DOJ in April 2022, the conditions of confinement at BRRC and other SCDJJ facilities have not improved.²⁹² Per statistics provided by the South Carolina Department of

288. INVESTIGATION OF SOUTH CAROLINA DEPARTMENT OF JUVENILE JUSTICE’S BROAD RIVER ROAD COMPLEX 1 (Apr. 14, 2022), <https://www.justice.gov/opa/press-release/file/1494661/download> [<https://perma.cc/VGA3-BQGD>].

289. S.C. GEN. ASSEMBLY LEGIS. AUDIT COUNCIL, *supra* note 287, at 7. In April 2021, a follow-up audit of DJJ by the Legislative Audit Council determined that recorded security incidents have more than doubled at BRRC since the 2017 audit—including a 42% increase in incidents involving juvenile-on-juvenile or juvenile-on-staff violence.” DJJ has consistently failed “properly, transparently, and timely” to investigate those incidents. And DJJ has failed to meet minimum staffing needs, causing 57 percent of staff to feel unsafe working at BRRC (“an increase from 40% in 2017”). *Id.* at 16.

290. *Id.* at 7.

291. Complaint at 3, U.S. v. S.C. Dep’t Juv. Just., No. 3:22-cv-01221-SAL (D.S.C. Apr. 14, 2022), <https://www.justice.gov/crt/case-document/file/1587041/download> [<https://perma.cc/5ABL-NR3G>].

292. Agreement Between the United States and the South Carolina Department of Juvenile Justice, U.S. v. S.C. Dep’t Juv. Just. (Apr. 13, 2022), <https://www.justice.gov/opa/press-release/file/1494671/dl> [<https://perma.cc/4J8R-ZN7H>].

SCDJJ has been sued by children in their individual capacity again and again (per SCDJJ’s response to FOIA request the number of lawsuits received by SCDJJ in calendar years 2019–2023 is as follows: 2019: 3; 2020: 6; 2021: 13; 2022: 8; 2023 (as of 12/15/23): 15) and by organizations in class action lawsuits. *See also* pending litigation, S.C. State Conf. NAACP v. S.C. Dep’t Juv. Just., No.: 0:22- 01338-MGL (D.S.C. Feb. 3, 2023). The NAACP lawsuit alleges that in April 2022, when the original Complaint was filed, all of the children in DJJ custody—including Plaintiffs’ clients and constituents—faced recurring severe violence, constant overuse of isolation, and a significant deficiency in educational and other rehabilitative services. Complaint at 1–2, S.C. State Conf. NAACP v. S.C. Dep’t Juv. Just., No.: 0:22- 01338-MGL (D.S.C. Apr. 26, 2022). Examples:

“Child 9 was repeatedly assaulted by other youth in the BRRC. Video footage captured several youth dragging him into a bedroom cubicle to assault him, twice chasing him to the exit door of the pod to further assault him, and then assaulting him

Children’s Advocacy, the number of critical incidents at SCDJJ in 2022/2023 was 503 (338 of them included physical assault, 10 were sexual assault, 51 of suicidal ideation).²⁹³ In FY 2021/2022, the number of critical incidents at SCDJJ was 299 (157 for physical assault, 14 for sexual assault, 39 for suicidal ideation).²⁹⁴ The *Compliance Monitoring Report* revealed several continuing problems: insufficient staffing to ensure a safe environment;²⁹⁵ structured programming was not offered in a manner that would engage youth in rehabilitative activities;²⁹⁶ staff are not following SCDJJ’s behavior management protocols;²⁹⁷ isolation continues to be used;²⁹⁸ the facility is being described as lacking order and being chaotic most times, and youth and staff feel uneasy and unsafe;²⁹⁹ and “attempts to offer structured rehabilitative programming after school [is] viewed by those delivering it and those

yet again in another bedroom cubicle. Although a DJJ officer observed the event, he refused to protect Child 9—he did not attempt to restrain the attackers, he did not remove the child 9 from the pod, and he did not call other officers to help assist in subduing the attackers. When Child 9’s grandmother complained about the assault—noting that he could barely chew because he had been hit in the jaw—Child 9 was punished and placed in isolation for weeks.” *Id.* at 18–19.

“Child 10 . . . has been the victim of over sixty assaults. One of the most brutal assaults occurred when Child 10 was sleeping in his dorm: a group of his peers obtained access to his room, snuck up on him while he was asleep, and attacked him with makeshift weapons including a sock filled with rocks. Child 10 was beaten until he was unconscious, and he awoke prostrate on the floor and bleeding. Neither the JCOs nor any other DJJ staff stopped the attack. Nor did they follow up with any investigation into the attackers. Shortly thereafter, he was placed in ‘protective custody’—meaning, solitary confinement. Child 10 received no schooling or rehabilitative services. Despite Child 10’s placement in isolated “protective custody,” he was not able to escape the violence. Last year, the door locks malfunctioned, causing the doors to come open. A group of youth entered Child 10’s room and stabbed him repeatedly, resulting in additional injuries and leaving scars. Once again, DJJ staff failed to intervene to keep Child 10 safe.” *Id.* at 19.

293. S.C. Department of Children’s Advocacy Critical Incident Log FY22-23 (on file with author)

294. S.C. DEP’T CHILD. ADVOC., 2022 ANNUAL REPORT, at 33 (2022), https://childadvocate.sc.gov/sites/scdca/files/Documents/Dept_Childrens_Advocacy_21-22_Annual_Report.pdf [<https://perma.cc/336M-8FM7>].

295. SUSAN BURKE ET AL., COMPLIANCE MONITORING REPORT: SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES AND THE SOUTH CAROLINA DEPARTMENT OF JUVENILE JUSTICE, at 7 (Oct. 2022), <https://djj.sc.gov/sites/djj/files/Documents/Oct%202022%20SCDJJ%20Compliance%20Monitoring%20Report%20FINAL.pdf> [<https://perma.cc/V2AZ-V2MF>].

296. *Id.* at 8.

297. *Id.* at 9.

298. *Id.*

299. *Id.* at 27.

receiving it as a failure.”³⁰⁰ The April 2023 DOJ *Compliance Monitoring Report* notes SCDJJ’s compliance with recommendations regarding staffing study, surveillance tools timeline, and approach to behavior management but SCDJJ remains non-compliant in the areas of rehabilitative programming and general provisions such as staffing, surveillance, structured programming, a positive behavior management system, and limiting use of force and restraints, which are areas that affect youth having a safe living condition.³⁰¹

4. *Recidivism Among South Carolina Youth*

As pointed out by Gupta-Kagan et al., “[r]ecidivism is an essential measure for any juvenile justice system. Low recidivism rates reflect successful efforts to rehabilitate young offenders and prevent future crime. High recidivism rates reflect the opposite.”³⁰²

SCDJJ calculates its recidivism rates without taking into account data on youth who are convicted in the adult system. The recidivism definition encompasses “[y]outh who are adjudicated for a new offense within one year of completing Arbitration, Probation, or Commitment. This rate includes only those youths who were subsequently adjudicated (convicted) in the juvenile justice system.”³⁰³ The data available on SCDJJ website shows the 2019–2020 recidivism rate for committed children at 19.2%, which is higher by about 5% than for children on probation (14.1%) and significantly higher than for children in arbitration programs (2.8%).³⁰⁴ SCDJJ’s calculation of recidivism does not depict the full picture. Other studies have indicated recidivism as

300. *Id.*

301. SUSAN BURKE ET AL., COMPLIANCE MONITORING REPORT: SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES AND THE SOUTH CAROLINA DEPARTMENT OF JUVENILE JUSTICE, at 7 (Oct. 2022), <https://djj.sc.gov/sites/djj/files/Documents/Oct%202022%20SCDJJ%20Compliance%20Monitoring%20Report%20FINAL.pdf>. [<https://perma.cc/V2AZ-V2MF>].

302. JOSH GUPTA-KAGAN ET AL., EFFECTIVE SOLUTIONS TO SOUTH CAROLINA’S JUVENILE JUSTICE CRISIS: SAFETY, REHABILITATION, AND FISCAL RESPONSIBILITY, at 42 (2017), <https://www.pandasc.org/wp-content/uploads/2017/04/Juvenile-Justice-Report.pdf> [<https://perma.cc/NRX8-5JXM>].

303. S.C. DEP’T JUV. JUST., *supra* note 281, at 14.

304. *Id.* (Recidivism rates for FY 2017-/2018 are: “Arbitration: 4.1%, Probation: 13.6%, Commitment: 15.7%; and for FY 2018-/2019: Arbitration: 4.4%, Probation: 14.8%, Commitment: 12.2%.”).

high as 80.2%,³⁰⁵ or 76%.³⁰⁶ Bradberry, having examined the adult criminal histories of a group of juveniles who were released from SCDJJ, concluded that “those who received indeterminate sentences as juveniles subsequently were incarcerated as adults at over twice the rate as those who had received determinate sentences as juveniles (41.82% and 19.41%, respectively).”³⁰⁷

B. Lessons Learned from Other States

1. Colorado Juvenile Parole Board

The Colorado Juvenile Parole Board was created in 1959.³⁰⁸ It is authorized to grant, deny, modify, suspend, or revoke, and specify conditions of parole for all youth adjudicated delinquents and committed to Colorado Department of Human Services for an indeterminate period of time not to exceed their twenty-first birthday.³⁰⁹ The youth’s parole time is established pursuant to Colorado Revised Statutes §§ 19-2.5-1117(1)(b), 19-2.5-1518(6), 19-2.5-1203(5)(a). The standard mandatory parole period is six months.³¹⁰ However, in some instances, the law authorizes the Board to extend the youth’s parole for up to a maximum of twenty-one months.³¹¹ The parole

305. A 2011 study commissioned by SCDJJ found an 80.2 percent thirty-six-month recidivism rate for children who were prosecuted and found guilty. GEORGE W. APPENZELLER ET AL., AN EVALUATION OF THE SOUTH CAROLINA JUVENILE ARBITRATION PROGRAM, at 38 (2011).

306. JAN RIVERS & TRUDIE TROTTI, SOUTH CAROLINA DELINQUENT MALES: AN 11 YEAR FOLLOW-UP INTO ADULT PROBATION AND PRISON, at 6 (Nat’l Crim. Just. Reference Serv. 1995), <https://www.ojp.gov/pdffiles1/Photocopy/161872NCJRS.pdf>. [<https://perma.cc/K9X5-XEPW>]. In 1995, Rivers and Trotti conducted a study following up 39,250 males born between 1964 and 1971, who had delinquency records in South Carolina, to determine how many have recidivated. *Id.* at 1. According to the authors, “[t]he most dramatic distinction of all in probability of adult prison and probation occurred when the 1967 cohort was divided into delinquents institutionalized in juvenile correctional facilities and those never institutionalized. Further, each institutionalization increased the likelihood of adult involvement.” *Id.* at 5. With every institutionalization the recidivism rate increased by 5% or more, reaching 76% with three or more institutionalizations. *Id.* at 6.

307. CHARLES BRADBERRY, JUVENILES AT RISK: A COHORT ANALYSIS OF JUVENILES RELEASED FROM THE SOUTH CAROLINA DEPARTMENT OF JUVENILE JUSTICE, at 7 (2003), <https://scdps.sc.gov/sites/scdps/files/Documents/ohsjp/stats/Juveniles/Report%20v5.pdf> [<https://perma.cc/E9T3-3C5E>]. South Carolina’s recidivism numbers do not adequately reflect the rates of recidivism. There is a need for a systemic study of recidivism in South Carolina. It is also not possible to compare the available recidivism numbers in South Carolina to the numbers from other states because states vary in the formulas they use to present recidivism rates.

308. 1959 Colo. Sess. Laws 361.

309. Colo Rev. Stat. §§ 19-2.5-1201(7), 19-2.5-704 (2022)

310. COLO REV. STAT. § 19-2.5-1203(5)(a)(2022).

311. COLO REV. STAT. § 19-2.5-1203(5)(a)–(b) (2022).

decisions must be made in accordance with the best interest of the youth and the public, pursuant to Colo. Rev. Stat. 19-2.5-1201.

The Board “may also discharge a juvenile from parole before completion of the mandatory six-month parole period when the board finds that the juvenile meets” certain conditions, such as graduation from a high school; full payment of restitution; youth’s readiness to be discharged based on an objective risk assessment; and presentation of a re-entry plan.³¹²

Youth “may be represented by counsel in any hearing before the board or a hearing panel to grant, modify, or revoke parole.”³¹³ “An administrative law judge shall assist any hearing panel of the juvenile parole board that is considering the suspension, modification, or revocation of a juvenile’s parole.”³¹⁴ “An administrative law judge shall, upon the request of the juvenile parole board, conduct a preliminary hearing in a case in which a parole violation has been alleged to determine whether there is probable cause to believe that the parolee has violated a condition of parole.”³¹⁵ “If a juvenile’s parole is revoked pursuant to section 19-2.5-1206, the juvenile shall serve all or a portion of the remainder of the sentence to commitment, and the period of reparole or extended period of reparole imposed pursuant to subsection (5)(a) of this section must be reduced by any time served on parole prior to the revocation.”³¹⁶

2. *Utah Youth Parole Authority*

Utah Youth Parole Authority (hereinafter, YPA) was created by legislature in 1986.³¹⁷ In 2016, PEW Charitable Trust conducted an assessment of Utah’s juvenile justice system and found that, among others, most youth who entered the system were referred for low-level offenses and were at low risk to reoffend, and youth were stalled in the system for long periods of time due to court-ordered conditions.³¹⁸ A year later, the Utah legislature enacted extensive reforms in the juvenile justice system that put in motion a shift aimed at protecting public safety, controlling costs, and avoiding pushing young people deeper into the juvenile justice system.³¹⁹ The

312. COLO REV. STAT. § 19-2.5-1203(9)(c) (2022).

313. COLO REV. STAT. § 19-2.5-1203(8) (2022).

314. COLO REV. STAT. § 19-2.5-1205 (2022).

315. COLO REV. STAT. § 19-2.5-1206(5) (2022).

316. COLO REV. STAT. § 19-2.5-1203(5)(e) (2022).

317. UTAH CODE ANN. § 62A-7-109 (2021).

318. 2020 UTAH SENT’G COMM’N, JUVENILE DISPOSITION GUIDELINES, at 4 (2020), <https://justice.utah.gov/wp-content/uploads/Juvenile-Guidelines-2020-Final.pdf> [<https://perma.cc/ULE5-MQCX>].

319. *Reshaping Juvenile Justice in Utah*, CRIME & JUST. INST., at 1 (Apr. 2019), <https://www.crj.org/assets/2019/04/Utah-2019-Reshaping-Juvenile-Justice.pdf> [<https://perma.cc/XE6V-YZWE>]; *See supra* Part I.A.2.

reforms continued to be expanded into 2020s, when the legislature passed bills changing which cases are referred to juvenile court, who is eligible for detention, and the length of jurisdiction of the family court over a young person.³²⁰

The philosophy of Utah’s juvenile justice system is based on the “Balanced and Restorative Justice Model,” which consists of three goals: Community Protection, Youth Accountability, and Competency Development.³²¹ Utah Juvenile Court adopted a set of evidence-based practices, the “Principles of Effective Intervention,” which “include four basic principles: risk, need, responsivity, and program integrity.”³²² These evidence-based principles apply both at the case planning stage and at disposition. “Any disposition entered should be compatible with the youth’s case plan, should address identified criminogenic risk and needs, as well as take into consideration the responsivity issues of the youth.”³²³

The *2020 Juvenile Disposition Guidelines* created by Utah Sentencing Commission pursuant to Utah Code § 63M-7-404, serve as a guide post for all system involved participants, and the recommending authority is mandated by statute to consider them.³²⁴ The *Disposition Guidelines* are rooted in evidence-based research and include consideration of adolescent development and trauma.³²⁵ They stress judicial discretion and individualized treatment of each youth and list numerous factors to be considered by the court for each child.³²⁶ The Juvenile Court in Utah has several dispositional options, starting from rewarding youth with appropriate incentives,³²⁷ and ending with secure placement.³²⁸ When youth is sentenced to a secure care, the sentence is for an indeterminate period of time, not to exceed their twenty-first birthday.³²⁹ Youth Parole Authority (YPA) establishes parole guidelines for each youth committed indeterminately to secure facilities.³³⁰ That takes place within 45

320. UTAH SENT’G COMM’N, *supra* note 318, at 5.

321. *Id.* at 6.

322. *Id.* at 7.

323. *Id.* at 8.

324. UTAH CODE ANN. § 78A-6-605(2) (2021).

325. UTAH SENT’G COMM’N, *supra* note 318, at 9–10.

326. *Id.* at 17. Suggested factors include: Impact of offense on victim and community; amenability with lesser sanctions; attendance or participation in educational and treatment programs; significant improvement since the offense; physical/mental impairment; age and maturity of the youth; current status; trauma history; bias; and other. *Id.*

327. *Id.* at 19–20.

328. *See* UTAH CODE ANN. § 80-6-802 (2023).

329. § 80-6-802(1); § 80-6-802 (2)(a); H.B. 384, 2020 Leg., 214th Sess. (Utah 2020) (extending the jurisdiction for youth who face transfer to adult court to not exceed their twenty-fifth birthday, beginning in 2020).

330. JOHN R. DEWITT ET AL. DIVISION OF YOUTH CORRECTIONS ANNUAL REPORT 1994 (1995).

days of youth's commitment at the initial hearing³³¹ and is "based on the Suggested Length of Stay Matrix (Appendix 08-04A), which takes into account the minor's offense severity."³³² A suggested length of stay may be adjusted by the YPA based upon the mitigating and aggravating circumstances of the committing offense. Treatment progress and participation may affect the actual length of stay.³³³ As stated in Part I.A.2., the presumptive term of secure care of youth offenders is from three to six months.³³⁴ "If a juvenile offender is ordered to secure care for a misdemeanor offense, the authority may immediately release the juvenile offender on parole if there is a treatment program available for the juvenile offender in a community-based setting."³³⁵ Youth committed on a misdemeanor offense cannot be in secure care longer than a term of incarceration for an adult for the same offense.³³⁶ The length of stay for youth committed on aggravated felonies can be as long as eighteen to twenty-four months.³³⁷ The YPA can depart from the Matrix if there are compelling and substantial reasons, or mitigating circumstance.³³⁸ Additionally, "to encourage and enhance program participation, those minors who make substantial progress in their treatment plans will be given consideration for release at the lower end of their suggested length of stay."³³⁹ After the initial hearing, YPA schedules Progress Review Hearings to review the minor's progress in secure care and to establish a date for a Parole Review Hearing. Those hearings take place every three months.³⁴⁰ A minor has a right to attend all hearings, along with the minor's family member and clergy or other personal advisors for the minor.³⁴¹ "The minor may have counsel present at all hearings."³⁴²

331. UTAH CODE ANN. § 80-6-804(1) (2023).

332. YPA GUIDELINES FOR LENGTH OF STAY, UTAH DIV. OF JUV. JUST. & YOUTH SERVS. (2022) <https://public.powerdms.com/UTAHDHHS/documents/167152/08-04%20Guidelines%20For%20Length%20Of%20Stay> [<https://perma.cc/DPL4-SLQT>].

333. *See id.*; *Youth Parole Authority Suggested Length of Stay Matrix*, <https://public.powerdms.com/UTAHDHHS/documents/167159/08-04A%20Suggested%20Length%20Of%20Stay> [<https://perma.cc/C4G7-EPRK>].

334. § 80-6-804(2)(a).

335. § 80-6-804(2)(b).

336. § 80-6-804(2)(h).

337. *Youth Parole Authority Suggested Length of Stay Matrix*, *supra* note 333.

338. UTAH DIV. OF JUV. JUST. & YOUTH SERVS., *supra* note 332.

339. *Id.*

340. Individual Hearings, UTAH DIV. OF JUV. JUST. & YOUTH SERVS. (2022) <https://public.powerdms.com/UTAHDHHS/documents/167177/08-05%20Individual%20Hearings> [<https://perma.cc/7VUR-FDAK>].

341. *Id.*

342. *Id.*

3. *A Few Words About California*

For almost two decades, California has implemented a range of legislative- and voter-supported initiatives aimed at decreasing the number of youths entering the state's juvenile and adult systems.³⁴³ This involved diminishing dependence on incarceration and broadening the availability of community-based alternatives for youth.³⁴⁴ To further this goal, they committed to rehabilitating their youth and to following evidence-based practices.³⁴⁵ As part of the reorganization of their correctional system, Senate Bill 737 (2005) required that "programs should be evidence-based, result-oriented and subject to periodic reviews."³⁴⁶ Yet, after numerous attempts to improve the system, "[i]n 2020, the Governor and the Legislature reached agreement on a framework to close the Division of Juvenile Justice (DJJ) and reallocate funding to counties to allow them to meet the needs of youth who would previously have been committed to the DJJ."³⁴⁷ As a consequence, the Board of Juvenile Hearings ceased its functioning as well.³⁴⁸ At the same time, they created a new dispositional option for youth fourteen years old and older for whom a less restrictive alternative disposition is unsuitable, secure youth treatment facility (SYTF).³⁴⁹ If a court commits a youth to an SYTF, it must set a baseline term of commitment that must "represent the time in custody necessary to meet the developmental and treatment needs of the ward and to prepare the ward for discharge to a period of probation supervision in the community."³⁵⁰ The legislature mandated the Judicial Council to develop and adopt a matrix of offense-based classification.³⁵¹ Senate Bill 92 stated that in developing the matrix, the council would be advised by a working group of stakeholders to include "representatives from prosecution, defense, probation, behavioral health, youth service providers, youth formerly incarcerated in the Division of Juvenile Justice, and youth advocacy and other stakeholders and organizations having relevant expertise or information on dispositions and

343. *Senate Bill 823 – DJJ Realignment Implementation*, BSCC (Cal. 2021), https://www.bscc.ca.gov/s_djjrealignment/ [<https://perma.cc/7ET6-QJPC>].

344. *Id.*

345. See Kristy N. Matsuda et al., *Division of Juvenile Justice: Treatment Model Process Evaluation*, CENTER FOR EVIDENCE-BASED CORRECTIONS UC IRVINE (2020).

346. *Id.* at 6.

347. *Juvenile Law: Secure Youth Treatment Facility Offense-Based Classification Matrix*, JUD. COUNCIL OF CAL., at 1, (Nov. 4, 2022), <https://www.courts.ca.gov/documents/sp22-14.pdf> [<https://perma.cc/C8TF-LVNM>]; Anna M. Jauregui-Law, *Juvenile Justice Realignment – 2021*, S.B. 92 (Cal. 2021).

348. Division of Juvenile Justice, *supra* note 41; see CAL. CODE REGS. tit. 9, § 30815 (2021).

349. CAL. WELF. & INST. CODE § 875(a) (2022).

350. CAL. WELF. & INST. CODE § 875(b).

351. CAL. WELF. & INST. CODE § 875(h)(1).

sentencing of youth in the juvenile justice system.”³⁵² The statute specified that the council take into account the following in its development process: “youth sentencing and length-of-stay guidelines or practices adopted by other states or recommended by organizations, academic institutions, or individuals having expertise or having conducted relevant research on dispositions and sentencing of youth in the juvenile justice system.”³⁵³ The working group focused on three primary objectives for the matrix: Positive Youth Development, Public and Community Safety, and Flexible and Fair Terms of Commitment.³⁵⁴ The working group aimed at making the matrix centered on evidence-based research on adolescent development, trauma, and recidivism. They also aimed at creating a matrix that would help to “ensure that the term of commitment is no longer than necessary to protect the public, by working to prevent the likelihood that the youth will reoffend but is of sufficient length to assure the victim and the community that the harm committed can be redressed by the juvenile justice system in a developmentally appropriate manner.”³⁵⁵ They agreed that “[a] baseline term [for commitment] should be based on the needs of the individual being committed, and not simply the seriousness of the offense.”³⁵⁶ The factors the court may take into consideration include: circumstances and gravity of the offense, youth’s history in the juvenile justice system, confinement time necessary to rehabilitate the youth, and youth’s developmental history.³⁵⁷ California Welfare and Institutions Code 875 also provides that the court must review the progress of each youth committed to an SYTF at least every six months, and that at each hearing the court may modify the youth’s baseline term by up to six months.³⁵⁸ The statute states that the matrix must provide for positive incentives for youth to engage productively with the individual rehabilitation plan.³⁵⁹ Moreover, California Welfare and Institutions Code 779.5 creates a mechanism for setting aside the commitment sentence if the party can show that “commitment facility has failed, or is unable to, provide the ward with treatment, programming, and education that are consistent with the individual rehabilitation plan.”³⁶⁰

352. *Id.*

353. *Id.*

354. JUD. COUNCIL OF CAL., *supra* note 347, at 3.

355. *Id.*

356. *Id.*

357. *Id.* at 4–5.

358. CAL. WELF. & INST. CODE § 875(e)(1).

359. CAL. WELF. & INST. CODE § 875(h)(1).*d.*

360. CAL. WELF & INST CODE § 779.5 (2022).

IV. GUIDANCE AND RECOMMENDATIONS

A. *Decisionmaking Process for Paroling Authorities*

A well-educated paroling authority that uses current research to guide the way it operates and makes decisions can help make our communities safer and stop needless expenditures of precious public resources. The formation of such an authority requires that Governors appoint parole board members with the competencies for effecting necessary changes—individuals who can and will collaborate with system and community partners, who understand and will use current research, and who will build infrastructure and capacity within parole organizations for delivering services effectively and efficiently.

—Nancy M. Campbell.³⁶¹

Paroling authorities play a critical role in criminal justice systems nationwide.³⁶² Recognizing that vital role, the National Institute of Corrections (NIC) developed a series of useful resources for parole board chairs, members and their executive staff. In 2008, they published the *Comprehensive Framework for Paroling Authorities in an Era of Evidence-Based Practice*,³⁶³ and in the years to follow, they commissioned the development of a series of five papers entitled *Parole Essentials: Practical Guides for Parole Leaders*, which provides concrete guidance on implementing stated principles, assisting the parole boards in honing their skills, defining their roles and responsibilities, and supporting effective practice.³⁶⁴ The series emphasizes that boards have to engage in strategic planning, team building, policy development, and effective internal communication as well as honing key skills in administration, human resources, and budgeting.³⁶⁵ The need for the use of objective assessment tools and the importance of clear decisionmaking guidelines regarding release and violation responses is a theme across all five papers.³⁶⁶ “Board members and executives must be aware of important evidence-based findings concerning offender assessment, the use of objective risk tools, effective

361. NANCY M. CAMPBELL, *COMPREHENSIVE FRAMEWORK FOR PAROLING AUTHORITIES IN AN ERA OF EVIDENCE-BASED PRACTICES* 5 (Pat Andrews et al. eds., 2008).

362. MORRIS L. THIGPEN ET AL., *CORE COMPETENCIES: A RESOURCE FOR PAROLE BOARD CHAIRS, MEMBERS, AND EXECUTIVE STAFF* v (1st ed. 2010).

363. CAMPBELL, *supra* note 361.

364. *See* MORRIS L. THIGPEN ET AL., *PAROLE ESSENTIALS: PRACTICAL GUIDES FOR PAROLE LEADERS* (3rd ed. 2011).

365. *See id.*

366. *See id.*

programming that addresses crime-related factors, the imposition of conditions, and the effect of staff-offender interactions on behavior.”³⁶⁷ It is critical that board members “discern lessons from evidence-based practices and apply this information to the operation of your parole board or agency.”³⁶⁸ In order “to be effective in the achievement of its goals and to be efficient in the use of taxpayers’ dollars,” “public policy and practice must be based on the best available scientific evidence.”³⁶⁹

Being evidence-based entails adopting practices informed by robust empirical research at both individual and organizational levels. This approach leads to outcomes that are not only more efficient and effective but also optimize the use of public resources, ultimately contributing to a reduction in future crime.³⁷⁰ “To be evidence-based is to build policies and practices on the foundation of empirical knowledge that is objective, reliable, and valid. To apply evidence to decisionmaking is to first seek to understand what research has demonstrated to be true about a particular issue, and then to use that information to inform decisionmaking.”³⁷¹ “Paroling authorities make fundamentally important decisions every day that encompass far more than the traditionally narrow view of ‘in’ and ‘out’ release decisions.”³⁷² They “determine when to hear cases, what activities offenders must accomplish prior to release, the terms and conditions of their release, and how to respond to violation behavior.”³⁷³ As stated by the NIC, research findings “can and should serve as the ‘intellectual core’ of those decisions.”³⁷⁴

NIC provides paroling authorities with strategies for supporting research-based parole practices, such as instituting a regular review of new research; understanding the gradations of research; cautiously applying research findings across disciplines; and contributing to the growing body of knowledge on what works (and what doesn’t) in improving offender outcomes.³⁷⁵ It also delineates twelve evidence-based parole policies and practices based on the rationale that “research demonstrates that all categories of offenders (high, moderate, and low risk) are more successful when

367. THIGPEN, *supra* note 362, at 21.

368. *Id.* at 22.

369. MORRIS L. THIGPEN ET AL., EVIDENCE-BASED POLICY, PRACTICE, AND DECISIONMAKING: IMPLICATIONS FOR PAROLING AUTHORITIES xiii (2d ed. 2011).

370. *Id.* at v–vii.

371. *Id.* at 1.

372. *Id.* at 10.

373. *Id.*

374. *Id.*

375. *Id.* at 19.

interventions are tailored to address their risk level,”³⁷⁶ and that “community-based programming is not only less expensive but . . . can also be more effective than in-prison programming.”³⁷⁷ NIC recommends that parole authorities “collect, exchange, and analyze local data,” “stay current on emerging research,” “depend on that research,” and “build collaborative partnerships with other system actors” in order to obtain coordinated policies and practices.³⁷⁸ They stress that paroling authorities should “reconsider decisionmaking methods and practices and determine the extent to which these align with research.”³⁷⁹

*B. Restatement of Law*³⁸⁰

Two sections of the *Restatement of Law—Children and the Law* are most pertinent to the subject of the length of time of youth incarceration: § 14.10 (Individualized Disposition No More Restrictive than Necessary) and § 14.11 (Limitation of Criminal Penalties or Sentences in Delinquency Proceedings).³⁸¹ Section 14.10 stresses that judges need to “craft developmentally informed dispositions most responsive to the needs and circumstances of the particular youth, considering the youth’s history of delinquency, home environment, and support systems, as well as the nature and severity of the offense.”³⁸² Moreover, it states that “[h]owever serious the offense, the disposition must be grounded in an articulable effort to reduce reoffending, support healthy and safe development, or inculcate accountability for wrongdoing.”³⁸³ The primary objective of delinquency dispositions involves holding young people accountable for their wrongdoing as they progress in maturity. It is crucial for youth to grasp the significance of taking responsibility for their actions and making amends for mistakes.³⁸⁴

376. *Id.* at 10. The authors cite “[r]esearch that demonstrates that structural assessment tools can predict risk of reoffense more effectively than professional judgment alone. . . . The use of actuarial tools . . . has been demonstrated to improve prediction [of recidivism] rates.” *Id.* at 5.

377. *Id.* at 10.

378. *Id.* at 20.

379. *Id.* at 21.

380. Restatements of Law are produced by the American Law Institute, a private organization comprised of judges, legal academics and practitioners, dedicated to the clarification, modernization, and improvements of the law. They cover a wider range of subjects and are considered secondary authority. See *How the Institute Works*, AM. L. INST., <https://www.ali.org/about-ali/how-institute-works/> [<https://perma.cc/36C6-DHWM>].

381. The cited sections are from RESTATEMENT OF THE LAW - CHILDREN AND THE LAW §§ 14.10–14.11 (Tentative Draft No. 4, 2022).

382. RESTATEMENT OF LAW: CHILDREN AND THE LAW § 14.10 (Tentative Draft No. 4, 2022).

383. *Id.*

384. *Id.*

When dealing with youth who persistently engage in offenses and are resistant to prior interventions, confinement might become necessary. But “confinement is a last resort, and any prolonged confinement must be subject to intensive periodic review.”³⁸⁵ Furthermore, “the youth is constitutionally entitled to periodic review of his or her responsiveness to the services and interventions being provided, and to ongoing reevaluation of his or her risks and needs.”³⁸⁶ Extending secure confinement based purely on the seriousness of the offense, without meaningful periodic risk reassessment, contradicts the principles of the “least restrictive alternative” and the requirement of individualization.³⁸⁷ The authors of § 14.10 point out that risk-assessment instruments can be helpful in identifying factors that might reduce the risk of offending on an individual basis and estimate the likelihood that continued delinquent behaviors will occur.³⁸⁸ They underscore that failure to review a confined youth’s progress, update the risk assessment, and consider the suitability of community alternatives could amount to an abuse of discretion.³⁸⁹

Section 14.11 looks at the youth’s right to a jury trial and what period of time of their placement disposition triggers that right.³⁹⁰ In that context, the authors agree that a twelve-month period of confinement “is necessary to communicate the importance of accountability for serious offending and to deter it, especially for older adolescents (age 16 or above).”³⁹¹ However, they say that:

several developmental considerations support a six-month marker for younger children. These include the truncated time perspective of young adolescents, the potentially significant developmental effects of removal from the home (especially a remote placement) for an extended period, and the expert consensus that a period of six months ordinarily provides an adequate opportunity to deliver clinical services to a youth who needs to be in a residential facility and to educate and counsel a youth who fails to accept responsibility for wrongdoing.³⁹²

As pointed out by the commentators of the § 14.11 of the *Restatement*, “[a] juvenile-court disposition imposing a lengthy minimum period of confinement based solely on the seriousness of the offense or prior offending

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

390. RESTATEMENT OF LAW: CHILDREN AND THE LAW § 14.11.

391. *Id.*

392. *Id.*

is incompatible with the underlying premise of juvenile justice because it Additionally, both SCDJJ and the Board need to collect data on recidivism and assure that their policies are reviewed and modified based on the statistics they gather and the meaning behind them.”³⁹³

Section 14.11(a) states that “[a] finding of delinquency is not a sufficient legal predicate for a criminal penalty or sentence unless: (1) the legislature has specifically required or authorized the penalty or sentence, and (2) the delinquency finding is made at a proceeding at which the youth is entitled to a jury trial and other safeguards applicable to criminal proceedings.”³⁹⁴ Continuous assessment of the young individual’s progress is a hallmark of juvenile justice intervention.³⁹⁵

C. Recommendations

Paroling authorities are uniquely positioned to impact individual lives and contribute to public safety. As stated by researcher at NIC, “every interaction within the criminal justice system offers an opportunity to contribute to harm reduction.”³⁹⁶ The conditions of confinement at SCDJJ have not improved since 1995 when Judge Anderson ordered SCDJJ to devise a plan to remedy constitutional violations found at its facilities.³⁹⁷ As stated by Judge Anderson, SCDJJ “controls neither its front door nor its back door: Admission to the institutions is controlled by the family courts; release is controlled by the Juvenile Parole Board.”³⁹⁸ In South Carolina, the Board has full discretion to both design the release guidelines and to implement them. The Board created the Guidelines in 1990s when the whole country was looking at adolescents through the lenses of the super-predator myth.³⁹⁹ The Guidelines are a clear reflection of the “tough on crime” mentality and do not take into consideration evidence-based research that has been available for decades.⁴⁰⁰ Young people in South Carolina linger at SCDJJ facilities for years before

393. *Id.*

394. *Id.* RESTATEMENT OF LAW: CHILDREN AND THE LAW § 14.11 cmt. at d (“However, ‘an indeterminate commitment to a juvenile facility, even for a lengthy period, does not violate subsection (b)(3) if the juvenile-court judge (and/or the juvenile-services agency) retains discretion to tailor the length of the commitment and the nature of the placement to an individualized assessment of the youth’s rehabilitative progress and risk of future offending”).

395. *Id.*

396. THIGPEN ET AL., *supra* note 369 at 14 (citation omitted).

397. *Alexander S. v. Boyd*, 876 F. Supp. 773, 804 (D. S.C. 1995).

398. *Id.* at 782.

399. Priyanka Boghani, *They Were Sentenced as “Superpredators.” Who Were They Really?*, FRONTLINE (May 2, 2017) <https://www.pbs.org/wgbh/frontline/article/they-were-sentenced-as-superpredators-who-were-they-really/> [<https://perma.cc/5WK4-CBUX>].

400. Carley Cook, *Framing Prisons in America: From Solitary Confinement to Supermax 25* (2019) (University of North Carolina at Chapel Hill).

they have a meaningful opportunity for release.⁴⁰¹ They cannot go in front of a judge for their sentence to be revised and, if their guidelines are within two to four or three to five years, they do not appear in front of the Board for one or two years.⁴⁰² This dire prospect for early release creates feelings of hopelessness and provides no incentives for the young people to comply with treatment requirements.⁴⁰³

The brief analysis of the parole boards in Colorado and Utah points to important lessons for the South Carolina Board of Juvenile Parole. Originally, both of these boards were created prior to 1990s and both of them have since undergone reforms and revisions of their policies in the 2020s. The reforms were rooted in evidence-based research and include consideration of adolescent development and trauma. Their guidelines are significantly shorter and if the guidelines are more than six months, youth have an opportunity to be in front of a release authority on regular basis, starting three months after the commitment.⁴⁰⁴

California got away with their parole board but the process they used to create the new sentencing matrix can be a guiding post for South Carolina. They shifted from being an offense-based state (focusing on the seriousness of the crime) to an offender-based state (making sure that the individual's needs are considered).⁴⁰⁵ They incorporated research on adolescent development, harms of incarceration and the risk of recidivism in order to

401. Amended Complaint at 44, S.C. State Conf. of NAACP v. S.C. Dep't of Juv. Just., No. 0:22-01338-MGL (Contending "children are detained—sometimes for months or even years at a time—without adequate access to social workers, counselors, medication, or other treatment" and "DJJ has a meaningful role both in determining whether a child is detained and determining when and whether they are released. Despite that, DJJ and its staff have refused to exercise their influence over detention and parole decisions to reduce overcrowding.").

402. *Quick Reference Guide to Juvenile Court in South Carolina*, CHILD.'S L. CTR. JOSEPH F. RICE SCH. OF L., 2023, at 37 https://cms.sc.edu/study/colleges_schools/law/centers/childrens_law/docs_general/juvenile_justice_publications/jj-quick_reference_guide_to_juvenile_court.pdf [<https://perma.cc/E52M-3DLF>].

403. Richard Mendel, *Why Youth Incarceration Fails: An Updated Review of the Evidence*, THE SENTENCING PROJECT (Mar. 1, 2023) <https://www.sentencingproject.org/reports/why-youth-incarceration-fails-an-updated-review-of-the-evidence/> [<https://perma.cc/46VX-ZWZ4>] (attesting that many youths will engage in harmful and sometimes destructive behavior that tends to reduce their likelihood of being released at their minimum guideline).

404. *SC Board of Juvenile Parole*, S.C. DEP'T. JUV. JUST., <https://djj.sc.gov/sc-board-juvenile-parole> [<https://perma.cc/HX94-TWCH>]; *Youth Parole Authority*, UTAH DEP'T HUM. HEALTH & SERVS., <https://jjys.utah.gov/services/youth-parole-authority/> [<https://perma.cc/98N7-BF9D>].

405. *Youth Offender Parole Hearings*, CAL. DEP'T CORRS. & REHAB., <https://www.cdcr.ca.gov/bph/youth-offender-hearings-overview/> [<https://perma.cc/7YDJ-74ZY>].

create a matrix that assures not only the protection of the public but also the harm reduction to the individual who committed an offense.⁴⁰⁶

NIC stresses that “criminal justice professionals must have the knowledge and skills that will enable them to maximize their influence.”⁴⁰⁷ Being evidence-based means to again and again ask questions: “What do we know?” and “What information is available to guide our decision-making.”⁴⁰⁸ The Board members must be aware of important evidence-based findings concerning youth and they must revise their policies and procedures periodically to assure their practice is based on the best available scientific evidence. They should consider shortening their guidelines for many offenses and creating a meaningful review process that assures youth access to the Board within at least six months of incarceration.

Pending SB 278 also creates a judicial review mechanism for committed youth.⁴⁰⁹ The bill does not contemplate a dissolution of the Board, yet that option might be considered if the Board proves to be unwavering in its position on reform. Additionally, both SCDJJ and the Board need to collect data on recidivism and ensure that their policies are reviewed and modified based on the statistics they gather and the meaning behind them.

V. CONCLUSION

Evidence-based research provides the foundation for discerning the best practices and guides decision makers towards effective and least harmful ways to conduct. South Carolina has a tremendous opportunity to reform its antiquated juvenile justice system and engage in evidence-based practice. Passing of the Juvenile Justice Reform Act of 2020 would be a step towards a shift aimed at avoiding pushing children deeper into the criminal justice system while protecting public safety and controlling costs. Short of its passing, the South Carolina Board of Juvenile Parole has an incredible opportunity to revise its practices and be at the forefront of the states following science. If the primary goal of the juvenile justice system is to rehabilitate youths, any policies that extend a youths’ stay should be examined closely. Given the findings in this paper, policies should consider research on

406. YOUTH JUSTICE IN CALIFORNIA: OBSTACLES TO CREATING A PUBLIC HEALTH APPROACH, NAT’L CENTER FOR YOUTH LAW (2021) <https://youthlaw.org/sites/default/files/attachments/2022-03/2021.09.15-YJ-in-CA-Obstacles-to-Public-Health-Approach.pdf> [<https://perma.cc/C2T3-ZD5P>]

407. THIGPEN ET AL., *supra* note 369 at 15.

408. *Id.* at 19.

409. S. 278, 125th Sess. (S.C. 2023). (proposing amended language to read “A detained child is entitled to further and periodic review: (1) within ten days following the child’s initial detention hearing; (2) within thirty days following the ten-day hearing; and (3) at any other time for good cause shown upon motion of the child, the State, or the department.”).

adolescent offending and harms of incarceration. If the primary goal of a policy is to protect the community, the authors of the policy need to examine research on the effect of length of incarceration, and studies on desistance.

The subject of youth release is broad and complex. This paper sheds light on a fraction of its complexity and thus calls for further exploration of the issue. The juvenile parole boards are few and apart among other release mechanism in the United States. Further research should explore the efficacy of judicial and agency release mechanisms.