CONVERSATIONS ON THE WARREN COURT'S IMPACT ON CRIMINAL JUSTICE: *IN RE GAULT* AT 50

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I. INTRODUCTION

In 1967, the United States Supreme Court held that youth were entitled to an array of procedural safeguards, including the right to counsel, during juvenile delinquency proceedings.[1] With its *In re Gault* decision, the Supreme Court ushered in the "due process era" of juvenile justice in America,[2] beginning what some have called a "revolution in children's rights."[3] However, members of the *Gault* Court and proponents of the decision in its day would be disappointed by the state of juvenile justice in America today. Despite the *Gault* Court's declaration that children who face a loss of liberty deserve fundamental constitutional protections,[4] youth in the criminal justice system today are more vulnerable than ever.

With police in schools and zero-tolerance policies on the books, youth can easily come into contact with law enforcement and be shunted into the criminal justice system.[5] Once there, many young people do not have legal representation even when they are entitled to it.[6] And for youth accused of a crime, the stakes are incredibly high. Youth in every state can be transferred to adult court and charged as if they were adults.[7] In adult court, juveniles are subject to mandatory minimums that were drafted with adults in mind.[8] Youth can be held in adult

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1. *In re* Gault, 387 U.S. 1, 41 (1967).
2. Terry A. Maroney, *The Once and Future Juvenile Brain*, *in* CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 189, 189 (Franklin E. Zimring & David S. Tanenhaus eds., 2014) (outlining three stages of development in American juvenile justice, including early rehabilitative phase, due process phase, and fear-driven stage of late-twentieth century).
3. Glenn Collins, *Debate over Children's Rights Is Intensifying*, N.Y. TIMES, July 21, 1981, at A1.
4. 387 U.S. at 36–37.
5. *See infra* pt. III.B.
6. *See infra* pt. III.A.
7. *See infra* pt. III.A.
8. *See infra* pt. III.B.

detention centers despite the proven dangers of sexual assault, physical violence, and suicide in those facilities.[9] Finally, while the Supreme Court abolished juvenile execution in 2005, the United States is the only developed nation in the world that sentences children to die in prison.[10] In short, the United States waged a war on kids in the late-twentieth century, and the rights announced in *Gault* could not contain that war.

This Article proceeds in three Parts. Part II discusses the *Gault* opinion and its significance in 1967. Part III argues that *Gault* has never been fully implemented and offers two explanations for its stunted application, neither of which was within the *Gault* Court's control. First, as a function of institutional design, the Supreme Court was not in a position to change the landscape of juvenile justice in a meaningful way. Second, fear-driven legislative choices of the late-twentieth century altered the criminal justice system for youth and adults in ways that the Court never could have predicted. Part IV considers more recent juvenile sentencing decisions in light of the post-*Gault* era. This consideration drives home the reality that comprehensive, lasting juvenile justice reform must be sought in state legislatures.

II. THE GAULT *DECISION*

In June 1964, 15-year-old Gerald F. Gault was on probation for previously "having been in the company of another boy who had stolen a wallet from a lady's purse."[11] That month, a neighbor accused Gault and his friend of making lewd remarks to her during a telephone call.[12] The opinion does not include the content of Gault's alleged remarks, but Justice Fortas described them as being "of the irritatingly offensive, adolescent, sex variety."[13] As a result of the accusation, police picked Gault up at his home while both of his parents were at work.[14] They

9. *See infra* pt. III.C.
10. *See infra* pt. III.C.
11. *Gault*, 387 U.S. at 4.
12. Prank phone calls have been around almost as long as the telephone, and for most adolescents prank phone calls are a harmless, if annoying, rite of passage. *See* Julie Beck, *The Long Life (and Slow Death?) of the Prank Phone Call*, THE ATLANTIC, Apr. 1, 2016, https://www.theatlantic.com/technology/archive/2016/04/the-life-and-death-of-the-prank-phone-call/476340/ (discussing how such calls provide adolescents with sought-after group bonding and "low-stakes rebellion").
13. 387 U.S. at 4.
14. *Id.* at 5.

detained him and took him to a juvenile detention center—without notifying his parents.[15]

In the following days and weeks, the entire process for determining Gault's guilt or innocence was informal, to say the least. The complaining neighbor never appeared in court; the State never presented Gault's parents with notice of formal charges against their son; the State never notified Gault or his parents of a right to counsel; and no rationale was offered either for detaining Gault initially or for releasing him pending his final hearing.[16] Ultimately, the juvenile judge determined that Gault had made the lewd phone call, and he sentenced Gault to six years in a state industrial school, with only a conclusory explanation: "[A]fter a full hearing and due deliberation the [c]ourt finds that said minor is a delinquent child . . . ."[17]

Before finding Gault's delinquency determination unconstitutional, the Court canvassed the history of the American juvenile court model and acknowledged its important and even laudable history.[18] First established in Illinois in 1899, early juvenile courts shared several defining features: informality, wide judicial discretion, and most importantly, a fundamental belief that a child accused of a crime was in need of social rehabilitation, rather than punishment for its own sake.[19] Early juvenile court advocates insisted that "[t]he child . . . essentially good . . . was to be made 'to feel that he is the object of [the state's] care and solicitude,' not that he was under arrest or on trial."[20] And the goal of the juvenile court was to "establish precisely what the juvenile did and why he did it . . . ."[21] In this context, rules of criminal procedure were seen as both irrelevant and counterproductive.

However, as the *Gault* Court concluded, by the mid-twentieth century, juvenile courts across the country had strayed from the ideals of their Progressive-era founders.[22] Juveniles were dealing with the worst of both worlds: they neither enjoyed the procedural safeguards of the adult court model nor were they guaranteed solicitude from juvenile

15. *Id.*
16. *Id.* at 6–7.
17. *Id.* at 8.
18. *Id.* at 14–17.
19. *See* AARON KUPCHIK, JUDGING JUVENILES: PROSECUTING ADOLESCENTS IN ADULT AND JUVENILE COURTS 10–11 (2006); FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 6–7 (2005).
20. *Gault*, 387 U.S. at 15–16.
21. *Id.* at 28.
22. *Id.* at 17–18 ("The constitutional and theoretical basis for this peculiar system is—to say the least—debatable. And in practice, as we remarked in the *Kent* case . . . the results have not been entirely satisfactory."). *See also* CARA H. DRINAN, THE WAR ON KIDS: HOW AMERICAN JUVENILE JUSTICE LOST ITS WAY 16–20 (2017) (providing overview of American juvenile court).

judges.[23] Gerald Gault's experience proved this point well. Gault had engaged in normal adolescent behavior, and to the extent that his actions were criminal, they were fairly minor.[24] In fact, his conduct was entirely consistent with what today's neuroscience tells us about adolescent crime.[25] Adolescent crimes are often a function of group conduct where susceptibility to peer pressure is greatest.[26] These crimes may come from a place of sexual curiosity and boundary testing,[27] and they reflect a lack of impulse control and inability to weigh long-term consequences against short-term thrills.[28]

Yet despite the normative and minimal nature of Gault's conduct, he had a disastrous outcome in court.[29] Because he was not in adult court, he did not enjoy any of the procedural safeguards that may have helped him mitigate, if not entirely defend, his charge.[30] At the same time, he did not enjoy the solicitude of a judge who was looking to ensure his wellbeing and growth.[31] Had Gault been an adult at the time of his conviction, he would have faced a maximum fine of fifty dollars or two months imprisonment.[32] Instead, he was sentenced to six years confinement.[33]

Reviewing a petition for habeas corpus filed by Gault's parents, the Supreme Court recognized the absurdity of this outcome.[34] Justice Fortas wrote that "[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court."[35] And the Court held that juveniles in delinquency proceedings are entitled to basic procedural safeguards: the right to notice of charges, the right to counsel, the right to

23. *Gault*, 387 U.S. at 27–29.

24. *Id.* at 29. *See also* Elizabeth Cauffman et al., *How Developmental Science Influences Juvenile Justice Reform*, 8 U.C. IRVINE L. REV. 21, 26 (2018).

25. Cauffman et al., *supra* note 24, at 30.

26. *Id.* at 24–27 (discussing the link between adolescent susceptibility to peer pressure and crime).

27. *See* Robin Walker Sterling, *Juvenile Sex Offender Registration: An Impermissible Life Sentence*, 82 U. CHI. L. REV. 295, 297 n.17 (2015) (discussing recent litigation around the issue of sex offender registry for minors in light of their developmental differences and sexual curiosity).

28. Cauffman et al., *supra* note 24, at 23–25.

29. As the Court itself noted, Gerald Gault had a family advocating for him and his freedom. One can only imagine the detention outcomes for youth who did not have that kind of support. *Gault*, 387 U.S. at 28 ("[O]ne would assume that in a case like that of Gerald Gault, where the juvenile appears to have a home, a working mother and father, and an older brother, the Juvenile Judge would have made a careful inquiry and judgment as to the possibility that the boy could be disciplined and dealt with at home, despite his previous transgressions.").

30. *Id.* at 26.

31. *Id.* at 15–16.

32. *Id.* at 9.

33. *Id.* at 29.

34. *Id.* at 58.

35. *Id.* at 28.

confrontation and cross-examination of witnesses, and the right of privilege against self-incrimination.[36] The Court acknowledged that if the traditional juvenile court model where "care would be used to establish precisely what the juvenile did and why he did it"[37] had ever been appropriate, the flexibility of the model was no longer serving the best interests of youth.[38]

In its day, *Gault* was promising—arguably revolutionary—in at least two respects. First, the *Gault* Court recognized children as independent beings with affirmative legal rights of their own, and this was still a novel concept in 1967.[39] Prior to *Gault*, juvenile delinquency proceedings were treated as civil proceedings because it was thought that children had a right not to liberty, but rather to custody—either with parents or the state.[40] In that context, when liberty was taken away, the state "d[id] not deprive the child of any rights, because he ha[d] none."[41] Thus, the *Gault* Court's very premise—that a child had a liberty interest at stake when accused of a crime—was progressive and marked a step forward for youth.

Second, *Gault*, like the Court's decision in *Gideon v. Wainwright* only four years before,[42] represented an important move toward holding the states accountable for their inequitable and often draconian criminal justice practices. In both cases, the Court formally recognized the fundamental unfairness in asking individuals to confront the awesome power of the state on their own when they faced a loss of liberty.[43] Despite the fact that neither *Gideon* nor *Gault* have been fully

36. *Id.* at 31–58.

37. *Id.* at 28.

38. *Id.* at 29–30 ("So wide a gulf between the State's treatment of the adult and of the child requires a bridge sturdier than mere verbiage, and reasons more persuasive than cliché can provide. As Wheeler and Cottrell have put it, 'The rhetoric of the juvenile court movement has developed without any necessarily close correspondence to the realities of court and institutional routines.'") (citation omitted).

39. *Id.* at 36.

40. *Id.* at 17.

41. *Id.*; *see also* Steven Mintz, *Placing Children's Rights in Historical Perspective*, CRIM. LAW BULL., Summer 2008, at 313, 313–14 (noting that at the end of the eighteenth century, "the notion that children might be rights-holders seemed laughable," but that by the 1960s there was "a heightened stress on children's autonomy rights").

42. 372 U.S. 335 (1963) (holding that the Sixth Amendment requires states to provide indigent defendants with counsel in criminal prosecutions).

43. *See, e.g.*, *id.* at 344 ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . [L]awyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.").

implemented on the ground,[44] both were still watershed decisions. *Gideon* and *Gault* required the states to begin the project of securing representation for poor adults and children accused of a crime.[45] Moreover, by granting poor criminal defendants formal procedural protections, the Court armed those individuals with a new oversight mechanism: constitutional claims in federal court when those protections were denied.[46]

In sum, the *Gault* decision was profound in its day, and it ushered in a new era of formal protections for juvenile defendants. However, as discussed in Part III, events beyond the Court's control in the late-twentieth century eclipsed the import of the decision itself and further jeopardized youth accused of crime.

III. GAULT*'S PROMISE UNFULFILLED*

Gault has never been fully implemented, and this Part offers two explanations for its stunted application, neither of which the *Gault* Court could have prevented. First, as a matter of institutional design, the Supreme Court was never in a position to significantly improve the juvenile justice concerns illuminated in *Gault*. Second, fear-driven legislative choices of the late-twentieth century altered the criminal justice system for youth and adults in ways that the Court could not have predicted.

A. *Gault*'s Failures

Members of the Warren Court who sought criminal justice reform would be disappointed to learn of *Gault*'s legacy. Studies of juvenile defense have consistently concluded that *Gault* has never been fully implemented at the state and local level.[47] A 1995 report by the American Bar Association found that "a large number of children in this country still appear in court without a lawyer," despite *Gault* and federal

44. For a discussion of *Gault*'s implementation challenges, see *infra* pt. III. Many scholars and organizations have documented the states' refusal to implement *Gideon* over the decades. *See, e.g.*, NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, *Justice Denied* 2 (2009), https://constitutionproject.org/wp-content/uploads/2012/10/139.pdf (describing ongoing failure of states to provide effective representation to poor criminal defendants nearly five decades after *Gideon*).

45. *Gideon*, 372 U.S. at 344; *Gault*, 387 U.S. at 36.

46. *See, e.g.*, *Gideon*, 372 U.S. at 337.

47. NAT'L JUVENILE DEFENDER CTR., *Access Denied: A National Snapshot of States' Failure to Protect Children's Right to Counsel* 4 (2017), http://njdc.info/wp-content/uploads/2017/05/Snapshot-Final_single-4.pdf [hereinafter *Access Denied*].

statutory law affirming the decision.[48] Similarly, a 2003 survey by the Office of Juvenile Justice and Delinquency Prevention (OJJDP) found that "only 42 percent of youth in custody reported having a lawyer . . . ."[49]

In 2017, the National Juvenile Defender Center released a report on *Gault*'s fiftieth anniversary, and its key findings were damning.[50] Despite every state having basic structures to provide attorneys for children, few states live up to *Gault*'s vision. For example, only eleven states guarantee children a lawyer regardless of financial status,[51] and in all other jurisdictions financial eligibility must be resolved on a case-by-case basis before the child receives representation.[52] As the report explains, this eligibility inquiry is problematic in several respects. It can delay representation, sometimes requiring the child to be detained without a lawyer in the process; it can intimidate the family and prompt a child to waive their right to counsel; and the inquiry often excludes families whose income is still too low to contemplate hiring private counsel.[53] At the same time, according to the report, no state guarantees children a lawyer during interrogation, perhaps the most critical stage in the state's investigation;[54] thirty-six states allow children to be charged fees for "free" lawyers;[55] waiver without legal advice is the norm;[56] and only eleven states provide legal representation to minors after sentencing.[57] In sum, "[f]ifty years after the landmark [*Gault*] decision, state laws and practices still do not honor the constitutional rights of youth."[58]

Meanwhile, the stakes have never been higher for juvenile defendants. Young people can be charged in adult court far too easily and frequently; they can be subject to extreme sentences; they can be housed in adult facilities; and their chances of successful rehabilitation and

48. AM. BAR. ASS'N., JUVENILE JUSTICE CENTER, *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 21 (1995), http://njdc.info/wp-content/uploads/2013/11/A-Call-for-Justice_An-Assessment-of-Access-to-Counsel-and-Quality-of-Representation-in-Delinquency-Proceedings.pdf.

49. Sarah Barr, *Campaign Says Juveniles Need Better Access to Quality Legal Counsel*, JUV. JUST. INFO. EXCHANGE (May 17, 2016), http://jjie.org/campaign-says-juveniles-need-better-access-to-quality-legal-counsel/246782/.

50. *Access Denied*, *supra* note 47, at 7.

51. *Id.* at 10.

52. *Id.* at 10–13 (describing the methods for determining financial eligibility and the flaws with those processes).

53. *Id.* at 11 (citing these concerns among others).

54. *Id.* at 15–16.

55. *Id.* at 21.

56. *Id.* at 25 (noting that in forty-three states children can waive their right to a lawyer before consulting with a lawyer).

57. *Id.* at 31; *see also id.* at 32 (discussing the range of advocacy counsel could provide to youth after sentencing, such as ensuring safe conditions of confinement, taking up appeals, reducing fees and fines, and protecting access to family during confinement).

58. *Id.* at 4.

reentry are hampered by all of these variables.[59] This dire state of affairs for justice-involved youth has garnered attention and prompted innovative forms of activism in recent years.[60]

For example, in 2015, the federal government filed a Statement of Interest (Statement) in a class-action lawsuit challenging the deprivation of counsel for youth in Georgia.[61] The Statement was an attempt to inform the state court's analysis of children's due process rights as articulated in *Gault*, and it was the first such filing by the Department of Justice since the *Gault* decision itself.[62] Equally noteworthy, the National Football League Players Coalition (Coalition) recently chose to focus on juvenile justice reform as one of its key racial and social equality pursuits.[63] At the Coalition's first-ever Super Bowl Press Conference, it announced its plan to invest two million dollars in six organizations, including the National Juvenile Defender Center.[64] Since that announcement of grant funding, the Coalition has also used its platform to educate the public about the importance of representation for youth accused of a crime.[65]

In short, while the *Gault* decision triggered formal rights for children accused of crimes across the country, those rights still have never been fully implemented more than fifty years later. And as promising as this recent sense of urgency about juvenile representation is, we must understand why the *Gault* decision has never been impactful at the state level in order to chart a path forward.

B. Understanding *Gault*'s Anemic Implementation

The state of juvenile representation nationwide today is disappointing to say the least, but one can hardly fault the Warren Court for this gap between its declaration of rights in *Gault* and the decision's

59. *See infra* pt. III.B.

60. *See Dept. of Justice Statement of Interest Supports Meaningful Right to Counsel in Juvenile Prosecutions*, U.S. DEP'T OF JUSTICE (Mar. 13, 2015), https://www.justice.gov/opa/pr/department-justice-statement-interest-supports-meaningful-right-counsel-juvenile-prosecutions.

61. *Id.*

62. *Id.*

63. *Key Pillars*, NAT'L FOOTBALL LEAGUE PLAYERS COAL., https://players-coalition.org/key-pillars/ (under "Criminal Justice Reform," see "Topline Issues") (last visited Apr. 10, 2020).

64. Craig Dray, *Players Coalition Holds First Press Conference at Super Bowl LIII*, PRO PLAYER INSIDERS (Jan. 30, 2019), http://proplayerinsiders.com/nfl-player-team-news-features/players-coalition-holds-first-press-conference-super-bowl-liii/.

65. The Coalition regularly advocates for juvenile justice reform by tweeting about the issue, including the specific issue of deprivation of the right to counsel. *See, e.g.*, *Nat'l Football League Players Coal.*, TWITTER (May 25, 2019, 2:32 PM), https://twitter.com/playercoalition/status/1132399067361730560.

anemic implementation at the state level. Rather, one can understand *Gault*'s stunted implementation as a function of two issues: institutional design and legislative choices—neither of which were within the Court's control.

1. Institutional Design

As scholars have discussed at length, the Supreme Court can participate in social change, but not in isolation.[66] Rather, advocates of social change often obtain confirmation of rights from the Court, while implementation of those rights falls to the executive and legislative branches—frequently at the state level.[67] As a result, rights as announced by the Court often go unfulfilled,[68] and the right to counsel demonstrates this principle well. In 1963, the Supreme Court announced that the Sixth Amendment grants individuals the right to counsel in criminal cases at the state's expense.[69] More than fifty years after that decision, the right to counsel has never been fully realized.[70] For decades, public defenders have been overworked and underpaid despite litigation challenging public defense systems and legislative attempts to improve those systems.[71]

And no wonder—indigent defense is a locally-implemented issue, and in a nation of more than three thousand counties, there has yet to be an adequate accounting of indigent defense services, let alone an assessment of their efficacy.[72] At the same time, indigent defense has always presented a political process problem: many voters view themselves as far removed from the criminal justice system, and elected

66. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 35 (1991) (arguing that the Supreme Court itself cannot generate meaningful social change); *see also* L.A. Powe, Jr., *The Supreme Court, Social Change, and Legal Scholarship*, 44 STAN. L. REV. 1615, 1616 (1992) (reviewing HOLLOW HOPE); Mark Tushnet, *Some Legacies of* Brown v. Board of Education, 90 VA. L. REV. 1693, 1712 (2004) (suggesting that the Court can articulate powerful principles of social reform despite constraints imposed on the judicial branch).

67. *See* Powe, *supra* note 66, at 1622.

68. *See id.* ("[H]istory reveals that judicial decisions, by themselves, produced virtually no change. Only when supplemented by executive and legislative action did judicial action lead to real social change.").

69. Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

70. *See supra* text accompanying note 57; Andrew Cohen, *How Americans Lost the Right to Counsel, 50 Years After 'Gideon'*, THE ATLANTIC, Mar. 2013, https://www.theatlantic.com/national/archive/2013/03/how-americans-lost-the-right-to-counsel-50-years-after-gideon/273433/.

71. *See generally* Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 434, 437, 476 (2009).

72. For a discussion of national attempts to document the methods of indigent defense services and their efficacy, see generally *6AC & Our Work*, SIXTH AMENDMENT CTR., http://sixthamendment.org/about-us/ (last visited Apr. 10, 2020); *Overview*, MEASURES FOR JUSTICE, https://measuresforjustice.org/about/overview/ (last visited Apr. 10, 2020).

state actors rarely champion the rights of poor minorities.[73] The same has been true for the right to counsel for youth accused of a crime.[74] Thus, out of the gates, *Gault* faced an uphill battle in terms of implementation.

2. Legislative Choices

Meanwhile, the Warren Court simply could not have predicted the tough-on-crime politics of the late-twentieth century, and no procedural rights could keep pace with the trend toward mass incarceration.[75] Even though crime had begun to rise in the 1960s and there was great fear associated with that trend,[76] at the time of the *Gault* decision the nationwide jail and prison population was still below 300,000.[77] But between 1960 and the mid-1990s, violent crime rose consistently, reaching an all-time peak in 1991.[78] The War on Drugs was ushered in, and lawmakers on both sides of the aisle embraced tough-on-crime political positions, putting more crimes on the books, enhancing the penalties for crimes, and rewarding prosecutors for tough sanctions.[79] As the United States sent more people to prison for longer periods of time, its correctional population exploded.[80] With more than two million

73. Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L.J. 2150, 2172 (2013) ("[T]he criminal courts are not a concern of most people because they deal primarily with racial minorities and the poor. As Attorney General Robert F. Kennedy observed at the time of *Gideon*, 'the poor person accused of a crime has no lobby.' States, counties, and municipalities have no incentive to provide those they are prosecuting with capable lawyers.") (citation omitted).

74. *Id.* at 2152.

75. A full discussion of mass incarceration is outside the scope of this brief Symposium Article. Two dominant accounts are offered in MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 6, 16–17 (2010) (arguing that the War on Drugs and racially discriminatory law enforcement and sentencing practices generated mass incarceration as a tool for racial oppression), and JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 127–28, 233–35 (2017) (challenging the dominant narrative that the War on Drugs and mandatory minimums drove mass incarceration and arguing that prosecutorial discretion is largely to blame).

76. Lauren-Brooke Eisen & Oliver Roeder, *America's Faulty Perception of Crime Rates*, BRENNAN CTR. FOR JUSTICE (Mar. 16, 2015), https://www.brennancenter.org/blog/americas-faulty-perception-crime-rates (citing a violent crime rate increase of 126% between 1960 and 1970).

77. *Trends in U.S. Corrections*, THE SENTENCING PROJECT 1 (June 2019), https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf.

78. Charles C.W. Cooke, *Careful with the Panic: Violent Crime and Gun Crime Are Both Dropping*, NAT'L REVIEW (Nov. 30, 2015), http://www.nationalreview.com/corner/427758/careful-panic-violent-crime-and-gun-crime-are-both-dropping-charles-c-w-cooke.

79. *See* ALEXANDER, *supra* note 75, at 42–58; *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471–72 (discussing prosecutors as an ambitious group and convictions as the metric of success for prosecutors).

80. *See* ALEXANDER, *supra* note 75, at 54–55.

adults and children behind bars today, the United States leads the world in its rate of incarceration.[81]

Youth suffered from the trend toward mass incarceration, too. While states failed to fully implement *Gault*, they simultaneously implemented laws and policies that made children more vulnerable than ever in the criminal justice system.[82] As I have argued more fully elsewhere, a few legislative decisions of the late-twentieth century were especially damaging for youth accused of a crime: transfer laws, mandatory minimums, and the emerging school-to-prison pipeline.[83]

a. Transfer Laws

For most of the twentieth century, a child accused of committing a crime was typically dealt with in the juvenile justice system.[84] It was possible for the juvenile judge to transfer a child's case into adult court, but such transfer "involved a hearing at which the state had to persuade the juvenile judge that the [youth] was not amenable to rehabilitation, had committed a crime too serious for adjudication in juvenile court given its punitive limits, or both."[85] Transfer of a juvenile case into adult court was rare and difficult.[86]

Beginning in the 1970s, states amended their laws in a number of ways, making it easier for children to be prosecuted in adult criminal court.[87] Some state laws reduced the age at which a juvenile judge was authorized to transfer a child to adult court, while other state laws automatically excluded certain juvenile defendants from the juvenile court's jurisdiction based upon the child's age or the charged offense.[88] Finally, some states amended their laws to vest the prosecutor with unilateral authority to make the juvenile transfer decision.[89]

81. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POLICY INITIATIVE (Mar. 19, 2019), https://www.prisonpolicy.org/reports/pie2019.html.

82. *See, e.g.*, DRINAN, *supra* note 22, at 23.

83. *Id.* The central thesis of THE WAR ON KIDS is that the United States abandoned the premise of the juvenile court model in the late twentieth century, enacting punitive practices that made it possible for youth accused of a crime to be treated as adults. Transfer laws, mandatory minimums, and the school-to-prison pipeline were part of that trajectory. *See id.* at 20–24, 46–56.

84. KUPCHIK, *supra* note 19, at 1.

85. DRINAN, *supra* note 22, at 20; *cf.* FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 141–44 (2005) (discussing mission of juvenile court as being its primary limitation in that some juvenile cases warrant a punishment response the juvenile court cannot impose).

86. DRINAN, *supra* note 22, at 20.

87. KUPCHIK, *supra* note 19, at 1, 154–59 (discussing the three primary methods for transfer of jurisdiction from juvenile to adult court).

88. *Id.* at 1.

89. *Id.*

Today, every state has some mechanism for transferring a juvenile case into adult court, and most states have several.[90] In twenty-three states and the District of Columbia, there is at least one transfer provision with no minimum age requirement.[91] Thirty-four states have "once an adult always an adult" provisions, meaning that once a child has been convicted in adult court, any future adjudications for that child will take place in adult court.[92]

These laws have codified the legal fiction that a child becomes an adult in the eyes of the law when accused of a crime, and they have exposed hundreds of thousands of children to the adult criminal justice system.[93] Unlike the juvenile court's focus on rehabilitation, "[t]he adult criminal process is entirely adversarial, and incarceration is the common punishment."[94] Even if the incarceration term is relatively short, the collateral consequences of an adult criminal conviction can be life-altering for anyone, let alone a minor.[95] For example, a child convicted in adult court may be required to register as a sex-offender for life,[96] and juvenile convictions in adult court can serve as prior convictions for purposes of adult recidivism statutes.[97] In short, for justice-involved youth, the threshold question of whether their case will be transferred to adult court is often outcome-determinative.

90. Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT'L CONF. STATE LEG. (Jan. 11, 2019), http://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx; *see also* Patrick Griffin et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, NAT'L CRIMINAL JUSTICE REFERENCE SERVICE 3 (Sept. 2011), https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf.

91. *Juveniles Tried as Adults*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (2016), https://www.ojjdp.gov/ojstatbb/structure_process/qa04105.asp.

92. Griffin et al., *supra* note 90, at 3.

93. Jessica Lahey, *The Steep Costs of Keeping Juveniles in Adult Prisons*, THE ATLANTIC, Jan. 8, 2016, https://www.theatlantic.com/education/archive/2016/01/the-cost-of-keeping-juveniles-in-adult-prisons/423201/ (reporting that nearly 200,000 children enter the adult criminal system each year).

94. DRINAN, *supra* note 22, at 53.

95. Cynthia Soohoo, *You Have the Right to Remain a Child: The Right to Juvenile Treatment for Youth in Conflict with the Law*, 48 COLUM. HUM. RTS. L. REV. 1, 11 (2017) ("Criminal convictions carry a life-long stigma that can prevent youth from accessing higher education or getting a job, further increasing the risk of recidivism. Criminal convictions can limit access to driver's licenses and prevent youth from voting or holding public office.").

96. Amy E. Halbrook, *Juvenile Pariahs*, 65 HASTINGS L.J. 1, 5 (2013) ("In some jurisdictions, lifetime juvenile sex offender registration is mandatory for certain offenses.").

97. United States v. Orona, 724 F.3d 1297, 1309–10 (10th Cir. 2013) (holding that juvenile adjudication could be used as predicate offense for purposes of Armed Career Criminal Act); *see also id.* at 1302 (canvassing state laws on the issue).

b. Mandatory Minimums

Around the same time that states introduced transfer laws, both the federal government and the states introduced increasingly punitive sentencing schemes, including mandatory minimum sentences.[98] The convergence of these two developments meant that by the end of the twentieth century, children could easily be prosecuted in adult court, and in adult court, they could be subjected to harsh, often mandatory sentences—sentences that refused to acknowledge the mitigating aspects of youth.[99] As the United States Supreme Court has recently acknowledged, imposing lengthy sentences on minors, especially on a mandatory basis, creates a fundamental unfairness.[100] First, a child sentenced to a long term of years will serve a much greater percentage of their life than an adult who receives the same sentence.[101] Second, lengthy mandatory sentences ignore the scientific fact that children are both less culpable and more amenable to rehabilitation over time.[102] Because of this science, in recent years at least two jurisdictions have outlawed the application of mandatory minimums to justice-involved youth.[103]

c. School-to-Prison Pipeline

By the end of the twentieth century, the nation had embraced extreme juvenile justice practices, and the idea that youth were dangerous began to trickle down to schools.[104] Specifically, schools

98. DRINAN, *supra* note 22, at 22–24.

99. *Id.*

100. *See infra* pt. IV.

101. *See* Graham v. Florida, 560 U.S. 48, 70 (2010) ("Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.").

102. Roper v. Simmons, 543 U.S. 551, 570–71 (2005).

103. State v. Lyle, 854 N.W.2d 378, 381 (Iowa 2014) (abolishing mandatory minimums as applied to juveniles); State v. Houston-Sconiers, 391 P.3d 409, 420 (Wash. 2017) ("[W]e hold that sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system.").

104. Not only did youth suffer from the general fear associated with rising crime, but also in the mid 1990s, John DiIulio predicted the emergence of a juvenile "superpredator"—"that there would be hordes upon hordes of depraved teenagers resorting to unspeakable brutality, not tethered by conscience." Clyde Haberman, *When Youth Violence Spurred 'Superpredator' Fear*, N.Y. TIMES, Apr. 6, 2014, http://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html?_r=0. DiIulio was wrong, and he later admitted as much; between 1994 and 2011, juvenile homicide actually fell by two-thirds. Nonetheless, his theory of the juvenile superpredator loomed large during the late 1990s and impacted social views of youth as needing containment. *Id.* A full discussion of the school-to-prison pipeline is outside the scope of this Article. For a thorough discussion of the dynamic, see, e.g., Jason P. Nance, *Students, Police and the School to*

introduced security measures historically reserved for criminal justice efforts.[105] For example, schools began to employ not just locking doors and gates, but also surveillance cameras, metal detectors, and drug-sniffing dogs.[106] The most visible part of this trend was the introduction of security personnel inside schools, often police officers or school resource officers (SROs).[107] At the same time, schools across the nation adopted "zero-tolerance" school discipline policies—essentially mandatory minimums in the school setting.[108] These policies involve predetermined consequences for infractions, are usually harsh, and do not take into account context or potentially mitigating variables.[109]

Coupled with the presence of law enforcement in schools, zero-tolerance policies have resulted in youth being arrested and charged in cases where, only a few decades ago, school administrators would have handled the matter.[110] As Professor Josh Gupta-Kagan explains, a failure to clearly define the role of SROs at the local level has led to a significant expansion in power for SROs.[111] In many communities, SROs are not in the building just for law enforcement purposes, but rather they are also called upon to enforce school disciplinary rules—even things as minor as uniform violations.[112] This was a perfect storm for children in school buildings:

> State laws and school district policies required that schools refer student misbehavior in schools to law enforcement. Broad criminal laws—such as those criminalizing any behavior which amounted to "disturbing schools"—rendered a large swath of adolescent misbehavior criminal. In combination with these policies, SROs' increased presence and involvement in school discipline led to a sharp increase in arrests for incidents arising at school.[113]

Prison Pipeline, 93 WASH. U. L. REV. 919 (2016); Jason P. Nance, *Dismantling the School to Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313 (2016).

105. *See* DRINAN, *supra* note 22, at 46–52 (discussing the school-to-prison pipeline and the way in which it has shunted kids into the criminal justice system).

106. *Id.* at 47.

107. *Id.*

108. *Id.* at 48.

109. *Id.*

110. *Id.*

111. Josh Gupta-Kagan, *Reevaluating School Searches Following School-to-Prison Pipeline Reforms*, 87 FORDHAM L. REV. 2013, 2039–40 (2019).

112. *Id.* at 2040.

113. *Id.* at 2040–41.

In this process, America "outlawed adolescence."[114]

The impact of these legislative choices cannot be overstated: they were nothing short of a war on kids, and the results have been devastating, especially for poor minority youth. Today, every jurisdiction has some provision (and most states have several) that permits a juvenile to be transferred to adult criminal court, oftentimes with no judicial oversight and without a minimum age.[115] Youth in adult court are subject to sentences, even mandatory ones, that were drafted with adults in mind.[116] Youth can be housed in adult correctional facilities, despite being the most vulnerable to physical and sexual assault in those locations.[117] Youth endure conditions of confinement that we once thought appropriate for only the most dangerous adult inmates, including mechanical restraints and solitary confinement.[118] Until 2005, the United States was the only nation to execute people for juvenile offenses,[119] and today we are the only developed nation in the world that still sentences children to die in prison.[120]

Moreover, as is true in the adult system, the nation's extreme juvenile practices have had a disproportionate impact on poor and minority youth.[121] Black youth are more than twice as likely as white youth to be arrested,[122] and even as overall youth detention rates continue to decline, black youth are five times as likely as white youth to

114. Amanda Ripley, *How America Outlawed Adolescence*, THE ATLANTIC, Nov. 2016, https://www.theatlantic.com/magazine/archive/2016/11/how-america-outlawed-adolescence/501149/.

115. *See* Powe, *supra* note 66, at 1622 ("[H]istory reveals that judicial decisions, by themselves, produced virtually no change. Only when supplemented by executive and legislative action did judicial action lead to real social change.").

116. *See* ALEXANDER, *supra* note 75, at 17; PFAFF, *supra* note 75, at 127–28, 233–35; Eisen, *supra* note 76; *Trends in U.S. Corrections*, *supra* note 77; Cooke, *supra* note 78.

117. *See* DRINAN, *supra* note 22, at 72–81 (discussing the evidence that adult prison is a dangerous place for minors).

118. *See generally Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States*, AM. CIVIL LIB. UNION 48, 60–65 (Oct. 12, 2012), https://www.aclu.org/sites/default/files/field_document/us1012webwcover.pdf.

119. Roper v. Simmons, 543 U.S. 551, 575 (2005) ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.").

120. Josh Rovner, *Juvenile Life Without Parole: An Overview*, THE SENTENCING PROJECT (2019), https://www.sentencingproject.org/publications/juvenile-life-without-parole/.

121. Rudolph Alexander, Jr., *The Impact of Poverty on African American Children in the Child Welfare and Juvenile Justice Systems*, 4 FORUM ON PUB. POLICY ONLINE 1 (2010), https://files.eric.ed.gov/fulltext/EJ913052.pdf.

122. Samantha Michaels, *Black Kids Are Five Times Likelier than White Kids to Be Locked Up*, MOTHER JONES (Sept. 13, 2017), https://www.motherjones.com/politics/2017/09/black-kids-are-5-times-likelier-than-white-kids-to-be-locked-up/.

be detained.[123] Similarly, poverty shunts children into detention who would never be there if they had the financial resources to pay for a diversion program or an ankle bracelet—let alone an effective attorney.[124]

In sum, despite the formal rights afforded to juvenile defendants by the *Gault* decision, the Court simply could not contain the states' efforts to treat children as adults in both procedural and sentencing terms.

IV. LEARNING FROM GAULT

Reflecting on *Gault* and its legacy today is instructive, especially given the Supreme Court's recent efforts to rein in extreme juvenile sentencing.[125] It is tempting for advocates of juvenile justice reform to put tremendous stock in these juvenile sentencing decisions and to look to the Court for further leadership on the juvenile justice reform front.[126] But as *Gault* at fifty suggests, that would be misguided. The final Part of this Article considers the Court's recent juvenile sentencing cases and offers some suggestions for how juvenile justice advocates might conceive of and leverage those cases given the lessons of *Gault*'s implementation.

A. The *Miller* Trilogy

In a series of cases known as the *Miller* trilogy,[127] the Supreme Court has limited the extent to which states can subject children to the harshest sentences on the books.[128] In 2005, the Supreme Court held in *Roper v. Simmons* that the Constitution forbids execution of those who commit homicide prior to the age of eighteen.[129] Relying upon longstanding Eighth Amendment methodology, the Court examined youth as a group and analyzed whether execution of minors was

123. *Black Disparities in Youth Incarceration*, THE SENTENCING PROJECT (Sept. 12, 2017), https://www.sentencingproject.org/publications/black-disparities-youth-incarceration/.

124. DRINAN, *supra* note 22, at 29–34 (describing the link between poverty and youth contact with the criminal justice system).

125. *Recent Court Cases on Extreme Sentences for Youth*, FAIR SENTENCING FOR YOUTH, http://fairsentencingforyouth.org/legislation/us-supreme-court/ (last visited Apr. 10, 2020).

126. *See id.*

127. This term refers to Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); and Miller v. Alabama, 567 U.S. 460 (2012).

128. I have discussed these decisions in greater detail in prior works. *See* DRINAN, *supra* note 22, at 84–96; Cara H. Drinan, *The* Miller *Revolution*, 101 IOWA L. REV. 1787 (2016); Cara H. Drinan, *Misconstruing* Graham *&* Miller, 91 WASH. U. L. REV. 785 (2014); Cara H. Drinan, Graham *on the Ground*, 87 WASH. L. REV. 51 (2012).

129. 543 U.S. at 578.

proportionate given their diminished culpability and greater capacity for rehabilitation.[130] At the same time, the Court looked at legislative trends regarding juvenile execution and exercised its own judgment to rule that the practice violated evolving standards of decency.[131] Five years later, in *Graham v. Florida*, the Court again relied upon neuroscience documenting the differences between adolescent and adult brains to hold that the Constitution precludes a life-without-parole sentence for a minor who commits a non-homicide crime.[132] In 2012, in *Miller v. Alabama*, the Supreme Court held that the Eighth Amendment bars juvenile life-without-parole sentences except for the rare juvenile whose crime reflects "irreparable corruption."[133] And according to the *Miller* Court, sentencing bodies must engage in a searching analysis of the minor's home, educational, mental, physical, and social environments in order to make that determination.[134] Finally, in *Montgomery v. Louisiana*, the Court held that its *Miller* decision was retroactively applicable, and with its decision, thousands of prisoners nationwide became eligible for a resentencing or parole hearing.[135]

These decisions reflect the lessons of neuroscience—science that confirms what "any parent knows."[136] This science tells us that the frontal lobe of the brain controls functions like risk assessment and judgment; that the brain is still maturing well into late adolescence; and, as a result, adolescents are more subject to peer pressure than their adult counterparts, and they value short-term gain over long-term goals.[137] Because of their fleeting immaturity, children are both less culpable and more amenable to rehabilitation.[138] In sum, the *Miller* trilogy stands for the proposition that children are different in the eyes of the law, and state sentencing practices must reflect that fact.

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130. *Id.* at 569–74 (citing broad differences between adults and minors and how those differences impact punishment theory).

131. *Id.* at 575.

132. 560 U.S. at 67–68, 82 (abolishing juvenile-life-without-parole sentences for juvenile non-homicide crimes).

133. 567 U.S. 460, 479–80 (2012) (citation omitted).

134. *Id.* at 476–80.

135. 136 S. Ct. 718, 736 (2016). The Sentencing Project estimates that 2,100 individuals were sentenced to mandatory JLWOP and became eligible for relief under *Montgomery*. Josh Rovner, *Juvenile Life Without Parole: An Overview*, THE SENTENCING PROJECT (Jul. 23, 2019), https://www.sentencingproject.org/publications/juvenile-life-without-parole/.

136. *Miller*, 567 U.S. at 471 ("Our decisions [in *Roper* and *Graham*] rested not only on common sense—on what 'any parent knows'—but on science and social science as well.") (citation omitted).

137. *Id.* at 471–72. *See generally* Laurence Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking*, 23 PSYCHOL. PUB. POL'Y & L. 410 (2017).

138. *Miller*, 567 U.S. at 472–75.

B. Lessons from *Gault* as Applied to *Miller* and the Path Forward

In the last decade, advocates have leveraged these Eighth Amendment decisions to urge radical changes to the treatment of justice-involved youth. First and foremost, grass-roots organizations have pursued the abolition of juvenile-life-without-parole (JLWOP) and other extreme juvenile sentences.[139] In addition, citing the "kids are different" rationale of these cases,[140] scholars have argued for re-examination of juvenile transfer laws and for conditions of confinement that reflect young people's vulnerability and unique capacity for rehabilitation.[141] The juvenile defense bar now recognizes that, when minors face a potential life sentence, it is tantamount to a capital trial for youth, and there are specific, articulated standards for this kind of representation.[142] Juvenile advocates have challenged sex-offender registration requirements for minors, arguing that lifetime registry violates the logic and rationale of the *Miller* trilogy.[143] Finally, citing the Court's requirement that states provide minors a "meaningful opportunity to obtain release,"[144] lawyers and scholars have promoted youth-specific parole protocols for minors serving lengthy terms.[145]

To date, these efforts have produced mixed results. On one hand, juvenile justice advocates have made some major strides toward age-appropriate sentencing for youth in America in the wake of the *Miller* trilogy. For example, at the time of the *Miller* decision, only five states

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139. The Campaign for the Fair Sentencing of Youth has been the primary change-agent on this issue nationally. *See Tipping Point: A Majority of States Abandon Life-Without-Parole Sentences for Children*, CAMP. FOR THE FAIR SENT. OF YOUTH (Dec. 3, 2018), https://www.fairsentencingofyouth.org/wp-content/uploads/Tipping-Point.pdf [hereinafter *Tipping Point*] (discussing progress since *Miller* and need for continued JLWOP reform).

140. Perry L. Moriearty, Miller v. Alabama *and the Retroactivity of Proportionality Rules*, 17 U. PA. J. CONST. L. 929, 949 (2015) (stating that with the *Roper* decision, "[t]he Court's modern 'kids are different' jurisprudence was born").

141. *See, e.g.*, Elizabeth S. Scott, *Children Are Different: Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 99–103 (2013) (discussing *Miller* trilogy implications for both transfer law and appropriate correctional environments).

142. *See* Heather Renwick, *Trial Defense Guidelines: Representing a Child Client Facing a Possible Life Sentence*, CAMPAIGN FOR FAIR SENTENCING OF YOUTH (Mar. 2015), https://www.fairsentencingofyouth.org/wp-content/uploads/Trial-Defense-Guidelines-Representing-a-Child-Client-Facing-a-Possible-Life-Sentence.pdf.

143. *See, e.g.*, Halbrook, *supra* note 96 at 5; Spencer Klein, *The New Unconstitutionality of Juvenile Sex Offender Registration: Suspending the Presumption of Constitutionality for Laws That Burden Juvenile Offenders*, 115 MICH. L. REV. 1365 (2017); Sterling, *supra* note 27, at 297 n.17.

144. Miller v. Alabama, 567 U.S. 460, 479 (2012) (quoting Graham v. Florida, 560 U.S. 48, 75 (2010)).

145. *See, e.g.*, Beth Caldwell, *Creating Meaningful Opportunities for Release:* Graham*,* Miller *and California's Youth Offender Parole Hearings*, 40 N.Y.U. REV. L. & SOC. CHANGE 245 (2016); Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 377 (2014).

banned JLWOP.[146] Today, twenty-one states and the District of Columbia ban the sentence, while another five states have no one serving JLWOP.[147] Moreover, as recently as 2015, nine states automatically charged seventeen-year-olds in adult court and two states routinely treated sixteen-year-olds as adults.[148] Today, in forty-five states, the maximum age for juvenile court jurisdiction is seventeen, with only five states routinely charging sixteen-year-olds in adult court.[149] At the same time, California recently passed legislation preventing youth fifteen and under from being transferred into adult court for *any* crime.[150] The success of these "raise the age" campaigns in recent years is due in large part to the *Miller* trilogy and the widespread acceptance that juveniles—even seventeen-year-olds—still have years of brain development ahead of them.[151] Finally, as of December 2018, nearly 400 people who were sentenced as youth to die in prison have now come home because of state changes in sentencing and parole laws.[152] This is remarkable change in a short period of time.

And yet, *Miller*'s implementation has neither been straightforward nor has it been consistent across the country. To begin, many state courts and legislatures were hesitant to adopt meaningful changes in the early aftermath of *Graham* and *Miller*.[153] At the same time, while the abolition of JLWOP now seems achievable in the future, thousands of youth sentenced to de facto life terms may not be so fortunate as courts continue to be split on how to handle such sentences.[154] Moreover, in some jurisdictions where legislators have enacted reforms designed to give youth a chance at reentry, prosecutors are attempting to thwart

146. *See Tipping Point*, *supra* note 139, at 2.

147. *Id.*

148. Maurice Chammah, *The 17-Year-Old Adults*, THE MARSHALL PROJECT (June 3, 2015), https://www.themarshallproject.org/2015/03/03/the-17-year-old-adults.

149. Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court*, NAT'L CONF. STATE LEGS. (Jan. 11, 2019), http://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx.

150. Sara Tiano, *California Passes Bill Banning Transfer of Juveniles Under 16*, CHRON. OF SOCIAL CHANGE (Aug. 30, 2018), https://chronicleofsocialchange.org/justice/juvenile-justice-2/california-passes-bill-banning-transfer-of-juveniles-under-16/32081 (emphasis added).

151. Marc Schindler & Vincent Schiraldi, *Good Reasons to Raise Age for Juvenile Justice*, JUSTICE POL'Y INST. (Nov. 17, 2015), http://www.justicepolicy.org/news/9871.

152. *See Tipping Point*, *supra* note 139, at 6.

153. *See generally* Drinan, *Misconstruing* Graham *&* Miller, *supra* note 128, at 785.

154. *See* DRINAN, *supra* note 22, at 94–96. Courts have been split on the question whether de facto life terms and literal life terms should be treated the same under the *Miller* line of cases. *Compare* Bunch v. Smith, 685 F.3d 546, 547 (6th Cir. 2012) (rejecting claim that *Graham* clearly applies to the "practical equivalent of life without parole"), *with* State v. Ramos, 387 P.3d 650, 658 (Wash. 2017) (holding that youth serving LWOP or de facto LWOP are equally entitled to a *Miller* hearing).

those efforts.[155] For example, the District of Columbia recently passed legislation giving prisoners who were under eighteen at the time of their conviction and who have served at least twenty years a sentencing review hearing.[156] D.C.'s United States Attorneys have tried to block the release of every prisoner who has sought freedom under the new law.[157] Even in states where a parole mechanism is in place for those who were sentenced to JLWOP, the parole process is often hollow and meaningless.[158] For example, despite his victory before the Supreme Court, Henry Montgomery himself was recently denied parole for the second time even though, at seventy-two, he has served fifty-five years and has an impeccable improvement in his correctional record.[159] Finally, despite the success with campaigns to "raise the age" of adult court jurisdiction as a default matter, transfer laws remain ubiquitous and often unchecked by judicial oversight, and youth continue to be housed in adult correctional facilities.[160] In short, advocates have leveraged the *Miller* trilogy to seek ambitious reforms, but enormous work remains to be done in order to guarantee age-appropriate treatment for justice-involved youth in America.

It would be misguided to expect the Supreme Court to sustain the reform momentum to date. Since its decision in *Montgomery v. Louisiana* in 2016, in which the Court found *Miller* retroactively applicable, the Court has appeared reticent to expand the scope of the *Miller* trilogy and deferential in matters of *Miller*'s implementation.[161] For example, as discussed above, courts are split on the question of how to handle de facto life sentences or life sentences that result from aggregate term-of-year sentences, and the Court has refused to squarely address those issues.[162] At the same time, the science on which the *Miller* trilogy relied

155. *Prosecutors Buck Supreme Court Mandate to Limit Life Without Parole Sentences for Children*, LA. CTR. FOR CHILDREN'S RIGHTS (Nov. 1, 2017), http://www.laccr.org/wp-content/uploads/2017/11/JLWOP-Deadline-Press-Release-11-2-17.pdf.

156. Kira Lerner, *D.C. Shows Mercy for People Who Committed Crimes as Children, but Prosecutors Are Fighting Back*, THE APPEAL (May 23, 2019), https://theappeal.org/d-c-offers-hope-to-people-who-committed-crimes-as-children-but-prosecutors-are-fighting-back/.

157. *Id.*

158. *See* DRINAN, *supra* note 22, at 109–31 (describing the unpredictable nature of parole proceedings for those serving JLWOP even within the same jurisdiction); *see also* French Russell, *supra* note 145, at 373–74 (discussing the various ways in which state parole procedures fall short of providing a "meaningful opportunity to obtain release").

159. Samantha Michaels, *A 72-Year-Old Lifer Won a Landmark Supreme Court Ruling, but Louisiana Won't Let Him Out of Prison*, MOTHER JONES (Apr. 12, 2019), https://www.motherjones.com/crime-justice/2019/04/henry-montgomery-juvenile-lifer-louisiana-denied-parole/.

160. *See supra* pt. III.B.

161. *See* Bostic v. Dunbar, No. 17-912, *cert. denied* 138 S. Ct. 1593 (2018).

162. *See id.* In *Bostic*, the defendant was sentenced to an aggregate term of 241 years for a non-homicide crime. Pet. Writ of Cert. at 2–3, *Bostic v. Pash*, 2017 WL 6606886 (U.S. Dec. 20, 2017) (No.

suggests that adolescent brain development continues into the mid 20s, and juvenile justice advocates have pushed for policies to reflect that reality.[163] Again, though, the Court does not seem inclined to consider expanding the logic of the *Miller* trilogy to cases in which the defendant is over eighteen.[164] Moreover, in *Virginia v. LeBlanc*, the Court signaled that it would grant states wide latitude in implementing the mandates of the *Miller* trilogy.[165] LeBlanc was sentenced to life without parole for a non-homicide crime at sixteen.[166] He sought relief under *Graham*, but Virginia argued that he did, in fact, have a "meaningful opportunity to obtain release" as required by *Graham* because the state had a *geriatric* release program under which he could seek release at the age of sixty.[167] The Supreme Court held that Virginia's decision was not an unreasonable application of *Graham*.[168] Thus, the Court appears to have no appetite either for vigorously enforcing the mandates of the *Miller* trilogy or for expanding its core holdings.

At the same time, Justice Kennedy was a driving force behind the Court's examination of extreme juvenile sentences[169] and a vocal opponent of broader American criminal justice practices.[170] With his departure and the establishment of a solid conservative majority on the Supreme Court,[171] juvenile justice advocates can expect diminishing

17-912). Under state law, he was to become parole-eligible at the age of 112. Bostic argued that his sentence was barred by *Graham v. Florida*, and yet the Supreme Court declined to answer the question whether Bostic's case should be treated the same as cases like Graham's in which the death-in-custody sentence is a stand-alone sentence. *Id.* at 7–8.

163. *See* David Jordan, *Vermont Rolls Out a New Idea to Rehabilitate Young Offenders*, CHRISTIAN SCIENCE MON. (July 6, 2018), https://www.csmonitor.com/USA/Justice/2018/0706/Vermont-rolls-out-a-new-idea-to-rehabilitate-young-offenders (discussing state reforms that incorporate this brain science).

164. *Cf. Tucker v. Louisiana*, No. 15-946, *cert. denied* 136 S. Ct. 1801 (2016) (J. Breyer dissenting from the denial of cert in defendant's capital appeal and noting that the defendant was 18 years, 5 months and 6 days old at the time of crime).

165. 137 S. Ct. 1726, 1729 (2017).

166. *Id.* at 1727.

167. *Id.* at 1727–28.

168. *Id.* at 1728–29.

169. Reginald Dwayne Betts, *What Break Do Children Deserve? Juveniles, Crime, and Justice Kennedy's Influence on the Supreme Court's Eighth Amendment Jurisprudence*, 128 YALE L.J. FORUM 743, 744–51 (2019).

170. *See, e.g.*, Anthony M. Kennedy, Associate Justice, U.S. Supreme Court, Speech at American Bar Ass'n Annual Mtg. (Aug. 9, 2003) (transcript at https://www.supremecourt.gov/publicinfo/speeches/sp_08-09-03.html) (addressing scale, discrimination, and unfairness of American corrections).

171. Robert Barnes, *Supreme Court Conservatives Overturn Precedent as Liberals Ask "Which Cases the Court Will Overrule Next,"* WASH. POST, May 13, 2019, https://www.washingtonpost.com/politics/courts_law/supreme-courts-conservatives-overturn-precedent-as-liberals-ask-which-cases-the-court-will-overrule-next/2019/05/13/b4d3c4f8-7595-11e9-bd25-c989555e7766_story.html?utm_term=.494c32628b60.

Eighth Amendment protections from the Court.[172] For example, the Court recently granted certiorari in the case of Lee Boyd Malvo,[173] one of the convicted defendants in the "D.C. Sniper" killings.[174] Malvo, who was seventeen at the time that he and a much older co-defendant committed ten murders, is currently serving a life sentence in Virginia.[175] Malvo's attorneys have argued that, under *Miller* and *Montgomery*, he is entitled to a resentencing hearing at which his youth and other mitigating circumstances are considered.[176] In other words, he is asking a lower court to determine, per *Miller*, whether he is the rare case of a juvenile whose crimes reflected "irreparable corruption" rather than "transient immaturity."[177]

Virginia, however, claims that the Commonwealth does not impose *mandatory* life-without-parole sentences, and thus Malvo is not entitled to retroactive relief.[178] As Malvo's attorneys pointed out in their brief opposing certiorari, there is no widespread confusion regarding *Miller*'s application, and a majority of courts have already concluded that *Miller* applies to both mandatory *and* discretionary life-without-parole sentences imposed on juveniles.[179] Further, as Malvo argued, *Montgomery* and *Miller* made clear that juvenile life-without-parole is only constitutional when imposed upon "the rare juvenile offender whose crime reflects irreparable corruption,"[180] and no court has made that determination in Malvo's case. In sum, given the new composition of the Court, there is good reason to expect diminished procedural

172. *See, e.g.*, Bucklew v. Precythe, 139 S. Ct. 1112, 1118–19 (2019) (rejecting petitioner's challenge to method of execution in light of his medical condition). *See also* Nina Totenberg, *Supreme Court's Conservatives Defend Their Handling of Death Penalty Cases*, NPR (May 14, 2019), https://www.npr.org/2019/05/14/722868203/supreme-courts-conservatives-defend-their-handling-of-death-penalty-cases (discussing the contentious state of death penalty jurisprudence among the Justices right now).

173. Malvo v. Mathena, 893 F.3d 265 (4th Cir. 2018), *cert. granted sub nom.* Mathena v. Malvo, 139 S. Ct. 1317 (2019).

174. Domenico Montanaro, *Supreme Court to Take Up DC Sniper Case, Raising Issue of Sentencing Minors*, NPR (Mar. 18, 2019), https://www.npr.org/2019/03/18/704420800/supreme-court-to-take-up-d-c-sniper-case-raising-issue-of-sentencing-minors.

175. *Id.*

176. *Malvo*, 893 F.3d at 270–71 (describing history and nature of Malvo's habeas claims under *Miller*).

177. *Id.* at 272 (quoting Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016)).

178. Pet. Writ of Cert. at 5, *Mathena v. Malvo*, 2018 WL 3993386 (U.S. Aug. 16, 2018) (No. 18-217).

179. Br. Opp'n Cert. at 11–17, *Mathena v. Malvo*, 2018 WL 5263264 (U.S. Oct. 19, 2018) (No. 18-217).

180. *Id.* at 1 (internal citations omitted).

safeguards for youth accused of serious crimes and even some reason to fear backsliding on this front.[181]

Even if this new Court may not sustain the momentum of the *Miller* trilogy—let alone expand upon it—juvenile justice advocates need not despair. In fact, there may be a silver lining to be found in the examination of *Gault* at fifty. *Gault* at fifty serves as a reminder of how modest the Supreme Court's capacity for criminal justice reform really is. Despite the *Gault* Court's capacious vision of procedural rights for children facing detention, at the end of the day, it was state legislative bodies that determined the reality of those rights.[182] And the reality has been less than ideal, as discussed in Part III of this Article.[183]

However, this need not necessarily be true in the context of the *Miller* trilogy. To the extent that state legislative bodies are the engines of criminal justice reform, those engines can drive reform that either expands or contracts the rights of justice-involved youth.[184] And there is good reason to think that today, unlike in the 1970s, state legislators may be receptive to ongoing juvenile justice reform. Crime rates continue to be historically low,[185] and juvenile arrests are similarly low as compared to their peak in the 1990s.[186] States have already moved toward reducing reliance on incarceration for kids, and juvenile detention today is approximately half what it was in the 1990s.[187] Perhaps because of the Court's moral leadership in the *Miller* trilogy, the brain science that tells us kids are different from adults has taken hold, and the public is solidly in favor of rehabilitation for youth.[188] Finally, a

181. Malvo's counsel maintains that Virginia merely seeks to "relitigate *Montgomery*" through the pretext of a retroactivity question. *Id.* at 23–27. If this is true, and if the Court were to accept the Commonwealth's invitation to do so, then the central findings of *Miller* and *Montgomery* would be in jeopardy.

182. *See supra* pt. III.

183. *See supra* pt. III.

184. PEW CHARITABLE TRUSTS, *33 States Reform Criminal Justice Policies Through Justice Reinvestment* (Nov. 2016), https://www.pewtrusts.org/-/media/assets/2017/08/33_states_reform_criminal_justice_policies_through_justice_reinvestment.pdf (describing the array of state reform laws designed to reduce correctional populations and improve public safety in 33 states since 2007).

185. John Gramlich, *5 Facts About Crime in the U.S.*, PEW RESEARCH CENTER (Oct. 17, 2019), https://www.pewresearch.org/fact-tank/2019/01/03/5-facts-about-crime-in-the-u-s/ (discussing sharp declines in violent and property crime since 1993).

186. DEP'T OF JUST., *Statistical Briefing Book*, *Juvenile Arrest Trends* (Oct. 22, 2018), https://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05201.

187. *Trends in Juvenile Incarceration*, CHILD TRENDS, https://www.childtrends.org/indicators/juvenile-detention (last visited Dec. 30, 2019) (demonstrating that the number of youth in detention in 2015 was less than half what it had been in 1997).

188. *See, e.g.*, *New Poll Results on Youth Justice Reform*, GBAO STRATEGIES (Mar. 18, 2019), https://backend.nokidsinprison.org/wp-content/uploads/2019/03/Youth-First-National-Poll-Memo-March-2019-Final-Version-V2.pdf.

number of states in recent years have demonstrated that they can reduce reliance on youth incarceration while improving public safety.[189] The climate for juvenile justice reform is much more hospitable than it was in the immediate aftermath of *Gault*. Thus, even if the Court may not be inclined to expand juvenile justice rights at this time, state lawmakers have good reasons and political incentives to do so.

V. CONCLUSION

An examination of *Gault* at fifty is disappointing indeed, for there is a tremendous gap between the procedural rights announced by the *Gault* Court and the reality of those rights for youth. However, this examination serves as an important reminder that state legislative bodies are the primary agents of criminal justice policy. The Supreme Court can, and occasionally has, provided crucial moral leadership on the criminal justice front, but ultimately such issues are the tasks of state legislative bodies. Just as the states implemented measures that hindered the vision of the *Gault* Court, today state lawmakers can correct the course of juvenile justice and perhaps make possible the Warren Court's procedural ideals in the process. In the wake of the Court's more recent *Miller* trilogy, a majority of states have now banned the sentence of JLWOP, and states should continue the march toward national abolition. But states can and should go further.[190] They should return to the *Gault*-era default of prosecuting youth in juvenile court and once again make it difficult and rare for youth to be tried as adults. They should abolish mandatory minimums as applied to juveniles and ensure that youth in its own right is always a relevant, mitigating variable at sentencing. They should acknowledge that incarceration has a criminogenic effect on kids and make every effort to keep kids out of detention. And in order to secure all of these measures, states should begin by implementing the core right of *Gault*: effective representation for kids whose liberty is in jeopardy.

189. Jake Horowitz, *States Take the Lead on Juvenile Justice Reform*, THE PEW CHARITABLE TRUSTS (May 11, 2017), https://www.pewtrusts.org/en/research-and-analysis/articles/2017/05/11/states-take-the-lead-on-juvenile-justice-reform.

190. *See generally* DRINAN, *supra* note 22, at 132–53 (describing what a war *for* kids would look like, including a return to juvenile court as the default; abolition of mandatory minimums for kids; and keeping youth out of detention at all costs).