CHAPTER 11

JUVENILE JUSTICE

John D. "Jay" Elliott*

> Henry Montgomery has spent each day of the past 46 years knowing he was condemned to die in prison. Perhaps it can be established that, due to exceptional circumstances, this fate was a just and proportionate punishment for the crime he committed as a 17-year-old boy. In light of what this Court has said in *Roper*, *Graham*, and *Miller* about how children are constitutionally different from adults in their level of culpability, however, prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored.
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> *Montgomery v. Louisiana*[1]

> [Mandatory life without parole] contravenes *Graham*'s (and also *Roper*'s) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.
>
> *Miller v. Alabama*[2]

> From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.
>
> *Roper v. Simmons*[3]

> An offender's age is relevant to the 8th amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.
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> *Graham v. Florida*[4]

I. INTRODUCTION

For a decade now, the U.S. Supreme Court has reminded the nation's justice system that children are different from adults. Ordinarily, any civilized society would recognize this. Sadly, however, it took this country's highest court, prodded by a committed movement of lawyers and scientists, to reverse an irrational crime control theory based solely on retribution, with no regard for proportionality of punishment.

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1 136 S. Ct. 718, 736-37 (2016).

2 132 S. Ct. 2455, 2466 (2012).

3 543 U.S. 551, 570 (2005).

4 130 S. Ct. 2011, 2031 (2010).

That movement has managed to impel remarkable changes in juvenile justice – as well as public sentiment – during the same decade.

A. Juvenile Life without Parole

Henry Montgomery will be resentenced in the wake of the Supreme Court decision declaring its rule in *Miller v. Alabama*[5] – declaring mandatory life without parole for a homicide offense committed by a juvenile unconstitutional – retroactive.

When he was 17 years old in 1963, Mr. Montgomery killed Deputy Sheriff Charles Hurt in East Baton Rouge, Louisiana.[6] First convicted of capital murder and sentenced to death, he was tried a second time after the Louisiana Supreme Court reversed his conviction due to unfair public prejudice, according to the opinion of the U.S. Supreme Court.[7]

Years later, after Mr. Montgomery had exhausted every collateral attack on his conviction and sentence, the Supreme Court declared unconstitutional the mandatory imposition of a life sentence without any possibility of parole for a murder committed by a person under the age of 18 at the time of the crime. In *Miller v. Alabama*, relying on its rationale first announced in *Roper v. Simmons* that children are categorically different from adults for sentencing purposes (there, a sentence of death), the Court held that such mandatory sentences violated the Eighth Amendment prohibition on cruel and unusual punishment.

In Mr. Montgomery's case, the Court held that its prohibition on such sentences was a new substantive rule of law forbidding a category of punishment, and hence retroactive under *Teague v. Lane*.[8] Before it could address that question, however, the Court had to confront whether it had jurisdiction to hear Mr. Montgomery's challenge to his sentence, which was mounted under Louisiana's state court rules for collateral attack on an unlawful sentence. Louisiana had held that any such challenge under the Eighth Amendment must be raised on direct appeal. The Supreme Court appointed an amicus to address whether it had jurisdiction, because both Mr. Montgomery and the state of Louisiana had agreed the Court should take up the question.[9]

Meeting that question, the Court held that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule."[10] In doing so, the Court announced a new interpretation of *Teague*, one liable to affect other collateral challenges in state courts across the United States. It was no small question, and one that occupied a good bit of the arguments in Montgomery in October 2015.

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[5] 132 S. Ct. 2455 (2012).

[6] Apparently Deputy Hurt had an interest in working with youth and volunteered for the juvenile division of the Sheriff's Department. The Center for Public Integrity has the story here, in advance of the Supreme Court's decision. *See Split Second Flash of a Gun Still Resonates 52 Years Later*, Center for Public Integrity, www.publicintegrity.org, under "Juvenile Justice."

[7] 136 S. Ct. at 725.

[8] 489 U.S. 288 (1989).

[9] This was not the first time the Court signaled that it was troubled over the jurisdictional question. It had also raised the question in *Tolliver v. Louisiana*, No. 14-6673, and *Toca v. Louisiana*, No.14-6381, which had been in the same posture. Mr. Toca was freed from prison in January, 2015 after serving 30 years, rendering that challenge moot. Mr. Tolliver's case was remanded in light of the Court's decision in *Montgomery*.

[10] 136 S. Ct. at 729.

As court-watchers held their breath, so did over a thousand inmates, slated to die in prison as a result of a mandatory life sentence imposed on them for a homicide they either committed or assisted with when they were less than 18 years old.

Though there are an estimated 2,500 individuals serving life without parole for offenses they committed under the age of 18, not all of them received such a sentence because state law mandated it.[11] The Supreme Court's decision in *Graham v. Florida*,[12] holding that life without parole sentences were unconstitutional as applied to youth who were under the age of 18 committing non-homicide offenses, affected an estimated 129 inmates.[13] Furthermore, while the number of inmates facing life without parole for juvenile homicides is determinable, many states corrections agencies don't discern between those of their charges kept as a result of a discretionary sentence and a mandatory one. The actual number of inmates therefore affected by Montgomery are difficult to ascertain, but one public interest law firm, the Phillips Black project, has conducted two exhaustive studies about this population.

The first, published in July 2015, surveyed each U.S. jurisdiction's response in the to *Miller v. Alabama*, cataloguing judicial and legislative responses to the decision throughout the country.[14] The second, released September 22, 2015, conducted an in-depth analysis of juvenile life without parole sentences imposed state and county throughout the nation, and found that just nine states accounted for over 80% of such sentences.[15] The study also revealed that the sentence of life without parole was already falling into disuse around the country.

B. After *Montgomery*

Once these prisoners are identified, states will need to devise vehicles to give them opportunities for relief from draconian sentences. How these remedies are fashioned will depend upon the states' discrete resentencing and parole structures.

Generally, as Justice Kennedy suggested in his majority opinion, states may relitigate the mandatory sentence imposed on the inmate in court, or they may simply give inmates an opportunity "to be considered for parole."[16] In Louisiana, where an estimated 301 inmates, men and women, have been sentenced under its mandatory regime, the Louisiana Public Defender Board has estimated that the first year of such litigation will cost $3 million.[17] In Pennsylvania, home to over 450 such inmates, the impact of Montgomery has been rather tumultuous. While that state enacted legislation in 2012 to

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[11] This issue was first analyzed in the 2009 edition of *The State of Criminal Justice* at pages 195-96, available at the ABA Criminal Justice Section Juvenile Justice Committee website, as are the past seven chapters. *See* www.americanbar.org/groups/criminal_justice, under "committees."

[12] 130 S. Ct. 2011 (2010).

[13] *Id*. at 2024.

[14] Available at www.phillipsblack.org, under "research."

[15] *Id.* Entitled *No Hope: Re-Examining Lifetime Sentences for Juvenile Offenders*, those states are California, Florida, Illinois, Louisiana, Michigan, Mississippi, Missouri, North Carolina, and Pennsylvania. Unsurprisingly, the sentence falls most often on minority youth. Indeed, all of Texas' imposition of the sentence was on persons of color.

[16] *Montgomery,* 136 S. Ct. at 736.

[17] Mahogane Reed, *The Kids Win Again: Working Towards a "Fresh Start" after Montgomery v. Louisiana*, Louisiana L. Review, Feb. 14, 2016, available at http://lawreview.law.lsu.edu, under "LLR Lagniappe."

adopt graduated sentences for youth under 18 who committed homicide, short of life, the state is struggling with whether its 450 prisoners should be allowed parole or resentenced.[18]

In the wake of the Supreme Court's line of decisions on life without parole sentences for youth, there remain unanswered questions, but the Court may have answered one, and that is whether such sentences may be imposed at all on children under the age of 18. After all, the United States is apparently alone in the practice.[19] Nonetheless, the implication of *Miller v. Alabama* is that such sentences will be permitted, albeit rarely, at least in the eyes of the majority. Another question that remains very much alive, however, is the felony-murder rule, which subjects a number of youth under the age of 18 to life sentences despite not being the perpetrator of the homicide.[20] The line of cases ending with *Montgomery* may also influence such sentencing practices as mandatory minimum sentences for juveniles tried as adults.[21]

C. Broader Implications of SCOTUS

Without question, the U.S. Supreme Court has launched a national conversation about the characteristics of youth and their importance for the criminal justice system. This, of course, was not by accident, for these cases, along with *J.D.B. v. North Carolina*,[22] requiring youth be taken into account in police interrogations, were the result of nearly two decades of work by lawyers and social scientists to roll back punitive policies which infected the criminal justice system.[23]

Most important for the outcomes in the Supreme Court, the fields of neuroscience and adolescent development were the subjects of much investment, primarily by the MacArthur Foundation. The Foundation established a research network for the study of adolescent development and juvenile justice. Funded from 1997 to 2009, the network supported research which had a profound influence on the majority opinions of the Court.[24]

Lawyers spearheaded the movement as well – lawyers such as Professor Victor Streib, who for years had been the conscience of the legal community in chronicling sentences of death imposed on children and youth who were under the age of 18 when they

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[18] For an ongoing analysis of how resentencing of these prisoners is being carried out throughout the country, see http://sentencing.typepad.com/sentencing_law_and_policy/assessing-miller-and-its-aftermath. Professor Douglas Berman, of the Moritz College of Law at Ohio State University, aggregates news around the country on this and other sentencing issues, and he also authored amicus briefs in *Miller* and *Montgomery*.

[19] The international implications of life without parole sentences imposed on youth under the age of 18 at the time of the crime, as well as execution of such youth, were discussed at length in 2009 edition of *The State of Criminal Justice* at pages 195-96.

[20] For a good analysis of this issue, see Emily C. Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper, Graham and J.D.B.,* 11 CONN. PUB. INT. L.J. 297 (2012).

[21] Kami Chavis Simmons, *Baby Steps Toward a More Benevolent Juvenile Justice System, Response, Montgomery v. Louisiana*, GEO. WASH. L. REV. DOCKET (Feb. 1, 2016), available at www.gther.org.

[22] 131 S. Ct. 2394 (2011).

[23] Underwritten substantially by philanthropic organizations such as the MacArthur Foundation, the Annie Casey Foundation, Pew Charitable Trusts and others, lawyers, psychologists, psychiatrists and sociologists mounted campaigns to achieve several goals. The movement was discussed at length in the 2015 edition of The State of Criminal Justice.

[24] Among the architects of the network who devoted their careers to the research shaping the Court's decisions in significant ways were Professor Elizabeth Scott, Thomas Grisso, Ph.D., Marsha Levick, Esquire, and Laurence Steinberg, Ph.D. They have authored an excellent analysis of the impact of social science research on the Court and its implications for juvenile justice reform in *The Supreme Court and the Transformation of Juvenile Sentencing*, available at www.modelsforchange.net, under "publications." First published in September 2015, the article has been updated in light of *Montgomery v. Louisiana*.

were alleged to have committed crimes, usually homicide. He was recognized for his work by the American Bar Association when he received the Livingston Hall award from the Criminal Justice Section in 2002.[25] He was joined by lawyers around the country in laying the groundwork for the ultimate demise of the death penalty for youth under 18, in *Roper v. Simmons*.[26]

One of those youngsters was George Stinney, Jr., who was 14 years old when he was arrested for the murders of two white girls in Alcolu, South Carolina. In a space of less than 90 days, he was convicted in a trial that lasted one day, sentenced to death, and electrocuted. The sentence was carried out June 16, 1944. There was no appeal, and hence no transcript of the trail. He was the youngest child executed in the 20th Century. Seventy years later, on December 16, 2014, a state court judge vacated his conviction. The court deemed his confession to an investigating deputy sheriff "unreliable" and his counsel "the essence" of ineffectiveness.[27]

II. FOURTH WAVE REFORMS

The alliance between law and social sciences supported by philanthropy and the decisions of the U.S. Supreme Court, related as they are, have had a synergistic effect on juvenile justice reform in the ten years intervening from *Roper v. Simmons*.[28] Those reforms have been described as "the Fourth Wave," discussed at length in last year's chapter on the State of Juvenile Justice.

As one might expect, many reforms have taken place in legislatures around the country, with common themes predicated on the rediscovery that children are different for purposes of a criminal justice system. A report compiled by the National Conference of State Legislatures published in September 2015 summarizes the trends in legislative change.[29] In addition to identifying responses to *Miller* and *Graham's* dictates regarding life without parole for youth under 18, the report notes the following themes:

1. A number of states engaged in comprehensive reform. These include Arkansas, Georgia, Hawaii, Indiana, Kansas, Kentucky, Nebraska, New Hampshire, South Dakota, Utah, and West Virginia. These states enacted legislation that generally provided for increased diversion of youth from formal court processing detention and commitment to secure institutions, favoring increased community-based programming.

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[25] The award is named for Harvard Professor Emeritus Livingston Hall, who led the effort by the ABA to create its Juvenile Justice Standards, together with the Institute for Judicial Administration. Each volume of the standards approved by the ABA and their accompanying commentary may be found at the juvenile justice committee website.

[26] An engaging discussion of the work of these lawyers in achieving that goal may be found in *Roper v. Simmons 10 Years Later: Recollections and Reflections on the Abolition of the Juvenile Death Penalty*, available at the website of Juvenile Law Center, www.jlc.org, under "blog" (Mar. 2, 2015).

[27] The order may be found at the website of the Civil Rights and Restorative Justice project at the Northeastern University School of Law, at www.northeastern.edu/civilrights/. The case is featured on the site as of this writing.

[28] 543 U.S. 511 (2005).

[29] The report, *Trends in Juvenile Justice State Legislation 2011-2015*, may be found at www.ncsl.org, under "research," at "civil and criminal justice." At the juvenile justice site, that report may be found with a number of other valuable resources analyzing juvenile sentencing, shackling of juveniles in court, solitary confinement and other issues surveyed in this chapter.

2. State legislatures have turned away from using the adult criminal justice system as an antidote to juvenile crime, by returning jurisdiction to the juvenile courts. This includes restoring the function of the juvenile courts to transfer youth accused of serious offenses to the criminal courts, relying less on the use of direct filing by the prosecutor there, and expanding the inquiry in those proceedings to take into account among other factors, age and the prospects for rehabilitation.[30]

3. Several states have also raised the age for juvenile court jurisdiction. The report notes that while 41 states set the age of criminal liability at age 17, some states have now raised the age for retention of youth in the juvenile courts. As the report describes, the trend started in Connecticut, where 16 and 17 year olds were returned to the juvenile justice system, saving a reported $102 million in juvenile justice expenditures between 2002 and 2014. Illinois raised the age of juvenile court jurisdiction for misdemeanors to age 18, in legislation effective January 1, 2010. The Illinois Department of Human Services, responsible for the administration of juvenile justice in that state, reported that between 2008 and 2011, arrests of youth between the ages of 10 and 17 were down 24%, and juvenile detention was down 18% by 2012.[31] And in Massachusetts, which raised the age of criminal responsibility to age 18 in 2013, after an initial spike in detention and commitment of 17 year olds, those numbers appear to have diminished considerably.[32]

4. States have begun to rely more on early intervention and prevention of delinquency, diverting so-called status offenses from formal court processing and reducing the use of pretrial detention. In some states such as Ohio and Texas, reaping the financial reward of closing juvenile institutions, those savings have been reinvested in community-based programs, which the report deems "realignment" of those resources.

5. States have improved on procedural protection for youth in court, and enhanced the defense function in the juvenile court, especially for indigent youth. In the past decade, 23 states enacted legislation to provide for a standard of competency to stand trial for youth distinct from the adult measure that includes social and cognitive development, twelve of them in past five years. States have also enacted legislation to provide for legal counsel in the earliest stages of prosecution and limit the ability of the youngster to waive the right to counsel.

6. With an increased recognition of the fact that a majority of youth arrested have a diagnosable mental health condition or substance abuse disorder, some states have responded with policies and expenditures to expand

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[30] It is important to note that the *IJA/ABA Juvenile Justice Standards relating to Transfer Between Courts* would prohibit transfer of any youth under 15 years of age to the adult justice system for serious offenses, and require the juvenile court to engage in a comparative analysis of the dispositional alternatives available in the juvenile and criminal justice system. See Standard 1.1, Age Limits, and Standard 2.2, Necessary Findings.

[31] The report may be found at the Illinois Department of Human Services website, http://www.dhs.state.il.us, by linking to "about DHS," and linking to "reports" of the Illinois Juvenile Justice Commission under "Advisory Councils, Boards and Commissions."

[32] *See Raise the Age Annual Report – October 1, 2014 to September 30, 2015*, found at http://www.mass.gov/eohhs/gov/departments/dys/publications-and-reports.html.

> mental health services to youth involved in the justice system, encouraging other agencies to collaborate with juvenile justice agencies to provide those services.
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> 7. Racial and ethnic disparities in juvenile justice have plagued the system for years. The report observes that 18 states have enacted legislation to require community-based policing or funded programs that support such a model. 31 states now have legislation defining and prohibiting racial profiling. States have also begun improvement of data collection and analysis in the criminal and juvenile justice systems to assist in eliminating inherent bias.
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> 8. With an increased comprehension that youth involved in the juvenile justice system will need to re-enter their communities or escape the collateral consequences of even a juvenile offense, states have begun to concentrate efforts on aftercare programming, including housing, work-release and treatment services. Through legislation, states have also improved methods for the sealing and expungement of records.

States would do well to rely on the Model Act Governing the Confidentiality and Expungement of Juvenile Delinquency Records, adopted by the ABA House of Delegates at its annual meeting in August 2015.[33] The model act addresses the assimilation of records and information about youth in the juvenile justice system, access to the information and limitations on access, procedures for expungement, and importantly, the consequence of expungement, that is to say, a nullity. A youngster with a juvenile record would not need to disclose and would be permitted to deny its existence without penalty. The model act is grounded in the IJA/ABA *Juvenile Justice Standards relating to Juvenile Records and Information Systems.*

III. SHACKLING

One trend identified in the NCSL report is the emerging proscription of the wholesale shackling of youth in the nation's juvenile courts. That trend was impelled in no small part by the American Bar Association, when in February 2015 the House of Delegates passed Resolution 107A, calling on state and local jurisdictions to end the practice by enacting a presumption against the use of restraints on children and youth in the juvenile court, justified only by a risk of harm or flight.[34] The resolution urged states to

> adopt a presumption against the use of restraints on juveniles in court and to permit a court to allow such use only after providing the juvenile with an opportunity to be heard and finding that the restraints are the least restrictive means necessary to prevent flight or harm to the juvenile or others.

At the time, about a dozen states had curtailed the practice through legislation, judicial rule making, or decision.[35] In the wake of the ABA resolution, several more states

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[33] The act and accompanying report are in Resolution 103A, adopted by the House of Delegates August 3, 2015 and available at http://www.americanbar.org/directories/policy.html.
[34] The resolution and report may be found at http://www.americanbar.org/directories/policy.html.
[35] *See* Report accompanying ABA Resolution 107A, at 2-3 (Aug. 2015).

and local jurisdictions responded with restrictions on the practice, and by May 2015 the number had nearly doubled.[36]

Six months after the ABA adopted its resolution, the National Council on Juvenile and Family Court Judges adopted its own resolution. On August 10, 2015 the Council announced it supported a presumptive rule or policy against shackling children in the nation's courtrooms, with exceptions made on an individualized basis supported by a cogent rationale, including a risk to safety.[37] The Council also called on judges to convene security staff and court officials to develop policies consistent with its resolution.

By then, while some inertia behind this particular reform had set in due to legislatures' adjournment, states began taking up the issue again this spring. By now, a total of 23 states have statewide prohibitions on the wholesale use of restraints on children in the juvenile court through legislation, court rule, or administrative policies. This is in addition to a number of local jurisdictions banning the practice. Other states are considering similar measures, such as Colorado and Delaware.

IV. SOLITARY CONFINEMENT

The NCSL report highlighted another emerging trend among the states in limiting or curtailing the use of solitary confinement for youth. As with shackling children, the emerging science of the brain and adolescent development spotlighted the practice and its deleterious effects on the young.[38]

Those effects were brought into sharp focus when a 22 year old young man killed himself after having spent three years at New York's Riker's Island awaiting trial on charges of stealing a backpack, two of them in solitary confinement. Kalief Browder was 16 years old when he was arrested in the spring of 2010, for a robbery he vowed he did not commit, rejecting a plea. He was released in November 2013, without ever having gone to trial. Plagued with suicidal thoughts in and out of prison, he killed himself in June 2015.[39]

In January 2016, President Barack Obama announced that, through the U.S. Bureau of Prisons, he was banning the use of solitary confinement of youth in federal juvenile facilities. In a column he authored accompanying his announcement, he cited young Mr. Browder's plight.[40] The policy is part of a comprehensive series of executive

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[36] For a summary of state and local jurisdictions that have prohibited the practice, go to the Campaign Against Indiscriminate Juvenile Shackling at the National Juvenile Defender Center, at www.njdc.info under "our work" at "collaborative initiatives." The Campaign has now published a fact sheet entitled "Where Are There Statewide Bans on Automatic Juvenile Shackling?"

[37] The resolution may be found at the Council's website, http://www.ncjfcj.org, under "about" at "resolutions and policy statements."

[38] *See, e.g.*, American Public Health Association Policy Statement No. 201415, Nov. 18, 2014, *Solitary Confinement as a Public Health Issue*: "The placement of juveniles in solitary confinement for disciplinary reasons is particularly problematic. Recent research suggests that the brain continues to develop into young adulthood and that adolescent risk-taking behaviors and lack of self-regulation may be a function of neurobiological factors." Available at www.apha.org, under "policy and advocacy."

[39] Jennifer Gonnerman describes the story of his travail in an article for *The New Yorker*, June 7, 2015, available at www.newyorker.com under "news." In an interview with the *New York Times* reported June 8, 2015, Ms. Gonnerman, who had covered his story – which became emblematic of New York's difficulties with its criminal justice system – said, "he almost recreated the conditions of solitary," secluding himself in his bedroom for long periods of time.

[40] Available at www.washingtonpost.com/opinions (Jan. 25, 2016).

actions placing limits on the use of solitary confinement for adults in the federal corrections system.[41]

Solitary confinement or isolation from the general population of inmates may be used for a variety of reasons for children and youth (and not all of them in custody). Isolation may be used for punishment, to be sure, but it may also be employed to segregate vulnerable youth from other children or adults, depending on the setting, or ostensibly as a therapeutic measure.

A survey of state practices conducted by the Lowenstein Center for the Public Interest published October 2015 found that many states were moving away from the use of *punitive* solitary confinement.[42] The report found that 21 states prohibited the use of solitary confinement as punishment in juvenile facilities by law or practice, and 20 more imposed time limits on the use of solitary confinement ranging from six hours to 90 days, while ten states either had no limits or allowed for indefinite extensions of seclusion.[43]

Meantime, however, professional organizations like the American Public Health Association and the American Academy of Child and Adolescent Psychiatry advocate a near complete prohibition on the use of solitary confinement for children and youth in detention or correctional facilities.[44] Corrections organizations such as Annie Casey's Juvenile Detention Alternatives Initiative, or JDAI and the American Correctional Association have developed standards and policies to limit the practice.[45] In March 2015 the Council of Juvenile Corrections Administrators produced a toolkit for assessment of isolation practices and guidelines for regulating the use of isolation in such facilities.[46] The general theme of these recommendations is that prolonged use of isolation for children and youth should be prohibited in all but extraordinary circumstances, and for brief periods of time.

The *IJA/ABA Juvenile Justice Standards relating to Corrections Administration* stop short of an absolute prohibition on the practice, although the commentary to the applicable standards recognizes there is a case to be made for it.[47] The standards recognize three distinct purposes of isolation from the general population of juveniles in custody: as a disciplinary tool for the most serious infractions; (2) as a measure of self-protection for a youngster who requests it, and (3) a temporary emergency measure for a child whose behavior creates a "clear and imminent" danger to self or others. While the standards would allow isolation as a disciplinary tool for up to ten days, they rely as well on a comprehensive disciplinary scheme and emphasize that isolation take place in the youngster's room or

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[41] The announcement detailing the new policies was prompted by a review of the practice of isolation and solitary confinement in the federal system conducted by the U.S. Justice Department at the direction of the President, one month after Kalief Browder committed suicide. The report and DOJ recommendations may be found at www.justice.gov/restrictivehousing.

[42] *51-Jurisdiction Survey of Juvenile Solitary Confinement Rules in Juvenile Justice Systems*, emphasis in the original. The report may be found at www.lowensteinprobono.com under "areas of focus," at "juvenile justice."

[43] *Id.* at 2.

[44] *See, e.g.,* American Academy of Child and Adolescent Psychiatry, *Solitary Confinement of Juvenile Offenders* (Apr. 2012)(policy statement), available at www.aacap.org, at "policy statements by year," under "quick links."

[45] The American Civil Liberties Union has developed an overview of the standards of these and other organizations, in a *Summary of National Standards Restricting the Solitary Confinement of Youth*, as a part of its campaign to curtail the use of juvenile solitary confinement, available at www.aclu.org/report/alone-afraid. The campaign has available checklists for practitioners and resources for policymakers interested in curtailing the use of solitary confinement for youth.

[46] The publication is available at www.cjca.net, under "resources," as a "toolkit."

[47] *See* Commentary, *IJA/ABA Juvenile Justice Standards relating to Corrections Administration*, Standard 7.11(H) governing isolation in secure settings, at 164.

something similar to it. Even then, the applicable standard stresses that room confinement alone is the sanction, not to be accompanied by any other punitive measure that deprives the child of sleep, food, exercise, or reading materials. As for protection of the child upon the child's request or for emergency measures, the standards limit room confinement to eight hours. Furthermore, the standards anticipate that staff will routinely be engaged with any youth in room confinement, with medical assistance available.

With the advent of social science casting increasing doubt on the utility or effectiveness of solitary confinement, not to mention its harmful, even lethal effects on youth, it is clear by now that solitary confinement should become a relic – inimical to the prospect of the rehabilitative ideal of juvenile justice. After all, as one editorial has observed, "It's meant to break the spirit. And that it does."[48]

V. SCHOOL TO PRISON PIPELINE

The brutal takedown of a student sitting at her desk in a South Carolina high school by a "school resource officer" re-energized a debate throughout the country about the presence and role of police officers assigned to schools.[49]

Without a doubt, school-based policing generally has had a significant influence on the numbers of children and youth ejected from schools and shunted to the justice system, in the metaphor now widely known as the school to prison pipeline. That phenomenon has been the subject of two previous chapters in this series.[50] The American Bar Association has convened a Task Force on the School to Prison Pipeline to analyze the phenomenon and offer solutions to dismantle or disrupt it.

The task force was convened by the ABA Coalition on Racial and Ethnic Justice, along with the Criminal Justice Section and the Council for Racial and Ethnic Diversity in the Educational Pipeline, the latter an outreach initiative of the ABA to enhance the prospects for a more diverse population of students to become lawyers. Chaired by Professor Sarah E. Redfield of the University of New Hampshire Law School, the task force is supported by a number of ABA entities, including the Center on Children and the Law and the Commission on Youth at Risk.

The task force has conducted a series of town hall meetings around the country, promoting discussions with a variety of policy-makers and participants with expertise in education, school security, and the justice system. The task force also surveyed the literature in the field and debated the competing interests at stake in maintaining children's entitlement to education in a safe, secure environment.

The task force issued its preliminary report and recommendations at the ABA Midyear Meeting in February 2016.[51] Calling the pipeline "one of our nation's most formidable challenges," the report characterizes the phenomenon as the result of:

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[48] JACKSONVILLE (FL) TIMES UNION, Mar. 1, 2016, available at www.jacksonville.com, under "opinion," at "editorials."

[49] *See, e.g.*, *Rough Student Arrest Puts Spotlight on School Police*, N.Y. TIMES, Oct. 28, 2015; *Do Cops In Schools Do More Harm Than Good?,* TIME MAG., Oct. 29, 2015.

[50] *The State of Criminal Justice* 139-46 (2011); *The State of Criminal Justice* 245-47 (2013).

[51] The task force report may be found at the Juvenile Justice and Information Exchange with an accompanying cover story, at www.jjie.com under "ideas and opinions" (Feb. 12, 2016).

> low expectations and engagement, poor or lacking school relationships, low academic achievement, incorrect referral or categorization in special education, and overly harsh discipline including suspension, expulsion, referral to law enforcement, arrest, and treatment in the juvenile justice system.

The preliminary report has a number of recommendations for lawmakers, educators, and policy makers. These recommendations include:

- Legal representation for students facing suspension or expulsion by trained attorneys.
- Ongoing discussions between educators, law enforcement, and juvenile justice decision makers to develop strategies to reverse the phenomenon.
- Development of model policies and protocols for educators and police to distinguish between the imposition of discipline and referrals for arrest.
- Training measures for school resource officers and police to deal with students, and especially LGBTQ students and students with disabilities.
- Training on implicit bias and methods of debiasing discretionary decisions commonly made by teachers and administrators, police, juvenile courts and others to reduce or eliminate discriminatory discipline.
- Elimination of "zero tolerance" as a basis for disciplinary policies.
- Legislation to eliminate the criminalization of student misbehavior that does not endanger others, and eliminate the use of suspension, expulsion and referral to law enforcement for lower level offenses.
- Development of alternative disciplinary interventions and strategies, including restorative justice models.
- Funding for adequate research, data collection, and analysis to improve policies and decision-making about school discipline and referrals to the juvenile justice system.

The task force recommendations are consistent with previous ABA recommendations and policy. In 2009, the ABA urged the adoption of policies for the nation's education and law enforcement establishments to limit exclusion of students from school as a response to disciplinary problems, provide complete procedural protections for students facing exclusion from school in disciplinary proceedings (including an opportunity for legal counsel), and reduction in the criminalization of truancy, disability related behavior and "other school-related conduct."[52] The recommendation also supported improved data-gathering to examine graduation rates, dropout rates, and disciplinary practices for discriminatory effects. In 2001, the ABA urged the elimination of zero tolerance as a disciplinary policy in the nation's schools.[53]

Indeed, as a part of the IJA/ABA Juvenile Justice Standards, the ABA House of Delegates considered the adoption of an entire volume of standards relating to schools and education. The draft standards contemplated a comprehensive disciplinary system for

[52] Resolution 118B (Aug. 2009).
[53] Resolution 102B (Feb. 2001).

schools, with a student facing expulsion a right to counsel, at public expense, if necessary. That volume was not approved, however, when it was met with controversy.[54] It is clear by now, however, that the impact of exclusionary education policies and practices, coupled with an overarching reliance on the public justice system to shunt whole cohorts of kids out of the nation's schools must be reckoned with.

VI. Emerging ABA Standards

As the ABA takes up the recommendations of the school to prison pipeline task force, a project commenced by the Criminal Justice Section to address "dual jurisdiction" and "crossover" youth – children involved with the juvenile justice system who are the subject of other court proceedings, such as child protective proceedings, or involved with other agencies such as education or mental health.

The section Task Force on Crossover, Dual-Jurisdiction and Multi-System Youth has developed a proposed comprehensive set of standards to provide guidance to juvenile courts and related agencies and organizations for collaboration, coordination of effort and juvenile court handling of these youth. The proposed standards were discussed at some length two years ago in the State of Criminal Justice, and among other areas, address the intersection between school discipline and referrals of youth to law enforcement, including school-based police.[55]

Relying on principles reflected in the IJA/ABA *Juvenile Justice Standards Relating to Police Handling of Juvenile Problems*, the standards recommend non-intervention or diversion by police in dealing with minor delinquent behavior. In a section entitled "Responsibilities of Law Enforcement, Schools and Juvenile Courts in Responding to School Related Conduct," the standards reflect many of the same recommendations of the School to Prison Pipeline Task Force, including the need for clear delineation of roles in enforcing disciplinary codes and the criminal law, the development of protocols and operating agreements governing school-based policing, and training for police assigned to schools.

The proposed standards produced by the effort are meant to complement the existing 20 volumes of the IJA/ABA Juvenile Justice Standards, and will be taken up by the Criminal Justice Section council for a first reading at the section's Spring meeting in late April 2016.

Apropos of the existing juvenile justice standards of the ABA, the National Research Council urged the Association to review and update the standards in light of 30 years of developments in the law and social sciences, to include revisions incorporating brain science and adolescent development. The recommendation of the NRC was a part of its report entitled *Implementing Juvenile Justice Reform: The Federal Role*, published in September 2014 and discussed in last year's chapter.

In the wake of that recommendation, the Criminal Justice Section has commissioned a task force to review and update the existing 20 volumes, taking into account significant legal developments of the intervening three decades since the approval of the standards, not the least of which are the decisions of the U.S. Supreme Court; policies adopted by the ABA regarding juvenile justice and related areas; and scientific discovery of important

[54] *See ABA State of Criminal Justice 2011* at 145-46.
[55] *See ABA State of Criminal Justice 2014*, at 217-19.

findings about child and adolescent development. The task force is chaired by Marsha Levick, the deputy director of Juvenile Law Center in Philadelphia, and herself the 2010 recipient of the Livingston Hall Award. The task force will begin its work in the summer of 2016.[56]

VII. Federal Legislation

The venerable Juvenile Justice and Delinquency Prevention Act is overdue to be re-authorized. Last authorized by Congress in 2002, the act has provided incentives for juvenile justice reform since it was first passed in 1974. The act's four "core" requirements requiring compliance by states and jurisdictions enjoying its funding have emerged over time, to require removal of juveniles from adult facilities in the justice system, and complete separation by sight and sound under the limited circumstances where they might be held in such facilities, the deinstitutionalizing of status offenders from formal juvenile court processing, and reduction of racial and ethnic disparities in the juvenile justice system.

A bill reauthorizing the act was introduced by Senators Charles E. Grassley (R-IA) and Sheldon Whitehouse (D-RI) in the waning days of the congressional session in 2014, and reintroduced again in April, 2015 by both senators. S. 1169 would continue the core requirements of the act for participation, and improve them. Among other features the act would provide clearer direction for measuring and assessing the over-representation of minority youth in the juvenile justice system, and abolish the so-called "valid court order" exception allowing status offenders to be held in contempt of court and incarcerated, despite being culpable of non-criminal misconduct.

The measure was on the verge of passage in the Senate by unanimous consent on February 11, 2016, when Senator Tom Cotton (R-AR) objected, over the abolition of the valid court order exception.[57] Apparently, juvenile court judges in Mr. Cotton's state of Arkansas rely heavily upon the exception to punish children who don't obey the courts. That state ranked third in the number of youth incarcerated for contempt with these orders in 2013.[58] Déjà vu; the exception was originated by Representative John Ashbrook (R-OH), who had been lobbied effectively by judges in his state to seek the amendment of the act as a condition of its reauthorization.[59]

The ABA long ago called for the removal of status offenses from the criminal jurisdiction of the juvenile courts, arguing in its proposed standards on non-criminal

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[56] The other members of the task force are Justice Mary Yu, of the Washington State Supreme Court, Adam Foss, assistant district attorney, Suffolk County MA District Attorney's Office and head of its juvenile unit, Professor Kristin Henning, Georgetown Law School and director of its juvenile law clinic, Professor James Forman, Jr., Yale Law School, Judge Kim Berkeley Clark, Allegheny County, Pennsylvania Juvenile Court, and the author. Jyoti Nanda, at the UCLA Law School will serve as the reporter for the project.

[57] *Roll Call*, the independent congressional reporting service, has the exchange between Senators Cotton, Whitehouse and Grassley, calling it "tense." See http://www.rollcall.com/news/tense-floor-exchange-blocks-juvenile-justice-bill.

[58] The data on the use of the "valid court order" exception is reflected in a fact sheet developed by the Coalition for Juvenile Justice, which historically has supported the act and its reauthorization. The Coalition also operates a project to promote the goal of the act deinstitutionalizing status offenders, called the "Safety, Opportunity and Success," or SOS project. The data can be found at the project website, at www.juvjustice.org, under "our work," at "issue areas."

[59] *See State of Juvenile Justice*, 2014 at 216-17.

misbehavior that much of that conduct could be addressed in other programs and forums.[60] More recently, the National Council of Juvenile and Family Court Judges announced its support for phasing out the valid court order exception.[61] Indeed, separate legislation introduced in the House and Senate this session would directly eliminate the incarceration of status offenders by adding that provision to the existing Juvenile Justice and Delinquency Prevention Act.[62] In time, and with luck, the valid court order exception will be eliminated in favor of policy originally advanced by the ABA in the mid-1970's.

Other legislation pending in Congress would encourage sealing and expunging criminal and juvenile records in the federal system and limit the use of solitary confinement in federal facilities for juveniles, the latter making statutory what was accomplished by the executive branch.[63]

VIII. *Gault* at 50

On May 15, 1967 the U.S. Supreme Court handed down the decision of *In re Gault*,[64] declaring that the "condition of being a boy does not justify a kangaroo court," and that the due process of law required that a youngster in the juvenile court facing confinement in a juvenile institution deserved notice of the charges adequate to prepare for a hearing, with the right to legal counsel, and a right to confront witnesses with a privilege against self-incrimination. That landmark decision celebrates its 50th anniversary in 2017.

The anniversary will be celebrated throughout the country with reflections on the *Gault* decision, what it accomplished, and what it did not, its promises kept and those as yet unfulfilled. Certainly the American Bar Association will be among the organizations contemplating its impact, and its implications for a youngster's rights to due process and effective counsel. The National Juvenile Defender Center in Washington D.C., which originated as a project of the ABA, will be a key leader in that regard, and has created a website to serve as a clearinghouse for the events commemorating *In re Gault*, and a resource for professional developments underscored by this seminal decision.[65]

IX. CONCLUSION

The premise of the juvenile court – that children are different from adults and must be treated that way in the nation's system of justice – is enjoying a renaissance. That is manifested by significant legal and legislative reforms of the last decade, hopefully heralding further reforms. The American Bar Association long ago recommended vast improvements in the juvenile justice system, many of which reflect the changes in the past decade. Moreover, the ABA has continually played a leadership role in resisting the

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[60] *See, e.g.,* Introduction, *IJA/ABA Juvenile Justice Standards Relating to Noncriminal Misbehavior* at 19-20 (Draft)(Ballinger Publishing Co. Cambridge MA 1982).

[61] *See Resolution Supporting Reauthorization of JJDP Act and Elimination of Valid Court Order Exception*, at www.ncjfcj.org, under "about" at "resolutions and policy statements 2010."

[62] The Coalition for Juvenile Justice has a webpage devoted to pending legislation in the 114th Congress affecting juvenile justice and youth policy, at www.juvjustice.org under "federal policy," at "other federal legislation."

[63] *Id*.

[64] 387 U.S. 1, 28 (1967).

[65] The website is www.Gaultat50.org.

punitive policies that infected the justice system, in favor of law and policy recognizing the distinction of youth. It is clear the Association must continue to do so.