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# INVISIBLE STRIPES: THE PROBLEM OF YOUTH CRIMINAL RECORDS

JUDITH G. MCMULLEN\*

## ABSTRACT

It is common knowledge that persons with criminal records will have a more difficult path to obtaining legitimate employment. Similarly, conventional wisdom acknowledges the unfortunate fact that young people, on average, are more prone to engage in risky, impulsive, and other ill-advised behavior that might result in brushes with law enforcement. This article addresses the difficult situation faced by people who obtained a disabling criminal record before reaching the age of twenty-one. Not only do such individuals face stigma and possible discrimination from potential employers, the efforts of today's young people to "go straight" are hampered by nearly unlimited online access to records of even the briefest of encounters with law enforcement, even if those encounters did not result in conviction. This article examines the broad scope and troubling effects of the intersection between policies attempting to "reform" youthful offenders, and policies giving any curious citizen access to records about a person's youthful indiscretions, no matter how minor. The article concludes that current practices are inconsistent with 1) what we know about the development of young people; 2) developing U.S. Supreme Court jurisdiction; and 3) the social goal of rehabilitating youthful offenders. I conclude by suggesting more restricted access to and use of information about contact between young people and the criminal justice system.

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## I. INTRODUCTION

In the 1939 film *Invisible Stripes*, George Raft plays ex-con Cliff Taylor, who is unable to live a lawful life when released on parole because he faces discrimination and rejection based on his criminal past.<sup>1</sup> Although he is no longer wearing his striped prison garb, Cliff's crimes and incarceration are common knowledge in the community, and his attempts to become gainfully employed are stymied at every turn by his criminal record, leading to a tragic outcome portrayed in spectacular Hollywood fashion.<sup>2</sup>

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<sup>1</sup> See *INVISIBLE STRIPES* (Warner Brothers 1939).

<sup>2</sup> *Id.* In an effort to save his younger brother Tim from his own fate and to obtain money to set Tim up running his own legitimate garage, Cliff returns to "working" with a criminal gang run by his former prison associate, Chuck, but when the police catch up with the gang things do not end well for Cliff, to put it mildly. *Id.* The movie had an all-star cast, which no doubt brought more attention to what was, even in 1939, a serious societal issue: in addition to George Raft, the film featured William Holden, Jane Bryan, and Humphrey Bogart (who played Chuck, the criminal gang leader). *Id.*

Every year in the United States, thousands of teenagers and young adults find themselves sporting their own invisible stripes as they try to move past previous encounters with the law and pursue jobs, education, and housing. The problem is that young people who have had even minor contacts with the police find themselves with permanent criminal records that are readily accessible online, creating barriers to employment, housing, and education.<sup>3</sup> Although people of all ages may be haunted by prior arrests or convictions for all types of crimes, this article will focus on young people who have been accused or convicted of crimes other than first degree murder, with particular emphasis on the plight of those who commit one or more of the offenses typical of rebellious teenagers.<sup>4</sup> Several public policies in the last thirty years—such as reduction of juvenile court protections for young offenders, increasing use of adult criminal process for young people, and increased reliance on digitized information sources in the society—have combined to create a perfect storm that will continue to disadvantage

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<sup>3</sup> See, e.g., Binyamin Applebaum, *Out of Trouble, but Criminal Records Keep Men Out of Work*, N.Y. TIMES (May 24, 2016), <https://www.nytimes.com/2016/05/24/opinion/have-you-ever-been-arrested-check-here.html>; Tina Rosenberg, *Have You Ever Been Arrested? Check Here*, N.Y. TIMES (May 24, 2016), <https://www.nytimes.com/2016/05/24/opinion/have-you-ever-been-arrested-check-here.html>.

<sup>4</sup> Throughout the article, the terms “young person” and “young people” refer to individuals between the ages of twelve and twenty-one, because research discussed later indicates that young people do not reliably function as mature adults until their mid-twenties. The term “criminal record” refers to a record of encounters with law enforcement, including not only convictions for misdemeanors or felonies, but also findings of juvenile delinquency, as well as arrests or stops that do not result in conviction. The focus here is on young people, whose particular combination of immaturity and lack of an established place in society make them particularly vulnerable to the effects of stigmatization. Similarly, even offenders who have committed murder may be able to be rehabilitated, but the focus here is on the less controversial group of offenders, as well as young people who have been merely accused of offenses. These individuals present less serious issues surrounding the risks inherent in their integration into free society since they have records stemming from less violent and serious behaviors, such as possession or use of alcohol or controlled substances, or undesirable activities such as fighting, assault, shoplifting, theft, trespassing or vandalism. Although convicted murderers could certainly be expected to encounter discrimination upon release from prison, this article excludes them from consideration because first degree murder presents unique issues not relevant to our current discussion. See, e.g., *Graham v. Florida*, 560 U.S. 48 (2010), in which the Court stated: “There is a line between homicide and other serious offenses against the individual.” *Id.* at 69. The Court went on to note that non-homicide crimes, even very serious ones, are inherently less severe than murder and differ from murder in a moral sense. *Id.*

In addition, I intend to mainly focus on the difficulties experienced by young people with criminal records as they navigate the worlds of education and employment. Although adverse consequences may also be encountered in the housing context, I do not want the addition of yet another body of law to shift the focus away from my main point, which is that current policies allow discrimination of an unprecedented sort against young people with criminal records, and that the consequences are devastating and counterproductive.

a significant percentage of Americans unless corrective action is taken.<sup>5</sup> In a 2011 report by the National Employment Law Project, the authors noted that a survey of online job ads on Craigslist revealed that large and small companies alike routinely refused to consider applicants with records of misdemeanor or felony convictions.<sup>6</sup> Moreover, discrimination and lost opportunities can result even when the charges are later dropped or the accused is found innocent.<sup>7</sup>

Young people who have been found delinquent, have been convicted of crimes or misdemeanors, or have only been arrested but not convicted, often end up with records that are easily accessed by potential employers, schools, and landlords.<sup>8</sup> Despite various laws that purport to restrict discrimination based on law enforcement records, many young people do in fact experience discrimination based on their records, and therefore face a more difficult path to becoming self-supporting, law-abiding adults.<sup>9</sup>

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<sup>5</sup> An example illustrates the nature and seriousness of the situation. U.S. Department of Justice Senior Advisor Amy L. Solomon, shared the story of “Jay,” a thirty-year-old man who, at age twenty-one, was convicted of involuntary manslaughter and served thirty-eight months in prison. Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, 270 NAT’L INST. JUSTICE. J. 42 (2012), <http://www.nij.gov/journals/270/pages/criminal-records.aspx>. Jay had lost control of his car after a night of drinking, and his best friend was killed in the resulting accident. *Id.* In an anguished letter to the U.S. Department of Justice, Jay wrote: “I have worked hard to turn my life around. I have remained clean for nearly eight years, I am succeeding in college, and I continue to share my story in schools, treatment facilities and correctional institutions, yet I have nothing to show for it...I have had numerous interviews and sent out more than 200 resumes for jobs which I am more than qualified. I have had denial after denial because of my felony.” *Id.* Solomon adds that “Jay’s story is not unusual.” *Id.*

As this article will discuss, the problems stemming from reliance on digitized information by employers and others is largely a product of the easy availability of computer-based records detailing every misstep of a young person, and the permanence of that data once it appears on the Internet. *See generally* JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (2015). Although it is outside the scope of this article, the problem of existing records may also be exacerbated by the increased use of algorithms to screen applicants for jobs. *See, e.g.,* Solon Baracas & Andrew D. Selbst, *Big Data’s Disparate Impact*, 104 CAL. L. REV. 671 (2016).

<sup>6</sup> MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, Nat’l Emp’t Law Project, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT (2011), [http://www.nelp.org/content/uploads/2015/03/65\\_Million\\_Need\\_Not\\_Apply.pdf](http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf).

<sup>7</sup> Rodriguez and Emsellem tell the story of “Arcadia,” who was working as a bartender when the police raided the bar and charged a number of people with possession of a controlled substance and refusal to cooperate with police. *Id.* at 18. Soon after, the charges against Arcadia were dismissed for lack of probable cause. *Id.* Ten years later, after she had been working for a cleaning services company for two years, a new client of the firm conducted a criminal background check on all company employees and found the record of the arrest, including the fact that the charges were dismissed; nevertheless, Arcadia lost her job as a result. *Id.*

<sup>8</sup> *See generally* JACOBS, *supra* note 5, at 93–112.

<sup>9</sup> RIYA SAHA SHAH & JEAN STROUT, *FUTURE INTERRUPTED: THE COLLATERAL DAMAGE*

While people of all ages may encounter similar difficulties, this article demonstrates how this problem is especially egregious for people who are under age twenty-one at the time of their contact with the law. For example, an adult who ends up on the wrong side of the law might already have an established job and reputation that may withstand the negative impact of an arrest or a conviction. Also, young people are more likely to run afoul of the law because typical adolescent immaturity, and the impulsivity and poor judgment that often accompany it, can cause law-breaking behavior that a more mature individual might avoid. As evidenced by the accounts of misbehaving college students that abound in the American press and popular culture, these behaviors do not stop promptly at age eighteen, which is currently the legal age of majority.<sup>10</sup> Even as the consequences of youthful errors become harsher, scientific research shows that the maturation process is longer and more complex than was previously believed.<sup>11</sup>

This article reflects on current laws dealing with conflicting social policies in an era of rapidly changing knowledge about science, social science, and technology. I posit that our current situation is the product of

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CAUSED BY PROLIFERATION OF JUVENILE RECORDS (Feb. 2016), [http://jlc.org/sites/default/files/publication\\_pdfs/Future%20Interrupted%20-%20final%20for%20web.pdf](http://jlc.org/sites/default/files/publication_pdfs/Future%20Interrupted%20-%20final%20for%20web.pdf). The authors note that while some states require confidentiality for juvenile records, there are many exceptions which allow access by various parties, who may use the information to discriminate in the context of jobs, housing or education. *Id.* at 9–11. The authors also cite research showing that white job applicants having criminal records were 50 percent less likely to receive callback interviews, and the effect was more pronounced for black job applicants with records, who were 65 percent less likely to be called back. *Id.* at 6. Young people who acquire criminal records in adult court experience many impediments to employment as well, as their records are uniformly available to all searchers. See Solomon, *supra* note 5 (detailing numerous negative collateral consequences impacting even the most reformed of people who have criminal records).

<sup>10</sup> Perhaps the most obvious example of collegiate misbehavior in popular culture is the classic movie *Animal House*, which depicts the drunken antics of a group of fraternity members at a fictional university. Unlike the comical antics in such movies, real-life misbehavior can be serious and even deadly. See, e.g., Sheryl Gay Stolberg, *18 Penn State Students Charged in Fraternity Death*, N.Y. TIMES (May 5, 2017), <https://www.nytimes.com/2017/05/05/us/penn-state-fraternity-death-timothy-piazza.html>. See also HENRY WECHSLER & BERNICE WUETHRICH, DYING TO DRINK: CONFRONTING BINGE DRINKING ON COLLEGE CAMPUSES, (2002). Local crime reports often contain numerous examples of relatively minor law-breaking by persons in their teens and early twenties. See, e.g., City of Brookfield, *Brookfield and Elm Grove Police Report: Man caught shooting heroin fights mom's boyfriend*, J. SENTINEL (May 23, 2017), <http://www.brookfield-elmgrovenow.com/story/news/crime/2017/05/23/brookfield-and-elm-grove-police-report-man-caught-shooting-heroin-fights-moms-boyfriend/339637001/> (including weekly crime report for Brookfield, Wisconsin which includes a seventeen-year-old cited for battery and fourteen- or fifteen-year-olds cited for retail theft).

<sup>11</sup> See Part IV.A., *infra*.

efforts to harmonize several conflicting interests that need to be recognized and addressed. First, society's desire to protect itself by nipping young people's bad behavior in the bud conflicts with the social goal of using discipline to educate, rather than as a form of retribution. Similarly, using laws to protect, salvage, and rehabilitate young people conflicts with the desire to hold offenders accountable. In today's age of advanced technology, our society has yet to adequately deal with its commitment to the public's "right to know" every detail of a fellow citizen's indiscretions, which conflicts with our long-held ideals of individual privacy. Technology presents another dilemma: how to reconcile the goal of efficiency in hiring, housing, and education decisions (to reduce costs, increase speed, and reduce erroneous judgments) with the recognition that human beings can make more nuanced moral decisions about other human beings than computers can.

A sizable body of legal scholarship describes the problems of eternal criminal records, and offers a critique of the juvenile justice system.<sup>12</sup> This article will address that literature by examining the intersection of these issues: the plight of individuals who, due to the legal system's current approach to youthful wrongdoing, find themselves caught in a web of permanent criminal records, now eternally available on the Internet. This article adds to the existing literature in several ways. First, it focuses on adolescents and young adults—individuals whose criminal records begin before the age of twenty-one. The special features of, and problems faced by young people, particularly those between the ages of seventeen and twenty-one, have not been widely addressed in the legal scholarship thus far. Second, this article reflects on the interaction among the social, political, and legal forces that have contributed to this situation. This requires understanding of the failures of various well-reasoned attempts to solve the problems described here. Third, this article examines some of the premises upon which the current approach is based by considering recent research into the effects of the policies towards juveniles in our justice

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<sup>12</sup> See, e.g., Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. OF SOCIOLOGY 937 (2003); SHAH & STROUT, *supra* note 9; JACOBS, *supra* note 5; A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM (Nancy Dowd ed., 2015); Lahny Silva, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U. CINN. L. REV. 155 (2011); RODRIGUEZ & EMSSELLEM, *supra* note 6; Dallan F. Flake, *When Any Sentence is a Life Sentence: Employment Discrimination Against Ex-Offenders*, 93 WASH. U. L. REV. 45 (2015). Although much research suggests that the problems discussed in this article are much worse for members of racial minorities, See, e.g., DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007), this article will focus on issues faced by young people of all races and ethnicities.

system, the cognitive development of young people, and the efficacy of rehabilitative programs. This section concludes that many aspects of the current approach are at odds with our modern understanding of the world.

Ultimately, this article makes two claims. First, our current legal and social policy of creating permanent criminal records for juveniles who are under eighteen at the time of their crimes is indefensible given what we know about adolescents. Second, the goal of rehabilitating young offenders is significantly undermined by the current system of creating and using criminal records for persons who were between ages eighteen and twenty-one at the time of their encounters with law enforcement.

Part II describes the history of our current approach to youthful wrongdoing, including a brief discussion of the history of the juvenile justice system, the move towards treating young defendants as adults, and the developments in Supreme Court jurisprudence in this area. Part III describes the social, political, and legal goals of our current policy towards errant young people and offers an assessment of the dynamics and success or failure of these often-conflicting goals. Part IV reviews current medical and psychological research, and demonstrates what is often a disconnect between what we know and what we do in terms of policy. Part V offers a synthesis of these materials and makes suggestions for further research and possible action.

## II. THE SITUATION

### A. HISTORY AND CURRENT PRACTICES

#### 1. The History and Philosophy of Juvenile Court

The American legal system has long struggled with how to appropriately discipline young people who have broken the law. Throughout our history, adolescents have been treated as adults for prosecution and punishment purposes. But at least since the late eighteenth century, when an increasingly urban American society began to understand childhood and adolescence as developmental stages, there have been periodic attempts to establish designated juvenile programs.<sup>13</sup> Prior to the Progressive era in the American history, however, only piecemeal efforts

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<sup>13</sup> Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 388 (2013).



were made to address accused juvenile offenders separately from adult offenders.<sup>14</sup>

The current American version of juvenile court began in the early twentieth century. Most historians agree that the first official juvenile court was established in Chicago in 1899, when a judge heard the case of eleven-year-old Henry Campbell.<sup>15</sup> Henry's mother, despite insisting that he was not a "bad boy at heart," had him arrested for larceny. In consultation with Henry's parents, the judge agreed to send the boy to his grandmother in New York, in the hopes of removing him from bad peer influences.<sup>16</sup>

The idea of a separate court for young people was meant both to acknowledge the lesser culpability of children compared to adults, and to focus on rehabilitating rather than punishing young offenders.<sup>17</sup> There are two different accounts of why this came to pass. In one account, the creation of a different court system was the product of empathy for children and adolescents who were tried as adults and imprisoned in adult facilities, where their safety was endangered and they learned to be more effective criminals.<sup>18</sup> Reformers were appalled that children, sometimes as young as seven, would be brought before the criminal court on charges like thievery, but would then be confined with adult murderers and other hardened criminals.<sup>19</sup>

Other scholars like Anthony M. Platt have concluded that the creation of a separate juvenile court was the result of a desire of the late nineteenth and early twentieth century's "child savers" who wanted to control the children of lower class parents not only for their own good, but for the good of society.<sup>20</sup> These social reformers argued that children should be removed from "a home which fails to fulfill its proper function."<sup>21</sup> They particularly targeted impoverished parents on the grounds that poor homes were not a

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<sup>14</sup> ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* xviii–xxiii (2d ed. 1977).

<sup>15</sup> DAVID S. TANENHAUS, *JUVENILE JUSTICE IN THE MAKING* 23 (2004). There were apparently some unofficial juvenile proceedings in other states prior to that time. See, e.g., PLATT, *supra* note 14, at 9 (mentioning Massachusetts, New York and Colorado). However, Platt notes that Illinois' Juvenile Court Act, passed in 1899 "was the first official such enactment to be acknowledged as a model statute by other states and countries." *Id.* at 10.

<sup>16</sup> TANENHAUS, *supra* note 15, at 24.

<sup>17</sup> CHRISTOPHER P. MANFREDI, *THE SUPREME COURT AND JUVENILE JUSTICE* 25–32 (1998).

<sup>18</sup> TANENHAUS, *supra* note 15, at 6–11.

<sup>19</sup> *Id.* at 8–9.

<sup>20</sup> PLATT, *supra* note 14, at 134–36.

<sup>21</sup> *Id.* at 135.

fit and moral place for children.<sup>22</sup>

The operation of the juvenile court system during the first three-quarters of the twentieth century was based on several core principles: broad jurisdiction, procedural informality, flexible outcomes, and discretion to limit public access to courtrooms.<sup>23</sup> Proceedings were relatively informal, presumably to allow judges to fully understand all relevant facts concerning the child's acts, situation, abilities, and future needs; judges could order a variety of services and placements for the child, depending on the child's actions and family situation.<sup>24</sup> The focus was on rehabilitation rather than punishment, because the era's Progressive reformers "believed that children, like adult offenders, could be diagnosed and cured of underlying conditions that lead to delinquency."<sup>25</sup> Finally, the proceedings were not open to the public and the records were sealed, so as to preclude stigmatization of children and adolescents for behavior stemming from their immaturity.<sup>26</sup>

## 2. History of Waivers to Adult Court and Arguments for Waivers

For several decades, the juvenile justice system automatically channeled alleged offenders under the age of eighteen into informal proceedings, leading to outcomes such as court supervision, state services for the juvenile or his family, or detention in a dedicated juvenile facility. At the same time, alleged offenders over the age of eighteen were invariably charged and processed in adult courts.<sup>27</sup> However, the fairness and efficacy of the juvenile system came under attack both from child advocates and tough-on-crime politicians.

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<sup>22</sup> *Id.*

<sup>23</sup> MANFREDI, *supra* note 17, at 29–32.

<sup>24</sup> *Id.*

<sup>25</sup> Henning, *supra* note 13, at 390.

<sup>26</sup> Privacy of proceedings and records was not the practice during the early years of juvenile court, when a courtroom packed with as many as 150 to 300 spectators was the norm. TANENHAUS, *supra* note 15, at 28. Private hearings met with some resistance, but began to gather support beginning in about 1910 as the first juvenile court in Chicago evolved. *Id.* at 49–52. James Jacobs asserts that the juvenile court movement, with its accompanying secrecy for proceedings and records, was the product of a sociological tradition that recognized the stigma and labeling that are products of a criminal record. JACOBS, *supra* note 5, at xii. Jacobs traces labeling theory to the mid-twentieth century, citing Howard Becker, Edwin Lemert, Ed Schur, and Erving Goffman for works describing how people cope with and adapt to a criminal identity. *Id.* I will briefly address labeling theory later in this paper, see Part III.D, as I look at the counter-productive effects of aggressive law enforcement efforts aimed at young people.

<sup>27</sup> MANFREDI, *supra* note 17, at 25–33.

Child advocates struck the first major crack in the façade of a separate juvenile system in the 1960s when they attacked policies that promised rehabilitation, but withheld procedural protections.<sup>28</sup> The Supreme Court's decision in *In re Gault*<sup>29</sup> responded to those concerns, and changed the way juveniles were treated by the legal system. Gerald Gault, a fifteen-year-old boy accused of making lewd phone calls, was found delinquent based on hearsay evidence and received a punishment that far exceeded any criminal penalty for an equivalent offense in adult court.<sup>30</sup> The Court overturned the finding of delinquency, holding that the constitutional privilege of self-incrimination applies to both juveniles and adults.<sup>31</sup> The Court reasoned that "absent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements."<sup>32</sup> Justice Fortas's majority opinion famously opined that "[t]he condition of being a boy does not justify a kangaroo court."<sup>33</sup> While *Gault* focused on providing greater due process protections to young defendants, and specifically preserved the right of states to keep juvenile cases confidential, critics of confidentiality argued that it "provid[ed] cover for unethical judicial conduct and allow[ed] juvenile court actors to believe that they are immune from scrutiny and accountability."<sup>34</sup>

Proponents of greater due process protection for juveniles found themselves in an odd partnership with those who wanted to dismantle juvenile court protections because they believed it offered *too much* to juveniles. Public attitudes towards juveniles and juvenile court shifted during the late 1980s and early 1990s as politicians began to stoke public

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<sup>28</sup> Henning, *supra* note 13, at 391. However, "skepticism about both the effectiveness and legitimacy of the rehabilitative ideal's implementation by juvenile courts did not suddenly emerge fully developed in the mid-1960s." MANFREDI, *supra* note 17, at 32. Doubts about informal and treatment-oriented approaches existed from the inception of the juvenile court, and the failure of many juvenile institutions to live up to their promises only contributed to the concerns. *Id.*

<sup>29</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>30</sup> Gerald was found to have violated Arizona Revised Statute §13-377, which provided that someone who "in the presence or hearing of any woman or child...uses vulgar, abusive or obscene language, is guilty of a misdemeanor...." The statutory penalty for an adult was a fine of \$5 to \$50, or imprisonment not to exceed two months. *Gault*, 387 U.S. at 8. However, Gerald was committed as a delinquent to the State Industrial School until the age of twenty-one, a term of more than five years. *Gault*, 387 U.S. at 7.

<sup>31</sup> *Id.* at 55.

<sup>32</sup> *Id.* at 57.

<sup>33</sup> *Id.* at 28.

<sup>34</sup> *Gault*, 387 U.S. at 25; Henning, *supra* note 13, at 393.

perception that juvenile crime was steadily increasing in frequency and severity, even though juvenile crime rates actually fell during the 1990s.<sup>35</sup> The media reported violent and sometimes sensationalized crimes perpetrated by young people, like the 1994 murder of an eleven-year-old gang member by two boys, aged fourteen and sixteen.<sup>36</sup> During the same period, criminologist John J. DiUlio, then at Princeton University, predicted that the emergence of a new class of teen and pre-teen “super-predators” would lead to a sharp increase in teenage violent crime at the turn of the twenty-first century.<sup>37</sup> DiUlio and his co-authors, William J. Bennett and John P. Walters, defined “super-predators” as “radically impulsive, brutally remorseless youngsters” who fear nothing and engage in brutal crimes of all sorts.<sup>38</sup> They went on to describe “these mean-street youngsters” as individuals for whom “the words ‘right’ and ‘wrong’ have no fixed moral meaning.”<sup>39</sup> They were particularly critical of the juvenile justice system of the 1990s, which they described as a “revolving door” that reinforced the violent behavior of super-predators.<sup>40</sup> They also discussed several programs that were already in place to respond to the revolving door problem, one of which was to focus on trying juveniles as adults.<sup>41</sup>

DiUlio’s theories were soon discredited when, instead of the predicted rise, the juvenile crime rate in the United States fell drastically.<sup>42</sup> Franklin E. Zimring, director of the University of California, Berkeley’s Earl Warren Legal Institute and professor of law, noted that in fact the opposite of

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<sup>35</sup> Henning, *supra* note 13, at 395. Between 1994 and 2003, juvenile arrests for violent crimes such as rape, murder, robbery, and aggravated assault declined significantly. Henning, *supra* note 13, at 396 (citing HOWARD N. SNYDER & MELISSA SICKMUND, *JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT* 127 (2006)).

<sup>36</sup> Janet Allon & Kali Holloway, *9 Senseless Social Panics That Did Lasting Damage to America*, SALON, (Mar. 7, 2015), [http://www.salon.com/2015/03/07/9\\_senseless\\_social\\_panics\\_that\\_did\\_lasting\\_damage\\_to\\_america\\_partner/](http://www.salon.com/2015/03/07/9_senseless_social_panics_that_did_lasting_damage_to_america_partner/).

<sup>37</sup> Elizabeth Becker, *As Ex-Theorist on Young “Superpredators,” Bush Aide Has Regrets*, N.Y. TIMES (Feb. 9, 2001), <http://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html>.

<sup>38</sup> WILLIAM J. BENNETT, JOHN J. DIULIO, JR. & JOHN P. WALTERS, *BODY COUNT* 27 (Simon & Schuster 1996).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 117.

<sup>41</sup> *Id.* at 117–27.

<sup>42</sup> Between 1997 and 2011, the commitment rate for juveniles dropped 48 percent. THE PEW CHARITABLE TRUST, *LATEST DATA SHOW JUVENILE CONFINEMENT CONTINUES RAPID DECLINE* (Aug. 28, 2013), <http://www.pewtrusts.org/en/research-and-analysis/factsheets/2013/08/28/latest-data-show-juvenile-confinement-continues-rapid-decline>.

DiUlio's predictions had come to pass, calling them "utter madness."<sup>43</sup> Nonetheless, the notion of super-predators was firmly entrenched in public consciousness and led to harsh policy changes, despite the fact that even DiUlio eventually backed away from his ideas.<sup>44</sup> However, the term "super-predator" captured the public's imagination and increased the fear of "a bloodbath of teenaged violence."<sup>45</sup> Coupled with predictions of ever-rising juvenile crime rates, this fear resulted in a backlash against the whole notion of treating children more leniently than adults.<sup>46</sup>

As is often the case, strong public sentiment spurred legislative action. States broadened the criteria for the waiver of juveniles into adult court, with some instituting a presumption that certain crimes would be tried in adult court, even if the alleged perpetrators were young children.<sup>47</sup> The fact that DiUlio's theories were discredited did not lead to changes in the laws that were originally enacted because of the specter of the super-predator: the Equal Justice Initiative reported in 2015 that thirteen states in the United States had no minimum age for prosecuting children as adults.<sup>48</sup> Adult prosecution of juveniles has also created collateral problems, including incarceration of children with adults<sup>49</sup> and denying juveniles the confidentiality protections they would otherwise enjoy.

### 3. Education Policy as a Complicating Factor

Beginning in the 1990s, schools' participation in "get tough" efforts made it even more difficult for misbehaving juveniles to regain a straight and narrow path, as schools began forging direct ties with law enforcement. This cooperation consisted of introducing police officers into schools,

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<sup>43</sup> Becker, *supra* note 37.

<sup>44</sup> *Id.*; Allon & Holloway, *supra* note 36.

<sup>45</sup> Allon & Holloway, *supra* note 36 (quoting James Fox of Northeastern University).

<sup>46</sup> *Id.*

<sup>47</sup> For example, in Michigan, children of any age can be tried in adult court. See AM. CIVIL LIBERTIES UNION, SECOND CHANCES: JUVENILES SERVING LIFE WITHOUT PAROLE IN MICHIGAN PRISONS (2004),

<http://www.aclumich.org/sites/default/files/file/Publications/Juv%20Lifers%20V8.pdf>.

Wisconsin presumes that juveniles charged with murder or attempted murder will be waived into adult court, with waiver available for children as young as ten years of age. WIS. STATS. § 938.183(1) (2016).

<sup>48</sup> EQUAL JUSTICE INITIATIVE, ALL CHILDREN ARE CHILDREN: CHALLENGING ABUSIVE PUNISHMENT OF JUVENILES 6-8 (2012),

<https://eji.org/sites/default/files/AllChildrenAreChildren-2017-sm2.pdf>.

<sup>49</sup> It has been estimated that 95,000 children are housed in adult correctional facilities in any given year in the United States. *Id.* at 9.

adopting “zero tolerance” policies for certain student misbehavior, and criminalizing some student behavior that had previously been treated as a violation of school rules with only school discipline.<sup>50</sup>

Several well-publicized school shootings during the 1990s created a clamor to introduce police into schools to protect against similar incidents. However, this initial idea soon evolved into the concept of a police “peace officer” who would be consulted about other rule infractions.<sup>51</sup> In addition, many school boards adopted a zero tolerance policy, based on the theory that if minor drug or violence infractions were punished severely, they would not escalate into major violations.<sup>52</sup> Zero tolerance generally meant not only that drugs, weapons, and violent acts would not be tolerated in a school, but also that severe punishments such as suspension and expulsion would be imposed on any child violating the policies, regardless of the context.<sup>53</sup> The combination of police presence in the schools and zero tolerance increased the number of juvenile or criminal charges brought against students for offenses like fighting or being disrespectful to teachers, a phenomenon known as the “school-to-prison pipeline.”<sup>54</sup>

Some state legislatures increased the stakes by enacting statutes that criminalize a broad range of school misbehaviors.<sup>55</sup> Approximately eighteen states have enacted statutes criminalizing disruption in schools, although most legislation targets non-students or specific types of disruption.<sup>56</sup> For example, a lawsuit brought by the American Civil Liberties Union in 2016 targeted a particularly broad version of these statutes enacted in South Carolina, which made it a crime “to disturb in any way or in any place the students or teachers of any school” or “to act in an obnoxious manner.”<sup>57</sup> Because obnoxious behavior by middle and high

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<sup>50</sup> The Editorial Board, Opinion, *Zero Tolerance, Reconsidered*, N.Y. TIMES (Jan. 5, 2014), <https://www.nytimes.com/2014/01/06/opinion/zero-tolerance-reconsidered.html>.

<sup>51</sup> See, e.g., Greg Botelho & Ralph Ellis, *Police in the Schools: Why Are They There?*, CABLE NEWS NETWORK (Oct. 30, 2015), <http://www.cnn.com/2015/10/27/us/south-carolina-school-resource-officers/>.

<sup>52</sup> RUSSELL SKIBA ET AL., AM. PSYCHOL. ASS'N, ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS 3–6 (2006), <http://www.apa.org/pubs/info/reports/zero-tolerance-report.pdf>.

<sup>53</sup> Dennis Cauchon, *Zero-Tolerance Policies Lack Flexibility*, U.S.A. TODAY (Apr. 13, 1999), <https://usatoday30.usatoday.com/educate/ednews3.html>.

<sup>54</sup> See, e.g., Stephanie F. Ward, *Less Than Zero*, AM. BAR ASS'N J., Aug. 2014, at 56-57.

<sup>55</sup> Erik Eckholm, *South Carolina Law on Disrupting School Face Legal Challenge*, N.Y. TIMES (Aug. 11, 2016), <https://www.nytimes.com/2016/08/12/us/south-carolina-schools.html>.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

school students is commonplace, enforcement of such statutes could force many students into the juvenile or adult justice systems. The South Carolina experience is illustrative: The New York Times reported that “[m]ore than 1,200 students, disproportionately black, are arrested under this law each year ... for everything from disobeying a teacher’s order to fighting in the hallway.”<sup>58</sup> Other states have changed their laws to hold students criminally responsible for behaviors such as truancy, which was formerly handled by the school, or as a matter for which parents could be held criminally liable.<sup>59</sup> When students are charged with truancy in juvenile court, they may be placed on probation, the terms of which typically include a requirement of regular school attendance: violation of these probationary terms could violate juvenile probation and possibly lead to incarceration.<sup>60</sup>

#### 4. Supreme Court Cases

United States Supreme Court cases on juvenile sentencing are also germane to this discussion, although it must be noted at the outset that the most relevant line of cases deals specifically with extremely serious offenses (such as first degree murder) committed by persons who were between the ages of fifteen and eighteen at the time they committed their

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<sup>58</sup> *Id.* According to state records, “African American students are four times as likely as white students to be charged.”

<sup>59</sup> Dana Goldstein, *Inexcusable Absences*, THE MARSHALL PROJECT (Mar. 6, 2015), <https://www.themarshallproject.org/2015/03/06/inexcusable-absences#.TEGLVgAQk>. Texas recently revised its truancy laws, but prior to 2015 Texas law made truancy a criminal offense, with some students ending up in jail if they did not pay the steep fines assessed against offenders. Terri Langford, *New Truancy Law Set to Put Pressure on School, Parents*, THE TEX. TRIBUNE (Aug. 8, 2016, 6:00 AM), <https://www.texastribune.org/2015/08/08/new-truancy-law-puts-pressure-schools/>. Ironically, in some cases the juveniles incurred the additional penalty of expulsion once their jail time was served, while other disillusioned kids simply dropped out. See Kendall Taggart & Alex Campbell, *Texas Sends Poor Teens to Adult Jail for Skipping School*, BUZZFEED (Apr. 22, 2015, 9:36 AM), [https://www.buzzfeed.com/kendalltaggart/texas-sends-poor-teens-to-adult-jail-for-skipping-school?utm\\_term=.kbX998P2l2#.leQjjWd5L5](https://www.buzzfeed.com/kendalltaggart/texas-sends-poor-teens-to-adult-jail-for-skipping-school?utm_term=.kbX998P2l2#.leQjjWd5L5) (describing the case of Serena Vela, a Texas teenager whose high school kicked her out the first day when she was released from jail after serving a nine-day term for failure to pay \$2,700 in truancy fines. Vela could not afford to pay the fines, and neither could her unemployed mother, with whom the girl shared a trailer. Although Texas has since reformed its law, young people who were incarcerated under the old law still have criminal records. A more common state approach is to make child truancy a crime for the parents of children. In many other states, truancy is a juvenile offense that can bring a student under the jurisdiction of the juvenile court, and can result in being removed from home or placement in juvenile detention).

<sup>60</sup> Goldstein, *supra* note 59. Aside from creating new ways to accumulate a criminal record, these policies are linked to higher drop-out rates, and thus may exacerbate some of the problems already faced by many students. See Part III. B. and C., *infra*.

crimes.<sup>61</sup> Thus, these cases do not directly apply to the entire subset of young offenders and alleged offenders with which this article is primarily concerned. Nonetheless, these decisions reflect the fact that, while schools and states have moved towards harsher punishments with lifelong consequences for young offenders, the U.S. Supreme Court has taken a somewhat different direction, based on an analysis that concludes that the most severe punishments are disproportionate to the level of culpability of minors. The Court's reasoning and analysis bears discussion because the question of when lifelong punitive consequences are justified in the context of the diminished capacity and culpability of minors demonstrates how current policies run counter to important social goals and values, such as the education, and rehabilitation, of young offenders.

The Supreme Court has recognized that juveniles are fundamentally different than adults and thus it has treated those who commit a crime before turning eighteen with more leniency and has emphasized the need for rehabilitation. In *Roper v. Simmons*,<sup>62</sup> which struck down the death penalty for defendants who were under the age of eighteen when their crimes were committed, the Court recognized three general differences between juveniles under eighteen and adults.<sup>63</sup> First, "a lack of maturity and an underdeveloped sense of responsibility" in younger offenders that often leads to "impetuous and ill-considered actions and decisions."<sup>64</sup> Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."<sup>65</sup> Third, juvenile character is

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<sup>61</sup> *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that imposition of the death penalty on offenders under the age of eighteen at the time of their offenses is unconstitutional. Petitioner was sentenced to death for a murder he had planned and committed while age seventeen); *Graham v. Florida*, 560 U.S. 48 (2010) (overturning a sentence of a juvenile offender to life without parole for a non-homicide crime. The petitioner had accepted a plea for armed burglary and attempted armed robbery in an incident where no money was actually stolen. Later, he pled guilty to a parole violation, which triggered a life without parole sentence.); *Miller v. Alabama*, 567 U.S. 460 (2012) (holding imposition of life without parole sentences on juvenile offenders is unconstitutional. In each of the consolidated cases, a fourteen-year-old offender was convicted of murder and sentenced to life without parole.); *Montgomery v. Louisiana*, 577 U.S. 718 (2016) (applying, retroactively, the ban on automatic life without parole sentences for persons who were minors at the time of their crimes in a case where the petitioner was seventeen years old at the time he killed a deputy sheriff).

<sup>62</sup> *Simmons*, 543 U.S. at 557. Simmons was seventeen when he planned and carried out a particularly cruel and random murder, which involved binding and blindfolding his victim and then drowning her in a river. He later bragged to friends that he had killed her "because the bitch seen my face."

<sup>63</sup> *Id.* at 569.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*



more transitory and less well-formed than adult character.<sup>66</sup> The Court went on to say that “[f]rom 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.”<sup>67</sup>

Similarly, in *Miller v. Alabama*, the Court struck down mandatory life sentences without parole for juveniles.<sup>68</sup> In both *Miller* and its companion case,<sup>69</sup> juveniles who were fourteen years old at the time of their crimes were convicted of murder, and sentenced to life imprisonment without the possibility of parole.<sup>70</sup> Mandatory life-without-parole sentences for juveniles violated the Eighth Amendment based on two lines of precedent dealing with proportionate punishment.<sup>71</sup> The first line of precedent “adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty.”<sup>72</sup> The second “prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death.”<sup>73</sup> The Court’s finding relied both on common sense, and on science and social science research. For example, in *Roper*, the Court cited studies supporting the proposition that “‘only a relatively small proportion of adolescents’ who engage in illegal activity ‘develop entrenched patterns of problem behavior.’”<sup>74</sup>

In addition to an adolescent’s relatively larger aptitude for reformation, the Court in *Miller* cited the differences between juvenile and adult brains for a juvenile’s reduced ability to control his behavior and thus lessen his moral culpability for rash or risky behaviors.<sup>75</sup> Thus, punishing minors as

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<sup>66</sup> *Id.* at 570. It should be noted that all of these findings are consistent with (and were in fact garnered from) the research into adolescent development which will be discussed later in this paper.

<sup>67</sup> *Id.*

<sup>68</sup> *Miller v. Alabama*, 567 U.S. 460 (2011).

<sup>69</sup> *See id.*; *Jackson v. Hobbs*, No. 11-2350, 2015 U.S. Dist. LEXIS 121987 (E.D. Ark., Aug. 22, 2014).

<sup>70</sup> *Miller*, 567 U.S. at 466.

<sup>71</sup> *Id.* at 470.

<sup>72</sup> *Id.* (citing *Graham v. Florida*, 560 U.S. 48 (2010)).

<sup>73</sup> *Id.* (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978)).

<sup>74</sup> *Miller*, 567 U.S. at 471 (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

<sup>75</sup> *Miller*, 567 U.S. at 471–72.

harshly as adults was found unjustified because “the heart of the retribution rationale relates to an offender’s blameworthiness.”<sup>76</sup> Similarly, juveniles are less likely to be deterred because their customary recklessness, immaturity, and impetuosity “make them less likely to consider potential punishment[s]” when choosing a course of action.<sup>77</sup> It should be noted that *Miller* was mainly concerned that mandatory sentences of life-without-parole prevent the sentencing judge from considering characteristics of juveniles in general, and specific defendants in particular, in assessing whether the punishment is proportionate under the totality of the circumstances; the decision does *not* preclude the possibility of imposing a sentence of life without parole on a young offender.<sup>78</sup>

More relevantly, in *Graham v. Florida*, the Court held that the Eighth Amendment prohibits imposing life without parole on minors convicted of non-homicide crimes.<sup>79</sup> The petitioner in *Graham* was sixteen when first convicted of armed burglary and sentenced to probation.<sup>80</sup> Less than six months after his release from jail, he was arrested and charged with armed burglary and armed robbery.<sup>81</sup> Although he denied the charges, he admitted to violating his parole by fleeing from the police.<sup>82</sup> Although the State recommended only four years in prison, the sentencing judge decided that *Graham* was not capable of being reformed and sentenced him to life in prison with no possibility of parole.<sup>83</sup>

The Court held that the Eighth Amendment precludes imposing a life sentence without the possibility of parole on a defendant who, while under the age of eighteen, commits a non-homicide offense.<sup>84</sup> The Court relied on developments in neuroscience and psychology that show significant differences in judgment, action, moral culpability, and potential for reform between juveniles and adults.<sup>85</sup> *Graham* drew parallels between life-without-parole sentences and the death penalty, because both alter the rest of the offender’s life “by a forfeiture that is irrevocable.”<sup>86</sup> In addition, the

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<sup>76</sup> *Id.* at 472.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 473–80.

<sup>79</sup> *Graham v. Florida*, 560 U.S. 48, 82 (2010).

<sup>80</sup> *Id.* at 53–54.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 55.

<sup>83</sup> *Id.* at 56–57.

<sup>84</sup> *Id.* at 75.

<sup>85</sup> *Id.* at 62–75.

<sup>86</sup> *Id.* at 69.

Court noted that the punishments will almost always be more extreme when imposed upon juveniles because, due to their younger age, they are likely to spend a greater percentage of their lives in prison than an adult offender.<sup>87</sup>

Most recently, in *Montgomery v. Louisiana*, the Court further developed its jurisprudence on the relative culpability of minors, reaffirming the unconstitutionality of sentencing a child whose crime “reflects transient immaturity” to life without parole.<sup>88</sup>

The relevance of this line of cases to this Article’s discussion is threefold. First, they represent a shift towards viewing adolescence as a sort of mitigating circumstance, thereby supporting a more nuanced and presumptively rehabilitative approach for offenders under the age of eighteen. Second, they show that the Court is guided by scientific research about brain development and the maturation process, and is persuaded that such evidence supports a more merciful approach to adolescent offenders. Although the Court necessarily draws the line at age eighteen for its finding that the death penalty or automatic life-without-parole sentences cannot be Constitutionally imposed on juvenile offenders, the reasoning supports the notion that physical and psychological maturation should be closely examined in determining appropriate punishments for all young offenders. Finally, in each case, the Court is influenced by a growing social and legal consensus about the vulnerability and mitigated culpability of young people. The Court’s willingness to consider social consensus is significant, especially given the current trend among some social scientists and policy makers to back away from trying more juvenile defendants as adults.<sup>89</sup> Ultimately, the Court may scrutinize any policies that fail to recognize the lesser culpability and greater need for protection and rehabilitation of young defendants, and some current practices may be determined to be unconstitutional.

Nothing in *Roper*, *Graham*, *Miller*, or *Montgomery* suggests that young people should not be punished for their transgressions. Juveniles may

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<sup>87</sup> *Id.* at 70–71.

<sup>88</sup> *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016).

<sup>89</sup> See, e.g., Erik Eckholm, *States Move Toward Treating 17-Year-Old Offenders as Juveniles, Not Adults*, N.Y. TIMES, May 13, 2016. Eckholm’s article notes that in recent years, several states have backed away from automatically treating young defendants as adults, with Illinois and Connecticut raising the age from sixteen to eighteen and Massachusetts, Mississippi and New Hampshire raising the age from seventeen to eighteen, and several other states considering a similar move. *Id.* Louisiana, a state featured in Eckholm’s discussion, has since passed a law that will phase seventeen-year-olds back into juvenile court. LA. CTR. FOR CHILDREN’S RIGHTS, *Raise the Age Louisiana* (Oct. 9, 2017), <http://www.laccr.org/what-we-do/transforming-juvenile-justice/raise-the-age-louisiana/>.

be held accountable for their actions, but their level of moral responsibility is not equal to that of an adult.<sup>90</sup> Indeed, a life sentence might be warranted in a case involving a minor, but the Court has opined that this would be rare and presumptively inappropriate.<sup>91</sup> The key for the Court is that the vulnerability and immaturity of juveniles, as well as their greater capacity for reformation, should be considered in any determination of the consequences of their misdeeds. This reasoning logically extends to other situations discussed here, in which criminal penalties result in a “life sentence” of sorts for young offenders, particularly in employment and education. Although the government itself does not deny employment or education opportunities to juveniles with a criminal record, allowing such records to be made public inevitably leads to that result. And while this may not be a violation of the Eighth Amendment, the Court’s analysis of the proportionality of punishments, as well as the need to advance legitimate goals, suggest that government actors should reconsider making juvenile criminal records accessible to the public.

In a 2015 law review article, Professor Dallan F. Flake argued that employment discrimination against ex-offenders is so pervasive and so damaging that “any sentence is effectively a life sentence they must continue serving long after their debt to society has been paid.”<sup>92</sup> Flake points out that federal employment protections are very limited. Also, although several states and some high-profile employers facilitate employment of former offenders, many others refuse to hire former convicts because of the potential of facing liability for negligent hiring and many lawmakers resist reforms for fear of appearing soft on crime.<sup>93</sup> Because “employment is one of the strongest predictors of recidivism,” Flake argues for major changes in federal employment law to expand employment opportunities for former offenders.<sup>94</sup> Although Flake’s recommendations are not aimed at a specified age group, he cites research relevant to juveniles.<sup>95</sup> Young offenders may be particularly susceptible to employment discrimination because they often lack an established, positive

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<sup>90</sup> *Graham*, 560 U.S. at 68.

<sup>91</sup> *Montgomery*, 136 S. Ct. at 733.

<sup>92</sup> Flake, *supra* note 12 (applying his analysis to the situation facing offenders of all ages).

<sup>93</sup> *Id.* at 47–49.

<sup>94</sup> *Id.* at 51 (citing PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA’S PRISONS 2 (Apr. 2011), [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs\\_assets/2011/pewstateofrecidivism.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2011/pewstateofrecidivism.pdf)).

<sup>95</sup> *Id.* at 55–67.

track record with an employer and are likely to be less educated, putting them at a disadvantage in the hiring process. Yet, our current policies do little to address their situation.

#### B. CRIMINAL RECORDS ACCESS

The difficult situation faced by a young person with a criminal record has been exacerbated by modern technology, particularly the proliferation of online search options that enable easy and cheap access.<sup>96</sup> Traditionally, alleged offenders under the age of eighteen were processed in juvenile court, and their records were sealed. However, as previously discussed, the social and legal changes of the 1980s and 1990s have resulted in the waiver of more juveniles into adult courts. Records of conviction in adult court have always been open to the public, so juveniles who are tried in adult court lose not only the benefits of a juvenile system that is primarily aimed at rehabilitation, but also the protection of sealed court records.<sup>97</sup> In addition, previously-unavailable juvenile records are now often publicly available on computer databases.<sup>98</sup>

Before widespread computerization, criminal and court records were stored on paper or micro-fiche by individual states or counties, and the difficulty of searching for the information was a barrier to random scrutiny.<sup>99</sup> In that time, finding someone's criminal record was neither easy nor guaranteed to succeed. It required "serious effort and expertise to find out whether someone had a criminal record and, if so, for what crimes."<sup>100</sup> Importantly, the researcher needed to know what to request and where to do it, and the search often involved looking at court records in every state that the subject ever lived in or visited. Moreover, in some states, the search would have to be county by county due to the lack of statewide centralized records.<sup>101</sup>

The emergence of the internet has enabled instant access to many digital records, and services like Intelius.com or beenverified.com make searching names cheap, quick, and easy. Moreover, some jurisdictions have cut out the middleman and have created databases to allow online searches

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<sup>96</sup> JACOBS, *supra* note 5, at 4–5.

<sup>97</sup> *Id.* at 54; SHAH & STROUT, *supra* note 9, at 3–4.

<sup>98</sup> SHAH & STROUT, *supra* note 9, at 6–9.

<sup>99</sup> JACOBS, *supra* note 5, at 55.

<sup>100</sup> *Id.* at 5.

<sup>101</sup> *Id.* at 55.

of court records.<sup>102</sup> Matthew Desmond describes one such system, Wisconsin's Consolidated Court Automation Programs ("CCAP"), noting that the system catalogues brushes with the law, including both civil matters like divorces and child support disputes, and criminal matters like evictions, felonies, misdemeanors, and arrests of all kinds.<sup>103</sup> Arrests that do not result in conviction (due to dismissal or a not guilty verdict) are displayed on CCAP accompanied by the following disclaimer: "The dismissed charges were not proven and have no legal effect. [Name] is presumed innocent of the dismissed charges."<sup>104</sup> As Desmond notes, "employers and landlords could come to their own conclusions" after reading this.<sup>105</sup> He also points out that CCAP's own website acknowledges that it is likely impossible for a person to ever get his information removed from CCAP.<sup>106</sup> Wisconsin is one of many states that allow online searches of its criminal records, but different states vary in their procedures and the content that they make available on their websites.<sup>107</sup> Any potential school, landlord, or employer can easily access information about a subject's contacts with the law—indeed, any curious citizen can mine this information at will.

When assessing the impact of information technology on young people who have had contact with the legal system, it is important to note that differences in the availability of records between the juvenile and adult court systems have all but vanished, and juvenile records are now widely accessible.<sup>108</sup> Seven states allow public access to all juvenile records, and thirty-three states plus the District of Columbia allow access to certain juvenile record information.<sup>109</sup> Only ten states prohibit public access to all juvenile records, and all states allow limited access to certain designated

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<sup>102</sup> See, e.g., *Wisconsin Court System Circuit Court Access*, <https://wcca.wicourts.gov/index.xsl> (last visited Oct. 8, 2017).

<sup>103</sup> MATTHEW DESMOND, *EVICTED* 87 (2016).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* Eviction records and misdemeanors are displayed on the website for twenty years, and felonies are displayed for at least fifty years. *Id.* It is not clear if arrests that do not result in conviction are ever removed, since they fall into neither category.

<sup>107</sup> JACOBS, *supra* note 5, at 6–7. See, e.g., *Maine Criminal History Record & Juvenile Crime Information Request Service*, <https://www5.informe.org/online/pcr/> (database includes conviction and adjudication information for both adult and juvenile crimes); *Minnesota Bureau of Criminal Apprehension, Minnesota Public Criminal History*, <https://cch.state.mn.us> (includes convictions but not arrests or juvenile records).

<sup>108</sup> SHAH & STROUT, *supra* note 9, at 3.

<sup>109</sup> *Id.* at 3–4.

individuals or agencies (for example court or law enforcement personnel).<sup>110</sup>

In the electronic age, this proliferation of records presents several problems. The moment a juvenile is arrested, records are created in the law enforcement agency's system, typically including not only the arrest and the charges, but also private information such as witness statements, family information, court-ordered evaluations, and social and health history.<sup>111</sup> Indeed, some law enforcement databases include information about people who *have not even been arrested*, but merely stopped and frisked.<sup>112</sup> Although this information might not be publicly available, some of it may be shared (either officially or "unofficially") with school officials or potential employers.<sup>113</sup> Because law enforcement personnel have access to juvenile court records, they can enter additional (including private) information from the court files into their own databases.<sup>114</sup> And despite various state laws that make juvenile records confidential, the many exceptions to those laws may erode privacy protections.<sup>115</sup> In some states, so-called "confidential" records can be shared with schools, employers, or government agencies, and every time a new person or entity accesses a juvenile's record, the risk of collateral consequences increases.<sup>116</sup> When more people have access to gang databases, the likelihood that information will spread to other records or databases increases.<sup>117</sup> "Once information

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<sup>110</sup> *Id.* at 4.

<sup>111</sup> *Id.* at 6.

<sup>112</sup> JACOBS, *supra* note 5, at 15–25 (describing the use of databases to identify and track suspected gang members, among others).

<sup>113</sup> *Id.* at 22. For example, Jacobs notes that while private employers might not have direct access to a database listing suspected gang members, they may employ off-duty police officers who are willing to get that information for them. *Id.* I offer my own anecdote in support of Jacobs' contention that even supposedly "sealed" records may be accessed by employers and others. When my daughter was in middle school, the father of one of her classmates contacted some buddies who worked in law enforcement and had them run juvenile records checks on all his son's classmates and teammates. Upon discovering that *the brother of one of the teammates* had been adjudicated delinquent for marijuana possession, the father proceeded to share this information with all the other parents in the class, along with his advice to keep the other kids away from the boy with the delinquent brother. My outrage at this abuse of access was only worsened by realizing that there was no reliable way of discovering who had improperly accessed the records and thereby redressing the wrong.

<sup>114</sup> SHAH & STROUT, *supra* note 9, at 6–7.

<sup>115</sup> Such exceptions may limit confidentiality based on the nature of the offense, the number of offenses for which the youth has been adjudicated, or the youth's age at the time of offense. *Id.* at 7.

<sup>116</sup> *Id.*

<sup>117</sup> JACOBS, *supra* note 5, at 22.

becomes publicly accessible,” Professor Jacobs warns, “it cannot be made confidential again.”<sup>118</sup>

Not every search for information is conducted on official state websites. Many for-profit companies purchase records from state or local governments and sell the information they compile. However, information in these compilations is not always accurate.<sup>119</sup> Records obtained through commercial search firms may be recorded inaccurately, and they may not be kept up-to-date with developments in a case, such as reduction to a lesser charge or expungement.<sup>120</sup> Moreover, customers unfamiliar with legal parlance or procedures may not fully understand the content of the records, may ignore nuances, or may draw unjustified conclusions.<sup>121</sup> The situation is further complicated by the fact that online databases contain different types of information, with some including arrest records without qualifying information such as noting whether or not the person was convicted or even tried.<sup>122</sup> Yet large numbers of employers discriminate against job applicants based on such information: Professor Flake cites one study reporting that 92 percent of employers perform criminal background checks, and another study finding that almost 20 percent of employers said they “would definitely not,” and 42 percent saying they “probably not,” hire someone with a criminal record.<sup>123</sup>

The eternal existence of an arrest record, whether the accused was arrested as a juvenile or as an adult, presents one of the most vexing problems in the criminal justice system. “Even the briefest minor interaction with the justice system can leave someone with a criminal record—and a permanent barrier to a job, housing, education or an occupational license.”<sup>124</sup> Minor infractions such as getting into a fistfight or possession

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<sup>118</sup> *Id.*

<sup>119</sup> SHAH & STROUT, *supra* note 9, at 7.

<sup>120</sup> *Id.*

<sup>121</sup> This is a serious problem, particularly when an applicant’s “criminal record” consists of arrests that did not result in convictions: a 2010 survey of employers showed that more than 30 percent of them considered arrests that did not lead to conviction in deciding whether to extend or withhold a job offer, even though excluding candidates based on arrest records is a violation of federal and many state laws. RODRIGUEZ & EMSELLEM, *supra* note 6, at 13–14. *See also* DESMOND, *supra* note 103 (discussing the disclaimer that while Wisconsin’s official court information site warns that persons arrested but not convicted are presumed innocent, readers of the information are free to draw their own conclusions).

<sup>122</sup> Applebaum, *supra* note 3.

<sup>123</sup> Flake, *supra* note 12, at 56–57, 60.

<sup>124</sup> Rosenberg, *supra* note 3. Rosenberg notes that seventy million Americans have criminal records—the same number that have college degrees. *Id.* *See generally* Pager, *supra* note 12.



of a small amount of marijuana may show up on a criminal record check, even if the person was never charged or convicted.<sup>125</sup>

### III. GOALS, DYNAMICS, AND IMPACT OF CURRENT POLICIES

This section will examine the impact of the above-described current policies on people who have criminal records because of youthful misbehavior. First, it will examine the number of young people affected. Second, it will review research on the effects of current law enforcement policies, focusing on the zero tolerance and police presence in schools, the trend towards increased stops or arrests of young people by the police, and the readily-available records of virtually all youthful misdeeds. Although it might seem that many of these issues could be addressed by preventing the waiver of juveniles into adult courts, I posit that many of the most serious adverse consequences are instead due to the stigma of the publicly available record of misdeeds.<sup>126</sup>

The stated objectives of legal policies dealing with young people are to help them to learn from their mistakes, place them on the right path, and ensure that they will outgrow the consequences of their mistakes.<sup>127</sup> However, the research discussed in this section shows that current approaches of treating more and more young people like adults, criminalizing behavior that was previously regarded as youthful irresponsibility, and making records of all youthful misdeeds widely and permanently available are policies that are making it difficult for young people to develop into contributing members of society. The expansive incorporation of police into school settings, coupled with zero tolerance policies towards certain behaviors and the criminalization of other behaviors, negatively impact young people: the criminalization of behavior that had previously been addressed as an educational issue now has the potential to create a permanent criminal record, with the connected risk of

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<sup>125</sup> Rosenberg, *supra* note 3.

<sup>126</sup> Despite idealistic aspirations about individual attention and reform efforts, even juvenile courts can fail young wrongdoers if the penalties are too harsh or the dispositional orders are not realistic. Many cases are resolved by an admission of guilt by the young person, who may not understand the charges or the process. Kimberly P. Jordan, *Kids are Different: Using Supreme Court Jurisprudence about Child Development to Close the Juvenile Court Doors to Minor Offenders*, 41 N. KY. L. REV. 187, 196 (2014). Punitive approaches taken by courts may not change the young person's behavior and may have long-term negative effects. *Id.* Immaturity in reasoning and judgment, failure to appreciate risk and danger, susceptibility to peer pressure, and negative influences or trauma in their environment may make it difficult for young offenders to comply with dispositional orders and stay out of trouble. *Id.* at 196–97.

<sup>127</sup> See, e.g., MANFREDI, *supra* note 17, at 24–52.

job discrimination by potential employers. Indeed, many studies show that the current get-tough policies are doing more harm than good.

#### A. WHO IS IMPACTED BY THE CURRENT POLICIES?

A wide range of youthful misdeeds can result in arrests, charges, or convictions in either juvenile or adult criminal courts.<sup>128</sup> On the less serious end of the spectrum are behaviors like underage cigarette smoking, underage alcohol consumption, staying out past curfew, or skipping school—acts that would not violate the law if performed by adults. Other common adolescent misdeeds that are against the law include possession or use of marijuana, trespassing, shoplifting, loitering, vandalism, and disorderly conduct.<sup>129</sup> These behaviors, while neither ideal nor desirable, are in many ways developmentally appropriate in the sense that they demonstrate the impulsive, rebellious, and risky behavior that is a hallmark of adolescence.<sup>130</sup>

Although it may appear that young people who commit these offenses are simply outliers, or bad kids who need to learn a lesson,<sup>131</sup> a 2012 study published by Robert Brame, et al., in the journal *Pediatrics* showed that these infractions are far from rare in the United States.<sup>132</sup> Brame and his colleagues analyzed self-reported arrest data taken from the National Longitudinal Survey of Youth from 1997 to 2008, and found that the cumulative arrest prevalence rate for youth in the sample was between 15.9 and 26.8 percent by age eighteen.<sup>133</sup> The incidence of arrest was even higher by age twenty-three, when the incidence of in-sample arrests was between

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<sup>128</sup> As previously noted, this article focuses on misdemeanors and local ordinance violations, as well as felonies other than first degree murder, although some of the studies discussed here do not distinguish between first degree murder and other felonies.

<sup>129</sup> An offense that can include mouthing off to police officers, rowdy conduct, urinating in public, and other similarly disrespectful or annoying behavior that is neither severely violent nor severely destructive to property.

<sup>130</sup> Ann E. Kelley et al., *Risk Taking and Novelty Seeking in Adolescence: Introduction to Part I*, 1021 ANNALS N.Y. ACAD. SCI. 27, 27 (2004).

<sup>131</sup> See, e.g., Jordan, *supra* note 126, at 198 (noting how, even in the supposedly more kid-receptive realm of juvenile court “[t]he over-arching feeling... is that kids who are there are ‘bad’” and deserving of punishment, with little concern about the long-term adverse effects of adjudication for the young people).

<sup>132</sup> Robert Brame et al., *Cumulative Prevalence of Arrest from Ages 8 to 23 in a National Sample*, 129 PEDIATRICS 21 (2012).

<sup>133</sup> *Id.* at 24.

30.2 and 41.4 percent.<sup>134</sup> In other words, by age twenty-three at least one-third of people have been arrested at least once.

The Brame study noted that, at least up until age eighteen, the percentage of children and adolescents who have been arrested has remained fairly constant over the past several decades.<sup>135</sup> The researchers compared their data to a 1965 study by Ronald Christensen, which assessed the incidence of arrest for the same age groups and found that the estimate of arrests at age eighteen was comparable between the two studies, with both showing a steep rate of increase in arrests between ages twelve and eighteen.<sup>136</sup> The Brame study commented that this “reflects the relatively common experience of criminal involvement and arrests for criminal involvement during the adolescent years in the United States (both in the 1960s and today).”<sup>137</sup> However, comparison of the two studies also shows that from ages eighteen to twenty-three, the arrest rate rose significantly in the time period between the 1965 and the 2012 study.<sup>138</sup> The Brame study flagged this as a serious concern, arguing that being arrested not only indicates, but may also cause adverse future outcomes, because young people’s success depends on cultivating “conventional social networks and social capital through education and securing stable employment,” while young people with arrest records “may be effectively shut out of educational and employment opportunities.”<sup>139</sup> Hence, the system may have unintentionally perpetuated a vicious cycle, by taking misbehaving youth who are not optimal citizens and creating an indelible record, which makes it harder for them to succeed.

It was beyond the scope of the Brame study to identify the reasons for the significant increase in arrests between the ages of eighteen and twenty-three, and it may be impossible to conclusively determine whether the increase is due to more law-breaking behaviors, more aggressive law enforcement practices, both, or some other factor.<sup>140</sup> However, the study’s conclusion that arrests are now a common experience for young Americans

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 23–25.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 25.

<sup>138</sup> *Id.* The estimated rate of arrest by age twenty-three in the 1965 study was 22 percent, compared to 30.2 to 41.4 percent in the 2012 study by Brame *et al.* *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> This is a common-sense claim. For example, it is impossible to determine whether more or fewer young people are engaging in illegal activities, because obviously some unknown percentage of law-breakers will not be caught. Self-reporting gives us some idea, but people may either be motivated to under or over report, depending upon the situation.

deserves further consideration. In this regard, it is instructive to look at the statistics for alcohol and marijuana possession and use, two examples of common (yet illegal) youthful behaviors that may result in stops, arrests, or charges, and which may cause lifelong consequences for some individuals.

Although alcohol consumption has been declining among some segments of the youth population, underage alcohol consumption remains fairly widespread.<sup>141</sup> In 2015, 7.7 million Americans between the ages of twelve and twenty admitted to consuming alcohol, which represents about 20 percent of the underage population. This figure is lower than 2014, when 8.7 million individuals, or about 22.8 percent of the underage population, reported current alcohol use.<sup>142</sup> According to the Department of Health and Human Services, in 2014, 59.6 percent of young adults aged eighteen to twenty-five consumed alcohol, amounting to 20.8 million individuals.<sup>143</sup> The 2015 National Survey on Drug Use and Health shows a steady decline in underage consumption of alcohol between 1991 and 2016, but the survey also shows that the level of alcohol consumption among college students (currently 58.3 percent) has remained relatively constant since 2002.<sup>144</sup>

This data has several implications. On the one hand, it is reasonable to question the value of a policy requiring a stop, arrest, or fine for such a common youthful activity, particularly when enforcement appears arbitrary. On the other hand, intervening with alcohol use seems like a good idea as excessive and unsupervised drinking (which are characteristic of underage alcohol use) often leads to activities such as driving under the influence, fighting, or vandalism that would be criminal for adults as well, and there intervention might prevent escalation of these behaviors.<sup>145</sup> In fact, violation of alcohol laws account for a significant number of arrests made

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<sup>141</sup> MONITORING THE FUTURE 2016 SURVEY RESULTS, NAT'L INST. OF HEALTH, <https://www.drugabuse.gov/related-topics/trends-statistics/infographics/monitoring-future-2016-survey-results> (last updated Dec. 2016).

<sup>142</sup> SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., BEHAVIORAL HEALTH TRENDS IN THE UNITED STATES: RESULTS FROM THE NATIONAL SURVEY ON DRUG USE AND HEALTH 19–21 (2015), <https://www.samhsa.gov/data/sites/default/files/NSDUH-FRR1-2014/NSDUH-FRR1-2014.pdf> (“Current alcohol use is defined as any use of alcohol in the past 30 days. Binge alcohol use is defined as drinking five or more drinks on the same occasion on at least 1 day in the past 30 days.”).

<sup>143</sup> *Id.* at 19.

<sup>144</sup> SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2015 NATIONAL SURVEY ON DRUG USE AND HEALTH 17–18 (2016), <https://www.samhsa.gov/data/sites/default/files/NSDUH-FRR1-2015/NSDUH-FRR1-2015/NSDUH-FRR1-2015.pdf>.

<sup>145</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, *Fact Sheets - Underage Drinking* (last updated Oct. 20, 2016), <https://www.cdc.gov/alcohol/fact-sheets/underage-drinking.htm>.

in the United States: data from the Federal Bureau of Investigation (FBI) shows that in 2014, there were around 250,000 arrests of persons under the age of twenty-five for liquor law violations or drunkenness, and more than half of those arrests were of people under twenty-one.<sup>146</sup> This is a small fraction of the 8.7 million underage drinkers who admitted to current alcohol consumption during that same year, and is an illustration of the hit-and-miss nature of consequences for such misbehavior. Of course, being arrested for underage drinking can lead to a variety of outcomes for young people, ranging from no formal action; to a municipal citation for underage drinking; to arrest and charges of some sort, with the exact responses varying depending on local attitudes, behavior of the offender, or other pressures on police departments.<sup>147</sup> It should be noted that at least part of the legal response to such non-violent but illegal behavior is appropriate. Many of these typical youthful misdeeds, not just underage drinking, but also curfew violations, trespassing (without damage to property), or even minor shoplifting, may be treated as municipal violations, and are not recorded as misdemeanors or felonies.<sup>148</sup>

Marijuana use is another example of a common illegal activity. And unlike alcohol, marijuana use among young people has been increasing in

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<sup>146</sup> Criminal Justice Information Service Division, Table 41: Arrests, Persons Under Age 15, 18, 21, and 25 Years of Age, FEDERAL BUREAU OF INVESTIGATION: UNIFORM CRIME REPORTING, <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-41>. This data counts one arrest for each time a person is summoned or cited; because a single person may be arrested multiple times, the data does not tell us how many individuals were arrested. Criminal Justice Information Service Division, Table 41: Arrests, Persons Under Age 15, 18, 21, and 25 Years of Age, FEDERAL BUREAU OF INVESTIGATION: UNIFORM CRIME REPORTING, <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/persons-arrested/main>.

<sup>147</sup> See, e.g., *Aren't Police Supposed to Arrest Intoxicated Underage Kids at a Party? Why Didn't They?*, QUORA (Sep. 20, 2015) <https://www.quora.com/Aren't-police-supposed-to-arrest-intoxicated-underage-kids-at-a-party-Why-didnt-they> (providing question and answer forum where contributors—some claiming to be police officers—cited reasons for arrest or non-arrest, including whether the adolescents were respectful and contrite, a reluctance of police to create a criminal record over such a minor violation, a desire to focus on addressing violent crimes instead of normal teenage misbehavior, community norms, and racial considerations).

<sup>148</sup> See, e.g., HOUSTON, TX. CODE OF ORDINANCES ch. 28, art. V, sec. 28-171 et seq., [https://library.municode.com/tx/houston/codes/code\\_of\\_ordinances?nodeId=COOR\\_CH28MIO\\_FPR\\_ARTVJUCU](https://library.municode.com/tx/houston/codes/code_of_ordinances?nodeId=COOR_CH28MIO_FPR_ARTVJUCU). The municipal code specifically encourages police officers to use discretion in dealing with young curfew offenders, and authorizes officers to address the situation without issuing a citation imposing a fine. *Id.* This mitigates some of the ill effects of having a criminal record, since many employment and other applications only ask whether the applicant has ever been convicted of a misdemeanor or a felony. The problem is that, in the age of quick computer searches, if an arrest ultimately leads to a municipal ticket the arrest record will most likely still be available online, often without explanation about the seriousness of the offense or the evidence—or lack of it—against the accused young person.

recent years, even though use by juveniles has remained fairly steady.<sup>149</sup> In 2015, approximately 1.8 million, or 7 percent of respondents aged twelve to seventeen admitted to being current users of marijuana, while approximately 6.9 million (19.8 percent) of young adults identified themselves as current users.<sup>150</sup> In other words, just about one in five young adults had used marijuana in the past thirty days. Although marijuana use is commonplace, its users continue to be prosecuted in many states for the criminal offense of possession of a controlled substance, even as other states have legalized recreational use.

Also common is the ominous charge of “possession of drug paraphernalia,” which includes possession of a pipe or bong, or other devices that could be used for drug ingestion, even if no drugs are found.<sup>151</sup> Illegal items such pipes, bongs, and rolling papers are openly sold by shops, under the pretext that they can be used for smoking tobacco.<sup>152</sup> The widespread availability of drug paraphernalia in stores may confuse young people as to whether their possession is illegal. Moreover, when police officers stop young people without drugs, the officers have discretion to charge for possession of drug paraphernalia for ambiguous items such as rolling papers or water pipes. Once again, the lifelong consequences of being arrested for committing a common adolescent crime, coupled with unevenness in enforcement, raises questions about the usefulness of the current approach.

Enhanced enforcement of laws addressing alcohol and marijuana use by young people have been, in many cases, supplemented by a greater police presence and heightened enforcement of various rules in other arenas of teenage life, such as school. The next two sections examine the impact of the practices of having a police presence in schools and zero tolerance policies towards various youth offenses. Once again, the research indicates that these approaches fall short of achieving their intended goals of educating and rehabilitating misbehaving youth to give them a chance at a productive, happy adult lives.

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<sup>149</sup> SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 142, at 6.

<sup>150</sup> *Id.*

<sup>151</sup> *See, e.g.*, 21 U.S.C. § 863 (outlawing the selling, transport, import or export of drug paraphernalia, but exempting materials traditionally used for tobacco). State statutes like Wisconsin’s make possession or use of drug paraphernalia illegal, and impose different consequences depending on the age of the offender and other circumstances. WIS. STATS. § 961.573 (2016); *See also* U.S. DEPT. OF JUSTICE, PARAPHERNALIA FAST FACTS, <https://www.justice.gov/archive/ndic/pubs6/6445/6445p.pdf>.

<sup>152</sup> *See* U.S. DEPT. OF JUSTICE, *supra* note 151. *But see* Wisconsin Headshops, Smokeshops, HEADSHOPFINDER, <https://headshopfinder.com/head-shops-in-wi.php> (last visited Oct. 8, 2017).

## B. POLICE IN SCHOOLS

The movement to place police officers in schools seems to have been motivated by a desire to facilitate a safe, weapon-free environment, especially in the aftermath of school shootings like those in Jonesboro, Arkansas and Columbine, Colorado in 1998 and 1999 respectively.<sup>153</sup> The practice has become widespread: during the 2013–2014 school year, 43 percent of public schools in the United States had professional security personnel on school premises at least once a week.<sup>154</sup> It is understandable that parents and teachers might favor safety measures to prevent students from bringing guns and knives into school. However, the evidence indicates that the intended duties of these “school resource officers” (SROs) extend well beyond the simple goal of preventing extreme violence, like shootings or stabbings, and into intervention in teenage scuffles and other disruptive behavior.<sup>155</sup>

This policy comes at a cost; it creates police records for students who would otherwise spend a day in the principal’s office or in detention. Research shows that schools with at least one full-time SRO or other law-enforcement officer report crimes to the police more frequently.<sup>156</sup> One study showed that, compared to schools without SROs, schools with SROs reported 12.3 percent more non-serious violent crime to law enforcement—including weaponless fights or physical threats not involving weapons.<sup>157</sup> It

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<sup>153</sup> Emma Brown, *Police in Schools: Keeping Kids Safe, or Arresting Them for No Good Reason?*, WASH. POST (Nov. 8, 2015), [https://www.washingtonpost.com/local/education/police-in-schools-keeping-kids-safe-or-arresting-them-for-no-good-reason/2015/11/08/937ddfd0-816c-11e5-9afb-0c971f713d0c\\_story.html?utm\\_term=.0bc77eb7ac89](https://www.washingtonpost.com/local/education/police-in-schools-keeping-kids-safe-or-arresting-them-for-no-good-reason/2015/11/08/937ddfd0-816c-11e5-9afb-0c971f713d0c_story.html?utm_term=.0bc77eb7ac89). In Jonesboro, two middle school students, aged eleven and thirteen, killed five people. In Columbine, two heavily armed high school students, Dylan Klebold and Eric Harris, killed thirteen people and injured twenty-one before taking their own lives. However, some experts claim that in many cases, police in the schools are utilized by underfunded school districts to maintain ordinary school discipline. See, e.g., *Police Presence in Schools*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline/police-presence-schools> (last visited Sept. 4, 2017).

<sup>154</sup> NAT’L CTR. FOR EDUC. STATS., PUBLIC SCHOOL SAFETY AND DISCIPLINE 2013–14 10 (2015) (defining “security personnel” to include “security guards or security personnel, School Resources Officers (all career law enforcement officers with arrest authority and special training...), and other sworn law enforcement officers”).

<sup>155</sup> Brown reported that almost 70 percent of school security personnel said that they were involved in ordinary school discipline matters. Brown, *supra* note 153.

<sup>156</sup> Chongmin Na & Denise C. Gottfredson, *Police Officers in Schools: Effects on School Crime and the Processing of Offending Behaviors*, JUST. Q., Oct. 3, 2011, at 619 (“The presence of an officer in the school is associated with more than a doubling of the rate of referrals to law enforcement for the most common crime perpetrated by students in schools—simple assault without a weapon.”).

<sup>157</sup> *Id.* at 640.

has also been shown that harsher penalties are more likely in schools with at least one full-time law enforcement officer on the premises.<sup>158</sup> These findings confirmed the results of previous research that had found “that the presence of police officers helps to redefine disciplinary situations as criminal justice problems rather than social, psychological or academic problems, and accordingly increases the likelihood that students are arrested at school.”<sup>159</sup> Critics claim that the officers are often poorly trained, which may lead to more arrests, “sometimes for infractions as minor as flatulence or dress code violations.”<sup>160</sup> Yet criminalization of behavior previously dealt with by the schools has been widely accomplished not only by the routine presence of law enforcement in schools, but also by the adoption of zero tolerance policies towards a variety of undesirable (but fairly typical) adolescent behaviors.

### C. ZERO TOLERANCE POLICIES IN SCHOOLS

The term “zero tolerance” refers to “a philosophy or policy that mandates the application of predetermined consequences, most often severe and punitive in nature, that are intended to be applied regardless of the seriousness of behavior, mitigating circumstances, or situational context.”<sup>161</sup> Originally conceived of as a response to drug offenses, zero tolerance policies have been applied to student misconduct more broadly, based on the notion that swift and harsh crackdowns on even minor or unintentional rule infractions will remove some disruptive students and deter others from committing similar violations.<sup>162</sup> Often the penalties for a rule infraction are school-based, such as suspension or expulsion, but the presence of law enforcement officers in schools may lead to criminal charges or penalties as well.<sup>163</sup> Indiscriminate use of zero tolerance policies have produced ridiculous situations, such as small children suspended for bringing knives intended as eating utensils to school, or a student facing expulsion for allegedly hitting a teacher with a fluffy snowball.<sup>164</sup> The

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<sup>158</sup> *Id.* at 636.

<sup>159</sup> *Id.* at 642 (citing AARON KUPCHIK, HOMEROOM SECURITY: SCHOOL DISCIPLINE IN AN AGE OF FEAR 115 (2010)).

<sup>160</sup> Ward, *supra* note 54, at 55–56.

<sup>161</sup> SKIBA ET AL., *supra* note 52, at 2.

<sup>162</sup> *Id.* at 2.

<sup>163</sup> Ward, *supra* note 54.

<sup>164</sup> See, e.g., Ian Urbina, *It's a Fork, It's a Spoon, It's a . . . Weapon?*, N.Y. TIMES (Oct. 11, 2009), <http://www.nytimes.com/2009/10/12/education/12discipline.html>. In Delaware, six-year-old Zachary Christie took a camping utensil that could serve as a fork, knife, and spoon to school to



interplay between suspension, expulsion, and criminal penalties is intricate, but it hardly advances the goal of rehabilitating young offenders.

For one thing, zero tolerance policies are deservedly under fire because they do not appear to have reduced school violence levels, which have remained constant since the mid-1980s.<sup>165</sup> Moreover, the high levels of school expulsion and suspension resulting from zero tolerance policies are correlated with higher school drop-out rates, lower grades, and lower standardized test scores.<sup>166</sup> In addition, zero tolerance policies in schools may have contributed to an increase in formal processing for other offenses previously handled by schools and parents, creating arrest records for young people who never would have had them in previous generations.<sup>167</sup> A 2006 study by a task force of the American Psychological Association found that zero tolerance policies increased the likelihood of arrest not only for the targeted violent crimes, but also for other offenses like vandalism, theft, or fighting on campus.<sup>168</sup>

The criminalization of in-school lapses has led to the “school to prison pipeline,” thrusting students into a criminal justice system that emphasizes retribution over rehabilitation.<sup>169</sup> “School infractions that a decade ago would have been handled locally by the principal are now more likely to lead to arrest or referral to the juvenile court.”<sup>170</sup> Students who have been convicted of offenses, on average, have lower commitment to school and

use for his lunch. After a hearing, he was suspended and sentenced to forty-five days in the school district’s reform school. The district defended its policy, noting that the rule precludes consideration of intent. *Id.* The article also recounts the case of a third-grade girl who was expelled after her grandmother sent her to school with a birthday cake and a knife to cut it. After that case, the state legislature passed a law allowing a school district to decide expulsions on a case-by-case basis, but the provision does not help children like Zachary, who are facing suspension. The snowball incident involved a high school student in the Chicago area; fortunately for him, surveillance video showed that the offending snowball was not thrown by the accused student. Ward, *supra* note 54, at 55. Although suspensions and expulsions are not criminal records, individuals may be required to report them on various school or employment applications, posing a problem analogous to the reporting of a criminal or arrest record.

<sup>165</sup> SKIBA ET AL., *supra* note 52, at 4.

<sup>166</sup> CHRISTOPHER BOCCANFUSO & MEGAN KUHFELD, MULTIPLE RESPONSES, PROMOTING RESULTS: EVIDENCE-BASED, NONPUNITIVE ALTERNATIVES TO ZERO TOLERANCE 2 (2011), <http://www.nea.org/assets/docs/alternatives-to-zero-tolerance.pdf>.

<sup>167</sup> SKIBA ET AL., *supra* note 52, at 76.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 76; see also Peter E. Leone, *Doing Things Differently, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM* 86 (Nancy E. Dowd ed., 2015) (arguing that suspension and school failure actually make young people more prone to delinquency).

<sup>170</sup> SKIBA ET AL., *supra* note 52, at 76. The authors cite a 2001 study by Dohrn, finding that “compared to student arrests for violent crime on school grounds, arrests are five times more likely for vandalism, six times more likely for theft, and nine times more likely for fighting on campus.”

higher recidivism rates. Sometimes, their offenses are used as a basis for expulsion, or lead to dropping out, both of which increase the likelihood of adverse life outcomes given the importance of a high school diploma in finding gainful employment and future stability.<sup>171</sup>

Moreover, although consistency is valued in disciplinary interventions, zero tolerance policies are implemented differently from one school or district to another.<sup>172</sup> For example, in the case of a South Carolina statute that criminalizes disturbing schools, “the same act can draw a verbal warning in one school and a criminal charge in another.”<sup>173</sup> To make matters worse, unlike confidential school records, discipline through the justice system creates permanent, easily-accessible criminal records.

#### D. ADVERSE IMPACTS OF CRIMINAL RECORDS AND YOUTH LABELING

When discussing the impact of having a criminal record on young people, it is important to reiterate that the term “criminal record” is often construed broadly by record-keepers. The word “criminal” may conjure up images of murderers, rapists, and bank robbers in the ordinary person’s mind but, as discussed earlier, criminal records databases typically list records of arrest for any suspected violations of state or local law, even relatively minor ones, regardless of the outcome of the charges. Some databases even record *stops* by law enforcement where no arrest was ultimately made.<sup>174</sup>

Whereas the adverse employment prospects for persons with felony convictions have been long documented, research shows severe disadvantages facing young people with records of far lesser indiscretions.<sup>175</sup> “Youth with arrest records have been shown to have unstable and abbreviated employment histories, are less likely to stay in high school and enroll in college, are at greater risk of failing to obtain other markers of adult success such as having their own home and a stable relationship with a partner, and are more likely to have medical problems

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<sup>171</sup> See, e.g., Leone, *supra* note 169, at 89–91; Langford, *supra* note 59; Jason Breslow, *By the Numbers: Dropping Out of High School*, PBS FRONTLINE (Sept. 21, 2012), <http://www.pbs.org/wgbh/frontline/article/by-the-numbers-dropping-out-of-high-school/> (providing statistics showing that high school dropouts have a harder time getting jobs and earn significantly less than high school or college graduates, high school graduates are also more likely to live in poverty, and more likely to become involved with the criminal justice system).

<sup>172</sup> SKIBA ET AL., *supra* note 52, at 4; see also Leone, *supra* note 169, at 89–91.

<sup>173</sup> Eckholm, *supra* note 55.

<sup>174</sup> See generally JACOBS, *supra* note 5, at 17–18.

<sup>175</sup> SHAH & STROUT, *supra* note 9, at 4.

and adult drug and alcohol abuse.”<sup>176</sup> The adverse impact on young people has two aspects: one is linked to having a criminal record, and the other is the magnification of this adverse impact by the wide availability of criminal records in the digital age.

First, the severe adverse consequences of having a criminal record is beyond question. For example, having a criminal record can reduce the likelihood of a job callback or offer by nearly 50 percent.<sup>177</sup> However, many of these “criminal records” show only arrests, a significant number of which did not result in conviction.<sup>178</sup> Even states laws that prohibit employer inquiries about applicants’ arrest record do not prevent employers from seeking that information on the internet.<sup>179</sup>

Although studies on the impact of criminal records on job applicants may not distinguish between records containing offenses of differing severity, evidence shows that the mere existence of an arrest record, even one resulting in acquittal or dropped charges, may stigmatize a young person almost as much as a conviction record.<sup>180</sup> Potential employers routinely inquire about past arrests and previous convictions, and often do not hire candidates with such records.<sup>181</sup> Research shows that even

<sup>176</sup> Brame et al., *supra* note 132, at 26.

<sup>177</sup> SHAH & STROUT, *supra* note 9, at 27 (citing Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 199 (2009)). This adverse impact is even worse for African American men as compared to white men.

<sup>178</sup> *Id.* Even for felony arrests, one-third do not result in convictions. *Id.* (citing Tracey Kyckelhahn and Thomas H. Cohen, *Felony Defendants in Large Urban Counties, 2004*, BUREAU OF JUSTICE STATISTICS (Apr. 2008), <https://www.bjs.gov/content/pub/pdf/fdluc04.pdf>).

<sup>179</sup> See, e.g., LEGAL ACTION CTR., *KNOW YOUR RIGHTS: UNDERSTANDING JUVENILE AND CRIMINAL RECORDS AND THEIR IMPACT ON EMPLOYMENT* 9 (2005); See also Part II.B., *supra*. As previously discussed, surveys show that most employers perform background checks on all prospective employees, and between 85 and 95 percent of employers surveyed perform them on at least some applicants. Rosenberg, *supra* note 3; Flake, *supra* note 12, at 56–60.

<sup>180</sup> Future Interrupted describes the cases of two young men whose futures were harmed by arrests that did not result in convictions or adjudications of delinquency. SHAH & STROUT, *supra* note 9, at 9–11. In one case, a young man was denied admission to the National Guard because he had been charged with assault and battery, even though he was never adjudicated delinquent as a result of the charge. *Id.* at 9. In another case, a young man had been charged with burglary as a teenager, but the district attorney did not prosecute him, yet years later when he was a law student (after successfully completing high school, college and graduate school) he was barred from working as an intern in the U.S. Attorney’s office because of the earlier charge. *Id.* at 11.

<sup>181</sup> See, e.g., Appelbaum, *supra* note 3. The discovery of a criminal record can lead to other adverse consequences as well. Elizabeth Harris describes the story of David Powers, a young man who, after coming out of drug rehab and pleading guilty to charges of drug possession, returned to college, became an accountant, held excellent jobs in finance, and successfully completed three semesters at law school. When the school discovered the complete history behind his criminal

employers who indicated a willingness to hire ex-offenders tend to discriminate in actual practice.<sup>182</sup>

As discussed above, arrest records are often easily obtainable, and people may assume that these records show poor character or represent guilt even if the arrestee was not charged or convicted.<sup>183</sup> This problem has worsened in the past few decades with the advent of online search services and the expectation that employers, landlords, and schools will utilize them. Young people are particularly hard hit by the trend since they have not yet established their careers.<sup>184</sup>

Another significant concern is that young people with any involvement with law enforcement have worse life outcomes compared to others.<sup>185</sup> Issues of incarcerating juvenile convicts are well-known: interruption of their education and contact with other offenders who may help them to become “better criminals.” However, research suggests that mere arrest and detention, even without an adult conviction or adjudication of delinquency, can indicate long-lasting negative impacts on young people. In a 2014 study, Linda Teplin identified a random sample of young people who had been arrested and held in detention for offenses of varying severity between 1995 and 1998 in Chicago, Illinois.<sup>186</sup> The study found significantly higher

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record, they rescinded his acceptance, and Powers was unsuccessful in a lawsuit seeking his reinstatement. Now, due to not only the record but also the infamy caused by the expulsion and the subsequent lawsuit, Powers has had difficulty in obtaining a job commensurate with his skills and education. Elizabeth A. Harris, *Past Drug Charges Derail a Law Student's Education*, N.Y. TIMES, Apr. 9, 2015, at A22. Thus, revelation of the criminal record (some of which was officially expunged) led to getting kicked out of school, which brought publicity for the criminal record, which led to job discrimination—a veritable cascade of adverse consequences.

<sup>182</sup> JACOBS, *supra* note 5, at 281–82 (citing research showing that employers that claimed willingness to hire people with criminal records were no more likely to actually hire them than were employers who said they would *not* hire applicants with records).

<sup>183</sup> *Id.* at 291–96.

<sup>184</sup> University of Minnesota sociologist Christopher Uggen, now fifty, admits that he was arrested several times for fighting and other minor offenses when he was a teenager. “For somebody of my generation who had a brush with the law, they were able to quickly put it in the rearview mirror and move on,” he said, noting that for his current students, even a conviction ten years in the past could be a huge stumbling block. Applebaum, *supra* note 3.

<sup>185</sup> Gary Gately, *Detained Youths More Likely to Die Violent Deaths as Adults*, JUVENILE JUSTICE INFO. EXCH. (June 19, 2014), <http://jjie.org/detained-youths-more-likely-to-die-violent-deaths-as-adults/107151/>.

<sup>186</sup> Linda A. Teplin et al., *Firearm Homicide and Other Causes of Death in Delinquents: A 16-Year Prospective Study*, 134 PEDIATRICS 1, 64 (Jul. 2014). Participants’ deaths were tracked and verified from November 1995 to December 2011, and the death rates were compared to death rates in the general population according to age, gender, and race/ethnicity. *Id.* at 64–65. The study broke new ground because the sample included young people who were arrested, detained, but not adjudicated delinquent. The study uses the term “delinquent” broadly to mean both juveniles

mortality rates for delinquent youth as compared to the general population.<sup>187</sup> Moreover, a larger proportion of the delinquent youths died by homicide compared to the general population.<sup>188</sup> Although the study did not find a causal relationship between arrest and detention of young people and a higher death rate, it suggested that young people who have had such contacts with the justice system may need services and protection beyond punishment.<sup>189</sup> The previously discussed research by Brame, et al. emphasized that having an arrest record puts young people at higher risk for being involved in violent situations and having a generally unsafe lifestyle.<sup>190</sup>

Other researchers have found that even being stopped by the police increases the likelihood of subsequent delinquency.<sup>191</sup> The authors of a 2013 study on delinquency following police contact theorize that a significant factor in the downward spiral of many young people after they have had police contact is the labeling that follows.<sup>192</sup> They posit that once labeled delinquent, young people adopt attitudes, behaviors, and beliefs that are consistent with their label.<sup>193</sup> In other words, being treated as a problem by the police makes young people view themselves as problematic, and they may live down to that label. In time, deviant behavior and attitudes may become a defense mechanism as the young person copes with changed circumstances, such as the lowered expectations or judgmental attitudes of authority figures or peers.<sup>194</sup> The authors conclude that because the label of delinquency may become a self-fulfilling prophecy, aggressive police

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who were adjudicated delinquent and juveniles who were merely arrested and detained. Gately, *supra* note 185.

<sup>187</sup> Teplin, *supra* note 186, at 65. This increased risk of mortality continued into adulthood. *Id.* at 65–66.

<sup>188</sup> *Id.* at 66.

<sup>189</sup> The study points to modifiable risk factors often seen in delinquent youth, such as gang membership, drug dealing and alcohol use disorder, and concludes that “[d]elinquent youth are an identifiable target population to reduce disparities in early violent death.” *Id.* at 71.

<sup>190</sup> Brame et al., *supra* note 132, at 26. Brame suggests that arrest records are a risk marker for both involvement in violent situations generally and for violent victimization. *Id.*

<sup>191</sup> Stephanie Ann Wiley et al., *The Unintended Consequences of Being Stopped or Arrested: An Exploration of the Labeling Mechanisms Through Which Police Contact Leads to Subsequent Delinquency*, 51 CRIMINOLOGY 927, 954–59 (2013).

<sup>192</sup> *Id.* at 956–58.

<sup>193</sup> *Id.* at 957. According to labeling theory, the changes in behavior and attitude reduce inner conflict that comes with being labeled with a derogatory term and make future delinquent behavior easier for the young people. *Id.*

<sup>194</sup> *Id.* at 928. This process is sometimes referred to as “secondary deviance.”

action in response to relatively common youthful indiscretions may be counterproductive.<sup>195</sup>

Moreover, although someone with a long-term clean record can try to seal or expunge his or her tainted record, widely varying state limits on what can be sealed or expunged, onerous procedures, and almost unlimited prosecutorial discretion to seal or expunge have rendered this remedy hardly attainable.<sup>196</sup> Even more troubling, expungement is not available for arrest records that ended in the charges being dropped or the defendant being acquitted, because there is technically nothing to expunge. One possible avenue for reform would be to expand the possibilities for expungement of youth records, and make expungement automatic for certain types of offenses.<sup>197</sup>

#### IV. ASSESSMENT OF ARGUMENTS FOR MORE YOUTH-PROTECTIVE POLICY

Considering the above research, it is difficult to persuasively argue that current policies have been successful in disciplining, educating, and rehabilitating errant young people. But why should this concern us? Why do these allegedly bad kids deserve anything else? As the research discussed in this section will show, so-called bad kids can often be successfully rehabilitated, and failure to rehabilitate results in poor outcomes for both young offenders and society. Many argue that the current approach to young offenders fails to rehabilitate them and comes at a high price to both the offenders and to the rest of society, and that we need to pursue evidence-based alternatives.<sup>198</sup> The literature, however, is split over the best approach.

There are two prevailing lines of argument for treating young offenders with more compassion. Most scholars and policymakers base current

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<sup>195</sup> Wiley et al., *supra* note 191, at 928. The authors describe a hypothetical scenario in which normal policing behavior might include stopping and questioning a group of adolescents who are hanging out together. The hypothetical supposes that one youth is arrested for possession of a half joint of marijuana, while the others are sent away. The researchers suggest that while such police behavior is typical, it may be counterproductive because of the adverse consequences stemming from the label “delinquent.” *Id.*

<sup>196</sup> See generally RIYA SAHA SHAH, LAUREN FINE, & JAMIE GULLEN, JUVENILE LAW CTR. with CMTY. LEGAL SERVS. OF PHILADELPHIA, SEALING AND EXPUNGEMENT 23–45 (2014).

<sup>197</sup> See, e.g., JACOBS, *supra* note 5, at 119–20 (The Netherlands and France are examples of countries that have automatic expungement for certain offenses after a specified period without new criminal charges.)

<sup>198</sup> See, e.g., SHAH & STROUT, *supra* note 9; RODRIGUEZ & Emsellem, *supra* note 6; Henning, *supra* note 13.

recommendations on evolving neuroscience and psychology research, some of which has been cited by the Supreme Court in recent cases.<sup>199</sup> They argue that get-tough policies and overuse of penalties such as incarceration, even for non-violent crimes, are unacceptable for offenders of all ages because such policies are ineffective and increase the burdens on society.<sup>200</sup> This first line of argument focuses on the young people themselves, and argues that they are entitled to special treatment, more help, and more mercy because they are qualitatively different from older adults. This approach is mainly derived from recent research on brain maturation and young people's social maturity.<sup>201</sup>

The second line of argument is based on research about the impact on young people and society from current practices, versus the results that could be obtained from other, more effective approaches. This analysis does not focus on the age of the subjects at the time of their offenses, but instead looks at the characteristics and behavior of people of all ages in the context of crime, punishment, and possible rehabilitation.<sup>202</sup>

#### A. NEUROLOGICAL AND PSYCHOLOGICAL RESEARCH

Studies in the fields of psychology and neuroscience have shown that adolescents do not possess the experience, judgment, or neurological capabilities of adults.<sup>203</sup> Research about adolescent brain development shows that brains, on average, are not fully formed until the mid-twenties, and some research indicates that the cortical development may be slower in boys than in girls, leading to even later maturation of boys.<sup>204</sup> Although it has long been recognized that adolescents are prone to impulsive, risky, and anti-social behavior, until recently, raging hormones or childhood experiences, rather than the continuation of neurological change during

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<sup>199</sup> See Part II.A., *supra*.

<sup>200</sup> See, e.g., Mark R. Fondacaro, *Why Should We Treat Juvenile Offenders Differently than Adults*, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM 129–38 (Nancy E. Dowd ed. 2015).

<sup>201</sup> See Part IV.B., *infra*.

<sup>202</sup> See *id.*

<sup>203</sup> It is in recognition of this that the Supreme Court has held in the cases discussed in Part I that juvenile offenders should in many cases not be subject to penalties as severe as those imposed upon adult offenders due to the relative immaturity and malleability of character of juveniles. That is, because of the diminished responsibility of minors, certain harsh consequences may be unconstitutionally disproportionate to their offenses. See Part II.A., *supra*.

<sup>204</sup> Mo Costandi, *Adolescent Brain Development*, WELLCOME TRUST: THINK BLOG, <https://thinkneuroscience.wordpress.com/2014/01/22/adolescent-brain-development/> (thoughts from Sarah-Jane Blakemore, Professor of Cognitive Neuroscience at University College London).

adolescence, were blamed.<sup>205</sup> However, it is now apparent that “[t]he ability to integrate these multiple components of behavior—cognitive and affective—in the service of long-term goals involves neurobehavioral systems that are among the last regions of the brain to fully mature.”<sup>206</sup> In particular, the volume of the prefrontal cortex (the portion of the brain responsible for cognitive functions such as planning, abstract thinking, imagination, and impulse control) continues to increase throughout adolescence and then declines, not reaching its adult size until the early twenties.<sup>207</sup> This provides a biological explanation for the long-recognized phenomena of adolescent behavior: yielding to peer influence, impulsive actions, and risky behaviors. Even older adolescents who appear physically mature may not have adult-like brain function and may exhibit impaired abilities to weigh consequences and synthesize information.<sup>208</sup> Impulse control and decision-making skills mature steadily from childhood through adolescence, while risk-taking and reward-seeking behaviors peak during adolescence and subsequently decline in adulthood.<sup>209</sup>

However, while young people are more likely than adults to engage in risky or imprudent behavior, they are also likely to mature into law-abiding citizens. Evidence shows that young people tend to mature out of their reckless behavior even behavior that is criminal in nature.<sup>210</sup> Moreover, as discussed above, many juvenile records involve misdeeds such as truancy,

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<sup>205</sup> Elizabeth Cauffman, *The Adolescent Brain: Excuse Versus Explanation: Comments on Part IV*, 1021 ADOLESCENT BRAIN DEVELOPMENT 160, 160–61 (2004).

<sup>206</sup> Ronald E. Dahl, Staunton Professor of Psychiatry and Pediatrics, Univ. of Pittsburgh Medical Ctr., Keynote Address, Adolescent Brain Development: A Period of Vulnerabilities and Opportunities, in 1021 ADOLESCENT BRAIN DEVELOPMENT 1, 18 (2004).

<sup>207</sup> NAT’L INST. OF MENTAL HEALTH, THE TEEN BRAIN: STILL UNDER CONSTRUCTION 2 (2011), <https://infocenter.nimh.nih.gov/pubstatic/NIH%2011-4929/NIH%2011-4929.pdf>; Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCIENCE 8819, 8828–29 (2001); A.B.A. JUVENILE JUSTICE CTR., ADOLESCENCE, BRAIN DEVELOPMENT, AND LEGAL CULPABILITY 1 (2004), [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_juvjus\\_Adolescence.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_Adolescence.authcheckdam.pdf).

<sup>208</sup> The recognition of reckless and undesirable adolescent behavior is centuries old, as evidenced by an oft-quoted passage from Shakespeare: “I would that there were no age between 10 and 23, for there’s nothing in between but getting wenches with child, wrongdoing the ancients, stealing, fighting....” William Shakespeare, *THE WINTER’S TALE*, Act III, sc. 7.

<sup>209</sup> B.J. Casey et al., *Braking and Accelerating of the Adolescent Brain*, 21 J. RES. ADOLESCENCE 21 (2011), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3070306/>.

<sup>210</sup> Jordan, *supra* note 126, at 194 (“[A] longitudinal study of serious offenders revealed a majority of youthful offenders will cease criminal behavior as they mature.”) (citing MODELS FOR CHANGE, RESEARCH ON PATHWAYS TO DESISTANCE 3 (2012), [http://www.pathwaysstudy.pitt.edu/documents/MfC\\_RPD\\_2012\\_final.pdf](http://www.pathwaysstudy.pitt.edu/documents/MfC_RPD_2012_final.pdf)).



violating curfew, smoking cigarettes, or drinking alcohol, none of which would be crimes except for the offender's age.<sup>211</sup>

Although low impulse control and immature decision-making skills can result in serious crimes like first-degree murder, many of the coming-of-age transgressions are far less serious. Shoplifting, trespassing, assault, petty theft, vandalism, truancy, possession of drug paraphernalia or small amounts of illegal substances, underage drinking, and public drunkenness are typical youthful misconduct that are often memorialized in criminal records. The widespread commission of non-violent offenses by young people makes uneven and almost arbitrary imposition of consequences particularly unfair. Additionally, while the twin goals of deterrence and accountability are laudable, creating lifelong criminal records for young people who have committed petty offenses is unlikely to advance either goal.

Therefore, an important question in assessing the current policies is whether aggressive imposition of penalties will quicken the natural maturation process and the rate at which young offenders reform their transgressions. Evidence shows that get-tough approaches do not lead to a faster maturation process, and may in fact impede the maturation of young offenders into law-abiding adults.<sup>212</sup> Adult criminal court for juveniles presents the double whammy of harsher sentences and exclusion from treatments or other services available through juvenile court, leading some scholars to conclude that “[t]ransfers represent nothing more than unacceptable retribution.”<sup>213</sup>

## B. EVIDENCE-BASED ARGUMENTS

In contrast to psycho-neurological arguments, scholars like Professor Mark Fondacaro take the position that juvenile law reform should not be based only on a scientific model of diminished capability for minors because developments in neuroscience and medicine may alter our understanding and lead to rolling back reforms.<sup>214</sup> Professor Fondacaro argues that we should instead base reforms on empirical evidence that

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<sup>211</sup> See Part III.A., *supra*; see also Jordan, *supra* note 126, at 195.

<sup>212</sup> See, e.g., Richard E. Redding, *Lost in Translation No More*, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM 140 (Nancy E. Dowd ed. 2015) (The common get-tough tactic of waiver to adult court “has counterrehabilitative effects, exacerbates recidivism, and does not deter would-be offenders.”).

<sup>213</sup> Richard Mora & Mary Christianakis, *Fit to Be T(r)ied*, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM 230–31 (Nancy E. Dowd ed. 2015).

<sup>214</sup> Fondacaro, *supra* note 200, at 129–38.

shows how draconian punishments are inappropriate for offenders of all ages.<sup>215</sup> He takes issue with the Supreme Court's conclusion that juveniles should be treated more leniently because they are more malleable and responsive to interventions.<sup>216</sup> Although he does *not* dispute the conclusion that juveniles respond positively to better treatment, he objects to the implication that adults do not respond similarly to treatment "because we have not tried to do the kinds of multisystemic interventions with adults that might have demonstrated effects on their prospects for change."<sup>217</sup>

Other scholars acknowledge it is likely that adolescent and adult brains are different, resulting in differences in behavioral malleability. These scholars favor researching possible rehabilitative programs and implementing those with promising success rates.<sup>218</sup> Richard Redding points out that several such approaches have been identified, and argues that scholars and politicians should educate themselves and the greater public, and solicit support for programs that lead to better outcomes not only for offending youth, but for society as a whole.<sup>219</sup>

According to Redding, "science belies the widely held assumptions that harsh punishment is an effective deterrent and that rehabilitation programs are ineffective or fail the cost-benefit test."<sup>220</sup> He further claims that "we have developed effective methods for identifying those youth at high risk for offending, preventing juvenile crime through programs targeted at these high-risk youth, and rehabilitating even serious, violent, and chronic juvenile offenders."<sup>221</sup> Redding argues that the public opinion

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<sup>215</sup> *Id.* at 129–30.

<sup>216</sup> *Id.* at 134.

<sup>217</sup> *Id.*

<sup>218</sup> Redding, *supra* note 212, at 139–50.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 142.

<sup>221</sup> *Id.* (citing M.W. Lipsey, *The Primary Factors That Characterize Effective Interventions with Juvenile Offenders: A Meta-Analytic Overview*, 4 VICTIMS & OFFENDERS 124–47 (2009)). According to Redding, the most successful programs are at least six months in duration; have a comprehensive family-and-community-based approach; are tailored to the young person's unique characteristics, risks and needs; and are administered by well-trained personnel who are monitored and held accountable for outcomes. Redding, *supra* note 212, at 142–43. Redding focuses on chronic juvenile offenders, and argues that targeting the small percentage of chronic offenders who later become career criminals would be the most cost-effective approach, resulting in a substantial cost savings to society, both in dollars and cents, and in terms of intangible social costs such as diminished fear of crime and improved quality of life for people in the community. *Id.* Redding notes that preventing just one youth from becoming a career criminal saves approximately two million dollars. Therefore, he argues, we do not even need a high rate of success to justify investing in programs to rehabilitate and reduce recidivism. *Id.* at 143–44.

about dealing with young offenders emphasizes punishment and retribution, reflecting the public's stubborn belief that punishment works, even in the face of conflicting evidence.<sup>222</sup> Yet when Americans are provided with nuanced questions that include background information about young offenders and sentencing options, survey responses do not generally support the most punitive approaches.<sup>223</sup> However, even when the public might be willing to pay for effective rehabilitation programs, politicians are loath to advance such programs for fear of appearing soft on crime.<sup>224</sup>

Unfortunately, imposing more rational penalties and using proven rehabilitative programs alone will not change the damage of having a criminal record produced from brief police encounters and proposed solutions which focus on future career criminals do not help young offenders.

## V. ASSESSING THE WAY FORWARD: PROPOSALS

The illegal but non-violent behaviors discussed above should not cause long term problems for errant young people because some juvenile records will in fact be sealed; labor laws offer protections to some persons with criminal records; and those holding decision-making roles about jobs, housing, and school admissions officers might reasonably understand youthful transgressions. But, as previously discussed, there is strong evidence of continued problems dogging young people who committed or were merely accused of non-violent offenses. The parallel between these long-term adverse consequences and multi-year or even life sentences is inescapable when one considers the drastic consequences, even for those who have paid their debt to society.<sup>225</sup> The inappropriateness of such a harsh outcome makes a shift in our policies necessary, especially in light of recent

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<sup>222</sup> Redding, *supra* note 212, at 140–41. “Studies show that people express a desire to punish even when they cannot identify any practical purpose it would serve and even when punishment clearly is unnecessary to prevent reoffending.” *Id.*

<sup>223</sup> Richard E. Redding, *Adult Punishment for Juvenile Offenders: Does It Reduce Crime?*, in *HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE* ch. 19 (Nancy E. Dowd et al. eds. 2005), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=896548](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=896548). However, although public opinion surveys show that taxpayers are willing to pay for rehabilitation programs that are effective, many people believe “the myth that offenders are ‘bad apples’ who cannot be rehabilitated.” Redding, *supra* note 212, at 142.

<sup>224</sup> Redding, *supra* note 212, at 142 (“[P]olicy makers consistently overestimate the public’s support for punitive policies.”). Redding also argues for an aggressive education effort aimed at judges, prosecutors, politicians, and the public at large. Redding, *supra* note 223, at 3.

<sup>225</sup> See, e.g., Flake, *supra* note 12; Danielle R. Jones, *When the Fallout of a Criminal Conviction Goes Too Far: Challenging Collateral Consequences*, 11 *STAN. J. C.R. & C.L.* 237, 268 (2015).

Supreme Court jurisprudence emphasizing the greater vulnerability and malleability of young offenders.

Where does this leave us? For one thing, further empirical research is needed on some issues. One useful avenue of research would be to track employment outcomes for young people with juvenile records to see if employment prospects are changed by heightened or lessened access to those records.<sup>226</sup> Such research is likely to be hampered by the fact that, unfortunately, the vast majority of states do not keep track of data on who accesses juvenile records, how they do it, or how often.<sup>227</sup> Therefore, state and federal law enforcement agencies should track by whom and when juvenile records are accessed. More research is also needed about the cohort of young people who are just above the age of majority: those between the ages of eighteen and twenty-one. For example, what has caused the increase in the number of arrests in this age group, as documented by the Brame study, and how has this increase impacted this group's employment prospects?<sup>228</sup> Finally, our privacy laws should be updated so that court and law enforcement records can be effectively sealed and expunged.<sup>229</sup>

The above research and discussion also suggest certain policy shifts. First, evidence supports treating all defendants who are under the age of eighteen at the time of their alleged offenses as juveniles. There might be room for a narrow exception here in cases like first degree murder, but even then, it should be limited to only older adolescents. Second, we should return to a policy of strict confidentiality for juvenile records. This is difficult to do considering the digital age, but access to official databases should be limited, and those who get access should be tracked in case of inappropriate dissemination of information. As noted above, more research is needed about how to effectively remove damaging information from the

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<sup>226</sup> Although the research on employment consequences already discussed here suggests that accessibility of juvenile records by potential employers is damaging to prospects, research may pinpoint other factors that contribute to the problem—such as interruptions in education or deprived social environments—that need to be addressed separately.

<sup>227</sup> SHAH & STROUT, *supra* note 9, at 8 (“Even when state laws protect the confidentiality of juvenile records, they often do not track the limited exceptions to confidentiality that permit individuals to access records.”).

<sup>228</sup> Possible explanations include the impact of general tough-on-crime rhetoric, or the collateral effect of criminalizing school behavior or zero tolerance policies, which may lead to higher drop-out rates, leaving young people with fewer prospects and greater temptations towards criminal activity, but I can find no empirical research that directly addresses this question.

<sup>229</sup> See, e.g., JACOBS, *supra* note 5, at 91–132; Farhad Manjoo, *Right to Be Forgotten Online Could Spread*, N.Y. TIMES (Aug. 5, 2015), <https://www.nytimes.com/2015/08/06/technology/personaltech/right-to-be-forgotten-online-is-poised-to-spread.html>.

internet. Third, civil violations and misdemeanors committed by persons under age twenty-one should be automatically expunged after a certain term of years without further offenses. Fourth, the records pertaining to arrests not resulting in conviction must be automatically removed from publicly available databases.

## VI. CONCLUSION

This article has focused on resources from sociology, psychology, criminology, and law to shed light on the difficult situation facing once-errant young people who endeavor to find a solid foothold as law-abiding adults. Although the data suggest that legal policies that are more protective of young people may be useful, the discussion, and sometimes the research itself, is muddled by shifting definitions, conflicting goals, and questions of causation that make the classic chicken-and-the-egg question look simple by comparison. Still, I believe that the research, theories, and goals discussed in this article support the claim that we need to shift direction, and try another approach to rehabilitating young people with criminal records.