Notes

"CHILDREN ARE DIFFERENT" AND THEIR LAWYERS SHOULD BE TOO

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ABSTRACT

Nearly sixty years ago, In re Gault *guaranteed children in juvenile court the right to counsel. However,* Gault *fell short. While recognizing children's distinct vulnerability, the Court created a right for children that is weaker than that of adults and failed to recognize how youth in fact require a more expansive right to counsel. Grounded in the stories of court-involved youth who received deficient representation, this Note illustrates the devastating consequences of* Gault*'s limitations. It argues that the differences between children and adults that compelled the Court to adopt additional protections for children in sentencing also justify an expanded right to counsel. The Note uses the characteristics of youth articulated in Eighth Amendment cases to recommend six changes to how children are represented. These changes are: first, requiring each jurisdiction to have a dedicated youth defender's office, which provides specialized training and supervision; second, eliminating common conflicts of interest; third, making mitigation mandatory; fourth, guaranteeing the right to postdisposition advocacy; fifth, moving toward a holistic defense model; and sixth, adopting a youth-specific standard for ineffective-assistance-of-counsel claims.*

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INTRODUCTION

Chris[1] shuffled through the courthouse to his holding cell with shackles binding his wrists, waist, and ankles. His neon jumpsuit dwarfed his five-foot, one-hundred-pound frame. He had just been arrested and charged for the rape of his twelve-year-old cousin. He faced a transfer to adult court, decades in prison, and lifetime registration as a sex offender. He was thirteen.

I was his therapist and had arrived early to see how I could advocate on his behalf. I had previously worked at a holistic juvenile[2] defender's office, in which social workers and lawyers teamed up to represent children in and out of the courtroom.[3] Our social workers were critical in helping our lawyers communicate to the court how the developmental stage and trauma history of a child affected the child's behavior and why the court needed to consider that information. Chris needed someone to show the judge and prosecutor that he was not who they thought.

Chris was not a rapist who needed to do adult time and be stigmatized for the rest of his life. He was a prepubescent thirteen-year-old who had been exposed to chronic and complex trauma. When he was just five, his father, whom he adored, had been shot by the police. Chris then lived with a series of violent stepfathers; one sexually abused him. At nine, his mother died of AIDS. Unable to cope, he was sent to a psychiatric facility by age ten and then to foster care. He had recently returned home to his grandmother's and was trying to adjust to a chaotic household with little supervision. He was making progress, but he still felt shame about his own sexual abuse victimization. He did

1. Chris is a pseudonym for a composite of clients I had when I worked as a social worker. While all identifiable characteristics have already been removed, I use a composite client, blurring the details of multiple client stories to further protect confidentiality and to prevent clients from being able to identify the story as their own. For more information about composite stories and the ethics supporting their use, see generally Maureen Duffy, *Writing About Clients: Developing Composite Case Material and Its Rationale*, 54 COUNSELING & VALUES 135 (2010).

2. The word juvenile can be stigmatizing and connote guilt for children who deserve a presumption of innocence. *See* FAIR & JUST PROSECUTION, SEEING WHAT'S UNDERNEATH: A RESOURCE FOR UNDERSTANDING BEHAVIOR & USING LANGUAGE IN JUVENILE COURT 4 (2021), https://www.fairandjustprosecution.org/staging/wp-content/uploads/2021/04/Seeing-Whats-Underneath-Behavior-and-Language-in-Juvenile-Court.pdf [https://perma.cc/MC9D-DQSV]. I will use the word juvenile to describe the system in order to refrain from euphemizing the harm caused by it, but I will use the words child or youth to describe the individuals in the system.

3. See *infra* Part III.E for more on why holistic defense is needed to adequately represent children.

not understand why he had been sent away. The court needed to see Chris's complexity—his pain and his promise. I trusted his lawyer would help.

Chris's grandmother could not afford to hire an attorney, so a public defender seemed like the only option. But the "court counselor"—the equivalent of a probation officer in juvenile court—informed me that there was no public defender in their county, just private attorneys who contracted with the state and were appointed to represent children.[4] Chris's attorney had not arrived yet, so I went to sit with Chris's grandmother.

She told me that she was overwhelmed. Despite her desire to engage, she had struggled throughout therapy, largely because her own trauma made her avoid emotional discussions with her grandchildren. Now, with one grandchild a victim and the other in chains, she felt even more paralyzed. She was preoccupied with the distress of her granddaughter and felt conflicted about how to help her grandson. To make matters worse, she had just learned that she would pay an hourly fee for Chris's representation. As the sole provider, earning minimum wage, she was worried about how she would afford the lawyer and, as a result, whether to engage with him.[5]

When the lawyer finally arrived, the bailiff brought Chris in for his secure custody hearing. Had there been a holistic defender, someone from the defense team would have already spoken to the family and assessed options for the child to stay with an extended family member or another adult to avoid exposing a thirteen-year-old to the traumatic environment of jail. But this lawyer had not even spoken to Chris, let alone his family. At the hearing, the lawyer passively went along with the court counselor and prosecutor's recommendation that Chris remain in jail pre-adjudication. For a charge like rape, it could be months.

After the hearing, the lawyer should have accompanied Chris to the holding cell to see how he was doing; to tell Chris that he would fight for him; and to explain, in a developmentally and trauma-informed way, the situation Chris faced. Unfortunately, the lawyer left immediately. Chris was a smart kid, but without attention from the lawyer, the seriousness of his situation eluded him. He kept asking: "Can you make sure Grandma doesn't give away my new puppy?"

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4. See *infra* Part III.A for more discussion of the consequences of contract-counsel systems.

5. See *infra* Part III.B for more discussion of how common conflicts of interest are exacerbated by charging parents for their children's indigent defense.

After a week of phone calls, I finally got a hold of the lawyer. I asked about his plan. His response: "Take whatever deal the prosecutor gives us." I was unable to accept his apathy. I took steps to show the court that Chris deserved a mitigated disposition, including getting letters from Chris's school counselor about his academic and behavioral growth and a letter from the food pantry where he routinely volunteered. I also wrote a letter detailing how he had been affected by his own sexual victimization and how diligently he was working in therapy. I found a psychiatric facility for youth with sexualized behaviors and helped Chris's grandmother, still processing her feelings about whether and how to help her grandson, navigate the complex enrollment process. I called the lawyer back to suggest that we approach the prosecutor with these mitigation materials and a deal of our own that involved treatment instead of incarceration. "That's a terrific idea!" he said, as if it were his first time seeking a mitigated disposition.[6]

The judge listened intently as I explained our plan. Chris was given probation for a lesser charge and sent to treatment. While Chris smiled as his cuffs were removed, many other children across this country remain crying in a cell because their lawyers were well-meaning but overworked, apathetic,[7] or never trained to advocate for children. This Note is for those kids.

Nearly sixty years ago, *In re Gault*[8] guaranteed children in juvenile court the right to counsel.[9] Four years behind *Gideon v. Wainwright*,[10] which guaranteed the right to indigent adults,[11] the extension of the right to our society's most vulnerable was welcome news.[12] However, *Gault* left unfinished business, creating a right for children that was

6. See *infra* Part III.C for more discussion on the importance of mitigation in youth defense.

7. While some defenders, like Chris's, are apathetic, the vast majority are heroic—enduring secondary traumatic stress as they take on astronomical caseloads for abysmal pay. This Note seeks to draw attention to the *structural forces* that cause youth defenders to underperform, not to perpetuate the harmful and false stereotype that defenders are inherently apathetic and lazy.

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

9. *Id.* at 36.

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

11. *Id.* at 339–40.

12. TCR Staff, *Gault at 50: The Unfinished Business of Juvenile Justice*, CRIME REPORT: CTR. ON MEDIA CRIME & JUST. AT JOHN JAY COLL. (May 16, 2017), https://thecrimereport.org/2017/05/16/gault-at-50-the-unfinished-business-of-juvenile-justice [https://perma.cc/DC36-EBVL].

weaker than that of adults and failing to recognize how youth may require a more robust right to counsel.[13]

This Note is not the first to take issue with the anemic right to counsel in the juvenile context.[14] Nor is it the first to argue that the unique vulnerability of children demands a right to counsel that provides additional protections.[15] However, this Note appears to be the first to ground this argument in the Eighth Amendment revelation that "children are constitutionally different."[16] It also makes specific constitutional and policy recommendations for remedying the problems with Chris's representation and guaranteeing effective assistance for children.

This Note proceeds in three parts. Part I will outline the unique characteristics of juvenile court, what the right to counsel guarantees in this context, and the current state of youth defense. Part II will delve into the Eighth Amendment "children are different" cases and argue that the specific characteristics of youth that have compelled the Court to require additional protections for children in sentencing justify additional protections in the context of the right to counsel. Part III will make specific recommendations for how to expand the right to effective counsel for children, drawing on the characteristics of youth discussed in the Eighth Amendment cases. These recommendations are: requiring each jurisdiction to have a dedicated youth defender's office, which provides specialized training and supervision; eliminating common conflicts of interest, which are exacerbated when indigent parents are required to pay an hourly rate for their child's defense; making mitigation a mandatory component of effective representation; guaranteeing the right to postdisposition advocacy; moving toward a holistic defense model; and adopting a youth-specific standard for ineffective-assistance-of-counsel ("IAC") claims.

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13. *See* Barbara A. Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 775–76 (2010) (critiquing *Gault*). Part I will elaborate on the deficiencies of youth representation and how they affect children.

14. *See, e.g.*, *id.*; Mae C. Quinn, *Giving Kids Their Due: Theorizing a Modern Fourteenth Amendment Framework for Juvenile Defense Representation*, 99 IOWA L. REV. 2185, 2185 (2014).

15. *See, e.g.*, Fedders, *supra* note 13, at 771; Quinn, *supra* note 14, at 2185.

16. Miller v. Alabama, 567 U.S. 460, 471 (2012).

I. BACKGROUND: JUVENILE COURT AND CHILDREN'S RIGHT TO COUNSEL

In our nation's early history, a defendant's youth provided no meaningful protection, and young children were given draconian sentences in adult court.[17] In response, reformers at the turn of the twentieth century championed the creation of juvenile courts, arguing that children required a different system in which the child is an "object of [the state's] care and solicitude."[18] These courts did not see crimes committed by children as the child's fault but rather the fault of ill-equipped parents.[19] As a result, juvenile courts were designed not to punish but to rehabilitate, at least for white children.[20] Juvenile courts were to serve as *parens patriae*, acting in the child's best interest as a competent parent would to "save him from a downward career."[21] In 1899, Illinois established the first juvenile court,[22] and within twenty

17. *See* State v. Guild, 10 N.J.L. 163, 189–90 (1828) (holding that, aside from a jury's responsibility to be "more cautious" with a child's confession, the court should not grant any other protection to a twelve-year-old defendant and that sentencing him to execution, as if he were an adult, was proper); 4 WILLIAM BLACKSTONE, COMMENTARIES *24 (explaining that "sparing [a ten-year-old boy found guilty of murder] merely on account of his tender years, might . . . propagate a notion that children might commit such atrocious crimes, with impunity" and that all judges supported capital punishment in such a case).

18. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909).

19. *See id.* at 107 ("[T]he child . . . who has broken a law or an ordinance, is to be taken in hand by the state, not as an enemy but as a protector, as the ultimate guardian, because [of] either the unwillingness or inability of the natural parents to guide it toward good citizenship . . . .").

20. *Id.* ("[It is] the duty of the state . . . not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen."). Despite the benevolent rhetoric from many early reformers, the rehabilitative efforts of the juvenile system were reserved for white children, while children of color were often treated more punitively in the juvenile system or funneled into the adult system. *See* GAULT CTR., CAUSE OF ACTION: FULFILLING THE PROMISES OF *GAULT* 5–10 (2022), https://defendyouthrights.org/wp-content/uploads/Cause-of-Action-Report.pdf [https://perma.cc/SH86-EV8L] (describing the "true history of juvenile courts"). For a more thorough exploration of the juvenile system's long history of over-surveilling and controlling youth of color, see generally Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679 (2002); KRISTIN HENNING, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH (2021); Tamar R. Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379 (2017). While the intersection of race and youth are critical, this Note does not focus on the role that race plays. Readers are encouraged to read the above cited articles for a more thorough exploration of how race has shaped the experience of children in the system.

21. Mack, *supra* note 18, at 120.

22. 1899 Ill. Laws 131.

years, all but three states followed suit.[23] Today, every state has a separate court for children.[24]

The concept of juvenile court, however, was fraught with contradiction from the start. While the creation of juvenile courts was itself a recognition that children need additional protection in the criminal process, the core procedural protections provided to criminal defendants were not initially provided in juvenile courts.[25] Reformers believed that "[t]he ordinary trappings of the court-room [were] out of place" and even impeded the "sympathetic spirit" of juvenile court.[26] In other words, "the apparent rigidities, technicalities and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded."[27] Reformers believed that the rehabilitative goals of juvenile court were better served by a less formal court atmosphere in which the judge can be "[s]eated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him."[28]

Sixty years later, in *In re Gault*, the Court considered whether the vision of a juvenile court—to serve as an informal *parens patriae*—justified the continued denial of procedural rights to children in juvenile proceedings.[29] In *Gault*, a fifteen-year-old boy was charged with making lewd phone calls to a neighbor.[30] He was not served with the petition against him.[31] He was not given notice of the specific facts alleged.[32] He was not informed of his rights against self-incrimination nor his confrontation rights.[33] He was not informed of a right to

23. ELLEN RYERSON, THE BEST LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT 81 (1978).

24. Nochem S. Winnet, *Fifty Years of the Juvenile Court: An Evaluation*, 36 A.B.A. J. 363, 363 (1950).

25. *See* Fedders, *supra* note 13, at 778–79 (collecting cases). One case cited by Fedders was *In re Santillanes*, 138 P.2d 503 (N.M. 1943), where the court denied procedural rights to children because juvenile court cases were not criminal but instead "special statutory proceedings." *Id.* at 508.

26. Mack, *supra* note 18, at 120.

27. *In re* Gault, 387 U.S. 1, 15 (1967).

28. Mack, *supra* note 18, at 120.

29. *Gault*, 387 U.S. at 13–18.

30. *Id.* at 4.

31. *Id.* at 5.

32. *Id.*

33. *Id.* at 10.

counsel.[34] While the maximum punishment in adult court would have been two months in jail, the purportedly rehabilitative juvenile court sentenced him to six years in what it described as "in all but name a penitentiary or jail."[35] Overruling the Arizona Supreme Court's denial of the family's habeas petition, the majority observed that "Juvenile Court history has again, demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principal and procedure" and that "due process standards, intelligently and not ruthlessly administered, will not . . . displace any of the substantive benefits of the juvenile process."[36] The Court held that, in any case in which the child's freedom could be curtailed, the Due Process Clause of the Fourteenth Amendment guaranteed the right to counsel.[37]

Despite the importance of extending the right to counsel to children, scholars have lamented the shortcomings of *Gault*. First, *Gault* restricted the right to counsel for children to the adjudication phase of the case,[38] making it narrower in scope than the right for adults.[39] Second, *Gault* failed to provide a right to the transcript of proceedings or a right to appeal,[40] making an IAC claim an even less sufficient remedy than it is in adult court.[41] Third, the Court failed to define "[t]he [a]mbiguous [r]ole of [p]arents," who often have conflicts of interests with their children.[42] Most importantly for this Note, the

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34. *Id.*

35. *Id.* at 61 (Black, J., concurring).

36. *Id.* at 18, 21.

37. *Id.* at 41. The right to notice, the privilege against self-incrimination, and the right to confrontation were also guaranteed. *Id.* at 33, 55, 56. The rights to an appeal and a transcript were not. *Id.* at 58. While not the focus of this Note, some have argued that the Court's decision in *Gault* and subsequent cases to entrench the youth right to counsel in the Due Process Clause of the Fourteenth Amendment instead of the Sixth Amendment may justify a more expansive conceptualization of the youth right to counsel. *See, e.g.*, Fedders, *supra* note 13, at 818 n.248.

38. *Gault*, 387 U.S. at 13.

39. *See* Marsha Levick & Neha Desai, *Still Waiting*: *The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel at All Stages of the Juvenile Court Process*, 60 RUTGERS L. REV. 175, 184–90 (2007) (comparing the temporal scope of the right in adult court, which applies at all "critical stages"—including probable cause, sentencing, and revocation hearings—to the right in juvenile court, which does not apply at the juvenile equivalent hearings—known as detention, disposition, and postdisposition hearings).

40. *Gault*, 387 U.S. at 58.

41. *See* Fedders, *supra* note 13, at 806–07 (outlining the "multitude of legal and practical factors [that] function to make it extremely difficult for juveniles to bring and prevail on IAC claims").

42. *Id.* at 788–90.

Court stopped short of holding that the vulnerabilities of children demand a *more* expansive right to counsel. While the Court did acknowledge that a child is an "easy victim of the law . . . and needs [counsel] on whom to lean lest the overpowering presence of the law, as he knows it, crush him,"[43] the Court "failed to consider . . . how [children's] cognitive and psychosocial underdevelopment would affect their ability to exercise their newly granted rights."[44]

Gault's limitations have yielded unacceptable outcomes for children. Though there are countless examples of highly effective youth defenders,[45] a recent meta-analysis found that, overall, children with lawyers are more likely to be sent to institutional placement than those who waive the right to counsel.[46] This meta-analysis should not be used to undercut the argument that every child should be appointed a lawyer for the entire duration of their case, as children with well-resourced and specialized defenders experience dramatic benefits.[47] Furthermore, children facing charges with a greater risk of out-of-home placement are more likely to have counsel appointed, and the attorney penalty observed in this meta-analysis could therefore be attributed to a failure to control for the severity of offense in many of these studies.[48] However, the fact that there is doubt about the utility of the average youth defender is deeply concerning.

Several structural obstacles contribute to the frequent ineffectiveness of youth counsel. First, juvenile court attorneys often have high caseloads and limited experience.[49] Historically, scholars

43. *Gault*, 387 U.S. at 45–46 (citing Haley v. Ohio, 332 U.S. 596, 599–60 (1948)).

44. Fedders, *supra* note 13, at 776; *see also* Donna M. Bishop & Hillary B. Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by* In re Gault, 60 RUTGERS L. REV. 125, 136 (2007) ("The Court erred in failing to recognize that procedures that succeed in securing fairness for adults may not be sufficient to secure fairness for children.").

45. *See infra* notes 227–30, 236 and accompanying text.

46. Stuti S. Kokkalera, Annmarie Tallas & Kelly Goggin, *Contextualizing the Impact of Legal Representation on Juvenile Delinquency Outcomes: A Review of Research and Policy*, 72 JUV. & FAM. CT. J. 47, 48 (2021).

47. *See infra* note 236 and accompanying text.

48. Kokkalera et al., *supra* note 46, at 60.

49. *Id.*; *see also* Katy McCarthy, *An Overwhelmed System: A Day in the Life of a Juvenile Public Defender*, JUV. JUST. INFO. EXCH. (Dec. 6, 2013), https://jjie.org/2013/12/06/in-california-a-day-in-the-life-of-a-juvenile-public-defender-and-his-clients [https://perma.cc/46W7-XM2H] (describing the challenges faced by a youth defender who "processe[d] approximately 200 different clients per month"); OFF. OF JUV. JUST. & DELINQ. PREVENTION, INDIGENT DEFENSE FOR JUVENILES 2 (2018), https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/

have argued that this can lead many youth defenders to neglect tasks essential to representation.[50] Recent assessments suggest that, due to systemic problems, the average youth defender continues to fail to communicate with clients outside of court,[51] investigate facts,[52] file pre-adjudication and discovery motions,[53] obtain experts,[54] and prepare for disposition hearings.[55] Second, attorneys may not understand whom they represent and be co-opted by a parent or feel "discouraged from acting in an adversarial manner, [and] instead coalesce" with the prosecutor or judge who wants the child institutionalized.[56] Third, only seven states statutorily require youth-specific training.[57] This leaves lawyers ill-equipped to handle the idiosyncrasies of representing children, including bench-trial litigation[58] and the challenges of communicating with children given their cognitive level and reluctance to trust adults.[59]

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indigent_defense_for_juveniles.pdf [https://perma.cc/F683-WVSY] (explaining that low compensation for youth defenders leads to high turnover).

50. Fedders, *supra* note 13, at 792–93.

51. *See, e.g.*, NAT'L JUV. DEF. CTR., ARIZONA BRINGING *GAULT* HOME: AN ASSESSMENT OF ACCESS TO AND QUALITY OF JUVENILE DEFENSE COUNSEL 28 (2018), http://defendyouthrights.org/wp-content/uploads/2018/09/Arizona-Assessment-NJDC.pdf [https://perma.cc/XG8Z-LYVK] ("A recurring problem in many jurisdictions across Arizona is the failure of attorneys to engage in meaningful communication with their clients . . . . [S]ome defenders do not talk to their clients at all . . . .").

52. *See, e.g.*, NAT'L JUV. DEF. CTR., UNDERVALUED: AN ASSESSMENT OF ACCESS TO AND QUALITY OF JUVENILE DEFENSE COUNSEL IN NEW HAMPSHIRE 30 (2020), http://defendyouthrights.org/wp-content/uploads/NewHampshire-Assessment-Web.pdf [https://perma.cc/2XM7-5U86] ("[S]ometimes there is an attitude about giving an investigator to juvenile cases because they are not deemed as important.").

53. *See, e.g.*, NAT'L JUV. DEF. CTR., OVERDUE FOR JUSTICE: AN ASSESSMENT OF ACCESS TO AND QUALITY OF JUVENILE DEFENSE COUNSEL IN MICHIGAN 32 (2020), http://defendyouthrights.org/wp-content/uploads/Michigan-Assessment-Web.pdf [https://perma.cc/2E7N-Z3VJ] ("Almost without exception, defenders interviewed said they 'seldom' or 'never' file pre-trial motions.").

54. *See, e.g.*, *id.* ("One referee noted that she has not seen an expert used in her 20 years on the juvenile delinquency bench.").

55. *See, e.g.*, NAT'L JUV. DEF. CTR., LIMITED JUSTICE: AN ASSESSMENT OF ACCESS TO AND QUALITY OF JUVENILE DEFENSE COUNSEL IN KANSAS 45 (2020) [hereinafter NAT'L JUV. DEF. CTR., KANSAS ASSESSMENT], http://defendyouthrights.org/wp-content/uploads/Kansas-Assessment-Web.pdf [https://perma.cc/WY94-7RGP] ("[D]efenders do not regularly challenge the dispositional plan recommended by probation or the county attorney.").

56. Kokkalera et al., *supra* note 46, at 60.

57. *Id.* at 60 fig.1.

58. Fedders, *supra* note 13, at 793.

59. *Id.* at 793–94.

Children who receive deficient defense face severe consequences.[60] Some may downplay the repercussions of poor representation in the juvenile context[61] since children are confined in places with euphemistic names like "Youth Development Center,"[62] and confinement typically cannot exceed the age of twenty-one.[63] However, all fifty states allow children to be transferred to adult court under certain circumstances, subjecting children to adult sentences and often adult facilities.[64] Furthermore, youth prisons have often been found to have high rates of sexual and physical abuse as well as neglectful solitary confinement.[65] Children who enter the juvenile court system have astronomical rates of trauma exposure,[66] changing the architecture of the brain[67] and making them more likely to engage in risky behaviors.[68] Instead of receiving proper treatment in their communities, children with substandard representation are often sent to facilities in which they incur additional trauma, making lifelong criminal legal system involvement more likely.[69] Studies have shown

60. *Id.* at 798.

61. *Id.* at 799.

62. *Youth Prisons: Juvenile Detention's Racial Disparity, Rampant, Violence and Lasting Damage*, NEWS BEAT: A SOCIAL JUSTICE PODCAST, https://www.usnewsbeat.com/youth-prisons [https://perma.cc/D4TL-Q6XC].

63. *See, e.g.*, UNIV. OF N.C. SCH. OF GOV'T, NC PROSECUTORS' RESOURCE ONLINE: 520.5 JUVENILE DISPOSITION, https://ncpro.sog.unc.edu/manual/520-5 [https://perma.cc/FQS6-U7HT].

64. Anne Teigen, *Juvenile Age to Adult Jurisdiction and Transfer to Adult Court Laws*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 8, 2021), https://www.ncsl.org/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws [https://perma.cc/5773-KBNE].

65. Carly B. Dierkhising, Andrea Lane & Misaki N. Natsuaki, *Victims Behind Bars: A Preliminary Study of Abuse During Juvenile Incarceration and Post-Release Social and Emotional Functioning*, 20 PSYCHOL. PUB. POL'Y & L. 181, 181 (2014) [hereinafter Dierkhising et al., *Victims Behind Bars*] (finding that 96.8 percent of children were exposed to some type of abuse or neglect while incarcerated).

66. Carly B. Dierkhising, Susan J. Ko, Briana Woods-Jaeger, Ernestine C. Briggs, Robert Lee & Robert S. Pynoos, *Trauma Histories Among Justice-Involved Youth: Findings from the National Child Traumatic Stress Network*, 4 EUR. J. PSYCHOTRAUMATOLOGY 1, 1, 4 (2013) (finding that up to 90 percent of court-involved children have experienced at least one traumatic event and that the average court-involved child experienced approximately five different types of trauma).

67. *See* J.D. Bremner, *Traumatic Stress: Effects on the Brain*, 8 DIALOGUES IN CLINICAL NEUROSCIENCE, 445–61 (2006) (explaining how trauma causes overdevelopment of the amygdala and underdevelopment of the prefrontal cortex).

68. *Effects*, NAT'L CHILD TRAUMATIC STRESS NETWORK, https://www.nctsn.org/what-is-child-trauma/trauma-types/complex-trauma/effects [https://perma.cc/DRF2-WN85].

69. *See* Dierkhising et al., *Victims Behind Bars*, *supra* note 65, at 1 (finding that children experiencing trauma while incarcerated were more likely to have persistent involvement in

that just one night in detention makes a child more likely to recidivate than a child not detained for the same charge.[70]

Finally, poor representation can expose children to collateral consequences.[71] Juvenile courts fail to fulfill their promise to "hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past."[72] Instead, adjudications can have profound effects on children's futures. Children with adjudications can be suspended and expelled from school, asked about their record on college and employment applications, and barred from public housing.[73] They can also be exposed to immigration consequences, lifetime sex offender registration, and more severe sentences in the adult system as a result of juvenile records.[74]

Deficient representation has particularly devastating effects for Black, Latine, and Native children, who are overrepresented in juvenile court[75] and are more likely to be detained,[76] formally petitioned,[77] transferred to adult court,[78] and removed from their community.[79]

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criminal activity); Bryanna Hahn Fox, Nicholas Perez, Elizabeth Cass, Michael T. Baglivio & Nathan Epps, *Trauma Changes Everything: Examining the Relationship Between Adverse Childhood Experiences and Serious, Violent and Chronic Juvenile Offenders*, 46 CHILD ABUSE & NEGLECT 163, 163 (2015) (finding that the higher the number of adverse childhood experiences, the higher the risk is of serious and chronic involvement in the criminal legal system).

70. *See* JUST. POL'Y INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES (2022), https://justicepolicy.org/wp-content/uploads/2022/02/06-11_rep_dangersofdetention_jj.pdf [https://perma.cc/AN5A-WBCT] (summarizing findings that youth detention increases recidivism). Not only does incarceration often make youth behavior worse, it is also generally not necessary in the first place. *See* OFF. OF JUV. JUST. & DELINQ. PREVENTION, PSYCHOSOCIAL MATURITY AND DESISTANCE FROM CRIME IN A SAMPLE OF SERIOUS JUVENILE OFFENDERS 1 (2015) (finding that "[t]he vast majority of juvenile offenders, even those who commit serious crimes, grow out of antisocial activity as they transition to adulthood").

71. Fedders, *supra* note 13, at 797–98.

72. *In re* Gault, 387 U.S. 1, 24 (1967).

73. NAT'L JUV. DEF. CTR., A JUVENILE DEFENDER'S GUIDE TO CONQUERING COLLATERAL CONSEQUENCES 2–4 (2018), http://defendyouthrights.org/wp-content/uploads/2018/10/Collateral-Consequences-Checklist-for-Juvenile-Defenders.pdf [https://perma.cc/K2NL-CC3Z].

74. *Id.*

75. NAT'L CTR. FOR JUV. JUST., JUVENILE COURT STATISTICS, 2020, at 21 (2023), https://ojjdp.ojp.gov/library/publications/juvenile-court-statistics-2020 [https://perma.cc/V7DD-ZCYQ].

76. *Id.* at 34.

77. *Id.* at 37.

78. *Id.* at 40.

79. *Id.* at 48.

II. EXTENDING THE EIGHTH AMENDMENT CHILDREN-ARE-DIFFERENT DOCTRINE

In a series of Eighth Amendment cases over the past two decades, the Supreme Court declared that "children are constitutionally different from adults for purposes of sentencing."[80] Starting with *Roper v. Simmons*,[81] the Court held that the Eighth Amendment bars capital punishment for children.[82] In *Graham v. Florida*,[83] the Court precluded the sentencing of children to life without parole ("LWOP") for non-homicide offenses.[84] Then, in *Miller v. Alabama*,[85] the Court banned all mandatory LWOP sentences for children under eighteen,[86] holding that LWOP can only be imposed in rare circumstances in which the court considers the child's "youth and attendant characteristics"[87] and still finds that the child is "irreparable."[88]

In these cases, the Court articulated three main "gaps between juveniles and adults" based on both "common sense" and newly emerging social science and neuroscience.[89] While these three distinct characteristics of children were announced in the context of sentencing, they also justify additional protections for children in the context of the right to effective counsel.

This Part is split into two sections. The first describes these three differences and briefly proposes changes to youth representation that must be made to account for these differences. The second section addresses skepticism that will likely be raised about applying the *Miller* cases to the right to counsel.

80. Miller v. Alabama, 567 U.S. 460, 471 (2012) (citing Roper v. Simmons, 543 U.S. 551, 569–70 (2005) and Graham v. Florida, 560 U.S. 48, 68 (2011)).

81. Roper v. Simmons, 543 U.S. 551 (2005).

82. *Id.* at 578.

83. Graham v. Florida, 560 U.S. 48 (2011).

84. *Id.* at 82.

85. Miller v. Alabama, 567 U.S. 460 (2012).

86. *Id.* at 479.

87. *Id.* at 483.

88. *Id.* at 479–80 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)).

89. *Id.* at 471.

A. The "Gaps Between Juveniles and Adults" and Their Relevance to Youth Defense

First, the *Miller* cases recognized that children have a "lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking."[90] This immaturity requires that youth defenders obtain specialized training and supervision in how to communicate at the cognitive and psychosocial level of children in order to provide effective assistance. Otherwise, children cannot understand their lawyer's advice and act accordingly. Part III.A will further explore the patchwork structure of youth defense systems, how this prevents youth defense specialization, and why dedicated youth defender's offices are needed so that lawyers can be trained and supervised to effectively counsel immature clients.

Second, the Court recognized that children "are more vulnerable . . . to negative influences and outside pressures, including from their family and peers."[91] The Court further noted that children "have limited contro[l] over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings."[92] Due to children's lack of control and vulnerability to influence, an effective lawyer for children must make sure that they are representing the child and not being influenced by these outside pressures, such as a family member who may not have the child's best interests in mind. Part III.B will further discuss changes that must be made to minimize these dangerous conflicts of interest.

The "limited control" that children experience also demands more holistic representation.[93] The Court recognized that children are often made more susceptible to delinquent behavior by "crime-producing settings."[94] While adults, who have more control over their environment, can choose to make changes in their life, children have more limited options.[95] Consequently, a holistic defense team with an

90. *Id.* (internal quotation marks omitted) (quoting *Roper*, 543 U.S. at 569).

91. *Id.* (internal quotation marks omitted) (quoting *Roper*, 543 U.S. at 569).

92. *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Roper*, 543 U.S. at 569).

93. *Id.* (internal quotation marks omitted) (quoting *Roper*, 543 U.S. at 569).

94. *Id.* (citing *Roper*, 543 U.S. at 569).

95. *Cf.* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1014 (2003) ("[A]s legal minors, [children] lack the freedom that adults have to extricate themselves from a criminogenic setting.").

imbedded social worker is essential.[96] The social worker can help children and their families cope with their difficult environment.[97] They can help them navigate psychological, interpersonal, and societal obstacles to the resources children need to rehabilitate in a community setting instead of in custody.[98] Part III.E will further explore the holistic model and its importance for making counsel for children effective.

Third, the Court recognized that a child's character is "less fixed" than that of an adult "and his actions less likely to be evidence of irretrievabl[e] deprav[ity]."[99] This greater capacity for change among children requires that counsel engage in vigorous postdisposition advocacy. If juvenile court is meant to be rehabilitative, and the Supreme Court has recognized that sentences should allow parole for children who demonstrate change, lawyers must meet with their clients after disposition to monitor such change. Further, they must petition the court if the state is failing to provide rehabilitative programming or if the child has successfully rehabilitated and deserves early release or termination of supervision. Part III.D will explore how the less-fixed nature of a child's character necessitates a right to postdisposition counsel.

The Court further explained that these "three significant gaps between juveniles and adults" based on "science and social science" research "lessen[] a child's 'moral culpability'."[100] While this revelation has potentially profound consequences for sentencing children, it does little if a child does not have counsel who engages in mitigation to demonstrate to the court how a child's immaturity, lack of control, and less-fixed character renders him less culpable. Part III.C will explore the reasons that mitigation is essential to effective counsel for children.

B. Addressing the Skeptics

Some may argue that the Court is unlikely to expand the children-are-different doctrine to the right-to-counsel context given that *Miller* was a 5-4 decision with a majority comprised of the four liberal justices and the swing vote of Justice Anthony Kennedy, who has since

96. *See infra* Part III.E.

97. *See infra* Part III.E.

98. *See infra* Part III.E.

99. *Miller*, 567 U.S. at 471 (alteration in original) (internal quotation marks omitted) (quoting *Roper*, 543 U.S. at 570).

100. *Id.* at 471–72 (quoting Graham v. Florida, 560 U.S. 48, 68 (2011)).

retired.[101] This skepticism is bolstered by the Court's recent decision in *Jones v. Mississippi*.[102] In *Jones*, the Court held that, in exercising its discretion to impose juvenile life without parole ("JLWOP"), the sentencing court is not required to make a separate factual finding of permanent incorrigibility or state on the record the reasons for an implicit finding of permanent incorrigibility.[103] This procedural change, empowering judicial discretion to impose JLWOP without explicit justification, has been deemed the "quiet burial of the *Miller* trilogy."[104]

While *Jones* indeed limits *Miller* and shows the Court trending away from an expansive interpretation of the children-are-different doctrine, the Court's reasoning actually strengthens the argument that a more robust right to counsel is needed for children. The defendant in *Jones* argued that a sentencing court fails its obligations under *Miller* to consider youth when sentencing a child to JLWOP if it does not provide an on-the-record sentencing explanation of a finding of incorrigibility.[105] However, the Court rejected this claim, holding that "an on-the-record sentencing explanation is not necessary to ensure that a sentencer considers a defendant's youth," emphasizing that judges will still consider youth, "especially if *defense counsel* advances an argument based on the defendant's youth."[106] Furthermore, the Court explained,

> If defense counsel fails to make the sentencer aware of the defendant's youth . . . . the defendant may have a potential [IAC] claim, not a *Miller* claim—just as defense counsel's failure to raise relevant mitigating circumstances in a death penalty sentencing proceeding can constitute a potential ineffective-assistance-of-counsel problem . . . .[107]

Thus, by putting the responsibility on counsel to demonstrate why a defendant's "youth and attendant characteristics" should mitigate his

101. *Id.* at 463.

102. Jones v. Mississippi, 141 S. Ct. 1307 (2021).

103. *Id.* at 1311, 1319.

104. Cara H. Drinan, Jones v. Mississippi *and the Court's Quiet Burial of the* Miller *Trilogy*, 19 OHIO ST. J. CRIM. L. 181, 186–88 (2021).

105. *Jones*, 141 S. Ct. at 1311, 1319.

106. *Id.* at 1319 (emphasis added).

107. *Id.* at 1319 n.6.

sentence,[108] the Court may have weakened *Miller*, but it also indicated that youth matters in defining the right to effective counsel.

Additionally, even if the U.S. Supreme Court is trending away from the children-are-different doctrine, state courts have continued to expand it.[109] The U.S. Supreme Court "create[s] a floor, but not a ceiling," and state courts can define their state constitutional amendments to be more expansive than the federal amendments.[110] In recent years, some states have held that the Eighth Amendment bar on mandatory JLWOP extends to defendants who are eighteen[111] or as old as twenty.[112] Some states have held that the Eighth Amendment prohibits mandatory de facto JLWOP sentences in which there is technically a possibility of parole but not until the child becomes geriatric or statistically likely to be dead.[113] Other states have held that the Eighth Amendment not only bars *mandatory* JLWOP but *all* JLWOP sentences.[114] Iowa even held that mandatory sentences for children were unconstitutional across the board.[115] Thus, even if the Court is walking back children-are-different jurisprudence, state courts could be the vanguard of expanding the doctrine to new frontiers such as the right to counsel.

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108. *Id.* at 1316, 1319 n.6. While *Jones* focuses on counsel's obligation to direct attention to a defendant's youth, *id.*, *Miller* requires a broader consideration of "youth and [its] *attendant characteristics*," *Miller*, 567 U.S. at 483 (emphasis added). This is because "youth is more than a chronological fact," and a court must also consider "the background and mental and emotional development of a youthful defendant." *Id.* at 476 (citing Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982)). Thus, by the reasoning in *Jones*, counsel must also bring up the child's mental and emotional development if the court is not required to do so.

109. Douglas Keith & Madiba Dennie, *State Courts Advance Protections for Young Defendants Even as SCOTUS Slows Progress*, BRENNAN CTR. FOR JUST. (Nov. 17, 2022), https://www.brennancenter.org/our-work/analysis-opinion/state-courts-advance-protections-young-defendants-even-scotus-slows [https://perma.cc/7XJ9-GHY6]; Mark Denniston & Christoffer Binning, *The Role of State Constitutionalism in Determining Juvenile Life Sentences*, 17 GEO J.L. & PUB. POL'Y 599, 613 (2019).

110. State v. Sweet, 879 N.W.2d 811, 832 (Iowa 2016) (justifying its holding that the eighth amendment of the Iowa constitution categorically bars juvenile life without parole).

111. *E.g.*, People v. Parks, 987 N.W.2d 161, 164–65 (Mich. 2022).

112. *E.g.*, *In re* Pers. Restraint of Monschke, 482 P.3d 276, 281 (Wash. 2021).

113. *E.g.*, State v. Null, 836 N.W.2d 41, 71–72 (Iowa 2013); Bear Cloud v. State, 334 P.3d 132, 141–42 (Wyo. 2014); State v. Haag, 495 P.3d 241, 243 (Wash. 2021); State v. Kelliher, 873 S.E.2d 366, 370 (N.C. 2022).

114. *See, e.g.*, Diatchenko v. Dist. Att'y for the Suffolk Dist., 1 N.E.3d 270, 284–85 (Mass. 2013); *Sweet*, 879 N.W.2d at 839.

115. State v. Lyle, 854 N.W.2d 378, 400 (Iowa 2014).

Other skeptics may argue that expanding the children-are-different doctrine to the right to effective counsel is too big a stretch since the doctrine is confined to Eighth Amendment sentencing cases.[116] However, there is already precedent of children-are-different analysis in the context of more procedural constitutional rights. For example, *Miller* relied heavily on *J.D.B. v. North Carolina*,[117] which held that children are also different in the context of the Fifth Amendment.[118] In *J.D.B.*, a thirteen-year-old boy moved to suppress a confession that he made after he was removed from his classroom and questioned by school administrators and police about a burglary.[119] The boy was not informed of his rights pursuant to *Miranda v. Arizona*,[120] nor was he informed that he was free to leave.[121] The child argued that a reasonable person of his age would not know he was free to leave and that therefore a *Miranda* warning was necessary.[122] The North Carolina Supreme Court declined to extend the *Miranda* custody analysis to include consideration of the suspect's age.[123] Citing *Roper* and *Graham*'s articulation of how children are different throughout the opinion, the U.S. Supreme Court reversed, holding that "children will often feel bound to submit to police questioning when an adult . . . would feel free to leave."[124] Therefore, children's "vulnerab[ility] and susceptib[ility] to . . . outside pressures,"[125] made them different, not just for the Eighth Amendment but also for Fifth Amendment custody analysis.[126] Both before and after *J.D.B.*, several states used similar

116. *See* J.D.B. v. North Carolina, 564 U.S. 261, 295 (2011) (Alito, J., dissenting) (implying that the Eighth Amendment holdings are "inapposite" to whether children require additional protections in the context of other rights).

117. J.D.B. v. North Carolina, 564 U.S. 261 (2011).

118. *See id.* at 265 ("[W]e hold that a child's age properly informs the *Miranda* custody analysis.").

119. *Id.* at 265–67.

120. Miranda v. Arizona, 384 U.S. 486 (1966). If a suspect is in police custody, the Fifth Amendment requires that a suspect subject to interrogation be informed of their right to remain silent, that anything they say can be used against them, of their right to an attorney, and that the court will appoint an attorney if they cannot afford one. *Id.* at 471. If the government fails to provide these warnings, it cannot use subsequent statements made by the suspect. *Id.* at 471–72.

121. *J.D.B.*, 564 U.S. at 266.

122. *See id.* at 267–68 (noting that the child argued that he was in a "custodial setting").

123. *Id.* at 268.

124. *Id.* at 264–65.

125. *Id.* at 272 (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)).

126. *Id.* at 264–65.

reasoning to expand the doctrine further to set forth a "reasonable child standard" for Fourth Amendment seizure analysis.[127]

J.D.B. and these state Fourth Amendment cases are not outliers that transplant the children-are-different doctrine far afield from its home in Eighth Amendment jurisprudence. In fact, *J.D.B.* stands on the shoulders of criminal procedure cases from half a century before the children-are-different doctrine was applied to sentencing. Both *J.D.B.* and the *Miller* cases cited *Haley v. Ohio*[128] in which the Court considered a fifteen-year-old defendant's youth in determining that his confession was coerced.[129] In *Gallegos v. Colorado*,[130] the Court considered whether a fourteen-year-old's confession, which was signed after the child had been in custody for five days, violated due process.[131] While the police said that they informed him of his right to counsel, he did not consult with counsel or his family.[132] The Court held that, even though he was informed of his right to counsel, his age precluded him from "know[ing] how to protect his own interests or how to get the benefits of his constitutional rights."[133]

Together, *Haley* and *Gallegos* not only show that the children-are-different analysis is not confined to Eighth Amendment jurisprudence. They also underscore that the right to counsel is particularly important to children. As "easy victim[s] of the law," the Court emphasized that children "need[] [counsel] on whom to lean lest the overpowering presence of the law . . . crush [them]."[134] Ironically, *In re Gault* also quoted this line from *Haley* to show the importance of extending the right to counsel to children,[135] but it failed to spell out how counsel

127. *E.g.*, Hunt *ex rel.* DeSombre v. State, 69 A.3d 360, 366 (Del. 2013); F.E.H. v. State, 28 So. 3d 213, 216–17 (Fla. Dist. Ct. App. 2010); People v. Lopez, 892 N.E.2d 1047, 1064–65 (Ill. 2008); *In re* I.R.T., 647 S.E.2d 129, 134 (N.C. Ct. App. 2007). *See generally* Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513 (2018) (summarizing the extension of the reasonable-child standard in the Fourth Amendment context and arguing for a standard that takes into account how Black children respond to police due to the differential treatment they experience).

128. Haley v. Ohio, 332 U.S. 596 (1948).

129. *Id.* at 599–600.

130. Gallegos v. Colorado, 370 U.S. 49 (1962).

131. *Id.* at 59–60.

132. *Id.* at 54.

133. *Id.*

134. *Id.* at 53 (quoting *Haley*, 332 U.S. at 599–600).

135. *In re* Gault, 387 U.S. 1, 46 (1967) (quoting *Haley*, U.S. at 600).

needed to be different to protect the heightened vulnerability of children.

If any doubt remains that the children-are-different doctrine can be expanded from its recent focus on the Eighth Amendment, *Miller* itself acknowledges that taking youth into account when defining legal rights and liabilities is not an "oddity in the law."[136] "To the contrary," the Court explained, "'[o]ur history is replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults."[137] "Indeed," the Court in *Miller* explained, "it is the odd legal rule that does *not* have some form of exception for children."[138] *Miller* acknowledged that children have long been treated differently in the context of criminal law,[139] property,[140] contracts,[141] and torts.[142] Thus, expanding the idea that children are different to sentencing was not a radical concept—it was a long overdue step to bring sentencing in line with other areas of the law. Now is the time to do the same for the right to effective counsel.

III. SPECIFIC RECOMMENDATIONS FOR MAKING COUNSEL FOR CHILDREN EFFECTIVE

Reimagining a right to effective counsel for children that better accounts for their unique vulnerabilities is a daunting task. This Part proposes constitutional and policy reforms on the federal, state, and local levels—some more immediately feasible and others more aspirational. It recalls the barriers to effective counsel that Chris faced and uses the *Miller* cases' articulation of how children are different to justify tangible changes to how children are represented.

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136. Miller v. Alabama, 567 U.S. 460, 481 (2012).

137. *Id.* (alteration in original) (quoting J.D.B. v. North Carolina, 564 U.S. 261, 274 (2011)).

138. *Id.*

139. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *464–65 (explaining that limits on children's capacity under the common law "secure them from hurting themselves by their own improvident acts").

140. *See, e.g.*, *J.D.B.*, 564 U.S. at 273 (noting "limitations on [children's] ability to alienate property").

141. *See, e.g.*, *id.* (noting the "limitations on [children's] ability to . . . enter a binding contract").

142. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 10 cmt. b (AM. L. INST. 2010) (noting that, in negligence actions, "[a]ll American jurisdictions accept the idea that a person's childhood is . . . relevant" in defining reasonable person conduct).

A. Require Each Jurisdiction To Have a Dedicated Youth Defender

Chris needed someone who could defend him from a transfer to adult court and lifetime sex registration. Yet there was no public defender in Chris's county. Instead, Chris was appointed a private attorney who contracted with the state on a case-by-case basis. He had no training, supervision, or passion specific to public defense, let alone the defense of children.

Sadly, Chris's experience is not unusual. *Gault* left the decision of how to provide counsel to indigent children to the states, which further delegated those decisions to counties and sometimes to individual courts.[143] This "created a patchwork of approaches and systems for ensuring appointed counsel, meaning that the protection of children's constitutional right to counsel varies greatly depending on where in the country" they face charges.[144] While some states and counties have organized public defender offices, most indigent children are represented by contract counsel rather than public defenders.[145] These (often solo) practitioners "do not benefit from the structure, management, oversight, training, mentorship, or support of a salaried public defender system."[146] Of course, "talented lawyers practice in each type of defense system."[147] However, empirical comparisons, some focusing on the juvenile context, have found that people represented by contract attorneys suffer worse legal outcomes.[148]

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143. NAT'L JUV. DEF. CTR., BROKEN CONTRACTS: REIMAGINING HIGH-QUALITY REPRESENTATION OF YOUTH IN CONTRACT AND APPOINTED COUNSEL SYSTEMS 7 (2019) [hereinafter NAT'L JUV. DEF. CTR., BROKEN CONTRACTS], https://njdc.info/wp-content/uploads/NJDC_Broken_Contracts-Report-WEB.pdf [https://perma.cc/57QA-WH65].

144. *Id.*

145. *Id.* at 7. Non–public defender counsel can be referred to as "contract counsel," "appointed counsel" or "assigned counsel." *Id.* at 9. There are differences between these models of representation, *id.*, but this Note refers to the larger category as "contract counsel."

146. *Id.* at 7.

147. *Id.* at 9.

148. Cyn Yamashiro, Tarek Azzam & Igor Himmelfarb, *Kids, Counsel and Costs: An Empirical Study of Indigent Defense Services in the Los Angeles Juvenile Delinquency Courts*, 49 CRIM. L. BULL., no. 6, 2013, at 2; Miriam S. Gohara, James S. Hardy & Damon Todd Hewitt, *The Disparate Impact of an Under-funded, Patchwork Indigent Defense System on Mississippi's African Americans: The Civil Rights Case for Establishing a Statewide, Fully Funded Public Defender System*, 49 HOW. L.J. 81, 88–89, 94–95 (2005); Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 13187, 2007); James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 154 (2012); Thomas H. Cohen, *Who is Better at Defending Criminals? Does Type of Defense Attorney Matter*

The lack of specialized training and support for contract counsel is especially problematic in the juvenile context. The *Miller* cases identified a "lack of maturity and an underdeveloped sense of responsibility" as the first difference between children and adults.[149] This cognitive and psychosocial immaturity means lawyers need to have the skills and devote the time to explain to children their legal situations and how to adjust their behavior. Unfortunately, lawyers often do not have these skills,[150] nor do they devote the time to explain.[151] State assessments of youth representation have noted that children often "have no idea what [is] happening or how it [is] going to affect [them]" because the "defenders' abilities to communicate well with youth clients varies greatly."[152] Recall Chris and his perseveration on his new puppy. The research shows that there are many children like him whose attorneys fail to adequately communicate with them, leaving them "confused by the court process and upset by [the] results."[153]

Furthermore, the "special difficulties encountered by counsel in juvenile representation" are not limited to the challenges of communicating at the right cognitive level.[154] In *Graham*, the Court identified that, due to their developmental stage, children are "reluctan[t] to trust defense counsel" and "less likely . . . to work effectively with their lawyers to aid in their defense."[155] Thus, a youth defender not only needs to know how to explain complex legal situations with words that children understand but also how to

in Terms of Producing Favorable Case Outcomes, 25 CRIM. JUST. POL'Y REV. 29, 29 (2014); Michael A. Roach, *Indigent Defense Counsel, Attorney Quality, and Defendant Outcomes*, 16 AM. L. & ECON. REV. 577, 577 (2014).

149. Miller v. Alabama, 567 U.S. 460, 471 (2012) (internal quotation marks omitted) (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)).

150. *See* Kokkalera et al., *supra* note 46, at 64 (explaining that "[o]nly seven states have statutes which promulgate specific training requirements for juvenile defenders" and that "[s]tates which have decentralized public defender agencies may lack uniformity in training and standards"); NAT'L JUV. DEF. CTR., KANSAS ASSESSMENT, *supra* note 55, at 33 (discussing one probation officer's perception that defenders fail "to communicate with their clients in youth-specific language: 'Those big beautiful words you use with adults, you can't use with kids'").

151. *See, e.g.*, NAT'L JUV. DEF. CTR., KANSAS ASSESSMENT, *supra* note 55, at 32 (finding that lawyers often meet with clients for only five to fifteen minutes prior to the first hearing if at all).

152. *Id.*

153. *Id.* (describing lawyers who failed to explain to children that they were going to be sent to a facility or that their plea deal included sex offender registration).

154. Graham v. Florida, 560 U.S. 48, 78 (2010).

155. *Id.*

overcome the distrust that adolescents, especially those with trauma,[156] have toward adults. Without lawyers who have received specialized training to develop both skills, children will remain confused about the proceedings against them and how to collaborate with counsel.

Leaving kids in this state of confusion and distress is not only wrong, but it can also contribute to worse legal outcomes, such as being held in contempt or having probation extended or revoked for inappropriate behavior in detention, court, or while on community supervision. For Chris, it was crucial that his social worker was there to fill the void left by the contract counsel, who never visited or communicated with him outside of court. Chris's acceptance to an alternative treatment program and the judge's approval of it was dependent on Chris's behavior in detention and his agreement to go to treatment and take it seriously. Only someone experienced in working with children with trauma could assist Chris in adjusting his behaviors to avoid prison time and sex registration. Chris's nonspecialized lawyer lacked this experience.

While the ultimate goal should be to establish dedicated youth defenders in every jurisdiction, there are other more incremental steps that can be taken in the meantime. There are a variety of contract-counsel-system structures that provide a range of oversight.[157] On one end of the spectrum are states with alternative defense agencies, which manage contracts and appointments.[158] These centralized offices generally provide the most support and oversight for non–public defenders.[159] On the other end of the spectrum are discretionary judicial appointment systems in which there are no formal contracts or minimum qualifications.[160] Even within decentralized structures, the Gault Center (formerly the National Juvenile Defender Center ("NJDC")) argues that "changes can be made to improve management and oversight," such as requiring that contract counsel attain "[s]pecialized knowledge of juvenile court" and "ongoing continuing legal education [about] . . . the science of adolescent development,

156. *See Effects*, NAT'L CHILD TRAUMATIC STRESS NETWORK, https://www.nctsn.org/what-is-child-trauma/trauma-types/complex-trauma/effects [https://perma.cc/V6CF-ZMZU] ("Having learned that the world is a dangerous place where even loved ones can't be trusted to protect you, [trauma-exposed] children are often vigilant and guarded in their interactions with others . . . .").

157. NAT'L JUV. DEF. CTR., BROKEN CONTRACTS, *supra* note 143, at 11.

158. *Id.*

159. *Id.*

160. *Id.*

educational issues impacting delinquency cases, and adolescent mental health issues."[161] In the long run, however, states should opt for the greater oversight afforded by the statewide alternative defense agencies as they work towards establishing a dedicated juvenile defender's office in every county.

The Department of Justice ("DOJ") can also play a role in pushing states to move toward youth defense systems with more specialized training, support, and oversight. Recognizing that the 1994 Crime Bill would thrust more children into the court system and exacerbate already staggering racial disparities, Congress passed 34 U.S.C. § 12601.[162] This statute empowers the attorney general to sue "any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles" for the "pattern or practice" of depriving children of their constitutional rights.[163] Since its enactment, the DOJ has initiated three suits under this statute and intervened in nine private suits.[164] Despite such limited use, the DOJ has achieved meaningful results in disputes ranging from conditions of confinement to the inadequacy of youth representation.[165] In *N.P. v. Georgia*,[166] the DOJ filed a statement of interest in a class action against a county defender and helped secure a settlement to increase staffing, establish a youth-specific division, and require specialized training on how to effectively represent youth.[167] Advocates in areas without dedicated youth defender's offices should collaborate with the DOJ to bring suits that can call for specialization and state oversight.

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161. *Id.* at 11, 17.

162. GAULT CTR., *supra* note 20, at 11–12. "The 1994 crime bill has been widely acknowledged as one of the factors fueling mass incarceration during the late 1990s and early 2000s. Section 12601, however, has been instrumental in challenging patterns or practices that deprive individuals of their constitutional or federal rights." *Id.* at 11 n.60.

163. 34 U.S.C. § 12601(a).

164. GAULT CTR., *supra* note 20, at 12–13.

165. *Id.* at 13–14 (summarizing "DOJ actions [that have] triggered significant systemic reform efforts to the delivery of youth defense and have proven to be a powerful tool in uncovering and uprooting systemic violations of children's right to counsel").

166. N.P. *ex rel.* Darden v. State, No. 2014-CV-241025 (Ga. Super. Ct. consent decree approved Apr. 20, 2015).

167. *See generally* Statement of Interest of the United States, N.P. *ex rel.* Darden v. State, No. 2014-CV-241025 (Ga. Super. Ct. Mar. 13, 2015) [hereinafter *N.P.* Statement of Interest]; Consent Decree at 3, 6–7, N.P. *ex rel.* Darden v. State, No. 2014-CV-241025 (Ga. Super. Ct. Apr. 20, 2015).

B. Eliminate Common Conflicts of Interest

Youth defenders are particularly vulnerable to conflicts of interest, and children need additional protections to ensure that their lawyer is truly representing them and not an adult family member. The duty of loyalty is an essential component of the right to effective counsel—so much so that, in the adult context, a conflict of interest triggers a "rigid rule of presumed prejudice" under *Strickland v. Washington*.[168] Yet, despite the dangers that conflicts pose, *Gault* failed to require youth defenders to avoid the common conflicts that arise in juvenile court, namely those with parents.[169] The lower court in *Gault* argued that children generally do not need lawyers because parents and probation officers can look out for their best interests.[170] However, the lower court noted that situations in which there is a "conflict between the child and his parents" may call for the court to appoint a lawyer, implying that such conflicts render children particularly vulnerable.[171] When the Supreme Court held that access to counsel could not be discretionary, it failed to acknowledge this potential conflict and to put limits on the role of parents, instead giving them significant power to control their children's representation.[172]

The conflicts stemming from the ill-defined role of parents in youth representation take many forms. On a basic level, what parents consider to be in their child's best interest may conflict with the child's expressed interest.[173] For example, parents may believe that a child should receive a harsh consequence to teach their kid a lesson or get

168. Strickland v. Washington, 466 U.S. 668, 692 (1984) (describing the duty of loyalty as "perhaps the most basic of counsel's duties" and making a violation of it one of the few presumptive showings of prejudice in the second prong of an IAC claim).

169. *See* Fedders, *supra* note 13, at 788–90 (summarizing the "[a]mbiguous [r]ole of [p]arents" in the representation of juveniles in the wake of *Gault*).

170. *In re* Gault, 387 U.S. 1, 35 (1967).

171. *Id.*

172. *See id.* at 42 (implying that parents have the right to waive their child's right to counsel).

173. *See* Margareth Etienne, *Managing Parents: Navigating Parental Rights in Juvenile Cases*, 50 CONN. L. REV. 61, 85 (2018) (describing how parents encourage their children to confess to crimes even though that may not be in the child's best interest). The question of how parental rights and children's rights interact in the context of youth representation is complex and has long generated controversy. For an exploration of this tension, see generally *id.* Additionally, it is important to note that "the binary choice between parental inclusion and exclusion is . . . too simplistic a framework," and in many circumstances, parental involvement can be critically helpful without interfering with the defender's loyalty to the child client. *Id.* at 86, 89.

them out of their home.[174] In other situations, parents may have a more direct conflict in which they are witnesses or victims in the case against their child.[175] Parents may even be a potential codefendant and direct their child's representation in a way that minimizes the parent's legal exposure.[176] Recognizing these conflicts, scholars and youth-defense training groups have endorsed expressed-interest representation to minimize the influence of parents and court actors with conflicting interests.[177]

These conflicts are exacerbated by the common practice of making parents pay for their indigent child's representation.[178] Consider how Chris's grandmother felt. She was already deeply conflicted about engaging with her grandson's lawyer since her grandson was charged with raping her granddaughter. Her ambivalent engagement with the lawyer was magnified when she learned that she, a minimum-wage worker supporting four kids, would pay an hourly rate. Research shows that this financial burden posed on already indigent families causes parents to encourage less vigorous defenses, often avoiding trial or other types of intensive legal advocacy.[179] Sometimes these financial burdens cause parents to waive the right to counsel altogether.[180] In adult court, safeguards are put into place to prevent third-party payers

174. Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 315 (2003).

175. Erika Fountain & Jennifer L. Woolard, *The Capacity for Effective Relationships Among Attorneys, Juvenile Clients, and Parents*, 14 OHIO ST. J. CRIM. L. 493, 510 (2017).

176. *See* Tamar R. Birckhead, *Culture Clash: The Challenge of Lawyering Across Difference in Juvenile Court*, 62 RUTGERS L. REV. 959, 981 (2010) [hereinafter Birckhead, *Culture Clash*] (describing how "most parents of juveniles are, at best, conflicted" about whether to assist with their child's case, while others may have a direct conflict of interest); Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1502–03 (2009) (noting that parents may "interfer[e] with or sabotag[e] candid communication between the juvenile and her lawyer").

177. Birckhead, *Culture Clash*, *supra* note 176, at 962, 967–68 (summarizing the recent support for representing the child's expressed interest—"what the youth says she wants"—instead of the child's "best interest as determined by counsel, the client's parents . . . , the probation officer, . . . prosecutor, or . . . judge" (internal quotation marks omitted)).

178. *See* JUV. L. CTR., THE PRICE OF JUSTICE: THE HIGH COST OF "FREE" COUNSEL FOR YOUTH IN THE JUVENILE JUSTICE SYSTEM 7–9 (2018), https://debtorsprison.jlc.org/documents/JLC-Debtors-Price-of-Justice.pdf [https://perma.cc/CQ8G-XS54] (showing that forty states have statutes permitting or requiring families to pay in some form for indigent-youth defense).

179. *Id.* at 11.

180. *Id.*

from directing representation.[181] Yet such safeguards do not appear to exist in juvenile court, where the payment scheme makes conflicts of interest particularly likely.[182]

As discussed in the *Miller* cases, children "are more vulnerable . . . to negative influences and outside pressures, including from their family and peers . . . [and] have limited control over their own environment."[183] Consequently, in order to be effective, attorneys must not become overly influenced by the same outside pressures as their clients and must restore a sense of control to children in directing their representation. To this end, states should presume indigency[184] and ban requirements that indigent parents pay for representation due to the conflicts that so frequently arise. States should mandate training and supervision on expressed-interest practice. Finally, courts should join those who mandate that a youth defender's "singular loyalty [must be] to the defense of the juvenile" to meet the standard for effective counsel.[185]

C. Make Mitigation Mandatory

The purported purpose of juvenile court is to focus on the underlying causes of a child's behavior.[186] However, the prosecutor, court counselor, and judge did not know about nor seek to learn about Chris's trauma history. Neither did Chris's lawyer. If a social worker had not been there to help the court connect the dots between Chris's

181. *See* MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 13, 1.8(f) (AM. BAR ASS'N 2023) (noting the safeguards that need to be followed with third-party payers); *In re* State Grand Jury Investigation, 983 A.2d 1097, 1105–06 (N.J. 2009) (creating a six-part test to prevent third-party payers from directing representation).

182. *See* NAT'L JUV. DEF. CTR., ACCESS DENIED: A NATIONAL SNAPSHOT OF STATES' FAILURE TO PROTECT CHILDREN'S RIGHT TO COUNSEL 9–11 (2017) [hereinafter NAT'L JUV. DEF. CTR., ACCESS DENIED], https://njdc.info/wp-content/uploads/2017/05/Snapshot-Final_single-4.pdf [https://perma.cc/5CYW-2KBD] ("[I]f parents incur the cost of representation, there is potential for conflict between the juvenile defender's loyalty to the child and perception of loyalty to the parents . . . .").

183. Miller v. Alabama, 567 U.S. 460, 471 (2012) (internal quotation marks omitted) (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)).

184. Only eleven states provide children with attorneys regardless of income, leaving many children without an attorney while indigency is being determined and some without representation altogether. *See* NAT'L JUV. DEF. CTR., ACCESS DENIED, *supra* note 182, at 9–11.

185. People v. Austin M., 975 N.E.2d 22, 40 (Ill. 2012).

186. *See* Mack, *supra* note 18, at 107 (criticizing the adult system: "It did not aim to find out what the accused's history was, what his heredity, his environments, his associations; it did not ask how he had come to do the particular act which had brought him before the court").

own sexual trauma and the rape of his cousin, thirteen-year-old Chris could have been imprisoned in a juvenile facility until he was twenty-one or even transferred to adult court and put on a lifetime sex offender registry.

The children-are-different doctrine requires lawyers to engage in mitigation[187] because the doctrine is not just about youth; it is about how trauma and youth interact. Like Chris's lawyer, the trial lawyers in *Roper* and *Graham* also failed to present mitigation evidence.[188] However, the Supreme Court focused on the youth defendants' trauma histories[189] in vacating their sentences and holding that children's "lack of maturity," diminished "control over their own environment," and "less fixed" traits make them overall less "moral[ly] culpab[le]" than adults.[190] Furthermore, the Court in *Miller* made clear that "youth is more than a chronological fact" and that sentencing courts must consider not only the "offender's age" but also "the wealth of *characteristics and circumstances attendant to it*." [191] These circumstances include trauma histories such as whether the child is from a "stable household" or a "chaotic and abusive one."[192] In other words, "[j]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental

187. "Mitigation is a complex, multi-pronged approach to preparing for sentencing" and other stages in which liberty is threatened. W. VA. PUB. DEF. SERVS., OVERVIEW OF MITIGATION AND THE CLIENT INTERVIEW 1 [hereinafter W. VA. PUB. DEF. SERVS., OVERVIEW OF MITIGATION], https://pds.wv.gov/attorney-and-staff-resources/Documents/1587491866_What%20is%20mitigation.pdf [https://perma.cc/4BQ7-PP73]. Mitigation begins with the collection of records, including educational and mental health records, and interviewing the client, their family, and other community members about the client's positive attributes and trauma history. *Id.* at 2–6. Mitigation can also include retaining experts to explain the client's behavior and putting together a plan as an alternative to incarceration that can involve treatment, education, employment, and stable housing. *Id.* at 7–8; *see also* W. VA. PUB. DEF. SERVS., COMMON THEMES: MITIGATION FOR THE NEGATIVE AND THE POSITIVE, https://pds.wv.gov/attorney-and-staff-resources/Documents/1619014031_Mitigation%20Themes%20handout.pdf [https://perma.cc/J2VQ-ASEZ] (outlining the various protective factors that can be presented to show potential for future stabilization). Finally, mitigation involves presenting the client's history and future plans through compelling written and oral argument to the court. W. VA. PUB. DEF. SERVS., OVERVIEW OF MITIGATION, *supra* note 187, at 8.

188. Beth Caldwell, *Appealing to Empathy: Counsel's Obligation To Present Mitigating Evidence for Juveniles in Adult Court*, 64 ME. L. REV. 391, 395–96 (2012).

189. *Id.* at 395–97.

190. Miller v. Alabama, 567 U.S. 460, 471–72 (2012) (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005)).

191. *Id.* at 476 (emphasis added) (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

192. *Id.* at 477.

and emotional development of a youthful defendant be duly considered in assessing his culpability."[193]

Yet how can a court consider trauma history if there is no lawyer who raises it? Several scholars have argued that effective representation for children should include mitigation in JLWOP cases and other circumstances in which children are tried as adults.[194] These arguments analogize to the requirement that lawyers must engage in mitigation in death penalty cases.[195] Some may argue that "death is different" and that this requirement cannot be extended to noncapital cases.[196] However, the same argument was made in response to the idea of extending Eighth Amendment protection to JLWOP in *Miller*. But there, the Court responded that "children are different too."[197] Furthermore, some lawyers have successfully argued for requiring mitigation for effective assistance in three-strikes cases.[198] Finally, as discussed in Part II, the *Jones* Court suggested that attorneys may have a responsibility to present the mitigating circumstances of youth.[199] In justifying its holding that courts do not need to make a factual finding of "incorrigibility," the majority stated that a lawyer who fails to mitigate should face an IAC claim "just as defense counsel's failure to raise relevant mitigating circumstances in a death penalty sentencing proceeding can constitute a potential [IAC] problem."[200]

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193. *Id.* at 476 (internal quotation marks omitted) (quoting *Eddings*, 455 U.S. at 116).

194. *See, e.g.*, Caldwell, *supra* note 188; David Siegel, *What Hath* Miller *Wrought: Effective Representation of Juveniles in Capital-Equivalent Proceedings*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 363, 369 (2013); Cara H. Drinan, *The* Miller *Revolution*, 101 IOWA L. REV. 1787, 1810–15 (2016); Margaret Helein, *"Youth Matters": Why Demanding the Same Heightened Level of Mitigation in Juvenile Life Without Parole Sentencing Proceedings as Is Required in Capital Sentencing Proceedings Is the Only Constitutional Option*, 71 AM. U. L. REV. 2061, 2062 (2022).

195. *See* Williams v. Taylor, 529 U.S. 362, 399 (2000) (holding that counsel was ineffective for failure to mitigate); Wiggins v. Smith, 539 U.S. 510, 514 (2003) (same); Rompilla v. Beard, 545 U.S. 374, 377 (2005) (same).

196. Harmelin v. Michigan, 501 U.S. 957, 994 (1991) (holding that the Eighth Amendment only bars mandatory sentencing in the context of death).

197. *Miller*, 567 U.S. at 481 (2012) (ruling that, while death is different, "children are different too").

198. Caldwell, *supra* note 188, at 402–03. Three-strikes laws "require[] that a trial judge impose a life sentence for almost any crime [no matter how minor] if the defendant has been previously convicted of two statutorily defined 'serious' felonies." Michael Romano, *Striking Back: Using Death Penalty Cases To Fight Disproportionate Sentences Imposed Under California's Three Strikes Law*, 21 STAN. L. & POL'Y REV. 311, 321–22 (2010).

199. Jones v. Mississippi, 141 S. Ct. 1307, 1319 (2021).

200. *Id.* at 1319 & n.6.

Admittedly, the Court may hesitate to extend the mitigation requirement beyond JLWOP to cases in juvenile court based on the belief that juvenile court proceedings are not sufficiently serious to merit this requirement. However, the immense collateral consequences of juvenile court involvement and exposure to juvenile jails and prisons, which are often rife with abuse and neglectful solitary confinement, are serious,[201] especially considering that children are still developing and especially susceptible to further psychological damage.[202] Furthermore, *Strickland* specified that ABA standards "are guides to determining what is reasonable" under the first prong of the IAC standard,[203] and the cases that required mitigation in the death-penalty context relied on the ABA standards for capital defense.[204] For decades, the ABA[205] and the Gault Center[206] have both promulgated standards for youth defense that require mitigation, just as they are required in the death-penalty context. Finally, because juvenile court was created to consider what has happened to children in making decisions about how to help them,[207] one could argue that requiring mitigation makes particular sense in the juvenile-court context.

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201. *See supra* notes 60–74 and accompanying text (describing the physical, mental, and collateral consequences of confinement on juveniles, including the abuse they endure and the trauma to which they are exposed).

202. *See supra* notes 69–74 and accompanying text.

203. Strickland v. Washington, 466 U.S. 668, 688 (1984).

204. Williams v. Taylor, 529 U.S. 362, 396 (2000); Wiggins v. Smith, 539 U.S. 510, 524 (2003); Rompilla v. Beard, 545 U.S. 374, 387 (2005).

205. INST. OF JUD. ADMIN. & AM. BAR ASS'N, JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES § 9.2(B) (1980), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/JJ/JJ_Standards_Counsel_for_Private_Parties.pdf [https://perma.cc/5NHJ-VTXA] ("[T]he lawyer has a duty independently to investigate the client's circumstances, including . . . previous history, family relations, economic condition and any other information relevant to disposition.").

206. *See* NAT'L JUV. DEF. CTR., NATIONAL JUVENILE DEFENSE STANDARDS, 63, 73–74, 112, 116, 126, 139 (2013), https://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf [https://perma.cc/K4ZQ-FCUB] (stating that defenders should obtain evidence, including social histories and mental health information, to mitigate at pretrial detention hearings, disposition hearings, when children are awaiting placement, probation and parole revocation hearings, and transfer hearings).

207. *See In re* Gault, 387 U.S. 1, 15 (1967) (quoting Mack, *supra* note 18, at 119–20) (explaining that juvenile courts did not focus on "whether the child was 'guilty' or 'innocent,' but 'What is he, *how has he become what he is*, and what had best be done in his interest'" (emphasis added)).

D. Guarantee the Right to Postdisposition Representation

If Chris's team had not negotiated a mitigated disposition and Chris had been sent to juvenile prison instead of treatment, he likely would have never spoken with an attorney during his lengthy period of incarceration. The reality is that "an overwhelming majority of youth in the delinquency system lack access to quality representation during [the postdisposition] phase," which is often the "longest and most critical phase of the delinquency process."[208]

The differences between children and adults articulated by the *Miller* cases make the lack of postdisposition representation in juvenile court particularly troubling. First, because children "lack . . . maturity," are more "impulsiv[e]," and "more vulnerable . . . to negative influences and outside pressures" than adults,[209] they are more likely to falsely confess.[210] This makes access to the appeals process especially important in order to serve as a backstop for the frequent mistakes made in adjudications.[211] Yet studies estimate that less than 1 percent of juvenile cases are appealed,[212] one eleventh of the rate of appeals in adult cases.[213]

Second, because a child's character is "less fixed"[214] and the juvenile system is designed to rehabilitate, lawyers are needed during

208. NAT'L JUV. DEF. CTR., PROTECTING RIGHTS, PROMOTING POSITIVE OUTCOMES: POST-DISPOSITION ACCESS TO COUNSEL 1 (2014) [hereinafter NAT'L JUV. DEF. CTR., POST-DISPOSITION ACCESS TO COUNSEL], http://defendyouthrights.org/wp-content/uploads/2014/10/Post-Disposition-HR-10.13.14.pdf [https://perma.cc/3W2R-CJUK].

209. Miller v. Alabama, 567 U.S. 460, 471 (2012).

210. As of 2022, 78 percent of exonerated defendants who were younger than fourteen and 34 percent of those who were younger than eighteen falsely confessed, dwarfing the 10 percent of adult exonerees who falsely confessed. NAT'L REGISTRY OF EXONERATIONS, AGE AND MENTAL STATUS OF EXONERATED DEFENDANTS WHO CONFESSED (2022), https://www.law.umich.edu/special/exoneration/Documents/Age%20and%20Mental%20Status%20FINAL%20CHART.pdf [https://perma.cc/Q9R5-E8Z2].

211. *See* Megan Annitto, *Juvenile Justice Appeals*, 66 U. MIAMI L. REV. 671, 732 (2012) ("Healthy appellate review should be one guaranteed safeguard that can partially protect against false confessions.").

212. *Id.* at 715–16; Thomas G. Shannan, Note, *"Are We There Yet?" No.: The Numbers That Support Adopting Automatic Appeals in Juvenile Delinquency Proceedings*, 106 CORNELL L. REV. 1629, 1657–60 (2021).

213. Donald J. Harris, *Due Process v. Helping Kids in Trouble*: *Implementing the Right To Appeal From Adjudications of Delinquency in Pennsylvania*, 98 DICK. L. REV. 209, 218 (1994); *see* Annitto, *supra* note 211, at 680, 716 (finding an even larger discrepancy comparing rates of adult appeals to her findings of the rate of appeals in juvenile court).

214. *Miller*, 567 U.S. at 471 (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005)).

the postdisposition stage to ensure that rehabilitative goals are being met. This is particularly important for children who are incarcerated or committed to another facility. Due to the lack of postdisposition representation, conditions of confinement have little oversight.[215] As one youth defender put it: "Juvenile facilities are surrounded by a legal moat, and the drawbridge is totally up. . . . How many children are lost, beaten, bullied, and abused? If public defenders were allowed to do regular post-disposition advocacy, these injustices would come to light."[216] Thus, no one is there to make sure educational and therapeutic programing is in place as ordered by the disposition[217] or to blow the whistle if the child is experiencing abusive or neglectful treatment that impedes rehabilitation.[218] Furthermore, if the child makes progress, no one is there to argue for early release.[219] This is especially troublesome considering that juvenile sentences are often indeterminate and are supposed to end when the state deems a child rehabilitated.[220]

Despite the overall dearth of such representation, some youth defenders and law school clinics are engaging in innovative postdisposition work.[221] Instead of abandoning children during their lengthy and often traumatic disposition period, these innovative offices advocate for more rehabilitative conditions of confinement, the educational and therapeutic services that children were promised, and early release with tailored reentry plans for those that have demonstrated rehabilitation.[222] This postdisposition work is essential

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215. *See* Sandra Simkins & Laura Cohen, *The Critical Role of Post-Disposition Representation in Addressing the Needs of Incarcerated Youth*, 8 J. MARSHALL L.J. 311, 328–41 (2015) (explaining that "[d]angerous conditions are the norm in some facilities and reflect the inherent problems that exist when kids lack access to counsel").

216. NAT'L JUV. DEF. CTR., ACCESS DENIED, *supra* note 182, at 31.

217. *See* Simkins & Cohen, *supra* note 215, at 323–27 (summarizing the many roles that postdisposition representation should be playing to ensure rehabilitative programming); Megan F. Chaney, *Keeping the Promise of* Gault*: Requiring Post-Adjudicatory Juvenile Defenders*, 19 GEO. J. ON POVERTY L. & POL'Y 351, 380–84 (2012) (summarizing the lack of oversight regarding the rehabilitative programming that is provided in juvenile prisons and the need for lawyers to hold facilities accountable).

218. *See* Simkins & Cohen, *supra* note 215, at 328–37 (summarizing the physical abuse, sexual abuse, and excessive solitary confinement that occurs without the support of counsel).

219. *Id.* at 327.

220. *Id.* at 341.

221. NAT'L JUV. DEF. CTR., POST-DISPOSITION ACCESS TO COUNSEL, *supra* note 208, at 1–3.

222. *Id.*

for lawyers to effectively represent children. Otherwise, courts will continue to ignore children's "less fixed" nature and effectively subject them to punitive, fixed-length sentences designed for adults instead of rehabilitative dispositions that take a child's "capacity for change" into account.[223]

E. Move Toward Holistic Representation

Lawyers representing children encounter unique complications when engaging in mitigation and reentry planning because, as the *Miller* cases emphasize, children have limited "contro[l] over their own environment[s]."[224] While an adult defendant can more easily help their attorney negotiate a mitigated sentence or reentry plan by making changes in their lives such as signing themselves up for community service or therapy,[225] a child is often constrained. Consider Chris's situation. He could not simply enroll himself in a residential treatment program to avoid a lengthy prison sentence and possible transfer to adult court. He needed his grandmother's help. She had her own mental health issues, a low literacy level, and expressed conflicting feelings about whether and how to advocate for her grandson. Fortunately, Chris had a therapist trained in holistic defense to assist his grandmother in navigating her feelings and the treatment facility's enrollment process, which involved an extensive back and forth with Medicaid, the facility, and the Department of Juvenile Justice, all of which needed to sign off on the plan.

Research shows that, at each stage in the process—from pretrial detention to decisions about diversion to adjudication and disposition—juvenile courts often judge a child's need for court involvement not solely by their behavior but also by environmental factors such as their *need for services*.[226] As a result, a growing number

223. Miller v. Alabama, 567 U.S. 460, 471, 473 (2012).

224. *Id.* at 471 (first alteration in original) (internal quotation marks omitted) (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)).

225. *See* Anthony R. Colleluori, *What To Put in a Pre-Sentence Report*, 34 PRAC. LAW. 29, 34–35 (1988) (advising adult defendants to engage in community service, "start therapy as soon as possible," and "impress upon the court that a long jail stint might unnecessarily upset any counseling or rehabilitation program the client might presently be attending").

226. *See* Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y 53, 81 (2012) (outlining how "policies give decision-makers wide discretion to consider" the "child's needs and the family's socioeconomic status" and how this leads to less-resourced children being funneled deeper into the court system at each stage of the process).

of defenders utilize a holistic-defense model because they recognize that providing effective counsel for children requires engagement with the child's environment.[227] These offices have social workers, youth advocates, investigators, and civil attorneys embedded on the defense team to assist defenders in better understanding and advocating for the needs of the whole child, both in and out of the courtroom.[228] These interdisciplinary teams work with the child and their family to connect them to mental health treatment, employment or job training, educational accommodations, housing, financial benefits, and more.[229] By helping children modify their environments, holistic teams can convince judges that children can be rehabilitated in their own communities and also help children, as *Miller* puts it, "extricate themselves from horrific, crime producing settings"[230] and avoid recidivism.

Skeptics may argue that juvenile probation officers provide these services, and thus there is no need for extralegal support on the defense team. Indeed, probation officers have long been heralded as caring supporters for children in juvenile court, able to connect them and the family to resources.[231] But *Gault* expressly rejected the contention that probation officers can effectively represent the child's interests because they are also charged with testifying against them.[232] While probation is often thought of as "the ideal alternative to detention," recent scholarship has illustrated how probation often functions as a "driver of incarceration," especially for youth of color.[233] Many youth probation officers have benevolent intentions, but the "inordinate discretionary power"[234] that the profession wields causes several

227. *See, e.g.*, *Juvenile Public Defense*, LA. CTR. FOR CHILD.'S RTS. (2019), https://lakidsrights.org/we-represent/juvenile-public-defense [https://perma.cc/8NJF-KREJ] (acknowledging that effective legal advocacy requires working outside the courtroom); *Juvenile Defense and Mental Health Practice Area*, COUNCIL FOR CHILD.'S RTS. (2023), https://www.cfcrights.org/defense [https://perma.cc/S5EC-SHEY] (noting the importance of children's environments on courtroom outcomes).

228. *Juvenile Public Defense*, *supra* note 227.

229. *Id.*

230. Miller v. Alabama, 567 U.S. 460, 471 (2012).

231. *See* Mack, *supra* note 18, at 117 (listing social interventions employed by probation officers).

232. *In re* Gault, 387 U.S. 1, 35–36 (1967).

233. Jyoti Nanda, *Set up To Fail: Youth Probation Conditions as a Driver of Incarceration*, 26 LEWIS & CLARK L. REV. 677, 678 (2022).

234. *Id.*

thousand children to be incarcerated every year due to technical violations of probation.[235] Thus, probation officers cannot gain the trust of children to the same extent as a social worker on their defense team.

One could argue that requiring specialization, free counsel, mitigation, and postdisposition advocacy is already too expensive and that adding an interdisciplinary team is a fiscal fantasy. This is shortsighted. While empirical evaluation of holistic defense remains limited, recent studies in both the adult and youth contexts have found that defendants who received holistic defense spent less time incarcerated, required fewer appearances in court, and may be less likely to recidivate.[236] Thus, though expensive, such interventions could reduce the strain on the courts, public defender caseloads, and the costs of incarceration and future crime.

F. Adopt a Youth-Specific Standard for IAC Claims

Finally, to ensure that effective assistance of counsel for children is provided, there must be a proper remedy for IAC. In the adult context, the test from *Strickland v. Washington* requires that a defendant appealing a conviction on the basis of IAC demonstrate that (1) "counsel's performance was deficient" and (2) "that the deficient performance prejudiced the defense."[237] This is a notoriously difficult standard to meet for two reasons. First, the appellate court "must

235. *See Easy Access to the Census of Juveniles in Residential Placement: 1997-2019*, NAT'L CTR. FOR JUV. JUST. (Apr. 26, 2022), https://www.ojjdp.gov/ojstatbb/ezacjrp/asp/display.asp [https://perma.cc/4ZEW-DLUH] (showing that, across the country, anywhere between two and fifteen thousand children are incarcerated annually due to technical violations of their probation); NAT'L JUV. DEF. CTR., PROMOTING POSITIVE DEVELOPMENT: THE CRITICAL NEED TO REFORM YOUTH PROBATION ORDERS 1 (2016) (reporting that as of 2013, "17% of youth in residential placement facilities were being held for technical violations of probation" and describing several ways probation is developmentally inappropriate, thereby setting children up to fail).

236. Stephen Phillippi, Casey L. Thomas, Yilin Yoshida & Hasheemah Afaneh, *Holistic Representation in Juvenile Defense: An Evaluation of a Multidisciplinary Children's Defense Team*, 39 BEHAV. SCI. & L. 65, 65 (2020) (finding that "holistic defense was significantly associated with improved outcomes among juvenile clients, including increased . . . treatment, increased employment and educational attainment, and decreased odds of recidivism . . . [as well as] lower adjudication or early termination from custody"); James M. Anderson, Maya Buenaventura & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 820–21 (2019) (finding that, in a large sample of adults, holistic defense "reduce[d] the likelihood of a custodial sentence by 16%[,] expected sentence length by 24% [and that o]ver the ten-year study period, holistic defense in the Bronx resulted in nearly 1.1 million fewer days of custodial punishment").

237. Strickland v. Washington, 466 U.S. 668, 687 (1984).

indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[238] Second, proving prejudice is especially challenging because criminal defendants are in a "logical bind."[239] How can they show that they were prejudiced by counsel's lack of investigation if they do not know what such investigation would have uncovered?[240]

Some scholars have argued that the unique vulnerabilities of children and juvenile court's rehabilitative purpose requires an IAC standard that is more protective of children.[241] One suggestion is to adopt the ABA Standards as a constitutional benchmark for defining the activities that a lawyer must engage in to avoid deficient performance under *Strickland*'s first prong.[242] As discussed in Part III.C, the ABA guidelines were highly influential in defining the requirements of effective assistance in death penalty cases. Since the ABA also states that mitigation is essential in the juvenile context,[243] the guidelines could be used to mandate mitigation among other activities in juvenile court too. In their statement of interest in a civil pattern and practice suit against a county defender in Georgia, the DOJ articulated their own youth-specific competency standards, citing the Gault Center's standards.[244] Adopting the ABA or Gault Center's standards as a constitutional benchmark would ensure that the first prong of the *Strickland* standard has more specific and higher requirements in the juvenile context.

While there has not been widespread adoption of a youth-specific IAC standard with a more demanding first prong, Montana has rejected *Strickland* in juvenile cases, holding that the "highly deferential standard is insufficient."[245] The Montana Supreme Court further explained that juvenile cases, which affect "the development and fundamental liberty interests of youth . . . involve special considerations and present special challenges to effective representation not present in adult criminal proceedings."[246] While the

238. *Id.* at 689.
239. Fedders, *supra* note 13, at 808.
240. *Id.*
241. *See id.* at 802–18 (examining the difficulties of IAC claims under current doctrine).
242. *Id.* at 817.
243. *See supra* note 205 and accompanying text.
244. *N.P.* Statement of Interest, *supra* note 167, at 11–12.
245. *In re* K.J.R., 391 P.3d 71, 77 (Mont. 2017).
246. *Id.* at 77–78.

court refrained from ruling on what the youth-specific standard would look like, since the parties had not briefed the issue, the court suggested that counsel for children "must have specialized knowledge, skills, and experience in the areas of youth court procedure, substantive youth court law, and in communicating with and counselling the youth."[247] Finally, the court acknowledged that "youth court defendants often present with particular disabilities and traumas," indicating a potential requirement for additional specialized training and skills in counselling children with mental health issues.[248]

Scholars have also argued for eliminating the prejudice prong in juvenile court.[249] Unlike calls to eliminate the prejudice requirement in adult court, which have focused on "hindsight bias" and how the prong effectively requires defendants to prove actual innocence, Professor Barbara Fedders argues that the rehabilitative purpose of juvenile court requires a different conception of what it means to be prejudiced.[250] The *Gault* Court held that due process for children required assistance of counsel, not only to protect the innocent but also to provide guilty children with a perception of fairness.[251] As the Court explained, "[u]nless appropriate due process of law [including representation by effective counsel] is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of [juvenile] court."[252] Therefore, "[e]ven if the deficient representation did not affect the factual finding of guilt or innocence, if it thwarted the juvenile's rehabilitation, it may nevertheless have been constitutionally ineffective."[253]

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247. *Id.* at 78 n.5. Such a requirement would likely reduce the pool of attorneys *currently* eligible to represent children and require investment in youth-defense training.

248. *Id.*

249. Fedders, *supra* note 13, at 817–18.

250. *Id.* at 818 (internal quotation marks omitted) (quoting Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 2).

251. *In re* Gault, 387 U.S. 1, 26 (1967) (quoting RUSSELL SAGE FOUND., JUVENILE DELINQUENCY – ITS PREVENTION AND CONTROL 33 (1966)).

252. *Id. See generally* Anna Abate & Amanda Venta, *Perceptions of the Legal System and Recidivism: Investigating the Mediating Role of Perceptions of Chances for Success in Juvenile Offenders*, 45 CRIM. JUST. & BEHAV. 541 (2018) (summarizing prior research backing up the theory in *Gault* that perceptions of procedural justice and similar concepts reduce recidivism in youth and finding similar results in their own study).

253. Fedders, *supra* note 13, at 818.

This proposition is made more plausible by recent cases that have held that prejudice can occur *without* demonstrating that, but for counsel's deficiency, a convicted defendant would have been proven innocent. In *Missouri v. Frye*,[254] the Court held that failure to adequately communicate with a client about a plea bargain can prejudice a client and amount to IAC.[255] The Court further broadened the prejudice prong in *Lee v. United States*,[256] holding that a defendant can show prejudice if his lawyer failed to explain the collateral consequences of conviction, causing him to accept a plea, even if he would almost certainly have lost at trial.[257] The Court reasoned that incompetence can be prejudicial if it curtails "defendant's *decisionmaking* [about how to proceed], which may not turn solely on the likelihood of conviction."[258]

Finally, the *Miller* cases' focus on children's "capacity for change"[259] provides further justification for an IAC standard that considers how a child's rehabilitation is undermined by deficient representation. If the Court truly believes that a child's character is "less fixed," that a child can be rehabilitated,[260] and that a denial of effective representation can cause a child to "resist the rehabilitative efforts of [juvenile] court,"[261] deficient assistance denies children what they are due even if competent representation would not have necessarily proven them innocent.

CONCLUSION

The time has come to recognize that children require more for counsel to be effective. For centuries almost every area of the law has accounted for youth.[262] More recently, the Court extended the obvious truth—that children are different—to the context of sentencing.[263] The

254. Missouri v. Frye, 566 U.S. 134 (2012).

255. *Id.* at 145.

256. Lee v. United States, 582 U.S. 357 (2017).

257. *Id.* at 370–371.

258. *Id.* at 367.

259. Miller v. Alabama, 567 U.S. 460, 473 (2012).

260. *Id.* at 471 (internal quotation marks omitted) (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005)).

261. *In re* Gault, 387 U.S. 1, 26 (1967) (quoting RUSSELL SAGE FOUND., JUVENILE DELINQUENCY – ITS PREVENTION AND CONTROL 33 (1966)).

262. *See supra* notes 117–42 and accompanying text.

263. *See supra* Part II.

Court's articulation in the *Miller* cases of the specific ways that children are different provides a blueprint for what counsel must do to account for their client's vulnerabilities.

Children's "lack of maturity and . . . underdeveloped sense of responsibility"[264] requires their attorneys to receive specialized training and supervision on how to communicate complex legal issues at the child's cognitive and developmental level, how to gain their trust, and how to counsel them to adjust their behaviors. Children's susceptibility to "outside pressures" and "limited 'contro[l] over their own environment'"[265] requires counsel to avoid common conflicts of interest with parents and to engage in holistic representation, which assists children in navigating their environment. Children's "less fixed"[266] nature and "greater capacity for change"[267] requires postdisposition advocacy to blow the whistle if rehabilitative programming is not being provided or to advocate for a less restrictive environment if the child has already rehabilitated. Finally, since these differences outlined by the *Miller* cases converge to make children "less culpable than adults,"[268] their attorneys must engage in mitigation to show how their "youth and attendant characteristics"[269] make them less deserving of punishment. These changes will not be easy, but there are examples of defenders across the country already leading the way. Let us follow them. It is what our society's most vulnerable need and deserve.

264. Miller v. Alabama, 567 U.S. 460, 471 (2012) (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)).

265. *Id.* (quoting *Roper*, 543 U.S. at 569).

266. *Id.* (quoting *Roper*, 543 U.S. at 570).

267. *Id.* at 465 (internal quotation marks omitted) (quoting Graham v. Florida, 560 U.S. 48, 74 (2011)).

268. *Id.* at 472 (quoting *Graham*, 560 U.S. at 72).

269. *Id.* at 483.