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Julie E. McConnell
University of Richmond School of Law

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UNSHACKLED: STORIES OF REDEMPTION AMONG SERIOUS YOUTHFUL OFFENDERS

*Julie E. McConnell**

* Julie E. McConnell is a Professor of Law, Legal Practice at the University of Richmond School of Law. She earned her undergraduate degree at Agnes Scott Women's College and her JD degree from the University of Richmond School of Law. At Richmond Law, Professor McConnell teaches juvenile delinquency law and procedure and directs the Children's Defense Clinic. Through the Clinic, she and her students represent indigent children on a pro-bono basis charged with delinquency or truancy offenses or seeking Special Immigrant Juvenile Status. She and her students provide comprehensive, highly-individualized, and effective client-centered representation to youth and in some cases, their parents or guardians, in court and before school boards and 504 or IEP teams. The clinic also represents individuals, either in court or before the parole board, in post-conviction, who were originally sentenced as minors and are seeking sentence reductions or parole release. Professor McConnell also co-edits the Virginia CLE publication, *Juvenile Law and Practice in Virginia* and serves as a juvenile legal system expert in Virginia cases and with the International Institute of Justice and the Rule of Law in Valetta, Malta. She would like to gratefully acknowledge the assistance on this article of current and former law students, Kelly Boppe, Salua Kamerow, Claudia Leonor, Samantha Mier, Olivia Seksinsky, and Chase Whittaker.

ABSTRACT

*In a series of decisions concerning child defendants, the United States Supreme Court has embraced the understanding, based on adolescent brain development, that the legal system must recognize children are different than adults concerning criminal culpability and sentencing. That recognition, culminating in *Miller v. Alabama* and *Montgomery v. Louisiana*, led to the opportunity for thousands of individuals across the country, initially sentenced to death-in-prison sentences when they were minors, to gain a meaningful opportunity for release. These cases permanently banned mandatory life sentences for children. In Virginia, the legislature now allows reconsideration of these cases through hearings before the parole board, through which the agency can consider these individuals for early release from incarceration. The legislature mandated that the parole board consider the attributes of youth not previously considered in these individuals' original sentencings.*

This article explores the ways in which some of these young people have engaged in a journey of redemption that has led to their release on parole. As a society, we have been overly reliant on extreme punishment and law enforcement to address our failure to protect and support children in marginalized communities. Some states are finally beginning to recognize the flawed logic underlying these practices. Virginia has made positive strides to reform the juvenile criminal legal system. The legislature mandated that courts consider adverse childhood experiences, foster-care involvement, and other hardships before sentencing young people to prison. These reforms are a step towards developing evidence-based responses to criminal involvement that hold young people accountable and consider the root causes of their criminal involvement.

INTRODUCTION

In the last half of 2021, student attorneys in the University of Richmond Children's Defense Clinic won parole grants for four men originally sentenced to lengthy prison sentences when they were children. Each of them had served more than twenty-five years in prison. These men experienced an extraordinary transformation as they grew up. They developed empathy and remorse, became positive role models in their prisons, embraced educational opportunities, and developed a prosocial approach to life. The miracle is that they somehow did this while incarcerated in maximum security prisons. There are many reasons for their rehabilitation, but a consistent theme is they had at least one person in their lives who never gave up on them. Once they matured and their brains fully developed, they were able to embrace the presence of loving people in their lives who would encourage them to pursue opportunities to become productive citizens. Each of them endeavored to

prove that they were more than the worst thing they ever did. Their stories illustrate the power of second chances.

Section I of this article discusses an example of extraordinary resilience, the history of our acculturation to extreme punishment in the criminal legal system, and the role of adolescent development in delinquent behavior. The article will explore examples from our work that illustrate the inherent resilience of adolescents when given the opportunity to pursue prosocial, healthy relationships and experiences. The paper examines the role of structural racism, inequality, mass incarceration, capital punishment, and the “superpredator” myth in developing a legal system that criminalizes adolescent behavior and too often treats children like adults. Section II of this article will discuss Virginia’s approach to the prosecution of adolescents over the last four decades to provide context for the influence of these elements. This analysis will also describe the evolution of cases involving the punishment of children in the criminal legal system more broadly and the United States Supreme Court’s evolving interpretation of the Eighth Amendment’s Cruel and Unusual Punishments Clause. Finally, Section III of the article will apply those interpretations to some of the cases on which the Children’s Defense Clinic is working. In many of these cases, we have helped our clients find redemption and a chance for freedom. Sadly, we continue to represent many rehabilitated individuals who were tried as adults when they were still children and may never be released. Our work continues to bring these stories of redemption to the fore. The paper concludes with a description of Virginia’s recent transformation of the criminal legal system and the treatment of adolescents, in particular. The Virginia General Assembly has made great strides to codify the requirement that judges consider many of the principles described in the paper concerning adolescent development, childhood trauma, inequality, and racism. There is still much work to do to create a fair and effective criminal legal system, but Virginia, at least, is moving in the right direction.

I. CHILDREN INHERENTLY HAVE A DEEP CAPACITY FOR REHABILITATION

I had the distinct honor and privilege of witnessing one of our longtime clients walk out of prison in the fall of 2021. In the mid-1990s, a judge sentenced him to die in prison. Today, he is a free man living a life of extraordinary redemption, acceptance of responsibility, and rehabilitation. My students and I have been exceptionally fortunate to watch many of our clients grow up and transform into productive, law-abiding citizens. In this case, the parole board saw the humanity in this man and decided he had been held fully accountable. He served twenty-six years in prison for crimes he committed

when he was only seventeen. When he went to trial, courts across the country routinely sentenced children directly to adult prison, and the court did just that in his case.¹ Today, many states give courts the option of sending such a child to a juvenile facility instead of an adult prison for the entire sentence or for the first half of a “blended” sentence, which begins with juvenile prison time and ends with adult prison time.²

In 1995, Virginia charged our client with murder and related offenses. He is now in his forties. At the time of his admittedly very serious crimes, this client’s traumatic childhood heavily influenced his behavior. He was highly susceptible to peer pressure; his violent surroundings had deeply impacted him. Because he was only a teenager when sentenced, he grew up in prison. During most of that time, the Commonwealth of Virginia detained him in maximum or super-maximum security facilities, where he had minimal access to resources, programming, or opportunities.

Life in a maximum-security facility can also be extraordinarily violent and traumatic. The horrors and negative influences of his youth did not stop when he entered prison. Yet, against all odds, he developed a sense of remorse and quickly learned how to stop making excuses and become a more prosocial person. Once he matured, he had a near-perfect prison record. He began to rise above peer pressure and negative influences. His unfailing positivity, ability to de-escalate conflict, efforts to work with all types of individuals, and genuine leadership led to opportunities to serve as a religious leader at every institution in which he resided. Ultimately, the prison recognized all he had to offer and allowed him to serve as a teacher in a cognitive re-entry program.³ He took every opportunity in prison to volunteer in programs, facilitate seminars for other inmates, and serve as a mentor and role model.

¹ MALCOM C. YOUNG & JENNI GAINSBOROUGH, PROSECUTING JUVENILES IN ADULT COURT: AN ASSESSMENT OF TRENDS AND CONSEQUENCES 2 (2000), <https://www.prisonpolicy.org/scans/sp/juvenile.pdf>.

² See *Sentencing Authority*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/reform2/ch2_k.html (last visited Feb. 2, 2022) (“A number of States have created ‘blended’ sentencing structures for cases involving serious and repeat juvenile offenders as a mechanism for holding these youth accountable for their offenses, while retaining the court’s ability to provide the most effective sanction option.”); see also Pam Belluck, *Fighting Youth Crime, Some States Blend Adult and Juvenile Justice*, N.Y. TIMES (Feb. 11, 1998), <https://www.nytimes.com/1998/02/11/us/fighting-youth-crime-some-states-blend-adult-and-juvenile-justice.html>. Of the 50 states subsumed within the United States, twenty-six have adopted some form of blended sentencing between juvenile and adult criminal courts. Shelly S. Schaefer & Christopher Uggen, *Blended Sentencing Laws and the Punitive Turn in Juvenile Justice*, 41 LAW & SOC. INQUIRY 435, 438–39 (2016). The maximum age of juvenile court jurisdiction is age 16 in Georgia, Texas, and Wisconsin. Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NAT’L CONF. OF STATE LEGIS. (April 8, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx>.

³ *Re-Entry Planning*, VA. DEP’T OF CORR., <https://vadoc.virginia.gov/offender-resources/incoming-offenders/facility-programs/cognitive/re-entry-planning/> (last visited Feb. 2, 2022).

Prison employees, corrections officers, offenders, counselors, and program facilitators all acknowledge that he is a hard worker, a positive influence, and someone who can navigate and de-escalate conflict because others respect him as an even-keeled and thoughtful leader.

Today, this man is thriving outside of prison as a citizen. He has a robust re-entry plan that includes family support, his legal team, and the assistance of a non-profit organization designed for the sole purpose of helping offenders reintegrate into society. He now owns a home, has stable employment, and enjoys community support. Despite the many years he spent behind bars, he has successfully transitioned into his community thanks to his hard work while incarcerated to prepare for successful reintegration. He has gotten married, had his voting rights restored, earned his driver's license, and is now establishing a business. He recognizes that his crimes, all of which he committed during a short window of time in his seventeenth year, were not just crimes against individuals but were also crimes against society. He is different from the angry, scared, and misguided seventeen-year-old who committed those heinous crimes. He is ready to show the world just how correct the United States Supreme Court was when it recognized that many juveniles have a tremendous capacity for change and "are [therefore] constitutionally different from adults for the purposes of sentencing."⁴

II. THE JUVENILE BRAIN IS TYPICALLY NOT FULLY DEVELOPED UNTIL AT LEAST 25

During adolescence, there is an imbalance between the prefrontal system, which regulates reasoning, and the limbic system, which controls emotions.⁵ Once the brain establishes a balance between both systems, typically completed by age twenty-five, it becomes more probable that individuals will make appropriate prosocial choices.⁶ During adolescence, however, the limbic system dominates.⁷ Therefore, while a typical adult may reason that drinking excessively is dangerous, an adolescent is more likely to discount the danger in favor of the challenge and excitement of getting away with it.⁸ Simply put, children and youth are hardwired for risk-taking. Their brain registers significant peaks of dopamine expression during childhood, which is typically only fully regulated by the mid-twenties.⁹

⁴ Miller v. Alabama, 567 U.S. 460, 471 (2012).

⁵ See B.J. Casey et al., *The Adolescent Brain*, 1124 ANN. N.Y. ACAD. SCI. 118 (2008).

⁶ See *id.* at 116.

⁷ See *id.* at 116–17.

⁸ See *id.*

⁹ See *id.* at 119.

The adolescent brain is susceptible to its environment because it is highly plastic.¹⁰ In other words, the developing brain is moldable and continues to be shaped by the experiences we have in adolescence.¹¹ Because the brain develops over many years, it allows young people to mature and rehabilitate over time.¹² However, confining youth to adult jails and prisons can significantly hinder their access to rehabilitation and educational services, impacting healthy brain growth.¹³

A. Transient Immaturity is at the Root of Most Juvenile Crime

The Supreme Court has recognized that youthful impetuosity and lack of self-control are the result of transient immaturity.¹⁴ The court has also acknowledged that youth, more than adults, tend to allow negative peer pressure to influence their decision-making.¹⁵ Psychology and neuroscience corroborate that the parts of the brain involved in behavior regulation don't fully develop until after adolescence.¹⁶ This lack of brain development, in turn, contributes to the failure to consider consequences.¹⁷

The Supreme Court has recognized that juveniles have diminished culpability due to a lack of maturity and responsibility, vulnerability to negative influences and outside pressures, and lack of a fully-formed character.¹⁸ These characteristics often result in “impetuous and ill-considered actions and decisions,” but juvenile decision-making limitations diminish as time passes and their brains develop.¹⁹ Thus, courts have concluded that only a minuscule proportion of juveniles who engage in illegal activity develop an entrenched pattern of problematic behavior.²⁰ While young people should still be held responsible for their actions, their actions are typically not evidence of “irretrievably depraved character.”²¹ As the Supreme Court observed in *Roper v. Simmons* and reaffirmed in *Graham v. Florida*, given what

¹⁰ See LAURENCE STEINBERG, *AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE* 23 (First Mariner Books ed., 2015).

¹¹ See *id.* at 24.

¹² See *id.* at 26.

¹³ Andrea Wood, *Cruel and Unusual Punishment: Confining Juveniles with Adults After Graham and Miller*, 61 EMORY L.J. 1445, 1448 (2012).

¹⁴ *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

¹⁵ *Id.*

¹⁶ *Graham v. Florida*, 560 U.S. 48 (2010) (holding a life sentence is cruel and unusual punishment for non-homicide offenses committed by children).

¹⁷ *Miller* at 471–72 (citing *id.* at 68).

¹⁸ *Roper* at 569–70.

¹⁹ *Id.* at 570 (citing *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

²⁰ *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (citing *Roper v. Simmons*, 543 U.S. 551, 570 (2005)).

²¹ *Graham* at 68 (citing *Roper* at 571).

we now know about adolescent brain development, “the case for retribution is not as strong with a minor as with an adult.”²²

B. The Miller Factors are Key Considerations When Sentencing Children

In *Miller v. Alabama*, the Supreme Court detailed the ways in which juveniles are fundamentally different from adults, particularly for the purposes of the criminal legal system. Specifically, the Court recognized five factors, commonly known as the *Miller* factors,²³ that make juveniles, even those that commit serious offenses, less culpable than adults. The factors are as follows:

1. Adolescent brains are not fully developed regarding impulse control, planning ahead, and risk avoidance;
2. Adolescents cannot extricate themselves from negative family or social environments and are more vulnerable than adults to negative influences such as abuse and neglect;
3. Adolescent brains are particularly susceptible to peer pressure;
4. Adolescents are less able than adults to assist in their own defense or evaluate plea options; and
5. Adolescents have tremendous potential for rehabilitation because their brains are still developing.

In addition to the five *Miller* factors, numerous studies have demonstrated that adverse childhood experiences (“ACEs”), or trauma, also profoundly affect the development of critical areas of the brain responsible for executive functioning (i.e., decision-making and risk-taking behavior), namely the prefrontal cortex.²⁴

III. MASS INCARCERATION AND THE SUPERPREDATOR MYTH LED TO DEATH-IN-PRISON SENTENCES FOR CHILDREN

A. The Evolution of Mass Incarceration

It is essential to examine how we became over-reliant on incarceration as a means of social control to understand how we began sentencing children to die in prison. The ratification of the 13th Amendment in 1865 was the genesis of mass incarceration in the United States. The 13th Amendment criminalized slavery and involuntary servitude in the United States and its territories. However, it contained a critical loophole: slavery and involuntary servitude

²² Roper at 570–71 (holding that the death penalty is cruel and unusual punishment for children); *Graham v. Florida*, 560 U.S. 48, 71 (2010) (citing Roper at 570–71).

²³ *Miller* at 471–78; see also Elizabeth Scott et al., *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMP. L. REV. 675, 696–701 (2016) (discussing how to apply the five *Miller* factors).

²⁴ See, e.g., Jessie I. Lund et al., *Adverse Childhood Experiences and Executive Function Difficulties in Children: A Systematic Review*, 106 CHILD ABUSE & NEGLECT 104485 (2020) (finding that, across thirty-six studies that examined executive functions related to forms of maltreatment, including abuse, neglect, and exposure to intimate partner violence, many found a “strong relationship between maltreatment and [prefrontal cortex] deficits among children”) (emphasis added).

shall not exist “except as a punishment for crime whereof the party shall have been duly convicted.”²⁵ The Punishment Clause of the 13th Amendment effectively stripped certain individuals of their constitutional rights. This provision gave rise to a prison labor system to replace slavery.²⁶ The United States government’s overreliance on free prison labor led to the world’s largest prison population.²⁷

The criminal-exception loophole of the 13th Amendment created conditions that preserved the economic benefits and social caste system that was intrinsic to slavery.²⁸ Slavery was so fundamental to the structure of laws and relationships that politicians struggled to re-imagine a world without bondage and captivity after the Civil War.²⁹ Pro-slavery legislatures, comprised of all-White police and Confederate veterans of the United States Civil War, began to create “Black Codes” to regulate freed African Americans’ public behavior and employment rights.³⁰ States designed the Black Codes to restrict African Americans’ freedom and ensure their availability as a cheap labor force following the end of the Civil War.³¹ If an African American violated these Black Codes, they risked fines and incarceration.³²

The Black Codes manufactured a legal solution to the demand for cheap labor following the ratification of the 13th Amendment.³³ Legislatures instituted new forms of governance over the newly emancipated and freed African Americans, forcing them into unpaid labor and incarceration.³⁴ These codes were exhaustive, covering freedoms associated with every aspect of

²⁵ U.S. Const. amend. XIII, § 1.

²⁶ Whitney Bennis, *American Slavery, Reinvented*, ATLANTIC (Sept. 21, 2015), <https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/>; Caroline M. Kisiel, *Loopholes Have Preserved Slavery for More than 150 Years after Abolition*, WASH. POST. (Jan. 27, 2021), <https://www.washingtonpost.com/outlook/2021/01/27/loopholes-have-preserved-slavery-more-than-150-years-after-abolition/>.

²⁷ Kisiel, *supra* note 26; *see also* JACOB KANG ET AL., VERA INST. OF JUST., PEOPLE IN JAIL AND PRISON IN SPRING 2021 1 (2021) (acknowledging that there are 1,774,900 incarcerated persons in the United States as of June 2021).

²⁸ Kisiel, *supra* note 26 (“Proslavery lawmakers created laws that, if violated, were covered by the [criminal-loophole] exception . . .”).

²⁹ *See* Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 923 (2019).

³⁰ Kisiel, *supra* note 26; *see also id.* at 922 (“Despite the unseating of many southern ‘planters’ in Congress after the Civil War, proslavery proponents of slavery in northern states like Delaware and southern states like Kentucky vigorously fought to salvage that explicit hierarchy and social caste system, *underscoring Blacks’ subordination and Whites’ supremacy under the law.*”) (emphasis added). *See generally* *Black Codes*, HIST., (Jan. 26, 2022), <https://www.history.com/topics/Black-history/Black-codes>.

³¹ *Black Codes*, *supra* note 30.

³² *Id.*

³³ Goodwin, *supra* note 29 at 936.

³⁴ *Id.*

life.³⁵ They regulated public interactions between Black and White people and rules that required freed Black people to carry proof of employment or risk being arrested and forced to forfeit earlier wages.³⁶ The Black Codes effectively criminalized the behavior of freed and newly emancipated African Americans as they tried to create new lives for themselves. Alabama, for example, passed laws to specifically criminalize Black gun ownership and the sale of any produce and poultry.³⁷ While these codes were mostly repealed by 1868, they laid the foundation for the emergence of the insidious Jim Crow laws that punctuated much of the 20th century.³⁸

Despite the storied legacy of the 13th Amendment's Punishment Clause on mass incarceration, the United States did not become truly serious about mass incarceration until the 1970s, starting with President Nixon's War on Drugs.³⁹ The mid-20th century saw the emergence of mass "law and order" rhetoric in response to a wave of violent crimes and riots in American urban centers.⁴⁰ During this time, political strategists tried to appeal to White voters by advancing tough-on-crime policies that exploited fears and stereotypes of Black criminality.⁴¹ Known as the "Southern Strategy," Republican politicians sought to manipulate racial fracture points and mobilize Southern working-class Whites against the Democrats.⁴² Amid a civil rights movement that brought minorities to the vanguard of American politics, Republican strategists exploited racial animus to appeal to southerners and working-class Whites who felt marginalized by the nationwide conversation about race relations.⁴³

³⁵ *Id.* at 937.

³⁶ *Id.*

³⁷ *Id.* ("On December 19, 1865, Alabama amended its criminal statute providing among other things, that Blacks employed by farmers 'shall not have the right to sell any corn, rice, peas, wheat, or other grains, any flour, cotton, fodder, hay, bacon, fresh meat of any kind, poultry of any kind, [or] animal of any kind").

³⁸ See *The Southern "Black Codes" of 1865-66*, CONST. RTS. FOUND., <https://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html> (last visited Mar. 13, 2022); Kisiel, *supra* note 26.

³⁹ James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration>. See also *Nixon Adviser Admits War on Drugs Was Designed to Criminalize Black People*, EQUAL JUSTICE INITIATIVE (Mar. 25, 2016), <https://eji.org/news/nixon-war-on-drugs-designed-to-criminalize-black-people/>.

⁴⁰ Ruth Delany et al., *American History, Race, and Prison*, VERA (Sept. 2018), <https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison>.

⁴¹ Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 CRIME & JUST. 273, 277-78 (2010).

⁴² *Id.* at 279 (presenting an excerpt of Lee Atwater's Southern Strategy, as related in a 1981 interview).

⁴³ *Id.*

B. The 1994 Federal Crime Bill

Ultimately, it was the 1994 Federal Crime Bill that truly threw gasoline on the flames of mass incarceration.⁴⁴ Under the direction of President Bill Clinton, legislators embraced tough-on-crime policies as an integral component of their political platform.⁴⁵ The mid-1980s and early 1990s had been marred by gang violence and endemic cocaine use throughout urban America.⁴⁶ In signing the 1994 crime bill, President Clinton remarked, “Gangs and drugs have taken over our streets and undermined our schools.”⁴⁷

This change in the political landscape would shape the future of politics and the larger criminal legal system for years to come. The 1994 Federal Crime Bill is the most extensive federal crime legislation ever passed.⁴⁸ The bill authorized the death penalty for dozens of federal crimes and codified the “three strikes” rule, which mandated life imprisonment for a third violent felony conviction.⁴⁹ In the wake of the crime bill, the likelihood of an extensive prison sentence grew exponentially for everything from minor assaults to drug trafficking.⁵⁰ Moreover, all these changes had a terrible impact on Black and Brown communities. According to the Sentencing Project, one of every three Black boys and one of every six Latino boys born in 2001 will go to prison in his lifetime.⁵¹ At the same time, one of every seventeen White boys born that year could expect to go to prison.⁵² These statistics should have sounded an alarm that our criminal legal system is horribly flawed, but we have done little to curb this trend.

These grim statistics are evident in the cases we handle in the clinic. Almost without exception, our cases involve a person of color, consistent with what we know about the overrepresentation of minorities in the juvenile legal system nationally. According to the Sentencing Project,

⁴⁴ See Lauren-Brooke Eisen, *The 1994 Crime Bill and Beyond: How Federal Funding Shapes the Criminal Justice System*, BRENNAN CTR. FOR JUST. (Sept. 9, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/1994-crime-bill-and-beyond-how-federal-funding-shapes-criminal-justice>.

⁴⁵ See *id.*

⁴⁶ *Id.*

⁴⁷ *1994 Crime Bill*, C-SPAN, at 27:12 (Sept. 13, 1994), <https://www.c-span.org/video/?c4392792/user-clip-1994-crime-bill>.

⁴⁸ Eisen, *supra* note 44.

⁴⁹ *Id.*

⁵⁰ Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, THE ATLANTIC (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-Black-family-in-the-age-of-mass-incarceration/403246/>.

⁵¹ THE SENT'G PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 1 (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> (citing Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J. (SUPP. 3) 87S, 88S (2011)).

⁵² *Id.*

[A]t the beginning of the 1980s, Black and [W]hite youth were arrested at roughly equivalent rates, approximately one in 300. The War on Drugs⁵³ changed that. Through the 1980s, the arrest rate for Black youth increased more than 350 percent even as the arrest rate for [W]hite juveniles declined. By 1991, a Black child was 579 percent more likely to be arrested for a drug offense than a [W]hite teenager.⁵⁴

C. *The Superpredator Theory*

On the heels of the 1994 Crime Bill came the infamous “superpredator” theory, popularized by a Princeton University Professor named John DiIulio.⁵⁵ DiIulio argued that society was facing a wave of “superpredators,” whom, he claimed, “live by the meanest code of the meanest streets, a code that reinforces rather than restrains their violent, hair-trigger mentality.”⁵⁶ DiIulio concluded that a generation of teenagers, animated by pervasive “moral poverty,” would soon take to the streets and commit violent crimes.⁵⁷ He attributed this moral poverty to “Black inner-city neighborhoods” and “predatory street criminals among Black urban youth.”⁵⁸ Ultimately, DiIulio’s superpredator myth legitimized pseudo-scientific assumptions and long-standing fears of Black criminality.⁵⁹ The superpredator myth gained further traction in 1995 when political scientist James Q. Wilson asserted that:

⁵³ *The War on Drugs*, HIST. (Dec. 17, 2019), <https://www.history.com/topics/crime/the-war-on-drugs> (“The War on Drugs is a phrase used to refer to a government-led initiative that aims to stop illegal drug use, distribution and trade by dramatically increasing prison sentences for both drug dealers and users. The movement started in the 1970s and is still evolving today.”).

⁵⁴ JOSHUA ROVNER, THE SENT’G PROJECT, DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM 5 (2014), <https://www.sentencingproject.org/publications/disproportionate-minority-contact-in-the-juvenile-justice-system/>.

⁵⁵ See generally Peter Annin, *Superpredators Arrive: Should We Cage the New Breed of Vicious Kids?*, NEWSWEEK, Jan. 22, 1996, at 57 (“On the horizon . . . are tens of thousands of severely morally impoverished juvenile super-predators. They are perfectly capable of committing the most heinous acts of physical violence for the most trivial reasons . . . They fear neither the stigma of arrest nor the pain of imprisonment.”); John DiIulio, *Defining Criminality Up*, WALL ST. J., July 3, 1996, at A10 (“Juvenile super-predators who maim and murder without remorse or fear.”); John J. DiIulio, Jr., *My Black Crime Problem, and Ours*, CITY J., Spring 1996, <https://www.city-journal.org/html/my-Black-crime-problem-and-ours-11773.html> (referring to “super-predators”); Suzanne Fields, *The Super-Predator*, WASH. TIMES, Oct. 17, 1996, at A23 (“The super-predator is upon us.”); Gene Koprowski, *The Rise of the Teen Super-Predator*, WASH. TIMES, Oct. 23, 1996, at A17.

⁵⁶ John J. DiIulio, Jr., *The Coming of the Super-Predators*, THE WEEKLY STANDARD, Nov. 27, 1995, at 23.

⁵⁷ THE CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, THE ORIGINS OF THE SUPERPREDATOR: THE CHILD STUDY MOVEMENT TO TODAY 2 (2021), <https://cfsy.org/wp-content/uploads/Superpredator-Origins-CFSY.pdf>.

⁵⁸ *Id.*

⁵⁹ *Id.*

By the end of [the past] decade [i.e., by 2000] there will be a million more people between the ages of 14 and 17 than there are now. . . . Six percent of them will become high rate, repeat offenders—thirty thousand more young muggers, killers and thieves than we have now. Get ready.⁶⁰

The media quickly adopted the superpredator rhetoric and played a significant role in its proliferation across the United States.⁶¹ Before the introduction of the superpredator myth, the three top national news networks combined ran approximately one hundred crime stories each year.⁶² However, by the end of the 1990s, that number skyrocketed to five hundred crime stories per year.⁶³ The term “superpredator” may have failed as a social science theory, but it has shaped policy for decades, with a devastating human toll.⁶⁴ The media’s sensationalization of superpredators led to extreme changes in how the criminal legal system treated children and still influences policy today.⁶⁵

D. In Complete Contradiction of the Superpredator Myth, the Juvenile Crime Rate has Continuously Declined.

By the end of the decade, juvenile crime had actually decreased and has continued to do so, but the damage had been done to the juvenile legal system.⁶⁶ In Virginia, for example, there are 70 percent fewer youth in the juvenile legal system than a decade ago (9,551 in 2011 to 2,980 in 2021).⁶⁷ Even the creator of the “superpredator” rhetoric conceded that the theory was wrong.⁶⁸ Though the superpredator theory turned out to be a myth, the term was tragically successful in establishing harsher juvenile laws, ending confidentiality protections for young felons, and producing unintended consequences for youth all over the country.

⁶⁰ JAMES C. HOWELL, PREVENTING AND REDUCING JUVENILE DELINQUENCY: A COMPREHENSIVE FRAMEWORK 4 (Sage Publications 2d. ed, 2009).

⁶¹ See Carroll Bogert & Lynell Hancock, *Superpredator: The Media Myth That Demonized a Generation of Black Youth*, THE MARSHALL PROJECT (Nov. 20, 2020), <https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-Black-youth>.

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ Virginia, for example, created an overly inclusive case transfer system that provided the courts with largely unfettered authority to adjudicate juveniles as adults in the circuit court, where punishments are far harsher than in juvenile court. See VA. CODE ANN. § 16.1-269.1 (2021).

⁶⁶ See Carroll Bogert & Lynell Hancock, *Superpredator: The Media Myth That Demonized a Generation of Black Youth*, THE MARSHALL PROJECT (Nov. 20, 2020), <https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-Black-youth>.

⁶⁷ *Virginia’s Juvenile Justice System*, JLARC (last visited Mar. 28, 2022), <http://jlarc.virginia.gov/landing-2021-virginias-juvenile-justice-system.asp>.

⁶⁸ See Bogert & Hancock, *supra* note 66.

IV. CAPITAL PUNISHMENT ALSO PLAYED A ROLE IN EXTREME SENTENCES FOR CHILDREN

The United States Supreme Court struck down the death penalty as unconstitutional in 1972 in *Furman v. Georgia*, noting its disproportionate impact on racial minorities.⁶⁹ Just four years later, the Supreme Court upheld a new Georgia capital punishment statute in *Gregg v. Georgia* and many of the states rushed to reinstate the death penalty.⁷⁰ Despite clear evidence of notoriously racially discriminatory application of Georgia's new death penalty statute, the Supreme Court later concluded in *McCleskey v. Kemp* that racial bias in sentencing is "an inevitable part of our criminal justice system."⁷¹ As a result of the Court's acceptance of racial bias in the system, more than 75% of death row defendants who have been executed in this country were sentenced for killing White victims, even though in society as a whole, about half of all homicide victims are African American.⁷²

Virginia reinstated the death penalty following *Gregg* on October 1, 1975, and has executed 111 people.⁷³ And consistent with Georgia, those who killed White victims were more likely to be charged with capital murder than those who killed Black victims.⁷⁴ However, in the last two decades, Virginia juries have been increasingly reluctant to impose the death penalty, and no jury has imposed the death penalty since 2011.⁷⁵ Ultimately, Virginia banned capital punishment entirely in 2021.⁷⁶

⁶⁹ *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (striking down Georgia's death penalty statute as a violation of the Eighth Amendment's "cruel and unusual punishments" clause noting that "if any basis can be discerned for the selection of these few sentenced to die, it is the constitutionally impermissible basis of race.").

⁷⁰ *Gregg v. Georgia*, 428 U.S. 153, 186–87 (1976) (clarifying that a capital punishment statute that is carefully drafted could be constitutional).

⁷¹ *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987).

⁷² *Race and Death Penalty by the Numbers*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/race/race-and-the-death-penalty-by-the-numbers> (last visited Feb. 6, 2022).

⁷³ *Virginia's Execution History*, VIRGINIANS FOR ALTERNATIVES TO THE DEATH PENALTY, <https://www.vadp.org/dp-info/virginias-execution-history/> (last visited Feb. 6, 2022).

⁷⁴ See Corinna Barrett Lain, *Three Observations about the Worst of the Worst, Virginia-Style*, 77 WASH. & LEE L. REV. ONLINE 469, 483 (2021), <https://scholarlycommons.law.wlu.edu/wlulr-online/vol77/iss2/8> (citing Frank Green, *Death Penalty Has Been Used to Enforce Racial Hierarchies Since Colonial Times, Study Concludes*, RICHMOND TIMES-DISPATCH (Sept. 15, 2020), <https://perma.cc/92DA-3LJ2> ("In 2000, a study of Virginia's death penalty by the Joint Legislative Audit and Review Commission found that defendants who murdered White victims were more likely to be indicted for capital murder and face prosecution than defendants who murdered Black victims.")).

⁷⁵ *Virginia History of the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/virginia> (last visited Feb. 6, 2022).

⁷⁶ *Virginia Abolishes the Death Penalty*, EQUAL JUSTICE INITIATIVE (Mar. 24, 2021), <https://eji.org/news/virginia-death-penalty-abolition/>.

A. The Supreme Court Struck Down the Death Penalty for Children in 2005

In *Roper v. Simmons*,⁷⁷ the United States Supreme Court struck down the death penalty for children as violative of the Eighth Amendment. Before the Supreme Court banned the death penalty for juveniles in *Roper*, the United States executed 366 people for offenses committed when they were children.⁷⁸

V. THE ROLE OF THE DEATH PENALTY IN FORCING PLEA AGREEMENTS
TO LIFE IMPRISONMENT

Through our work on juvenile parole cases, we learned that there are many ways that the judicial system was particularly unforgiving of juvenile defendants in the 1990s and early 2000s (and in some cases still today). In 2021, Virginia became the first southern state to abolish the death penalty, but not before it executed 1,390 people.⁷⁹ Before Virginia abolished it, prosecutors and law enforcement weaponized the death penalty to coerce young people, particularly racial minorities, to accept life sentences to avoid the threat of the death penalty.

A prosecutor gave one African American client less than an hour to decide whether to take a plea agreement to avoid the death penalty. When he was hesitant, his lawyer brought his family in to convince him to take the plea before he had the opportunity to see a shred of evidence introduced in court. Unless the parole board grants this man parole, he will die in prison. The threat of the death penalty is a powerful tool to force plea agreements.⁸⁰

The Commonwealth threatened this same client with the death penalty, despite having had an extremely difficult childhood and significant mitigation. His challenges came to the court's attention when he went into the foster care system at six years old. His father had pulled a gun in front of him and started firing at his mother. Despite the clear threat to his safety and evident instability in the home, Virginia allowed this child to return home six months

⁷⁷ *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

⁷⁸ *Id.*; Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes*, January 1, 1973-February 28, 2005, DEATH PENALTY INFO. CTR. 3 (Oct. 7, 2005), <https://files.deathpenaltyinfo.org/legacy/documents/StreibJuvDP2005.pdf>.

⁷⁹ Hailey Fuchs, *Virginia Becomes First Southern State to Abolish the Death Penalty*, N.Y. TIMES (Mar. 24, 2021), <https://www.nytimes.com/2021/03/24/us/politics/virginia-death-penalty.html>; *Virginia History of the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/virginia>.

⁸⁰ Kent S. Scheidegger, *The Death Penalty and Plea Bargaining to Life Sentences*, CRIM. JUST. LEGAL FOUND. 1, 2-3 (Feb. 2009), <https://cjl.org/publications/papers/wpaper09-01.pdf>. Of course, if this child were being sentenced today, death would not even be an option as the United States Supreme Court found the death penalty to be an unconstitutionally harsh sentence in *Roper v. Simmons*, 543 U.S. 541, 575 (2005).

later. After that, his life became increasingly chaotic, eventually leading to his living with his sister, who exposed him to drugs, alcohol, and significant illegal activities. The older teens he frequently associated with used him and other young children to deal drugs. His guardians repeatedly ignored recommendations that he enroll in mental health counseling to deal with the lifelong trauma of his upbringing. Finally, the Court sent him to live with his abusive, alcoholic, and drug-addicted father.

When this child later committed a violent crime out of a sense of desperation, his youth and chaotic upbringing rendered him unable to assist in his defense or evaluate plea options. A youthful offender's still developing cognitive and intellectual capacities, immaturity, and general lack of understanding of the legal process all place a child offender at a disadvantage compared to a similarly situated adult offender.⁸¹ He simply did not have the ability to decide whether to take a plea before there had even been a probable cause hearing. That plea resulted in his eventual death-in-prison sentence.

A. An Example of a Virginia Death Penalty Case from the Early 1980s

It is a tragedy that so many young people pled guilty to crimes that carried a life sentence because the prosecutor or police threatened them with the death penalty. In a civilized society, the state should never use the threat of execution to coerce someone into a guilty plea.

Before I started working in a professional capacity with children, I worked with the condemned on Virginia's death row. The first person I met on death row was Willie Lloyd Turner. I did not know what to expect, but it was an experience that profoundly impacted my career. I learned early on in our conversations that Turner was a direct descendant of Nat Turner, the leader of a Virginia slave rebellion in 1831.⁸² Willie Lloyd Turner grew up in abject poverty in rural Virginia, and his crime was notorious.⁸³ As a young man, he had killed a beloved store owner in his hometown in a robbery gone terribly wrong.⁸⁴ No one would deny that there should be accountability for this crime. But given the history of the disproportionate application of the death penalty when the victim is White and the perpetrator is Black, as in this case,

⁸¹ See Scott et al., *supra* note 23 at 699; see also *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

⁸² Jennifer L. Larson, *A Rebellion to Remember: The Legacy of Nat Turner*, UNIV. N.C. (last visited Feb. 6, 2022), <https://docsouth.unc.edu/highlights/turner.html>.

⁸³ Laura LaFay, *Turner's Life Pushed Him to Death's Edge, Sister Says*, VIRGINIAN PILOT (May 25, 1995), <https://scholar.lib.vt.edu/VA-news/VA-Pilot/issues/1995/vp950525/05250473.htm>.

⁸⁴ Phil McCombs, *Murderer's Fate Shakes Town's Faith in Justice*, WASH. POST (June 14, 1982), <https://www.washingtonpost.com/archive/politics/1982/06/14/murderers-fate-shakes-towns-faith-in-justice/7a76407a-535c-4b4a-b2f2-b14f6a8abc63/>.

what was most concerning was the trial court's refusal to allow his attorney to question the jury venire in any form about racial animus.⁸⁵

I spent some time getting to know Mr. Turner. Our interactions made me think about all the things that had gone wrong in his life long before he committed this terrible crime. Like so many others, he was illiterate when he went to prison.⁸⁶ Ironically, he learned how to read and write there, eventually becoming an inventor.⁸⁷ Corrections officials speculated that he had a photographic memory and could recreate things he had seen even for just a few seconds. He had created multiple keys that could have helped him escape from death row. The man I came to know was reflective about his crime and felt great remorse.

Of course, this would never make up for what he had done, but at least I knew that he felt great regret. And to help the world see that, Mr. Turner left a message in his property to be found after his execution. When his attorney opened Mr. Turner's typewriter after leaving the death chamber with it, as Turner had directed, he found a note that said, "Smile," a loaded gun, and eighteen extra bullets.⁸⁸ Turner told his attorney that he had not used it because of him.⁸⁹ I have always believed that one of the lessons here was that Willie Lloyd Turner had found his humanity. Perhaps he could have forced his way out of the prison, but instead, he went to his execution peacefully.

VI. THE EROSION OF THE PROMISE OF *MILLER'S* PROTECTIONS FOR CHILDREN

Although there has not been a rush to return to capital punishment for children, the fate of those decisions concerning mandatory life sentences is uncertain given the recent *Jones v. Mississippi* decision, in which the Supreme Court chipped away at the protections the court put in place in *Miller*.⁹⁰ In *Jones*, the Supreme Court undermined the contention that *Miller* and later

⁸⁵ *Turner v. Murray*, 476 U.S. 28, 29–31 (1986).

⁸⁶ LaFay, *supra* note 83.

⁸⁷ *Id.*

⁸⁸ Peter Baker, *Man Had Gun on Death Row, Lawyer Says*, WASH. POST (May 27, 1995), <https://www.washingtonpost.com/archive/local/1995/05/27/man-had-gun-on-death-row-lawyer-says/83cf7152-9a5e-48e8-b2e0-eb96ec316c7a/>.

⁸⁹ *Id.*

⁹⁰ *Jones v. Mississippi*, 141 S. Ct. 1307, 1318–19 (2021) (holding that *Montgomery* and *Miller* do not require a finding a child is incapable of rehabilitation before a life sentence can be imposed). Justice Sotomayor dissented and was joined by Justices Stephen Breyer and Elena Kagan. 141 S. Ct. at 1328–41. She accused the majority of "distort[ing] *Miller* and *Montgomery*" beyond recognition. 141 S. Ct. at 1334. The dissenters argued that *Montgomery* and *Miller* did impose a finding of incorrigibility and require a vigorous interrogation of a defendant's potential "to separate those juveniles who may be sentenced to life without parole from those who may not." 141 S. Ct. at 1328.

Montgomery v. Louisiana require a predicate finding that a child is incapable of rehabilitation before imposing a life sentence.⁹¹ In this case, Brett Jones, the defendant, was fifteen years old when he murdered his grandfather, an act that earned him a penalty of life in prison without parole.⁹² This sentence was affirmed even in the wake of *Miller*, where the Supreme Court ruled that life without parole was the appropriate sentence for Jones.⁹³ The Court rejected Jones's argument that, under *Miller* and *Montgomery*, a judge who imposes a life without parole sentence "must make a separate factual finding that the defendant is permanently incorrigible" or provide an on-the-record explanation "that the defendant is permanently incorrigible."⁹⁴

The contention that a predicate finding of incorrigibility is necessary does appear consistent with precedent. In *Montgomery*, Justice Kennedy noted that *Miller* had "created a new substantive rule by 'bar[ring] life without parole . . . for all but the rarest of juvenile offenders: those whose crimes reflect permanent incorrigibility.'"⁹⁵ Justice Sotomayor emphasized this point in her *Jones* dissent, asserting that *Miller* requires the sentencing judge to make a finding of permanent incorrigibility.⁹⁶ However, the majority dismissed this argument and noted that such a system is "constitutionally sufficient;" in effect, the majority condensed the *Miller* and *Montgomery* decisions into rulings that afforded state courts a highly flexible degree of discretion in sentencing.⁹⁷ The Court's decision does not comport with precedent: both the concurring and dissenting opinions focused on this deviation, and the Court even notes the discrepancy in a footnote to the opinion.⁹⁸ Nevertheless, the Court insisted the ruling was consistent with prior decisions, thus lessening the protections offered by *Miller* and *Montgomery*. This is a regrettable ruling, given the progress we have seen in recent decades, and a foreboding sign of things to come.

⁹¹ *Montgomery v. Louisiana*, 577 U.S. 190, 208–09 (2016) (holding that *Miller*'s ban on mandatory life sentences for juveniles should be applied retroactively); 141 S. Ct. at 1318–19; *Jones v. Mississippi*, No. 18–1259, slip op. at 2 (U.S. Apr. 22, 2021).

⁹² 141 S. Ct. at 1312.

⁹³ *Id.* at 1312–13.

⁹⁴ *Id.*

⁹⁵ *Montgomery v. Louisiana*, 577 U.S. 190, 208–09 (2016).

⁹⁶ *Jones v. Mississippi*, 141 S. Ct. 1307, 1331 (2021).

⁹⁷ *Id.* at 1329.

⁹⁸ 141 S. Ct. at 1331.

VII. VIRGINIA'S RESPONSE TO THE SUPERPREDATOR MYTH AND THE 1994 FEDERAL CRIME BILL

In the wake of racially-biased superpredator and mass incarceration mania, Virginia made significant changes to its juvenile and adult legal systems in 1996. For example, the General Assembly mandated that any felony adjudication, whether in juvenile or adult court, would become a permanent part of the record of any child aged fourteen years of age or older.⁹⁹ So unless the court decided to take the case under advisement, any child aged fourteen years of age or older would face a lifetime of closed doors.¹⁰⁰ Felony adjudications can lead to eviction, expulsion from school, denial of Pell Grants, difficulty finding employment, and so much more.¹⁰¹

Virginia created a sentencing scheme that allowed courts to sentence children as adults for felony offenses if the Commonwealth obtained a transfer and conviction in adult court.¹⁰² The General Assembly also passed the Serious Juvenile Offender Statute, which empowered both juvenile and circuit court judges to sentence juvenile offenders under the age of twenty-one to the juvenile prisons of the Department of Juvenile Justice.¹⁰³ The law additionally allowed circuit court judges to sentence a young person to serve an adult sentence after the juvenile sentence, referred to as a “blended sentence.”¹⁰⁴ While the legislature gave courts the option to send young people to the Department of Juvenile Justice first, prosecutors often requested that courts send them directly to the Department of Corrections. The state sent both of our female parole clients, one of which was only fourteen years old, and all of our male parole clients, who ranged from fifteen to seventeen, directly to adult prisons.

Our fourteen-year-old female parole client was tried as an adult for homicide and sent directly to an adult prison, surrounded by violent adult female offenders and adult male correctional officers. She has been in an adult prison

⁹⁹ See VA. CODE ANN. § 16.1-307 (1996).

¹⁰⁰ Courts typically reserve advisement for minor offenses and children just becoming involved in the juvenile legal system. This allows a court to dismiss the charge without an adjudication if the child makes satisfactory progress while under court supervision. *What is Virginia's Diversion Program for Juvenile Offenders*, WHITESTONE YOUNG (Sept. 21, 2021), <https://www.wbmylaw.com/what-is-virginias-diversion-program-for-juvenile-offenders/>.

¹⁰¹ See KIM AMBROSE & ALISON MILLIKAN, BEYOND JUVENILE COURT: LONG-TERM IMPACT OF A JUVENILE RECORD 3 (Stacy Chen & Christie Hedman eds., 2013) (acknowledging that a juvenile adjudication can have myriad collateral consequences); MARK DAVID EVANS, THE CONSEQUENCES OF ADJUDICATION: SANCTIONS BEYOND THE SENTENCE FOR JUVENILES UNDER COLORADO LAW (2019) (exploring the five primary collateral consequences of juvenile adjudications: school and employment, eligibility for public benefits, family situation, eligibility for firearm ownership, and citizenship).

¹⁰² See VA. CODE ANN. § 16.1-272 (2020).

¹⁰³ See VA. CODE ANN. §§ 16.1-272, -285.1, -285.2 (2021).

¹⁰⁴ See VA. CODE ANN. § 16.1-272 (2021).

for more than twenty years, where she has experienced sexual abuse and violence. At the time of her crime, she says of herself, “I was a reckless, broken, out-of-control, senseless, lost little girl...I gave up on myself because I was too ashamed and scared of being vulnerable.” Now in her thirties, she has accepted responsibility and expressed tremendous remorse for her crime when she was just fourteen.

She is focused on her education, future, and helping better the lives of other inmates. Indeed, she has earned an Associate’s degree and is now pursuing a Bachelor’s degree. She has also become a leader in the cognitive re-entry program at her prison. Numerous correctional employees have acknowledged that she is a changed person who will succeed outside of prison. When she was a child, her family could not take care of her. Today, her father, grandfather, and uncle fully support her and are in a better position to help her transition home. She attributes the strong emotional support of her family as the factor that made a significant difference in her life. Her institutional record also shows that growing older and pursuing an education has benefited her greatly.

VIII. FACILITIES DESIGNED TO HOLD CHILDREN ARE MORE EFFECTIVE THAN ADULT PRISONS IN TAPPING INTO CHILDREN’S INHERENT CAPACITY FOR REHABILITATION

A. Juvenile Facilities Focus On Both Accountability and Rehabilitation

Children and adults are different, and so is the goal of incarceration for each group.¹⁰⁵ When a child is committed to the Department of Juvenile Justice, the program offers many opportunities for the young person to participate in rehabilitative programs and services until those working with the youth are comfortable with the juvenile's rehabilitation.¹⁰⁶ When sentencing children involved with the criminal legal system, the goal should always be to rehabilitate the youth so they can safely return to the community.¹⁰⁷ Another critical goal should be to help them assimilate into the community so that they do not recidivate.¹⁰⁸ Punishment, rather than rehabilitation or assimilation back into the community, is the primary purpose of adult imprisonment.¹⁰⁹

¹⁰⁵ *Juvenile vs. Adult Justice*, FRONTLINE PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/juvenile/stats/juvvsadult.html> (last visited Feb. 6, 2022).

¹⁰⁶ *Our Transformation*, VA. DEPT. OF JUV. JUST., <http://www.djj.virginia.gov/pages/about-djj/djj-transformation.htm> (last visited Feb. 6, 2022).

¹⁰⁷ *Id.*

¹⁰⁸ DATA RESOURCE GUIDE FISCAL YEAR 2020, VA. DEPT. OF JUV. JUST. 19 (2020).

¹⁰⁹ Etienne Benson, *Rehabilitate Or Punish?*, 34 MONITOR PSYCH. 46, 46 (2003).

Studies show that appropriate interventions can help develop better self-regulation even in the most impulsive, aggressive child.¹¹⁰ Our clients whom the state tried as adults for more serious offenses such as robbery or murder consistently make significant progress while incarcerated in the Virginia Department of Juvenile Justice (“DJJ”) rather than adult prisons because, at its best, the DJJ works to promote prosocial thinking and a rejection of criminogenic tendencies.¹¹¹ When fully funded, the DJJ can provide a structured, stable environment with a robust support system and evidence-based rehabilitative programming.¹¹² Many kids are motivated to return to the community and show everyone that they are more than the worst thing they ever did.¹¹³ In Virginia—as in most, if not all of the United States’ territories—youth incarcerated in adult jails and prisons have less access to rehabilitative programs and educational services than their counterparts confined in juvenile correctional facilities.¹¹⁴

B. Adult Prisons are Primarily Designed to Incapacitate and Punish Offenders

Adults sentenced to prison terms are frequently thought to be non-responsive to alternative social programs designed for behavior management or are sentenced to prisons because alternatives are non-existent.¹¹⁵ Correctional officers are more likely to see prison residents as adult offenders and focus on enforcing rules, maximizing surveillance, and demonstrating their power.¹¹⁶ Not only do alternatives to a term of incarceration, such as supervised probation, exist in Virginia, but many of our Children’s Defense Clinic clients have continued to prove themselves amenable to such treatments and programs.¹¹⁷

Many incarcerated individuals have more limited access to programming aimed at their personal or social development.¹¹⁸ At the Department of Juvenile Justice, youths participate in a Community Treatment Model, which

¹¹⁰ LAURENCE STEINBERG, *AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE* 26 (First Mariner Books ed., 2015).

¹¹¹ DATA RESOURCE GUIDE FISCAL YEAR 2020, VA. DEPT. OF JUV. JUST. 18 (2020).

¹¹² *Id.*

¹¹³ See *Sentencing Authority*, *supra* note 2 (“A number of States have created ‘blended’ sentencing structures for cases involving serious and repeat juvenile offenders as a mechanism for holding these youth accountable for their offenses, while retaining the court’s ability to provide the most effective sanction option.”); see also Belluck, *supra* note 1.

¹¹⁴ Wood, *supra* note 13 at 1448.

¹¹⁵ Chelsea Dunn, *Condemning Our Youth to Lives as Criminals: Incarcerating Children as Adults*, 11 RICH. PUB. INT. L. REV. 30, 46 (2008).

¹¹⁶ Wood, *supra* note 13 at 1448.

¹¹⁷ *Children’s Defense Clinic*, U. RICH. SCH. OF LAW, <https://law.richmond.edu/academics/clinics-skills/in-house/childrens-defense/index.html> (last visited Feb. 1, 2022).

¹¹⁸ Grant Duwe, *The Use and Impact of Correctional Programming for Inmates on Pre- and Post-Release Outcomes*, NAT’L INST. JUSTICE 23–24 (2017).

integrates elements of trauma-informed care to promote the development of resilience, improved decision-making, and prosocial relationships.¹¹⁹ In our experience, this model is highly effective in helping our clients reject criminogenic thinking and embrace prosocial values.

IX. SOCIETY MUST EMPLOY EVIDENCE-BASED RESPONSES TO CRIMINAL BEHAVIOR

A. Virginia's Serious Offender Statute Allows a Sentencing Court to Take a Second Look after the Young Person Has Been Incarcerated for at Least Two Years

In Virginia, the legislature created an opportunity through the Serious Offender Statute by which courts can recognize that a young person has been rehabilitated and release him from incarceration early.¹²⁰ In our experience, the primary purposes of the “serious offender” statute are to provide for the rehabilitative needs of youthful offenders and establish safer re-entry routes for members of the public by rehabilitating young offenders.¹²¹ Commitment under the serious offender statute requires that (1) the child is at least fourteen; (2) the child had prior involvement with felonious activity, or else the underlying felony charge is punishable by a term of confinement of greater than twenty years if committed by an adult; and (3) the sentencing court makes a finding that commitment as a serious offender is necessary to meet the child’s “rehabilitative needs” and “serve[s] the best interests of the community.”¹²² When a court finds that commitment as a serious offender is “necessary to the rehabilitative needs of [a young person] and would serve the best interests of the community,” this statute can be utilized.¹²³ This statute acknowledges that holding rehabilitated young people in prison is counter-productive and more dangerous to society.¹²⁴

Juvenile facilities are similar to adult facilities, with goals of control, discipline, order, security, and punishment. However, juvenile facilities have better programs to advance the rehabilitation and progress of youth

¹¹⁹ VA. DEPT. OF JUV. JUST., DATA RESOURCE GUIDE FISCAL YEAR 2020 (2020), http://www.djj.virginia.gov/documents/about-djj/drg/FY2020_DRG.pdf.

¹²⁰ See VA. CODE ANN. § 16.1-285.1 (2021).

¹²¹ *Id.*

¹²² *Id.*

¹²³ VA. CODE ANN. § 16.1-285.1(A) (2021).

¹²⁴ Ian Lambie & Isabel Randell, *The Impact of Incarceration on Juvenile Offenders*, 33 CLINIC PYSCH. REV., 448, 456 (2013).

offenders.¹²⁵ Adults, unlike children, are presumed to be the most non-responsive to therapeutic programs.¹²⁶

B. Additional Examples of Redemption Among Our Youthful Clients

One of the things my clinic students and I see all too often is that police officers make unfair and unfounded assumptions about the kids with whom they interact. An example that comes to mind is a young man, whom I will call Joe, who had never before been in trouble and was part of nonviolent protests around the Confederate monuments. He joined in the demonstrations to “bring change” to his community. Joe said he wanted to witness the efforts to address the injustice and oppression symbolized by the monuments. In the days leading up to the night when he participated in the protests, he saw that the police pepper-sprayed citizens and forced them away from the monuments. One night when Joe personally attended the demonstrations, he saw the police coming in his direction. Joe ran down an alley, and the police chased him in their car. When they apprehended him, they asked him why he ran, and he told them he “was scared.” They asked with incredulity why he would be afraid of the police. Clearly, there was a disconnect there. He told me that he was terrified, given what had happened to George Floyd and countless others.

This young man was on his way to a successful college career and wanted to stand up for what he believed in, but the police told him they thought he was up to no good. And they told him if he was not more careful, he would end up on a t-shirt: “RIP [Joe].” This experience had a profound impact on him. Watching the police officers’ body cam footage, I can understand why. From the first moment they encountered this exceptionally polite young man, the police assumed that he was a thug who needed to go to jail. They condemned him for not having a job, even though he explained that he had graduated from high school just two weeks earlier and was leaving early for college soon because he was an athlete.

Thankfully, my students and I were able to convince the prosecutors in the case to set up a mediation between the police officers and our client rather than convicting him of a felony. The benefit of this approach is that the officers could hear why Joe was there and what his plans for his future entailed. Our client benefitted from hearing the officers’ perspective on maintaining order. After these conversations, the prosecutor agreed to dismiss his charges,

¹²⁵ Jeffrey Fagan & Aaron Kupchik, *Juvenile Incarceration and the Pains of Imprisonment*, 3 DUKE FORUM FOR L. & SOC. CHANGE 29, 38 (2011).

¹²⁶ See e.g., Dunn, *supra* note 115 at 46.

and our client has gone on to a successful college career without a felony record.

Another client we represented had lost both of his parents, and his absent uncle became his guardian. This client, whom I will call Charlie, is a classic example of the *Miller* factor regarding the reality that children cannot, on their own, escape their home life. One day, Charlie brought a small quantity of marijuana to school, which the school resource officer quickly discovered. The school immediately expelled him. Thankfully, we found out about the expulsion in time to appeal. We arranged for dismissal of the marijuana charge after a period of good behavior; we then successfully appealed the expulsion, and he returned to school.

Once Charlie was back in school, we worked with school officials to help him graduate from high school. Despite a complete lack of support at home, he went to school and worked hard to earn his degree. His school counselor, social worker, and probation officer provided him with wrap-around support and committed to seeing him through to graduation, which he accomplished. His case provides a powerful example of the capacity for redemption when a child is supported.

Several years after this case, Charlie appeared in court for a minor non-criminal violation. The judge asked him how he was doing, and he told the judge that he had been doing great ever since “those students and that professor from the University of Richmond” had helped him find a positive path. I always share this story with my students to help them see what a difference client-centered holistic representation can make in protecting kids from the arbitrariness of the legal system.

The court sentenced another client to a blended Serious Offender sentence that would start in the Department of Juvenile Justice and, if he were not released early by the court, would end in the Department of Corrections. The court committed this young man, whom I will call Tom, to the Department of Juvenile Justice when he was only fifteen. Growing up, family members passed him around because of his drug-addicted parents’ inability to care for him. When he was just eight, his mother left him with a family member, saying that she was going out to pay bills. She never returned. The Department of Social Services placed Tom in the custody of a relative. The following year, his mostly-absent father died. Despite his traumatic upbringing, this young man embraced the opportunities provided by the DJJ and spent his time incarcerated pursuing an education and learning skills that would help him find employment upon his release. Since his release five years ago, Tom has done exceptionally well and has been a productive citizen.

In these cases, the court gave these young people a second chance. This process allows children to have an opportunity to turn things around, learn from their misbehavior, and move on to a productive life. Unfortunately, second chances are not on the table in so many other cases. This is precisely the situation with which the Court was concerned when it struck down mandatory life sentences for children in *Miller v. Alabama*. When courts do not have the option of considering mitigating circumstances, a mandatory sentence is a cruel and unusual punishment.

X. OUR PAROLE REPRESENTATION WORK FURTHER ILLUSTRATES THAT CHILDREN HAVE SIGNIFICANT CAPACITY FOR REHABILITATION

Many of the clients we represent in the Children's Defense Clinic managed to maintain their inherent resilience in spite of the overwhelming harshness and racism of the criminal legal system. My students and I have been able to help many clients gain early release based on evidence that they have reached rehabilitation. We have learned that it is hard to succeed after prison without robust transitional services and the consistent support of family and friends. Our clients who have engaged in supportive re-entry services on the inside and have family members and supporters to embrace them as they shed the shackles of incarceration for the last time will succeed. Our clients whose families have been unable to transcend the separation and trauma of having their child grow up in prison have a much harder time. Incarceration not only breaks those on the inside; it breaks families.¹²⁷

We had another client recently released after more than twenty years whose family had completely walked away from him once he was convicted. This client had the opportunity to take a plea for just a few years, but instead, he insisted on going to trial. That decision cost him dearly, as his conviction carried a mandatory life sentence. Before the court sentenced this young man, whom I will call Rob, his mother died from cancer. After that, his father walked away and started a new family. Rob never heard from him during his incarceration. We successfully petitioned under the "extraordinary and compelling circumstances" section of the First Step Act¹²⁸ for his release, given that even the Government thought he did not deserve more than a few years, but his challenges have been legion ever since. Although he was a model prisoner, he suffers from Post-Traumatic Stress Disorder and had nowhere to

¹²⁷ See generally Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, NAT. INST. OF JUST. (2017), <https://nij.ojp.gov/topics/articles/hidden-consequences-impact-incarceration-dependent-children> (noting the risk factors for family members and children of incarcerated individuals).

¹²⁸ 18 U.S.C. § 3582(c)(1)(A)(i); FED. BUREAU OF PRISONS, AN OVERVIEW OF THE FIRST STEP ACT, <https://www.bop.gov/inmates/fsa/overview.jsp>.

go upon his release. Rob has struggled with homelessness and depression. We worked for months to reunite him with his family and have recently succeeded; Rob is now in a loving and supportive environment, participating in mental health services and transitioning well.

A. The Use of Super-Maximum Prisons Further Traumatizes Youthful Defendants

In 1998 and 1999, Virginia opened Red Onion and Wallens Ridge prisons, respectively, which are super-maximum facilities located in the far southwest corner of Virginia.¹²⁹ The facilities, known as “supermax” prisons, were designed to isolate prisoners as much as possible. These prisons allow corrections officials to hold people in near-total social isolation and are notoriously dangerous.¹³⁰ In the 1990s, the Department of Corrections routinely sent youthful offenders directly to these facilities rather than juvenile facilities. One example is a client, whom I will call Jay, who killed another person in the weeks before Christmas in the mid-1990s when he was only seventeen years old. The consequences of his actions have plagued him ever since, as illustrated by his begging a police officer to kill him in the aftermath of the crime. Like all the clients described in this paper, Jay has consistently taken full responsibility and expressed profound remorse. Indeed, he pled guilty to all charges with no plea agreement, and he refused to place blame on anyone else.

As previously mentioned, the key regions of the brain responsible for decision-making, planning, impulse-control, and risk-management remain underdeveloped until twenty-five.¹³¹ ACEs further delay and inhibit neurological development.¹³² Of the ten most commonly evaluated ACEs, this client survived eight before his eighteenth birthday. As expected, Child Protective Services was no stranger to Jay’s home. The family participated in more than a dozen meetings to determine what services to implement. Even a system so often regarded as flawed and inadequate recognized that this child and family needed help. But for all the good intentions behind each of the programs tried, none of them succeeded in addressing the violent toxicity in Jay’s home environment. The system spent a lot of time and money to address his behavior,

¹²⁹ Craig Timberg, *At Va.’s Toughest Prison, Tight Controls*, WASH. POST (Apr. 18, 1999) at C1, <https://www.washingtonpost.com/wp-srv/local/daily/april99/supermax18.htm>.

¹³⁰ David Fathi, *Supermax Prisons: Cruel, Inhuman and Degrading*, ACLU (Jul. 9, 2010), <https://www.aclu.org/blog/national-security/supermax-prisons-cruel-inhuman-and-degrading>.

¹³¹ *Brain Maturity Extends Well Beyond Teen Years*, NPR (Oct. 10, 2011), <https://www.npr.org/templates/story/story.php?storyId=141164708>.

¹³² Sarah E. Cprek et al., *Adverse Childhood Experiences (ACEs) and Risk of Childhood Delays in Children Ages 1-5*, 37 CHILD & ADOLESCENT SOC. WORK J., 15–23 (2019).

only to place him back in the middle of a completely dysfunctional home environment.

Somehow, despite his upbringing and the violence he experienced as a child placed in a supermax prison, once he matured, Jay has remained free of any serious infractions in prison for the last seventeen years. He has pursued an education and has developed vocational skills to help him find gainful employment should he ever be released from prison. All these things became possible as his brain fully developed, and he grew out of criminogenic thinking.¹³³ Sadly, though, he may never be released back into the community to apply the skills he learned once he began his path to rehabilitation.

Another sixteen-year-old child, whose crime reflected immaturity and impulsivity, had no criminal convictions before his crime. This child, whom I will call Danny, neither understood the pain he could cause to others and himself nor his impulses when he pulled the trigger and ended another man's life. Like many others in the 1990s, this child was committed directly to the Department of Corrections rather than the Department of Juvenile Justice. The court condemned him to more than four decades for the murder. In Danny's own words, "My incarceration was very necessary for my journey into the meaning of life. I appreciate that prison has offered me the opportunity to learn, grow, adjust and develop into a man ready to reenter society with positive, productive goals and [the] ability to contribute to my community."

Even without hope for early release, Danny's remorse for the terrible crime he committed led him to pursue rehabilitation. He is a quintessential example of the resilience inherent in young people when allowed to participate in rehabilitative programs. After twenty-five years in prison, he still regrets his past conduct and is devoted to being a positive member of the community. While incarcerated, this client committed no infractions (which is almost unheard of) and, as a result, was allowed to complete mental health treatment and counseling programs, earn his GED, and take multiple trade and vocational courses. He also worked throughout his incarceration, which will help him acquire gainful employment. This client has said, "Society deserve[s] someone who could provide light instead of darkness." He now has the opportunity for a second chance as the parole board released him on parole.

¹³³ See *Graham v. Florida*, 560 U.S. 48, 79 (2010) ("Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation.").

B. In the Past, Age was Seen as an Aggravating Rather Than a Mitigating Circumstance

In many of these cases, courts viewed youth as an aggravating circumstance rather than a mitigating one, and minors were treated more harshly than their adult co-defendants. Another client condemned to die in prison declares that he lives every day with regret. He took a man's life at just fifteen years old—abandoned by his mother to the “care” of drug dealers ten years his senior. “The depth and gravity of what I took away,” he explains, “takes on a new meaning each and every single day as I have grown up and grown older.” The court sentenced this fifteen-year-old young man, whom I will call Zach, to seventy-seven years in an adult prison with violent adult offenders. “Prison is a miserable jungle of an environment, and no one adapts easily or seamlessly,” he wrote. Although he had no hope of release, he has persevered. He fought through his childhood trauma and, once he matured, worked to be more than his worst moment. The two drug dealers who forced this client to commit this crime received sentences of “time-served” and eleven years, respectively, for their role in this murder, while the court sentenced this child to serve more than seventy years.

Zach was in and out of foster care. He was often homeless. He watched as the police arrested his mother dozens and dozens of times. His grandmother told her therapist about his plight, and the therapist requested a Child Protective Services (“CPS”) investigation. Unfortunately, CPS never contacted him and, ironically, ruled the request “unfounded” after he was incarcerated.

The court sentenced Zach directly to the Virginia Department of Corrections. At his sentencing, the “prosecutor[s] argue[ed]...youth [was] aggravating rather than mitigating,” a theme thankfully rejected by the U.S. Supreme Court in *Roper v. Simmons* (the days when “the prosecutor[s] argue[...] youth is aggravating rather than mitigating” are over).¹³⁴

Zach is a rehabilitated and reformed man today, just as the fifth *Miller* factor suggests will often be the case. As the American Psychological Association (“APA”) stated in *Miller*, research proves “that personality traits change significantly during the developmental transition from adolescence to adulthood, and the process of identity-formation typically remains incomplete until at least the early twenties.”¹³⁵ Thus, youth “are simply more likely than adults to change.”¹³⁶ Similarly, a group of retired judges’ *Miller* amicus brief stated, “Amici have been repeatedly impressed and surprised by the

¹³⁴ *Roper v. Simmons*, 543 U.S. 551, 573 (2005).

¹³⁵ Brief for Am. Psych. Ass’n et al. as Amici Curiae Supporting Petitioners at 20, *Miller v. Alabama*, 567 U.S. 460 (2012) (No. 10-9646).

¹³⁶ *Id.*

ability of juvenile offenders – including very serious offenders – to change and reform as they grow older and come to appreciate the consequences of their actions better.”¹³⁷

Zach exemplifies this truth. He was fifteen at the time of his offenses. Despite his traumatic upbringing, Zach had no record of committing a juvenile delinquency matter or a criminal act before the fatal shooting. Regardless, the court convicted him as an adult, and he went straight into the adult correctional system. Zach never had the benefit of the rehabilitative programs of the juvenile justice system. And yet, fortunately, once he matured, he was able to tap into his natural resilience and is now a reformed and rehabilitated man. As Zach grew and his brain developed, he found his path to rehabilitation. He embraced the opportunities offered by the Department of Corrections. He focused on furthering his education, working, and nurturing his pro-social relationships. Zach achieved rehabilitation and a profound sense of remorse, exactly as developmental psychology tells us is possible. Still, unless we provide opportunities for a second look in these cases, the system will forever condemn offenders for the things they did as children. Thankfully, the parole board released Zach and gave him his second chance.

Another of our clients, whom I will call Antonio, has found the motivation to persevere, grow, and mature during his twenty-three years in prison. Since going straight to an adult maximum-security prison, he has relied on pro-social relationships outside of prison to help him develop into a remorseful, reformed, educated leader and role model. Not long after Antonio’s brain fully developed in his mid-twenties, he quickly learned to stop making excuses and turn his remorse into action. Since then, he has had a near-perfect prison record with only a handful of minor infractions. In his own words, “he has been on a journey of self-reflection, education, religion/spirituality, pro-social development, and growth.” Antonio has learned to rise above peer pressure and negative influences and has become a mentor for young people in prison. He has maintained unfailing positivity, gained the ability to de-escalate conflict, and learned to work with all types of individuals. The mystery is how this client accomplished these things despite his childhood and incarceration in a supermax adult prison.

As a teenager, Antonio was highly susceptible to peer pressure. As the APA stated in its *Miller* amicus brief, juveniles are “especially vulnerable to the negative influence of peer pressure.... The presence of peers makes adolescents and youth, but not adults, more likely to take risks and more likely

¹³⁷ Brief of Former Juv. Ct. Judges as Amici Curiae Supporting Petitioners at 13, *Miller v. Alabama*, 567 U.S. 460 (2012) (No. 10-9646).

to make risky decisions.”¹³⁸ Studies also show that adolescents take on more risks and are only likely to commit delinquent acts when influenced and accompanied by their peers.¹³⁹ Ironically, the court treated one of the peers with whom this client committed this crime very differently. This young man was fortunate to have a lawyer that negotiated a plea agreement for him in which he received a six-year sentence, even though he and this client had played similar roles in the crime. Neither of them presented a gun or pulled the trigger. The third co-defendant did that, and he and this client received essentially the same sentence.

This client was particularly susceptible to negative influences given that he grew up in an environment that normalized and even idolized criminal behavior. Again, as *Miller* emphasized, children do not have the opportunity to walk away from their families. He grew up in a public housing community ranked in the region’s top eight most violent neighborhoods.¹⁴⁰ Here, Antonio regularly witnessed violence and crime. Given the normalization of crime and violence in his community, paired with his young age and lack of supervision, it was not surprising that he turned to criminal activity.

Once he reached his mid-twenties, he recognized that his actions impacted others. He committed himself to building prosocial relationships in the community and prison. Thankfully, Antonio has fostered relationships with his family and friends in the community and reconnected with friends with whom he lost touch. This man knows he can never fully atone for the crimes he committed, but he chooses to spend each day focusing on helping others and doing what he can to better himself. He took every opportunity in prison to volunteer in programs, facilitate seminars for other inmates, and serve as a mentor and role model, even though he had no reason to believe he would ever walk out of prison. He is widely known by prison employees, corrections officers, offenders, counselors, program facilitators, and more as a hard worker, a positive influence, and someone who can navigate and de-escalate conflict because others respect him as a stable and thoughtful leader. Thanks to Virginia’s fledgling embrace of second chances, this man is free today. In his own words,

¹³⁸ Brief for Am. Psych. Ass’n et al. as Amici Curiae Supporting Petitioners at 16–17, *Miller v. Alabama*, 567 U.S. 460 (2012) (No. 10-9646).

¹³⁹ *Id.* at 8–9; see also Mary Gifford-Smith et al., *Peer Influence in Children and Adolescents: Crossing the Bridge from Developmental to Intervention Science*, 33 J. ABNORMAL CHILD PSYCH. 255, 263 (2005).

¹⁴⁰ See Jon Frank, *Living in Harm’s Way Throughout Hampton Roads, A Pattern of Violence Emerges in Most Public Housing: 72 Percent of the Region’s Public Housing Residents Eat and Sleep and Raise Children... In 15 Communities with Violent Crime Rates At Least Twice the Rate of Their Surrounding Cities*, THE VIRGINIAN PILOT, Oct. 15, 1995, at A1, <https://scholar.lib.vt.edu/VA-news/VA-Pilot/issues/1995/vp951015/10130654.htm>.

“I will forever live with the remorse of my criminal actions as a child. A part of me will never let me forgive myself for what I did, and that feeling is what pushed me to do all I can to “make up” for what I did. I know I can’t make up, but I can work hard every day in an attempt to. It is like something Martin Luther King once said, ‘I’m working to build a pyramid I will never see complete, yet I must continue to add bricks to it every day.’ . . . I will forever owe society and the many direct and indirect victims of my offenses an apology. I will forever live with that chip on my shoulder, and use it as a reminder to do better, be better, and try to exemplify redemption.”

C. Courts Denied Most Youth Sentenced for Serious Crimes in the 1990s and 2000s the Opportunity to go into Juvenile Facilities First

Even though another client, whom I will call Jonathan, was just a fifteen-year-old child at the time of his crime—a crime in which he did not physically hurt anyone—and had no prior criminal record, the court denied him a blended sentence, denied him access to the services the Department of Juvenile Justice (“DJJ”) offers, and denied him the opportunity to be charged as a serious offender and potentially have his time reduced – all of which he almost certainly would have received today. All of these options were available at the time of his sentencing. But due to misguided, misinformed policies adopted at the height of the “superpredator” era, he was seen not as a child in need of help but rather as a violent teenager who needed to be locked away from society. Thankfully, both our society and legislature have come a long way in addressing the systemic flaws of that era.

Instead of having the opportunity to rehabilitate with kids his age, the court sent Jonathan to adult prison with Virginia’s most violent offenders. Adjusting to that environment was a challenge, and he first committed many infractions as he fought to learn how to survive a supermax prison. However, after that first year, his record of infractions is almost spotless. The lens applied to his case would be very different given what we now understand about adolescent brain development and trauma. If facing trial today, in recognition of the *Miller* factors, the court could suspend any mandatory time and sentence Jonathan to serve the first part of his sentence in a juvenile correctional center.

One of our other clients, whom I will call Matthew, was seventeen at the time of his offense and had no previous record of either a juvenile delinquency matter or a criminal act. During the crime, this client’s co-defendant was the only one who carried a weapon and the one who shot the gun. Regardless, this client was convicted as an adult and sent straight into the adult correctional system. Matthew never had the benefit of the rehabilitative services and programs of the juvenile justice system. He had to find his path to rehabilitation in prison. As he matured, he realized that furthering his education, working, and nurturing relationships in the community were his path to

success. Matthew has fully embraced those opportunities and has served more than twenty-five hard years for this crime. He is in a strong position now to no longer threaten the community. Indeed, he could live a quiet life in the community and make a positive contribution as a tax-paying employee with a company that has already offered him a job.

Every day of his incarceration, he has had to think about what he would do differently today to prevent this tragedy. In Matthew's words, "Prison has been the matriculation I would never have had...prison has been the best thing to have happened to me, ironically. In order to become the man I am today, I had to go through the experiences I have for the past twenty-six years." This client pled guilty to all charges without a plea agreement and accepted responsibility for his role in the offenses. He regrets the terrible harm he caused every day, especially as he matured and better understood the gravity of what he and his co-defendant had done.

XI. THESE CLIENTS DESERVE A SECOND CHANCE

These clients are examples of everything for which *Roper*, *Graham*, *Miller*, and *Montgomery* stand. The crimes these individuals committed typify acts committed by adolescent minds. The American Medical Association ("AMA") summarized the adolescent brain as a hyperactive reward-driven system with an immature cognitive control system.¹⁴¹ The AMA concluded that, as a result, adolescent behavior is impulsive, motivated by short-term rewards, and is marked by ineffective risk assessment.¹⁴² In its *Miller* amicus brief, the APA stated that even serious juvenile crimes such as homicide are often spur-of-the-moment, impulsive reactions rather than premeditated actions and are typically predicated on a social or emotional stimulus.¹⁴³

In recognition of the clear evidence that children are highly likely to turn their lives around once their brains fully develop, the Virginia General Assembly has changed how we treat adolescents in the juvenile legal system. In 2020, the legislature passed a bill to allow the parole board to consider releasing individuals who have served twenty years for crimes they committed before they turned eighteen.¹⁴⁴ Many of the clients described above fall into that category. We continue to advocate before the parole board for

¹⁴¹ Brief for Am. Psych. Ass'n et al. as Amici Curiae Supporting Petitioners at 35, *Miller v. Alabama*, 567 U.S. 460 (2012) (No. 10-9646).

¹⁴² *Id.*

¹⁴³ *Id.* at 12. Science has now demonstrated that the portions of the brain responsible for self-control, regulating impulses, and avoiding unduly risky behavior do not fully develop until an individual is in his/her 20s. See Elizabeth Scott, *supra* note 23 at 683-84 (describing the "age-crime curve" and noting that "individuals do not evince adult levels of impulse control until their early or mid-twenties.").

¹⁴⁴ VA. CODE ANN. § 53.1-165.1 (2020).

recognition that they have turned their lives around.

The legislature also began to reform those policies that streamlined the trial of children as adults and returned discretion to juvenile court judges for fourteen and fifteen-year-old offenders.¹⁴⁵ Now, fourteen and fifteen-year-olds are no longer automatically certified as adults for murder or aggravated malicious wounding once the Juvenile and Domestic Relations Court has found probable cause.¹⁴⁶ If the prosecutor provides written notice of her intent to try a fourteen or fifteen-year-old child as an adult, the court must first hold a probable cause hearing.¹⁴⁷ If the court finds probable cause, the juvenile court must review a transfer report prepared by the Court Service Unit and hold a transfer hearing.¹⁴⁸ The court must then determine whether to keep the case in the juvenile court or send the case to the circuit court to try the child as an adult.¹⁴⁹

Additionally, the legislature created a new defense of diminished capacity when mental health or intellectual disability evidence is relevant to intent.¹⁵⁰ If diminished capacity had been a defense available to the clients discussed above, it could have made a significant difference in how the criminal legal system responded. The legislature also enacted several measures requiring the court and the prosecutor to consider mitigating circumstances, including a child's emotional development, trauma history, involvement with the foster care system, disability, and mental illness, before determining whether to try the youth as an adult.¹⁵¹ The General Assembly still mandates the trial of sixteen and seventeen-year-olds as adults when charged with violent crimes such as murder or aggravated malicious wounding.¹⁵² However, when the Commonwealth charges a sixteen or seventeen-year-old with a significant felony, such as robbery or rape, the Commonwealth can only move to try them as adults after considering a report about the child's history and a risk assessment.¹⁵³ If the Commonwealth still intends to try the young person as an adult, it must provide written notice, and the court must find probable cause before the case can be certified to circuit court.¹⁵⁴ Another significant change is that judges now have discretion over whether to try fourteen and fifteen-year-olds charged with murder or aggravated malicious wounding

¹⁴⁵ See VA. CODE ANN. § 16.1-269.1 (2021).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ VA. CODE ANN. § 16.1-269.2 (2021).

¹⁴⁹ *Id.*

¹⁵⁰ VA. CODE ANN. § 19.2-271.6 (2021).

¹⁵¹ See VA. CODE ANN. § 16.1-272 (2021); VA. CODE ANN. § 16.1-269.1A (2021).

¹⁵² VA. CODE ANN. § 16.1-269.1 (2021).

¹⁵³ VA. CODE ANN. § 16.1-269.1(C-D) (2021); VA. CODE ANN. § 16.1-269.2(B) (2021).

¹⁵⁴ VA. CODE ANN. § 16.1-269.1 (2021).

severe and violent felonies as adults.¹⁵⁵ Suppose the juvenile court finds probable cause and certifies the case for trial in the circuit court. In that case, such certification divests the juvenile court of jurisdiction as to the charge and any ancillary charges. However, if the judge decides to keep the case in juvenile court, the court maintains jurisdiction.¹⁵⁶

Suppose a case does get transferred to adult court. In that case, the judge is now required at sentencing to specifically consider, consistent with the *Miller* factors, any evidence regarding the child's exposure to ACEs,¹⁵⁷ early childhood trauma, experience with any child welfare agency, and the differences between youthful and adult offenders.¹⁵⁸ Circuit courts are no longer required to impose mandatory minimum sentences on youth tried as adults.¹⁵⁹ Further, defense counsel may now request expert assistance through an *ex parte* hearing if the court deems it appropriate.¹⁶⁰

The legislature also passed a law requiring parents' notification before interrogating a child.¹⁶¹ In recognition of the inequity of lengthy sentences and the collateral consequences of permanent criminal records, the legislature has begun creating and expanding opportunities for post-conviction societal reintegration. The Virginia legislature is also creating a system for the expungement of certain offenses after the individual has paid her debt to society. The legislature legalized marijuana possession for adults (and reformed the penalties for children), streamlined the restoration of voting rights, and expanded good time opportunities. The Department of Juvenile Justice has also invested in step-down options, such as independent living programs, that assist

¹⁵⁵ VA. CODE ANN. 16.1-269.1 (A-B).

¹⁵⁶ VA. CODE ANN. § 16.1-269.1(D) (2021).

¹⁵⁷ The original ACE Study was conducted at Kaiser Permanente from 1995 to 1997 with two waves of data collection. Over 17,000 Health Maintenance Organization members from Southern California receiving physical exams completed confidential surveys regarding their childhood experiences and current health status and behaviors. These seven experiences, which the researchers subsequently expanded to a list of ten, occurred in the homes of children across the country. Researchers found a graded relationship between how many ACEs an individual experienced in childhood and subsequent negative health outcomes in adulthood; meaning, the more ACEs a child experienced, the more physical health problems they had as adults. ACEs include: physical abuse, mental illness in the home, emotional abuse, emotional neglect, sexual abuse, family or domestic violence, substance abuse in the home, separation from a parent, or having a household member be incarcerated. Subsequent research has found ACEs are associated with a variety of negative outcomes, including poor physical and mental health, victimization, and justice system involvement. Additionally, researchers have identified other childhood experiences that should be considered ACEs as they are also highly correlated with negative outcomes in adulthood, such as the following: peer bullying/violence, poverty, experiencing racism, experiencing/witnessing community violence, experiencing parental or sibling incarceration, and foster care involvement. *About the CDC-Kaiser ACE Study*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Apr. 6, 2021), <https://www.cdc.gov/violenceprevention/aces/about.html>.

¹⁵⁸ VA. CODE ANN. § 16.1-272(D) (2021).

¹⁵⁹ VA. CODE ANN. § 16.1-272(A)(3) (2021).

¹⁶⁰ VA. CODE ANN. § 19.2-266.4 (2021); VA. SUP. CT. R. 2:702(a)(ii).

¹⁶¹ VA. CODE ANN. § 16.1-247.1 (2021).

young people upon release from juvenile prison, helping them transition back to the community with extensive support. Many of these changes will increase the opportunity for offenders to successfully reenter society as productive citizens who can participate in democracy and find better employment opportunities.

CONCLUSION

It is a new day in Virginia, but there is still more to do to fully realize the promise of a criminal legal system that both holds individuals accountable and envisions their rehabilitation. While there have been significant strides in the right direction, and data has debunked the superpredator myth, there is still much to be done. If we are genuinely committed to reducing serious crime in our communities, we must invest in evidence-based, trauma-informed policies that genuinely address the root causes of crime. We can no longer rely on the over-policing of poor communities and mass incarceration as the only tools in the toolbox.

We must invest in a comprehensive social safety net that guarantees that all children have safe housing, enough food, high-quality education, vocational opportunities, comprehensive medical and mental health care, plentiful extra-curricular opportunities in their neighborhoods, and supported families uplifted by their communities. Society and our clients have paid a heavy price for our failure to recognize the need to invest in our marginalized communities. It is past time for a more proactive approach that will better protect us all. We cannot police our way out of our failure to provide these guarantees. We have tried and failed.