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Toward a Theory of Procedural Justice for Juveniles

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INTRODUCTION

The juvenile court has historically been a hybrid institution in terms of its purpose and procedures, incorporating aspects of both the civil and criminal court systems.[1] In the late nineteenth century, the founders of the first juvenile courts in the United States were motivated by a desire to provide a forum—separate and discrete from that of adult criminal defendants—for the adjudication and disposition of child and adolescent offenders.[2] The initial result was an informal system emphasizing the rehabilitation and remediation of wayward youth, with little focus on the court's fact-finding role vis-à-vis the alleged criminal offense and even less consideration given to the

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1. McKeiver v. Pennsylvania, 403 U.S. 528, 541 (1971) ("Little, indeed, is to be gained by any attempt simplistically to call the juvenile court proceeding either 'civil' or 'criminal.'").

2. *See* DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING 4-22 (2004) (describing the efforts of women reformers and philanthropists during the 1880s and 1890s to establish a separate justice system in Chicago for children accused of committing crimes); *see also In re* Gault, 387 U.S. 1, 15 (1967) ("The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals.").

rights of the accused.[3] As the decades passed and the juvenile court became increasingly punitive, child advocates challenged the informality of delinquency proceedings, and critical due process rights were ultimately granted to young offenders.[4] In the 1960s and early 1970s, the United States Supreme Court held in a trio of foundational cases that juveniles have basic due process rights in delinquency proceedings[5] and before transfer from juvenile to adult criminal court.[6] Certain rights—including trial by jury—were not extended to juveniles,[7] however, premised on the contention that the unique and beneficial aspects of juvenile court would be compromised if all the formalities of the criminal system were "superimposed" upon it.[8] As the juvenile court system has expanded and the realities of limited resources and inadequate staffing have become apparent, the concern expressed by Justice Fortas in 1966

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3. *See* Commonwealth v. Fisher, 62 A. 198, 200 (Pa. 1905) ("To save a child from becoming a criminal, . . . the Legislature surely may provide for the salvation of such a child, if its parents or guardian be unable or unwilling to do so, by bringing it into one of the courts of the state *without any process at all*, for the purpose of subjecting it to the state's guardianship and protection.") (emphasis added); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109-10, 119-20 (1909) ("The problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.").

4. Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*,THE FUTURE OF CHILD., Fall 2008, at 15, 17.

5. *In re* Winship, 397 U.S. 358, 368 (1970) (applying the standard of proof of "beyond a reasonable doubt" to juvenile delinquency cases); *In re Gault*, 387 U.S. at 41, 55, 57 (holding that due process rights, such as the right to counsel, the privilege against self-incrimination, and the opportunity for cross-examination of witnesses, apply to juvenile delinquency proceedings).

6. Kent v. United States, 383 U.S. 541, 553-54 (1966) (holding that juveniles have a due process right to a hearing, to effective assistance of counsel, and to a statement of reasons prior to being transferred from juvenile court to adult criminal court).

7. The term "juvenile" as used here refers to those young offenders who are under the jurisdiction of their state's juvenile delinquency court. The majority of states in the United States cap juvenile court jurisdiction at age eighteen or seventeen, while three currently end it at age sixteen. Tamar R. Birckhead, *North Carolina, Juvenile Court Jurisdiction, and the Resistance to Reform*, 86 N.C. L. REV. 1443, 1445 & nn.1 & 3 (2008).

8. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 551 (1971).

that juveniles were receiving "the worst of both worlds" continues to resonate.[9]

The debate over how to weigh the potential benefits of juvenile court against the risks associated with the denial of due process rights has animated critical analysis of the juvenile justice system for the past forty years.[10] Some courts and commentators have applied the contractual concept of quid pro quo ("something for something")[11] when deciding whether a particular procedural protection, such as the right to a jury trial, is constitutionally mandated for juvenile offenders.[12] It is suggested in these opinions—usually in explicit terms—that with the granting of each "new" right to juveniles, there is less of a need for a separate children's court.[13] Alternatively, courts have

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9. *Kent*, 383 U.S. at 555-56 (stating that because juvenile court proceedings are neither wholly civil nor criminal in nature, a juvenile "gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children").

10. *See, e.g.*, Schall v. Martin, 467 U.S. 253, 263 (1984) ("We have tried, therefore, to strike a balance—to respect the 'informality' and 'flexibility' that characterize juvenile proceedings, . . . and yet to ensure that such proceedings comport with the 'fundamental fairness' demanded by the Due Process Clause.") (citations omitted); *In re Winship*, 397 U.S. at 366 (finding that application of the reasonable doubt standard to juvenile adjudications will not "risk destruction of beneficial aspects of the juvenile process"). *But see In re Gault*, 387 U.S. at 21 ("It is claimed that juveniles obtain benefits from the special procedures applicable to them which more than offset the disadvantages of denial of the substance of normal due process. As we shall discuss, the observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process.").

11. BLACK'S LAW DICTIONARY 1282 (8th ed. 2004) ("[Quid pro quo means a]n action or thing that is exchanged for another action or thing of more of less equal value . . . .").

12. *See, e.g.*, Doe v. McFaul, 599 F. Supp. 1421, 1428 (N.D. Ohio 1984) ("[J]udges agree that a juvenile court system must maintain a *quid pro quo* under which juveniles who are deprived of due process rights" receive "rehabilitative and individual treatment" in exchange.); Osorio v. Rios, 429 F. Supp. 570, 574 (D.P.R. 1976) ("[T]he *quid pro quo* for juvenile procedures is not . . . [only] 'rehabilitation' . . . [but also] escap[ing] legal disabilities imposed upon adult offenders, such as a criminal record.").

13. *See, e.g., McKeiver*, 403 U.S. at 545 ("There is a possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective

denied specific procedural protections to juveniles when convinced that young offenders have received rehabilitative services, and not punitive treatment, in return.[14] Other courts have moved away from a strict rendering of quid pro quo and toward a more flexible balancing of competing interests when determining whether to provide a particular procedural right to juveniles;[15] in these cases, the decision often hinges upon the court's sense of what is required to achieve a "fundamentally fair" result.[16] The question rarely

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proceeding."); *see also* United States v. Edward J., 224 F.3d 1216, 1223 (10th Cir. 2000) (relying on *McKeiver* to deny juveniles the right to a public trial, as it would bring "the clamor of the adversary system"); People v. Taylor, 850 N.E.2d 134, 142 (Ill. 2006) (holding that because juveniles do not have the right to a jury trial, juvenile adjudications cannot be deemed "criminal felony convictions").

14. *See, e.g., In re* C.B., 708 So. 2d 391, 397 (La. 1998) ("[T]here has been recognized in the juvenile system a 'quid pro quo' under which juveniles who are placed in adult facilities without the safeguards of due process that are enjoyed by adults will receive in return rehabilitative treatment rather than mere punitive incarceration.") (citations omitted).

15. *See, e.g.*, *In re Winship*, 397 U.S. at 365-66 ("[C]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts . . . ."); *see also* Santana v. Collazo, 714 F.2d 1172, 1181 (1st Cir. 1983) (remanding case to determine whether isolation of juveniles at a correctional institution was "reasonably related to a legitimate government objective, or simply adds to the punishment already imposed by incarceration"); *In re* Jason C., 767 A.2d 710, 718-19 (Conn. 2001) (using a balancing approach to conclude that the unique character of juvenile court will not be damaged by requiring that a juvenile be advised of the possibility of commitment extension before a plea is accepted); *In re* Steven G., 556 A.2d 131, 134-35 (Conn. 1989) (concluding that the lower court did not err in applying a "fundamental fairness" analysis when upholding the trial court's decision to allow additional charges to be brought midtrial against a juvenile); Irene Merker Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27 UCLA L. REV. 656, 695-96 (19-80) (describing the way in which the U.S. Supreme Court has "balanc[ed] the values served by the [D]ue [P]rocess [C]lause and the Bill of Rights against the values achieved by an efficient system for apprehension and correction of children accused of crime").

16. *See, e.g.*, Kent v. United States, 383 U.S. 541, 554, 561 (1966) (resting its decision that juveniles have a due process right to a hearing before transfer from juvenile to adult criminal court on abstract notions of "justice"); *see also* Breed v. Jones, 421 U.S. 519, 540-41 (1975) (relying on concepts of "fundamental fairness" to hold that the 5th Amendment prohibition against double jeopardy applies to juvenile court adjudications); *In re* Kevin S., 6 Cal. Rptr. 3d 178, 187-88, 197 (Ct. App. 2003) (relying on "the essentials of due process and fair treatment" to hold that juveniles have a right to appointed counsel on appeal of

posed, however, is whether weighing rehabilitative against punitive theories of delinquency court is the proper calculus.[17] Will certain procedural protections "spell the doom"[18] of the juvenile court system, or should the analysis be focused on completely different factors?

In 2008, the Kansas Supreme Court held that juveniles have a constitutional right to a jury trial,[19] bringing the total number of states that either provide jury trials to juveniles by right or allow them under limited circumstances to twenty.[20] *In re L.M.* was premised on the

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delinquency adjudications); State v. Brown, 879 So. 2d 1276, 1289 (La. 2004) (holding, based on notions of "fundamental fairness," that prior adjudications of delinquency cannot be used to enhance defendant's sentence where adjudication was rendered without the right to trial by jury).

17. *See* Franklin E. Zimring, *The Common Thread: Diversion in the Jurisprudence of Juvenile Courts*, *in* A CENTURY OF JUVENILE JUSTICE 142, 144-50 (Margaret K. Rosenheim et al. eds., 2002) (describing an informal and rehabilitative juvenile court as one in which standards of proof and defense lawyers are considered "a major drawback to identifying children in need and providing them with help" while a "diversionary" theory of juvenile justice perceives no conflict between appropriate due process protections that shield young offenders from the gratuitous harms and destructive impact of the criminal courts and achieving the beneficial functions of the juvenile system).

18. *In re C.B.*, 708 So. 2d at 398.

19. *In re* L.M., 186 P.3d 164, 170 (Kan. 2008).

20. Linda A. Szymanski, *Juvenile Delinquents' Right to a Jury Trial (2007 Update)*, NCJJ SNAPSHOT (Nat'l Ctr. for Juvenile Justice, Pittsburgh, Pa.), Feb. 2008 (stating that thirty states plus the District of Columbia have statutory or case law that denies juveniles the right to a jury trial, while the remaining states either allow for it by right for delinquency adjudications or provide jury trials for juveniles under limited circumstances). During the past fifteen years, several states—including Louisiana, Oregon, Pennsylvania, New Jersey, and Wisconsin—have proposed, but not enacted, legislation that would have permitted or required jury trials for juveniles. *Id.* With the 2008 Kansas court decision affording juveniles the right to trial by jury, ten states now provide for jury trials at adjudication. *See generally* OKLA. CONST. art. II, § 19; ALASKA STAT. § 47.12.110(a) (2008); MASS. GEN. LAWS ch. 119, § 56(c) (2008); MONT. CODE ANN. § 41-5-1502 (2007); N.M. STAT. § 32A-2-16 (2006); TEX. FAM. CODE ANN. § 54.03(b)(6) (Vernon 2008); W. VA. CODE § 49-5-6 (2007); WYO. STAT. ANN. § 14-6-223 (2009); MCR 3.911(a); *In re L.M.*, 186 P.3d at 170. Ten states allow jury trials for juveniles only under limited special circumstances. *See generally* ARK. CODE ANN. § 9-27-325(a)(1)(B) (2008) ("If a juvenile is designated an extended juvenile jurisdiction offender, the juvenile shall have a right to a jury trial at the adjudication."); COLO. REV. STAT. § 19-2-107(1) (2008) (stating that a jury trial may be demanded when a juvenile is alleged to be an aggravated juvenile offender or alleged to have committed a crime of violence); CONN. GEN. STAT.

contention that punitive legislation passed during the previous quarter-century had eroded the distinctions between the juvenile and criminal justice systems and thereby compromised the juvenile court's "benevolent, *parens patriae* character."[21] After closely comparing the language and purpose of the state's juvenile and criminal codes, the Kansas court concluded that because of the similarities between the two systems, young offenders must be afforded the protection of trial by jury under the Sixth and Fourteenth Amendments.[22] While *In re L.M.* is

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§ 46b-133c (2009) (stating that if juvenile is a "serious juvenile repeat offender," having been charged with committing a felony after the age of fourteen, the juvenile has a right to a jury trial); IDAHO CODE ANN. § 20-509(1) (2006) (stating that juveniles under the age of eighteen shall be "ordered by the court to be held for adult criminal proceedings" if alleged to have committed any of the enumerated offenses, and "[a]ny juvenile proceeded against pursuant to this section shall be accorded all constitutional rights, including bail and trial by jury," and all other procedural safeguards that are provided to adult defendants); 705 ILL. COMP. STAT. 405/5-810(3) (2007) ("A minor who is subject of an extended jurisdiction juvenile prosecution has the right to trial by jury."); MINN. STAT. § 260B.163 (2007) ("[H]earings on any matter shall be without a jury and may be conducted in an informal manner, except that a child who is prosecuted as an extended jurisdiction juvenile has the right to a jury trial on the issue of guilt."); N.H. REV. STAT. ANN. § 169-B:19 (2008) ("Any minor sentenced after a contested adjudicatory hearing to an order of conditional release extending beyond the juvenile's age of majority or suspended, deferred, or imposed incarceration at an adult correctional facility may, after the disposition is issued, request a de novo trial before a jury."); OHIO REV. CODE ANN. § 2152.67 (West 2005) (stating that jury trials are available for juveniles only upon the judge's own motion); R.I. GEN. LAWS §§ 14-1-7.2, -7.3 (Supp. 2008) (stating that after a certification hearing, juveniles sixteen and older who have been found delinquent for having committed two offenses after the age of sixteen shall be afforded the right to a jury trial); VA. CODE ANN. § 16.1-296(C) (2009) (stating that upon appeal of a delinquency finding, the juvenile, prosecutor, or judge may request a jury trial).

21. *In re L.M.*, 186 P.3d at 170. The Latin term "parens patriae" literally translates as "parent of his or her country" but refers in this context to the ability of the state to stand in as a "surrogate parent" to juveniles without requiring the due process protections afforded to adults. BLACK'S LAW DICTIONARY, *supra* note 11, at 1144-45; *see also In re* Gault, 387 U.S. 1, 16 (1967) ("The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance.").

22. *In re L.M.*, 186 P.3d at 170 ("[B]ecause the juvenile justice system is now patterned after the adult criminal system, we conclude that the changes have superseded the . . . Courts' reasoning and those decisions are no longer binding precedent for us to follow.").

considered by many juvenile justice advocates to have been a clear victory for young offenders,[23] its holding may also be seen as perpetuating the concept of quid pro quo, in which the rehabilitative ideal of juvenile court is directly juxtaposed against the due process protections provided to adults under the adversarial model.[24] Yet, instead of concluding that the jury trial right would compromise the beneficial nature of juvenile court, the Kansas Supreme Court found that there was so little left to distinguish the juvenile system from the adult system that this right could no longer be denied.[25] In this way, the decision may also be seen as taking a step toward the more radical notion that because of its shortcomings and ineffectiveness, the juvenile court system should be abolished as a separate procedural entity and replaced with a criminal court for minors.[26]

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23. *See, e.g.*, David Klepper & Diane Carroll, *Ruling: Juveniles Can Have Jury Trials*, WICHITA EAGLE, June 21, 2008, at 1A (stating that Kansas City attorneys who represent juvenile offenders welcomed the ruling, and quoting a local district court judge who regularly granted juveniles jury trials as calling the ruling "a big deal"); *see also* Mike Belt, *Court: Juveniles Have Right to Jury Trial*, LAWRENCE J.-WORLD (Kan.), June 21, 2008, at A1 (reporting optimism by defense attorneys that juries will be more sympathetic than judges, and fears by prosecutors that processing time and costs will "double, if not triple"); Steve Fry, *County Court Hears First Juvenile Trial*, TOPEKA CAPITAL -J., Oct. 28, 2008, at 1A (reporting concern regarding the increased numbers of juvenile jury trials); David Klepper, *Major Changes Predicted in Juvenile Justice System*, KAN. CITY STAR (Mo.), Sept. 28, 2008, at B1 (reporting that because of efforts in Missouri to treat juveniles more like adults, the Kansas decision is being closely considered); Jon Ruhlen, *Thus Far, Juvenile Jury Law a Minor Burden,* THE HUTCHINSON NEWS (Kan.), Jan. 25, 2009, at A1 (stating that the impact of the Kansas ruling is not yet known, as the area is "uncharted territory").

24. *See supra* notes 8-13 and accompanying text.

25. *In re L.M.*, 186 P.3d at 170.

26. *See, e.g.*, Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991) (arguing for merging the juvenile and adult court systems to provide more effective procedural safeguards for juvenile offenders); Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 96-102, 113-21 (1997) (arguing for a unified criminal justice system that provides young offenders full due process protections as well as sentence reductions based on their youth); *see also* Charles E. Springer, *Rehabilitating the Juvenile Court*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 397, 411-19 (1990) (arguing that because juvenile court treats children like criminals and vice versa, the juvenile court

This Article critically examines the ways in which courts have determined whether juveniles should be granted certain procedural rights, and it argues that rather than subscribe to the wooden concept of quid pro quo or utilize a subjective balancing approach, courts should allow empirical research evaluating adolescents' appraisals of the fairness of a decision-making process—also known as procedural justice—to inform the decision.[27] Part I analyzes United States Supreme Court case law that has addressed this issue and discusses the recent Kansas Supreme Court case that rejected precedent, but fails to shift the juvenile justice paradigm.

Part II argues that social science research provides a useful perspective from which to analyze whether specific procedural rights should be granted to juveniles. The first section examines research on why people obey the law. The second section discusses the legal socialization of adolescents and its influence on patterns of reoffending. The third section suggests that when juveniles perceive that they have been treated fairly by law enforcement and the courts—a judgment shown *not* to be dependent upon the outcome of the case—they are less likely to recidivate.

Part III begins the task of applying procedural justice theory and related findings by social psychologists to the juvenile court, an analysis that has not previously been presented by legal scholars.[28] The first section examines

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system should adopt a justice model that incorporates both retributive and distributive justice).

27. Shelly Jackson & Mark Fondacaro, *Procedural Justice in Resolving Family Conflict: Implications for Youth Violence Prevention*, 21 L. & POL'Y 101, 102 (1999). Since the 1970s, social scientists have used the term "procedural justice" to refer to the psychological effects of various decision-making models (e.g. adversarial, inquisitorial, or a hybrid approach) on fairness judgments; over the decades, experimental research and participant surveys have strongly suggested that multi-factor or "hybrid procedures" are perceived as both more fair, based on subjective assessments, and more accurate, based on objective measures and empirical study, than traditional adversarial procedures. Mark R. Fondacaro, Christopher Slobogin & Tricia Cross, *Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Social Science*, 57 HASTINGS L.J. 955, 975-81 (2006) (endorsing a more flexible view of due process); *see also infra* Part II.

28. While legal scholars have acknowledged the value of examining various juvenile court procedural models through the lens of social science research, a rigorous analysis of the ways in which procedural justice theory can reframe the

how the theory could reframe the debate over whether

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debate over whether to extend specific due process protections to juveniles has not previously been presented. Very few law review articles discuss the concept of procedural justice and its utility for juvenile delinquency court. *See, e.g.*, Fondacaro et al., *supra* note 27, at 984-89; Amy D. Ronner, *Songs of Validation, Voice and Voluntary Participation: Therapeutic Jurisprudence,* Miranda *and Juveniles*, 71 U. CIN. L. REV. 89, 93-94 (2002) (arguing that when criminal defendants believe that the legal system has treated them with fairness, dignity, and respect, they are more likely to cooperate with conditions of disposition and probation and less likely to recidivate, and applying this to the context of the interrogation of juveniles); *see also* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 111-12 (2004) (stating that mainstream criminal law scholarship has been "slow to incorporate" the insights of social psychologists "regarding the relational dimension of criminal wrongdoing into practice recommendations for criminal justice reforms"); *infra* notes 239-51 and accompanying text (discussing the work of scholars in the area of therapeutic jurisprudence and distinguishing it from procedural justice theory). Legal scholars have, however, utilized procedural justice theory to analyze other areas of the law. *See, e.g.*, Brian H. Bornstein & Susan Poser, *Perceptions of Procedural and Distributive Justice in the September 11th Victim Compensation Fund*, 17 CORNELL J.L. & PUB. POL'Y 75, 81-85 (2007) (examining the role that procedural and distributive justice played in claimants' satisfaction with the September 11th Victim Compensation Fund); Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 6-11 (2009) (proposing that procedural justice theory be applied to nonclass aggregation, and observing that procedural justice is context-dependent); Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1875-81 (2002) (arguing that social science research suggests that those concerned with the safety of domestic violence victims should not ignore batterers' perceptions of fairness); Adam Lamparello, *Social Psychology, Legitimacy, and the Ethical Foundations of Judgment: Importing the Procedural Justice Model to Federal Sentencing Jurisprudence*, 38 COLUM. HUM. RTS. L. REV. 115, 155-65 (2006) (proposing a process-oriented solution to federal sentencing jurisprudence based upon the procedural justice paradigm and supported by empirical data and social psychological research); Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 420-32 (2008) (arguing that procedural justice should be part of the plea bargaining reform agenda); *see also* Richard C. Boothman et al., *A Better Approach to Medical Malpractice Claims? The University of Michigan Experience*, 2 J. HEALTH & LIFE SCI. L. 125, 137-46 (2009) (finding empirically that when doctors admit to medical error and compensate their patients quickly and fairly when such error causes injury, the number of new medical malpractice claims decreases, resulting in significant fiscal savings); Kevin Sack, *Doctors Start to Say 'I'm Sorry' Long Before 'See You in Court,'* N.Y. TIMES, May 18, 2008, at A1 (reporting that at hospitals that have acknowledged a preventable error and apologized to the patient, the number of malpractice filings have dropped dramatically, and hospitals have experienced major savings in legal costs).

juveniles have a constitutional right to a jury trial. The second section applies the theory to the practice of allowing juveniles to waive counsel and admit to criminal charges at arraignment, which has been justified as enabling juveniles to receive treatment without the delay that often results from litigation of the charges. The third section applies the theory to the practice of allowing school-based actors such as teachers and administrators to serve as law enforcement without providing traditional due process protections to youth. The fourth and final section considers how procedural justice theory might affect the role of the parent in juvenile delinquency proceedings.

Part IV concludes by acknowledging the limits of procedural justice theory as applied to juveniles; it offers caveats and raises questions for moving ahead.

I. FROM QUID PRO QUO TO SUBJECTIVE BALANCING AND BACK

Perhaps because it was created to remedy the harsh and unforgiving manner in which the criminal court system dealt with young offenders,[29] the juvenile court system during the first half of the twentieth century was notable for its procedural informality and lack of administrative oversight.[30] As juvenile dispositions became more punitive, the quid pro quo exchange of rights for rehabilitation

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29. *See* David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, *in* A CENTURY OF JUVENILE JUSTICE 42, 43-45 (Margaret K. Rosenheim et al. eds., 2002) (describing how the early proponents of juvenile court designed the system to remove children from the harsh nature of the criminal justice system and to shield them from the stigma of publicity).

30. *See, e.g.*, Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323, 328-39 (1991); Zimring, *supra* note 17, at 142-43 ("Informal proceedings were preferred to formal ones, so that the delinquent's needs could be determined. Broad and vague definitions of delinquency were favored, so that all children who needed help would fall within the new court's jurisdiction."); *see also* Allison Boyce, Note, *Choosing the Forum: Prosecutorial Discretion and* Walker v. State, 46 ARK. L. REV. 985, 987 (1994) (stating that informality was seen as part of the rehabilitation process in the early years of juvenile court); Kellie M. Johnson, Note, *Juvenile Competency Statutes: A Model for State Legislation*, 81 IND. L.J. 1067, 1069 (2006) (stating, in the context of advocating for juvenile competency statutes, that "[o]riginally, the juvenile court system granted judges broad discretion to conduct very informal proceedings").

inevitably broke down, resulting in juveniles receiving neither effective treatment nor the procedural protections of adults.[31] From 1966 to 1970, the United States Supreme Court entered the breach with a series of decisions that relied upon the Due Process Clause for their grounding.[32] This Part discusses these decisions as well as the recent Kansas case in which the court utilized quid pro quo analysis to hold that juveniles *do* have a Sixth Amendment right to a jury trial.

A. *Defining Fundamental Fairness*

During a four-year period beginning in 1966, the United States Supreme Court addressed important aspects of the juvenile delinquency process in three formative cases, each of which relied upon the Due Process Clause rather than the Sixth Amendment for its holding.[33] The first, *Kent v. United States*, held that before a juvenile's transfer to adult criminal court, she must be given an opportunity for hearing, counsel must be given access to relevant records, and the court must accompany its transfer order with a statement of reasons or considerations for its decision.[34] While stopping short of mandating that all constitutional guaranties applicable to adult criminal defendants be

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31. *See generally* Joel F. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 12 (outlining a proposal for procedural reform in the juvenile courts based on the claims that the promises of the movement had not been fulfilled and that the current system precipitates recidivism and "destroys basic values and rights"); *see also* David R. Barrett, William J. T. Brown & John M. Cramer, Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966) (evaluating juvenile adjudicatory hearings, the role of the police, and the implications of these processes for the juvenile court system).

32. *See infra* notes 34-47 and accompanying text.

33. It is worth noting, however, that the Court's holdings in these cases were also premised, at least in part, on grounds separate and discrete from that of the Due Process Clause. *See, e.g.*, *In re* Gault, 387 U.S. 1, 47-50 (1967) (holding that the privilege against self-incrimination is available to juveniles through the "unequivocal" language of the Fifth Amendment, applicable to the states through the Fourteenth Amendment); Kent v. United States, 383 U.S. 541, 560 (1966) (analyzing the question of whether the transfer of a child from juvenile to adult criminal court is a "critically important" proceeding under the language of the District of Columbia's Juvenile Court Act).

34. *Kent*, 383 U.S. at 561.

applied to juveniles, the Court held that it would be "extraordinary" if society permitted children to be transferred to adult court without these basic protections.[35]

The second and most comprehensive case of this period was *In re Gault*, widely celebrated by attorneys and advocates,[36] which rejected the assertion that the substantive benefits of the juvenile court process "more than offset" the denial of due process rights to juveniles.[37] Instead, upon holding that such due process rights as the right to counsel, the privilege against self-incrimination, and the opportunity for cross-examination of witnesses apply to juvenile delinquency proceedings, the Court stated that these protections may, in fact, be "more impressive and . . . therapeutic" for the juvenile than the long-assumed benefits of the juvenile system—namely, its informality and the benevolence and compassion of the judge.[38] Citing a 1966 report on juvenile delinquency by sociologists Stanton Wheeler and Leonard Cottrell, the Court recognized that when harsh punitive measures come on the heels of "procedural laxness," a child may feel that she has been

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35. *Id.* at 554, 556; *see also* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (stating that the Court has "refrained . . . from taking the easy way" by holding that all due process rights granted to adults should apply equally to juveniles, and has instead "'properly attempted to strike a judicious balance by injecting procedural orderliness into the juvenile court system'" (quoting Commonwealth v. Johnson, 234 A.2d 9, 15 (Pa. Super. Ct. 1967))).

36. *See, e.g.*, Katherine R. Kruse, In re Gault *and the Promise of Systemic Reform*, 75 TENN. L. REV. 287 (2008); Wallace J. Mlyniec, In re Gault *at 40: The Right to Counsel in Juvenile Court—A Promise Unfulfilled*, 44 CRIM. L. BULL. 371 (2008)*; see also* Thomas Adcock, *Accolades*, N.Y. L.J., June 2007, at 20 20(2007) (reporting on an awards ceremony and program commemorating the 40th anniversary of *Gault*); Sarah Viren, *Rights & Wrongs—Programs Teach Legal Rights to Elementary School Students*, THE HOUSTON CHRON., Feb. 15, 2008, at B1 (reporting on a program to teach children their basic legal rights, inspired by the 40th anniversary of *Gault*); Press Release, Rutgers Law School, Rutgers Law School Hosts Conference Marking 40th Anniversary of Landmark Decision that Established Due Process Rights of Juveniles (Apr. 1, 2007), http://news.rutgers.edu/medrel/news-releases/2007/04/rutgers-law-school-h-20070401.

37. *In re* Gault, 387 U.S. 1, 21 (1967). "[T]he appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned." *Id.* at 26.

38. *Id.*

"deceived or enticed."[39] As Wheeler and Cottrell have stated, "Unless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel."[40]

The Court was careful to situate its decision, however, within the framework of due process balancing by concluding that the provision of basic due process protections to juveniles would by no means require that "the conception of the kindly juvenile judge be replaced by its opposite."[41]

The third case in this trio, *In re Winship*, decided three years after *Gault*, held that because the Due Process Clause requires application of "essentials of due process and fair treatment," juveniles—like adults—are constitutionally entitled to proof beyond a reasonable doubt during the adjudicatory hearing.[42] Again acknowledging that there is "no automatic congruence between the procedural requirements imposed by due process in a criminal case, and those imposed by due process in [a] juvenile case[ ],"[43] the Court in *Winship* concluded without much explication that to afford juveniles the protection of the highest standard of proof would not "risk destruction of beneficial aspects of the juvenile process."[44]

It is significant that the Court in each of these three cases arrived at the decision to provide procedural protections to juveniles based not on the specific Sixth Amendment guarantees of notice, confrontation, counsel, and trial by jury that are required for "all criminal prosecutions,"[45] but on the general language of the Due

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39. *Id; see also infra* Part II.C (asserting that the Court in *Gault* recognized the import and validity of procedural justice theory).

40. *In re Gault*, 387 U.S. at 26 (quoting STANTON WHEELER & LEONARD S. COTTRELL, JR., JUVENILE DELINQUENCY: ITS PREVENTION AND CONTROL 33 (1966)).

41. *Id.* at 27; *see also* Kent v. United States, 383 U.S. 541, 555 (1966) ("But the admonition [that the juvenile court] function in a 'parental' relationship is not an invitation to procedural arbitrariness.").

42. *In re* Winship, 397 U.S. 358, 367 (1970) (quoting *In re Gault*, 387 U.S. at 30).

43. *Id.* at 374-75 (Harlan, J., concurring); *see also id.* at 359.

44. *Id.* at 366.

45. The Sixth Amendment provides:

Process Clause of the Fourteenth Amendment.[46] Some commentators have suggested that applying this more subjective or "interpretive approach" to the juvenile delinquency process means that as long as procedural mechanisms can be shown to be as "fair" as the Sixth Amendment's adversarial model, they too may satisfy constitutional requirements—even if demonstrably different.[47]

On the heels of cases that relied on conceptions of "fairness" to grant procedural rights to juveniles, the United States Supreme Court rejected the notion that juveniles have a right to a jury trial in delinquency court.[48] The Court was divided as to the basis of *McKeiver v. Pennsylvania*, however, as a plurality of justices agreed on the result based on policy considerations and the presumed negative impact of jury trials on juvenile court proceedings,[49] while concurring justices determined that the touchstone should be both the Sixth Amendment and the concept of fundamental fairness as established by the Due Process Clause.[50] Meanwhile, the *McKeiver* dissenters relied

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> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

46. *Gault*, 387 U.S. at 13-14, 30-31. The Due Process Clause of the Fourteenth Amendment provides: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV; *see also supra* note 33.

47. *See, e.g.*, Fondacaro et al., *supra* note 27, at 956-57, 963-65.

48. McKeiver v. Pennsylvania, 403 U.S. 528, 550-51 (1971).

49. *Id.* at 545-50; *see also* Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 560-62 (1998) (stating that the *McKeiver* plurality rejected the jury trial model as not necessary to achieve fundamental fairness, because there was "no reason to doubt that judges would decide cases as fairly as juries").

50. *McKeiver*, 403 U.S. at 551-53 (White, J., concurring) (holding that neither the Sixth Amendment nor due process requires juvenile jury trials, but that the states are free to offer jury trials in juvenile court if they choose); *id.* at

squarely on the Sixth and Fourteenth Amendments to conclude that juveniles who are prosecuted for criminal acts potentially triggering loss of liberty *are* entitled to the same protections as adults accused of crimes.[51]

As suggested earlier, a critical part of the subtext underlying the decisions of *Kent, Gault, Winship*, and *McKeiver* is the matter of whether juvenile courts have the necessary resources to perform in a *parens patriae* capacity.[52] Also explored is the question of whether the juvenile court system is performing so well in regard to rehabilitation and recidivism that due process safeguards afforded to adult criminal defendants may be justifiably withheld from young offenders.[53] In the three United States Supreme Court cases that have extended due process protections to juveniles, these questions are answered in the negative, with the Court stating that the system has become sufficiently punitive and ineffective to warrant additional procedural protections for juveniles.[54] In *McKeiver*, however,

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557 (Harlan, J., concurring) (holding that neither the Sixth Amendment nor due process requires jury trials for either adult or juvenile defendants); *id.* at 553-57 (Brennan, J., concurring) (holding that the Sixth Amendment does not require jury trials for juveniles, and that as long as jury trials are public, principles of fundamental fairness are satisfied).

51. *Id.* at 557-63 (Douglas, J., dissenting).

52. *See, e.g.*, *McKeiver*, 403 U.S. at 544 ("Too often the juvenile court judge falls far short of that stalwart, protective, and communicating figure the system envisaged. The community's unwillingness to provide people and facilities and to be concerned, the insufficiency of time devoted, the scarcity of professional help, the inadequacy of dispositional alternatives, and our general lack of knowledge all contribute to dissatisfaction with the experiment."); *In re* Gault, 387 U.S. 1, 21-22 (1967) ("[I]t is important, we think, that the claimed benefits of the juvenile process should be candidly appraised. Neither sentiment nor folklore should cause us to shut our eyes, for example, to such startling findings as that reported in an exceptionally reliable study of repeaters or recidivism . . . ."); Kent v. United States, 383 U.S. 541, 555-56 (1966) ("There is much evidence that some juvenile courts, including that of the District of Columbia, lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation.").

53. *See, e.g.*, *In re* Winship, 397 U.S. 358, 365-66 (1970) ("[C]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts . . . .").

54. *See In re Winship*, 397 U.S. at 365-66 (recognizing that children with delinquency adjudications can be subjected to a loss of liberty comparable in seriousness to felony prosecutions); *In re Gault*, 387 U.S. at 543 (citing evidence

while the Court acknowledges that "the fond and idealistic hopes of the juvenile court proponents and early reformers" have not been realized, it qualifies its admission by contending that "[this] is to say no more than what is true of criminal courts in the United States. But failure is most striking when hopes are highest."[55] More recently, the Kansas Supreme Court also answered these questions in the negative, rejecting *McKeiver*'s reasoning not by shifting the paradigm but by applying traditional quid pro quo analysis.[56]

B. *Kansas Fails to Shift the Paradigm*

Although the Kansas Supreme Court did not provide a detailed account of the facts of *In re L.M.* in its opinion,[57] they are worth recounting for they are typical of juvenile cases that are tried before a judge—a significant number of which may be characterized by the insufficiency of the evidence presented,[58] resulting from judges who fail to apply the beyond a reasonable doubt standard consistently and prosecutors who overcharge young offenders.[59] Sixteen-year-

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of high juvenile crime rates and questioning whether the juvenile system is effective to reduce crime or rehabilitate offenders) (citations omitted); *Kent*, 383 U.S. at 555-56 (stating that there is "much evidence" that some juvenile courts lack the capacity to perform adequately).

55. McKeiver, 403 U.S. at 543-45. *But see id.* at 545 (maintaining that if jury trials are constitutionally required for juveniles, it would mean the end of the "idealistic prospect" of juvenile court as "an intimate, informal protective proceeding").

56. *See infra* notes 57-83 and accompanying text.

57. 186 P.3d 164, 165 (Kan. 2008) ("Further discussion of the facts is not relevant to the issue on appeal and will not be discussed herein.").

58. Guggenheim & Hertz, *supra* note 49, at 564-65 (citing multiple cases from a single calendar year in which juvenile delinquency findings following bench trials were overturned because of insufficient evidence); *see also* R.L.A.C. v. State, 823 So. 2d 1288, 1291-92 (Ala. Crim. App. 2001) (juvenile adjudication overturned due to insufficient evidence regarding juvenile's unauthorized use of motor vehicle); *In re* C.M.T., 861 A.2d 348, 355 (Pa. Super. Ct. 2004) (juvenile adjudication overturned due to excluded evidence of child's mental disability); *infra* Part III.B.

59. Guggenheim & Hertz, *supra* note 49, at 564 ("The case law suggests that judges often convict [juveniles after bench trials] on evidence so scant that only the most closed-minded or misguided juror could think the evidence satisfied the standard of proof beyond a reasonable doubt."); *see also In re* Anthony W., 879

old L.M. was charged with one count of aggravated sexual battery, a felony under Kansas law, and one count of possessing alcohol as a minor, a misdemeanor.[60] The testimony showed that L.M. met the victim,[61] who was a decade his senior, late at night outside a bar where she had been drinking and arguing with her boyfriend.[62] After the victim gave L.M. a cigarette and told him her name, he tried to kiss her and licked the side of her face.[63] During the assault, L.M. had his arms around her, but did not grab or touch any other part of her body or touch any part of his own body.[64] After the victim rejected his advances, L.M. let her go; she then waited outside her home for her boyfriend to return, as she did not have a key.[65] Although the victim did not sustain any injuries and felt it unnecessary to report the incident, her boyfriend called the police.[66] L.M. was subsequently taken into custody without incident; he was

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A.2d 717, 731-32 (Md. 2005) (overturning juvenile delinquency adjudication for failure of trial court to require the state to provide independent corroboration of accomplice testimony); Brief for Juvenile Law Center et al. as Amici Curiae Supporting Appellant at 5-6, *In re* K.M.M., 885 A.2d 592 (Pa. Super. Ct. 2005) (No. 193-CW-2004) (arguing that juvenile adjudication be overturned as trial court did not review evidence of father's ability to care for juvenile).

60. *In re L.M.*, 186 P.3d at 165; Brief of Appellant at 2-3, *In re L.M.*, 186 P.3d 164 (No. 06-96197-A).

61. For purposes of clarity, I refer here to the complainant as the "victim," though it is arguable, as explained *infra*, whether she was actually victimized in any meaningful sense by L.M. Likewise, I refer to the incident as an "assault" also for purposes of clarity, as it is again arguable whether the act reached the level of "assault," as required by law.

62. Brief of Appellant, *supra* note 60, at 2; Amended Brief of Appellee at 2-4, *In re L.M.*, 186 P.3d 164 (No. 06-96197-A).

63. Brief of Appellant, *supra* note 60, at 3; Amended Brief of Appellee, *supra* note 62, at 2.

64. Brief of Appellant, *supra* note 60, at 3; Amended Brief of Appellee, *supra* note 62, at 2, 4. *See generally* KAN. STAT. ANN. § 21-3518 (2007) (defining aggravated sexual battery as the "intentional touching of the person of another . . . who does not consent . . . *with the intent to arouse or satisfy the sexual desires* of the offender . . . [w]hen the victim is overcome by force or fear") (emphasis added).

65. Brief of Appellant, *supra* note 60, at 3; Amended Brief of Appellee, *supra* note 62, at 3.

66. Brief of Appellant, *supra* note 60, at 3-4; Amended Brief of Appellee, *supra* note 62, at 4.

questioned by police into the early hours of the morning, showing signs of being intoxicated and confused.[67]

L.M., who had never before been arrested, was held in a juvenile detention facility from the day of the incident, August 11, 2005, until his first trial date on January 5, 2006, when he was released pending a new trial date one week hence.[68] On January 12, 2006, after his motion for a jury trial was denied and the case was tried before a judge, L.M. was convicted of aggravated sexual battery and again ordered detained until final disposition on February 7, 2006.[69] The district court then sentenced him as a "Serious Offender I to a term of eighteen months in a juvenile correctional facility, but stayed the sentence and ordered L.M. to be placed on probation" until age twenty.[70] Pursuant

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67. Brief of Appellant, *supra* note 60, at 4-5; Amended Brief of Appellee, *supra* note 62, at 5-6.

68. Brief of Appellant, *supra* note 60, at 1, 5; *see also* Lois A. Weithorn, *Envisioning Second-Order Change in America's Responses to Troubled and Troublesome Youth*, 33 HOFSTRA L. REV. 1305, 1389, 1424 (2005) (explaining that removing juveniles from their homes should be a short-term last resort, and that thousands of children are "placed or retained . . . unnecessarily"); Emily N. Winfield, Note, *Judicial Policymaking and Juvenile Detention Reform: A Case Study of* Jimmy Doe et al. v. Cook County, 12 J. GENDER RACE & JUST. 225, 227-28 (2008) (stating that while juvenile detention facilities are intended for "offenders who pose a particularly high risk" of reoffending or failing to appear in court, "as many as seventy percent of juveniles are detained for nonviolent offenses"); BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POL'Y INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 2 (2006), http://www.justicepolicy.org/images/upload/0611_REP_DangersOfDetention_JJ.pdf (finding that while pretrial juvenile detention facilities are not designed as a substitute for long-term detention alternatives, many detained youth spend from a several days to a few months in locked custody awaiting placement or transfer); THE ANNIE E. CASEY FOUND., REFORM THE NATION'S JUVENILE JUSTICE SYSTEM 3 (2009), http://www.aecf.org/~/media/PublicationFiles/Juvenile_Justice_issuebrief3.pdf ("Juvenile justice systems routinely detain and incarcerate youth who pose little or no danger to public safety, despite research that community supervision and non-residential, evidence-based programs are more effective and vastly more cost-efficient.").

69. *In re* L.M., 186 P.3d 164, 165 (Kan. 2008); Brief of Appellant, *supra* note 60, at 1-2.

70. *In re L.M.*, 186 P.3d at 165; *see* KAN. STAT. ANN. § 38-2369(a)(2)(A) (Supp. 2007) (defining Serious Offender I as "an offender adjudicated as a juvenile offender for an offense which, if committed by an adult, would constitute a nondrug severity level 4, 5 or 6 person felony or a severity level 1 or 2 drug

to Kansas law, L.M. was required to comply with the conditions of sex offender treatment and sex offender registration.[71]

Although not addressed in any detail by the Kansas Supreme Court in its decision,[72] the collateral consequences of L.M.'s juvenile adjudication for aggravated sexual battery were particularly punitive.[73] In addition to the fact that

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felony"). Such offenders may be committed to a juvenile correctional facility for a term of between 18 and 36 months, with an aftercare term of between 6 and 24 months. *Id.*

71. *In re L.M.*, 186 P.3d at 165; *see* KAN. STAT. ANN. § 22-4906 (Supp. 2005); *see also* Rick Kittle, *K.S.A. 22-4901 et seq.—Offender Registration in Kansas*, 69 J. KAN. B. ASS'N 28 (2000) (discussing the history and application of the Kansas Offender Registration Act).

72. *In re L.M.*, 186 P.3d at 172 ("Given our decision that juveniles have a [constitutional] right to a jury trial . . . we decline to analyze this argument.").

73. Brief of Appellant, *supra* note 60, at 17-29 (arguing that the Kansas Offender Registration Act has significant punitive implications for juveniles); Brief of Juvenile Law Center as Amicus Curiae in Support Appellant at 2-9, *L.M.*, 186 P.3d 164 (No. 06-96197-A) (arguing that the public disclosure provisions of the Kansas Offender Registration Act constitute serious punishment). L.M. was also convicted of the misdemeanor offense of minor in possession or consumption of alcohol, which does not have comparable implications or consequences for the juvenile offender. *In re L.M.*, 186 P.3d at 165; s*ee* KAN. STAT. ANN. § 41-727 (2000); *see also* Joanna S. Markman, Community Notification and the Perils of Mandatory Juvenile Sex Offender Registration: The Dangers Faced by Children and Their Families, 32 SETON HALL LEGIS. J. 261, 270, 282-83 (2008) (asserting that because confidentiality is necessary for the rehabilitation of juvenile sex offenders, mandatory community notification provisions are counterproductive); Timothy E. Wind, *The Quandary of Megan's Law: When the Child Sex Offender Is a Child*, 37 J. MARSHALL L. REV. 73, 116 (2003) ("[P]ublic notification law[s] cause . . . unnecessary stress to [ ] juvenile offenders by exposing them to scrutiny and ridicule in the community, further harming their efforts at rehabilitation and increasing the likelihood of recidivism.); Michele L. Earl-Hubbard, Comment, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788, 792 (1996) (arguing that requiring juveniles to register as sex offenders raises several potential constitutional violations); Brittany Enniss, Note, *Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences*, 2008 UTAH L. REV. 697, 716 (asserting that sex offender registration laws jeopardize juveniles' employment, education, and housing opportunities, and that a system of individual assessment would better protect the public); Elizabeth Garfinkle, Comment, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CAL. L. REV. 163, 203-04 (2003) (stating that public

juveniles generally are more likely to be subject to incarceration—and receive longer terms—than young adult offenders charged with the same crimes[74] and the fact that juvenile delinquency adjudications can be used to enhance sentences in adult criminal court,[75] L.M. faced repercussions resulting from the very nature of the offense charged.[76] The Kansas Offender Registration Act contains public disclosure provisions that the Kansas Supreme Court had previously considered "punishment" for purposes of ex post facto analysis,[77] giving credence to the argument that the community notification provisions would be particularly harmful to juveniles.[78] Research on adolescent development

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notification constitutes "government defamation by falsely labeling all sex offenders as potential future predators without sufficient due process," making the label of "dangerous predator" especially defamatory for juveniles). *But see* Nancy G. Calley, *Juvenile Sex Offenders and Sex Offender Legislation: Unintended Consequences*, FED. PROBATION, Dec. 2008, at 37, 40 (suggesting that because many juveniles are given the opportunity to admit to reduced charges or have their adjudications stayed, thereby avoiding sex offender registration and community notification, this may have the unintended consequence of allowing them to miss out on early intervention and appropriate treatment opportunities), *available at* http://www.uscourts.gov/fedprob/December_2008/JuvenileSexOffenders.html.

74. *See* Megan C. Kurlychek & Brian D. Johnson, *The Juvenile Penalty: A Comparison of Juvenile and Young Adult Sentencing Outcomes in Criminal Court*, 42 CRIMINOLOGY 485, 498-503 (2004) (finding that juvenile offenders receive longer sentences than do young adult offenders).

75. *See, e.g.*, State v. LaMunyon, 911 P.2d 151, 158 (Kan. 1996) (holding that while a juvenile delinquency adjudication is not a criminal "conviction," it may be considered when calculating an adult offender's criminal history, even in jurisdictions in which juveniles are denied the right to trial by jury); State v. Kuhlman, 144 P.3d 1214, 1216-17 (Wash. Ct. App. 2006) (holding that juvenile adjudications count as criminal convictions for purposes of calculating statutory penalties, even when the trier of fact is a judge and not a jury as long as other procedural safeguards are in place).

76. Brief of Appellant, *supra* note 60, at 17-18.

77. State v. Myers, 923 P.2d 1024, 1041-44 (Kan. 1996) (holding that the public disclosure provisions of the Kansas Offender Registration Act constitute punishment).

78. *See* KAN. STAT. ANN. § 22-4904(a) (Supp. 2005) (stating that under Kansas law, a person adjudicated as a juvenile offender for the commission of a sexually violent crime is required to register with the sheriff of his county of residence and that all identifying information is available to the public in person or via the internet); *see also* KAN. STAT. ANN. § 22-4907(a), (b) (Supp. 2005) (stating that information required to be disclosed on the sex offender

also suggests that public notification inflicts a harm on juveniles that is disproportionate to the offense.[79]

Rejecting *McKeiver*'s contention that the benevolent *parens patriae* character of the juvenile justice system distinguishes it from the adult criminal system, the Kansas court based its holding recognizing a jury trial right for juveniles on the Sixth Amendment, rather than upon general notions of fairness and due process.[80] The court held that since 1984, when Kansas adopted the United States Supreme Court's reasoning in *McKeiver*,[81] the legislature had changed the language of the Kansas Juvenile Offender Code by "negating its rehabilitative purpose" and aligning its dispositional provisions with those of the criminal sentencing guidelines, thereby creating a juvenile court so similar to its adult counterpart that the jury trial right

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registration form includes, but is not limited to, the offender's name, address, date of birth, social security number, a photo, fingerprints, and a DNA sample).

79. *See* Patricia Coffey, *The Public Registration of Juvenile Sex Offenders*, FORUM (Ass'n for the Treatment of Sexual Abusers, Beaverton, Or.), Winter 2007, at 6 ("The notion that public labeling will be productive in reducing risk for further sexual offending is inconsistent with decades of theoretical and research-based understanding of child development, delinquency, and social psychology."); Phoebe Geer, *Justice Served? The High Cost of Juvenile Sex Offender Registration*, DEV. MENTAL HEALTH L., July 2008, at 33, 34, 40-44 (asserting that because bright-line rules do not distinguish between "relatively innocent, non-violent, and unlikely to be repeated" juvenile sex offenses and those that are indicative of a violent criminal nature, a lifetime stigma results); Michael Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 ARIZ. ST. L.J. 651, 674 (2008) (advocating major reform of the sex offender registration system, as the punishment often does not fit the crime); Stacey Hiller, Note, *The Problem with Juvenile Sex Offender Registration: The Detrimental Effects of Public Disclosure*, 7 B.U. PUB. INT. L.J. 271, 287 (1998) (noting that juvenile sex offender registration exposes children to "community violence and social outrage"); NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S., HUM. RTS. WATCH, Sept. 2007, at 9 ,http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf ("Applying registration, community notification, and residency restriction laws to juvenile offenders . . . will [ ] cause great harm to those who, while they are young, must endure the stigma of being identified as and labeled a sex offender, and who as adults will continue to bear that stigma, sometimes for the rest of their lives.").

80. *In re* L.M., 186 P.3d 164, 170 (Kan. 2008).

81. *See* Findlay v. State, 681 P.2d 20, 21-22 (Kan. 1984), *abrogated by In re L.M.*, 186 P.3d 164 (adopting the reasoning of *McKeiver*).

could no longer be discretionary.[82] While acknowledging that most other state courts have declined to extend this constitutional right to juveniles, the majority remained "undaunted in [its] belief" that because the Kansas juvenile justice system was now patterned after the adult criminal system, *McKeiver* was no longer binding.[83] In this way *In re L.M.* demonstrates that when the expansion of juveniles' rights is based solely on the Sixth Amendment, the most likely model will be adult criminal court, thereby failing to shift the juvenile justice paradigm. Alternatively, when an extension of rights is premised on procedural justice theory, the new model can more readily be drawn from outside the parameters of the criminal justice system.

While the Kansas decision establishes a bright line with its reasoning, practical factors—including the power of judicial precedent, fiscal constraints on the state's ability to provide juvenile jury trials upon request, and law makers' reluctance to appear "soft" on crime—have been paramount in the determinations of other jurisdictions.[84] Some have clearly distinguished the terminology and purpose of their state's juvenile code from its criminal code, whether under

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82. *In re L.M.*, 186 P.3d at 168-70 (stating that the revised Kansas juvenile code replaced non-punitive terminology with criminal terminology, aligned juvenile sentencing provisions with adult sentencing guidelines, and removed the protections that *McKeiver* had relied upon to distinguish the juvenile from the adult criminal system). *See generally* Carla J. Stovall, *Justice and Juveniles in Kansas: Where We Have Been and Where We Are Headed*, 47 U. KAN. L. REV. 1021 (1999) (stating that the principles underlying Kansas's revised juvenile code represent a "significant changes from past practice," creating a system that more closely models the adult criminal system); William T. Stetzer, Note, *The Worst of Both Worlds: How the Kansas Sentencing Guidelines Have Abandoned Juveniles in the Name of "Justice,"* 35 WASHBURN L.J. 308 (1996) (examining the negative impact of Kansas's revised juvenile code on the juvenile justice system).

83. *In re* L.M., 186 P.3d at 170-71; *Kansas: No Rush Expected on Juvenile Trials Ruling*, JOPLIN GLOBE (Mo.), June 29, 2008, at A1 (noting that the majority in *In re L.M.* acknowledged that it could not find support for its holding requiring jury trials for juveniles in rulings of other states); *see also In re L.M.*, 186 P.3d at 172 (overruling *Findlay* based on the legislative overhaul to the Kansas juvenile justice code).

84. *See, e.g.*, Rachel Zimmerman, *Lawyers Want Jury Trials for Juveniles Under New Law*, SEATTLE POST-INTELLIGENCER, Aug. 18, 1997, at A1 (reporting that opponents of the juvenile jury trial in Washington cite such concerns as precedent, policy, and cost).

due process, quid pro quo analysis or both.[85] Others have definitively held that the Sixth Amendment does not mandate the right to a jury trial for juveniles.[86] Courts and legislatures that choose instead to rely on subjective interpretations of due process when analyzing this issue will inevitably revisit the question of how best to define 'fairness.' Under what standard should it be determined that a specific procedural right is as fair as the adversarial model envisioned by the Sixth Amendment? Such a query

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85. *See, e.g.*, State *ex. rel.* D.J., 817 So. 2d 26, 34-35 (La. 2002) (rejecting the argument that Louisiana's juvenile system has become so similar to the adult criminal system that jury trials are constitutionally mandated and holding—under due process analysis—that jury trials are not required); *see also* Gwen Filosa, *La. Juveniles Get No Right to Jury Trial; Court Reverses Woodson Ruling*, TIMES-PICAYUNE (New Orleans, La.), May 15, 2002, at 1 (reporting that the Louisiana Supreme Court held that juveniles do not have a constitutional right to a jury trial under the Juvenile Code, as the system retains a "quid pro quo" under which juveniles receive rehabilitation instead of punitive prison time).

86. *See, e.g.*, State v. Chavez, 180 P.3d 1250, 1252-53 (Wash. 2008) (holding that a Washington state statute denying juveniles the jury trial right did not violate the right to a jury trial under the state or federal constitutions); Laura Onstot, *Communist States Aren't the Only Ones Denying Jury Trials; In Washington, Juveniles Have No Right to One*, SEATTLE WKLY., Mar. 26, 2008, *available at* http://www.seattleweekly.com/2008-03-26/news/communist-states-aren-t-the-only-ones-denying-jury-trials.php (stating that the Wash. Supreme Court ruled 6-3 that juveniles have no constitutional right to a jury trial); Stephanie Potter, *Lifetime Sex Offender Registration Okd for Teenager*, CHI. DAILY L. BULL., Aug. 22, 2008, at 1 (reporting decision of Illinois appellate court denying jury trial to juvenile sex offender who must register annually for the rest of his life, as the requirements "do not affect a protected property or liberty interest"). *But see* Gerald P. Hill, II, *Revisiting Juvenile Justice: The Requirement for Jury Trials in Juvenile Proceedings Under the Sixth Amendment*, 9 FLA. COASTAL L. REV. 143, 172-75 (2008) (arguing that because there is no meaningful distinction between juvenile and adult criminal court, the Sixth Amendment must be applied in full to juveniles, including the right to trial by jury); Tina Chen, Comment, *The Sixth Amendment Right to a Jury Trial: Why is it a Fundamental Right for Adults and Not Juveniles?*, 28 J. JUV. L. 1, 7-10 (2007) (arguing that juveniles have a fundamental Sixth Amendment right to trial by jury); Kerrin C. Wolf, Note, *Justice by Any Other Name: The Right to a Jury Trial and the Criminal Nature of Juvenile Justice in Louisiana*, 12 WM. & MARY BILL RTS. J. 275 (2003) (arguing that the Louisiana Supreme Court decided the issue incorrectly, that juveniles should have a right to a jury trial, and that *McKeiver* should be overruled); Steven A. Drizin, Op-Ed., *Juveniles Deserve Jury Trials*, CHI. TRIB., Dec. 22, 1999, at 31 (arguing that the Constitutional right to a jury trial should be extended to juveniles).

may be answered — at least in part — by recent empirical research by social scientists.[87]

II. EVIDENCE FROM THE SOCIAL SCIENCES

Academic disciplines approach the study of crime and criminal behavior from differing perspectives. Sociology — one of the many disciplines from which to choose — considers broad-spectrum structural explanations for human behavior, with sociologists typically trained to focus on the question of why people *break* the law.[88] Social psychologists, on the other hand, perhaps due to their reliance on surveys of the general population, are more likely to ask why people *obey* the law.[89] The focus of this Part is on the latter rather than the former question, premised on the notion that in a world of limited resources, it is more pragmatic to examine the reasons why adolescents *comply* with the law, rather than dwell on the causes of their noncompliance.[90] The discussion begins by

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87. *See infra* Parts II and III.A (applying procedural justice theory to the question of juveniles' right to a jury trial).

88. Andrew V. Papachristos, Tracey L. Meares & Jeffrey Fagan, *Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders* 1-2 (Yale University Law Sch. John M. Olin Ctr. for Studies in Law, Econ. & Pub. Policy, Research Paper No. 373, Columbia Law Sch. Pub. Policy Research Papers, Working Paper No. 09-199, 2009), *available at* http://ssrn.com/abstract=1326631; *see also* JOHN E. CONKLIN, CRIMINOLOGY 17 (6th ed. 1998) ("Criminology is a discipline that gathers and analyzes empirical data in order to explain violations of the criminal law and societal reactions to those violations.").

89. Papachristos et al., *supra* note 88, at 1-2.

90. *See* Don W. Brown & Stephen L. McDougal, *Noncompliance with Law: A Utility Analysis of City Crime Rates*, 58 SOC. SCI. Q. 195, 210 (1977) (finding that when criminal offenders do a cost-benefit analysis in deciding whether to engage in criminal conduct, the benefits of compliance rather than the costs of noncompliance had the strongest effect); *see also* Howard N. Glasser, *The Nurtured Heart Model for Dealing with Challenging Children*, OUTCOMES, INNOVATIONS & BEST PRAC. (Cmty. P'ship. S. Ariz., Tucson, Ariz.), Fall 2000, at 2 (finding that a therapeutic approach to disciplining challenging children, in which adults encourage them to perceive greater incentives for positive choices than for negative behaviors, lowered recidivism rates and reduced the need for medication to control behavior); Shirli Levinson Ward, Glasser's Parent Training Model: Effects on Child and Parent Functioning 65 (Apr. 10, 1997) (unpublished Ph.D. dissertation, University of Arizona) (on file with University

examining social science research in the area of procedural justice theory, takes up an analysis of how children and adolescents develop ties to the law and legal actors and concludes by demonstrating a causal relationship between juveniles' perceptions of fairness and their likelihood of reoffending.

A. *Why Obey the Law?*

Since the 1970s, preeminent social and behavioral scientists who study criminal procedure have examined a series of intersecting questions that relate to the central problem of which legal system—adversarial,[91] inquisitorial,[92] investigative,[93] or a hybrid[94]—is the most effective in reducing crime.[95] The inquiry has been grounded in procedural justice theory, the notion that people are more likely to comply with law and policy when they believe that the procedures utilized by decision-makers are fair,

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of Arizona Library) ("[T]hose involved in Glasser's parent training program demonstrated significant changes in functioning following treatment.").

91. *See, e.g.*, Hans F.M. Crombag, *Adversarial or Inquisitorial: Do We Have a Choice?*, *in* 17 PERSPECTIVES IN LAW AND PSYCHOLOGY, ADVERSARIAL VERSUS INQUISITORIAL JUSTICE: PSYCHOLOGICAL PERSPECTIVES ON CRIMINAL JUSTICE SYSTEMS 21, 21-24 (Peter J. van Koppen & Steven D. Penrod eds., 2003) (describing the adversarial system as one in which the parties control the presentation of the facts of the case, which are presented orally; judgment is usually rendered by one's peers; and "fair play" is considered the proximate goal).

92. *See, e.g.*, *id.* at 22-25 (describing the inquisitorial system as one in which the court controls the presentation of evidence, which is typically in documentary form; where the court takes responsibility for finding the truth; and where technicalities considered to "threaten" the search for truth are put aside).

93. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 348-49 (1976) ("The judicial model of an evidentiary hearing is neither required, nor even the most effective, method of decision-making in all circumstances . . . [and an administrative hearing prior to terminating disability benefits] fully comports with due process.").

94. *See, e.g.*, Fondacaro et al., *supra* note 27, at 977-78.

95. *See id.* at 975-80 (discussing the work of pioneering social scientists, John Thibaut, Laurens Walker, and Allan Lind, as well as more contemporary researchers, Tom Tyler, Blair Sheppard, and Donna Shestowsky).

unbiased, and efficient.[96] Its proponents contend that procedural fairness plays a "key role" in people's willingness to cooperate with a wide range of decisions, from United States Supreme Court rulings to corporate drug-testing policies.[97] The empirical research has focused on exploring why people are either satisfied or dissatisfied with a particular dispute outcome and whether there is a relationship between the type of process used and one's perceptions of systemic fairness;[98] the finding that people care enormously about the process and greatly value the opportunity to "tell one's story," regardless of the outcome, has been replicated across a wide range of methodologies, cultures, and settings.[99]

During the past two decades, researchers have continued to advance this work, applying procedural justice theory to a wide range of literatures, including law, medicine, business, education, and social work.[100] The

96. *Id.* (distinguishing between "subjective" procedural justice, which focuses on the fairness of the system and "objective" procedural justice, which considers the degree to which decision-makers are unbiased and rely upon accurate information, and then examining the "costs" or efficiency of various procedures in a given legal setting); Juan Ramirez, Jr. & Amy D. Ronner, *Voiceless* Billy Budd*: Melville's Tribute to the Sixth Amendment*, 41 CAL. W. L. REV. 103, 120-21 (2004) ("Studies suggest that if the socializing influence of experience is the issue of concern (i.e., the impact of participating in a judicial hearing on a person's respect for the law and legal authorities), then the primary influence is the person's evaluation of the fairness of the judicial procedure itself, not their evaluations of the outcome . . . . When people believe that legal authorities are less legitimate, they are less likely to be law-abiding citizens in their everyday lives." (citation omitted)); *see also* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 238 (2004) ("[P]rocedural justice is concerned with the adjudicative methods by which legal norms are applied to particular cases and the legislative processes by which social benefits and burdens are divided.").

97. Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 180 (2005).

98. Fondacaro et al., *supra* note 27, at 976, 981-82.

99. MacCoun, *supra* note 97, at 171-78 ("[T]he basic phenomena of procedural justice have been documented across dozens of social, legal, and organizational contexts involving every major demographic category in the United States, and almost every major industrial country in North America, Asia, and Europe." (citation omitted)); *id.* at 186-88 ("[M]ost studies have found striking similarities across demographic groups in the antecedents and consequences of procedural fairness, suggesting a shared understanding of the concept." (citation omitted)).

100. *Id.* at 172; *see also* Fondacaro et al., *supra* note 27, at 975-76.

empirical studies of Tom Tyler, for instance, have explored the differences between the instrumental perspective on why people follow the law, which is dominated by deterrence literature linking human behavior to incentives and penalties (follow the law only if you are likely to get caught),[101] and the normative perspective on this question, which relies both on personal morality (follow the law because it is right) and adherence to legitimacy (because we have confidence in the police and the courts, we should follow the law).[102] By focusing on the extent to which normative factors influence compliance with the law separate and apart from deterrence, the work of Tyler and others has suggested that people obey the law when the rules and procedures are consistent with their personal values and attitudes; in other words, when people are personally committed to obeying the law, they voluntarily assume the obligation to follow legal rules, irrespective of the risk of punishment.[103]

In subsequent empirical work, Tyler has explored the factors that contribute to the likelihood of deference to authority among a variety of ethnic groups.[104] His results suggest that the behavior of and processes used by police officers and judges—if perceived to be fair and benevolent—can encourage voluntary acceptance of decisions made by legal authorities, which in turn can lead to lower rates of

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101. *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3, 23, 42-45 (1990).

102. *Id.* at 3-5, 22-27.

103. *Id.* at 19-27.

104. TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW 49-75, 141-51 (2002) (finding, based on a sample of interviews with Caucasian, African-American, and Latino residents of two cities, that deference to legal authorities is shaped by procedural justice and trust in the motives of legal actors, and that minority group members are less willing to defer to the decisions made by legal authorities as well as less likely to report that their experiences with legal authorities are procedurally fair and unbiased); *see also* Jennifer L. Woolard et al., *Anticipatory Injustice Among Adolescents: Age and Racial/Ethnic Differences in Perceived Unfairness of the Justice System*, 26 BEHAV. SCI. & L. 207, 221-25 (2008) (finding that among adolescents with no criminal justice system experience, greater proportions of African-Americans and Latinos anticipate injustice than whites; among those with justice system experience, expectations of injustice do not vary among racial and ethnic groups; and adolescents with higher overall anticipatory injustice were less likely to comply with authorities).

reoffending.[105] While it is arguable whether his findings are consistent with human intuition, it is potentially useful to have multiple data sets demonstrating that treating people with dignity and respect makes them more likely to view procedures as fair and the motives behind law enforcement's actions as well-meaning. It is also of likely utility to have data showing that when people consider police and court procedures to be equitable and the motives of authorities trustworthy, they are more likely to obey the law.[106]

Tyler references and builds upon the work of seminal figures in the fields of psychoanalysis, sociology, and economics to argue that social norms and values become part of a person's internal motivational system and guide behavior separate from the impact of the threat of power on human behavior, which relies instead upon a traditional system of incentives and sanctions.[107] In this way, self-control replaces the need for control by others.[108] According to Tyler, one's sense of obligation to a certain set of rules is the key element in the concept of legitimacy, as it leads to *voluntary* deference.[109]

Of further significance to the argument here are the innumerable benefits gained through a procedural system

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105. TYLER & HUO, *supra* note 104, at xiii-xiv, 57.

106. *Id.* at xiv, 57, 74-75; *see also* Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?*, 10 N.Y.L. SCH. J. HUM. RTS. 835, 864-65, 874 (1993) ("[A]t least one study has found that persons involved in felony cases, who may be unfairly characterized as marginal adherents to society's value system . . . are most influenced by procedural fairness rather than the leniency of the sentence they receive.").

107. Tom R. Tyler, *Introduction: Legitimating Ideologies*, 18 SOC. JUST. RES. 211, 212 (2005) (referencing the work of Sigmund Freud, Emile Durkheim, and Max Weber).

108. *Id.*

109. *Id.* ("Hence, unlike influence based upon the influencer's possession of power or resources, the influence motivated by legitimacy develops from within the person who is being influenced.") (citation omitted); *see also* Daniel W. Shuman & Jean A. Hamilton, *Jury Service—It May Change Your Mind: Perceptions of Fairness of Jurors and Nonjurors*, 46 S.M.U. L. REV. 449, 451 (1992) (citing studies finding that one-third of the U.S. public believes the judicial system is unfair, leading them to question its legitimacy, which in turn affects their compliance with the law).

that garners compliance that is voluntary and self-regulating. Empirical evidence in this area suggests that when forced compliance or coercive power is used on its own to shape behavior, it is costly in terms of staffing, time, and resources.[110] When people defer to legal norms out of a sense of personal morality and legitimacy, however, fewer resources are required.[111] Thus, procedural justice theory provides a savings in both human capital and material costs when it is used to influence behavior, as the research confirms that people are more likely to police themselves if they believe that laws are fair, legitimate, and ought to be followed.[112]

While the work of Tyler and others has focused primarily on adult populations, the influence of personal morality on behavior toward the law has also been examined in social science literature on child development and juvenile delinquency.[113] Several studies have laid the groundwork for exploring whether children who are influenced by instrumental considerations of reward and punishment are more likely to break the law than those

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110. Tyler, *supra* note 107, at 212 ("When the public views government as legitimate it has an alternative basis for support during difficult times. Further, when government can call upon the values of the population to encourage desired behavior, society has more flexibility about how it deploys its resources."); Tom R. Tyler et al., *Armed, and Dangerous (?): Motivating Rule Adherence Among Agents of Social Control*, 41 LAW & SOC'Y REV. 457, 470 (2007) ("Authorities are seldom in the position to expend excessive organizational resources on monitoring and punishing employee misbehavior. The procedural justice perspective suggests that people will comply with, and, more strikingly, voluntarily defer to rules when they feel that the rules and authorities . . . are following fair procedures . . . . What makes such a finding optimistic . . . is that the creation and implementation of procedures that all individuals perceive as fair is not restricted in the same way that allocations of resources are.").

111. Tyler, *supra* note 107, at 212; Papachristos et al., *supra* note 88, at 4 (referencing the sociologist Emile Durkheim to argue that because forced compliance is costly, the social order is best maintained when the majority believes that the government is legitimate and that the legal structure is just);

112. Tyler, *supra* note 107, at 211-12. This focus on efficiency goes back to the writings of social theorists during the time of Plato and Aristotle, who recognized that influencing human behavior through the threat of power is both "costly and inefficient." *See also id.* at 211.

113. TYLER, *supra* note 101, at 37, 65 (referencing the works of Augusto Blasi, among others).

who are influenced by a sense of personal obligation,[114] but the literature is thin and more research is needed. Thus, while it may be suggested that normative concerns relating to children's feelings of personal morality and legitimacy influence compliance with the law in many of the same ways as they do for adults, this connection has not yet been made.

B. *The Legal Socialization of Children*

Behavioral psychologists who have studied adolescent populations have generally focused on a question closely related to that of why people obey the law—what factors shape adolescent criminal behavior?[115] While these researchers have agreed that children's compliance with the law is promoted by the processes of maturation and psychosocial development,[116] some have recognized further that legal socialization is a process that is not static between childhood and adolescence but variable, changing over time and developing concurrently with a child's cognitive and moral maturation; it is profoundly affected by one's peers, family unit, and neighborhood culture; and it is interactive and integrative, a process in which children internalize information that is assimilated from their own experiences, from the attitudes and factual claims of others,

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114. *See, e.g.*, Augusto Blasi, *Bridging Moral Cognition and Moral Action: A Critical Review of the Literature*, 88 PSYCHOL. BULL. 1, 11-13, 37-41 (1980) (concluding that adolescents who reveal "higher stages of moral reasoning" are less likely to engage in delinquent behavior because of feelings of personal commitment rather than due to pressure to conform to the judgments of others); Don W. Brown, *Adolescent Attitudes and Lawful Behavior*, 38 PUB. OPINION Q. 98, 105 (1974) ("The evidence presented here suggests that constraint between reported non-compliance with laws and affective-evaluative orientations toward law, legal authorities, and legal institutions tends to be greater among individuals to whom law is more salient than among those to whom law is less salient."); Gregory J. Jurkovic, *The Juvenile Delinquent as a Moral Philosopher: A Structural-Development Perspective*, 88 PSYCHOL. BULL. 709, 720 (1980) ("On the most general level, it appears that adolescents who have failed to relinquish a premoral orientation . . . at a time when their peers are moving to higher stages are at risk for behavior problems, whereas those performing along more conventional lines *may or may not* be at a similar risk.").

115. Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUST. RES. 217, 217-19 (2005).

116. *Id.* at 218-20.

and from the ways in which others react and respond to them.[117] The core argument underpinning the literature in this area is that children develop an orientation toward the law and legal actors early in life, and that this orientation shapes their behavior towards authority from adolescence through adulthood.[118]

Research in this area has shown that a myriad of factors combine to shape and influence the law-related behavior of children and adolescents, including institutional legitimacy, an obligation to obey the law from a normative perspective, legal cynicism, one's sense of whether it is acceptable to act outside the law and social norms, and the impact of moral ambiguity and disengagement, processes by which adolescents detach from the system of internal controls and moral values and become more open to illegal behavior.[119] Additional factors shaping criminal behavior include the deterrent effect of punitive sanctions, in which punishment that is perceived to be "swift, certain, and severe" inhibits criminal activity,[120] and the theory of rational choice, whereby behavior is determined by the weighing of the costs and benefits associated with violating the law.[121] Research has suggested, however, that active adolescent offenders may be less sensitive to the threat of sanctions and rational choice theory than either adults or young people who have not previously engaged in criminal activity; the reasons are twofold—immaturity causes youth not only to underestimate the level of risk but also to downplay the threat of punishment that is oriented toward

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117. *Id.* at 219; Jeffrey Fagan & Alex R. Piquero, *Rational Choice and Developmental Influences on Recidivism Among Adolescent Felony Offenders*, 4 J. EMPIRICAL LEGAL STUD. 715, 716 (2007) (describing legal socialization as a "developmental process [that] results in the internalization of legal rules and norms that regulate social and antisocial behaviors, and that create a set of obligations and social commitments that restrain motivations for law violation").

118. Fagan & Piquero, *supra* note 117, at 716; Alex R. Piquero et al., *Developmental Trajectories of Legal Socialization Among Serious Adolescent Offenders*, 96 J. CRIM. L. & CRIMINOLOGY 267, 270-74 (2005).

119. Fagan & Tyler, *supra* note 115, at 221; *see also id.* at 233-34 (stating that the likelihood that a child will experience moral disengagement is dependent upon the presence of deviant peers, exposure to violence, aggressive tendencies, and one's neighborhood).

120. Fagan & Piquero, *supra* note 117, at 720.

121. *Id.* at 719-22.

the future rather than the present.[122] Intellectual and psychosocial deficits caused by developmental delays, mental illness, and drug dependency can also "impair or skew" rational calculations of risk and reward made by adolescents.[123]

Not surprisingly, procedural justice also plays a significant role in the process of legal socialization, as social scientists have demonstrated that perceptions of fair treatment enhance children's evaluations of the law, while unfair treatment triggers negative reactions, anger, and defiance of the law's norms.[124] Specifically, researchers have found that children's perceptions of fair procedures are based on the degree to which the child was given the opportunity to express her feelings or concerns, the neutrality and fact-based quality of the decision-making process, whether the child was treated with respect and politeness, and whether the authorities appeared to be acting out of benevolent and caring motives.[125] In this way, procedural justice directly affects compliance with the law, while indirectly affecting whether one views the law as legitimate.[126] The next step is to explore empirically whether a causal relationship exists between juveniles' perceptions of fairness and rates of recidivism.

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122. *Id.* at 721.

123. *Id.* at 721-22.

124. Fagan & Tyler, *supra* note 115, at 231, 233.

125. *Id.* at 222; Fagan & Piquero, *supra* note 117, at 719; *see also* Woolard et al., *supra* note 104, at 223 (finding that anticipations of injustice shape behavioral compliance with court officials and that adolescents with higher levels of anticipatory injustice are less likely to confess to police, disclose candidly to their public defender, and accept a plea agreement from the prosecutor); *infra* Part IV.A (discussing the ways in which procedural justice theory overlaps with the discipline of therapeutic jurisprudence).

126. Fagan & Tyler, *supra* note 115, at 231-36; *see also* Allison R. Shiff & David B. Wexler, *Teen Court: A Therapeutic Jurisprudence Perspective*, *in* LAW IN A THERAPEUTIC KEY 287, 294 (David B. Wexler & Bruce J. Winick eds., 1996) (arguing that because teen court gives impartial youth a "voice" in the juvenile justice system, the experience increases their perceived fairness of the system, encourages them to obey the law in the future, rehabilitates former juvenile defendants serving as jurors, and "inoculates" other teens on the jury from committing similar crimes).

C. *Recidivism and Adolescents' Perceptions of Fairness*

In recent decades, social scientists have focused their research more deliberately upon the question of whether a causal connection between procedural justice and rates of reoffending by juveniles may be shown through data analysis. A sampling of recent research in this area includes studies conducted among the following samples: children and adolescents ages ten through sixteen from two racially and socio-economically contrasting neighborhoods in Brooklyn, New York;[127] serious juvenile offenders ages fourteen to eighteen in Phoenix, Arizona and Philadelphia, Pennsylvania;[128] young male prisoners ages fifteen to twenty-four at a German detention center;[129] Canadian youth ages fifteen to seventeen with cases pending in one of the large youth courts in Toronto, Ontario;[130] and young people ages fourteen to sixteen enrolled in an Australian public high school with an ethnically and economically diverse population.[131] The data from these studies, which have focused to varying degrees on the relevance of adolescents' views of the legitimacy of legal institutions and legal actors, suggest a causal connection between procedural justice and recidivism that is not outcome-dependent.[132] While all such studies have their

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127. Fagan & Tyler, *supra* note 115, at 223-25.

128. Fagan & Piquero, *supra* note 117, at 723-24.

129. Kathleen Otto & Claudia Dalbert, *Belief in a Just World and Its Functions for Young Prisoners*, 39 J. RES. PERSONALITY 559, 562 (2005); *see also* Louis Oppenheimer, *The Belief in a Just World and Subjective Perceptions of Society: A Developmental Perspective*, 29 J. ADOLESCENCE 655, 665-68 (2006) (finding that beliefs that the world is orderly and just begin to diminish at age twelve, and that beginning at age sixteen, more sophisticated forms of reasoning develop that enable individuals to handle a world that is neither orderly nor just).

130. Jane B. Sprott & Carolyn Greene, *Trust and Confidence in the Courts: Does the Quality of Treatment Young Offenders Receive Affect Their Views of the Courts?* , CRIME & DELINQ., Mar. 12, 2008, at 7.

131. Lyn Hinds, *Building Police-Youth Relationships: The Importance of Procedural Justice*, 7 YOUTH JUST. 195, 199 (2007).

132. *See, e.g.*, Fagan & Piquero, *supra* note 117, at 739-40 ("These results suggest that there are processes of legal socialization and rational choice that influence patterns and trajectories of self-reported offending among serious juvenile offenders. . . . Like adults, adolescent views about the legitimacy of authority are influenced by procedural justice judgments about their own and

limitations,[133] a consistent trend based on multiple data sets may be seen.

Relevant to this work is social science research emphasizing a link between an adolescent's capacity to stand trial and her ability to take responsibility for her

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others' experiences with the police."); Fagan & Tyler, *supra* note 115, at 236 ("This study suggests that these attributes of law shape norms and law-related behaviors among adolescents, not just the views of adults . . . . Accordingly, this study argues that beginning in adolescence legitimacy is an important force shaping law-related behavior."); Hinds, *supra* note 131, at 202 ("[I]ncreasing young people's attitudes about the legitimacy of police should increase compliance with police rules and decisions, and strengthen young people's compliance with laws and commitment to social norms more generally."); Otto & Dalbert, *supra* note 129, at 561 ("Taken collectively, perceiving the legal proceedings as just may be the decisive factor allowing prisoners to accept their sentence and develop an intrinsic motivation to obey the law in the future." (citations omitted)); Sprott & Greene, *supra* note 130, at 15 ("Specifically, this study found that above and beyond the youths' initial perceptions of the legitimacy of the justice system and their overall satisfaction with the resolution of their case, their views of the judge and their own lawyer significantly affected their final views of the legitimacy of the court and legal system."); *see also* Richard E. Redding, *Adult Punishment for Juvenile Offenders: Does it Reduce Crime?*, *in* HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE 375, 383-86 (Nancy E. Dowd et al. eds., 2006) (discussing possible explanations for empirical findings showing higher recidivism rates for violent juvenile offenders tried in criminal, rather than juvenile, court, and suggesting that one reason may be a "strong sense of injustice and resentment about being tried as adults").

133. *See, e.g.*, Fagan & Tyler, *supra* note 115, at 237 (acknowledging that further research is needed across a "wider range of neighborhood conditions" and that because of the differences in legal socialization of males and females in this sample, more samples of adolescent girls may be necessary); Hinds, *supra* note 131, at 202-03 (acknowledging that the sample size in the study of Australian youth was small and that the survey data was cross-sectional, meaning that it did not examine young people's views using data collected from the same individuals at two different points in time); Sprott & Greene, *supra* note 130, at 16 (acknowledging that the sample size in the study of Canadian juvenile offenders was small and limited only to those who had gone to trial and received a community-based punishment, while excluding those who had admitted their guilt and/or were sentenced to a period of confinement); *see also* Susan S. Silbey, *After Legal Consciousness*, 1 ANN. REV. L. & SOC. SCI. 323, 337-41 (2005) (questioning the model of fairness used in procedural justice studies, and expressing skepticism of overly uniform survey results as well as ethnographic studies that that do not squarely address people's perceptions of fairness); *infra* Part IV.B (discussing the limitations of procedural justice research).

actions and thereby cooperate with rehabilitative services.[134] The connection between a child's mental or emotional capacity and her sense of accountability relates not only to the criminal prosecution of young offenders, but also to the civil context when commitment or long term in-patient treatment is under consideration. Under these circumstances, evidence suggests that allowing adolescents to direct their own care enhances the ultimate effect and impact of therapy.[135] Examining such issues from a therapeutic perspective highlights the importance of ensuring that juveniles have the opportunity for meaningful and knowing participation in the legal system,[136] whether the threat to a minor's liberty comes from incarceration or institutionalization.[137]

As stated earlier in the context of discussing *In re Gault*,[138] sociologists and social psychologists acknowledged the connection between a juvenile's belief that she was fairly treated and the likelihood of her future compliance

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134. Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1295 (2000) ("'An offender is more likely to have a positive response to treatment when he or she is able to take responsibility for the behavior that the treatment aims to change.'" (quoting Richard Barnum & Thomas Grisso, *Competence to Stand Trial in Juvenile Court in Massachusetts: Issues of Therapeutic Jurisprudence*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 321, 336 (1994))).

135. *Id.* at 1330-31 (citing Kathleen M. Quinn & Barbara J. Weiner, *Legal Rights of Children, in* LEGAL ISSUES IN MENTAL HEALTH CARE 309, 323 (Barbara J. Weiner & Robert M. Wettstein eds., 1993)); s*ee also* Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 60 (1999) ("Restructuring the civil commitment process in the ways suggested can significantly increase patients' perceptions of fairness, participation, and dignity, thereby increasing the likelihood that they will accept the outcome of the hearing . . . and will participate in the treatment process in ways that will bring about better treatment results.").

136. Hartman, *supra* note 134, at 1296 ("'If a mental disability prevents the offender from appreciating what was alleged to have occurred or from taking a reasonable role in establishing the facts of the matter, it is difficult to expect the offender to become an ally in treatment.'" (quoting Barnum & Grisso, *supra* note 134, at 336)); *see also infra* Part IV.A (discussing the discipline of therapeutic jurisprudence).

137. Hartman, *supra* note 134, at 1330-31.

138. 387 U.S. 1, 26 (1967); *see also supra* notes 36-41 and accompanying text.

with the law and legal actors more than forty years ago.[139] However, while the United States Supreme Court recognized the import of procedural justice theory and its potential impact on juveniles' recidivism rates in 1967, this connection has not been advanced in Supreme Court jurisprudence since *Gault*.[140] While a handful of lower federal courts and some state courts have referenced the work of social scientists when determining whether juveniles should be granted specific due process protections,[141] this is only one of many areas in which lawmakers and legal authorities would benefit from a fuller

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139. STANTON WHEELER & LEONARD S. COTTRELL, JR., JUVENILE DELINQUENCY: ITS PREVENTION AND CONTROL 33 (1966) ("Unless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel."); *see also* FRANCIS A. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 19 (1964) ("A child brought before a tribunal . . . will properly feel[] that he has the right to receive from the court a sober and cautious weighing of the evidence relating to that issue. He has, in short, a right to receive not only the benevolent concern of the tribunal but justice. One may question with reason the value of therapy purchased at the expense of justice."); Allan H. Horowitz & Nancy L. Nickerson, Note, McKeiver v. Pennsylvania*: A Retreat in Juvenile Justice*, 38 BROOK. L. REV. 650, 689 (1972) (citing the Wheeler & Cottrell study to support the juvenile's right to a jury trial, noting that the due process of a jury trial can further rehabilitation by being "more impressive and more therapeutic" than the informality of juvenile court).

140. A Lexis/Westlaw search of U.S. Supreme Court decisions since 1967 located only a single instance in which the Court referred to juvenile offenders and the concept of procedural justice, though the reference is somewhat oblique. Schall v. Martin, 467 U.S. 253, 291 (1984) ("Juveniles [who are] subjected to preventive detention come to see society at large as hostile and oppressive and to regard themselves as irremediably 'delinquent.'"); *see also* Morrissey v. Brewer, 408 U.S. 471, 484 (1972) ("[F]air treatment in parole revocations will enhance the chance of rehabilitation by avoid reactions to arbitrariness."); Goldberg v. Kelly, 397 U.S. 254, 264-66 (1970) (suggesting that terminating welfare benefits without a hearing could cause psychological harm).

141. *See, e.g.*, *In re* H.L.R., 75 Cal. Rptr. 308, 313-14 (Ct. App. 1969) (noting the importance of enforcing juvenile defendant's *Miranda* rights under procedural justice theory, even when there is ample evidence of guilt); Lanes v. State, 767 S.W.2d 789, 795-96 (Tex. Crim. App. 1989) (relying on procedural justice theory to require that police officers have probable cause before arresting a juvenile); *see also* Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 FORDHAM L. REV. 1873, 1886-1903 (1996) (arguing that research on child development can be of assistance to judges who must make ethical decisions in a variety of legal contexts that impact children's lives).

understanding of social psychology.[142] The next Part demonstrates that having a deeper appreciation of the factors that motivate juveniles' deference to the law can better enable authorities to act in ways that encourage children's cooperation.[143]

III. APPLYING PROCEDURAL JUSTICE THEORY TO JUVENILE COURT

Children's limited knowledge and understanding of the criminal justice system, which has been explored at great length in both social science research[144] and legal scholarship,[145] underscores the importance of creating a

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142. TYLER & HUO, *supra* note 104, at 176; *see also* Bernard P. Perlmutter, *"Unchain the Children":* Gault*, Therapeutic Jurisprudence, and Shackling*, BARRY L. REV., Fall 2007, at 1, 37-41 (arguing that when today's courts consider the validity of juvenile court practices such as shackling, they should follow *Gault* and utilize empirical research in the fields of criminology, sociology, and public policy to inform their decisions).

143. TYLER & HUO, *supra* note 104, at 176.

144. *See, e.g.*, Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A study of 17 Cases*, CRIM. JUST., Summer 2000, at 26, 28-30, 33-35 (finding, based on empirical evidence, that young people do not understand the words or concept of the *Miranda* warning, and that adolescents are "too cognitively immature to assist in their defense"); Elizabeth Cauffman et al., *Justice for Juveniles: New Perspectives on Adolescents' Competence and Culpability*, 18 QUINNIPIAC L. REV. 403, 416-17 (1999) (discussing a study on the relationship between judgment and psychosocial maturity that found that adolescents make poorer decisions than adults because of immaturity)*; see also* Jennifer L. Woolard et al., *Examining Adolescents' and their Parents' Conceptual and Practical Knowledge of Police Interrogation: A Family Dyad Approach*, 37 J. YOUTH ADOLESCENCE 685, 694-97 (2008) ("[P]arents do know more than their children about some aspects of interrogation . . . . However, parents and adolescents sometimes have severe fundamental misconceptions about the parameters of legal police interrogation procedures."); *but see* Cauffman et al., *supra*, at 413-15 (discussing the dearth of ecologically valid social science research exploring adolescent competence to stand trial and culpability).

145. *See, e.g.*, Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles After* Roper v. Simmons, 65 WASH. & LEE L. REV. 385, 418-20 (2008) (discussing, in the context of interrogation, the difficulties that children and adolescents have understanding the meaning and consequences of legal terminology); Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles about the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111, 1120-22 (2006) (stating that a "significant body of literature" has questioned whether juveniles fully understand the nature of the criminal

system that young offenders perceive as fair and impartial.[146] This goal is further supported by empirical evidence suggesting a possible causal connection between procedural justice and lowered recidivism rates for juveniles.[147] This Part begins the process of exploring how these findings can guide judges and lawmakers when they are evaluating procedural practices that impact juveniles.

A. *A Jury of One's Peers?*

As discussed earlier, courts typically have not drawn on social science research generally, or procedural justice theory specifically, when determining whether to extend due process rights to juveniles.[148] Instead, jurisprudence in this area has followed the traditional approach of considering the question in terms of quid pro quo exchanges of rights for treatment,[149] or in terms of due process balancing that is not tethered to what is known empirically about child development,[150] or a combination—or blurring—of the two. While some legal scholars have asserted that juveniles should have the right to a jury trial, their arguments—though well-meaning—have been premised on abstract notions of "fairness" rather than upon empirical data related to procedural justice theory.[151]

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process or appreciate the potential collateral consequences); Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 811 (2005) (citing recent research demonstrating that youth under age sixteen are "significantly more likely" than adults to lack the competence necessary to participate meaningfully in criminal proceedings, and that this risk is "substantial" for youth under fourteen); Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 152-56 (2003) (discussing the differences in decision-making capacities of adolescents and adults).

146. *See* Ingrid M. Cordon et al., *Children in Court*, *in* ADVERSARIAL VERSUS INQUISITORIAL JUSTICE PSYCHOLOGICAL PERSPECTIVES ON CRIMINAL JUSTICE SYSTEMS 167, 167-73 (Peter J. van Koppen & Steven D. Penrod eds., 2003).

147. *See supra* notes 127-33 and accompanying text.

148. *See supra* notes 140-42 and accompanying text.

149 *See supra* notes 11-13 and accompanying text.

150. *See supra* notes 15-16 and accompanying text.

151. *See, e.g.*, Susan E. Brooks, *Juvenile Injustice: The Ban On Jury Trials For Juveniles In The District of Columbia*, 33 U. LOUISVILLE J. FAM. L. 875, 894 (1995) (arguing that juveniles have the right to jury trials based, inter alia,

Likewise, others have contended that the jury trial right should *not* be extended to juvenile court, based on suppositions and anecdotal evidence regarding likely trial outcomes, rather than empirical findings related to adolescents' perceptions of the system and rates of reoffending.[152]

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upon the connection between a juvenile's perceptions of having been treated fairly and successful rehabilitation but not citing supporting empirical data); -Hill, *supra* note 86, at 162-63 (stating that high recidivism rates for juveniles justify providing them with jury trials that will allow them to understand the seriousness of their conduct and seriousness of the proceedings); Ellen Marrus, "*That Isn't Fair, Judge": The Costs of Using Prior Juvenile Delinquency Adjudications in Criminal Court Sentencing*, 40 HOUS. L. REV. 1323, 1350-51 (2004) (arguing that the lack of jury trials for juveniles results in error and bias in judge-made adjudications, but not citing empirical research); Chen, *supra* note 86, at 7-8 (citing several "benefits" to the jury trial right for juveniles, but not mentioning empirical links between notions of fairness and lowered recidivism rates); Sandra M. Ko, Comment, *Why Do They Continue to Get the Worst of Both Worlds? The Case for Providing Louisiana's Juveniles with the Right to a Jury in Delinquency Adjudications*, 12 AM. U. J. GENDER SOC. POL'Y & L. 161, 178-83 (2004) (arguing that juveniles should have a jury trial right in delinquency court based on several factors, including the importance of providing a proceeding perceived to be fair by juveniles, but not mentioning empirical studies on procedural justice and recidivism); Sara E. Kropf, Note, *Overturning* McKeiver v. Pennsylvania*: The Unconstitutionality of Using Prior Juvenile Convictions to Enhance Adult Sentences Under the Sentencing Guidelines*, 87 GEO. L.J. 2149, 2170 (1999) (arguing that "perceptions matter" and that denying juveniles the right to a jury trial will cause them to feel they have not been treated fairly, but not referencing empirical evidence or procedural justice theory); Jaime L. Preciado, Comment, *The Right to a Juvenile Jury Trial in Wisconsin: Rebalancing the Balanced Approach*, 1999 WIS. L. REV. 571, 601-05 (arguing that juvenile jury trials provide "important safeguards for the overall quality of justice," and that the jury system gives citizens a voice and is necessary for "fair, impartial" trials for juveniles, but not mentioning the connection between procedural justice and recidivism); Wolf, *supra* note 86, at 299, 302 (articulating "positive effects" of juries on the juvenile justice system, but not addressing the perceptions of juveniles themselves or how they might impact recidivism rates); *see also* McKeiver v. Pennsylvania, 403 U.S. 528, 561-62 (1971) (Douglas, J., dissenting) (acknowledging that juveniles who perceive the system as fair are more likely to be successfully rehabilitated, but not referencing empirical data).

152. *See, e.g.*, Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 169 (characterizing the jury trial right for juveniles as merely a "chip to be used in the poker game of plea bargaining," and stating that the loss of this right is by no means "catastrophic" because the penalties in juvenile court are less punitive than in adult court). *But see* Janet E. Ainsworth, *Youth Justice in a Unified*

To engage in a rigorous examination of how procedural justice theory could reframe this particular debate would require an interdisciplinary approach that most courts and lawmakers have thus far resisted or have failed to acknowledge as having potential value from a public policy perspective. Funding empirical studies that focus on the question of how juveniles perceive the jury trial right would be an apt starting point.[153] Specific areas of inquiry could include an examination of whether young offenders denied the right believed that the juvenile justice system was fair; whether those with the right were satisfied with the handling of their cases; and whether the right to a jury trial appears to reduce recidivism. These findings could then be used to inform judges and lawmakers when deciding whether, and on what basis, to extend the jury trial right to juvenile offenders.

This is not to say, however, that such an examination would be easy or that it would clearly point in one direction or another. As stated earlier, social science data is limited in its utility.[154] It is undeniable, however, that allowing such data to inform and potentially reframe the discussion can add much-needed texture and nuance. In addition, an empirical examination of whether jury trials heighten juveniles' perceptions of fairness, thereby lowering rates of reoffending, need not end there but can serve as the opening for considering other adjudicative options and procedural strategies for juvenile court—from victim-offender mediation,[155] restorative justice programs,[156] and the

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Court: Response to Critics of Juvenile Court Abolition, 36 B.C. L. REV. 927, 942-44 (1995) (emphasizing the "transformative" power of the jury trial right for juveniles); Guggenheim & Hertz, *supra* note 49, at 562-71 (finding that judges are more likely than jurors to weigh evidence in favor of the prosecution and are less likely to assess the credibility of the accused with an open mind, particularly in juvenile court).

153. *See* Bibas & Bierschbach, *supra* note 28, at 131-32 (providing a meta-analysis of empirical studies that have compared victim-offender mediation and family conferencing with traditional criminal justice mechanisms).

154. *See supra* note 133 and accompanying text.

155. *See, e.g.*, William R. Nugent et al., *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 UTAH L. REV. 137, 161-65 ("[P]articipation in [victim-offender mediation] is clearly associated with a decrease in subsequent delinquent behavior that leads to an adjudication of guilt, ... [that victim offender rehabilitation participants are] reoffending at a rate nearly 27% lower

therapeutic role that apology and remorse can play[157] to waiving counsel, appearing pro se, and admitting at arraignment.[158]

Further, given the informality of most juvenile courtrooms, an unanswered question is how much traction procedural justice theory can achieve in this setting. In a regime that functions largely by means of streamlined admissions and not protracted—or even contested—hearings,[159] introducing notions of procedural justice in a meaningful way poses distinct challenges. Unless the delinquency court process can be retooled so that even those offenders with straightforward, readily resolved matters are given the space to experience procedural justice, the endeavor will not succeed. The values of procedural justice theory must be transparently communicated to all children

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than that of nonparticipants, ... [and that] restorative justice philosophy may hold great promise for the development of juvenile justice practices that lead tomore positive outcomes for victims, juveniles, and for the general public.").

156. *See* TONY F. MARSHALL, RESTORATIVE JUSTICE: AN OVERVIEW 5-8 (1999), *available at* http://www.homeoffice.gov.uk/rds/pdfs/occ-resjus.pdf (discussing programs of community mediation, victim-offender mediation, and community conferencing in which the parties in a case collectively resolve how best to address the disposition of the matter and then determine its implications for the future). Restorative justice is innovative in the sense that it is "concerned with the breakdown of the barriers between legal processes (the 'criminal justice system') and community action, including the introduction of personal involvement in what are generally impersonal, highly regularized, often bureaucratic, procedures." *Id.* at 23*; see also* CAROL LUPTON & PAUL NIXON, EMPOWERING PRACTICE: A CRITICAL APPRAISAL OF THE FAMILY GROUP CONFERENCE APPROACH 115-37 (1999) (describing a decision-making process utilized in child welfare systems in Great Britain that focuses on the family's strengths rather than its weaknesses, better enabling the participation and empowerment of all members of a child's family).

157. *See, e.g.*, Bibas & Bierschbach, *supra* note 28, at 113-21, 131-34 (citing empirical studies finding that both adult and juvenile offenders who participate in mediation and similar mechanisms are more likely to feel that the criminal justice system was fair and less likely to recidivate).

158. *See infra* notes 161-186 and accompanying text.

159. *See, e.g.*, STEVEN M. COX, ET AL., JUVENILE JUSTICE: A GUIDE TO THEORY, POLICY, AND PRACTICE 194-96 (6th ed. 2008) ("[T]he nature of the charges, the plea, and the punishment are negotiated and agreed on before the defendant actually enters the courtroom. The adversarial system . . . has been circumvented."); *see also* DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 200-02 (1977) (discussing the failure of defense counsel to protect a juvenile offender's right to remain silent).

and adolescents who find themselves under the jurisdiction of the juvenile court; this may, in fact, be the greatest hurdle to overcome.

B. *Waiving Counsel and Admitting at Arraignment*

If juveniles' perceptions of fairness are not outcome-dependent, as empirical studies have suggested,[160] and if the opportunity for a young offender to speak in open court and be heard is a critical component to achieving a meaningful court experience, what of the oft-touted option of allowing children and adolescents to waive their right to counsel and admit to pending charges at arraignment?[161] How might empirical data inform judges and law makers as to whether juveniles consider such a scheme to be fair, thereby increasing the likelihood of successful rehabilitation, or unfair, suggesting that reoffending rates would increase? Do young offenders perceive this to be a just balancing, as services could potentially be provided more quickly and a protracted adversarial process avoided? Or do juveniles view the summary imposition of such programs as punitive and lacking in beneficial value?[162]

The current state of United States law on the right of juveniles to waive counsel in delinquency court is somewhat mixed.[163] While *In re Gault* requires that every state provide

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160. *See supra* notes 127-33 and accompanying text.

161. *See, e.g.*, *In re* Maricopa County Juvenile Action No. JV-108721 and F-327521, 798 P.2d 364, 366-67 (Ariz. 1990) (relying on a rule of court that specifically allowed juveniles to waive their right to counsel); *In re* Manuel R., 543 A.2d 719, 723 (Conn. 1988) (upholding the right of juveniles to waive counsel); *In re* State, 252 A.2d 237, 239-41 (Juv. & Domestic Rel. Ct. Union County, N.J. 1969) (supporting a juvenile's right to waive counsel based on the proposition that competence to waive counsel is a question of fact, not law, even for juveniles). In the spirit of clarity, the term "arraignment" as used here is meant to refer to a juvenile's initial appearance on pending delinquency charges for felonies as well as to the first court date for adjudication of misdemeanor charges.

162. *See infra* notes 236-37 and accompanying text (discussing the negative perceptions that many juveniles have of required rehabilitative programs and services).

163. Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 316-17 (2003) ("[S]tates are currently inconsistent in their handling of waivers of counsel by juveniles.").

counsel to juveniles accused of crime, at least at the adjudicatory phase,[164] this does not mean that young offenders *must* accept legal representation, but only that they have the right to counsel if they request representation.[165] Very few states require mandatory appointment of counsel in juvenile cases with no option for waiver.[166] In these states, a juvenile may neither waive counsel nor represent herself even for the limited purpose of pleading guilty, as such are considered to be "intentional relinquishment" of known rights that are inapplicable to juveniles.[167] In a substantial minority of states, waiver of counsel may only occur under limited circumstances, requiring a rigorous inquiry into the validity of the waiver or proof by clear and convincing evidence that the juvenile waived knowingly and intelligently and that the waiver was in her best interests.[168] In the remaining majority of states, children may waive their right to counsel at any stage of the proceedings, as long as it is determined to be—based on a variety of criteria—voluntary, knowing, and intelligent.[169]

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164. *In re* Gault, 387 U.S. 1, 41 (1967) (holding that the right to counsel applies to juvenile delinquency proceedings); *see also* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *The Challenge of Crime in a Free Society* 86-87 (1967) (stating that in order to assure "procedural justice for the child," counsel should be appointed "without requiring any affirmative choice" by the juvenile or the parent).

165. Marrus, *supra* note 163, at 316.

166. RANDY HERTZ ET AL., TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT 54-55 (1991) (stating that Iowa and Texas have prohibited the waiver of counsel by juveniles, that Wisconsin prohibits waiver by juveniles under age 15, and that several other states permit waiver but only after the juvenile has been advised of the consequences of waiver by an attorney, judge, or after a hearing); Tory J. Caeti et al., *Juvenile Right to Counsel: A National Comparison of State Legal Codes*, 23 AM. J. CRIM. L. 611, 622-23 (1996); Robert E. Shepherd, Jr., *Juvenile's Waiver of the Right to Counsel*, CRIM. JUST., Spring 1998, at 38, 38 (citing the state codes of Iowa and Texas).

167. Marrus, *supra* note 163, at 316.

168. *See* Caeti, *supra* note 166, at 622-23 (finding that seventeen states have a per se rule against waiver by juveniles or have very strict waiver requirements); Shepherd, *supra* note 166, at 38 (citing the laws of Virginia, New York, and Minnesota).

169. Marrus, *supra* note 163, at 316-18. *But see* Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1324-25 (1989) ("[T]he lack of guidelines as to how the various factors should be weighed . . . .

As found in a review of legal scholarship on the juvenile's right to a jury trial,[170] very few law review articles on the role of counsel in juvenile court are grounded in empirical evidence or reference the connections among perceptions of fairness, procedural justice theory and recidivism.[171] Again, while there are many who argue *against* allowing juveniles to waive counsel, these well-intentioned critiques are generally premised on claims—whether corroborated or not—that children and their parents lack the ability to intelligently waive their rights,[172]

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result in virtually unlimited and unreviewable judicial discretion to deprive juveniles of their most fundamental procedural safeguard—the right to counsel.").

170. *See supra* note 151 and accompanying text.

171. *See, e.g.*, Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 285-86, 301 (2005) (calling for a model of advocacy that gives the child a meaningful voice in the attorney-client relationship, based on the notion that this would promote rehabilitation as well as the public safety objectives of the juvenile court); *see also* JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS § 6.1 (Inst. of Judicial Admin. & Am. Bar Assoc. 1980) ("A juvenile's right to counsel may not be waived."); Scott Barclay, *A New Aspect of Lawyer-Client Interactions: Lawyers Teaching Process-Focused Clients to Think About Outcomes*, 11 CLINICAL L. REV. 1, 5, 10-13 (2004) (presenting an empirical study of civil litigants that focused on why individuals appeal from adverse decisions in civil cases, and concluding that lawyers are more outcome-focused in defining the goals of their legal actions, while clients have more process-focused goals for appealing, including achieving retribution, gaining access to a fair decision-maker, and creating systemic change); NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* 183-99 (2009), http://tcpjusticedenied.org/ (identifying the systemic failures of the indigent defense system, including suggestions for improving the waiver system that would protect the accused); ROBIN WALKER STERLING, THE ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT 7-24, 60 (2009), http://www.njdc.info/pdf/role_of_juvenile_defense_counsel.pdf (providing a detailed description of the role of juvenile defense counsel, including stating that one of the first principles of the public defense delivery system is ensuring that cousel is not waived and that counsel is assigned as soon as possible).

172. *See, e.g.*, Jerry R. Foxhoven, *Effective Assistance of Counsel: Quality of Representation for Juveniles is Still Illusory*, 9 BARRY L. REV. 99, 106-11 (2007) (discussing evidence that many juvenile waivers of counsel are not knowing and voluntary, and arguing against allowing waivers, but not corroborating the claims with social science research or providing a developmental perspective); Norman Lefstein et al., *In Search of Juvenile Justice:* Gault *and Its Implementation*, 3 L. & SOC'Y REV. 491, 537-38 (1969) (arguing against allowing

the assumption that lawyers for children invariably improve their clients' adjudicative outcomes,[173] or a combination of the two.[174] Similarly, those who contend that juveniles should be allowed to waive the right to counsel often do so based on abstract notions of adolescent autonomy without grounding in social science research.[175]

Barry Feld is one of the few scholars who has conducted empirical work on the impact that counsel has on the

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juveniles to waive the right to counsel because "social factors" militate against the likelihood that minors and their parents are "capable of intelligent and objective waivers of their rights," but offering no corroboration of the claim); *see also* Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of* Miranda *Rights*, 2006 WIS. L. REV. 431, 434-44 (relying on research in the areas of adolescent psychosocial and brain development to argue that minors have a limited capacity to waive rights, but not exploring juveniles' perceptions of procedural justice as they relate to the waiver of such rights).

173. *See, e.g.*, Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 609-22, 650 (2002) (advocating the prohibition of juvenile waiver of counsel based on juveniles' lack of capacity and public policy, and rejecting concerns regarding the violation of juveniles' right to autonomy, but not addressing the question of whether mandatory representation serves notions of procedural justice); Lefstein et al., *supra* note 172, at 539-43 (asserting without corroboration that a juvenile would be prejudiced if allowed to waive the representation of counsel). *But see infra* notes 177-80 and accompanying text.

174. *See, e.g.*, *Hearing on H.B. 1508 Before the H. Comm. on the Admin. of Crim. Just.*, 2004 Leg., Reg. Sess. (La. 2004) (statement of Ernestine Gray, Co-Chair, ABA Juvenile Justice Comm.), *available at* http://www.njdc.info/pdf/18_LAaba.pdf ("Consulting with counsel and counsel's subsequent presence in court is crucial because few juveniles have the experience and understanding to decide meaningfully that the assistance of counsel would not be helpful.").

175. *See, e.g.*, *In re Manuel R.*, 543 A.2d 719, 723 (Conn. 1988) (rejecting arguments for a per se rule prohibiting juveniles from waiving counsel, which was premised on empirical research on the lack of capacity of children, and asserting that such a rule would compromise the right of adolescents to make autonomous decisions regarding their legal representation). *But see* Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 82-93 (1984) (advocating for an expressed interest approach of representation in which the child is allowed to direct her own counsel in delinquency proceedings, but acknowledging that the matter should be informed by social science and moral philosophy); Hartman, *supra* note 134, at 1282, 1298 ("[I]mplicit in [the U.S. Supreme Court's] rulings affording constitutional rights to adolescents is the corollary ability to exercise or waive those rights.").

adjudications and dispositions of juvenile clients. While he acknowledges the study's limitations,[176] his findings and those of others suggest—somewhat surprisingly—that juveniles with counsel are more likely to be incarcerated and to receive other punitive sanctions than those without counsel.[177] While the causes are difficult to determine conclusively, Feld surmises that the presence of juvenile defense lawyers may antagonize judges, and conversely, that judges may be more lenient towards juveniles who are not represented.[178] Feld does not reason, however, that this justifies allowing juveniles to waive counsel; on the contrary, he argues that waiver should not be allowed and that a mandatory representation model would "wash out" the apparently negative effects of assistance of counsel.[179] Recognizing that non-waivable counsel for *all* juveniles may

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176. Feld, *supra* note 169, at 1332-33 (acknowledging that the relationship between the presence of counsel and the increased severity of disposition may be "spurious," as a single study cannot "control for all the variables that influence dispositional decision-making").

177. Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed?*, 34 N. KY. L. REV. 189, 219-21, 228-30 (2007) (stating, based on empirical research, that when juveniles are represented in delinquency court, they are less likely to have positive outcomes); Feld, *supra* note 169, at 1208-09, 1236-37, 1259, 1330 (finding that empirical research shows that juveniles actually have worse outcomes in delinquency court when they are represented by counsel); *see also* George W. Burruss, Jr. & Kimberly Kempf-Leonard, *The Questionable Advantage of Defense Counsel in Juvenile Court*, 19 JUST. Q. 37 (2002) (finding that the presence of an attorney consistently increased the likelihood of juveniles receiving out-of-home placements in all settings).

178. Feld, *supra* note 177, at 228-30 (suggesting that represented juveniles may fare worse than those who are pro se because their lawyers may be inexperienced, incompetent, biased, or overworked, and that judges may punish such juveniles more severely because they believe the presence of counsel insulates them from appellate reversal); Feld, *supra* note 169, at 1238. It is also possible that Feld's findings result, at least in part, from selection bias, meaning that juveniles who are likely to either retain or accept appointed counsel may have been charged with more serious offenses, thereby leading to more punitive sanctions for reasons other than those suggested above. *See also* N. Lee Cooper et al., *Fulfilling the Promise of* In re Gault*: Advancing the Role of Lawyers for Children*, 33 WAKE FOREST L. REV. 651, 658-63 (1998) (discussing the systemic causes of ineffective representation in juvenile courts, the many reasons that children waive counsel, and the ways in which the "cumulative effect of these factors is a derogation of juvenile court practice itself").

179. Feld, *supra* note 169, at 1326-27.

not be realistic in practice, Feld suggests instead that a per se requirement of consultation with counsel prior to waiver be introduced or, in the alternative, a prohibition on removing a child from her home or incarcerating her without providing the advice of counsel.[180]

The right to waive counsel and appear as a pro se defendant was established by the United States Supreme Court in *Johnson v. Zerbst*[181] and *Faretta v. California*[182] when it held that a criminal defendant has a constitutional right to waive counsel when the decision is made knowingly and intelligently.[183] The Court has not directly ruled on whether this right extends to juveniles, but it has held that minors can waive their pre-trial right to counsel during interrogation under the "totality of the circumstances" standard.[184] Empirical research has shown, however, that juveniles are not as competent as adults to waive their right to counsel in a manner that is knowing and intelligent.[185]

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180. *Id.* at 1329-30.

181. 304 U.S. 458 (1938).

182. 422 U.S. 806 (1975).

183. *Id.* at 835; *see Johnson*, 304 U.S. at 464-65; *see also* Scott v. Illinois, 440 U.S. 367, 374 (1979) (holding that it is improper to incarcerate an adult defendant, even for a minor offense, without the appointment of counsel or a valid knowing and intelligent waiver of counsel).

184. Fare v. Michael C., 442 U.S. 707, 725-26 (1979). *But see* Birckhead, *supra* note 145, at 424-26 (analyzing the *Michael C.* decision from a critical perspective, and contending that young suspects require safeguards that adults do not, and that they lack the capacity to waive counsel and be interrogated without the presence of an adult).

185. *See, e.g.*, THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 41-93, 109-60 (1981) (finding that juveniles ages fourteen and younger were significantly less likely to comprehend their rights to counsel than older teens and adults, and finding that intelligence strongly correlates with the understanding of one's legal rights); Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 233 (2006) (finding that juveniles under sixteen had the most difficulty exercising their *Miranda* rights and their adjudicative competence); Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 333-63 (2003) (finding that adolescents performed more poorly than adults during testing to measure competence to stand trial); Melinda G. Schmidt et al., *Effectiveness of Participation as a Defendant: The Attorney-Juvenile Client Relationship*, 21 BEHAV. SCI. & L. 175, 177-78, 193 (2003) (discussing empirical studies that have demonstrated juveniles'

Further, the "relative paucity" of appellate case law governing the waiver of counsel by juveniles is likely a reflection of the absence of counsel to preserve the issue for appeal in waiver cases as well as the general infrequency with which juvenile appeals are brought.[186]

Thus, given the limited number of research studies in this specific area,[187] it is difficult—if not impossible—to draw any definitive conclusions as to juveniles' perceptions of fairness vis-à-vis the right to waive counsel in juvenile court. Some of the unanswered questions include whether young offenders are more or less likely to be given a voice when they are represented by counsel, enabling them to participate meaningfully in juvenile court proceedings;[188] whether judges and prosecutors are more or less sympathetic or empathetic to the unrepresented juvenile than to the one with a contentious—or incompetent[189]—

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misunderstandings and distortions of the attorney-client relationship that are likely to "interfere with their effective participation as defendants"); *see also* Patricia Puritz & Katayoon Majd, *Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice*, 45 FAM. CT. REV. 466 (2007) (urging juvenile defense attorneys to base their arguments challenging children's waivers of rights on adolescent development, "[g]iven the differential decisional capacity of youth").

186. Shepherd, *supra* note 166, at 40; *see also* N. Lee Cooper et al., *supra* note 178, at 674-75 (stating that the practice of taking appeals of juvenile delinquency cases is lacking in most jurisdictions, and arguing that there are strong arguments for pursuing appeals and for developing an "appeals infrastructure"); Steven A. Drizin & Greg Luloff, *Are Juvenile Courts A Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 294-99 (2007) (stating that there is not an "active and zealous" appellate or post-conviction practice in juvenile court); Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Proceedings*, 14 LEWIS & CLARK L. REV. (forthcoming 2010) (discussing the paucity of ineffective assistance claims in juvenile appeals); Puritz & Majd, *supra* note 185, at 466 (discussing the barriers to effective defense representation in delinquency cases, the high stakes of court involvement, and the fact that children affected by ineffective indigent defense systems are disproportionately low-income children of color).

187. A rigorous search of social science databases found no studies focused on juveniles' perceptions vis-à-vis the right to waive counsel.

188. *See* Schmidt et al., *supra* note 185, at 192 (finding that many juveniles with prior experience in the criminal justice system maintain "a degree of cynicism or distrust" of defense attorneys and, as a result, view the U.S. indigent defense system negatively).

attorney; and whether a juvenile's perceptions of the fairness of the process are dependent upon having the option to waive counsel and resolve the case *pro se* at the first court hearing. Suffice it to say, more research is needed in this area, which is arguably at the core of the juvenile justice system.[190]

C. *Schoolhouse Justice*

Another area in which judges and law makers would benefit from review and consideration of empirical data on juveniles' perceptions of fairness and rates of reoffending is that of the administration of justice within educational institutions. There is a storied record of United States Supreme Court opinions recognizing that a critical function of the educational system is to instill, as stated in *Brown v. Board of Education*, "the very foundation of good citizenship" in its students.[191] The Court has characterized teachers, administrators, and other school actors as serving as role models for their students, "exerting a subtle but important influence over their perceptions and values."[192]

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189. *See* Drizin & Luloff, *supra* note 186, at 289-92 ("[M]any juvenile defendants are victims of ineffective assistance of counsel." [This can result from factors such as] poor investigation, infrequent use of motions, high caseloads, over-reliance on pleas, a juvenile court culture of wanting to 'help' juveniles, and a general lack of training among attorneys on youth and adolescents.").

190. *See* Kristin Henning, *Defining the Lawyer-Self: Using Therapeutic Jurisprudence to Define the Lawyer's Role and Build Alliances that Aid the Child Client*, *in* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 411, 425-26 (Marjorie A. Silver ed., 2007) (stating that the right to direct and control counsel "falls at the center" of all other rights in the juvenile justice system); Ellen Marrus, *supra* note 163, at 334 ("'[T]he right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice.'" (quoting Kent v. United States, 383 U.S. 541, 561 (1966))).

191. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); *see also* New Jersey v. T.L.O., 469 U.S. 325, 373 (1985) (Stevens, J., concurring and dissenting) ("Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry."); Ambach v. Norwick, 441 U.S. 68, 76 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized [by the courts.]").

192. *Ambach*, 441 U.S. at 78-79 ("Thus, through both the presentation of course materials and the example he [or she] sets, a teacher has an opportunity

The Court has also acknowledged that a vital part of this process involves respecting students' "fundamental rights," so as to ensure that students, in turn, learn "to respect their obligations to the State."[193]

Much has changed in recent decades, however, and as school actors increasingly serve side-by-side with or in lieu of law enforcement,[194] a vicious cycle has been perpetuated: when students are disciplined without meaningful process, they inevitably view their treatment as having been unfair and, as a result, are more likely to act out and reoffend because they do not respect the authority of their teachers and administrators.[195] In determining whether and to what

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to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities.").

193. Tinker v. Des Moines Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) (stating that if the school system does not respect students' "fundamental rights," students are unlikely to learn to "respect their obligations to the State"); *see also* W. Va. State Bd of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("[Of the many functions which school officials perform, there are] none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at is source and teach youth to discount important principles of our government as mere platitudes."). *But see* Morse v. Frederick, 551 U.S. 393, 396-97 (2007) ("[S]chools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use . . . .[T]he school officials . . . did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it.").

194. *See* Josh Kagan, *Reappraising* T.L.O.*'s "Special Needs" Doctrine in an Era of School-Law Enforcement Entanglement*, 33 J.L. & EDUC. 291, 291-92, 305-16 (2004) (discussing the extent to which schools and law enforcement have become "increasingly entangled"); Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067, 1069 (2003) ("[I]ncreasingly interdependent relationships between school officials and law enforcement authorities, coupled with the proliferation of zero tolerance policies in public schools, has led to the increased criminalization of youth behavior.")

195. *See, e.g.*, Kagan, *supra* note 194, at 314-15 (suggesting that school discipline policies perceived by students to be unfair ultimately prevent rehabilitation and increase recidivism); *see also* Kristen Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 524 (2004) ("[S]chool notification statutes and school expulsion policies work together to inhibit rehabilitation and actually increase crime over time.").

degree school officials should be allowed to infringe upon the privacy and due process rights of students, courts have relied upon a subjective balancing test, whereby fairness to the young person is weighed against the urgent need to maintain school discipline.[196] Yet, few have asked whether this is the most effective—or efficient—standard by which to judge the procedures that we impose upon children and adolescents in educational settings. How do students themselves perceive the current framework for addressing violations of disciplinary regulations and state criminal statutes on school property? Are there fair and balanced ways of addressing such infractions that would promote both procedural justice and school safety? Which processes and procedures are most likely to result in improved student conduct, increased cooperation with teachers and administrators, and greater academic success?

Establishing the historical legal context of these issues provides a helpful frame for discussing their nuances. Until the late 1960s, our public educational institutions punished and disciplined students within the walls of their own buildings without the involvement of law enforcement or the courts, except in the most egregious and violent cases.[197] In 1975, the United States Supreme Court decided *Goss v. Lopez*,[198] holding by a slim majority that notice and an opportunity for "some kind of hearing" were required before a school could suspend a student, even for fewer than ten

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196. *See, e.g.*, *T.L.O.* 469 U.S. at 341 & n.2 ("[T]he accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law."); Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 155-57 (5th Cir. 1961) (utilizing a balancing approach to hold that students at a public institution have a right to notice and a specific statement of charges and grounds prior to expulsion). *But see* Paul Holland, *Schooling* Miranda*: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 LOY. L. REV. 39, 111 (2006) (arguing that the assumption that applying *Miranda* to the school setting will compromise discipline and safety is "natural but nevertheless ill-founded").

197. *See* Bernardine Dohrn, *The School, the Child, and the Court*, *in* A CENTURY OF JUVENILE JUSTICE 267, 280 (Margaret K. Rosenheim et al. eds., 2002) (describing traditional school discipline policies, including classroom reprimands, referrals to an administrator's office, corporal punishment, suspension and expulsion).

198. 419 U.S. 565 (1975).

days.[199] The right to counsel and the standard of "proof beyond a reasonable doubt" were not extended to these hearings, however,[200] and the *Goss* dissenters warned that even the modest requirement of a barebones hearing could potentially undermine school discipline.[201] During the 1990s, the era of the juvenile "super-predator"[202] brought an increase in the criminalization of adolescent behavior,[203] leading to more school-based arrests and resulting in greater numbers of suspensions and expulsions.[204] Many

199. *Id.* at 579.

200. *Id.* at 583.

201. *Id.* at 593 (Powell, J., dissenting) ("When an immature student merits censure for his conduct, he is rendered a disservice if appropriate sanctions are not applied or if procedures for their application are so formalized as to invite a challenge to the teacher's authority—an invitation which rebellious or even merely spirited teenagers are likely to accept."). Empirical data on whether *Goss*'s introduction of process into school disciplinary matters impacted subsequent recidivism rates could be revealing; however, a search of social science databases found no applicable studies.

202. John J. DiIulio Jr., *The Coming of the Super-Predators*, WEEKLY STANDARD, Nov. 27, 1995, at 23 (coining the term "super-predators" to refer to "severely morally-impoverished" juvenile "street criminals" who, DiIulio claimed, were responsible for the "youth crime wave" and were raised in homes "where unconditional love is nowhere but unmerciful abuse is common"); PETER ELIKANN, SUPERPREDATORS: THE DEMONIZATION OF OUR CHILDREN BY THE LAW 41-42, 66 (1999); Joyce Purnick, *Youth Crime: Should Laws Be Tougher?*, N.Y. TIMES, May 9, 1996, at B1 (quoting prosecutor as characterizing juvenile delinquents as "superpredators").

203. *See* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 59-61 (July 1996), *available at* http://www.ncjrs.gov/pdffiles/statresp.pdf (finding that as a result of the perception that juvenile crime was on the rise, the majority of states changed their laws during the early 1990s, resulting in a generally more punitive juvenile justice system). *But see* MIKE A. MALES, FRAMING YOUTH: TEN MYTHS ABOUT THE NEXT GENERATION 32 (1999) (discussing the media's mischaracterization of youth violence during the 1990s as "soaring," when it was actually falling); Julian V. Roberts, *Public Opinion and Youth Justice*, 31 CRIME & JUST. 495, 499-503 (2004) (finding that empirical research has shown that people overestimated the volume of crime for which juveniles were responsible); J. Robert Flores, *Foreword* to HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEPT. OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT iii (2006), http://ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf (finding that the rate of juvenile violent crime arrests has decreased steadily since 1994, falling to a level "not seen since at least the 1970s").

204. Dohrn, *supra* note 197, at 282 (describing the skyrocketing of school expulsions as states added drug possession and assaults on school personnel as

schools, particularly in urban and low-income areas, became more prison-like, with an increased police presence and more institutional personnel dedicated to maintaining security.[205] Such circumstances were further exacerbated by the relaxation of rules governing the confidentiality of juvenile court records[206] and the proliferation of zero tolerance policies,[207] allowing schools to become "direct feeders" of youth into juvenile and adult criminal courts.[208]

A review of social science research on the perceptions of children and teenagers vis-à-vis their rights in the school setting reveals that the data is compelling but incomplete.[209]

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bases for disciplinary proceedings); Pinard, *supra* note 194, at 1096-97, 1104-05 (discussing the "interdependency and interconnectedness" between school officials and law enforcement that has "in many ways melded the criminal justice system with school disciplinary processes"); *see also* Gun-Free Schools Act § 4141, 20 U.S.C. § 7151 (2006) (excluding guns from schools and mandating a one-year expulsion for possession of a firearm on school property); Joan M. Wasser, Note, *Zeroing in on Zero Tolerance*, 15 J.L. & POL. 747, 749-50 (1999) (stating that many states expanded the definition of "weapon" to allow them to expel students "caught even once" for carrying even common implements such as knives or low-tech fireworks).

205. *See* Dohrn, *supra* note 197, at 282-83. *But see* Holland, *supra* note 196, at 40 (cautioning against speaking too generally about the role of police in schools, as there are still many districts in which administrators retain a traditional tutelary role).

206. *See* Henning, *supra* note 195, 577-88 (examining how schools and public housing authorities obtain juvenile records and use them to exclude children and their families from the benefits of education and housing, reevaluating assumptions about adolescents' amenability to treatment, and concluding that public housing authorities should be denied access to juvenile records while schools should have limited access on a case-by-case basis in order to accommodate both school safety and rehabilitation); Kagan, *supra* note 194, at 313.

207. Pinard, *supra* note 194, at 1069, 1109-11 ("Critics assert that while zero tolerance policies were originally aimed to rid schools of dangerous weapons, they have reached past their intended purpose to criminalize student behavior which poses no threat to physical well-being or safety.").

208. Dohrn, *supra* note 197, at 283; Holland, *supra* note 196, at 74 ("The National Assocciation of School Resource Officers . . . claim[s] that school-based policing is 'the fastest growing area of law enforcement.'" (citation omitted)); *see also* Pinard, *supra* note 194, at 1069, 1105-07 (discussing the debate over whether increased placement of law enforcement officers in schools engenders "greater trust and understanding between children and . . . authorities" or whether it is "a drastic step that could lead to various abuses").

209. *See infra* notes 210-12 and accompanying text.

Studies abound that illustrate that students of color are disproportionately punished in United States schools and subjected to the most punitive sanctions, including suspensions and expulsions.[210] There are also studies that indicate that because American schools increasingly define and manage the problem of student misbehavior through the perspective of crime control, students who are repeatedly disciplined begin to view themselves as future criminals or prisoners on the "criminal justice 'track.'"[211] Such studies recognize that anticipatory labeling of students as prospective criminals can be a self-fulfilling prophesy, as research shows that frequently suspended students are more likely to face juvenile or adult

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210. *See, e.g.*, Building Blocks for Youth, *Fact Sheet: Zero Tolerance,* http://www.buildingblocksforyouth.org/issues/zerotolerance/facts.html (stating that statistics from 1998-2000 show that children of color are subjected to higher rates of suspensions and expulsions than white children); Kagan, *supra* note 194, at 323 (reporting that schools with higher minority populations are more likely to have a significant police presence, leading to more frequent searches, and that interactions between police and students "disproportionately burden" African-American and Latino youth); Susan Sandler et al., *Turning* to *Each Other, Not* on *Each Other: How School Communities Prevent Racism in School Discipline* 5 (Esther Morales ed., 2000), *available at* http://www.justicematters.org/jmi_sec/jmi_dwnlds/turning.pdf (finding, based on U.S. Deptartment of Education statistics, that African-American students are suspended at twice their percentage in the national student population); *see also* MIKE MALES & DAN MACALLAIR, THE COLOR OF JUSTICE: AN ANALYSIS OF JUVENILE ADULT COURT TRANSFERS IN CALIFORNIA 4 (2000) (finding that minority youth are disproportionately referred to the juvenile justice system and, once there, receive the most punitive sanctions as compared to white youth); Pinard, *supra* note 194, at 1115-16 (stating that commentators have attributed discrepancies between the treatment of white students and students of color to cultural differences in communication styles between students of color and school administrators and to the fact that zero tolerance policies are more prevalent in schools that have majority populations of students of color).

211. Paul J. Hirschfeld, *Preparing for Prison? The Criminalization of School Discipline in the USA*, 12 THEORETICAL CRIMINOLOGY 79, 79, 91 (2008); *see also* Russell Skiba et al., Consistent Removal: Contributions of School Discipline to the School-Prison Pipeline 4 (School to Prison Pipeline Conference, Harvard Civil Rights Project 2003), *available at* http://www.civilrightsproject.ucla.edu/research/pipeline03/Skibbav3.pdf (finding that schools with an increased police presence and zero tolerance policies have higher rates of juvenile delinquency and incarceration, and suggesting that such policies increase the likelihood that affected students will recidivate).

incarceration.[212] More research, however, is needed, particularly that which explores the impact of specific procedures and practices utilized by school administrators and law enforcement on students' perceptions of fairness.

D. *Home Rule*

A final area in which courts, lawmakers, and even parents would benefit from greater knowledge and appreciation of social psychology concerns the role of the parent[213] in the juvenile justice system. Consistent with social science studies relevant to other areas impacting juveniles, the applicable data demonstrates that if a child or adolescent considers disciplinary measures within the home to be unfair, a pattern of behavior similar to that seen in other contexts will ensue: lack of respect for the authority figure, disengagement from the disciplinary structure, cynicism towards the system, and subsequent and continued rule-breaking.[214] Research has shown that children typically perceive family decision making to be unfair when parents deny them the opportunity to express their views; when procedures are perceived to be inconsistent across situations or family members; and when parents are considered to be biased, underhanded, or dishonest.[215] Additional fairness concerns stem from the child's perception that the parent's decision-making process is based on unreliable information, or the parent does not

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212. Hirschfeld, *supra* note 211, at 92 (citing Richard Arum & Irenee R. Beattie, *High School Experience and the Risk of Adult Incarceration*, 37 CRIMINOLOGY 515 (1999)).

213. The term "parent" as used here is intended to refer to the adult who serves in the role of parent, guardian, or custodian to the juvenile, whether that individual is a biological or adopted parent, sibling, grandparent, family friend, etc.

214. *See, e.g.*, Mark Fondacaro et al., *Procedural Justice in Resolving Family Disputes: A Psychosocial Analysis of Individual and Family Functioning in Late Adolescence*, 27 J. YOUTH & ADOLESCENCE 101, 101-19 (1998); Jackson & Fondacaro, *supra* note 27, at 101, 118-119, 121; Jennifer Stuart et al., *Procedural Justice in Family Conflict Resolution and Deviant Peer Group Involvement Among Adolescents: The Mediating Influence of Peer Conflict*, 37 J. YOUTH & ADOLESCENCE 674, 674-84 (2008); *see also* Jackson & Fondacaro, *supra* note 27, at 106 (discussing findings that parenting styles that reflect procedural justice constructs appear to be related to children's improved behavior and positive psychological adjustment).

215. Fondacaro et al., *supra* note 214, at 102, 114-15.

consider the child to be a valued member of the family.[216] As seen in other areas, the empirical research demonstrates that adolescents care deeply about being treated with dignity and respect and having their voices heard during the family's decision making process, regardless of whether it affects the ultimate outcome.[217] Studies have also shown that children who perceive their parents' disciplinary practices to be fair are more likely to internalize their family's values and beliefs.[218] While extrapolations from such extralegal research may be made, unfortunately there is very little data specifically focused on how young offenders view the role typically assumed by adult family members in juvenile court,[219] that of the party to whom judges and probation officers frequently defer and whom they resist evaluating critically.[220]

The role of the parent in a juvenile case has been closely analyzed in legal literature, and the consensus is that it is fraught with tension and inherent contradictions.[221] Most obviously, it is clear that from a therapeutic perspective, the "participatory and dignitary interests" of an accused child are highly likely to conflict with those of the child's parent in juvenile court.[222] This is certainly the case when, as happens frequently, the parent is the alleged victim of the offense for which the juvenile is charged or has a relationship—familial, sexual, or otherwise—with either the

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216. *Id.* at 103, 114-15 (citing Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. PERSONALITY & SOC. PSYCH. 850, 850-63. (1994)).

217. *Id.* (citing studies by Tyler and Lind, among others).

218. *Id.* at 106 (citing Tom R. Tyler & Peter Degoey, *Community, Family, and the Social Good: The Psychological Dynamics of Procedural Justice and Social Identification*, *in* THE INDIVIDUAL, THE FAMILY, AND SOCIAL GOOD: PERSONAL FULFILLMENT IN TIMES OF CHANGE (G.B. Melton ed., 1995)).

219. A thorough search of social science databases found no research on the question of how young offenders view the role of parents in juvenile court.

220. *See* Janet R. Fink, *Who Decides: The Role of Parent or Guardian in Juvenile Delinquency Representation*, *in* ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER 119, 124-25 (Rodney J. Uphoff ed., 1995).

221. *See, e.g.*, Kristin Henning, *It Takes a Lawyer to Raise a Child?: Allocating Responsibilities Among Parents, Children, and Lawyers in Delinquency Cases*, 6 NEV. L.J. 836, 849-52 (2006); *see also infra* notes 222-31 and accompanying text.

222. Henning, *supra* note 190, at 424.

alleged victim or another suspect in the investigation;[223] the parent is repeatedly provided the opportunity to communicate directly with the judge, prosecutor, or probation officer, while the juvenile is allowed only to speak through her attorney;[224] and the juvenile's attorney takes direction from the parent rather than the child as to the goals and objectives of the juvenile's case.[225] Yet, admittedly, there are also instances in which the parent acts as the stooge for the juvenile, diverting responsibility for the child's crime to herself, covering for the child's negative behavior at home or at school,[226] and interfering with or sabotaging candid communication between the juvenile and her lawyer in the name of "protecting" the child.[227]

Further complicating matters is the reality that long-term damage to the parent-child relationship can result from both the process and the ultimate resolution of a juvenile delinquency proceeding. Excluding parents from the attorney-client dynamic, which is caused inadvertently as well as deliberately by defense counsel, can lead parents to disengage from their supportive roles altogether, leaving the parent-child bond more fractured than it had been before the family's involvement with the juvenile justice system.[228] Likewise, frustrated or put-upon parents may

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223. Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 AM. CRIM. L. REV. 1277, 1293-94 (2004).

224. Henning, *supra* note 190, at 424.

225. Fink, *supra* note 220, at 122-23; Henning, *supra* note 190, at 424.

226. *See* HERTZ ET AL., *supra* note 166, at 696 (suggesting that counsel for the juvenile inform the parent in preparation for disposition of the "harm" that can result from revealing their child's "criminal activities, drug or alcohol use, serious misbehavior at home, or other bad conduct" to the probation officer or prosecutor).

227. *See* Farber, *supra* note 223, at 1307 ("When a child is suspected of a crime, his [or her] parent may demonstrate a range of emotions, such as fear, anger or protectiveness."); Henning, *supra* note 221, at 854; HERTZ ET AL., *supra* note 166, at 136 (discussing the potential difficulties that defense counsel may confront when explaining the need for a private interview with the juvenile to her parent, and noting that the attorney's insistence that the parent's presence may bias the interview could "produce nothing but ill will and intransigence on the parent's part").

228. *See* Farber, *supra* note 223, at 1305 ("I recognize that the appointment of counsel for the juvenile, by inserting a third party into the parent-child decision-making process, may have a significant impact on the integrity of the family

insist that their rights and authority over their children are a form of compensation for the burdens of providing basic food, shelter, health care, affection, and education to their delinquent children, further splintering critical alliances.[229] Similarly, parents may place blame wholly upon the child for alleged violations of juvenile court probation or post-release supervision[230] out of a reasonable fear that they may face criminal charges for contempt of court or other punitive sanctions.[231] Whatever the case, the circumstances are complex and the effects potentially profound.

Thus, while there is a fair amount of social science research exploring the perceptions that adolescents have of their parents as disciplinarians within the home environment,[232] further studies examining how juveniles perceive the role of the parent in the context of delinquency court—both in theory and practice—are clearly warranted. Similarly, research on whether juveniles' attitudes and receptivity toward the court are predetermined by their judgments of disciplinary measures at home could be fruitful.[233] Judges and law makers would be better equipped to outline the parameters of the parental role in juvenile court if they were informed by, among other factors, the

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unit."); Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT'L L.J. 449, 483-84 (1996).

229. Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 551 (2000) ("In some sense it is fair to view parental 'rights' as legal compensation for the burden of responsibility that the law imposes on parents.").

230. *See* HERTZ ET AL., *supra* note 166, at 728-29 (recommending that defense counsel prepare for the revocation hearing by, inter alia, talking with the parent to determine whether any of the bases for revocation may be explained and whether responsibility for the violation may be shifted from the juvenile to the probation officer or parent).

231. Henning, *supra* note 221, at 858-60; *see, e.g.* N.C. GEN. STAT. § 7B-2706 (2004) (stating that upon motion by the juvenile probation officer, prosecutor or upon the court's own motion, the court may issue an order directing the parent or guardian to appear and show cause why they should not be found or held in civil or criminal contempt for willfully failing to comply with an order of the court).

232. *See supra* notes 214-31 and accompanying text.

233. A search of social science databases revealed no research studies on this subject.

child's perspective on these issues as seen through the lens of procedural justice theory.

IV. CAVEATS AND QUESTIONS FOR MOVING AHEAD

A. *Which Model to Use?*

While sociologists have long recognized the importance of juveniles' believing that they have received procedural justice from the courts, this Article has demonstrated that the answer is not merely to superimpose adult due process standards onto delinquency proceedings, but it is something much more nuanced and challenging.[234] There is first the difficult question of whether an adversarial or an inquisitorial model (or a hybrid of the two) would be more conducive to achieving an equitable juvenile justice system.[235] Complicating this question, at least in terms of juvenile court systems in the United States, is the reality that an evidence-based determination of whether a juvenile committed an alleged offense is often a prerequisite to the state's providing a low-income family with rehabilitative and therapeutic services. While this does not mandate that juvenile court forever be modeled on an adversarial criminal justice system, addressing and separating out all the strands of the problem would require law makers and public policy experts to critically rethink and potentially restructure the current juvenile court model.

Further, juveniles adjudicated delinquent (as well as their parents) often consider services provided by the court—which are of varying quality and utility—to be burdens rather than benefits;[236] this view is compounded by

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234. *See supra* notes 148-232 and accompanying text.

235. Cordon et al., *supra* note 146, at 180-89 (discussing the differences between the two procedural systems in the context of adult criminal court); *see also* Fondacaro et al., *supra* note 27, at 981-83 (discussing studies that have compared the abilities of the adversarial and inquisitorial systems to reduce bias and increase accuracy, and suggesting that inquisitorial procedures may result in more accurate and less biased information than the adversarial process).

236. *See* HERTZ ET AL., *supra* note 166, at 716 (stating that the more probationary conditions that are imposed at disposition, the greater the risk that the juvenile will violate one or more of them and be subject to revocation of probation).

the knowledge that if the juvenile missteps, the punishment is likely an extension of the term of probation, detention, or commitment.[237] As discussed previously, social science research has suggested that such deterrent structures are both less effective and less efficient than systems perceived by children and adolescents to be fair and unbiased.[238] Again, resolving this question would require that law makers and juvenile justice advocates closely consider whether granting specific due process protections to juveniles would advance the goals of procedural justice theory.

There is also the critical question of how far—and in precisely which direction—to go. While there is a well-established movement devoted to applying the theory of therapeutic jurisprudence ("TJ") to juvenile court practice,[239] legal scholars and social psychologists should distinguish and differentiate between TJ and procedural justice theory, both in the spirit of clarity and to avoid counter-productive "border disputes."[240] According to the work of leading scholars in these areas, TJ is a discipline that examines the "therapeutic impact of the law on the various participants involved[,]" with the goal of promoting well-being.[241] In the context of criminal defense practice, TJ emphasizes the importance of lawyers considering rehabilitative efforts on behalf of their clients and provides lawyers with practice

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237. *Id.* at 726-29 (explaining that if a juvenile violates a condition of probation, any disposition that was available at the original dispositional hearing is possible at a revocation hearing, including an extension of probation or incarceration or even a new sentence of incarceration).

238. *See supra* notes 107-12 and accompanying text.

239. *See* Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, *in* LAW IN A THERAPEUTIC KEY 763, 763 (David B. Wexler & Bruce J. Winick eds., 1996) (stating that the therapeutic jurisprudence movement is no longer "fledging," and that the number of scholars who view the law through its lens has "grown appreciably" since David Wexler and Bruce Winick introduced the idea in the early 1990s).

240. *See* Jeffrey Fagan, *Juvenile Crime and Criminal Justice: Resolving Border Disputes*, 18 THE FUTURE OF CHILD., Fall 2008, at 81, 90-91 ("[T]he punitive and child-saver instincts for youth crime co-exist uneasily in the current statutory environment, forcing a binary choice between criminal and juvenile court jurisdiction, a choice that is not well suited to reconcile these tensions.").

241. Shiff & Wexler, *supra* note 126, at 291.

tips on how to guide their clients along "a promising rehabilitative path."[242] In regard to the juvenile justice system, TJ was developed to counter the paternalistic ideology of the traditional delinquency court[243] and to encourage and facilitate the child's sense of individual autonomy, self-determination, and choice.[244] Procedural justice theory is more of a touchstone or a guide that is focused on achieving legal processes that juveniles perceive as legitimate, premised on the recognition that when a child feels that the system has treated her fairly, she is more likely to accept responsibility for her actions and take steps towards reform.[245]

Yet, there is more overlap between these two theories than contrast or tension. Suffice it to say that this Article's focus has been on juveniles' perceptions of fairness as they relate to the juvenile justice system as a whole and as determined by an examination of a well-developed body of data, rather than on models of advocacy or the therapeutic consequences of legal rules and procedures.[246] Yet, the two disciplines of course are interconnected, as the quality (or lack thereof) of the attorney-client relationship inevitably influences whether the juvenile is impacted in a therapeutic

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242. David B. Wexler, *The TJ Criminal Lawyer: Therapeutic Jurisprudence and Criminal Law Practice*, *in* THE AFFECTIVE ASSISTANCE OF COUNSEL 367, 376 (Marjorie A. Silver ed., 2007).

243. *See* Henning, *supra* note 190, at 414-15 (stating that paternalism is "anti-therapeutic because it breeds apathy, hinders motivation, and limits the potential for rehabilitation"); *see also* Ronner, *supra* note 28, at 112 (describing therapeutic jurisprudence as an approach in which lawyers engage their juvenile clients in their own treatment plans, as compliance rates increase with such collaboration).

244. Henning, *supra* note 190, at 414-15; Ronner, *supra* note 28, at 114 (quoting *In re* Amendment to Rules of Juvenile Procedure, 804 So. 2d 1206, 1210-11 (Fla. 2001) ("[T]he dependent child's perception as to whether . . . she is being listened to and whether . . . her opinion is respected and counted is integral to the child's behavioral and psychological progress.")); *see also* Georgia Zara, *Therapeutic Jurisprudence as an Integrative Approach to Understanding the Socio-Psychological Reality of Young Offenders*, 71 U. CIN. L. REV. 127 (2002) (suggesting, from the perspective of therapeutic jurisprudence, that the undesired behavior of adolescents may be corrected once the child identifies personal goals and gains confidence in her ability to achieve them).

245. TYLER, *supra* note 101, at 37.

246. Slobogin, *supra* note 239, at 767 (stating that procedural justice theory tests assumptions of the law, while TJ offers a normative stance on the law).

manner, which in turn affects the child's perceptions of the adjudicatory process itself.[247] Likewise, adherents of both TJ and procedural justice theory rely on empirical research by behavioral scientists, striving to "avoid a narrow doctrinal focus . . . and [to] influence legislators and administrators as well as the courts."[248] In this way, both disciplines are "truly interdisciplinary."[249] So, while this Article's focus has not been upon client-centered juvenile defense advocacy or children's mental health per se, its arguments rely upon the recognition that these values and goals are of great significance to determining whether a child feels that her experience was fair.[250] Or, in other words, the enterprise of therapeutic jurisprudence is an important aspect—though just one aspect—of ensuring that juveniles receive procedural justice.[251]

B. *Shortcomings and Limitations*

As with any body of social science research, particularly that which attempts to draw a causal connection between abstract human perceptions (i.e., fairness and legitimacy) and subsequent compliance with authority, there are inherent limitations regardless of whether the analysis is centered on adults or adolescents. A basic one is that there have been very few longitudinal studies on procedural

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247. Henning, *supra* note 190, at 415-16 ("By facilitating the child's choice and self-determination in the disposition phase of a juvenile case, the system can enhance the child's motivation and increase the efficacy of treatment in which the child chooses or agrees to participate.").

248. Slobogin, *supra* note 239, at 764.

249. *Id.* (quoting David B. Wexler, *New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Law Scholarship*, 10 N.Y.L. SCH. J. HUM. RTS. 759, 761 (1993)).

250. *See* Ronner, *supra* note 28, at 95 ("In the juvenile context, the attorney is key—it is he or she who can help the juvenile articulate his or her wishes and, thus, have a voice and obtain validation."). *But see* Feld, *supra* note 177, at 228-30.

251. *See* Mae C. Quinn, *An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 B.C. L. REV. 539, 562-90 (2007) (arguing against the application of some therapeutic jurisprudence approaches to criminal defense practice on the ground that they are based upon faulty assumptions and present legal and ethical quandaries for the defense attorney).

justice theory.[252] While it has been shown that *ex ante* assessments of the fairness of a decision-making process can be very different than *ex post*,[253] the relevance of this phenomenon to procedural justice theory remains an open question.[254] Another limitation stems from the fact that the focus of much procedural justice research is upon political power and authority rather than upon law-abiding behavior.[255] In other words, most studies seek to mine the perceptions of the law held by individuals within the general population rather than those of individuals already actively engaged in criminal behavior.[256] This can be a critical drawback, as offenders have more experiences within the system and presumably more and various kinds of outcomes than do non-offenders.[257] Yet, studies have found consistent procedural justice effects across race, gender, ethnicity, and socioeconomic status.[258] In addition, studies specifically examining the impact of procedural justice on juvenile offenders have indeed been conducted; the hope is that with renewed interest in this data, more research will be funded and the sample sizes expanded, thereby enhancing the reliability of the results.[259]

A further limitation is the narrow focus of procedural justice theory on the ways in which an individual's

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252. *But see* Kristina Murphy & Tom Tyler, *Procedural Justice and Compliance Behaviour: The Mediating Role of Emotions*, 38 EUR. J. SOC. PSYCHOL. 652, 662-65 (2008) (finding, based on longitudinal study data, that one's emotional reaction—whether positive or negative—to perceived justice or injustice predicts who will or will not ultimately comply with authority, meaning that those with greater perceptions of procedural injustice are more likely to be "less satisfied, less productive, and less compliant").

253. MacCoun, *supra* note 97, at 192-93.

254. *Id.* at 193.

255. Papachristos et al., *supra* note 88, at 5.

256. *Id.*

257. *Id.* at 5-7.

258. O'Hear, *supra* note 28, at 462 & n.224 (citing Tom Tyler & E. Allen Lind, *Procedural Justice*, *in* HANDBOOK OF JUSTICE RESEARCH IN LAW 65, 65 (Joseph Sanders & V. Lee Hamilton eds., 2001) and quoting Robert J. MacCoun, *supra* note 97, at 187 ("[M]ost studies have found striking similarities across demographic groups in the antecedents and consequences of procedural fairness . . . .")).

259. *But see supra* notes 127-32 and accompanying text (discussing studies on procedural justice and juveniles that have focused on offenders).

perceptions are influenced by her own experiences and interactions rather than upon the impact and effect of her peer group, neighborhood, and extended social network.[260] Such factors are potentially significant because a major predictor of delinquent behavior by juveniles is the number and quality of their mentors and peers.[261] Studies in this area generally utilize interviews conducted with or surveys completed by individual juveniles in which the questions are designed to assess the youth's feelings regarding her treatment by the defense lawyer, prosecutor, and judge; questions are also posed that are intended to determine the degree to which the young person feels the law and the courts are legitimate.[262] As a result, such methods that focus on the individual's level of confidence either in her lawyer or in the system, without assessing the impact of peers or other external forces on the juvenile's perceptions, may have limited efficacy.[263]

In addition to these methodological limitations, there are critics of procedural justice theory who have raised questions directed more squarely at the discipline's most basic assumptions.[264] For instance, it has been asserted that when people experience a process to be fair, they can be led or manipulated into ignoring objectively unfair outcomes,[265] particularly if the majority of outcomes experienced by a

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260. Papachristos et al., *supra* note 88, at 6.

261. *Id.* (citing MARK WARR, COMPANIONS IN CRIME: THE SOCIAL ASPECTS OF CRIMINAL CONDUCT (2002)); *see also* Carrie F. Mulford & Richard E. Redding, *Training the Parents of Juvenile Offenders: State of the Art and Recommendations for Service Delivery*, 17 J. CHILD. FAM. STUD. 629, 631 (2008) (discussing a social development approach that is "based on the notion that youth who are attached to 'prosocial' peers, parents and others are less likely to engage in delinquent acts").

262. *See, e.g.*, Sprott & Greene, *supra* note 130, at 7-11.

263. *Id.* Likewise, research exploring whether juveniles' perceptions of the fairness of disciplinary measures within social structures such as gangs and other peer groups impact their judgments of the procedural fairness of courts could be revealing; a search of social science databases, however, found no such studies.

264. *See infra* notes 265-69 and accompanying text.

265. MacCoun, *supra* note 97, at 188-89; *see also* Ronald L. Cohen, *Procedural Justice and Participation*, 7 HUM. REL. 643, 658-61 (1985) (finding that in employment settings, limited participation in decision-making leads people to consider the process as less just than if they had not participated at all).

given group have been consistently negative.[266] So, for instance, a narrow focus on the importance of providing juvenile offenders with the opportunity to have a "voice" may obscure a more global need to give them meaningful control over judicial decisions.[267] Proponents of this concept of "false consciousness" argue that a preoccupation with due process diverts attention from broader questions of social inequality.[268] Other critics have suggested that procedural justice has more legitimacy for adults than juveniles based on developmental status and competence; these commentators view juveniles as incapable of appreciating "fairness" in a way that is normatively reliable.[269]

In sum, while there are clear limitations to the utility of applying procedural justice theory to juveniles, and while there are open questions regarding which procedural model to use for delinquency court, these should be considered as cautions rather than roadblocks. In other words, rather than restrict ourselves to suppositions based on abstract notions of fairness and subjective balancing or on unyielding quid pro quo calculations, why not make use of

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266. MacCoun, *supra* note 97, at 192. *See generally* John T. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCHOL. 881 (2004) (reviewing and integrating research focusing on the phenomenon of "outgroup favoritism," in which people purport to approve of outcomes that benefit groups to which they do not belong because it is preferable to acknowledging that the system itself is flawed).

267. MacCoun, *supra* note 97, at 192-93; *see also* E. Allen Lind, Ruth Kanfer & P. Christopher Earley, *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952, 957-58 (1990) (finding that giving participants a "post-decisional" or purely symbolic voice in the decision-making process is just as important a benefit as giving them a predecisional voice that can actually affect the outcome).

268. *See* MacCoun, *supra* note 97, at 189. *But see id.* at 199 (discussing critics of "false consciousness" who have characterized this view as "politically elitist and epistemologically naive").

269. *But see* P.S. Fry & V.K. Corfield, *Children's Judgments of Authority Figures with Respect to Outcome and Procedural Fairness*, 143 J. GEN. PSYCHOL. 241 (1983) (suggesting that procedural justice effects are valid for children); *see also* ELEANOR E. MACCOBY, SOCIAL DEVELOPMENT: PSYCHOLOGICAL GROWTH AND THE PARENT-CHILD RELATIONSHIP 307-08 (Jerome Kagan ed., 1980) (discussing the development of children's sense of fairness and finding higher-level fairness assessments as early as age eight).

the empirical data being produced by experts in the social sciences? Why not be open to an interdisciplinary and multilayered analysis of whether to extend specific due process rights to juveniles, rather than one that is cabined by the same traditional approaches that have been used for decades by courts and legislatures? Regardless of one's perspective, all sides—judges, prosecutors, defense attorneys, victims, and juveniles themselves—stand to benefit.

CONCLUSION

Courts and legislatures have long been reluctant to make use of the data, findings, and recommendations generated by other disciplines when determining questions of legal procedure affecting juveniles, particularly when the research has been produced by social scientists.[270] However, given the United States Supreme Court's recent invocation of developmental psychology in *Roper v. Simmons*,[271] which invalidated the juvenile death penalty,[272] there is reason to believe that such resistance is waning. In 2005 the *Simmons* Court found, inter alia, that based on research on adolescent development, "juveniles are not as culpable as adults and[, therefore], cannot be classified among the 'worst offenders,' deserving of" the ultimate penalty.[273] In the 2009–10 Term, the Court will take up the arguably related question of the constitutionality of life imprisonment without the possibility of parole for juvenile offenders,[274] making it likely that social psychology will play a role yet again in a Supreme Court decision.[275]

Such developments may be viewed as paving the way for judges and law makers to utilize empirical research

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270. *See supra* notes 140-42 and accompanying text; *see also* Bibas & Bierschbach, *supra* note 28, at 111-12.

271. 543 U.S. 551 (2005).

272. *Id.* at 567-75.

273. Birckhead, *supra* note 145, at 389-91.

274. Adam Liptak, *Justices Agree to Take Up Life-Without-Parole Sentences for Young Offenders*, N.Y. TIMES, May 5, 2009, at A16.

275. *Id.* (quoting sentencing expert Doug Berman, who said, "The principals driving *Roper* would seem to suggest that its impact does not stop at the execution chamber").

more consistently when determining whether due process rights should be extended to juveniles. By evaluating adolescents' appraisals of the fairness of courts and the law, social scientists have generated potentially invaluable data relating to recidivism rates and, thus, to the safety of our neighborhoods and communities. While research in these areas is incomplete and has its inherent limitations, that which exists can serve as yet another factor to inform decisions regarding jury trials, waiver of counsel, the school disciplinary process, and the role of the parent in juvenile court. It is not a stretch to suggest that children and adolescents would view the opportunity to have *more* information rather than less when crafting important juvenile court procedures to be the preferable—and fairer—choice.