WHY A SEPARATE JUVENILE JUSTICE SYSTEM?

CHAPTER OBJECTIVES

After reading this chapter, you should be able to

• Define the philosophical goal of juvenile justice systems
• Analyze the various justifications for punishment and how they have been used to respond to the behaviors of youth
• Explain the philosophical shifts that have affected the legal treatment of juveniles in the United States
• Identify current concerns and trends that will shape the future of juvenile justice
In 1960, Joseph was a 15-year-old boy who lived in Atlanta, Georgia. He hung out with the kids on the block, and eventually ended up skipping school quite a bit, drinking beers with his friends, and playing pranks on his neighbors. They were particularly fond of throwing raw eggs at people’s mailboxes and cars. One early evening Joseph and his friends drank some beers, and when the sun went down they all got on their bicycles, and sped through the neighborhood throwing eggs wherever they felt like it. Right in the middle of one of his most powerful throws, Joseph’s friends yelled that the cops were there and quickly biked away. Joseph was caught egging a neighbor’s expensive car by the police. When the officer realized he had beer on his breath, he was especially enraged. He took him into the police station and kept him there for two days without any contact with the outside world. While he was in the holding cell of the jail, he was with adults who had been arrested as well. He was very frightened by a number of these men because they bragged about committing serious crimes, and there were a number of fights that broke out; Joseph just hoped he wouldn’t soon be in the middle of one.

The police eventually took Joseph to another small room and conducted an interrogation of him. They asked him about his involvement in a line of home burglaries that had plagued the neighborhood and told him if he admitted that he was part of a gang of juvenile thieves he could go home and see his parents. Joseph was scared and lonely and went ahead and confessed to being a burglar, even though he wasn’t one. He figured it would be better to lie and to get out of the jail physically unharmed than to stay there. Nevertheless, Joseph quickly discovered that he would not actually be going home, and the police told him he would likely have his case heard in the adult court rather than in a juvenile hearing. Joseph was also told it looked like he was bound to spend some time in an adult prison because he had confessed to the burglaries, and in fact they had evidence related to his drinking and vandalizing. The police finally called Joseph’s parents, and they were shocked and appalled at what had transpired. They knew Joseph got involved in typical juvenile pranks now and again, but thought that teenage misbehavior should be thought of differently than adult crime and couldn’t believe the police didn’t treat Joseph more gently. Wasn’t that why there was a juvenile justice system after all? Why didn’t he have any protection under the law? Couldn’t anyone see that he was scared and felt pressured to confess?
WHAT IS THE GOAL OF THE JUVENILE JUSTICE SYSTEM?

When we look back now at Joseph’s situation and the point in history in which it happened—1960—we look back from a vantage point that is both similar to and different from the earlier one. On the one hand, as you saw in Chapter 2, the development of the first juvenile court in 1899 in Cook County, Illinois, was driven by one of the most important philosophical shifts that have influenced how we handle accusations of juvenile misbehavior under the law—the idea that young people are developing, and it is only right for adults to recognize this fact and to treat them differently from adults when they do wrong. At the time of Joseph’s mischief there had been a separate system for dealing with juvenile delinquency in place for over six decades. Yet, as you can see, in practice the system did not fully protect youth from unwarranted coercion while under investigation by juvenile justice authorities. Teens were stuck in a legal limbo of sorts: They were not legally considered adults, but they were thought to be due a more compassionate approach to their misbehavior.

In this chapter we will discuss the shifting goals of juvenile justice systems in the United States by considering in detail some of the most important legal decisions that changed the face of contemporary juvenile justice, most markedly in the due process revolution of the 1960s. Had Joseph decided to egg his neighbors’ houses 10 years later than he did, he would have had the legal right to a number of protections; these protections, if implemented, would have made his experiences with law enforcement officers transpire in a different way. Nevertheless, in spite of the legal changes that have occurred over time (including a number of important Supreme Court decisions in the 2000s that set boundaries on juvenile punishments), there are still instances today in which juveniles who are accused of acts of wrongdoing are denied their rights while being processed by juvenile justice workers. So, although on the books youth are allowed some due process rights, sometimes their realities are not as far from Joseph’s as we might expect. We have state juvenile justice systems today that are still imagined to be separate from adult state and federal criminal justice systems, in spite of significant overlap in terms of handling juvenile cases. The debate about why we should punish young people is ongoing, and we will first explore the philosophical justifications for punishment in order to better understand them. Then, in Chapter 12, we will look closely at the way that the juvenile justice process operates.

JUSTIFICATIONS FOR PUNISHMENT

There are many different reasons people allude to when they speak about why they think punishing people who have broken the law is necessary. Although they may not always be using the philosophical terminology that corresponds with their points of view, it is usually pretty easy to determine which philosophical justification(s) for punishment they are addressing.

Retribution is one of the justifications used for the punishment of both juveniles and adults. The notion of “an eye for an eye,” which originated from the Code of Hammurabi in Mesopotamia (1750 B.C.E.) and was later incorporated into the belief systems of Judaism and Christianity, embodies the idea of retribution. This is the idea of “you do this to me, so I do this to you.” Or in other, more philosophical terms, if you engage in wrongdoing it is only proper that you receive your just deserts (pronounced like your favorite after-dinner treat in spite of its spelling)—punishment that is proportionate to the harm that you have caused. Retribution hinges upon the idea that punishment is merited or deserved.
The Equal Justice Initiative (EJI) is a nonprofit organization of lawyers who work on behalf of populations that do not always get adequate legal assistance due to their age, race, and/or socioeconomic status. One of EJI’s campaigns focuses on children in adult prisons. As the organization explains it:

Across the United States, thousands of children have been sentenced as adults and sent to adult prisons. Nearly 3000 nationwide have been sentenced to life imprisonment without the possibility of parole. Children as young as 13 years old have been tried as adults and sentenced to die in prison, typically without any consideration of their age or circumstances of the offense.3

Lawyers with EJI have campaigned to educate the public about the vulnerabilities of youth and what they see as unjust correctional practices that lump young people in with adults and treat them the same. Their main contribution is to litigate cases on behalf of juvenile offenders, and to prepare reports, newsletters, and manuals to inform policymakers and others who want to reform the juvenile justice system. Prior to the decisions about juveniles serving life without parole, EJI prepared a report, Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison.4 EJI lawyer, Bryan Stevenson, represented Joe Sullivan, a black man with a mental disability who was sentenced to life in prison for committing the rape of a 72-year-old white woman at the age of 13 in 1989. Sullivan admitted that he had burglarized the woman’s house, but denied that he went back and raped her later in the day. His two older friends who he was with blamed the act on him. The victim, who was visually impaired, didn’t see her assailant well and described him only as “a colored boy . . . who had kinky hair and was quite black and he was small.” Although there was biological evidence, it was never tested, and years later when EJI lawyers went to retrieve the material to test it, they found it had been destroyed. Sullivan took his case all the way to the Supreme Court, but the justices decided to comment on the case not separately but as part of the Graham v. Florida decision.

DISCUSSION QUESTIONS

1. Listen to either the arguments or the decision of the court in the Graham v. Florida case (available online from The Oyez Project at IIT Chicago-Kent College of Law, 2013) to better understand the case EJI presented to the Supreme Court. What did you learn from listening to the case?

2. Quickly research Joe Sullivan’s case on the Internet. What has happened to Joe Sullivan since Graham v. Florida was decided?

Sources:

Some people liken retribution to a more common term, revenge. The focus of retribution is on the past. Under this rationale, punishment should occur simply because a person engaged in wrongdoing in the past, not because of any concern with the future. Philosopher Immanuel Kant argued for retribution as the sole justification for punishment, stating that “punishment can never be administered merely as a grounds for promoting another good with regard to the criminal himself (rehabilitation) or to civil society (deterrence or incapacitation), but in all cases must be imposed only because the individual on whom it is inflicted has committed a crime.”5
Retribution is based on ideas that became prevalent during the times of the Enlightenment in the 16th and 17th centuries. At the heart of this justification for punishment is the supposition that all people are in possession of a free will and a rational mind. Thus we can freely make choices, and it is only logical that we be held responsible for them. As described in Chapter 2, historically children were thought to be capable of utilizing their abilities to logically reason by the age of 14 or so, and retribution was a popular justification for juvenile punishment until the invention of adolescence; after the invention of adolescence other justifications for punishment became increasingly popular for many years. Then, retributive discussions about youth accused of breaking the law enjoyed a resurgence in popularity in the last three decades of the 20th century in the United States.

Zimring, in his discussion of penal proportionality and moral desert for the young offender, discusses the three types of personal attributes that might influence the commission of teen acts of delinquency. He states that, in each example he provides, teens lack adult skills and thus necessarily lack full moral responsibility for their acts. The three points he makes are the following:

1. There is a lack of cognitive capacity that youth experience. In other words, they typically do not have the ability to reason as a fully developed adult does. Older children and adolescents may lack the cognitive ability to understand the moral basis for rules and laws, and may not understand how to apply such rules to social situations. They may be able to recognize, if asked on a paper quiz for example, what the rules are but may not be able to translate that into how to follow them in the real world.

2. The ability to control impulses is essential to being able to translate an understanding of rules or laws into action. In large part, this kind of self-control is developed over time and strengthened each time a young person has the choice to act impulsively and consciously chooses not to do so. The mastery of impulse control also must occur in different circumstances, such as in temptation and in frustration. It is unlikely that teens can demonstrate a mastery over anger that is similar to that of an experienced adult due to a lack of life experience. As adolescents are allowed more and more freedom to try new experiences related to driving, dating, and socializing throughout their teen years, most people recognize that they cannot be held as morally responsible for their acts as adults who have already finished their stage of being exposed to the standard variety of impulse-testing experiences.

3. Resistance to peer pressure is a skill that is also being developed during the teen years. The social force of a group to encourage delinquency is one that a single teenager often has a difficult time staving off even if she or he has a solid grasp on right and wrong when alone. Because of this, adolescents are known for committing acts of group delinquency; it is much more rare for a young person to be acting completely on her or his own. Acts such as theft, rape, burglary, robbery, assault, and homicide are usually committed by lone adults, but the same acts, when committed by youth, are usually committed in groups. Research demonstrates
that challenges to youths’ pride and courage are usually what motivate such acts, and it takes a long time, developmentally, to master the art of saying no in the face of ridicule and ostracism. Morally, it is difficult to argue that a child who has not had the opportunity to develop coping skills for such social situations should be held as legally and morally responsible for his or her behavior.

In sum, Zimring argues that when adults debate the moral responsibility of juveniles, it is important to decide what measure of youth abilities we want to use. If we decide to use written tests as the gauge of youths’ moral abilities, we are bound to find that many more youth are capable of reasoning in a manner similar to adults. But, if we decide that looking at youth decision making in real-world contexts is a better indication of their cognitive and moral development, then we will find a more complicated picture that shows their immaturity.

Deterrence is a justification for punishment that is rooted in the assumption that human beings are rational and make free choices for which they should be responsible. To deter means to prevent, so this justification is focused upon the future and preventing crime through punishment. As explained by Packer, “punishment, as an infliction of pain, is unjustifiable unless it can be shown that more good is likely to result from inflicting than withholding it.”

The concept of deterrence is rooted in Jeremy Bentham’s (1748–1832) utilitarian philosophy—one that stresses that the role of the government is to maximize the happiness of the greatest number of people. According to the philosophy of deterrence, people are out to increase their own happiness, and sometimes this pursuit is not in the interest of the greater society (especially if it makes them happy to go out and harm others or commit crimes). So, they need to be influenced to perceive that although lawbreaking might be something that they see as bringing them pleasure in the future, the punishment that will follow that lawbreaking if they are caught will outweigh any personal benefits they derive from doing it. For crimes or acts of delinquency to be deterred, punishments that are known and that make people think twice about their choices are needed. According to the proponents of this rationale, punishment should be slightly more severe than the pleasure derived from a given act, certain, and delivered with celerity (i.e., swiftness), in order for it to effectively deter. Cesare Beccaria (1738–1794), an Italian scholar who influenced Bentham’s utilitarianism and is known for his contributions to deterrence theory and the classical school of criminology, stated that swiftness was the most important factor:

The promptness of punishment is more useful because when the length of time that passes between the misdeed is less, so much the strong and more lasting in the human mind is the association of these two ideas, crime and punishment.

The following three examples highlight contemporary examples of retribution and shaming of young people across the United States. These acts are done by adults who are in positions of authority over the youth and they are quite controversial.

1. **Utah: Ponytail Cut Off.** The mother of a 13-year-old Utah girl chopped off her daughter’s ponytail in court in order to reduce her community service sentence. The girl was in trouble for cutting the hair of a 3-year-old girl she met at a fast-food restaurant. The judge gave the mother an unusual choice: cut your daughter’s ponytail off (as a form of retribution) or have your daughter serve a longer community service sentence. The mother chose to cut off her daughter’s hair, but she later regretted doing so and said she felt intimidated by the judge. She expressed her concerns in a formal complaint against the court.

2. **Arizona: Boys Holding Hands as Punishment.** A 14-year-old boy, Charles Crockett, got in trouble at school for fighting with another boy during P.E. class. The principal of his school
told them they could either be suspended or choose what he intended to be a shaming punishment: holding hands with each other in the middle of school for an hour. The boys didn’t want to be suspended, so they opted for the handholding punishment, while other students taunted them and posted their picture on Facebook.

3. Michigan: Holding a Lawn Sign as Punishment for Misbehavior. A Michigan child got in trouble for talking back to his fourth-grade teacher. His parents decided to punish him by publicly shaming him. They required him to sit in front of his house with a sign that stated, “I don’t want to behave at school.”

There are two primary types of deterrence: specific and general. The idea behind specific deterrence, or individual deterrence, is that if people are punished for their crimes or acts of delinquency, then they will begin to think about the choices they made leading up to that act and will decide not to commit that same act in the future. For example, if Jazmin is punished for cheating on a test, then she will be less likely to cheat in the future if her punishment is appropriately severe and swift. The idea behind general deterrence, or deterrence aimed at the entire population, is that others will observe a person who is punished, and that person’s crime becomes an example of what not to do. If you see your father go to prison for many years for committing a crime, you will observe that and decide not to do the same according to this rationale. Although many use the philosophy of deterrence to justify the use of extreme punishments, such as torture and the death penalty, its original proponents argued that the philosophy does not support these punishments because they are not useful or necessary.

Incapacitation is yet another popular justification for punishment. The concept refers to making someone incapable of committing a crime, usually from either isolating or restricting his or her movement and/or choices within society. As with the concept of deterrence, incapacitation is oriented toward the future and is concerned with preventing crime and delinquency. As Feeley and Simon explain,

Incapacitation promises to reduce the effects of crime in a society, not by altering either offender or social context, but by rearranging the distribution of offenders in a society. If the prison can do nothing else, incapacitation theory holds, it can detain offenders for a time and thus delay their resumption of criminal activity. . . . if such delays are sustained for enough time and for enough offenders, significant aggregate effects in crime can take place although individual destinies are marginally altered.

The concept of selective incapacitation is a variant of the incapacitation justification that states that high-risk offenders can be identified and incapacitated for long periods of time, while lower-risk offenders can be handled with less serious punishments and for shorter amounts of time.

There are many ways that people have attempted to incapacitate through punishment practices. Whenever societies have attempted to stigmatize people who have committed acts of wrongdoing in ways that let the general public become aware of their acts,
they are working to make them less capable of doing those acts again particularly if they victimized others. Practices such as branding people, having thieves wear the letter T on their bodies to signify their offenses, and cutting off part of a person's body to prevent future wrongdoing (e.g., a thief might have a hand cut off as a means of dissuading him or her from future thieving) were attempts at incapacitation practiced in the United States that are no longer popular today. Instead, today various other forms are used, including databases of people convicted at any point of sex offenses, and the occasional punishments judges in the United States will mete out involving any range of shaming devices—signs in the front yard announcing offenses (“Watch out—I’m a convicted felon”), license plate holders announcing the crime of which a person was involved to the general public (“Call the police to tell them how I’m driving—I’ve been convicted of a DUI”), or license plates themselves for those convicted of driving under the influence.14

In the United States today, the best-known approach to incapacitation by far for adults is imprisonment. This is not surprising because the United States has had one of the highest imprisonment rates in the world since 2002. (The United States has been second to the Seychelles for a few years now, but this is because of the country’s unique role in locking up alleged pirates.)15 Imprisonment as incapacitation assumes that by locking people up, you are making them incapable of committing the illegal acts they committed on the outside. Other means of incapacitation include different forms of probation, such as house arrest and the use of electronic tracking devices.16 A controversial method of incapacitation is the chemical castration of some convicted sex offenders, which has been put into practice in states such as California since the mid-1990s.17

Rehabilitation is a justification for punishment that, like many others, is concerned with the future. The word can be understood by breaking it down into its two parts: re (“again”) and habilitate (“to make fit”). According to this rationale, punishment is needed to help wrongdoers change their behavior so they can eventually thrive as healthy members of society. The rehabilitative philosophy found its way into discussions about crime, delinquency, and punishment largely due to the influence of the Progressive movement at the turn of the 20th century (see Chapter 2 for more detail) and the rise of the scientific ideas of determinism (see also Chapter 5) and positivism. Some of the basics of the philosophy of rehabilitation involve the following ideas:

1. Human behavior is the product of causes often outside of one's conscious control (determinism) that can be scientifically examined (positivism) and then scientifically controlled;
2. Offenders and delinquents should go through a form of treatment that get at the factor or factors related to their behaviors; and
3. Any treatment conducted to treat a lawbreaking person should be done with the aim of benefiting his or her health and happiness, as well as benefiting the greater society as a whole.18

The use of rehabilitation as a justification for punishment was especially popular from the late 1800s through the 1960s. Fans of rehabilitation approach the subject in a variety of ways—touching upon issues of biology, psychology, sociology, and social work as a means of understanding lawbreaking. The actual methods by which the philosophy of rehabilitation has been implemented are similarly diverse—for those offenders thought to have a biochemical disorder, medication may be determined to be in order; for those thought to be reacting to some sort of psychological trauma, therapy and/or medicalization may be seen to be in order; for those who are thought to be affected by factors such as lack of access to jobs, quality education, and supportive communities, job training...
Job training programs are considered a form of rehabilitation that helps youth develop skills that can help them in and out of the work world.

programs, educational programs, and employment readiness might be encouraged; those with substance addictions might be placed in a therapeutic community or drug treatment facility. There are numerous ways this philosophy is translated into action depending upon what factors are believed to be driving the need for a change in behavior.

In the 1970s, a debate about the relevance of rehabilitation emerged, and the general public and politicians were swayed by the argument that “nothing works” to rehabilitate former offenders. Nevertheless, the philosophy remains a popular one among criminologists and other scholars who cite evidence for the value of the philosophy in informing punishment as well as among large portions of the general public who agree with the humanistic angle of this approach.

The last popular justification for punishment, restoration, is the least known, although its roots are in indigenous and religious belief systems that have been around for thousands of years. The idea behind it is that punishment should ideally be the least restrictive form necessary and that it should be used to bring some sort of healing or closure to the people affected by a crime or a harm (the victim[s], the wrongdoer, and the community as a whole). This justification for punishment is in many ways similar to rehabilitation, in that punishment is thought to be necessary for adults and teenagers who have broken rules or law, and possibly injured others either physically or mentally in the process, to make some important changes. Yet, restorative justice advocates tend to focus beyond the individual as they consider what punishments or mechanisms can be used to create change that will prevent future acts of wrongdoing.

The philosophy of restoration stresses accountability as a desired outcome of punishment—not only accountability on the part of the individual who has broken the law, but accountability on the part of society as a whole. According to this rationale, communities also bear responsibility for crime, because we collectively create the conditions that motivate people to commit crime. The philosophy of restoration thus encourages punishments that differ from what many of us typically label as punishments as a means to increase accountability and strengthen relationships between people and institutions. Mandated mediation sessions or family group conferences are often used when restoration is the aim of punishment. In these a combination of victims, offenders, and interested community members get together in an effort to figure out an act of delinquency or a crime occurred and what can be done to address the underlying problem. Oftentimes, those who have engaged in acts of delinquency or crimes pay monetary restitution to the victims or the victims’ families, or perhaps do some work for them to symbolically pay back the harm caused by their behavior. As we will discuss later in this book, restoration is a justification for punishment more commonly employed with juveniles than it is with adults.
JUVENILE JUSTICE AND SPECIALIZED TERMINOLOGY

When the first juvenile justice system was established in Cook County, Illinois, reformers wanted it to be clearly distinguished from the adult criminal system, so they used a different language to discuss the youth who entered the civil juvenile justice system, the primary issue at hand, and the stages of the process they encountered. This language was used to help young people rehabilitate and to avoid the stigmatizing terms of the adult system. When other juvenile courts were developed, they followed the model of the first juvenile court and used different terminology as well. Table 11.1 compares terms used for similar concepts or stages in the juvenile and adult systems.

Ritter raised the question of whether these terms are necessary in our current-day climate in which juveniles are often punished harshly as a means of satisfying the general public’s desire for retribution.22 He believes that it might be more useful to get rid of all of the different terms that describe the process of the juvenile system (in other words, to speak about youth being indicted, found guilty, and sentenced rather than hearing their charges on a petition, being adjudicated delinquent, and being given a disposition of delinquency) and to keep the one major distinction of referring to acts of youth lawbreaking as “delinquency.” Indeed, Nell Bernstein, the author of Burning Down the House, the End of the Juvenile Prison (2014), stated that she uses the terms children instead of juveniles and prison instead of detention facility, training school, juvenile camp, or reform school because they are more accurate terms. Christopher Bickel also made a powerful argument against the traditional juvenile justice terms and what they obscure:

Juvenile detentions centers are not simply places that regulate and control the behavior of children accused of crimes. Nor are they places that “rehabilitate” or “fix” children in need. Instead, juvenile detention centers provide the social location in which detained children, who are often working class and of color, are created unequal, and treated accordingly. I argue that inside juvenile detention centers, children are constructed as “captives,” as members of a permanent, disreputable category.23

PHILOSOPHICAL SHIFTS AND THE LEGAL TREATMENT OF JUVENILES

The popularity of the various justifications for punishment ebbs and flows over time, and the U.S. Supreme Court leads the way in terms of giving official backing to some justifications for punishments over others.

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<tr>
<th>TABLE 11.1</th>
<th>Juvenile Justice Terminology Versus Criminal Justice Terminology</th>
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<tbody>
<tr>
<td><strong>JUVENILE JUSTICE SYSTEM</strong></td>
<td><strong>CRIMINAL JUSTICE SYSTEM</strong></td>
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<tr>
<td>Delinquent</td>
<td>Criminal</td>
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<tr>
<td>Hearing</td>
<td>Trial</td>
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<tr>
<td>Order to appear/Charges on a petition</td>
<td>Warrant for arrest/Indictment</td>
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<tr>
<td>Adjudicated delinquent</td>
<td>Found guilty</td>
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<tr>
<td>Disposition</td>
<td>Sentence</td>
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<tr>
<td>Held in detention</td>
<td>Imprisoned</td>
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The Due Process Revolution

In the 1960s, the rehabilitation of juveniles was still the most popular justification among the general public for their punishment. During this period, a number of U.S. Supreme Court decisions were made that acknowledged that the experiences of many youth with law enforcement and juvenile justice officials, like those of Joseph in the opening scenario of the chapter, were fundamentally unfair. The Warren Court (known as such because the Chief Justice of the Supreme Court of the era was Earl Warren) ruled on a number of cases in which the due process rights of juveniles were increased. In Kent v. United States (1966), the U.S. Supreme Court stated that juveniles had the right to a hearing before having their cases transferred to adult court and an explanation as to why the juvenile court thought it necessary. The majority of the justices expressed concern about whether the juvenile courts had the necessary resources to do the job of which they were tasked, and agreed that “there may be grounds for concern that the child receives the worst of both worlds [in juvenile courts]: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.” The Kent decision was followed by what has become one of the most well-known juvenile decisions of this period, In re Gault. The Gault case was decided in 1967, and it required that alleged juvenile delinquents had the right to hearings in which formal procedures were followed. In addition, the Supreme Court stated that juveniles could not be institutionalized unless there was evidence that they had committed an act of delinquency. This decision inspired a shift in the popular concept of the juvenile delinquent yet again. Instead of the image of young people in need of care by the state to either protect them or teach them how to stay out of trouble, juvenile delinquents came to be seen simply as younger criminal defendants.

The In re Winship (1970) case signaled another move on the part of the U.S. Supreme Court to treat juvenile defendants more like their adult counterparts. The justices ruled that the highest standard of proof, “beyond a reasonable doubt,” needed to be used in juvenile proceedings to protect juveniles from the possibility of undeserved confinement in a juvenile institution. This decision meant a move away from the standard that had been used up until that point, the “preponderance of the evidence” standard, and from unquestioned use of the parens patriae philosophy (i.e., the state as a substitute parent) as a justification for placing youth into institutions.

It was also a legal acknowledgment that state intervention was not always working in the best interest of the child. Yet, due process rights for youth were not fully implemented. For example, in McKeiver v. Pennsylvania (1971), the Supreme Court ruled that youth were not entitled to a trial by jury in juvenile court proceedings.
The "Get Tough" Period: An Emphasis on Retribution, Incapacitation, and Deterrence

The majority of the 1970s, 1980s, and 1990s were characterized by efforts that countered the due process revolution for juveniles and emphasized getting tough on delinquency and those labeled as delinquents. The social construction of youth as mini-adults, which was in some ways reminiscent of the Middle Ages, began to take a firm hold in popular consciousness. This image was reinforced with scholarly claims that involuntary rehabilitation in treatment institutions was not consistently effective, as well as social panics about youth's descent into delinquency, such as those that we examined in Chapter 2.26 Young people, particularly teenagers, were seen as scary and threatening people who had grown up too fast and needed to be treated accordingly. In addition, the U.S. Supreme Court chipped away at the anonymity of juvenile court proceedings—in Oklahoma Publishing Company v. District Court (1977) and Smith v. Daily Mail Publishing Co. (1979)—and allowed the preventative detention of juveniles in some circumstances—in Schall v. Martin (1984)—developments that signaled that the due process revolution was no longer in full swing (see Figure 11.1). As legal scholar Barry Feld stated from the vantage point of the late 1990s, the judges and politicians during this period used whatever image of children that would empower them to better control them: “Courts and legislatures choose between competing characterizations of young people as autonomous and self-determining or as immature and incompetent in order to maximize their social control.”27

The notion of the youth “superpredator” was discussed frequently by well-known scholars who were looking at population forecasts and imagining a dim and scary future

<table>
<thead>
<tr>
<th>Year</th>
<th>Case</th>
<th>Description</th>
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<tbody>
<tr>
<td>1975</td>
<td>Breed v. Jones (1975)</td>
<td>Juveniles cannot be waived to adult court for a trial after being adjudicated in juvenile court. To do so is equivalent to double jeopardy, or being tried again for a matter that has already been settled.</td>
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<tr>
<td>1982</td>
<td>Eddings v. Oklahoma (1982)</td>
<td>The defendant’s age should be considered as a mitigating factor in deciding to apply the death penalty.</td>
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<tr>
<td>1988–1989</td>
<td>Thompson v. Oklahoma (1988) and Stanford v. Kennedy (1989)</td>
<td>These cases established that the imposition of the death penalty requires that someone be at least 16 years of age at the commission of the delinquent act.</td>
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The last three decades of the 20th century were characterized by measures to get tough on delinquency by harshly punishing youth. A match of racist stereotypes—superpredator became widely recognized as a “code word for young black males.” Youth of color were disproportionately the object of police attention and subsequently placed in institutions of all types. In his law review article, “The End of Adolescence: The Child as Other—Race and Differential Treatment in the Juvenile Justice System,” Kenneth Nunn states the concept of “othering” is what allowed the retributive turn in the juvenile justice system in the 1990s. He explains the process as one in which the “superpredator” was constructed as the ultimate other, as possessing all the characteristics that innocent young children do not. The “superpredator” was “brutally remorseless,” incorrigible, and savage. And because the “superpredator” was the antithesis of childhood, it was slyly constructed as young, Black, and male. This racially characterized “superpredator” was in fact a monster, and only the most serious and determined efforts could address the threat that the “superpredator” posed.

The superpredator panic amped up punitive responses to youth—in particular, responses to youth of color. Transfer to adult court became increasingly popular, as well as stricter sentences and a corresponding decrease in the level of confidentiality of juvenile court proceedings during this point in history, as the popular image of the delinquent became that of the hard-core delinquent who was “violent and irredeemable.” It appeared that juveniles were to have the punishment of adults, but without all of the legal rights given to adult defendants to protect themselves. All of this occurred in spite of the fact that juvenile justice systems were still based on the idea of rehabilitation. A clash in philosophies became the norm.

The Federal Response to the “Get Tough” Trend: The Juvenile Justice and Delinquency Prevention Act

The U.S. Congress passed the federal Juvenile Justice and Delinquency Prevention Act (JJDPA) of 1974, in an effort to address growing concerns among the general for law-abiding people living in the 2000s. James Q. Wilson predicted that there would be a million more people in their teens by the 2000s, and stated that of the half expected to be male, “six percent of them will become high rate, repeat offenders—30,000 more young muggers, killers, and thieves than we have now.” John Dilulio went with that idea and stated that the superpredators who would be running through U.S. communities in the 2000s would be upwards of 270,000 in number. James Alan Fox stated that the population growth would be concentrated more among black youth than it would among white youth, and media attention fueled the flames of racist stereotypes—superpredator became widely recognized as a “code word for young black males.”
public related to juvenile delinquency. At this time the Office of Juvenile Justice and Delinquency Prevention was created as a means of establishing a national entity that would focus on research and the dissemination of research related to juvenile delinquency and delinquency prevention. This act limited the powers of the juvenile court to handle not only delinquents, but troubled or neglected youth. Status offenders, nonoffenders, child delinquents, and dependent and neglected children were no longer seen as the primary concern of the juvenile courts. Supporters of the act were also concerned that juvenile delinquents should, whenever possible, be deinstitutionalized, or taken out of prisons and jails. As in our scenario at the beginning of the chapter with Joseph, in spite of the desire for separate confinement that drove juvenile justice advocates in the late 1800s, youth were still being locked up with adults in jails and prisons in some places in the United States more than 75 years later, and many observers were upset about it. This move toward deinstitutionalization of status offenders was evident in the JJDP Act. State juvenile justice systems were only to get funding from the OJJDP to support their efforts if they abided by the mandates of the JJDP Act and its subsequent reauthorizations, which mandated the following core requirements for juvenile justice systems (the latest being in 2002):

- **Deinstitutionalization of status offenders (DSO):** Juveniles who commit status offenses, those that only apply to children, such as running away, truancy (skipping school), drinking or possessing alcohol, and breaking curfew, should not be held for any period of time in adult facilities, and should not be held in juvenile facilities for any extended length of time. Exceptions to this rule can be made for some status offenders for up to 24 hours of detention time. Instead, youth should be given the opportunity to get services in the community such as mentoring, education, job support, counseling, and/or treatment of substance issues.

- **Adult jail and lockup removal:** To prevent psychological and physical abuse, young people are not supposed to be placed in adult jails or lockups. There are a few exceptions in which this is allowed: for up to 6 hours before and after a court hearing, up to 24 hours plus weekends and holidays in rural areas, or in what is deemed unsafe travel conditions.

- **Sight and sound separation:** When in an adult jail or lockup for the exceptions listed above, youth are supposed to be separated enough from the incarcerated adults to keep them safe. They should be protected from both hearing and seeing the adults. They shouldn’t share any common spaces with the adults in the facility, including time in the dining hall or recreational areas, and shouldn’t be housed next to the adults in their cells.

- **Reduction of disproportionate minority confinement (DMC):** Because data show that youth of color are more likely to be adjudicated delinquent and required to serve more time in secure facilities than their white counterparts, states must demonstrate that they are paying attention to this issue. They are supposed to assess the issue in their state and address the underlying reasons why it exists, ultimately reducing its occurrence.

As of mid-2016, the last time the JJDP Act was reauthorized was in 2002. It is set to expire in September 2016. Juvenile advocates would like to see a new version of the law that does the following:

1. Keeps youth out of the justice system.
2. Ensures equity and competence in legal representation and throughout the entirety of juvenile justice systems.
3. Guarantees developmentally appropriate responses to youth behavior including punishments that are based on youth's age and actions.

4. Creates more federal support for tribal, state, and local governments to implement in the JJDP Act in their juvenile justice systems.

Advocates who would like to see the JJDP Act updated cite the need for it to reflect contemporary research findings related to juvenile delinquency. In addition to recent sophisticated brain research that demonstrates the teenage brain is fundamentally different from a healthy adult brain, and less prepared to make skilled decisions (see A Focus on Research: Dobbs’ Beautiful Brains, below), juvenile justice reformers stress that the needs of girls are being overlooked by juvenile justice systems today. It wasn’t until 1992 that amendments to the JJDP Act required juvenile justice systems to provide gender-specific treatment, and prevention services to girls. Girls are often found to be victims of abuse both inside and outside of the system, and advocates stress the need for changes to the system to better protect girls held in detention. Advocates for a new JJDP Act authorization explain that funding needs to be made available for rigorous research into how gender-specific programming affects girls in the system, and how the effects are similar or different along racial, ethnic, and social class lines. In addition, a concern of many advocates is that although juveniles are not supposed to be placed in juvenile detention centers for status offenses, a loophole in the act allows it if they have violated a VCO. Thousands of youth on any given day are held in detention for status offenses if they have violated a probation order or committed a status offense, such as being out past curfew, being truant, or missing a probation meeting. Many of these young people do not pose a threat to the community, so their detention seems unnecessary, and even counterproductive, to many juvenile justice reformers, as they appear to be negatively influenced by exposure to those who have committed more serious acts of delinquency or adult crimes.

**Turning Tides? The 2000s and the Reassertion of Youth Differences**

Somewhat surprisingly, after the punitive turn of the mid-to-late 1990s, the tides have yet again shifted in the 2000s in terms of the construction of juvenile delinquency and its appropriate responses. Although the retributive and incapacitative aims of punishment are still very popular among a segment of the population, as well as the social construction of youth as violent and irrational, the U.S. Supreme Court has emphasized the original vision of youth as deserving of different treatment that informed the development of the juvenile court. A number of U.S. Supreme Court cases have alluded to the need to protect youth from cruel and unusual punishment and have considered the ongoing development of the teenage brain in these decisions (see Figure 11.2). Once again, the legal construction of youth is swinging back to the idea that they are vulnerable and
In the News

Why So Many Hawaiian, Samoan, and Filipino Youth in the Justice System?

In spite of the stated emphasis on rehabilitation in juvenile justice systems across the U.S., there is still plenty of evidence in the news that this philosophy does not always inform how juveniles are treated (as you will see in Chapters 12 and 13). The article “Why So Many Hawaiian, Samoan, and Filipino Youth in the Justice System?” published in the Honolulu Civil Beat, a source for news in the Hawaiian capital, highlighted one of the major themes that has come to characterize juvenile justice systems around the United States in recent decades: disproportionate minority confinement. The author of the article, Chad Blair, considered an Office of Youth Services report that found that mixed race youth, Native Hawaiians, and Pacific Islanders were disproportionately involved in the juvenile justice system of Hawaii. He explained that “race, ethnicity, class, and gender converge in the juvenile justice system to confine more youth of color than can be explained merely by criminal activity.” Blair reported that Samoan, Filipino, and Native Hawaiian youth were treated more harshly than Caucasian and East Asian youth at the arrest stage of the juvenile justice process and at the subsequent stages of detention, probation, and protective services. He pointed out that the root of the problem “seems to be related to racism and discrimination and how mixed-race people are treated in society” and highlighted the study’s findings that Hawaiian and Pacific Islander youth would likely fare much better if they were diverted into culturally based programs instead of being placed in juvenile detention facilities.

DISCUSSION QUESTION

1. The author of the news article drew from existing research to make the point that racism is linked to the disproportionate minority confinement of youth of Native Hawaiian, Filipino, and Samoan background in Hawaii. How do you think this root issue should be addressed? Why?

and that was further support that the practice was cruel and unusual under the Eighth Amendment. In 2012, in the combined cases of Miller v. Alabama and Jackson v. Hobbs, the Supreme Court decided that youths under the age of 18 who commit acts of murder should not be sentenced to a mandatory life sentence without the chance of parole. The Miller opinion noted that judges need to weigh an individual case to determine if life without parole would be a proportionate sentence for a youth who has committed murder. The majority opinion stated that young people have “diminished culpability and heightened capacity for change” and that, as a result, “appropriate occasions for sentencing juveniles to the harshest penalty will be uncommon.” The Court also noted that it will be difficult for a judge to be able to tell when a young person who has committed murder was acting from an “unfortunate but transient immaturity” or is an example of “the rare juvenile offender whose crime reflects irreparable corruption.” As you can see, the language employed in these decisions acknowledges that there is a place for both rehabilitation and retribution in the juvenile justice system, and gives juvenile judges the power to distinguish when one should inform a sentencing decision, rather than the other. In 2016, the U.S. Supreme Court decided in Montgomery v. Louisiana (2016) that the ban on life without parole sentences for juveniles convicted of homicide in the Miller decision must be retroactively applied in each state. This was an important decision because many states were trying not to apply the decision to those individuals who were convicted in the past, and hundreds of people who were sentenced to death across the United States may now have their sentences reconsidered in hearings or be released on parole.
In light of the conflicting visions of juvenile justice in the 21st century, it is unclear how long a separate juvenile justice system will be retained. Some sociolegal scholars advocate abolishing the juvenile court altogether and having only one system that processes youth, yet allows for more lenient sentencing due to age and lack of mental and social development. According to this rationale, a single court would facilitate a move to give young people accused of lawbreaking all of the legal rights given to adults in a criminal court. As we will elaborate upon in the following chapter, youth are not given all of the due process protections that adult defendants are, and this is seen as a problem by many observers. As Barry Feld notes, “while the sanctions of the juvenile court may be less harsh than criminal sentences, the direct penalties (institutional confinement) and the collateral consequences (transfer to criminal court, use of delinquency convictions to enhance sentences, sex offender registration, and the like) share similar penal elements.” In addition, research has demonstrated that juveniles who get the assistance of lawyers in their cases typically receive harsher sentences than those with the same sentences who did not “lawyer up.”

Youth of color with public defenders are especially negatively affected.

Most juvenile justice reformers are working within their current juvenile justice systems to change how the public and the formal system conceptualize youth and youth misbehavior. For example, there is a growing movement to abolish or minimize the punishments related to status offenses—acts that are only illegal because the people doing them are minors. In addition, several states (Arkansas, Georgia, Hawaii, Indiana, Kansas, Kentucky, Nebraska, New Hampshire, South Dakota, Utah, and West Virginia) have engaged in comprehensive reforms of their juvenile justice systems that avoid net-widening for low-level acts of delinquency and that finance the use of community-based resources for diverted youth. Other states have engaged in realignment of their juvenile justice systems by closing some of their youth prisons and placing youth in facilities closer to their homes or in community-based rehabilitation programs, such as Ohio, Texas, New York, and Georgia or, in California, letting county-level agencies rather than state agencies supervise all youth involved in nonviolent and low-level delinquency.
There is also a move to include 17-year-olds in the age of juvenile jurisdictions in the nine U.S. states that do not do so. Three states have recently done this (Connecticut, Illinois, and Massachusetts) and have reported positive results, and at least four others are attempting to raise the age as well. Arguments for these changes are justified by the decline in U.S. juvenile delinquency overall in the United States, brain development research, and legal precedents. The Youth Education and Families Institute argues that counties around the country should draw upon insights from research to reform their juvenile justice systems, primarily that youth delinquency is related more to being a teenager than being a “criminal”; severe punishments for delinquency have not been shown to be more effective than certain, immediate light consequences; and matching services to young people’s needs is the most direct path to positive outcomes. These rationales also help fuel the campaigns to end the transfer of children to adult courts for prosecution and the housing of youth in adult prisons and jails where they are five times more likely to be sexually assaulted than they would be in juvenile detention (Equal Justice Initiative, n.d.). They also are related to the federal government’s move to forbid solitary confinement for juveniles in federal facilities beginning in 2016, the elimination of solitary confinement in 19 states and the District of Columbia, and the restriction of solitary confinement in cities like Los Angeles (in conjunction with the main argument that isolation of this sort can do serious psychological harm to vulnerable young people).

U.S. Supreme Court decisions in the 2000s indicate that at the highest level of our judicial system, there is a shift in the majority’s views of delinquency that mirror the original rehabilitative aims claimed by those who established the first juvenile justice systems. As we will examine in Chapter 14, these changes do appear to be indicative of a gradual philosophical shift at the state and local levels, as reflected in the comprehensive delinquency programs currently under way in the United States today.

A Focus on Research

Dobbs’ Beautiful Brains: Scientific Discoveries About Adolescent Brain Development

U.S. Supreme Court decisions related to punishing juveniles in the 2000s have often alluded to the science of adolescent brain development. Scientists have found that teenage brains are different from adult brains in significant ways. As neuroscientist Laurence Steinberg points out, “the fact that there are significant changes in the brain during adolescence is no longer debatable—it indeed it ever was. Indeed, it appears that the brain changes characteristic of adolescence are among the most dramatic and important to occur during the human lifespan.”

As explained by David Dobbs, some of the traits of teenage behavior that are the most frustrating to their parents and other “more mature” people are actually important to their future successes as adults. Brain imagery scanning now allows scientists to compare and contrast the brains of adults and children. The National Institutes of Health did the first series of scans of the brain over time and found that although the brain doesn’t grow much after the age of 6, there is a lot going on in the brain starting at around age 12. Dobbs likens it to an “extensive remodeling, resembling a network and wiring upgrade.” The speeds of transmission of signals between the neurons in the brain get faster; the outer layer of gray matter of the brain that handles most of our conscious thinking, the cortex, gets thinner and more efficient; and the
changes occur gradually from the back of the brain (which handles basic functions such as vision and movement) to the front of the brain (which handles complicated thinking and reasoning). In addition, the brain begins processing at a more advanced level and the corpus callosum, the connection between the left and right sides of the brain, is strengthened as well as the connections between the hippocampus, which is involved in memory, and the front of the brain, which helps us set goals and compare and contrast different choices. Aging is also related to the faster processing of information in the front of the brain that allows for more complex reasoning. But, as these connections develop, there is a period of time in which it is all getting worked out, and skilled decision making can be inconsistent. (In other words, sometimes teenager Fred may be making what appear to be well-reasoned decisions, and other times he seems to be completely out to lunch.)

Some brain studies, in fact, suggest our brains react to peer exclusion much as they respond to threats to physical health for food supply. At a neural level, in other words, we perceive social rejection as a threat to existence. Knowing this might make it easier to abide the hysteria of a 13-year-old deceived by a friend or the gloom of a 15-year-old not invited to a party. These people! we lament. They react to the ups and downs as if their fates depended upon them! They’re right. They do.51

DISCUSSION QUESTIONS

1. After reading the above material about brain development, can you summarize what takes place in the brain of a young person over time?

2. Did you realize that your own brain was developing well into your early 20s? Does that change the way you might behave in the future?

3. If you have passed that stage of development, think back to how this information may have changed the way you lived (e.g., what substances you put into your body) had you known about it before then.

SUMMARY

As explained in the historical overview in Chapter 2, the stated purpose of the first juvenile justice system, which was emulated by others around the United States, was for the rehabilitation of youth who had acted out delinquently. Nevertheless, a number of different philosophical justifications for punishment exist—retribution, deterrence, incapacitation, rehabilitation, and restoration—and at various times of history they have all been invoked as being the proper reason behind juvenile punishment. When we look at legal decisions of the due process revolution of the 1960s, we see that during that period the majority of people, as well as the majority of Supreme Court justices, accepted the rehabilitation of juveniles as a laudable goal for juvenile justice systems. This changed in the three decades that followed, as support for a model in which juveniles were treated as less culpable and in greater need of protection than adults waned significantly. It became popular to “get tough” on juveniles, and retribution, incapacitation, and deterrence became the most popular approaches taken by state juvenile justice systems. The Juvenile Justice and Delinquency Prevention Act was developed in 1974 as a means of reasserting some core protections for juveniles in the system, and has subsequently been reauthorized with new protections included several times.

The myth of the juvenile “superpredator,” an image that was associated with low-income boys of color, particularly African American youth, fueled the popularity of get-tough approaches in the late 20th century. Juvenile justice scholars analyzed and debunked the superpredator myth, but it wasn’t until the late 1990s and early 2000s that another shift began to occur. In the 2000s, the U.S. Supreme Court made a number of decisions that alluded to and supported a vision of youth as developing human beings who should be treated differently than their adult counterparts. Scientific research on brain development and the human life course was marshaled by the Supreme Court in their decisions about the death penalty and life imprisonment without parole. Many juvenile justice reformers in the last few years in the United States have drawn upon both the scientific evidence and the legal decisions of the Supreme Court to justify the changes they were making to their juvenile justice systems. Meanwhile, juvenile justice advocates continue to campaign for stronger protections for young people in a new reauthorization of the JJDP Act, as there are still a number of inequities built into juvenile justice systems in the United States today.

EYE ON DIVERSITY EXERCISE: A LOOK ABROAD: THE TREATMENT OF JUVENILE DELINQUENCY IN IRAN

Iran is one of the few countries in the world that still executes people for acts committed while juveniles.

The philosophical debate about how to treat youth who have allegedly broken the law is relevant not only to events in the United States but to actions around the world. The international human rights community has drawn attention to how the country of Iran has continued to execute children in spite of the fact it agreed to follow the Convention on the Rights of the Child (CRC) more than 20 years ago. The CRC included an agreement to abolish the youth death penalty and life imprisonment without release. According the United Nations and Amnesty International, there are almost 200 youth on death row in Iran, and many have been found to have spent at least seven years there. The Iranian government reformed their laws about juvenile delinquency in 2013 and gave judges the discretion to consider the maturity level of the child and assign a different punishment instead of the death penalty. The Supreme Court said that all juveniles on death row were eligible for a retrial. Yet, all evidence points to the fact
that these formal legal changes haven’t translated to real reform. For this eye on diversity exercise, examine the photos and captions on The Guardian’s webpage “Waiting to Die: The Iranian Child Inmates Facing Execution—in Pictures” (https://www.theguardian.com/artanddesign/gallery/2016/jan/08/inside-iran-jail-where-children-face-execution-in-pictures).

1. What are the factors related to the girls’ presence on Iran’s death row?
2. Which images do you find tell the most compelling story about life on death row for the inmates? Why?

DISCUSSION QUESTIONS

1. Consider the various justifications for punishment. Which do you think serve as the strongest basis for juvenile justice, and why? Do you think having different juvenile and adult justice systems serves the justification you have picked? Why or why not?
2. The myth of the superpredator fueled the punitive mood of the 1970s, 1980s, and 1990s. Can you see a similar myth or scare today that may be driving public concerns about delinquency? If so, explain what it is and how you see it operating in your community or in the world at large.
3. The scientific research on brain development is compelling evidence that the teenage (and young adult) brain is in a state of flux and is not capable of the same degree of rationality as the adult brain. Do you understand why the Supreme Court decided to consider that research in its legal cases related to juveniles in the 2000s?

KEY TERMS

- Deinstitutionalization 321
- Disproportionate minority confinement 321
- General deterrence 314
- Incapacitation 314
- Individual (specific) deterrence 314
- Positivism 315
- Restoration 316
- Retribution 310
- Selective incapacitation 314
- Warren Court 318

CHAPTER PRETEST ANSWERS

1. True 5. False
2. False 6. True
3. True 7. True
4. False 8. True
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