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ISSUE BRIEF

**ADJUDICATING DISCRETION IN YOUTH
CASES: RESEARCH, LAW, AND POLICY
FOR CONSIDERATION IN IMMIGRATION
PROCEEDINGS**

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ADJUDICATING DISCRETION: RESEARCH, LAW, AND POLICY FOR CONSIDERATION IN IMMIGRATION PROCEEDINGS

INTRODUCTION

Most cases involving children¹ and youth in the immigration system do not involve youth misconduct. However, in some cases, judges are required to consider allegations or evidence of prior misconduct or “bad acts.” In those cases, immigration judges are required to consider the conduct of young people to determine whether an applicant merits immigration relief as a matter of discretion. In making these determinations, immigration judges may be asked to assess the relevance and significance of allegations or evidence of misconduct by young people and / or records of contact with juvenile legal systems, including reports of misconduct, mere arrests, and / or arrests resulting in delinquency adjudication.

“Our history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults.”

U.S. Supreme Court

While the number of children and youth that come before the court with allegations of misconduct may be small, there are critical implications for this cross-section of the population. While immigration law tends to treat children and youth as adults in miniature, domestic juvenile laws and a robust body of developmental research and neuroscience suggest that adverse conduct by youth (including mere allegations, mere arrests, and/ or findings of delinquency) should be evaluated through a lens of developmental immaturity, diminished culpability and pronounced capacity for positive change and growth in children, adolescents and young adults.

The diminished culpability of children and adolescents has long been recognized in the United States. In fact, the first juvenile court was created in 1899 in Cook County, Illinois by social welfare advocates who recognized that children in conflict with the law should be viewed and treated differently by law than adults.² Neuroscience, social science, law, and public policy support the understanding that children and adolescents possess a reduced culpability for their actions when compared to adults. However, beyond acknowledging that a juvenile delinquency finding is not a conviction for immigration purposes, immigration law currently makes no provisions to account for the diminished culpability of children. Legal standards in the context of discretion, which are designed for adults, are routinely applied to children and adolescents. This brief, along with others in the series, explains the importance of distinguishing between adults and children in immigration court by examining best practices established by science as well as in related, domestic legal fields such as juvenile justice.

THE ISSUE DEFINED

“CULPABILITY” AND YOUTH

¹ Use of the terms “child” and “children” to refer to individuals under the age of 18 comports with immigration law’s definition of child as found in INA 101(b) and 6 U.S.C. 279(g)(2).

² *Illinois Supreme Court History: Juvenile Courts*, the Illinois Courts, <https://www.illinoiscourts.gov/News/388/Illinois-Supreme-Court-History-Juvenile-Courts/news-detail> (last visited March 15, 2024).

An established body of both neuroscience and social science research finds that children and adolescents possess several unique characteristics which diminish their culpability relative to adults. A central tenet of this research is the idea that children and adolescents' brains are still growing and developing in critical ways. Thus, while children and adolescents can commit the same acts as adults, they cannot be deemed to have the same level of culpability as adults for those same acts "by virtue of their immaturity."³ This issue brief will also discuss research studying how legal culpability is affected by this developmental immaturity, as well as youths' increased susceptibility to coercion, unfixed nature of identity, and lack of control over life circumstances. The brief discusses domestic juvenile legal systems' recognition of and adaptation to the fundamental principle that children and youth are developmentally distinct from adults and thus cannot be held culpable for their conduct in the same ways as adults. This brief closes with critical implications of this research for purposes of immigration law and policy.

INTERDISCIPLINARY RESEARCH ON THE DECREASED LEGAL CULPABILITY OF CHILDREN AND ADOLESCENTS

DEVELOPMENTAL IMMATURIT

The American Psychological Association defines developmental immaturity as a "state of incomplete growth or development."⁴ The field of neuroscience has clearly established that the social and functional immaturity of children and adolescents is due in great part to the fact that the human brain does not finish developing until the mid to late 20s (for more information about adolescent brain development, see June 2023 Issue Brief, *Adolescent Brain Development: Research, Law, and Policy for Consideration in Immigration Proceedings*).⁵ In particular, the prefrontal cortex (responsible for skills like prioritizing, planning, and impulse control) is one of the last areas to mature.⁶

The developmental and functional immaturity of children and adolescents manifests in several ways that bring young people into contact with juvenile legal systems. Compared to adults, children and adolescents consistently exhibit: 1) increased impulsivity; 2) a lessened ability to consider the future consequences of their actions; 3) poor decision-making skills due to difficulty weighing risk; 4) increased susceptibility to peer pressure; 5) an identity whose nature is transient and unfixed; and 6) a lack of control over their life circumstances. Each of these will be discussed in turn below.

IMPULSIVITY

Due to their developmental immaturity, adolescents are more impulsive than adults and lack the ability to make sound decisions consistently.⁷ Furthermore, children and adolescents tend to have

³ Barry Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 LAW & INEQ. 263, 279 (2013).

⁴ *Immaturity*, APA Dictionary of Psychology, <https://dictionary.apa.org/immaturity> (last visited February 2, 2021).

⁵ *The Teen Brain*, National Institute of Mental Health, <https://www.nimh.nih.gov/health/publications/the-teen-brain-7-things-to-know> (last visited December 5, 2021).

⁶ *Id.*

⁷ Alison S. Burke, *Under Construction: Brain Formation, Culpability, and the Criminal Justice System*, INT'L J.L. & PSYCHIATRY 34 381-385, 383 (2011).

an “inability to stop doing the action” once an act is underway.⁸ Research shows that while an older teenager may possess the same intellectual abilities as an adult, his capacity to make “adult-quality decisions” and “exercise self-control” is significantly diminished.⁹ This is particularly true when an adolescent is making decisions in an emotionally charged or “hot” cognitive state, as compared to a non-emotional or “cold” cognitive state. The difference in adolescents’ hot and cold cognitive abilities occurs because “the region of the prefrontal cortex that moderates behavior in an emotional state tends to develop later in the life course than the area that makes decisions in non-emotional states.”¹⁰

Their diminished capacity for self-control means that adolescents can sometimes struggle to overcome aggressive impulses. Consequently, the “peak age” for violent offending is in the mid-teens, with very few people beginning a “violent career” in adulthood.¹¹ However, the vast majority of children (even those who commit a violent act) experience a “maturation effect” in which they naturally desist from offending as they leave adolescence.¹² In fact, the prevalence of violent acts begins to decline during late adolescence, culminating with a sharp drop-off by age 20.¹³ Thus, even though adolescents have a diminished ability to resist or overcome impulsive actions, as their brains mature, young people exhibit a marked capacity for positive change in behaviors.

DIFFICULTY CONSIDERING FUTURE CONSEQUENCES

Brain immaturity (coupled with a lack of life experience) also impairs the ability of children and adolescents to predict and weigh the future consequences of their actions.¹⁴ Brain scans indicate that the adolescent brain reacts more positively to new sensations and immediate rewards than do adult brains; consequently, adolescents place more emphasis on short-term consequences than long-term consequences.¹⁵ In addition, research has shown that adolescents tend to assume that future consequences will be less likely to happen or of less importance than do adults assessing the same situations.¹⁶ In short, adolescents place a greater emphasis on “immediate outcomes”¹⁷ and are less able to accurately consider how their behavior in the moment might eventually play out.

⁸ Peter Ash, *But He Knew It Was Wrong: Evaluating Adolescent Culpability*, J AM. ACAD. PSYCHIATRY LAW 40: 21-32, 24 (2012).

⁹ Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 813 (2003) (“Psycho-social development proceeds more slowly than cognitive development. As a consequence, even when adolescent cognitive capacities approximate those of adults, youthful decision-making may still differ due to immature judgment.”).

¹⁰ Rachel Barkin, *Hot and Cold Cognition: Understanding Emerging Adults’ Cognitive Reasoning*, Emerging Adult Justice Project, (December 2021), <https://justicelab.columbia.edu/sites/default/files/content/Hot%20and%20Cold%20Cognition.pdf>, page 1.

¹¹ Delbert S. Elliott, *Serious Violent Offenders: Onset, Developmental Course, and Termination*, 32 CRIMINOLOGY 1 (1994).

¹² U.S. Dep’t of Health & Human Services, *Youth Violence: A Report of the Surgeon General* (2001)..

¹³ *Id.*

¹⁴ *See* Feld, *supra* note 3 at 285.

¹⁵ *Id.*

¹⁶ Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1, 3-4 (1992).

¹⁷ *Id.* Stating that “[A]dolescents [may] judge some negative consequences in the distant future to be of lower probability than do adults or to be of less importance than adults do.”

DIFFICULTY WEIGHING RISK

At the same time the adolescent brain is prioritizing new sensations and immediate rewards, their brain structure also hampers the ability to accurately consider the risks of an action. Adolescents consistently underestimate both the likelihood and the amount of risk in an action, and they emphasize the gains (as opposed to the potential losses) of risky behaviors. Because children and adolescents assess risks differently (and more poorly) than adults, they are less likely to correctly anticipate the outcomes of their actions – for example, that someone might get seriously injured or killed in the commission of a crime or illegal act.¹⁸

SUSCEPTIBILITY TO THE INFLUENCE OF PEER BEHAVIOR IN ADOLESCENCE

Developmental research and neuroscience also confirm what any parent or teacher already knows: peers play a crucial role in the behavior and decision-making of adolescents. Social interaction is exceptionally important to adolescents, with the average teenager spending hours of their day interacting with their peers in person or online.¹⁹ This drive for peer approval and social interaction among adolescents is well documented in the scientific literature and can be seen as largely adaptive, as this is a time of life where forming friendships and community beyond the family unit is critical.²⁰ However, interacting with peers also stimulates greater neural activity in the reward center in the brain, “likely contributing to youths' risk-taking, poor judgment, and criminal involvement.”²¹ Their biological drive to seek connection and approval may make a youth more likely than an adult to commit a crime in order to avoid social rejection or ostracization.²²

Even when they are not being overtly coercive, merely being in the presence of one's peers can exert a significant influence on an adolescent's behavior. As noted above, adolescents have less independent decision-making ability than adults; that ability is further diminished in the presence of others.²³ The adolescent tendency to make riskier decisions than adults is increased significantly in the presence of peers.²⁴ The tendency to take greater risks and the susceptibility to peer influence both decrease with age, meaning that these features are inherent to the underdeveloped adolescent brain.²⁵

UNFIXED NATURE OF IDENTITY

While the hallmarks of adolescence – poor impulse control, failure to foresee consequences and weigh risks of their behavior, and susceptibility to peer influence – can be worrisome to caregivers

¹⁸ Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILDREN 15, 20 (2008).

¹⁹ Mihaly Csikszentmihalyi, et al., *The Ecology of Adolescent Activity and Experience*, 6 JOURNAL OF YOUTH AND ADOLESCENCE 281–294 (1977).

²⁰ Chun Bum Lam, Susan McHale, Ann C. Crouter, *Time With Peers From Middle Childhood to Late Adolescence: Developmental Course and Adjustment Correlates*, Child Development (2014).

²¹ See Feld, *supra* note 3 at 289.

²² *Id.* at 291.

²³ N. Dickon Reppucci, *Adolescent Development and Juvenile Justice*, 27(3) AM. J. OF COMMUNITY PSYCHOL. 307–326 (1999).

²⁴ See Ash, *supra* note 8.

²⁵ *Id.*

and other adults, research also establishes that this developmental phase is transitory. In other words, the behaviors of a young person tell us very little about who and what they will become as adults. Overwhelmingly, an adolescent's bad act is not a reflection of their bad character, but rather developmental immaturity²⁶. Social scientists posit that this capacity for positive growth and change is another reason to view adolescents as less culpable for their behaviors than adults. As discussed below, the United States Supreme Court has agreed.²⁷

Adolescence is a pivotal time in personality development, when several biological and social factors are contributing to the transition from a youth's childhood to their adult identity. During this time, behaviors can emerge that are transitory and not indicative of the child's current or future character. For this reason, psychologists generally refrain from diagnosing adolescents who have exhibited violence with antisocial personality disorder or similar conduct disorders, because it is nearly impossible to distinguish between the behavior of an "immature juvenile" and "the rare juvenile offender whose crime reflects irreparable corruption."²⁸ Similarly, signs of personality disorder decrease significantly over the course of adolescence, whereas the personality traits of an adult are more stable.²⁹

The United States Supreme Court has explicitly adopted the social science research regarding the diminished culpability of adolescents due to the unfixed nature of adolescents' identity. In *Roper v. Simmons*, the Court stated that the "reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."³⁰ The court also went on to justify banning the death penalty for adolescents, stating, "[I]t would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."³¹

LACK OF CONTROL OVER LIFE CIRCUMSTANCES

Social scientists have recognized that from a functional standpoint, children and adolescents lack control over their life circumstances when compared to adults. They are often dependent on parents, guardians, or other adults. This dependence renders youth less able to control their immediate circumstances. Unlike an adult, a child or adolescent may not be able to move, find employment, or exercise other independent actions to escape negative influences in his or her environment. Given this, it is unsurprising that research shows a strong correlation between adolescent crime and conditions of "socioeconomic deprivation."³²

²⁶ See Steinberg & Scott, *supra* note 18 at 833.

²⁷ See Ash, *supra* note 8 at 27.

²⁸ *Roper v. Simmons*, 543 U.S. 551, 573 (2005).

²⁹ See Ash, *supra* note 8.

³⁰ *Roper*, 543 U.S. 551 at 553.

³¹ *Id.* at 571.

³² See Ash, *supra* note 8 at 26. These environments may also subject children and youth to traumatic experiences that can lead to subsequent acting out or delinquent behavior. It is important to note here that the negative behavioral effects of childhood trauma, which are beyond a youth's control, are generally reversible through identification and treatment.

Lack of control over their environment, dependence on others for survival resources and other power imbalances between youth and adults render adolescents vulnerable to coercion by adults. In its more extreme form, this coercion can lead to forced criminality, where the child is forced to commit a crime for the adult's gain.³³ Children and youth from vulnerable or high-risk backgrounds are particularly susceptible to forced criminality.³⁴ The U.S. penal code also recognizes that children forced or coerced to commit crimes should not be punished.³⁵ The U.S. State Department has reported that criminal organizations worldwide force children to participate in a variety of criminal activities such as theft, drug production and selling, murder, and suicide bombing.³⁶ Furthermore, the State Department emphasizes that although these children are often mistaken for criminals themselves, they are actually victims of child trafficking.³⁷ Ironically, while the first encounter trafficked adolescents often have with law enforcement is as criminal defendants instead of victims,³⁸ treating these adolescents as criminals begins a rapidly escalating cycle of victimization.³⁹

The Supreme Court has recognized an adolescent's reduced autonomy as an additional basis for diminished legal culpability, noting in *Roper v. Simmons* that an adolescent's "own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."⁴⁰

These facets of developmental, neurobiological and functional immaturity explain why some children and adolescents present in immigration court with evidence of misconduct and/or juvenile records. From a functional, neurobiological and developmental standpoint, however, it is illogical to hold children and adolescents to the same standards of culpability as adults. Current research findings on the fundamental distinctions between young people and adults are increasingly shaping domestic legal systems' interactions with adolescents, with the goal of reducing the harm of those legal structures and enhancing opportunities for positive youth and community outcomes.

³³ *What is Modern Slavery?* CUMBRIA CONSTABULARY,

<https://web.archive.org/web/20210421055940/https://www.cumbria.police.uk/Advice-Centre/Personal-Safety/Human-Trafficking-as-Modern-Day-Slavery.aspx> (last accessed Feb. 6, 2022).

³⁴ Katherine Kaufka Walts et al., *Perpetrators or Victims? The U.S. Response to the Forced Criminality of Children*, ABA Litigation Section (Aug. 8, 2023),

<https://www.americanbar.org/groups/litigation/resources/newsletters/childrens-rights/perpetrators-victims-us-response/>

³⁵ *Id.*

³⁶ *The Use of Forced Criminality: Victims Hidden Behind the Crime*, U.S. STATE DEP'T, June 20, 2014, <https://2009-2017.state.gov/j/tip/rls/fs/2014/233726.htm>.

³⁷ *Id.* Note: the Trafficking Victims Protection Act defines any minor who performs a commercial sex act as a victim of human trafficking -- even if no force, fraud, or coercion is present. Rather, coercion is assumed because of the immaturity of children and their lack of capacity to consent.

³⁸ Stephanie Richard, *Arrest is Not the Answer*, COALITION TO ABOLISH SLAVERY, Jan. 2016,

https://www.castla.org/wp-content/themes/castla/assets/files/CAST_Arrest_is_Not_the_Answer_Jan_2016.pdf.

³⁹ *Id.*

⁴⁰ *Roper*, 543 U.S. 551 at 553.

LEGAL SYSTEMS ADAPTATION TO INTERDISCIPLINARY RESEARCH

The nation's first juvenile court was established in Chicago in 1899, founded on the premise that children and adolescents are fundamentally different from adults and should not be subjected to the same legal standards and systems. Within a quarter century, nearly every state had adopted separate laws and procedures to treat youth in conflict with the law differently than adults.

Today, while terminology, structures and processes differ across the United States, the nation's juvenile delinquency systems (also called juvenile legal systems) continue to recognize the fundamental principle that significant developmental differences between young people and adults require legal structures and legal responses tailored to the social, emotional and cognitive differences between young people and adults.⁴¹

For example, most states advance these principles through the statutory schemes which provide for processes and dispositions distinct from those applied to adults subject to the state's criminal laws. Many of these states also explicitly or functionally treat records of contact between young people and law enforcement or courts differently from those involving adults.

Some state statutes provide for these contacts to be adjudicated in a "family court" setting rather than a criminal court. Others establish separate juvenile processes and venues in which to resolve allegations of delinquency. Many of these cases provide for dispositions available only to youth subject to the jurisdiction of the juvenile or family court system.

In Illinois, for example, the Juvenile Court Act sets forth processes and procedures distinct from criminal processes, with heightened protections for youth and a focus on the "rehabilitation" and best interests of juveniles. The purpose and policy section of Article V of the Juvenile Court Act establishes that the law is intended to deal with the unique challenges of youth delinquency and to capitalize upon the unique opportunities for youth to be "equip(ped) with competencies to live responsibly and productively".⁴² Accordingly, the Act provides for policies and processes distinct from those applied to adults under the state's criminal laws.

The Act further emphasizes these distinctions by providing that "(a) juvenile adjudication shall never be considered a conviction nor shall an adjudicated individual be considered a criminal. Unless expressly allowed by law, a juvenile adjudication shall not operate to impose upon the individual any of the civil disabilities ordinarily imposed by or resulting from conviction. Unless

⁴¹ Heather Renwick, *Rejecting Harsh Sentences for Children: 20 Years of Sentencing Reform*, ABA (July 9, 2018), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2018/summer2018-rejecting-harsh-sentences-children-20-yrs-sentence-reform/>.

⁴² 705 ILCS 405/5-101.

All About Juvenile Justice Purpose Statements

“No adjudication under this article may be denominated a conviction and no person adjudicated a juvenile delinquent shall be denominated a criminal by reason of such adjudication” N.Y. Fam. Ct. Act § 301.1 (McKinney 1983)



expressly allowed by law, adjudications shall not prejudice or disqualify the individual in any civil service application or appointment, from holding public office, or from receiving any license granted by public authority.”⁴³ (Emphasis added.)

As in other states, Illinois law also provides for alternatives to prosecution and formal court proceedings to permit and encourage resolution of an arrest without prosecution and court involvement. There is no analog in Illinois’ adult criminal schematic.

Lastly, the Illinois Act provides for enhanced expungement mechanisms to ensure that youth are not unnecessarily disadvantaged by juvenile records, especially records of “mere

arrests” not resulting in adjudications of delinquency. Every state provides some provision for expungement or sealing of juvenile records. Nearly half of states currently provide for “automatic” expungement or sealing and state legislatures are increasingly endorsing laws that seal or expunge youth records, without requiring a petition process or court proceeding.⁴⁴ These enhanced expungement and sealing protections recognize that juvenile records are neither indicative of incorrigibility nor processed as criminal acts and are designed to insulate children from the well-documented harms associated with a “criminal record.”

Enhanced expungement and sealing provisions are not unique.⁴⁵ In fact, the very existence of the nation’s juvenile court systems recognizes and confirms that youth must be treated differently than adults under the law. In the last two decades, the nation’s juvenile and criminal legal systems have further adapted to recognize and incorporate the findings of the developmental research and neuroscience discussed above. As science – and society – discover more about how and why adolescents differ from adults, legislatures and juvenile courts have adjusted accordingly, incorporating this research into statutes and caselaw.

CRITICAL IMPLICATIONS FOR IMMIGRATION PRACTICE

Children and adolescents are fundamentally different than adults. They are treated differently in the criminal law and juvenile law context, as well as in civil and common law, where “the differentiating characteristics of youth” allow for the law to treat them differently than adults.⁴⁶

⁴³ 705 ILCS 405/1-8 (A).

⁴⁴ *Automatic Expungement of Juvenile Records*, National Conference of State Legislators <https://www.ncsl.org/civil-and-criminal-justice/automatic-expungement-of-juvenile-records> (last updated January 4, 2024)

⁴⁵ *Id.* In fact, all states allow youth to at least petition to seal or expunge their records. And almost half the states have some measure of automatic sealing.

⁴⁶ *J.D.B. v. North Carolina*, *supra* note; *see also* *Roper v. Simmons*, 542 U.S. 551, 619 (2005).

How might the neuroscience and other legal systems' adaptation to neuroscience and adolescent development impact immigration adjudications as a matter of discretion, especially where there is no discernable distinction under immigration law?

DISCRETION AND IMMIGRATION ADJUDICATIONS CONCERNING CHILDREN & YOUTH

Since 1978, the Board of Immigration Appeals (BIA) has relied on “a framework for an equitable application of discretionary relief.”⁴⁷ The seminal framework laid out in *Matter of Marin* involves a balancing of equities against adverse factors which are limited to “the nature and underlying circumstances of the exclusion (inadmissibility) ground at issue, the presence of additional significant violations of this country’s immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent’s bad character.”⁴⁸ The relevant *Marin* adverse factors applicable to youth with prior misconduct appear to fall under the rubric of “criminal history” or “other evidence indicative of a respondent’s bad character.” How might immigration judges adjudicate these factors through a developmentally appropriate lens?

ARE JUVENILE CONTACTS WITH LAW ENFORCEMENT PROPERLY CONSIDERED UNDER THE RUBRIC OF “CRIMINAL HISTORY?”

Depending on the juvenile justice laws of the state in which the child or adolescent was processed, juvenile contacts with law enforcement, including those leading to a delinquency adjudication, are not considered “criminal” matters and may not fall under the *Marin* rubric of “criminal history”. Because the nation’s juvenile delinquency systems are premised on the significant developmental differences between young people and adults, they accordingly utilize legal structures, processes and outcomes distinct and different from adult criminal justice processes. For example, in most states, juvenile justice laws employ youth-specific processes and dispositions distinct from those applied to adults subject to the state’s criminal laws. In addressing juvenile encounters and arrests nor do they contemplate the same criminal culpability. Take the Illinois Juvenile Court Act which explicitly provides that a juvenile adjudication (a juvenile court’s determination that a youth has engaged in delinquent conduct) is not a criminal conviction and shall not be considered as such.” The Act also emphasizes that “(a) juvenile adjudication shall never be considered a conviction *nor shall an adjudicated individual be considered a criminal.*” This suggests that behavior underlying the delinquency under the Illinois Act should also not be considered “criminal” for purposes of discretion. At the time of this writing, over a quarter of all juvenile codes, similar to the Illinois code cited here, expressly forbid the use of juvenile arrests *and* dispositions to be conflated with the term “criminal” or impose any civil disability.⁴⁹

Nonetheless, immigration adjudicators often rely on the proposition that “mere arrests” – when there is a record of law enforcement contact, but no determination of guilt by a court -- can be considered as part of the criminal history. For an adult, “mere arrests” *may* be considered to

⁴⁷ *Matter of Marin*, 163 I&N Dec. 584 (BIA 1978).

⁴⁸ *Id.*

⁴⁹ 705 ILCS 405/1-8 (A) (“A juvenile adjudication shall never be considered a conviction nor shall an adjudicated individual be considered a criminal. Unless expressly allowed by law, a juvenile adjudication shall not operate to impose upon the individual any of the civil disabilities ordinarily imposed by or resulting from conviction.”)

determine whether there is “evidence of criminal conduct which has not culminated in a final conviction” but which may nevertheless be considered in discretionary determinations.⁵⁰ For youth, however, this has often meant that, even where an arrest does not result in a finding of delinquency, adjudicators nonetheless review that arrest and the underlying offense absent a developmentally appropriate lens.⁵¹ This record is captured under the rubric of “criminal history.” However, depending on the state, the conclusion that these records are criminal records may be wholly incompatible with state law. This is particularly true for states’ juvenile justice statutes which contain the express language forbidding the equation of juvenile adjudications under the act with “criminality.”⁵²

ARE JUVENILE CONTACTS WITH LAW ENFORCEMENT PROPERLY CONSIDERED UNDER THE RUBRIC OF “BAD MORAL CHARACTER”?

The United States Supreme Court has made the critical observation “that the character of a juvenile is not as well formed as that of an adult[;] the personality traits of juveniles are more transitory, less fixed.”⁵³ As a result, the Supreme Court has found that “incorrigibility is inconsistent with youth,”⁵⁴ and that assessing the youth’s character as fixed “reflects an irrevocable judgment about [a youth’s] value and place in society, at odds with a child’s capacity for change.”⁵⁵

In a series of five decisions, the Supreme Court has explicitly confirmed that youth are “categorically less culpable”⁵⁶ for misconduct, even that which causes serious harm.⁵⁷ In *Miller v. Alabama*, for example, the Court noted that adolescents can be expected to exhibit “transient rashness, proclivity for risk, and inability to assess consequences”⁵⁸ and that the malleability of these characteristics must be considered by courts. Just as importantly, the Court has repeatedly held that young people have a unique capacity for change and rehabilitation.⁵⁹ Because “a child’s character is not as ‘well formed’ as an adult’s; his traits are ‘less fixed’ and his actions less likely to be ‘evidence of irretrievable depravity.’”⁶⁰ As a consequence, the Supreme Court admonishes us that criminal offending as a young person may not be indicative of adult character and behavior.⁶¹

The Supreme Court’s line of decisions distinguishing children and adolescents from adults is informed by decades of developmental research. The Supreme Court has adopted rulings supported by the

⁵⁰ Matter of Thomas, 21 I&N Dec. 20 (BIA 1994).

⁵¹ In fact, nationally, nearly half of juvenile arrests are resolved without the filing of a delinquency petition. (In 2021, the latest data available, 45% of arrests did not result in a petition.) Of the cases in which a court petition is filed, roughly half of those are resolved or diverted without a finding or adjudication of delinquency. See Easy Access to Juvenile Court Statistics: 1985-2021 at <https://www.ojjdp.gov/ojstatbb/ezajcs/asp/process.asp> (lkast visited March 15, 2024).

⁵² Mich. Comp. Laws Ann. §712A.1

⁵³ *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005).

⁵⁴ *Graham v. Florida*, 560 U.S. 48, 73 (2010), as modified (July 6, 2010) (internal citations omitted).

⁵⁵ *Miller v. Alabama*, 567 U.S. 460, 472 (2012) (internal citations omitted).

⁵⁶ *Roper v. Simmons*, 543 U.S. 551 (2005)

⁵⁷ See generally *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005), *Graham v. Florida*, 560 U.S. 48, *Miller v. Alabama*, 567 U.S. 460 (2012), *Montgomery v. Louisiana*, 577 U.S. ____ (2016), *Jones v. Mississippi*, 593 U.S. ____ (2020).

⁵⁸ *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

⁵⁹ *Montgomery v. Louisiana*, 577 U.S. ____ (2016).

⁶⁰ *Montgomery v. Louisiana*, 577 U.S., at ____ (slip op., at 8) (quoting *Roper*, supra, at 569–570; alterations, citations, and some internal quotation marks omitted).

⁶¹ *Roper v. Simmons* (03-633) 543 U.S. 551 (2005).

scientific evidence that acknowledge that youth possess a “lack of maturity and an underdeveloped sense of responsibility. . . [which] often result in impetuous and ill-considered actions and decisions.”⁶² Scientific studies have repeatedly demonstrated that the ability to make sound judgment does not develop until the early to mid-twenties.⁶³ Juvenile courts have thus been shaped to affirm the principle that because children and adolescents are fundamentally different from adults, young people should not be subjected to the same legal standards, systems, or penalties.

This developmentally appropriate lens for misconduct of children and youth suggests that juvenile contacts with law enforcement and juvenile delinquency adjudications, without any further indication of incorrigibility, should not be used to find that an applicant for an immigration benefit possesses “bad moral character.”

A FRAMEWORK FOR DEVELOPMENTALLY APPROPRIATE CONSIDERATION OF MISCONDUCT

“Just because you know the offense, doesn’t mean you know the offender.”⁶⁴

While juvenile contacts with law enforcement and juvenile delinquency adjudications, without any further indication of incorrigibility, should not be used to find that a youth possesses “bad moral character.” It is possible to lay out a developmentally appropriate frameworks for considering the misconduct of children and youth that warrants deeper inspection. As the juvenile justice legal system has divined, because children display a “lack of maturity and an underdeveloped sense of responsibility. . . [which] often result in impetuous and ill-considered actions and decisions,”⁶⁵ and because “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,”⁶⁶ children who engage in past misconduct deserve developmentally informed procedures to assess culpability. The following tips are designed to help adjudicators of discretion understand the way in which past misconduct is understood from the underlying law enforcement and statutory schemes related to children and youth who come in conflict with the law.

Records. In immigration courts, adjudicators may see various records for children without encountering a formal adjudication or court disposition. We gathered the following tips for understanding children’s law enforcement records during a November 2023 NAIJ Training on Discretion.⁶⁷

⁶² *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005).

⁶³ Laurence Steinberg, Adolescent Development and Juvenile Justice, 5 *Annual Review of Clinical Psychology* 459 (2009); Ezequiel Mercurio et al., Adolescent Brain Development and Progressive Legal Responsibility in the Latin American Context, 11 *FRONTIERS IN PSYCH.* 627, 24 April 2020.

⁶⁴ Dr. Elizabeth Cauffman, PhD. Webinar on Adolescent Development for NAIJ, June 20, 2023, organized by the Center for the Human Rights of Children, Loyola University Chicago School of Law.

⁶⁵ *Id.*

⁶⁶ Dickon Reppucci, *supra* note 23.

⁶⁷ NAIJ Webinar on Adjudicating Discretion, November 9, 2023, organized by the Center for the Human Rights of Children, Loyola University Chicago School of Law, featuring Hon. Amy Davenport, Chief Administrative Judge, Vermont Superior Court Judge (ret.).

Tips for understanding records for children and youth that contain information related to misconduct:

- **Information Contained in the I-213, the ORR Record, or Other Third-Party Allegations.** Disclosures made by an adolescent, especially made under duress or while in custody, may not be accurate or reliable because of adolescent development, traumatic stress, and other vulnerabilities. Research suggests that children ages 15 and younger “may be especially vulnerable to the pressures of interrogation and the possibility of false confession.”⁶⁸ Disclosures made by children to CBP officials, ORR officials, and other third-parties unavailable for cross-examination should not be used against children and youth facing deportation.
- **FBI Fingerprint Checks.** Despite confidentiality and sealing of juvenile records, the system can be “leaky” such that records that are intended to be sealed or confidential are shared out into other systems, for example with the FBI and DHS. For this reason, an FBI “hit” for a child may appear alongside a corresponding adult criminal code for which the child was taken into custody. However, as juvenile systems do not apply adult criminal standards and processes, the code cited in an FBI fingerprint check is not particularly instructive of the underlying facts nor indicative of the outcome of the underlying juvenile proceedings.
- **Confidential, Sealed, and Expunged Juvenile Records.**⁶⁹ A hallmark of juvenile proceedings is confidentiality and the proposition that juvenile records cannot be used and should not be used against children and youth, particularly when those records are sealed or expunged. The underlying premise for sealing or expunging juvenile records is that they are not considered relevant to character determinations made in adult circumstances. In many states, there is an automatic expungement or sealing that takes place in order to effectuate confidentiality and protect children and youth from having law enforcement contacts used against them. The Department of Justice has funded several programs to ensure youth can have their contacts with law enforcement properly cleared stating that “... criminal and juvenile justice systems, educational institutions, employers, landlords, and the public all have an ongoing role to play in ensuring that youthful transgressions do not lead to permanent collateral consequences.”⁷⁰ Immigration judges should also be mindful that, if the prosecutor and / or court found the underlying misconduct to be particularly grave, most states allow adult charges to be

“It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals, but not to children.”

- SCOTUS, 1967

TERMS TO KNOW:

- **Expungement** is the process of destroying or eliminating juvenile records. The goal of expungement is to make it as though the records never existed.
- **Sealing** makes juvenile records unavailable to the public but allows some agencies and individuals to access records.
- **Confidentiality laws** require that states make juvenile records confidential, allowing access to schools, crime victims, the media, and the public only specific instances.

⁶⁸ Steven A. Drizin & Richard A. Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C. L. Rev. 891 at 943 (2004).

⁶⁹ Graphic based on Andrea E Coleman, *Expunging Juvenile Records: Misconceptions, Collateral Consequences, and Emerging Practices*, Office of Juvenile Justice and Delinquency Prevention (2020), <https://ojjdp.ojp.gov/publications/expunging-juvenile-records.pdf> (last visited March 15, 2024).

⁷⁰ *Id.*

brought against children and adolescents. Most states have “carve outs” for serious violent offenses that allow prosecutors to file directly in adult court or move a case from juvenile to adult court.⁷¹

- **Mere Arrests.** Often, when an FBI record comes back, it may show a child or adolescent was merely arrested; the arrest may not have been referred for prosecution at all; or, if referred for prosecution, may not have resulted in charges being filed before a juvenile court. Mere arrests alone do not indicate anything about why the charges were not pursued farther. We gathered the following tips for understanding “mere arrests” during the November 2023 NAIJ Webinar on Discretion.

Tips for understanding “mere arrests” of children and adolescents:

- *National data indicates that most juvenile arrests result in dismissal—often due to lack of actionable evidence to support the underlying charge—or “diversion” to programs or services. This is done so that children and adolescents can avoid the juvenile justice system altogether. If the child or adolescent presented a risk to public safety, there would likely be different outcomes than release or diversion.*
- *Mere arrests can be the result of completely benign activity for youth. Specifically, it is not uncommon for youth to be involved in mass arrests irrespective of whether they have engaged in illicit activity. For example, if there is a fight or other incident reported to police, often all the kids in the vicinity (a park, a housing development, etc.) will get swept up in an arrest, and it will later turn out that some were just walking by, leaving school, etc.*
- *Sometimes arrest is used as crisis intervention! Take, for example, arrests for domestic violence. In some instances when young people are in conflict with family members, the youth may be arrested for a variety of reasons unrelated to culpability, including a need to protect youth at risk in their homes, a desire to avoid a child welfare referral for a family, a need to separate youth and adults in emergency situations and/or a desire to require youth or families to engage in services following arrest. While “domestic violence” charges are among the most common arrest charges for young people, nationwide, these arrests frequently do not result in court referrals or adjudications.⁷²*

In short, mere arrests tell the adjudicator very little about the youth, his or her behavior or character, or the juvenile justice measures taken to address the underlying situation.

⁷¹ Delinquency Cases Waived to Criminal Court, 2018 USDOJ OJ,P <https://ojjdp.ojp.gov/publications/delinquency-cases-waived-2018.pdf> (last visited, March 14, 2024).

⁷² Lisa S. Jacobs, *New Tool Will Help Form Responses to Adolescent Domestic Battery*, Juvenile Justice Information Exchange (August 8, 2016) <https://jjie.org/2016/08/08/new-tool-will-help-form-responses-to-adolescent-domestic-battery/>.

Status Offenses. Some children and youth acquire records of law enforcement contact merely by their status as a child or adolescent and by engaging in relatively typical adolescent behavior. “A status offense is a noncriminal act that is considered a law violation only because of a youth’s status as a minor. Typical status offenses include truancy, running away from home, violating curfew, underage use of alcohol, and general ungovernability.”⁷³ Marijuana is quickly being added to the list of status offenses for children and youth: in 26 states, marijuana use can be categorized as a status offense since marijuana use is a law violation due to the youth’s age.⁷⁴ Status offenses are closely linked with the effects of peer pressure on adolescent development and decision making.⁷⁵

**All About
Juvenile Justice
Purpose
Statements**

ADJUDICATION IS NOT A CRIMINAL CONVICTION		RESTORATIVE JUSTICE PRACTICES
26%		22%

“Except as otherwise provided, proceedings under this chapter are not criminal proceedings” Mich. Comp. Laws § 712A.1 (2021)

Particularly Serious Past Acts. In very rare and extraordinary circumstances, some children and youth will present before the court with particularly serious past misconduct. As discussed herein, the United States Supreme Court has provided guidance in evaluating whether and how youth should be held accountable for these behaviors and, in doing so, relied upon the developmental research and neuroscience demonstrating the difference between youth and adults.

In *Miller v. Alabama*, the Court evaluated the propriety of applying life without parole to two 14-year-old juveniles who had been convicted of murder. Here it is extremely important to highlight that these two adolescents were tried and convicted *as adults*. First, the Court ruled that the categorical or mandatory imposition of a life without possibility of parole sentence upon young people under the age of 18 is a violation of the United States Constitution’s prohibition of cruel and unusual punishment. The Court went on to establish a framework for analyzing the propriety of imposing an extraordinary punishment (such as life without parole) on children who engaged in criminal behavior. Indeed, deportation is also a significant and permanent deprivation of a liberty interest.

The Court in *Miller* identified five factors to be considered in determining whether (*as a matter of discretion*) to impose a sentence of life without parole on a juvenile: the juvenile's age and immaturity; family home environment; circumstances of the offense, including the role the juvenile had in the offense and any influence of peer pressure; the incapacities of youth that may have disadvantaged the juvenile in dealing with the justice system; and the juvenile's potential for

⁷³ Literature Review OJJDP, DOJ https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/status_offenders.pdf (last visited, March 14, 2024).

⁷⁴ Discussion at 11/9 NAIJ training, remarks of Judge Amy Davenport.

⁷⁵ *Id.* remarks of Judge Davenport NAIJ training.

rehabilitation. These have come to be known as the “*Miller* factors.” Courts across the nation have increasingly shifted away from categorical punishments and now apply these individualized factors in exercising discretion in determining whether and how to hold young people responsible for their behaviors. Again, these factors are applied by criminal courts to adolescents cases after the determination has been made to try the child or adolescent as an adult. Nonetheless, it provides guideposts for assessing culpability of youth as a matter of discretion.

CONCLUSION

The United States Supreme Court has made the critical observation “that the character of a juvenile is not as well formed as that of an adult[;] the personality traits of juveniles are more transitory, less fixed.”⁷⁶ As a result, the Supreme Court has found that “incorrigibility is inconsistent with youth,” and that assessing the youth’s character as fixed “reflects an irrevocable judgment about [a youth’s] value and place in society, at odds with a child’s capacity for change.”⁷⁷

All 50 states have juvenile justice systems with express goals of rendering adjudications that foster family unity and encourage and strengthen family ties.⁷⁸ All actions taken in the juvenile justice system are designed to rehabilitate, not punish, children in recognition of a child’s capacity for change and as an investment in our collective future. It is at odds with juvenile justice systems everywhere that an immigration court might undo that investment by subjecting a child to deportation as a matter of discretion.

⁷⁶ *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005).

⁷⁷ *Graham v. Florida*, 560 U.S. 48, 73 (2010), *modified on July 6, 2010* (internal citations omitted).

⁷⁸ In preparing this memo, law student researcher reviewed all fifty states’ purpose statements, guiding principles, or legislative history.