**Maine Law Review**

Volume 69 | Number 1 Article 4

January 2017

# Kids Will be Kids: Time for a "Reasonable Child" Standard for the Proof of Objective Mens Rea Elements

Christopher M. Northrop
*University of Maine School of Law*

Kristina R. Rozan
*University of Maine School of Law*

# KIDS WILL BE KIDS: TIME FOR A "REASONABLE CHILD" STANDARD FOR THE PROOF OF OBJECTIVE *MENS REA* ELEMENTS

*Christopher Northrop and Kristina Rothley Rozan*

# KIDS WILL BE KIDS: TIME FOR A "REASONABLE CHILD" STANDARD FOR THE PROOF OF OBJECTIVE *MENS REA* ELEMENTS

*Christopher Northrop and Kristina Rothley Rozan**

## I. INTRODUCTION

When a juvenile[1] is charged with a criminal offense, it is the prosecutor's and the defender's goals to prove and disprove, respectively, the *mens rea* element of the alleged crime. The lowest level of criminal culpability—negligence—typically establishes the "reasonable person" as the reference point for the prosecutor and the defender to use as to whether the child is to be held criminally responsible. For example, according to the Model Penal Code (hereinafter "MPC"), a person is negligent when his failure to perceive a particular substantial and unjustifiable risk "involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."[2] Some states' criminal statutes not only make reference to a "reasonable person" standard in their definition of negligence, but also in their definition of recklessness, the next higher level on the spectrum of culpability. For example, in Maine, a person is reckless when their conscious disregard of a risk involves "a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation."[3]

Under tort law, a child accused of negligence receives special consideration unless certain exceptions apply. According to the Restatement (Third) of Torts, a person negligently caused harm if they did not exercise "reasonable care under all circumstances."[4] For an adult defendant, in many cases it is sufficient for the fact-finder to consider only the harm's foreseeable likelihood and severity, and whether the defendant took precautions to eliminate or reduce its risk.[5] However, in cases involving children, "the inquiry into reasonable care . . . *requires* attention to considerations or circumstances that supplement or somewhat *subordinate* the

* Christopher Northrop is a clinical professor the University of Maine School of Law, where he launched its Juvenile Justice Clinic in 2006. Prior to joining Maine Law, Professor Northrop spent many years in private practice, concentrating on juvenile defense work. He has been involved with the National Juvenile Defender Center (NJDC) since its inception, and has served as a consultant for NJDC assessments of statewide juvenile defender systems in a number of states. Chris helped NJDC develop its Juvenile Training Immersion Program and its National Juvenile Defense Standards.

Kristina R. Rozan, Esq., is licensed to practice law in Maine. She is a recent graduate of the University of Maine School of Law, and holds a PhD from Yale University. At Maine Law, she worked with juvenile clients in the Cumberland Legal Aid Clinic. The views expressed in this article are the authors' alone and do not represent the opinions of any other organization or persons. All of Ms. Rozan's contributions occurred while she was a student.

1. Our definition of juvenile is any person who has not attained the age of 18.
2. Model Penal Code § 2.02(2)(d) (Am. L. Inst. 2015).
3. 17-A M.R.S.A § 35(3)(c) (effective Sept. 20, 2007).
4. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 3 (2010).
5. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 3 cmt. d. (2010).

primary factors,"[6] including the actor's age, intelligence, and experience, unless the child was engaged in a dangerous activity "characteristically undertaken by adults."[7] Further, children less than five years of age are categorically presumed to be incapable of negligence under tort law.[8]

Criminal law statutes make no similar special accommodations for children accused of negligence offenses, nor do they specify which characteristics of the accused must or even may be attributed to the reasonable person against which evidence of an actor's mental state is to be compared.[9] The drafters of the MPC provided minimal guidance in characteristics that might not undermine the objectivity of the reasonable person standard, such as whether the accused was "blind or if he had just suffered a blow or experienced a heart attack."[10] But, they warn that "the heredity, intelligence or temperament of the actor would . . . depriv[e] the criterion of all its objectivity."[11]

Instead, it has been left to the courts to decide whether the reasonable person in a criminal statute takes on personal characteristics of the defendant,[12] and the consequences for juvenile defendants have been decidedly mixed. Some courts have viewed this opportunity for discretion, rather, as an inappropriate step into the prerogative of the legislature. For example, in *State v. Heinemann*, the Supreme Court of Connecticut upheld a trial court's instruction that the defendant's age could be used to differentiate him from those threatening him when considering a duress defense,[13] but a requested instruction that his age was also a permissible factor to determine how he would have perceived the threat—regardless of the age of his alleged coercers—was rejected as it would "essentially would require this court to rewrite the entire Penal Code."[14] Conversely, the Court of Appeals of Alaska opined that holding juveniles to an adult standard of care for conversations that result in another person committing a crime would effectuate an inappropriate "broad and major change in the law" whereby juveniles would frequently be held to an adult standard of care.[15]

Notwithstanding these recent inconsistencies in line drawing by individual courts,[16] overall substantive criminal law continues to rely on adult standards of *mens rea* as the appropriate calibration of adolescent guilt.[17] Without express guidance to do otherwise, fact-finders anchor their judgment of a juvenile's culpability in their own adult decision making processes.[18] The result is that we are finding children

6. *Id.* (emphasis added).
7. *Id.*
8. *Id.* § 3(c).
9. Michael Vitiello, *Defining the Reasonable Person in the Criminal Law: Fighting the Lernaean Hydra*, 14 LEWIS & CLARK L. REV. 1435, 1437 (2010).
10. MODEL PENAL CODE § 2.02 cmt. at 242 (2015).
11. *Id.*
12. Vitiello, *supra* note 9, at 1436.
13. State v. Heinemann, 920 A.2d 278, 295 (Conn. 2007).
14. *Id*. at 297.
15. J.R. v. State, 62 P.3d 114, 119 (Alaska Ct. App. 2003).
16. Vitiello, supra note 9, at 1437.
17. Jenny E. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. REV. 539, 590 (2016)
18. *Id.*

criminally responsible for not behaving like reasonable adults. This standard is highly inappropriate and perhaps even irrelevant. Given what science tells us about the functioning of children's brains[19] and what the Supreme Court has said in several recent, high profile cases about juvenile culpability,[20] it unfairly draws youth into the juvenile system.

Inappropriate prosecution of children for any reason, including reliance on an improper reasonable person standard, is perilous to the individuals and to society.[21] First, juvenile system processing of any kind[22] can have lifelong consequences. In the short term, when we label certain acts as "deviant" and treat kids who commit them as "outsiders," we may actually perpetuate the delinquent behavior.[23] In the long term, records of juvenile adjudications can negatively affect educational, employment, housing, and military opportunities, and be used in adult criminal sentencing.[24] Second, it perverts the criminal and juvenile law systems when we hold anyone criminally responsible and, subsequently, punish them in error. Delinquency is committed by almost every youth at some point in time[25] and, after a period of occasional offending, most youth discontinue their delinquent behavior.[26] Third, the way we define criminal culpability has an enormous impacts. In 2009 there were over 1.5 million delinquency cases, and 33% of all these cases resulted in either adjudications of delinquency or transfers to adult criminal court.[27] In some urban areas, there is an extreme prevalence of police and court involvement with youth. A 2004 study in Denver found that 73% of males and 43% of females had been arrested by age 18.[28]

Based on the goals of the juvenile system, significant advances in adolescent development research and recent Supreme Court holdings on juvenile culpability, we argue here that the juvenile code should be amended to explicitly refer to a reasonable child standard for any *mens rea* element that relies on a reasonable person as the measure for criminal culpability. In Part II, we provide an overview of *mens*

---

19. *See* infra notes 27-69 and accompanying text

20. *See* infra notes 70-103 and accompanying text

21. *See* The Ctr. on Juv. and Crim. Just., *Diversion Programs: An Overview*, https://www.ncjrs.gov/html/ojjdp/9909-3/div.html (last visited March 19, 2016).

22. Juvenile justice processing may include arrest (police contact that resulted in referral to the prosecutor or court intake), police custody, detention, diversion, adjudication, deferred disposition, conditions of release, restitution, community service, court appearances, meetings with corrections officers, mandated counseling and program participation, probation, and confinement. *See* Statistical Briefing Book, *Juvenile Justice System Structure and Process*, https://www.ojjdp.gov/ojstatbb/structure_process/case.html (last visited Nov. 8, 2016).

23. *Diversion Programs: An Overview*, *supra* note 21.

24. Julie Ellen McConnell, *Five Devastating Collateral Consequences of Juvenile Delinquency Adjudications You Should Know Before You Represent a Child*, 61 VA. LAW. 34, 34 (2012).

25. Data from Denver between 1987 and 1996 show that each year 47-70% of juveniles committed delinquent acts. David Huizinga et al., *The Effect of Juvenile Justice System Processing on Subsequent Delinquent and Criminal Behavior: A Cross-National Study*, at 49 (2004) (https://www.ncjrs.gov/pdffiles1/nij/grants/205001.pdf).

26. *Id.* at 48.

27. Of the 1,500,000 delinquency cases in the United States in 2004, 488,800 resulted in adjudications of delinquency and over 8,000 others were transferred to criminal courts. Charles Puzzanchera et al., *Juvenile Court Statistics 2009*, NATIONAL CENTER FOR JUVENILE JUSTICE at 7, 45, 48 (2012), http://www.ojjdp.gov/pubs/239114.pdf (last visited Mar. 19, 2016).

28. Huizinga et al., *supra* note 25, at 2.

*rea*, including why it is an element in crimes, how it is used and defined, what the courts have said about who the reasonable person is or can be, who the factfinders think the reasonable person is, and how reasonableness is proven or disproven. We also briefly summarize recent scientific research about the juvenile brain and how can we use this information to construct a "reasonable child" standard. In Part III, we discuss the Supreme Court's holdings on juvenile culpability and argue why they should also apply to proof of the elements for the case in chief. In Part IV, we explain why a reasonable child standard supports of the goals of the juvenile justice system. In Part V, we consider options as to how to change the reasonable person standard to a reasonable child standard. In Part VI, we conclude that, from this point forward, a reasonable child standard should always be used as the reference for proof of objective *mens rea* elements for juveniles, and that legislative amendments to current criminal and juvenile statutes are the best way to achieve this.

## II. *MENS REA*, THE REASONABLE PERSON, AND SCIENCE

The purpose of the *mens rea* element in the definition of crimes is to support the legitimacy of the criminal law system.[29] While there are an infinite number of ways in which people harm each other or jeopardize the health, safety, welfare, and morals of others, we have agreed as a society to generally only hold persons criminally responsible when they commit these acts with intent, knowledge, or some minimum level of carelessness.[30] In other words, the *mens rea* element provides the factfinder with a mechanism to distinguish between when someone has simply stumbled over a dog and when they have kicked a dog.[31] This concept may be relatively straightforward to appreciate but has proved more subtle and challenging in practice. A philosophical split has emerged. One approach to *mens rea* is to define it in terms of the "evil," "wanton," or "malicious" state of mind of the perpetrator.[32] Another approach, as adopted by the MPC, removes the moral judgment from the analysis and focuses instead on the intention of the accused.[33] Rather than choosing one or the other, most jurisdictions have instead combined these approaches in unique ways such that it is now possible to identify twelve distinct *mens rea* terms used by the states and federally.[34] *Mens rea* is a fluid concept that shifts with changing social norms and expectations.[35]

Negligence, generally described as a significant deviation from an acceptable

29. Jeremy M. Miller, Mens Rea *Quagmire: The Conscience or Consciousness of the Criminal Law?*, 29 W. ST. U. L. REV. 21, 21-22 (2001).

30. There are also strict liability crimes, but they are discouraged. Staples v. United States, 511 U.S. 600, 606 (1994); Model Penal Code §2.02.

31. We are alluding to the famous observation by Justice Holmes that "even a dog distinguishes the difference between being stumbled over and being kicked." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (1881).

32. Miller, *supra* note 29, at 22.

33. *Id*.

34. *Id*. at 26. Miller goes on to list twelve levels of *mens rea*: premeditation, willful, intentional, the requisite mental state to perform a felony dangerous to human life, the requisite mental state to perform a felony not dangerous to human life, intent to perform a criminal act clouded by loss of mental stability, knowledge, reckless, negligent, negligent based on relationship, strict liability, and absolute liability. Id. at 39-43.

35. Carroll, *supra* note 17, at 548.

standard,[36] frequently is defined with a combination of subjective and objective elements. The MPC only asks the factfinder to evaluate if it was the purely subjective, "conscious object" of the actor to cause a particular result in deciding whether they acted "purposefully."[37] But whether a person acted "negligently" depends both subjectively on whether "he should be aware of a substantial and unjustifiable risk" and whether his failure to perceive the risk involved an objective "gross deviation from the standard of care that a *reasonable person* would observe in the actor's situation."[38] Aside from some suggestions in the commentary,[39] the drafters do not provide guidance on who this reasonable person should be.

Adult and juvenile courts struggle with how to measure this reasonable person. Part of the difficulty in defining the reasonable person has been a lack of consensus on the purpose for our criminal justice system.[40] Retribution is a dominant and ubiquitous justification for sanctioning dangerous behaviors that cause harm to others.[41] When we convict a person based an objective reasonable person standard, we are punishing them for their failure to meet our expectations of caution. Another prevalent justification for criminal justice is deterrence.[42] In convicting an individual for behaving unreasonably, we seek both to impress upon him the desirability of a future, law-abiding existence, and to discourage all citizens from committing crimes.[43] It is disputable whether the courts or the legislatures can craft a generic "reasonable person" standard that is attainable to both the individual standing before the court, and to all persons referring to this statute or precedent for guidance for their behavior. Indeed, prominent scholars[44] have argued that negligent behavior should be entirely excluded from criminal liability, in part because "the confusion of the 'external' standard of the 'reasonable man' employed in the method of proof with the standard of liability required by *mens rea* [has] given rise to decisions of very dubious validity."[45]

Rather than renouncing culpability for negligent acts entirely, courts have acknowledged the impropriety of applying a single, generic reasonable person standard to all defendants by allowing factfinders to incorporate limited variations of this reference point. Courts start with an objective reasonable person standard, then allow introduction of evidence that may justify dangerous behaviors of a particular defendant. For example, in the famous *Goetz* case, the court held it was proper that Mr. Goetz's "reasonable belief" about his "situation" could include the physical attributes of the victims and defendant.[46] This approach is not always successful. In *State v. Norman*, the Supreme Court of North Carolina held that the

36. Miller, *supra* note 29, at 42.

37. Model Penal Code § 2.02(2)(a) (2015)

38. *Id.* at § 2.02(2)(d) (emphasis added).

39. *Id.* at § 2.02.

40. Vitiello, *supra* note 9, at 1437.

41. The 'Lectric Law Library, *Retribution*, http://www.lectlaw.com/mjl/cl062.htm (2015).

42. Raymond Paternoster, *How Much Do We Really Know about Criminal Deterrence*, 100 J. Crim. L. & Criminology 765, 782 (2010).

43. *Id.*

44. *See* Vitiello, *supra* note 9, at 1438.

45. Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632, 635 (1963).

46. People v. Goetz, 497 N.E.2d 41, 52 (N.Y. 1986).

fact a woman suffered from battered woman syndrome was not relevant in determining the reasonableness of her belief in the necessity to kill her abusive husband.[47]

Similarly, in some juvenile adjudications, the courts have explicitly wrestled with the "initial question [of] how this hypothetical reasonable person is to be defined."[48] After examining the laws of civil negligence in Arizona and around the country, the Court of Appeals of Arizona issued the narrow holding that it was the legislature's intention for the reasonable person reference to be juveniles of like age, intelligence, and experience for a fifteen-year-old charged with criminal recklessness for riding a shopping cart in a parking lot and cases closely analogous.[49] However, the Supreme Court of Connecticut held the age of a defendant charged with robbery could only be considered a factor in evaluation of the objective component—did the defendant's age, size and strength make him more vulnerable to physical threats—of a duress defense. The jury was not allowed to consider the subjective component – was the defendant's moral temperament affected by his age.[50] In *In re A.A.M*, the Court of Appeals of Minnesota found that there was no case law or statutory authority in Minnesota to support a reasonable juvenile standard for the element of consent in a criminal-sexual-conduct case.[51] In *State v. Marshall*, the Court of Appeals of Washington presumed that because the Legislature established a rebuttable presumption that children 8 to 12 years of age were incapable of committing crimes, they intended for the "reasonable man in the same situation" standard for manslaughter to apply to juveniles over 12.[52] However, "the juvenile status of a defendant is part of his situation and relevant to a determination of whether he acted reasonably."[53] In *In re Welfare of S.W.T.*, the Supreme Court of Minnesota held that the culpable negligence of juveniles charged with aiding and abetting manslaughter must be decided with reference to the conduct and appreciation of risk reasonably to be expected from an ordinary and reasonably prudent juvenile of a similar age.[54] In *J.R. v. State*, the Court of Appeals of Alaska determined that to sustain a charge of murder in the second degree, the question of whether a juvenile defendant displayed a reckless disregard for life must be judged by whether his conduct conformed to that of a reasonable juvenile.[55] In *State v. Oaks*, the Court of Appeals of Arizona used an amendment to the state constitution about automatic transfer of juveniles charged with certain crimes to adult criminal court to dictate the use of an adult reasonable person standard at trial. This amendment required any older juvenile accused of a violent crime to be "subject to the same laws as adults," which the court held to mean that a fifteen-year-old charged with aggravated assault was properly measured against the standard of a reasonable person, and not that of a

47. State v. Norman, 378 S.E.2d 8, 14 (N.C. 1989).
48. *In re* William G., 963 P.2d 287, 293 (Ariz. Ct. App. 1997).
49. *Id*.
50. State v. Heinemann, 920 A.2d 278, 295 (Conn. 2007).
51. *In re* A.A.M., 684 N.W.2d 925, 928 (Minn. Ct. App. 2004).
52. State v. Marshall, 692 P.2d 855, 857 (Wash. Ct. App. 1984).
53. *Id.*
54. *In re* Welfare of S.W.T., 277 N.W.2d 507, 514 (Minn. 1979).
55. J.R. v. State, 62 P.3d 114, 119 (Alaska Ct. App. 2003).

reasonable juvenile of similar age.[56]

Regardless of any differences between adult and juvenile courts in the features of the accused that may or may not be ascribed to the reasonable person standard, or how reasonableness is proven or disproven, the methods in which the state proves the objective *mens rea* elements are similar. In both adult and juvenile court, absent a person's outright admission regarding his state of mind, his mental state must necessarily be ascertained by inference from all relevant surrounding circumstances.[57] Furthermore, there are no additional demands placed on the state to prove their case when the accused is a juvenile. For example, in *State v. Marshall*, the Court of Appeals of Washington held that the standard of conduct of a reasonable 15-year-old is an objective standard, "within the ken of the average fact finder, as is the standard of conduct of a reasonable adult," and, therefore, that expert testimony was neither needed nor required.[58]

The most fundamental requirements of our criminal statutes are that they clearly indicate when people have acted immorally, and that they are suitable and effective.[59] Two principal ethical arguments are offered as to why negligent acts are immoral.[60] The first states that negligent actors exhibit such an indifference to social values that they deserve punishment.[61] The second, closer aligned with tort law, is that negligent actors have violated their moral duty not to harm social values.[62] Despite long-standing, vigorous debate over the validity of negligence as a crime,[63] the ubiquity of criminal negligence statutes indicates our society's general agreement on the immorality of these acts. "Suitable" means that the level of the state's response to the act in terms of liberties taken and the intensiveness of rehabilitative efforts are appropriate. "Effective" means that the statute has the desired individual and general deterrence.

In the past, we have adjusted criminal statutes to satisfy these requirements based on shifting social norms and policy changes. For example, the juvenile system was initiated at the beginning of the 19th century by social reformers seeking a more compassionate and rehabilitative path for delinquent youth who were being tried similarly to adults, and then were indiscriminately confined with hardened adult criminals and the mentally ill in large overcrowded and decrepit penal institutions.[64] In the late 1980s, based on the splashy promotion of the "super-predator" archetype, the public perception that juvenile crime was on the rise, and general fears that the system was too lenient, many states adjusted their criminal laws towards a more punitive goal, which included mandatory sentences and automatic adult court transfer for certain crimes.[65]

---

56. State v. Oaks, 104 P.3d 163, 167 (Ariz. Ct. App. 2004).

57. *See In re* William G., 963 P.2d 287, 292 (Ariz. Ct. App. 1997).

58. 692 P.2d 855, 857 (Wash. Ct. App. 1984).

59. Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 Colum. L. Rev. 632, 636 (1963).

60. *Id.*at 637

61. *Id.*

62. *Id.* at 637-38.

63. *Id.*

64. Ctr. for Crim. Juv. & Crim. Just., *Juvenile Justice History*, http://www.cjcj.org/education1/juvenile-justice-history.html.

65. *Id.*

Today, significant advances in brain research offer contemporary bases for the continued progression in the definition of criminal statutes. Our understanding about the capacities and changes in the brain during adolescence can help us to re-craft laws and their application to be more justifiable, fair, and effective. It has been a regular tradition of our criminal system to adjust our definitions and concepts of criminality to match shifting social norms and expectations, including concepts of *mens rea*.[66]

With respect to need for statutes to define immoral acts, our society wishes to punish persons who are indifferent to social norms. Unless an accused person confesses to such indifference, the fact-finder relies on circumstantial evidence a proof of indifference.[67] Brain research shows that juveniles are not aware of social norms, and in fact engage in reward-seeking behaviors that may challenge social norms as a normative part of their development.[68] Therefore, what appears as careless indifference based on the standard of a reasonable adult is a normal and essential part of the brain development of a reasonable juvenile.[69] This does not mean kids should not be held responsible for harm that results from their negligence, but that it is inappropriate to criminalize this behavior as being immoral. Furthermore, according to the current language of the criminal statutes, negligence culpability attaches when there is a gross deviation from the standard of care of a reasonable person.[70] Based on current science, it is normal and expected that children as a class will take significantly less care than adults.[71] The options are, then, to eliminate negligence culpability for children entirely or else to only criminalize gross deviations from the standard of care that is to be expected for reasonable children.

Considering negligence as the failure to satisfy a duty, brain research informs us about the duties we can justly assign to juveniles and about their ability to satisfy them. Brain research supports both the time-honored tradition of tort law to assign duty as a function of age, and the age-basis on which we allow young persons to assume responsibilities like voting, drinking alcohol, and driving a car. Simply by virtue of their age, juveniles are less aware of their duty to others. They are also less able to assess the risk that their actions might violate their duty to others.[72] Therefore, a reasonable juvenile has less notice of her societal responsibilities and less capacity to satisfy them. Thus, the brain research predicts that a substantial gap between kids' behavior and the fulfillment of adult duties to society is completely normal.

Suitable criminal statutes result in punishment that is proportional to the

66. Carroll, *supra* note 17, at 553.

67. *Id*. at 558.

68. Brief for Am. Psychological Ass'n et al. at 30 as Amici Curiae Supporting Petitioners, Miller v. Alabama, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647) (citing Laurence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 BRAIN & COGNITION 160, 162 (2010)).

69. *Id.* at 10 (citing Franklin Zimring, *Penal Proportionality for the Young Offender*, in YOUTH ON TRIAL 271, 280 (Thomas Grisso & Robert Schwartz eds. 2000)).

70. Model Penal Code § 2.02(2)(d) (Am. L. Inst. 1985).

71. Brief of Am. Psychological Ass'n et al., *supra* note 68, at 7 (citing Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 344 (1992)).

72. *Id.* at 10.

seriousness of an offence. Brain research tells us that a juvenile's deviation from an adult reasonable standard of behavior is not the indicator of a "criminal mind" in the same way that it might be for an adult.[73] And so carelessly damaging a car in a parking lot with a shopping cart by an adult and by an child mean different things, and we are less justified in describing that behavior as evil when done by a child.

Brain research can also help us to craft and apply statutes that have the desired individual and general deterrence. Part of the role of the criminal statutes is to provide notice to society of immoral acts. Indeed, the MPC's drafters argue that negligence liability is an effective deterrent because it motivates people to "use their facilities and draw on their experience in gauging the potentialities of contemplated conduct," such that they may take care before acting.[74] A child is even less likely to have read the negligence statutes than an adult. Another role of criminal statutes is to expressly record society's well-known principles of right and wrong. The MPC drafters further justify negligence culpability because they say it properly imputes a "moral defect" to people who act out of insensitivity to the interests of others. But, brain research tells us that juveniles lack an adult's capacity for mature judgment.[75] The reasonable juvenile has less direct experience and less indirect general knowledge. And, insensitivity to others, although perhaps reprehensible, is a typical characteristic of children and not a moral defect.

In summary, brain research has tipped the scales in favor of consistently adopting a reasonable child standard for all criminal statutes, and particularly for negligence-level crimes. Whereas 10 years ago, based on the history of our legal and tort systems and our layman's understanding about children, decent arguments could be made both ways. But now, the research says that it is inconceivable that we should expect a child to behave like a reasonable adult. What the reasonable adult would label as delinquency is actually normal and necessary behavior for kids.

## III. SCOTUS SUPPORT FOR THE REASONABLE CHILD STANDARD

Since 2005, the Supreme Court of the United States has issued a handful of opinions that have rocked the world of juvenile law.[76] In these opinions, the Court combined the "commonsense reality"[77] of age with the latest brain science research and what they termed as general characteristics of adolescents that "any parent knows,"[78] to prescribe separate treatment for children who are suspected or convicted of crimes. As summarized by the Court, children often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them, they are more susceptible to outside influence, and their character is still evolving.[79] The Court concluded, therefore, that children as a class

73. *Id.* at 19.

74. The American Law Institute, *Model Penal Code and Commentaries* 243 (1985) (commenting on Model Penal Code § 2.02(2)(d)).

75. Brief of Am. Psychological Ass'n et al., *supra* note 68, at 13.

76. Elizabeth Scott, Thomas Grisso, Marsha Levick & Laurence Steinberg, *The Supreme Court and the Transformation of Juvenile Sentencing* (Sept. 30, 2015), http://modelsforchange.net/publications/index.html

77. J.D.B. v. North. Carolina, 564 U.S. 261, 265 (2011).

78. Roper v. Simmons, 543 U.S. 551, 569 (2005).

79. *Id.* at 569-70.

are less criminally culpable than adults and should be accorded different sentencing guidelines, even when convicted of the most heinous crimes. When performing the custody analysis for *Miranda* rights during police interrogations, courts must now take into account all of the relevant circumstances of the interrogation, including the age of the suspect.

In *J.D.B. v. North Carolina*, the Court held *Miranda* cases involving kids require special analysis because they are more likely than adults to make false confessions.[80] Indeed, the Court goes so far as to say that, in many cases, the evaluation of *Miranda* cases would be nonsensical absent the consideration of age,[81] and to ignore age would be a cost to the juvenile's constitutional rights.[82] All suspects in custody must receive a reading of their *Miranda* rights before they are interrogated. The inquiry as to whether the suspect was, in fact, in custody is purely objective with no consideration of the suspect's actual mindset. The first step in this inquiry is to describe the circumstances surrounding the interrogation.[83] The second is to ask, given those circumstances, whether a reasonable person would have felt at liberty to terminate the interrogation and leave.[84] The Court held that the suspect's age impacts the way we must address both of these steps.[85] Police are required to examine all circumstances, meaning any circumstance that would have affected how a reasonable person "in the subject's position" would perceive their situation.[86] A suspect's identity as a minor, according to the Court, cannot be disentangled from these circumstances.[87] Given that, as a class, children are less mature, less responsible, and more vulnerable or susceptible to pressure, the Court declared the reference against which to evaluate a suspect's interpretation of their liberty is not a "reasonable person," but a "reasonable child."[88]

In *Roper v. Simmons*, the Court held that the death penalty is unconstitutional, disproportionate punishment for juveniles.[89] Relying, in part, on the latest scientific and sociological studies as confirmation of the traditional wisdom of parents, the Court summarized that we can objectively conclude that juveniles possess the qualities of immaturity, vulnerability, and a lack of true depravity.[90] Therefore, "their irresponsible conduct is not as morally reprehensible as that of an adult," even when having committed the most heinous crimes.[91] They are more vulnerable or susceptible to negative influence, outside pressures, including peer pressure, and psychological damage. And, their lack of maturity results in impetuous and ill-considered actions and decisions, and lowers the likelihood of their taking any cost-benefit analysis. Hence, the death penalty is less likely to serve as a means of

80. *J.D.B.*, 564 U.S. at 269.
81. *Id.* at 275.
82. *Id.* at 281.
83. Thompson v. Keohane, 516 U.S. 99, 112 (1995).
84. *J.D.B.*, 564 at 270.
85. *Id.* at 276.
86. *Thompson*, 516 U.S. at 112.
87. *Id.*
88. *Id.* at 271-72.
89. Roper v. Simmons, 543 U.S. 551, 574 (2005).
90. *Id.* at 573.
91. *Id.* at 561.

deterrence than it would for adults.[92]

In *Graham v. Florida*, the Court held that life without parole for juvenile non-homicide offenders is a violation of the Eighth Amendment prohibition against cruel and unusual punishment.[93] Age should be a factor in the analysis of the severity of sentencing, reasoned the Court, because it affects the severity of the punishment—a juvenile spending their life in prison will be committed for a larger proportion of their life than an adult[94]—and the rehabilitative potential of the offender (which is greater for children). Life without parole for non-homicide juveniles also does not serve the legitimate penological goals of retribution, deterrence, and incapacitation.[95] Referring to *Roper*, the Court noted that juvenile offenders categorically have diminished moral culpability.[96] The Court also reviewed legislative enactments and actual sentencing practices in the United States and internationally to determine that there is a general consensus against the sentencing of non-homicide juveniles to life without parole.[97]

In *Miller v. Alabama*, the Court held that mandatory life-without-parole sentences for juveniles are unconstitutional.[98] A judge's or jury's lack of sentencing discretion based on the convicted juvenile's youth and its attendant characteristics, along with the nature of his crime, would be, according to the Court, inconsistent with their "lessened culpability" and greater "capacity for change."[99] The Court reasoned that the categorical bans on certain punishments for being disproportionate when applied to juveniles announced in *Roper* and *Graham*, and the requirement that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death initiated in *Woodson*, lead to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment.[100] Note that in *Montgomery*, the Court declared that *Miller*'s prohibition on mandatory life without parole for juvenile offenders announced a new substantive rule that, under the Constitution, must be retroactive.[101]

While the holdings of these cases pertain only to the delivery of *Miranda* warnings and sentencing, the justification and reasoning which form their bases broadly apply to the characteristics of juveniles as a class that are unquestionably relevant to the state's proof of its case in chief in a juvenile adjudication. The most fundamental principle in our criminal justice system is that we only burden the liberties of those who are criminally culpable.[102] Beginning with *Roper* and then again in *Graham*, *J.D.B.*, and *Miller*, the Court repeatedly and forcibly proclaims that a juvenile's irresponsible conduct is not as morally reprehensible as that of an adult. If a child's culpability is lower even when having committed a heinous

92. *Id.* at 561-62.
93. Graham v. Florida, 560 U.S. 48, 82 (2010).
94. *Id*. at 70.
95. *Id*. at 71.
96. *Id*. at 68.
97. *Id.* at 80.
98. Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012).
99. *Id*. at 2460 (quoting Graham v. Florida, 560 U.S. 48, 68, 74 (2010)).
100. *Id*. at 2463-64.
101. Montgomery v. Louisiana, 136 S. Ct. 718, 736-37 (2016).
102. Carroll, *supra* note 17, at 545.

crime,[103] then it is unquestionably lower for negligence offenses, the least villainous crimes. Given that the "reasonable person" is the standard by which we assess criminal negligence, the Court's broad proclamations on reduced juvenile culpability prevail upon us to include childhood as a characteristic of the reasonable person reference.

These Supreme Court holdings speak to the suitability of criminal negligence statutes as applied to children. As is discussed and undertaken in *Miller*, it is appropriate to regularly review the match between culpability and potential penalties. And as observed in *Graham*, the lower age of a juvenile defendant can exaggerate the liberties taken from someone convicted—or adjudicated—of a crime. Specifically, the records of a youth's involvement with the juvenile justice system often remain available indefinitely, creating obstacles as they seek employment, education, housing, and other opportunities.[104] It is doubtful that anyone would argue a child convicted or simply accused of criminal negligence is deserving of a lifetime stigma. Furthermore, these obstacles can directly interfere with any rehabilitative services initiated by the judicial or executive branches of the government as they attempt to guide a negligent child back toward a more productive and law-abiding path. In *J.D.B.*, the Court notes that all American jurisdictions accept the idea that age is a relevant circumstance in negligence suits.[105]

These Court opinions also enjoin us to carefully reconsider the effectiveness of criminal negligence statutes with respect to individual and general deterrence. As indicated in *Roper*, children cannot and do not engage in the same cost-benefit analysis as adults.[106] They are more vulnerable or susceptible to negative influence and outside pressures, including peer pressure. Hence, they are much less likely to be dissuaded to act either because of the knowledge that an act is deemed illegal and unfavored by society, or because of the potential consequences of that act.

While it might be raised that these Supreme Court holdings are highly applicable to the subjective intent or knowledge of an individual defendant, as they clearly are, the Court unequivocally states that "childhood" yields objective conclusions, independent of the mindset of any particular child.[107] The *Miller* Court describes immaturity, impetuosity, and failure to appreciate risks and consequences as "hallmark features" of juveniles.[108] Referencing the reasonable person standard in *Miranda* cases in particular, even the state admits that some personal characteristics are relevant to an objective custody analysis, like blindness.[109] And the *Graham* Court broadly declares that while a juvenile is not absolved of responsibility for his

103. Roper v. Simmons, 543 U.S. 551, 570 (2005).

104. JUVENILE LAW CENTER, *Juvenile Records: A National Review of State Laws on Confidentiality, Sealing and Expungement* 6, http://juvenilerecords.jlc.org/juvenilerecords/documents/publications/national-review.pdf (2014).

105. J.D.B. v. North Carolina, 564 U.S. 261, 274 (2011) (citing Restatement (Third) of Torts § 10 cmt. b (Am. Law Inst. 2005)).

106. *Roper*, 543 U.S. at 572 (citing Thompson v. Oklahoma, 487 U.S. 815, 837 (1988) (plurality opinion)).

107. *J.D.B.*, 564 U.S. at 275.

108. Miller v. Alabama, 132 S. Ct. 2455, 2468 (2012).

109. *J.D.B*, 564 U.S. at 278

actions, his transgressions are "not as morally reprehensible as that of an adult."[110] The Court now recognizes that children, as a group, are less mature, more reckless, highly influenced by peers and, at times, incapable of removing themselves from horrific crimes.[111]

## IV. THE "REASONABLE CHILD" AND THE JUVENILE JUSTICE SYSTEM

Juvenile justice provides a system, separate and distinct from criminal justice, which encourages the treatment and rehabilitation of delinquent kids[112] over punishment, and where they can avoid the stigma of a prior criminal conviction.[113] Prior to 1900, most child offenders over the age of seven were imprisoned with adults.[114] However, with society's shifting views on juvenile delinquency, political and social reformers around the turn of the 20th century began to create youth reformatories to house delinquent juveniles—along with some orphans and homeless children—away from adult convicts.[115] States also created separate, less formal adjudication systems where youths were no longer tried as adult offenders, and judges could consider extenuating evidence outside of the legal facts surrounding the crime or delinquent behavior.[116]

Later, Congress took corresponding steps in the furtherance of extending the guardian or "*parens patriae*" role of the state to encourage positive change in children engaged in criminal behavior. The 1938 Federal Juvenile Delinquency Act provided juveniles with special protections such as the right not to be jailed unless it was necessary to secure their custody, safety, or community safety, and the right to be separated from adults.[117] The Juvenile Delinquency Prevention and Control Act of 1968 conditioned federal funds on the states' development of plans designed to address and curb juvenile delinquency in the community. The 1974 Juvenile Justice and Delinquency Prevention Act—most recently authorized in 2002—intended to encourage national standards for the administration of juvenile justice,[118] added further protections including a requirement of "sight and sound separation" between

110. Graham v. Florida, 560 U.S. 48, 68 (2010) (quoting *Thompson*, 487 U.S. at 835 (plurality opinion)).

111. "First, children have a "'lack of maturity and an underdeveloped sense of responsibility,'" leading to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U.S. at 569. Second, children "'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers; . . . and lack the ability to extricate themselves from horrific, crime-producing settings." *Miller*, 132 S. Ct. at 2464.

112. Here, the term "delinquent" is used to describe kids who violate criminal laws or commit status crimes.

113. United States v. One Juvenile Male, 40 F.3d 841, 844 (6th Cir. 1994) (citing United States v. Brian N., 900 F.2d 218, 220 (10th Cir. 1990)).

114. LawyerShop, *History of America's Juvenile Justice System*, http://www.lawyershop.com/practice-areas/criminal-law/juvenile-law/history (last updated Oct. 6, 2015).

115. *See* Julian Mack, *The Juvenile Court*, 23 (No. 2) Harv. L. Rev., 104, 107 (1909).

116. *Id*. at 108.

117. Rudolph Alexander, Jr., *Federal Juvenile Justice Act*, 14 J. FOR JUV. JUST. AND DETENTION SERVICES 63, 63 (1999).

118. 42 U.S.C. § 5602(a)(5) (1974). Paragraph 5, including the "develop and encourage the implementation of national standards" language, was removed when this statute was amended in 2002. 42 U.S.C. § 5602(a) (2002).

youth and adult offenders in detention centers,[119] and a prohibition on placing youth who had committed status offenses[120] in a juvenile or adult detention facility.[121]

Despite these commendable accomplishments by the federal and state governments to take care of children at risk, it cannot be forgotten that the authority of the juvenile justice system comes from its power to enforce criminal statutes. Stated alternatively, the juvenile justice system may burden children's liberties, even with the intent of benign intervention, only when they have broken the law. The Fifth and Fourteenth Amendments, applicable to the federal and state governments, respectively, provide that no person can be deprived of life, liberty, or property, without due process of law. In *Gault*, the Court held that juvenile adjudications, just like adult criminal trials, must "measure up to the essentials of due process."[122] It is a fundamental principle of due process that in order to prove its case, the government must prove every element of the crime beyond a reasonable doubt.[123] While the juvenile justice system has adopted special features clustered around adjudication procedures and dispositional consequences, the standards for determining guilt in the criminal and juvenile systems are identical.[124] As the Court held in *Winship*, the state must prove all elements of a criminal charge against a juvenile beyond a reasonable doubt.[125] And the state's efforts to supply such proof will result in a constitutional deprivation of interests if it is undertaken inappropriately.

Based on the recent Supreme Court holdings in *J.D.B.*, *Roper*, *Graham*, and *Miller*, due process in juvenile adjudications requires the state, when prosecuting a child for an act that constitutes a crime with the *mens rea* element based a reasonable person standard, to refer to a reasonable child. First, it is virtually undisputed that the law should punish only culpable action.[126] The Court in these cases said repeatedly and expressly that children are less culpable than adults. And so, at the most basic level, it would be inconsistent with the Court's holdings to compare children to reasonable adults to measure to measure their culpability. To do otherwise would nullify the authority of the juvenile justice system.

Second, the state typically relies on circumstantial evidence as proof of intent.[127] According to the Court and the scientific data on which it partly relied, children are more impetuous and susceptible to outside pressures. Therefore, the acts of a child and any surrounding circumstances simply cannot be understood, nor may inferences

---

119. 42 U.S.C. §5633(a)(13).

120. Juvenile status offenses are acts in which an adult may legally engage that are considered illegal if performed by a minor. Common examples include running away, ungovernability, truancy, violating a city or county curfew, underage possession and consumption of alcohol, and underage possession and use of tobacco.

121. 42 U.S.C. § 5633(a)(12).

122. Application of Gault, 387 U.S. 1, 30 (1967).

123. *In re* Winship, 397 U.S. 358, 362 (1970).

124. Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 132-33 (2009).

125. *In re Winship*, 397 U.S. at 367-68.

126. Elizabeth Nevins-Saunders, *Not Guilty As Charged: The Myth of Mens Rea for Defendants with Mental Retardation*, 45 U.C. DAVIS. L. REV. 1419, 1428 n.30 (2012) (referring to Donald H. J. Hermann, Mary Roberts & Howard Singer, *Sentencing of the Mentally Retarded Criminal Defendant*, 41 ARK. L. REV. 765, 802 (1988)).

127. Carroll, *supra* note 17, at 558.

be drawn upon them in the same manner that we do for adults. As held in *In re William G.*, a fact-finder's interpretation of the riding of a shopping cart in a parking lot must be different for children than for adults.[128]

Third, an assertion that a person has the requisite intent to commit an offense suggests that the person has the capacity for consciousness, choice, and control,[129] and the Supreme Court has stated that children are presumptively different from adults in these capacities.[130] With respect to consciousness, the Court held that kids possess only incomplete ability to understand the world around them.[131] With respect to choice, the Court said that juveniles lack capacity to exercise mature judgment and has noted legal capacity laws, like smoking bans,[132] that secure kids from hurting themselves by their own improvident acts.[133] And regarding control, the Court declared that kids have less control, or experience with control, over their environment, and they lack the freedom to extract themselves from criminogenic circumstances.[134] The reasonable person reference should reflect the age-appropriate capacity for consciousness, choice, and control of the accused.

And fourth, due process assures that persons generally will not be held criminally responsible unless they had notice of the illegality of their actions. First, except for a limited list of status crimes, no person can be charged without fair notice that his conduct is punishable.[135] This notice requirement does not protect the acts of a person who can prove they had no knowledge of the criminal statute they are accused of violating.[136] To the contrary, an awareness of social norms and expectations can sufficiently provide a person with what will and will not be acceptable behavior. But a reasonable adult will not have the same social awareness as a reasonable child. The Court in *J.D.B.* stated that children lack experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,[137] which again points to the need for the reasonable child reference.

The Due Process Clause also serves the goal of providing litigants a sense of procedural justice.[138] Indeed, the Court has held that a fairness requirement is part of the Due Process Clause in juvenile adjudications.[139] In addition to being

128. *In re* William G., 963 P.2d 287, 293 (Ariz. Ct. App. 1997).

129. Nevins-Saunders, *supra* note 126 at 1428.

130. *Supra*, notes 109-112 and accompanying text

131. J.D.B. v. North Carolina, 564 U.S 261, 273 (2011).

132. *See* Roper v. Simmons, 543 U.S. 551, 569 (2005).

133. *J.D.B.*, 564 U.S. at 273 (citing 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 464–65).

134. *Roper*, 543 U.S. at 569 (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

135. United States Court of Appeals for the Armed Forces, *First Principles: Constitutional Matters: Due Process*, http://www.armfor.uscourts.gov/newcaaf/digest/IB6.htm (last visited Mar. 22, 2016).

136. Carroll, *supra* note 17, at 547.

137. *J.D.B.*, 561 U.S. at 272 (citing Bellotti v. Baird, 443 U.S. 622, 635 (1979) (plurality opinion)).

138. "The Due Process Clause serves two basic goal . . . The other goal is to make people feel that the government has treated them fairly by listening to their side of the story." Doug Linder, *Exploring Constitutional Concepts: Procedural Due Process*, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/proceduraldueprocess.html (last visited Nov. 13, 2016).

139. *In re* Gault, 387 U.S. 1, 30-31 (1967).

constitutionally mandated, this feeling of fair treatment is critical to the effectiveness of the juvenile justice system. In *Gault*, the Court referred to scientific studies suggesting the appearance as well as the actuality of fairness, impartiality, and orderliness may be more impressive and more therapeutic for juveniles than an informal court proceeding where a "fatherly judge" attempts to guide and help a child "by paternal advice and admonition."[140] Most children would instinctively sense the unfairness of being held to an adult standard of reasonableness.

It could be argued that in moving from a reasonable adult standard to a reasonable child standard, kids will not be held responsible for their actions. But, kids will be found criminally responsible for their acts when their negligent behavior deviates from what would be expected from a reasonable person at their age. And, there are other avenues for making kids pay for their misdeeds including the tort system and school discipline.

The over-application of juvenile justice contact does not serve the goals of the system or of society. Arrests and any resultant sanctions do not deter delinquent behavior and may instead exacerbate it.[141] Adolescent delinquency has been shown to be unrelated to adult employment,[142] but being sanctioned for such behavior, however, can be related to increased chances for unemployment.[143]

Finally, despite the good intentions of the juvenile justice system, the collateral consequences of a juvenile adjudication could outweigh any benefits of the state's benevolent interposition of its power. The services kids would receive as part of their disposition and other appropriate sources of support would still be available. And, kids who are adjudicated have difficulty obtaining employment, serving in the military, or obtaining financial aid for college.[144] These burdens are at odds with the goals of rehabilitation and the realization of a law-abiding adult life.

## V. EXPRESS STATUTORY ADOPTION OF THE REASONABLE CHILD STANDARD FOR CRIMINAL NEGLIGENCE

The Supreme Court's recognition of the science establishing an adolescent's diminished culpability and transitory nature leaves two approaches to consider[145] when a system attempts to incorporate this jurisprudence into the adjudication process of children accused of negligence offenses. The first is to use the holdings as grounds to argue over the subjective ability of the accused juvenile to meet the reasonable person standard as it is currently described and understood (the

140. *Id*. at 26.

141. Huizinga et al., *supra* note 25, at 4.

142. *Id.* at 132.

143. Riya Saha Shah & Jean Strout, JUVENILE LAW CENTER, *Future Interrupted: The Collateral Damage Caused by Proliferation of Juvenile Records* 11 (2016), http://jlc.org/sites/default/files/publication_pdfs/Future%20Interrupted%20-%20final%20for%20web.pdf.

144. JUVENILE LAW CENTER, *Youth in the Justice System: An Overview*, http://jlc.org/news-room/media-resources/youth-justice-system-overview (last visited Mar. 22, 2016).

145. Terry A. Maroney, *Adolescent Brain Science After* Graham v. Florida, 86 NOTRE DAME L. REV. 765, 782 (2011).

reasonable adult).[146] The second is to revise the objective standard itself.[147] Here, we argue for the latter. In specific, we suggest that state statutes—and the language of the MPC—defining a "reasonable person" as the reference point for criminal negligence for juveniles must be updated to expressly refer to a "reasonable child." Our rationale is, in summary, that this change is necessary to achieve compliance between juvenile justice and the jurisprudence of the Supreme Court, the goals of the juvenile system, the constitutional basis upon which the juvenile system is authorized, and society's understanding of adolescence and culpability. Statutory recognition validates the discretion of law enforcement officers, corrections officers, DAs, and judges to divert kids participating in low-level delinquency to receive support and make restitution for any harm they may have caused in a manner that does not disrupt what will most probably be their natural maturation toward crime-free adult behavior.[148] A reasonable child standard properly empowers defense attorneys to argue that their clients' acts do not reach the level of culpability sufficient to trigger intervention by the state. A statutory change undertaken by the legislatures dispenses with the aversion of the courts to make a policy-oriented change on their own in response to the Supreme Court's holdings, but without the endorsement of elected representatives. And, absent stronger sealing or expungement options, this shift to the reasonable child standard is the most effective way to shield children from unfair, counterproductive lifelong collateral consequences. We now address each one of these reasons in more detail.

With the Court's forcible reiteration in *Roper*, *Graham*, *J.D.B.*, and *Miller* of the reduced culpability of children, it is arguably inconceivable that participants in juvenile adjudications would continue to compare children's behavior with that of a reasonable adult at any stage in juvenile court proceedings.[149] This conclusion is especially compelling when the Court in *J.D.B.* has explicitly declared the requirement for a reasonable child standard in *Miranda* cases.[150] While the holdings in these cases pertain to sentencing and the custody test in the *Miranda* analysis, the Court does not set any limitations on the points along the course of a juvenile proceeding at which the science to which it referred is relevant. It is hardly far-fetched to apply the Court's beliefs on children's culpability to the proof or disproof of the *mens rea* element of an alleged crime which is precisely at the point where we assign or reject culpability, when diminished culpability is now the Court's operative jurisprudential theory.[151] But, while the neuroscience about the development of juvenile's brains is undeniably based on data collected about individual children, the Supreme Court's holdings in these four self-referential cases are about children as a class. The Court repeatedly and forcefully made statements, demonstrating its belief

146. *See* Carroll, *supra* note 17, at 594.

147. *Id.*

148. Brief of Am. Psychological Ass'n et al., *supra* note 68, at 7 n.5 (citing Terrie Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 685-86 (1993)).

149. *See* Carroll, *supra* note 17, at 576 ("These studies are relevant not only to a calculation of proportional punishment as it relates to the youthful actor's culpability, but also to calculations of mens rea as a signifier of culpability.").

150. J.D.B. v. North Carolina, 564 U.S. 261, 276 (2011).

151. Maroney, *supra* note 147, at 782.

in the relevance of neuroscience to general propositions as to the normal developmental course of adolescence.[152] Therefore, these cases do not obviously stand for the proposition that their holdings or the neuroscience is mandatory, or even generally applicable for the subjective ability of individual kids, in juvenile adjudications. In addition, the neuroscientific techniques may not be reliable enough to make individual evaluations of culpability.[153] Such evaluations may also be impractical or inconsistently available due to cost and time considerations. This is not to say that it is improper to make these subjective arguments, nor is it a prediction that the science will not advance to a point such that this approach becomes more suitable. While some may still cling to a narrow reading of the Court's holdings as only pertaining to *Miranda* custody analysis and sentencing, it would be inharmonious with the Court's clear support for reduced culpability to judge a juvenile as culpable based on his inability to conform with adult expectations, but then to later deem the adolescent offender inculpable as an adult for purposes of punishment,[154] and this "effort at containment" of the reduced culpability doctrine is likely to weaken over time.[155] Such a limited use of the science fails to address the underlying dilemma that the assessment of culpability was flawed in the first place.[156] Even scholars who argue for cautious use of the science acknowledge that, in *Graham*, the Court made clear that the general developmental principles underlying *Roper* are relevant to any aspect of doctrine relying on assumptions about youths' attributes and capacities,[157] and that group-level assessment as to juveniles' relative immaturity is, indeed, relevant to the construction of *mens rea* statutes that incorporate external norms, such as negligence and recklessness.[158] It may be argued that, by incorporating features of the accused into the character of the reasonable person, we will inappropriately convert a metric that is intended to function objectively into a subjective one. But the consideration of age in juvenile adjudications is analogous to in tort cases, where "[a]ll American jurisdictions accept the idea that a person's childhood is a relevant circumstance" where liability turns on what an objectively reasonable person would do in the circumstances.[159] To the contrary, to ignore age could make the objective inquiry of reasonableness more artificial.[160] The Court in *J.D.B.* held "that courts can account for that reality without doing any damage to the objective nature of the [*Miranda*] custody analysis."[161] Additionally, factfinders have a wide basis of community experience upon which it is possible, as a practical matter, to determine what is to be expected of children.[162] It may also be suggested that courts should wait for the Court to explicitly rule on how the brain science should change how we approach *mens rea* in a juvenile case. But, even before *Roper*, some states relied in part on the developmental neuroscience

152. *Id.* at 766.
153. *Id.* at 769.
154. Carroll, *supra* note 17, at 590.
155. Maroney, *supra* note 147, at 784.
156. Carroll, *supra* note 17, at 575.
157. Maroney, *supra* note 147, at 782.
158. *Id*. at 783.
159. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 10 cmt. b (2005).
160. J.D.B. v. North Carolina, 564 U.S. 261, 276 (2011).
161. *Id.* at 272.
162. *Id.* at 274 (citing RESTATEMENT (SECOND) OF TORTS § 283(A) cmt. b (1963-64)).

to eliminate the juvenile death penalty,[163] and criminal negligence is a considerably less heinous offense.

Next, the juvenile justice system is founded on the well-appreciated differences between children and adults, and on society's support for treating children differently as a group. It is, therefore, congruous with the traditions of this system to set a separate bar of reasonableness for children as a class. There are rare instances, particularly for violent crimes, where our society wishes children to be appraised as adults. These children are removed from the juvenile system and subsequently "bound over" to the adult criminal justice system so that they can be evaluated according to adult standards of culpability. The plain implication of this approach is that the standards to which children are held accountable in the juvenile system are different than those for adults, and it is only under extraordinary circumstances that we choose to evaluate their behavior as adults. Further, the primary goal and purpose of the juvenile system is to promote rehabilitation. Children passing through a normal stage of adolescence[164] are not in need of rehabilitation. It would be an anathema to that system to label as "criminal" what is, in fact, a transitory and a necessary component of eventual development into adulthood that allows individuals to understand socially created boundaries and to live within them.[165] Some may worry that raising the bar for the criminal culpability of kids will allow them to get away with delinquency, reduce their motivation to conform to societal norms, or make society less safe. But, we do not suggest that biological or neurological realities exclusively control behavior.[166] There are obviously times where people, at any age, grossly deviate from reasonable behavior such that state intervention is authorized, and the state should have a full opportunity to prove that is the case. The ultimate goal in formally adopting a reasonable child standard is not to absolve kids' responsibility for actions, but to be more accurate as to what we label as criminal behavior. Finding children criminally negligent when they lack the capacity to understand the risk that they are taking, is punishing them for their incapacities, not their bad minds.[167] Even if a child's behavior does not rise to the level of criminal negligence, there are still other ways to have them make restitution for any harm they may have caused. And, interactions with the juvenile system may perpetuate delinquent behavior.[168] Critics of a reasonable juvenile standard could say that there are already points in the juvenile justice process where a child's age can be properly accommodated such as the decision to arrest a child in the first place, whether to file a petition, or whether to divert a case. The constitutional due process rights of

163. Maroney, *supra* note 124, at 169.

164. *See id.* at 97.

165. Carroll, *supra* note 17, at 581.

166. *Id.* at 588.

167. Vitiello, *supra* note 9, at 1440.

168. Center on Juvenile and Criminal Justice, Diversion Programs: An Overview (Sept. 1999), https://www.ncjrs.gov/html/ojjdp/9909-3/div.html. An analysis of a police diversion program found that diversion appeared to aggravate rather than deter recidivism (Lincoln, 1976). Elliott, Dunford, and Knowles (1978) found that intervention, whether received in a traditional juvenile justice setting or in an alternative program, resulted in an increase in levels of perceived labeling and self-reported delinquency among youth. Two other studies supported this finding (Lincoln, 1976; Lipsey, Cordray, and Berger, 1981). Other concerns raised about diversion programs include those related to prejudice, discrimination, civil rights violations, and the issue of net widening.

children should not be left to the discretion of state agents. Other critics may argue that the setting of 18—or any age—as the cut-off between adolescence and adulthood is arbitrary, or alternatively that kids nearing 18 look enough like adults to be expected to behave as such. But, the employment of 18 as demarcation is entirely consistent with many other areas in law (like minimum voting age), and the brain research shows that immature decision-making capacity lasts well beyond the age of 18.[169]

The recent diminished culpability jurisprudence of the Court gives rise to another potential constitutional issue. If jurisdictions continue to employ an adult standard of reasonableness to measure children's *mens rea*, it could give rise to an argument that the use of this antiquated standard is a violation of a juvenile's due process, and lead to sentences challenged as cruel and unusual punishment contrary to the Eighth and Fourteenth Amendments.[170] The Court in *McKeiver*—citing *Winship* and *Gault*—recognized that the constitutional standard for due process in juvenile proceedings is fundamental fairness.[171] Fundamental fairness cannot be satisfied by gauging children's behavior according to the adult world where the norm is compliance.[172] Children as a class do not have the awareness of adult levels of care nor are they equipped to achieve them. This does not preclude a defense attorney from presenting evidence using neuroscientific methods to argue that an individual child did not have the capacity to achieve a reasonable standard of care, or a DA to refute such evidence. Regardless of any subjective evidence that may be discussed, the objective standard to which they refer, moving forward, should be that of a reasonable child and to do otherwise would extend the state's authority beyond the boundaries set by the constitution. "[T]he negligence standard is constitutionally permissible because it approximates what the due process guarantee aims at: an assurance that criminal penalties will be imposed only when the conduct at issue is something society can reasonably expect to deter,"[173] and the "same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence."[174] But again, given that the Court's opinions are more strongly grounded in observations about children as a group, the constitutional necessity of evaluating a child's subjective capacity for negligence is less sustained.

Next, the shift to a reasonable child standard for criminal negligence is fundamental to society's continuing commitment to treat children differently and to society's expectation for the role of *mens rea* elements in the definitions of crimes. Even the dissent in *Graham* acknowledges that "[o]ur society tends to treat the average juvenile as less culpable than the average adult."[175] The deep systemic changes enacted in the juvenile justice system in the 1990s in response to fears of

169. Maroney, *supra* note 163, at 152 ("[S]tructural maturation is not complete until the mid-twenties.").

170. *See* Furman v. Georgia, 408 U.S. 238, 241 (1972); *see also* State v. Marshall, 692 P.2d 855, 857 (Wash. Ct. App. 1984) (stating that a 15-year-old boy does not need to act as a reasonable adult or risk a criminal conviction); J.R. v. State, 62 P.3d 114, 119 (Alaska Ct. App. 2003).

171. McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971).

172. *See* Carroll, *supra* note 17, at 549.

173. State v. Hazelwood, 946 P.2d 875, 884 (Alaska 1997).

174. Roper v. Simmons, 543 U.S. 551, 571 (2005).

175. Graham v. Florida, 560 U.S. 48, 117 (2010) (Thomas, J., dissenting).

juvenile "superpredators" remain largely in place. "In important respects, the juvenile system became indistinguishable from the adult one, and the benefits it retained became available to fewer young persons."[176] An explicit reference to a reasonable child in the criminal negligence statutes would be a step toward regaining some of the ground lost for kids. This reference is also needed to repair the role of *mens rea*. Reliance on an adult *mens rea* standard for youthful offenders, in the face of overwhelming scientific evidence supporting the unjustness of this comparison, undermines *mens rea*'s value.[177] Many states recognize incompetency as a safety net for a child's behavior that, though damaging, is not blameworthy.[178] To ignore the legal gap between a competency determination and a child's inability to reach a reasonable adult standard to form criminal intent is to choose ease of prosecution over fundament fairness. Some citizens may feel they are safer by "broadening the net" of the juvenile court's jurisdiction over delinquent behaviors. As discussed above, interactions with the juvenile system fuel delinquency and disrupt what would otherwise be the natural maturation into crime-free adult behavior. "Adults bear a special responsibility to provide youth with adequate opportunities to reach their potential, no matter what they have done."[179] We are not suggesting that we raise the bar of culpability for the worst offences but instead for the least serious. Society and the courts have long endorsed the doctrine that criminal negligence liability should be harder to prove than tort negligence.[180] If the criminal system does not endorse a reasonable child standard analogous to that in torts, then the converse situation could result. Some citizens may worry that the retribution role of the juvenile courts, even if it is secondary to rehabilitation, will be diluted if it becomes harder to adjudicate kids. This retribution is not being applied fairly. In 2009, the delinquency case rate for males was 2.5 times greater than the rate for females.[181] While white youth made up 78% of the U.S. population under juvenile court jurisdiction,[182] the total delinquency case rate for black juveniles (103.2) was more than double the rate for white juveniles (40.3).[183] Black youths are more likely to be detained, especially for drug offense cases.[184]

With a reasonable child standard, kids accused of negligence crimes would no longer have to rely on the common sense of law enforcement personnel, corrections officers, DAs, and judges about the normalcy of delinquent behavior. Right now, the decision not to charge or ultimately adjudicate a child accused of a negligence

176. Maroney, *supra* note 163, at 102.

177. Carroll, *supra* note 17, at 544.

178. National Conference of State Legislatures, Juvenile Justice: States with Juvenile Competency Laws (Oct. 2015), http://www.ncsl.org/research/civil-and-criminal-justice/states-with-juvenile-competency-laws.aspx (last visited Nov. 13, 2016).

179. Terry A. Maroney, *Adolescent Brain Science After Graham v. Florida*, 86 NOTRE DAME L. REV. 765, 793 (2011).

180. Montgomery v. State, 369 S.W.3d 188, 193 (Tex. Crim. App. 2012).

181. National Center for Juvenile Justice, *Juvenile Court Statistics 2009* 14 (2012), http://www.ojjdp.gov/pubs/239114.pdf.

182. *Id*. at 19 (noting that the makeup of the U.S. population under juvenile jurisdiction in 2009 was 16% of black youth, 1% of American Indian youth, and 5% of Asian youth).

183. *Id*. at 20 (demonstrating delinquency case rates of (50.9) for American Indian youth and (14.2) for Asian youth).

184. *Id*. at 33.

crime based on the intuition that this is "just a kid being a kid" depends on the benevolent compassion of the decision-makers in the juvenile decision. There are several points along the course of a juvenile proceeding where the concept of a reasonable child should and, to some extent, perhaps already does inform and influence the outcome. But, decision-makers typically will have only partial information at early, pretrial stages about either the child or the circumstances of his offense.[185] Considering these four recent cases and their use of neuroscience as a reinforcement of the Court's commitment to the special legal status of youth,[186] it is time to give express legal stature to the decision process of people who determine the fate of kids in the juvenile system. This does not mean that kids will not be held responsible for harms they may have caused. They are still subject to school discipline systems and the civil courts. They can still interact with victims advocates and the restorative justice system as a means to resolve any outstanding issues. The opportunity still remains for kids in need of support to be referred to the appropriate providers and agencies. Criminal negligence may still be found even when a child acts with a sincere good faith belief that his actions pose no risk, as long as the factfinder determines that his belief was unreasonable for an ordinary and reasonably prudent child of similar age.[187] Some may argue that diversion provides the properly balance between state intervention and informality. But, any interaction with the juvenile justice system generates records that can result in collateral consequences. And, diversion programs can aggravate rather than deter recidivism, and raise levels of perceived labeling and self-reported delinquency among youth.[188]

A statutory change to the reasonable person reference would give the legislative blessing to formally apply the reasonable child standard that some state courts have already begun to entertain.[189] This change would have the additional benefit of creating a more consistent treatment of the defendant's age within a single proceeding. For example, a court would not refer to an objective reasonable child standard in the *Miranda* analysis, and then the reasonable adult standard in the trial. In *State v. Heinemann*, the court may not have issued the awkward holding that a defendant's age could be used to differentiate him from those threatening him when considering a duress defense,[190] but could not use age as a factor to determine how he would have perceived any threats regardless of the age of his alleged coercers. It is also possible to wait for the courts to interpret the ramifications on their own, and the *Graham* Court created more "breathing room" for the lower courts to do so.[191] However, there would be many children unfairly assessed in the meantime, and some courts might still resist applying adolescent brain science given how deeply the existing doctrinal forces are entrenched.[192] Many states still have significant punitive components in their juvenile delinquency codes. This trend to treat children charged

185. Miller v. Alabama, 132 S. Ct. 2455, 2474 (2012).

186. Maroney, *supra* note 145, at 767.

187. *In re* Welfare of S.W.T., 277 N.W.2d 507, 514 (Minn. 1979).

188. The Center on Juvenile and Criminal Justice, *Diversion Programs: An Overview* (Sept. 1999), https://www.ncjrs.gov/html/ojjdp/9909-3/div.html.

189. *See In re* William G., 963 P.2d 287, 293 (Ariz. Ct. App. 1997).

190. State v. Heinemann, 920 A.2d 278, 295 (Conn. 2007).

191. Maroney, *supra* note 145, at 784.

192. Maroney, *supra* note 124, at 145.

with crimes more like adults grew rapidly in the 1990s due to a spike in gun violence. Unfortunately, most of these laws are still on the books.[193] We could face a similar situation, just as when some courts were wrestling with the "troubling questions" of juvenile life without parole.[194] There would also be inconsistent treatment of kids[195] in a manner incongruent with the Supreme Court's reduced culpability doctrine that might be very difficult to appeal.

The reasonable child standard will empower defense attorneys to provide the best and most appropriate advocacy for their clients. When appropriate, defense counsel could present evidence to describe the reasonable child and how they would act in the circumstances. But, factfinders need no training in science to account for a child's age, and may instead rely on a "wide basis of community experience upon which it is possible to . . . determine what is to be expected of children."[196] Critics of this standard change might suggest the more correct statutory response to the brain science would be to add a new means to challenge the state's ability to prove the *mens rea* element of the crime of which a child is accused. For example, the Maine criminal statutes provide that the defense may introduce evidence of an abnormal condition of the mind to raise a reasonable doubt as to the existence of a required culpable state of mind.[197] But, the brain science does not defensibly support individual evaluations of mental state at this time,[198] and so challenges of individual variation may hinder its relevance and impact.[199] Adolescence is not something that needs to be proved, nor is infancy a defense. The juvenile justice system is not the place to handle normal childhood delinquency. The admission of testimony regarding adolescent development should not depend on a legislative modification,[200] other than formal adjustment of the proper negligence reference point.

> Another problem with a case-by-case approach is that it does not take into account of special difficulties encountered by counsel in juvenile representation . . . [where] [j]uveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it, . . . [and] are less likely than adults to work effectively with their lawyers to aid in their defense.[201]

The statutory adoption of a reasonable juvenile negligence standard puts what is, indeed, a policy change properly into the hands of the legislature, and the

193. Maroney, *supra* note 124, at 102.

194. People v. Pratcher, No. A117122, 2009 WL 2332183, at *44 (Cal. Ct. App. July 30, 2009); *see also* State v. Allen, 958 A.2d 1214, 1236 (Conn. 2008).

195. Vitiello, *supra* note 9, at 1452 ("Case-by-case adjudication does not allow a single, coherent solution to the problem.").

196. J.D.B. v. North Carolina, 564 U.S. 261, 274 (2011) (quoting RESTATEMENT (SECOND) OF TORTS § 284A, at 15).

197. 17-A M.R.S. § 38 (2016).

198. *See* Graham v. Florida, 560 U.S. 48, 68 (2010) ("[I]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.") (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)); Maroney, *supra* note 124, at 146 ("The most significant current limitation of developmental neuroscience is its inability to inform individual assessment.").

199. Maroney, *supra* note 124, at 146.

200. *See* Carroll, *supra* note 17, at 592.

201. *Graham*, 560 U.S. at 78.

adolescent brain research offers an appropriate basis for legal decisionmakers performing a policymaking function such as this to treat youth as a group in a particular way.[202] In some instances, the adoption of the Court's doctrine is the role of the lower courts, and some may suggest that the line-drawing between relevant and irrelevant subjective characteristics that may be ascribed to a reasonable person best is left to those institutions,[203] or in the extreme that resolving in the abstract all of the possible personal traits may be ascribed to the reasonable person may be too daunting for any legislative reform.[204] Adjudication has advantages over the legislative process because the courts' "duty to do justice," coupled with the public nature of decisions made on the record, affords a level of transparency not available in the legislative process.[205] Unfortunately, the courts' treatment of reduced juvenile culpability has been inconsistent, and without uniform guidance from courts, "we cannot hope for a uniform, predetermined solution" to the identity of the reasonable juvenile.[206] Despite frequent arguments on behalf of juvenile defendants, courts have been reluctant to rely on neuroscience outside of sentencing mitigation.[207] There is also an economic factor that favors legislation; the need to continually litigate adolescent development issues for individual cases will have a significant resource cost—time and money—for defenders, prosecutors and courts.[208] Additionally, legislatures are unquestionably in the best position to reverse the sweeping policy changes of the last two decades.[209] Laws enacted by the state legislatures around the country is the most reliable objective signal of contemporary values.[210] Without a categorical rule, juveniles run the risk that the particulars of their case will overpower "youth" as a matter of course,[211] as it did pre-*Roper*, "even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."[212]

Finally, with the significant collateral consequences of interaction with the juvenile system,[213] it is fair and legitimate to formally change the objective standard behavior to that of a reasonable juvenile. Even juvenile charges can have devastating "ripple effects" on a child's access to education, housing, and military careers, and

202. *See* Maroney, *supra* note 124, at 167.

203. Vitiello, *supra* note 9, at 1437.

204. Vitiello, *supra* note 9, at 1452.

205. Michael, *supra* note 9, at 1452-53.

206. *Id.* at 1454.

207. *See* Carroll, *supra* note 17, at 589 ("Likewise, time and time again, lower courts have remained unmoved in the face of scientific evidence challenging the transfer of juveniles to adult courts, the imposition of adult sentences, and the application of adult-calibrated mental states to juveniles.").

208. Expert testimony alone averages $351.00 per hour for case review, $456.00 per hour for depositions and $488.00 per hour for court time. Joseph O'Neill, *Expert Witness Fees: An Infographic* (Sept. 23, 2016), https://www.theexpertinstitute.com/expert-witness-fees/.

209. *See* Maroney, *supra* note 124, at 152.

210. Atkins v. Virginia, 536 U.S. 304, 322-23 (2002) (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).

211. *See* Graham v. Florida, 560 U.S. 48, 79 (2010),

212. Roper v. Simmons, 543 U.S. 551, 573 (2005). Note that here the Court was talking about sentences of life without parole for a non-homicide crimes.

213. Julie Ellen McConnell, *supra* note 24, at 36

can influence the outcome of future proceedings,[214] particularly for black males.[215] Weak or non-existent sealing or expungement laws, bolstered by the eternal memory of the Internet, mean that interactions with the juvenile system may never go away.[216] More fundamentally, over-adjudication has the potential to derail the otherwise natural progression of a delinquent youth into a law-abiding adult.

## VI. CONCLUSION

In a line of recent cases that have rocked the world of juvenile law, the Supreme Court relied on both the latest adolescent development research and the timeless knowledge of parents to forcefully and repeatedly state that children are more impetuous, more vulnerable to outside pressures, less depraved, and less culpable for their actions than adults.[217] Despite this stance, criminal negligence statutes continue to refer to the "reasonable person" standard, which does not take into account the age of the accused, as the benchmark for guilt or innocence. In doing so, we hold children to, at the very least, an irrelevant and arguably unfairly demanding behavioral ideal by criminalizing normative adolescent behavior. This result is entirely inconsistent with the Court's holdings that require special treatment for juveniles in the custody analysis for *Miranda* cases and during sentencing. Delinquency is a normal stage of adolescent behavior, particularly for boys, from which the vast majority age out.[218] Furthermore, records of juvenile adjudications can have lifelong, negative collateral consequences on children's educational, employment, housing, and military opportunities and, as such, subvert the rehabilitative purpose of the juvenile system.

In this article, we argue that states' juvenile codes and the MPC should be amended to explicitly refer to a reasonable child standard for any *mens rea* element that relies on a reasonable person as the measure for criminal culpability. This statutory change is necessary to achieve uniformity between the functioning of the juvenile justice system and the Supreme Court's modern doctrine of reduced juvenile culpability. The change is needed to reestablish the constitutional authority of the system, to explicitly validate the discretion that law enforcement officers, corrections officers, DAs, and judges already employ to accommodate age, and to avert the

---

214. *Id.* at 34; *see also Youth in the Justice System: An Overview*, JUV. L. CTR., http://jlc.org/news-room/media-resources/youth-justice-system-overview (last visited Sept. 15, 2016); see also *Maine*, THINK BEFORE YOU PLEA (Nov. 21, 2015, 9:31 PM), http://www.beforeyouplea.com/?q=me, for information specific to Maine.

215. *Diversion Programs: An Overview*, *supra* note 19 (emphasizing that minority youth are disproportionately affected by diversion).

216. *See* THINK BEFORE YOU PLEA, *supra* note 214 ("If a juvenile has been adjudicated as having committed a juvenile crime, people who directly supervise the health, behavior, or progress of that juvenile have access to arrest records if the information is made available for creating a rehabilitation plan for the juvenile. This includes school officials (the principal and the principal's designates) who have access to a juvenile's arrest records upon adjudication if the school officials are or might become responsible for the juvenile's health and welfare, and if the information is being distributed as part of the juvenile's school reintegration plan . . . . If the juvenile is adjudicated to have committed a crime involving a motor vehicle, the court will automatically send the juvenile's name, offense, date of the offense, date of the adjudicatory hearing, and any other relevant facts to the Secretary of State.").

217. *Supra* note 112

218. *See* Maroney, *supra* note 124, at 97.

potentially devastating collateral consequences that any juvenile record may yield.

As the Supreme Court has vigorously recognized, "[a] child's age is far 'more than a chronological fact.'"[219] It is time for a new approach to *mens rea* analysis for juveniles that is consistent with what we know from our experience, with the latest brain research science, and with the current jurisprudence of the highest court in the land.

219. J.D.B. v. North Carolina, 564 U.S. 261, 272 (2011) (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).