# Age-Appropriate Charging and Sentencing

BY ROBERT G. SCHWARTZ

The justice system in America is undergoing a tectonic shift—a realignment that conforms criminal law to the latest knowledge of adolescent development and neuroscience. This shift is not a "softening" of the justice system's response to juvenile crime. Rather, it is a constitutional mandate to hold juvenile offenders accountable in developmentally appropriate ways.

The most recent example of this realignment occurred in the US Supreme Court's June 25 decision, *Miller v. Alabama*, 132 S. Ct. 2455 (2012), holding that mandatory life sentences for juveniles are unconstitutional. *Miller* is the latest example of the marriage of law and science that began in the mid-1990s. It is easiest to appreciate this new world order by examining what the world was like before it occurred.

In the late 1980s, Juvenile Law Center participated as amicus in a Pennsylvania case of a nine-year-old prosecuted as an adult. Charged with first degree murder, the boy faced a mandatory sentence of life without parole. We joined defense counsel's argument that the boy should be remanded to juvenile court. Janet Fink, then chair of the Criminal Justice Section's Juvenile Justice Committee, worked on the American Bar Association (ABA) amicus brief when the case reached the Pennsylvania Supreme Court. (The ABA brief advanced the policy of the *IJA-ABA Standards Relating to Transfer between Courts*, which prohibits transfers of youth under age 15.)

Between our two briefs, amici noted the irony that, had the seven-year-old shooting victim lived, the defendant would have been too young for Pennsylvania's juvenile justice system. We pointed out that if the boy was tried in juvenile court, he could be held for almost 12 years—surely a proportional punishment that would have fulfilled the purposes of the penal law.

We cobbled together social science from psychologists Jean Piaget and Lawrence Kohlberg—we argued that nine-year-olds didn't appreciate the finality of death. The Pennsylvania Supreme Court eventually sent the case to juvenile court for different reasons, *Commonwealth v. Kocher*, 602 A.2d 1308 (Pa. 1992), but the case was an example of how the criminal justice system was misaligned with commonsense notions of child and adolescent development.

Then, in the mid-1990s, the MacArthur Foundation created a Research Network on Adolescent Development and Juvenile Justice. The network was created in part to respond to the wave of legislation that required thousands of teens to be tried as adults. Led by Temple University Professor Laurence Steinberg, the network included some of the nation's leading psychologists, criminologists, and academics. The network also included practitioners, of whom I was one.

Over a 10-year period, the network conducted research on teens' competence to stand trial, on culpability (blameworthiness), and on the reasons why most youth cease offending. While all of the research has had an impact on the field—*see* http://www.adjj.org—the research on competence and culpability has been especially potent. Many other researchers have built upon the network's research. Collectively, the new knowledge has led to legislative reform, and to case law that has reshaped juvenile justice in America. It is fair to say that in 2012, social, behavioral, and neuroscience require that juveniles be treated by the law differently than adults.

Justice Kennedy squarely addressed developmental differences in the Supreme Court's majority opinion in *Roper v. Simmons*, 543 U.S. 551 (2005). In declaring the death penalty unconstitutional for those who were under 18 at the time of their crimes, Kennedy observed that "[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." (*Id.* at 569.) The first two differences were youths' "impetuous and ill-considered actions and decisions," and their vulnerability "to negative influences and outside pressures, including peer pressure." (*Id.*) Those differences, in the words of MacArthur Network members Steinberg and Elizabeth Scott, made juveniles "less guilty by reason of adolescence." (*See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009 (2003).) Youth isn't a defense, but it should be considered a mitigator.

Justice Kennedy then addressed a third developmental difference: "the character of a juvenile is not as well formed as that of an adult." (*Roper*, 543 U.S. at 570.) Juveniles' personalities are in flux, and "[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." (*Id.* at 573.) That is, at the time

**ROBERT G. SCHWARTZ** *is cofounder and executive director of Juvenile Law Center in Philadelphia, has twice served as chair of the ABA Criminal Justice Section's Juvenile Justice Committee, and is the recipient of the Section's Livingston Hall Award. For more information on the author and Juvenile Law Center, go to http://www.jlc.org.*

of sentencing, no one can tell who this person will become in the years ahead.

Five years after *Roper* banned the juvenile death penalty, the Court in *Graham v. Florida*, 130 S. Ct. 2011 (2010), held unconstitutional a sentence of life without parole for juveniles in nonhomicide cases. Justice Kennedy, again writing for the majority, noted that recent developments in neuroscience reinforced the social and behavioral science literature and made an even stronger case for recognizing adolescent differences. *Graham* said again that "because juveniles have lessened culpability they are less deserving of the most severe punishments." (*Id.* at 2026.)

*Graham* made clear that the jurisprudence that emerged in *Roper* was about much more than the death penalty—it was about proportional punishment of youth who are tried as adults. Justice Kennedy observed that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." (*Id.* at 2027.)

A year after *Graham*, the Court interpreted *Miranda v. Arizona*, 384 U.S. 436 (1966), to accommodate the youth of a suspect. In *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011), Justice Sotomayor's majority opinion declared:

> [T]he age of a child subjected to police questioning is relevant to the custody analysis of *Miranda*. It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the *Miranda* custody analysis.

(131 S. Ct. at 2398–99 (citation omitted).)

Justice Sotomayor added, in a footnote, "Although citation to social science and cognitive science authorities is unnecessary to establish these commonsense propositions, the literature confirms what experience bears out. (*See, e.g.*, *Graham v. Florida* ('[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds')." (*J.D.B.*, 131 S. Ct. at 2403 n.5 (citation omitted).))

*Miller v. Alabama* followed the *Roper-Graham-J.D.B.* trilogy as night follows day. The court, through Justice Kagan, reversed the decisions of the Alabama and Arkansas supreme courts. The lower courts had upheld mandatory life sentences imposed on Miller and Jackson, both 14 at the time of their offenses. The US Supreme Court's ruling—holding unconstitutional mandatory life sentences for juveniles—applies to juveniles convicted of homicide who were under 18 at the time of their crimes.

Justice Kagan reaffirmed the science behind *Roper* and *Graham*. She added "that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." (Miller v. Alabama, 132 S. Ct. 2455, 2466 (2012).)

The court, while forbidding *mandatory* life sentences, did not address the question of whether juveniles could constitutionally receive life sentences. However, Justice Kagan declared:

> [G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."

(*Miller*, 132 S. Ct. at 2469 (quoting *Roper*, 543 U.S. at 573).)

The quartet of developmentally-based Supreme Court opinions in the last seven years is consistent with policies put forth by the Criminal Justice Section and adopted by the ABA. In 2002, the ABA opposed mandatory sentences, urging jurisdictions to give judges discretion "so that the sentence in each case fairly reflects the gravity of the offense and the degree of culpability of the offender." (ABA Resolution 107, *Blueprint for Cost-Effective Pretrial Detention, Sentencing, and Corrections Systems* 2 (Aug. 2002), *available at* http://tinyurl.com/cjvb72f.)

In 2008, the ABA approved a policy that balanced the need for public safety with the need to recognize developmental differences:

> RESOLVED, That the American Bar Association urges . . . governments to authorize and implement sentencing laws and procedures that both protect public safety and appropriately recognize the mitigating considerations of age and maturity of youthful offenders (i.e., those under age 18 at the time of their offense who are subject to adult penalties upon conviction) based on the following principles:
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> 1. Sentences for youthful offenders should generally be less punitive than sentences for those age 18 and older who have committed comparable offenses;

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that the lawyer had provided advice that the client had reasonably relied upon to the detriment of her and her husband.

An implied client-lawyer relationship based on reliance upon a lawyer's advice is widely recognized. The *Restatement of the Law Governing Lawyers* § 14 states that in addition to an express consensual client-lawyer relationship or an appointed counsel client-lawyer relationship, there is a third type of client-lawyer relationship. Section 14 states: "A relationship of client and lawyer arises when . . . a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person" and "the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services."

## Avoiding Unintended Clients

In order to avoid creating an unintended client relationship, a lawyer should make clear to a prospective client that the lawyer is not providing advice or any other service and that the lawyer is not agreeing or planning to provide any legal services for the prospective client. A lawyer must avoid saying or doing anything that can be reasonably viewed as applying the law to a specific person's situation. For example, a lawyer may make some general statements about the law at a party or to a group, but should not say anything about how the law applies to a specific person's situation.

A lawyer should also document all client-lawyer relationships with engagement letters. Similarly, the lawyer should document all contact with prospective clients who do not become clients with nonengagement letters. The nonengagement letters should explicitly state that the lawyer did not provide any advice to the prospective client and that the lawyer does not plan to provide any legal service to the prospective client.

## Conclusion

Lawyers need to know how and when a nonclient becomes a prospective client and a prospective client becomes a client, as well as the range of ethical obligations triggered by each type of relationship. Model Rule 1.18 demonstrates that very little is required on the part of a lawyer to create a prospective client relationship. And cases such as *Togstad* show that a lawyer's statements may be interpreted as giving advice and create a client relationship when the lawyer intends to do neither.

Lawyers' use of websites and social media raise a serious risk of lawyers creating prospective clients or unintended clients. What if, for example, a law firm's website invites people to contact firm lawyers with legal inquiries? Do people who share information with the firm via e-mail become prospective clients? If a lawyer uses a chat room or social networking site to discuss a person's legal problem, does the person become a client? Our next column will address these issues. ■

# JUVENILE JUSTICE *(CONTINUED FROM PAGE 50)*

2. Sentences for youthful offenders should recognize key mitigating considerations particularly relevant to their youthful status, including those found by the United States Supreme Court in *Roper v. Simmons*, as well as the seriousness of the offense and the delinquent and criminal history of the offender; and
3. Youthful offenders should generally be eligible for parole or other early release consideration at a reasonable point during their sentence; and, if denied, should be reconsidered for parole or early release periodically thereafter.

(ABA Criminal Justice Section, The State of Criminal Justice 2007–2008, at 317 (Victor Streib ed., 2008) (citation omitted).)

There is much work to be done to bring state systems into line with the principles of the *Roper-Miller* quartet, and with the policies of the ABA. The Supreme Court left open the question of whether life sentences could be imposed on juveniles for felony murder. It is unclear how state courts and legislatures will address the resentencing of juvenile lifers. Whatever path they choose to take, recognition of developmental differences will have to be their starting point. ■

**Research Sites:**
- Equal Justice Initiative: www.eji.org
- Campaign for the Fair Sentencing of Youth: www.fairsentencingofyouth.org
- Juvenile Law Center: www.jlc.org
- Human Rights Watch: http://www.hrw.org/topic/childrens-rights/juvenile-justice