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ARTICLES

ADVANCING THE RIGHTS OF YOUNG PEOPLE IN JUVENILE JUSTICE: THE IMPACT OF JUVENILE LAW CENTER

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INTRODUCTION

For the past forty years, Juvenile Law Center (JLC), the United States' first public interest law firm dedicated to children's issues, has worked to advance the rights of young people through legal advocacy, litigation, and campaigning.[1] Its work touches on many of the pressure points of the juvenile justice system and has been instrumental in the litigation of a range of important issues across the United States, including detention, due process, and sentencing. The cases of *Roper v. Simmons*,[2] *Graham v. Florida*,[3] and *Miller v. Alabama*[4] stand as hallmarks of JLC's success for a number of reasons: they broke new ground in relation to the treatment of young people in conflict with the law; they are underpinned by an understanding of children's unique status in line with their distinct developmental characteristics; and they came about, inter alia, through JLC's innovative and collaborative litigating strategy.[5] JLC has had a major

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1. Barry Zubrow, *Bob Schwartz to Retire from Juvenile Law Center in October 2015*, JUV. L. CTR.: PURSUING JUST. (Jan. 13, 2015), http://www.jlc.org/blog/bob-schwartz-retire-juvenile-law-center-october-2015. JLC was set up in 1975 by four Temple Law School graduates: Robert G. Schwartz, Marsha L. Levick, Philip Margolis, and Judith Chomsky.

2. 543 U.S. 551 (2005).

3. 560 U.S. 48 (2010).

4. 132 S. Ct. 2455 (2012).

5. See *infra* Section III for a discussion of the impact of JLC's litigation.

impact on the law of the United States in these and other areas of juvenile law, and it is beginning to have an impact internationally.

The aim of this Article is to explore the work of JLC in two ways. First, it presents an analysis of some of the important issues litigated by JLC in recent years, outlining the reforms achieved. The Article's second aim is to examine JLC's use of litigation, discuss the "how" of bringing about legal change and reform, and present a reflection on the wider impact of this strategic approach to public interest litigation. Overall, it is proposed that, although United States-based, the work of JLC is making a worldwide contribution by advancing an international rights-based strategy in youth justice. Accordingly, this Article will begin by setting out the context, by examining the international law on juvenile justice against which the international achievements of JLC will be judged.

I. THE INTERNATIONAL LAW ON JUVENILE JUSTICE

The standards of international law with respect to the treatment of children in conflict with the law and in the legal process help to place the legal achievements of JLC in their international context. They also help to facilitate an adjudication of how, as a result of these achievements, standards in U.S. juvenile law measure up against those applied in other jurisdictions. Primary among these international standards is the United Nations Convention on the Rights of the Child (UNCRC),[6] a binding international treaty now ratified by 196 countries with the sole exception of the United States.[7] The UNCRC's widespread ratification underpins the international consensus around its standards, giving its principles weight in the domestic arena even though it has not been ratified by the United States.[8] This is certainly the case with the UNCRC's unequivocal standards prohibiting sentences of death and life without possibility of release under Article 37(a), which some argue have achieved the status of *jus cogens* in international law.[9] In addition to the binding UNCRC, a wealth of related instruments have been adopted by both the United Nations and regional bodies like the Council of Europe, effectively codifying good practice in the treatment of juveniles.[10] Relevant instruments include the United Nations Standard

6. Convention on the Rights of the Child, Nov. 20, 1989, 1557 U.N.T.S. 3 [hereinafter Convention of the Rights of the Child]. The UNCRC was adopted and opened for signature, ratification, and accession by General Assembly Resolution 44/25 of November 20, 1989. The Convention has 196 states parties. The United States signed the Convention on February 16, 1995 but has not ratified it.

7. For the current status of ratification, see *Status of Ratification Interactive Dashboard*, U.N. OFF. HIGH COMMISSIONER FOR HUM. RTS., http://indicators.ohchr.org/ (last visited June 1, 2016).

8. This was recognized by the U.S. Supreme Court in *Roper v. Simmons*, when it referred to "the overwhelming weight of international opinion against the juvenile death penalty" as providing "respected and significant confirmation for [its] own conclusions." 543 U.S. 551, 578 (2005). For a discussion of U.S. ratification, see Susan Kilbourne, *The Wayward Americans—Why the USA Has Not Ratified the UN Convention on the Rights of the Child*, 10 CHILD & FAM. L.Q. 243, 244–45 (1998).

9. *See, e.g.*, Tera Agyepong, Note, *Children Left Behind Bars:* Sullivan*,* Graham*, and Juvenile Life Without Parole Sentences*, 9 NW. J. INT'L HUM. RTS. 83, 96–98 (2010).

10. Ursula Kilkelly, *Youth Justice and Children's Rights: Measuring Compliance with*

Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules),[11] the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty,[12] General Comment No. 10 of the Committee on the Rights of the Child on Children's Rights in Juvenile Justice,[13] and the Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice.[14] This body of international law on juvenile justice sets minimum standards for countries in their treatment of children who come into conflict with the law.[15] Together, the laws articulate a number of core principles, including a child's right to be treated in accordance with his/her age and the duty to further the child's well-being;[16] the right of a child to a fair trial including the right to counsel, to information, and to advocacy support before, during, and after the trial process;[17] and the right to treatment that is proportionate both to the offense and to a child's circumstances.[18] The standards advocate diversion—from the criminal justice system and from detention—for children who come into conflict with the law[19] and recognize that because children are a vulnerable group whose development and maturity continues to evolve, any measures or sanctions imposed should reflect children's ability to change.[20] In general terms, these instruments advocate specialization within the juvenile justice system, including among the police and other decision makers, and they strongly support the adoption of an individualized, child-centered approach that emphasizes the child's development over goals like punishment and retribution.[21]

International Standards, 8 YOUTH JUST. 187, 188 (2008).

11. G.A. Res. 40/33, U.N. Standard Minimum Rules for the Administration of Juvenile Justice (Nov. 19, 1985) [hereinafter Beijing Rules].

12. G.A. Res. 45/113, annex, United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (Dec. 14, 1990).

13. Comm. on the Rights of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice*, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007).

14. COMM. OF MINISTERS OF THE COUNCIL OF EUR., GUIDELINES OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON CHILD-FRIENDLY JUSTICE (2010) [hereinafter COUNCIL OF EUROPE GUIDELINES]. For more information, see COUNCIL EUR., http://www.coe.int (last visited June 1, 2016). *See also* Ton Liefaard, *Child-Friendly Justice: Protection and Participation of Children in the Justice System*, 88 TEMP. L. REV. 905 (2016).

15. Kilkelly, *supra* note 10, at 188.

16. Convention of the Rights of the Child, *supra* note 6, arts. 3, 40(1); Beijing Rules, *supra* note 11, r. 1.1, 14; Comm. on the Rights of the Child, *supra* note 13, ¶ 13; COUNCIL OF EUROPE GUIDELINES, *supra* note 14, at 18.

17. Convention on the Rights of the Child, *supra* note 6, art. 40(2); Beijing Rules, *supra* note 11, r. 7.1; Comm. on the Rights of the Child, *supra* note 13, ¶¶ 40–67; COUNCIL OF EUROPE GUIDELINES, *supra* note 14, at 17–19.

18. Beijing Rules, *supra* note 11, r. 5.1; Comm. on the Rights of the Child, *supra* note 13, ¶ 71; COUNCIL OF EUROPE GUIDELINES, *supra* note 14, at 19.

19. Convention on the Rights of the Child, *supra* note 6, art. 40(3); Beijing Rules, *supra* note 11, r. 11; Comm. on the Rights of the Child, *supra* note 13, ¶¶ 22–29; COUNCIL OF EUROPE GUIDELINES, *supra* note 14, at 25.

20. Beijing Rules, *supra* note 11, r. 17; Comm. on the Rights of the Child, *supra* note 13, ¶¶ 10, 13.

21. *See* Beijing Rules, *supra* note 11, r. 12, 18; Comm. on the Rights of the Child, *supra* note 13, ¶ 40; COUNCIL OF EUROPE GUIDELINES, *supra* note 14, at 26–32.

Despite the strong consensus in international instruments around these themes, there is enormous diversity among countries' systems, practices, and approaches to juvenile justice.[22] While some countries are identified as punitive and others as progressive, the reality is somewhat more complex as most countries' juvenile systems have both dimensions.[23] At the same time, there is no doubt that the United States continues to impose on juveniles one of the most, if not the most, punitive sentencing regimes in the world.[24] Until recently, U.S. courts could impose the death penalty and a sentence of life imprisonment without the possibility of release. What appears unique about the United States, however, is the scale of change currently underway as groundbreaking legal challenges to these and other laws work their way through state and federal courts. Also unique is the level of legal advocacy undertaken by organizations like JLC in the pursuit of a juvenile justice system that protects and promotes the rights of children in line with international standards. The use of litigation to effect social change in juvenile justice is not unique to the United States,[25] but it is significant that the legal challenges taken in the U.S. courts have produced groundbreaking judgments with such widespread impact.[26] A further, perhaps related, feature is the longevity of this advocacy—JLC began its strategy more than forty years ago, as this next Section now explains.

II. JUVENILE LAW CENTER: FORTY YEARS OF LITIGATION

Since 1975, JLC has worked to improve the treatment of children in the criminal justice and court systems, focusing its work on the strategic litigation necessary to effect change in these areas. Participation in over 150 cases has included direct litigation, co-counsel appearances, and amicus curiae submissions.[27] The majority of these challenges fall under the following headings: harsh sentences, transfer to adult court, expunging records, due process, and police questioning.

22. *See* Anthony N. Doob & Michael Tonry, *Varieties of Youth Justice*, 31 YOUTH CRIME & YOUTH JUST. 1, 1–5 (2004).

23. John Muncie & Barry Goldson, *Editor's Introduction* to COMPARATIVE YOUTH JUSTICE 1–5 (John Muncie & Barry Goldson eds., 2006).

24. John Muncie, *The Globalization of Crime Control—The Case of Youth and Juvenile Justice: Neo-liberalism*, *Policy Convergence and International Conventions*, 9 THEORETICAL CRIMINOLOGY 35, 49–50 (2005).

25. South Africa has also proven a fertile ground for such challenges. *See* Ann Skelton, *South Africa*, *in* LITIGATING THE RIGHTS OF THE CHILD: THE UN CONVENTION ON THE RIGHTS OF THE CHILD IN DOMESTIC AND INTERNATIONAL LITIGATION 13, 17–29 (Ton Liefaard & Jaap E. Doek eds., 2014).

26. See *infra* Part III.A for a discussion of the legal impact of JLC's work in the United States.

27. It is the only organization to have submitted "amicus briefs in the four major Supreme Court cases that have rested on developmental science." Bob Schwartz, *Litigation as a Tool for Reform*, JUV. L. CTR: PURSUING JUST. (Aug. 28, 2015), http://www.jlc.org/blog/litigation-tool-reform.

A. Challenging the Harsh Sentencing of Children

As highlighted above, international law prohibits the imposition of the harshest sentences on children under eighteen years in its prohibition of both the death penalty and life sentence without the possibility of release.[28] JLC has played a central role in efforts to challenge the imposition of these sentences in the United States, bringing the United States closer to the legal standards of UNCRC in this area. According to the UN Committee on the Rights of the Child, which monitors implementation of the UNCRC,

> In all decisions taken within the context of the administration of juvenile justice, the best interests of the child should be a primary consideration. Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law.[29]

JLC's work in this area has sought to implement this principle in U.S. sentencing practice, focusing on three cases before the U.S. Supreme Court—*Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*.

In *Simmons* (2005), over a decade ago, JLC argued before the U.S. Supreme Court that the execution of juveniles under the age of eighteen was unconstitutional considering, inter alia, the developmental differences between adolescents and adults.[30] Relying heavily on emerging scientific evidence, the Supreme Court noted three major differences between juveniles and adults (immaturity and recklessness, susceptibility to external influences, and capacity to mature/change) that meant they were "categorically less culpable" than adults, and thus ineligible for the worst penalty the state can impose.[31] Following the judgment, attention turned immediately to its consequences and scope—what did it mean for those other aspects of the criminal justice system that treat children as adults?[32] In 2009, the Court found itself again hearing argument from JLC and others that life without parole (LWOP) for nonhomicide cases was unconstitutional due, inter alia, to the transitory nature of the characteristics of youth, juveniles' diminished criminal culpability, and, crucially, their capacity for

28. Article 37 of the Convention on the Rights of the Child, ratified by every state except the United States, prohibits both sentences.

29. Comm. on the Rights of the Child, *supra* note 13, ¶ 10.

30. Brief of Juvenile Law Center, Children & Family Justice Center, Center on Children & Families, Child Welfare League of America, Children's Defense Fund, Children's Law Center of Los Angeles, National Association of Counsel for Children & 45 other organizations, as Amici Curiae In Support of Respondent, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1660637, at *2–5. Marsha Levick, JLC's chief counsel, was counsel of record in the presentation of the amicus curiae brief to the Supreme Court.

31. Roper v. Simmons, 543 U.S. 551, 567, 569–70 (2005).

32. *See* Ellen Marrus & Irene Merker Rosenberg, *After* Roper v. Simmons*: Keeping Kids Out of Adult Criminal Court*, 42 SAN DIEGO L. REV. 1151, 1161–69, 1180–81 (2005) (discussing reactions to *Simmons* and arguing that the Court's rationale in *Simmons* should also apply to decisions regarding whether juveniles should be considered adults for other criminal law purposes).

change and rehabilitation.[33] *Graham* (2010) concerned a sixteen-year-old boy who had been sentenced to LWOP following his conviction for violating his probation, following a conviction for robbery.[34] The Supreme Court held that the sentence of LWOP constituted cruel and unusual punishment for juveniles due to the limited culpability of such offenders and the severity of this sentence. In particular, having weighed the justifications for the sentence, the Court concluded that it was particularly cruel for a juvenile because he will, as a result, spend a greater percentage of his life in prison without reasonably satisfying the penological goals of retribution, incapacitation, deterrence, or rehabilitation. According to the Court, the state must provide a young person who commits a nonhomicide offense with "meaningful" or "realistic" opportunities for release. *Graham* was a significant judgment because it reaffirmed the Court's concern with a juvenile's diminished culpability, making it clear that its jurisprudence in *Simmons* was not solely about the death penalty ("death is different"), but rather opened the door to a new approach to sentencing juveniles that accounted for their developmental immaturity.[35] This led, inter alia, to a focus on the parole review process that acknowledged the potentially expansive application of *Graham*'s principles.[36] It also paved the way for an even more significant shift in the Court's jurisprudence regarding juveniles.[37]

The next challenge to harsh sentencing of juveniles, supported by JLC, came before the Court in the case of *Miller* (2012).[38] Here, JLC argued that the sentence of mandatory life without parole for juveniles convicted of homicide offenses was unconstitutional. Its amicus brief drew on the Court-accepted principle of a youth's diminished culpability, but combined it with the argument that a mandatory LWOP sentence is unconstitutional because it deprives juveniles of any consideration of the characteristics of youth.[39] In a significant judgment, the Court agreed that the mandatory imposition of LWOP on a

33. Brief of Juvenile Law Center, National Juvenile Defender Center, Children & Family Justice Center, *et al.* as *Amici Curiae* in Support of Petitioners at 2–3, Graham v. Florida, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621), 2009 WL 2388114. Marsha Levick was again counsel of record when JLC, with the National Juvenile Defender Center, Children and Family Justice Center, and others, presented as amici curiae in support of the petitioners. *Id.*

34. Graham v. Florida, 560 U.S. 48, 55–56 (2010).

35. *See* Michelle Marquis, Graham v. Florida: *A Game-Changing Victory for Both Juveniles and Juvenile-Rights Advocates*, 45 LOY. L.A. L. REV. 255, 259–60 (2011) (arguing that *Graham* stands for "the proposition that courts should *always* consider the diminished culpability of juveniles when deciding on appropriate punishments" (quoting Brief for Petitioner at 5, Sullivan v. Florida, 560 U.S. 181 (2010) (No. 08-7621))).

36. *See id*. at 271–74.

37. *See* Elizabeth S. Scott, "*Children are Different": Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 72 (2013) (discussing how the Supreme Court's recent opinions, including its opinion in *Graham*, signal change in Eighth Amendment doctrine by recognizing differences between juveniles and adults).

38. 132 S. Ct. 2455 (2012); *see also* Jackson v. Norris, 378 S.W.3d 103, 107 (Ark. 2011), *rev'd and remanded sub nom.* Miller v. Alabama, 132 S. Ct. 2455 (2012).

39. Brief for Juvenile Law Center *et al.* as *Amici Curiae* Supporting Petitioners at 12–14, Miller v. Alabama, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647). This time JLC was joined by colleagues from the Suffolk University and Northwestern University schools of law. *Id.* at 37.

juvenile breached the Eighth Amendment's ban on cruel and unusual punishment. According to the Court, *Graham* was not crime specific in its analysis of juveniles' mental makeup and vulnerabilities, and so a regime that precludes a court from giving consideration to youth in sentencing frustrates the principle of proportionate sentencing. More generally, the Court also confirmed that "youth matters" in sentencing, thereby highlighting that a regime that responds to criminal activity must be sufficiently flexible to enable relevant characteristics to be taken into account. Although the Court's decision in *Miller* might be viewed through a narrow lens, Elizabeth Scott cogently argues that its true reach is very broad indeed.[40] First, she highlights how the Court rejected an approach narrowed by reference to the youth of the petitioner (who was fourteen) or the nonintentional nature of the homicide committed, and instead made it clear in strong terms that it expected the LWOP sentence to become "uncommon" on the basis of a youth's diminished culpability.[41] This could potentially point the way for a ban on the sentence altogether, a point made even more likely by the Court's attitude toward national practice in this area.[42] This would, of course, bring the United States fully into line with the UNCRC on this issue, although the absence of references to international law in *Miller* are disappointing in this regard.[43]

Despite the clarity of the Court's ruling, the application of *Miller* has not been straightforward. State practice in its implementation has diverged depending on whether the state considered its judgment to contain a substantive rule, which has retrospective effect, or a procedural rule, which does not.[44] The Supreme Court of Louisiana adopted the latter approach and its decision was appealed to the U.S. Supreme Court, with JLC acting as co-counsel for the petitioner. In January 2016, the Supreme Court ruled in favor of retrospectivity in *Montgomery v. Louisiana* (2016),[45] finding that because *Miller* announced a substantive rule of constitutional law, it applied retrospectively to all previous sentences of mandatory LWOP imposed on juveniles.[46] The judgment opens the possibility of release to approximately 1,500 people serving mandatory sentences

40. Scott, *supra* note 37, at 74 ("Implicit in this generalization is a broader principle that the same attributes of adolescence that mitigate the culpability of the youths whose crimes the Court has reviewed reduce the blameworthiness of juveniles' criminal choices generally.").

41. *Id.* at 75–77; *see also Miller*, 132 S. Ct. at 2469.

42. *See* Scott, *supra* note 37, at 82–84. For more information on this point, see Craig S. Lerner, *Sentenced to Confusion:* Miller v. Alabama *and the Coming Wave of Eighth Amendment Cases*, 20 GEO. MASON L. REV. 25, 25–27, 34 (2012).

43. *See* Jonathan Levy, *The Case of the Missing Argument: The Mysterious Disappearance of International Law from Juvenile Sentencing in* Miller v. Alabama, *132 S. Ct. 2455 (2012)*, 36 HARV. J.L. & PUB. POL'Y 355, 355 (2013).

44. *See* Eric Schab, Commentary, *Departing from* Teague: Miller v. Alabama*'s Invitation to the States to Experiment with New Retroactivity Standards*, 12 OHIO ST. J. CRIM. L. 213, 213–14 (2015) (discussing the lack of consensus among the states with regard to whether *Miller* introduced a procedural or substantive rule).

45. 136 S. Ct. 718 (2016).

46. *Montgomery*, 136 S. Ct. at 732, 736.

of LWOP, which (courtesy of *Miller*) is now unconstitutional.[47] Should such people be able to prove that they were not irredeemable at the time of adjudication, they may be entitled to release.[48]

B. Reducing Transfers to the Adult System

At the heart of any criminal justice system that imposes harsh sentences on children is the ability to transfer juvenile cases to the adult criminal justice system where the maximum penalties are available regardless of the offender's age. This practice undermines the principle of juvenile justice that children's particular circumstances warrant specialized treatment that takes account of their age and maturity, diminished culpability, and the prospect that they are capable of playing a constructive role in society.[49] Although Article 1 of the UNCRC appears to allow for the exclusion of certain children from its protections,[50] the UN Committee on the Rights of the Child considers that the nondiscriminatory application of the UNCRC's juvenile justice principles requires every child under eighteen years to be treated in line with Article 40.[51] It has specifically criticized the trial of children as adults in this context.[52]

Despite its inconsistency with international norms and its negative impact on recidivism,[53] the transfer of juveniles to the adult system is in widespread use internationally[54] where its popularity stems from the power it reserves to the courts to sentence a juvenile according to the offense, irrespective of age. In this way, transfer mechanisms—whether automatic or discretionary—run counter to the "developmental model" of juvenile justice as a system that offers "proportionality [as] the bedrock of a fair and legitimate justice system."[55]

47. *See* ASHLEY NELLIS, SENTENCING PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 2 (2012), http://sentencingproject.org/wp-content/uploads/2016/01/The-Lives-of-Juvenile-Lifers.pdf (finding 1,579 individuals who were sentenced to life as juveniles still serving their sentences in prison).

48. Lyle Denniston, *Opinion Analysis: Further Limit on Life Sentences for Youthful Criminals*, SCOTUSBLOG (Jan. 25, 2016, 12:26 PM), http://www.scotusblog.com/2016/01/opinion-analysis-further-limit-on-life-sentences-for-youthful-criminals/.

49. Convention on the Rights of the Child, *supra* note 6, art. 40(1); *see also* Ton Liefaard, *Juvenile Justice and Children's Rights' Perspective*, *in* ROUTLEDGE INTERNATIONAL HANDBOOK OF CHILDREN'S RIGHTS STUDIES 234, 239–40 (Wouter Vandenhole et al. eds., 2015).

50. *See* Convention on the Rights of the Child, *supra* note 6, art. 1 (defining a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier").

51. Comm. on the Rights of the Child, *supra* note 13, ¶ 37.

52. *Id.* ¶ 38.

53. Donna M. Bishop et al., *The Transfer of Juveniles to Criminal Court: Does It Make a Difference?*, 42 CRIME & DELINQ. 171, 183 (1996).

54. *See* AARON KUPCHIK, JUDGING JUVENILES: PROSECUTING ADOLESCENTS IN ADULT AND JUVENILE COURTS 1 (2006); Ido Weijers et al., *Transfer of Minors to the Criminal Court in Europe: Belgium and the Netherlands*, *in* REFORMING JUVENILE JUSTICE 105, 105 (Josine Junger-Tas & Frieder Dünkel eds., 2009).

55. ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 229 (2008) [hereinafter SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE].

For all of these reasons, it is logical that JLC should seek to challenge "arbitrary and capricious" transfer provisions.[56] As with the cases relating to the sentencing of children, JLC has relied in its arguments on developmental and neuroscience research here, too.[57] For instance, in the Texas case of *Moon v. State* (2014),[58] JLC argued that the juvenile court erred by transferring the youth to adult court based on the charged offense alone, without an individualized determination of the youth's maturity, culpability, and capacity for change.[59] Moreover, relying on the Supreme Court rulings in *Simmons*, *Graham*, and *Miller*, JLC argued before the U.S. Supreme Court in *Watson v. Illinois* (2015)[60] that the automatic exclusion from juvenile court of certain youth charged with murder was unconstitutional when combined with the imposition of mandatory sentences.[61] Evidently, these cases not only challenge the impact of a regime that transfers juveniles to adult court, they also contest the treatment of these children that results from such transfer. Encouragingly, these challenges take place against a backdrop of the reform of state transfer laws, including the reinstatement of judicial discretion and the increased age at which transfer is possible.[62]

JLC has also sought to challenge the application of adult sentencing to young people outside of the transfer arena. For instance, the case of *State v. Rudy B*. (2008)[63] involved a seventeen-year-old sentenced as an adult to twenty-five years (as opposed to the maximum three and half years he would have served as a juvenile) under the provisions of a New Mexico statute. Here, JLC coauthored a brief that argued that the New Mexico statute setting down the amenability hearing structure was unconstitutional because it denied the right to have a jury determine whether a juvenile could receive an adult sentence.[64] In *People v. Nguyen* (2008),[65] JLC filed a brief in collaboration with other

56. *See* Janet C. Hoeffel, *The Jurisprudence of Death and Youth: Now the Twain Should Meet*, 46 TEX. TECH. L. REV. 29, 31 (2013).

57. For an example of such research, 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, 1009–10 (2003) [hereinafter Steinberg & Scott, *Less Guilty by Reason of Adolescence*].

58. 451 S.W.3d 28 (Tex. Crim. App. 2014).

59. Brief of the Juvenile Law Center *et al.* as *Amicus Curiae* in Support of Appellee Cameron Moon, Moon v. State, 451 S.W.3d 28 (Tex. Crim. App. 2014) (No. PD-1215-13).

60. People v. Watson, No. 1-12-1741, 2014 WL 4656905 (Ill. App. Ct. Sept. 18, 2014), *cert. denied sub nom.* Watson v. Illinois, 136 S. Ct. 399 (2015).

61. Brief of the Juvenile Law Center, Northwestern University School of Law's Children & Family Justice Center *Amicus* Brief Supporting Petition for Writ of *Certiorari* at 12–16, Watson v. Illinois, 136 S. Ct. 399 (2015) (mem.) (No. 14-9504).

62. *See* NICOLE D. PORTER, SENTENCING PROJECT, THE STATE OF SENTENCING 2014: DEVELOPMENTS IN POLICY AND PRACTICE 1–2 (2015), http://www.sentencingproject.org/doc/publications/sen_State_of_Sentencing_2014.pdf.

63. 243 P.3d 726 (N.M. 2010).

64. Amicus Curiae Brief of Juvenile Law Center in Support of Child/Appellant at 2–3, State v. Rudy B., 243 P.3d 726 (N.M. 2010) (No. 27, 589).

65. 209 P.3d 946 (Cal. 2009).

organizations arguing that the use of a juvenile conviction to enhance an adult criminal sentence violated the longstanding commitment in California to maintain a separate juvenile justice system.[66] The brief also referenced scientific research confirming the developmental differences between children and adults, and explained how juvenile convictions lack the reliability of adult convictions. Together, these cases illustrate the ways in which JLC has sought to challenge transfer mechanisms, the application of adult sentencing practices to juveniles, as well as the structures underpinning them.

C. Expunging Juvenile Records

International standards demonstrate that juveniles should not bear the consequences of their actions into their adult lives.[67] They also stress the importance that all sanctions imposed on juveniles should comply with the principle of proportionality, bearing in mind the circumstances of an offender as well as the offense.[68] Consistent with this principle, JLC has argued in a number of cases that a child should be spared from the permanent stigma associated with a criminal record or, in particular, lifetime and sometimes mandatory registration as a sex offender. For example, in the case of *In re Smith* (2009),[69] JLC argued in its amicus brief to the Ohio Supreme Court, cowritten with the American Civil Liberties Union (ACLU), that the juvenile court should have discretion to determine how to classify a child sex offender after taking into account a range of factors, including the reduced likelihood that a child will reoffend.[70] By exercising this discretion in particular cases, they argued, the juvenile court could promote the rehabilitation and eventual reintegration of

66. Brief for Pacific Juvenile Defender Center, Juvenile Law Center, Juvenile Division of the Los Angeles Public Defender, Alternate Public Defender, National Center for Youth Law & Youth Law Center for Leave to File Amicus Curiae Brief on Behalf of Appellant Nguyen and Brief at 12–14, People v. Nguyen, 209 P.3d 946 (Cal. 2009) (No. S154847).

67. *See* Beijing Rules, *supra* note 11, r. 21.1–.2. The UN Committee on the Rights of the Child recommends that the States parties introduce rules which would allow for an automatic removal from the criminal records of the name of the child who committed an offence upon reaching the age of 18, or for certain limited, serious offences where removal is possible at the request of the child, if necessary under certain conditions (e.g. not having committed an offence within two years after the last conviction).

Comm. on the Rights of the Child, *supra* note 13, ¶ 67.

68. According to the UN Committee on the Rights of the Child,

> [T]he reaction to an offence should always be in proportion not only to the circumstances and the gravity of the offence, but also to the age, lesser culpability, circumstances and needs of the child, as well as to the various and particularly long-term needs of the society. A strictly punitive approach is not in accordance with the leading principles for juvenile justice spelled out in article 40 (1) of CRC.

Comm. on the Rights of the Child, *supra* note 13, ¶ 71.

69. No. 1-07-58, 2008 WL 2581667 (Ohio Ct. App. June 30, 2008).

70. Merit Brief of *Amici Curiae* American Civil Liberties Union of Ohion Foundation, Inc., Juvenile Law Center, Montgomery County Public Defender, Children's Law Center, Inc., Central Juvenile Defender Center & Ohio Justice & Policy Center In Support of Appellant, Darian J. Smith at 6–10, *In re* Smith, 120 Ohio St. 3d 1416 (Ohio 2008) (No. 2008-1624).

child offenders into society.[71]

In *Welch v. United States* (2010),[72] JLC argued with the Center for the Wrongful Conviction of Youth, in echoing international standards,[73] that "juvenile adjudications should not be used to enhance adult sentences, since in juvenile court there is no jury, the culture is non-adversarial, defense attorneys are often overburdened and poorly resourced, unreliable evidence is often used, and appellate rights are either nonexistent or underutilized."[74] In *Commonwealth v. Robinson* (2011),[75] JLC argued that "a court should not consider an individual's juvenile record when deciding whether to impose the death penalty on him or her as an adult."[76] Both of these cases touch on the peculiarity of the juvenile system, which, although described as juvenile court, is not an adversarial criminal court as exists in the adult criminal justice system.[77] As "adjudications," JLC argued, its findings should not therefore be treated like convictions.

The disproportionate nature of mandatory, often lifelong, registration of juvenile sex offenders has come into sharp focus in light of the demands, upheld in *Miller*, for a more proportionate sentencing policy for juveniles.[78] Following this theme, JLC filed motions in *In re J.B.* (2013),[79] seeking relief on behalf of young people who, after being adjudicated delinquent for sexual offenses, were required under the Sex Offender Registration and Notification Act (SORNA) to register as sex offenders and were subject to community notification on the same terms as adults.[80] The motions requested the court to reconsider the youths' classification as juvenile sex offenders and to remove their information from the registry. In 2014, JLC successfully argued before the Pennsylvania Supreme

71. *Id.* at 17. This is in line with Article 40(3) of the UNCRC. Convention on the Rights of the Child, *supra* note 6, art. (40)(3).

72. Welch v. United States, 604 F.3d 408 (7th Cir. 2010), *cert. denied*, 564 U.S. 1018 (Mem) (2011).

73. According to the UN Committee on the Rights of the Child, "[R]ecords of child offenders should not be used in adult proceedings in subsequent cases involving the same offender." Comm. on the Rights of the Child, *supra* note 13, ¶ 66.

74. *Legal Docket*, JUV. L. CTR., http://www.jlc.org/legal-docket/amicus-curiae?page=1&topics=22 (last visited June 1, 2016); *see also* Brief of Center on Wrongful Convictions of Youth, Juvenile Justice Center, et. al., as *Amici Curiae* in Support of Petitioner at 3–6, 15–19, Welch v. U.S., 131 S. Ct. 3019 (2011) (mem.) (No.10-314).

75. Commonwealth v. Robinson, No. CP-39-CR-0058-1994, 2012 WL 10028332 (Pa. Com. Pl. June 21, 2012).

76. *Pennsylvania v. Robinson*, JUV. L. CTR., http://www.jlc.org/legal-docket/pennsylvania-v-robinson (last visited June 1, 2016).

77. *See generally* Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy,* 88 J. CRIM. L. & CRIMINOLOGY 68 (1997); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691 (1991).

78. Amy E. Halbrook, *Juvenile Pariahs*, 65 HASTINGS L.J. 1, 48–52 (2013).

79. 107 A.3d 1 (Pa. 2014).

80. Brief for Appellees at 1–2, *In re* J.B., 107 A.3d 1 (Pa. 2014) (No. CP-67-JV-0000726-2010). For a useful analysis of SORNA, see Britney M. Bowater, Comment, *Adam Walsh Child Protection and Safety Act of 2006: Is There a Better Way to Tailor the Sentences for Juvenile Sex Offenders?*, 57 CATH. U. L. REV. 817 (2008).

Court that the mandatory registration requirements under SORNA violated juvenile's due process rights by applying an irrebuttable presumption that all such offenders "pose a high risk of committing additional sexual offenses."[81] In a very significant ruling, the court noted that "SORNA's automatic registration removes the juvenile judges' ability to consider the rehabilitative prospects of individual juvenile sexual offenders."[82] In its approach, the court clearly espoused the demand for individualized adjudication of a juvenile's case and reinforced the importance of a rehabilitative approach in line with the concerns of the victim and society. These arguments again surfaced in the case of *In re M.A.* (2015),[83] when JLC argued that by imposing registration as a violent offender on a juvenile without consideration of either the characteristics that distinguish a young person from his adult counterpart or a young person's individual circumstances, Illinois's Violent Offender Against Youth Registration Act (VOYRA) was unconstitutional.[84] The court's ruling relied expressly on U.S. Supreme Court jurisprudence in *Miller*, *Graham*, and *Simmons*, espousing the principle that children are different from adults, to find that the statute violated both state and federal constitutional guarantees of equal protection and due process. The judgment is an important illustration of the reach of this principle into other areas of juvenile sentencing, in line with international standards.

D. Fairness and Due Process

The United States has led the way in advancing the due process rights of young offenders,[85] while international law has lagged behind with respect to these advances until recently.[86] JLC has taken and supported a number of cases relating to the right of children to access legal counsel. Over twenty-five years ago, JLC filed a class action lawsuit with co-counsel the ACLU of Pennsylvania in *T.M. v. City of Philadelphia* (1989), seeking the appointment of counsel for all children in dependency proceedings (the matter was settled and provided phased-in representation for all such children by the mid-1990s),[87] and in 2006,

81. *J.B.,* 107 A.3d at 4, 14, 16 (quoting 42 PA. STAT. AND CONS. STAT. § 9799.11(a)(4) (West 2013)).

82. *Id.* at 18.

83. 43 N.E.3d 86 (Ill. 2015).

84. Juvenile Law Center, Children & Family Justice Center, et al.'s Amicus Curiae Brief on Behalf of Respondent-Appellee at 8–14, *In re* M.A., 43 N.E.3d 86 (Ill. 2015) (No. 118049).

85. *See* Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 794–98 (2005).

86. Although the UNCRC clearly protects due process rights, Article 40(2)(b)(ii) refers to the guarantee of "legal or other appropriate assistance in the preparation and presentation of his or her defence." Convention on the Rights of the Child, *supra* note 6, art. 40(2)(b)(ii). This ambiguity continues in the UN Committee on the Rights of the Child's General Comment No. 10, *see* Comm. on the Rights of the Child, *supra* note 13, ¶ 49, although the European Court of Human Rights has upheld the right of the child to legal assistance especially during police questioning, Salduz v. Turkey, 2008-V Eur. Ct. H.R. 61, 61–62 (2008); *see also* COUNCIL OF EUROPE GUIDELINES, *supra* note 14, at 26–27.

87. *T.M. v. City of Philadelphia,* JUV. L. CTR., http://jlc.org/legal-docket/tm-v-city-philadelphia

JLC filed an amicus brief in the Ohio Supreme Court in a matter deciding whether juveniles should be permitted to waive counsel at any stage of delinquency proceedings.[88] The brief detailed the important role of counsel from a young person's first contact with the juvenile justice system through direct appeal[89] and led the Ohio Supreme Court to find that a juvenile is not permitted to waive his constitutional right to counsel without the trial court conducting an analysis of the young person's "background and experience generally and in the court system specifically," among other things.[90]

The quality of legal representation has also been a matter of concern to JLC. In the case of *People v. Austin M.* (2009),[91] JLC, along with other organizations, argued that a juvenile cannot receive quality legal representation from a lawyer who is also a guardian ad litem (GAL) because the two roles are at times contradictory (a GAL must act in the child's best interests but attorneys who act as GALs may provide ineffective assistance of counsel).[92] The brief further argued that the Supreme Court's guarantee of a juvenile's right to counsel from *In re Gault*[93] means the right to an advocate acting in his client's defense, not in his own best interests. In 2012, the Supreme Court of Illinois reversed Austin's adjudication of delinquency based on the finding that the legal representation he received at his delinquency trial was not the type of counsel guaranteed by due process and the Illinois Juvenile Court Act.[94] According to the court, a minor accused of delinquency has a nonwaivable right to a defense attorney. This decision underscores the importance of a juvenile's independent right to counsel. Ensuring children can access independent legal counsel is a crucial protection in a system where the resources of the state are deployed against them. According to legal instruments like the European Convention on Human Rights[95] and the European Guidelines on Child-Friendly Justice,[96]

(last visited June 1, 2016).

88. *In re* C.S., 874 N.E.2d 1177, 1180 (Ohio 2007).

89. Brief of Amici Curiae Juvenile Law Center et al. as Supporting Appellant Corey Spears, *In re* C.S., 874 N.E. 2d 1177 (Ohio 2007) (No. 06-1074).

90. *C.S.*, 874 N.E.2d at 1193.

91. 975 N.E.2d 22 (Ill. 2012).

92. Brief of Loyola *Civitas* Childlaw Center, Children & Family Justice Center, Juvenile Law Center & National Juvenile Defender Center as *Amici Curiae* in Support of Petitioner-Appellant Austin M. at 14–26, People v. Austin M., 975 N.E.2d 22 (Ill. 2012) (No. 111194) [hereinafter Brief of Civitas Childlaw Center]. For further information about the role of GALs, see Nicole Donins, *Guardian Ad Litem*, 25 J. JUV. L. 96, 97–101 (2005).

93. 387 U.S. 1 (1967).

94. *Austin M.*, 975 N.E.2d at 40–41.

95. The European Convention on Human Rights "not only provides the potential to develop specific human rights standards in youth justice, but also forms the mechanism to ensure that these standards have teeth." Ursula Kilkelly, *Youth Justice and Children's Rights: Measuring Compliance with International Standards*, 8 YOUTH JUST. 187, 189 (2008); *see also* European Convention for the Protection of Human Rights and Fundamental Freedoms, as *amended by* Protocols nos. 11 (Nov. 1, 1998) and 14 (June 1, 2010), Nov. 4, 1950, 213 U.N.T.S. 221.

96. The Guidelines on Child-Friendly Justice were adopted by the Committee of Ministers of the Council of Europe on November 17, 2010 at the 1098th meeting of the Committee of Ministers' Deputies. *See* COUNCIL OF EUROPE GUIDELINES, *supra* note 14, at 26.

access to a lawyer must be a minimum requirement in the defense of the rights of children in the juvenile justice system.

E. Children and the Police

But even where children are appointed a lawyer, they cannot be with them everywhere they go, and reflecting on this reality, international standards (like the guidance of the Committee on the Rights of the Child[97] and the European Guidelines on Child-Friendly Justice[98]) highlight the importance of specialization and training for professionals, including law enforcement, who come into contact with children. It is against this backdrop that the case of *J.D.B. v. North Carolina* (2012)[99] must be viewed, specifically in the context of school-based policing.

J.D.B. concerned a thirteen-year-old student who was accused in school of involvement in a series of thefts. He was removed from his classroom and questioned by four adults, including a uniformed police officer, on school grounds and was not given his *Miranda* warnings during the interrogation or prior to making any statements about his conduct. In subsequent proceedings before the U.S. Supreme Court, JLC filed two amicus briefs on behalf of the petitioner, arguing that a youth's age is relevant to the determination of whether a suspect is "in custody" for *Miranda* purposes, and that, accordingly, J.D.B. should have been given *Miranda* warnings. The Supreme Court agreed and found that the age of the child was relevant to the question of whether the child was in custody, articulating a "reasonable juvenile" standard for the purposes of *Miranda*.[100]

As Barry Feld noted in 2006, "Developmental psychological research over the past quarter-century has consistently emphasized adolescents' inability to understand or to exercise their *Miranda* rights during interrogation."[101] Notwithstanding that this ruling was "long overdue,"[102] its significance is difficult to overstate. The Court was persuaded by research highlighting that juveniles are under pressure to falsely confess during police interrogation, and John Wesley's analysis indicates a heavy reliance by the Court on the amici briefs submitted by the Center for the Wrongful Conviction of Youth, among others.[103] While its application may be limited to the common sense adaption of the *Miranda* warnings to allow for consideration of children's particular circumstances,[104]

97. Comm. on the Rights of the Child, *supra* note 13, ¶ 97 (drawing attention to the importance of training, especially for law enforcement).

98. COUNCIL OF EUROPE GUIDELINES, *supra* note 14, at 85.

99. 131 S. Ct. 2394 (2011).

100. *J.D.B.*, 131 S. Ct. at 2399–40.

101. Barry C. Feld, *Juveniles' Competence to Exercise* Miranda *Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 98 (2006).

102. John M. P. Wesley, Case Comment, *Age of Intimidation: Why the Supreme Court Got It Right in* J.D.B. v. North Carolina, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 269, 269 (2013).

103. *Id.* at 290–91.

104. *See id.* at 290.

others point to its much wider potential. Martin Guggenheim and Randy Hertz argue that the case is a "game changer" that could "transform police interrogations of juvenile suspects," especially if it is interpreted to require legal counsel before and during police questioning.[105] An even wider application, viewed through the lens of international children's rights standards, might support a rewriting of the broader legal parameters of how police question young people. The relationship between children and the police is a hugely influential one for children, and research shows that children's perception of the legitimacy of police treatment can have life-defining consequences for them.[106] In policy terms, *J.D.B.* could be used to advocate for specialized training for police who interact with children, and to ensure that police officers who work in schools have received specialized service training in child development and communication.[107] This change would be a really significant development toward U.S. implementation of children's rights standards.[108]

III. JUVENILE LAW CENTER: THE IMPACT OF ITS WORK

Section I of this Article outlined the international children's rights standards that guide states in their implementation of juvenile justice law and policy, and Section II detailed the litigation involving JLC, which has pursued the implementation of these standards. Section III of this Article now moves on to examine the impact of JLC's work, exploring in particular the methods it has used to bring about such substantial legal change for juveniles.

In the last decade, JLC is the only organization in the United States to have filed amicus briefs in the four major Supreme Court cases resting on developmental science: *Roper* (2004, ending the execution of juveniles); *Graham* (2010, ending juvenile life without parole sentences in nonhomicide cases); *J.D.B.* (2011, creating a "reasonable juvenile" standard when deciding whether *Miranda* warnings are required during interrogation); and *Miller* (2012, declaring unconstitutional mandatory life sentences for juveniles in homicide cases). When added to the cases in which it has been either lead or co-counsel—like *Montgomery* (2016) and *In re J.B.* (2014)—it is clear that JLC has been involved in all of the recent major juvenile cases argued and won before the highest courts in the United States. Internationally, these cases may not appear as significant because they challenge practices that are relatively rare outside of the United States. However, viewed strategically, the cases are significant because they

105. *See* Martin Guggenheim & Randy Hertz, J.D.B. *and the Maturing of Juvenile Confession Suppression Law*, 38 WASH. U. J.L. & POL'Y 109, 110, 170 (2012).

106. *See* Lyn Hinds, *Building Police-Youth Relationships—The Importance of Procedural Justice*, 7 YOUTH JUST. 195, 206 (2007); Ursula Kilkelly, *Policing, Young People, Diversion and Accountability in Ireland*, 55 CRIME, L. & SOC. CHANGE 133, 133–34 (2011).

107. *See* STRATEGIES FOR YOUTH, IF NOT NOW, WHEN? A SURVEY OF JUVENILE JUSTICE TRAINING IN AMERICA'S POLICE ACADEMIES 14–15 (2013), http://strategiesforyouth.org/sfysite/wp-content/uploads/2013/03/SFYReport_02-2013_rev.pdf.

108. *See* Lisa H. Thurau & Sia Henry, *Applying* J.D.B. v. North Carolina: *Toward Ending Legal Fictions and Adopting Effective Police Questioning of Youth*, *in* A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM 239, 240 (Nancy E. Dowd ed., 2015).

challenge established punitive thinking on the treatment of juveniles.[109] Even more importantly, perhaps, JLC has undertaken these challenges by deploying a range of persuasive arguments based on research from the field of psychology, social science, and neuroscience—the so-called developmental sciences. It is thus argued that these cases are important not solely because of their outcomes,[110] but also because they represent the achievement of reform, through the combination of law, research, and indeed philanthropy, which has had a seismic impact on the landscape of juvenile justice in the United States.[111] In this way, it is the manner of winning these cases that has international relevance. This Section of the Article examines these impacts from two different perspectives: the litigation and the strategy adopted. It concludes with some remarks that attempt to measure the influence of JLC's work in this area beyond these boundaries.

A. The Legal Impact

It is very well documented that beginning in the 1980s and continuing through the 1990s, many states in the United States passed legislation designed to get tough on what were described as the "superpredators" of juvenile crime, with policies that had a devastatingly punitive effect on the juvenile justice system as a whole.[112] These young people were prosecuted in adult criminal courts and detained in adult correctional facilities in increasing numbers.[113] However, recent U.S. Supreme Court cases taken or supported by JLC appear to mark a shift away from the "adultification" of juveniles and punitive policies toward a more rehabilitative philosophy.[114] For example, Alesa Liles and Stacy Moak, reviewing these Supreme Court cases, surmise that "the pendulum is once again shifting more in the direction of individualized justice focused on treatment."[115] Guggenheim notes that the decision in *Graham* vindicates the Progressives who more than a hundred years ago insisted that children should be sentenced like children.[116]

109. Scott, *supra* note 37, at 91.

110. Alesa Liles & Stacy C. Moak, *Changing Juvenile Justice Policy in Response to the US Supreme Court: Implementing* Miller v. Alabama, 15 YOUTH JUST. 76, 88 (2015) (suggesting that these "cases indicate[] that perhaps the pendulum is once again shifting more in the direction of individualized justice focused on treatment").

111. JLC has had an important relationship with the MacArthur Foundation, which has played a key role in this area for many years. *See, e.g.*, ELIZABETH SCOTT, THOMAS GRISSO, MARSHA LEVICK & LAURENCE STEINBERG, THE SUPREME COURT AND THE TRANSFORMATION OF JUVENILE SENTENCING (2015), http://modelsforchange.net/publications/778?utm_source=%2ftransformation&utm_medium=web&utm_campaign=redirect.

112. Scott, *supra* note 37, at 91; *see also* Alida V. Merlo & Peter J. Benekos, *Is Punitive Juvenile Justice Policy Declining in the United States? A Critique of Emergent Initiatives*, 10 YOUTH JUST. 3, 4 (2010).

113. Liles & Moak, *supra* note 110, at 77.

114. *Id.* at 78; *see also* Merlo & Benekos, *supra* note 112, at 4–5.

115. Liles & Moak, *supra* note 110, at 88.

116. Martin Guggenheim, Graham v. Florida *and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 500 (2012).

It is remarkable that in the 2005 case of *Simmons* the Supreme Court reversed the course it had been on for almost three decades.[117] In *Graham*, the Court overturned the next harshest sentence—LWOP for nonhomicide offenses—that had become widely accepted across the United States.[118] In *Miller*, the Supreme Court rejected mandatory LWOP, creating a new expectation of individualized sentencing for juveniles.[119] This latter case in particular consolidated the view that the sentencing process must engage with the distinctive features of children.[120] Although there was some confusion and inconsistency about the implications of *Miller*[121] (largely clarified by *Montgomery*), the enormous potential to challenge the whole range of mandatory sentencing options applied to juveniles is becoming apparent.[122] According to Alida Merlo and Peter Benekos, "[T]he science of adolescent brain development has provided a foundation to reconsider the culpability of youth and the proportionality of punishment."[123] Overall, they argue, a more balanced approach to juvenile offending has emerged.[124] In *Miller*, a judgment that reflected the significance of *In re Gault*,[125] the Court also reaffirmed the need for a "complete separation in structure, operation, and mission of juvenile justice as compared to adult criminal court."[126] Whether taken separately, or together, these cases represent seismic shifts in the direction of juvenile justice in the United States.

"States are re-examining juvenile sentencing laws," as a result of the *Simmons*, *Graham*, and *Miller* cases, "recognizing the over-reactive harshness of get-tough policies and their unintended consequences."[127] A "wave of law reform" has swept across the United States.[128] For example, at the time the *Miller* case was decided, forty-three states had some form of LWOP statutes affecting juveniles, and twenty-eight states had mandatory LWOP statues for certain offenses.

117. *See* Jennifer S. Breen & John R. Mills, *Mandating Discretion: Juvenile Sentencing Schemes After* Miller v. Alabama, 52 AM. CRIM. L. REV. 293, 300–03 (2015).

118. Sean Craig, Note, *Juvenile Life Without Parole Post-*Miller*: The Long, Treacherous Road Towards a Categorical Rule*, 91 WASH. U. L. REV. 379, 379 (2013).

119. *Id.* at 379–80.

120. Meredith Lamberti, Note, *Children are Different: Why Iowa Should Adopt a Categorical Ban on Life Without Parole Sentences for Juvenile Homicide Offenders*, 63 DRAKE L. REV. 311, 317–19 (2015).

121. *See* Robert S. Chang et al., *Evading* Miller, 39 SEATTLE U. L. REV. 85, 86–87 (2015); Lauren Kinell, Note, *Answering the Unanswered Questions: How States Can Comport with* Miller v. Alabama, 13 CONN. PUB. INT. L.J. 143, 143 (2013).

122. Elizabeth Scott, Thomas Grisso, Marsha Levick & Laurence Steinberg, *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMP. L. REV. 675, 682 (2016).

123. Merlo & Benekos*, supra* note 112, at 5.

124. *Id.*

125. *See* Guggenheim, *supra* note 116, at 457 (stating that *Graham* "is the most significant juvenile justice case advancing children's rights since the landmark *In re Gault* decision").

126. *See* Liles & Moak, *supra* note 110, at 78.

127. Merlo & Benekos, *supra* note 112, at 21.

128. Scott et al., *supra* note 122, at 687.

> Since the *Miller* decision, 23 states have either changed their laws or have proposed legislation that will change their laws regarding [LWOP] for juvenile offenders. The most common change, passed in 18 states, was to change the mandatory LWOP statutes to discretionary LWOP statutes. Those states contain various types of language that allow discretion in whether to sentence a juvenile to LWOP.[129]

Focus has now also turned to reform of the parole process for juveniles.[130]

Neelum Arya argues that the Supreme Court decision in *Graham* "has the potential to profoundly impact the field of juvenile justice and youth policies as a whole. . . . by eliminating the ability to prosecute youth as adults in the first place."[131] The removal of "retribution as a valid goal of the criminal justice system as applied to youth" is a possibility, with "a constitutional right to rehabilitation" becoming a genuine prospect.[132] Although some of the legislative frameworks enacted since *Miller* have been criticized for not fully embracing the philosophy of rehabilitation or the special characteristics of young people set out in the Supreme Court's opinion, it has been noted that the new provisions do indicate "effort on the part of states to reverse the trend of juveniles incarcerated to life."[133] The clarification around the retrospective application of *Miller* in *Montgomery* will undoubtedly expedite this process. From the federal level, juvenile justice policy and practice appears to be evolving "in the direction of treating juveniles differently from adults, and recognizing their ability to mature and change with time."[134]

Liles and Moak note that the Supreme Court decisions in *Simmons*, *Miller*, and *Graham* "appear to bring the US more in line" with the UNCRC and "toward full participation with other countries in protecting the rights of [children]."[135] Furthermore, "[t]o the extent that US policies influence European countries, perhaps these decisions mark a greater recognition of the uniqueness of childhood that will return juvenile policy to one focused on treatment and rehabilitation."[136] Ultimately, only time will tell whether the full transformative effect of these cases will be realized.

129. Liles & Moak, *supra* note 110, at 82; For a discussion of how states have responded to *Miller*, see Scott et al., *supra* note 122, at 688–91.

130. *See* Gerard Glynn & Ilona Vila, *What States Should Do to Provide a Meaningful Opportunity for Review and Release: Recognize Human Worth and Potential*, 24 ST. THOMAS L. REV. 310, 333–37 (2012) (discussing how the *Graham* decision has impacted states' implementation of parole reviews of youthful offenders); *see also* Scott et al., *supra* note 122, at 702–03 (analyzing the factors applied to parole hearings).

131. Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 100 (2010).

132. *Id.* at 102.

133. Liles & Moak, *supra* note 110, at 87–88.

134. *Id.* at 90.

135. *Id.*

136. *Id.* at 90–91.

B. Impact of the Strategy—the Use of Developmental Science

What is remarkable, perhaps, about the impact of the scientific evidence that has been so influential in changing the direction of U.S. law in this area is that it is not new. We have always known—through social science and the research of other disciplines—that children are different from adults; they are less mature, they make mistakes, and they often fail to see the consequences of their behavior.[137] However, advances in developmental science and neuroscience have enabled that evidence to be presented in a scientific form; its presentation to courts, who were ready to listen, made all the difference.[138] What was truly innovative was this combination of forces—putting the expertise of scientists and researchers at the disposal of skilled lawyers—that created the platform for legal change.[139] As JLC itself has noted, "*Roper* unlocked a vault from which developmental science emerged as a key litigation tool for children involved in the legal system, followed quickly by neuroscience and a body of law that has transformed the justice system in particular."[140] Early on, Elizabeth Scott and Larry Steinberg called for the reexamination of juvenile justice policy in light of the developmental science.[141] In particular, "[t]hey observe[d] that substantial new scientific evidence about adolescence and criminal activity by adolescents provide[d] the building blocks for a new legal regime superior to today's policy."[142] Their view was, and still is, that the scientific knowledge that was not available twenty years ago should be used to shape the direction of juvenile justice policy to promote greater conditions of social welfare and fairness.[143]

Funders who have supported the litigation strategy of advocates like JLC identified the potential of the combined forces of science and the law.[144] For instance, the MacArthur Foundation's Network on Adolescent Development and Juvenile Justice (the Network) brought together scholars, policy experts, and practitioners to ensure that debates about the future of the juvenile justice system are informed by a sound understanding of child and adolescent development.[145] They examined the current state of knowledge on child and

137. SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 55, at 59–60.

138. *See* Jay D. Aronson, *Neuroscience and Juvenile Justice*, 42 AKRON L. REV. 917, 917–21 (2009).

139. *See* Kathryn Monahan, Laurence Steinberg & Alex R. Piquero, *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 CRIME & JUST. 577, 598–604 (2015).

140. Schwartz, *supra* note 27.

141. *See* Steinberg & Scott, *Less Guilty by Reason of Adolescence*, *supra* note 57, at 1009–10; *see also* SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 55, at 29.

142. Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, FUTURE CHILD., Fall 2008, at 15, 15 [hereinafter Scott & Steinberg, *Adolescent Development*].

143. *Id.* at 29.

144. For a review of this work, see MACARTHUR FOUND., JUVENILE JUSTICE IN A DEVELOPMENTAL FRAMEWORK: A 2015 STATUS REPORT 13–14 (2015) [hereinafter MACARTHUR JUVENILE JUSTICE REPORT], https://www.macfound.org/media/files/MacArthur_Foundation_2015_Status_Report.pdf.

145. *Id.* at 4.

adolescent development and its practical applications in the juvenile justice system by designing a research program based on three broad themes of competence, culpability, and change. The Network and other studies and programs funded by the MacArthur[146] and Annie Casey foundations, and other philanthropic organizations, have had a notable influence on how juveniles are treated within the American justice system.[147] It is difficult to imagine that this kind of large-scale investment in the research and study of issues relevant to the trial, sentencing, and treatment of juveniles would be possible without the impetus provided by the high-profile litigation strategy pursued by JLC. A number of organizations in the United States are using the emerging scientific research relied on in *Simmons* to advocate that adolescent brain development should play a greater role in determining how youth are treated in the juvenile justice system. Such organizations include the Oregon Youth Authority; the Sackler Institute for Developmental Pscychobiology, Cornell University; and the Institute of Law, Psychiatry and Public Policy, University of Virginia.[148] As the director of the Institute of Law, Psychiatry and Public Policy stated: "Now we have that kind of scientific foundation to think about the juvenile justice system and its practices and policies in a way that people did not have before."[149] The high visibility that the work of JLC has given to this research has placed it at the disposal of a range of actors and advocates in support of reform.[150]

A 2013 report by the National Research Council, *Reforming Juvenile Justice: A Developmental Approach*, relies on the explosion of knowledge about adolescent development and the neurological underpinnings of adolescent behavior over the last decade to establish a strong platform for a twenty-first century juvenile justice system.[151] The report makes a number of recommendations about the reform efforts, grounded in the emerging understanding of adolescent development, that are needed if the juvenile justice system is to meet its aims of holding adolescents accountable, preventing reoffending, and treating them fairly. Such recommendations include the development of well-designed, community-based programs for juvenile offenders, the maintenance of the confidentiality of juvenile records, further collaboration among federal agencies, and the provision of representation to

146. LAURENCE STEINBERG, MACARTHUR FOUND., NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE 1–2 (1997) [hereinafter MACARTHUR, NETWORK], https://www.macfound.org/media/article_pdfs/HCD_NET_DEVELOPMENT_JUVENILE_JUSTICE.PDF.

147. *See, e.g.*, *About This Network*, MACARTHUR FOUND., https://www.macfound.org/networks/research-network-on-adolescent-development-juvenil/details#sthash.lse1E4i3.dpuf (last visited June 1, 2016).

148. Gary Gately, *Experts: Brain Development Should Play Bigger Role in Determining Treatment of Juvenile Offenders*, JUV. JUST. INFO. EXCHANGE (Dec. 17, 2013), http://jjie.org/experts-brain-development-should-play-bigger-role-in-determining-treatment-of-juvenile-offenders/.

149. *Id.*

150. *See id.*

151. COMM. ON ASSESSING JUVENILE JUSTICE REFORM, NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 15, 25 (Richard J. Bonnie et al. eds., 2013).

juveniles from well-trained professionals.

According to the Juvenile Justice Information Exchange, advocates in the area of juvenile justice in the United States consider lawmakers, prosecutors, and judges to be more receptive than ever before to science that shows that children's and teenagers' brains are still developing, so they need to be treated differently in the justice system. For example, President Obama's sweeping speech on criminal justice reform in July 2015 included a refrain emphasized throughout the recent cases in the U.S. Supreme Court: "Kids are different."[152] This "speech was one marker in a recent string of political pronouncements, legislative rumblings and on-the-ground policy developments," relating to juvenile justice reform.[153] The most recent of such policy developments was President Obama's ban on solitary confinement for juveniles in federal prisons, announced in January 2016.[154] Other states are beginning to take steps to improve the protection that juveniles enjoy in the legal system and to keep them out of the system overall.[155]

In truth, there have always been voices who advocated reform of juvenile justice—arguing for decarceration and decriminalization of young people.[156] But the visibility created by the U.S. Supreme Court cases and the work of national organizations like JLC, connected to the Network, has given this work credibility, authority, and integrity.[157] Organizations and strategies like Strategies for Youth (on policing), Campaign for Youth Justice (on the use of adult jails),[158] and Richard Ross's *Juvenile in Justice* (on solitary confinement)[159] have shed light on the issues, creating public awareness about the harm that the juvenile justice system is doing to young people on a massive scale.

C. Moving Beyond Legal Impact to Social Change

As the discussion above makes clear, the litigation pursued by JLC has had a remarkable impact on juvenile justice law at both federal and state levels. It

152. President Barack Obama, Remarks at the NAACP Conference (July 14, 2015), https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference.

153. Sarah Barr, *Advocates, Analysts See Pivotal Moment in Push for Reforms*, JUV. JUST. INFORMATION EXCHANGE (Aug. 3, 2015), http://jjie.org/advocates-analysts-see-pivotal-moment-in-push-for-reforms/.

154. Michael D. Shear, *Obama Bans Solitary Confinement of Juveniles in Federal Prisons*, N.Y. TIMES (Jan. 25, 2016), http://www.nytimes.com/2016/01/26/us/politics/obama-bans-solitary-confinement-of-juveniles-in-federal-prisons.html?_r=0.

155. *See, e.g.*, COMM'N ON YOUTH, PUB. SAFETY & JUSTICE, FINAL REPORT OF THE GOVERNOR'S COMMISSION ON YOUTH, PUBLIC SAFETY AND JUSTICE: RECOMMENDATIONS FOR JUVENILE JUSTICE REFORM IN NEW YORK STATE 1–60 (2015), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/ReportofCommissiononYouthPublicSafetyandJustice_0.pdf.

156. *See* Guggenheim, *supra* note 116, at 464–66.

157. *See* MACARTHUR, NETWORK, *supra* note 146.

158. CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA 4–5 (2007), http://www.campaignforyouthjustice.org/images/nationalreports/jailingjuveniles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf.

159. *What We Do*, JUV. JUST., http://www.juvenile-in-justice.com/about (last visited June 1, 2016).

has altered the landscape of juvenile justice in the United States, and it has done this through an innovative strategy that, inter alia, provides JLC's expertise to those litigating cases in places where it has no presence, thereby bringing together the scientific, academic, and legal communities to maximize their effect.[160] The opportunities created by these kinds of strategies are extensive and capable of being widely replicated. Public interest litigation to advance children's issues is underway in countries as diverse as South Africa[161] and Ireland.[162] It is a key focus of organizations like the Child's Rights International Network, whose work documents and supports such activity in this area.[163]

And yet despite the success of using the brain science and developmental research, it is clear that the potential of such a strategy—that helps courts, legislators, and decision makers to make better decisions about how to respond when young people break the law by putting relevant research at their disposal—is only beginning to attract the attention of the United States. Academics are beginning to query the application of the progress made in the United States elsewhere,[164] and the implications of developmental science to other youth justice systems are being actively discussed.[165]

Apart from the impact of the individual cases won, the influence of JLC has rippled out beyond the law into legislative policy, research, and social reform. As is evident by President Obama's remarks, noted above, the public mood has changed, and with that, anything is possible. It is also important that the strategy employed by JLC aims to ensure not only success in individual cases, but that arguments based on the principles of youth justice are made in the U.S. Supreme Court and across the United States in courts at all appellate levels. Its collaborative approach of co-litigation and co-authorship of amicus curiae briefs has allowed it to pool resources in order to win important cases. As part of this process, JLC has sought to build the capacity of other lawyers, ensuring that its work has an important multiplier effect.[166]

From a comparative perspective, it is interesting that recent progress in U.S. juvenile justice has been in areas that might be termed the hard end—the cases of violent, older criminals who do not typically engender sympathy in the broader public. By contrast, in Europe, the focus of reform is frequently on the

160. *See* MACARTHUR JUVENILE JUSTICE REPORT, *supra* note 144, at 5.

161. Skelton, *supra* note 25, at 29.

162. Conor O'Mahony & Ursula Kilkelly, O'Keeffe v Ireland *and the Duty of the State to Identify and Prevent Child Abuse*, 36 J. SOC. WELFARE & FAM. L. 320, 327–29 (2014).

163. *Guide to Strategic Litigation*, CHILD RTS. INT'L NETWORK (Jan. 30, 2014), https://www.crin.org/en/guides/legal/guide-strategic-litigation.

164. *See, e.g.*, Charlotte Walsh, *Youth Justice and Neuroscience: A Dual-Use Dilemma*, 51 BRITISH J. CRIMINOLOGY 21, 21–22 (2010).

165. *E.g.*, ANDREW BECROFT, "FROM LITTLE THINGS, BIG THINGS GROW": EMERGING YOUTH JUSTICE THEMES IN THE SOUTH PACIFIC 5–6 (2013), http://www.aic.gov.au/media_library/conferences/2013-youthjustice/presentations/becroft-paper.pdf.

166. The set of resources available on the JLC website aim to support the capacity of lawyers nationwide to better aid their clients. *Resources*, JUV. L. CTR, http://jlc.org/resources (last visited June 1, 2016).

softer end (i.e., the use of restorative justice)[167] and on the adoption of programs based on the welfare model.[168] At the same time, harsh treatment of young sex offenders, tougher sentencing, and the transfer to adult court for juveniles is firmly on the agenda in many jurisdictions that might be considered to have progressive youth justice systems.[169] Countries that have high ages of criminal responsibility—where juveniles under sixteen are not tried at all for instance—reserve the adult system with its trial and sentencing regime for those over sixteen. And in other countries, reform is discussed but not as apparently in those areas covered by the U.S. constitutional challenges. For instance, the British government announced a review of youth justice in England and Wales in 2015, but the report specifically excludes the age of criminal responsibility, operation of the courts, and sentencing.[170] Similarly, the drafters of the otherwise progressive European Guidelines on Child-Friendly Justice could not agree on a recommendation for specialist juvenile courts.[171] New Zealand, long established as a beacon of progressive youth justice, has been succumbing to more harsh policy measures in recent years, although it is significant that here, too, the reinforcement measure that kids are different has mitigated some of these influences.[172]

CONCLUSION

Although recently associated with some of the most punitive approaches to juveniles known worldwide, the United States is now emerging as a nation ready to come to terms with the demand for a more progressive juvenile justice policy.[173] Reforms at federal and state levels are now increasingly commonplace, even if overpolicing, overpenalization, and overinstitutionalization remain very

167. *See generally* ADAM CRAWFORD & TIM NEWBURN, YOUTH OFFENDING AND RESTORATIVE JUSTICE: IMPLEMENTING REFORM IN YOUTH JUSTICE (2d ed. 2011).

168. *See* Ross Homel, Kate Freiberg, Sara Branch & Huong Le, *Preventing the Onset of Youth Offending: The Impact of the Pathways to Prevention Project on Child Behaviour and Wellbeing*, TRENDS & ISSUES CRIME & CRIM. JUST., May 2015, at 1, 8–9, http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi481.pdf (discussing the role that families and schools can play in preventing crime).

169. *See* Muncie & Goldson, *supra* note 23, at 3–4. Of course this is not universally true. *See* Brigette Bouhours & Kathleen Daly, *Youth Sex Offenders in Court: An Analysis of Judicial Sentencing Remarks*, 9 PUNISHMENT & SOC'Y 371, 373 (commenting that "youth justice may be barking a similar 'get tough on crime' message as adult criminal justice, but the bite of youth justice may be considerably less").

170. The review was announced by the UK Minister for Justice on September 11, 2015. For the details, see Written Statement from Right Hon. Michael Gove MP to Parliament, Announcement of a Review into Youth Justice (Sept. 11, 2015), https://www.gov.uk/government/speeches/youth-justice.

171. The Guidelines say merely that "Member States are encouraged to . . . consider the establishment of a system of specialised judges and lawyers for children and further develop courts in which both legal and social measures can be taken in favour of children and their families." COUNCIL OF EUROPE GUIDELINES, *supra* note 14, at 33.

172. *See* Nessa Lynch, *Playing Catch-up? Recent Reform of New Zealand's Youth Justice System*, 12 CRIMINOLOGY & CRIM. JUST. 507, 507–08 (2012).

173. *See, e.g.*, Thurau & Henry, *supra* note 108, at 239–40.

serious challenges. The role of the police in American schools remains hugely problematic with the school-to-prison pipeline,[174] and the dominance of racism in the U.S. juvenile justice system has yet to be directly addressed in litigation.[175] Application of the developmental science to the question of race appears to be an urgent priority.[176] It is not suggested that strategic or public interest litigation is capable of addressing all of these issues or of producing the kind of wide-scale systemic reform that is required. But it is important to acknowledge where success has been achieved, where reforms have been won, and the methods by which this has all come about. This Article sought to show that litigation is a viable part of any multidimensional advocacy strategy for reforming how countries treat children in conflict with the law. As this Article shows, the work of JLC and many others has, perhaps ironically, brought the United States much closer to international norms set out in instruments like the UNCRC, all the time strengthening the international consensus around juvenile justice. While lawyers can be relied on to litigate, researchers, policy analysts, and all those who advocate for children and young people must take on the reform of the juvenile justice system as everyone's responsibility.

174. CATHERINE Y. KIM ET AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 1–7 (2010).

175. *See* Nancy E. Dowd, *A Developmental Equality Model for the Best Interests of Children*, *in* IMPLEMENTING ARTICLE 3 OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: BEST INTERESTS, WELFARE AND WELL-BEING (Elaine Sutherland & Lesley Barnes Macfarlane eds., forthcoming 2016) (exploring this question of racism's dominance).

176. *Id.*