

CHILDREN, ADOLESCENTS,
AND THE CRIMINAL LAW

Juveniles—including older adolescents—are less able to restrain their impulses and exercise self-control; less capable than adults of considering alternative courses of action and maturely weighing risks and rewards; and less oriented to the future and thus less capable of apprehending the consequences of their often-impulsive actions.

(Amicus brief of the American Psychological Association, p. 3, in *Graham v. Florida*, 2010)

Developmental psychologists today are making important and expanding contributions to the legal system. This chapter focuses on two of the most prominent questions they try to answer: (1) What are the developmental differences between adolescents and adults as they pertain to the law? (2) How capable and reliable are children as witnesses in a forensic context?

Ongoing research in developmental psychology and neuroscience has revealed that adolescents differ from adults in ways that are highly relevant to the legal system. For example, most adolescents neither fully understand nor exercise their constitutional rights. The research also questions whether adolescents should be held to the same standards of criminal responsibility as adults, including for serious criminal acts. Another question raised by recent studies is whether juvenile offenders have significantly greater promise to be rehabilitated compared to adult offenders. As Heilbrun and his colleagues (2016) state, “developmentally related differences between adolescents and adults are pertinent to the legal system in a variety of ways that are relevant to due process rights, legal procedure, and postadjudication treatment and sanctions” (pp. 6–7).

With respect to children compared to adolescents, the focus is less on decision making than on pretrial identifications and testimonial capacity. For example, are young children able to accurately identify the suspect in a lineup? Are professionals (e.g., police officers, mental health professionals) better able to detect lying in children than lying in adults? Are young children more prone to identify innocent persons in suspect-free lineups than adults? And at what age can children testify as credible and competent eyewitnesses in criminal and civil proceedings? How well do children handle cross-examination and other forms of questioning when in the courtroom? Are they more vulnerable than adults to suggestion and other social influences when testifying?

A note on terminology is important at the outset. The term *juvenile* refers broadly to young people. In the eyes of the law, it most often denotes an individual who is under the age of 18. However, society and mental health professionals generally assume that children (usually defined as under age 12) and adolescents (ages 12 to 18) are at different levels of maturity. The distinction between the two groups is making its way into the legal system as well. Thus, “children are assumed, under the law, to be vulnerable, dependent, and incapable of informed and mature decision making” (E. P. Shulman & Steinberg, 2016, p. 69). Consequently, they are held less responsible for their actions, and they are afforded a wide range of special protections under the law. Adolescents, on the other hand, are generally held more accountable for their actions, and often they have been treated as adults in the criminal court, especially when they have been charged with serious crimes. Even so, adolescents differ widely in their physical, cognitive, and emotional development. As Shulman and Steinberg (2016) explain, “lawmakers have traditionally responded to the uncertain development status of adolescents by legislating that they be treated either as children or as adults depending on the specific policy question” (p. 69). These differences in treatment are illustrated in areas such as voting, drinking, health care decision making, and court processing.

Before discussing adolescent and child development as it pertains to the judicial system, it is important that we cover some historical background. We will begin with the origins of the juvenile court.

BRIEF HISTORY AND OVERVIEW OF THE JUVENILE COURT

Juvenile courts and juvenile justice processes are considered civil rather than criminal and are therefore distinct from criminal courts in many respects. However, when juveniles are charged with crimes, those whose cases are heard in juvenile courts are entitled to the same constitutional protections as adults (*In re Gault*, 1967; *In re Winship*, 1970), with the exception of the right to a jury (*McKeiver v. Pennsylvania*, 1971). Today, many juveniles have their cases heard in criminal courts, particularly but not necessarily when they are charged with serious crimes. The 14-year-old Texas boy who allegedly killed two schoolmates in 2014 (and said he had hoped to break a school shooting record, perhaps killing as many as 150) is one example.

The first juvenile court, meant for both children and adolescents, was established in the United States in 1899, in the state of Illinois. A broad group of social activists had influenced the Illinois legislature to establish a judicial system that was to be separate from the adult criminal justice system. The early juvenile court system was largely based on the assumption that the young were in need of protection; required a more informal setting in which to adjudicate delinquent or criminal conduct; were less accountable for their offenses than adults; and, compared to adults, were more amenable to rehabilitation and treatment. The goal of the early court was to provide rehabilitation, not punishment. The Illinois legislation became a blueprint for other states to follow in establishing a court system exclusively directed at juveniles. “Within 25 years, almost every state in the United States had established a juvenile system” (Levick & Feierman, 2016, p. 23). Today every state has juvenile courts, either standing on their own or as part of a larger family court system. The federal system also deals with juveniles, though to a lesser extent. The Federal Delinquency Act (or Code), passed in 1938 and amended in 1943, 1974, and 1984, applies to any individual who commits a federal criminal violation prior to the person’s 18th birthday. The act applies to undocumented immigrants as well as to U.S. citizens. It permits federal delinquency proceedings where state courts cannot or will not accept jurisdiction.

Gradually, despite the allegedly good intentions of the founders of the juvenile court movement, the courts gained the reputation of being authoritarian, imposing unreasonable expectations on juveniles and their families, particularly the economically disadvantaged. In addition, juvenile courts tended to operate outside constitutional boundaries and behind closed doors (Levick & Feierman, 2016). When the juvenile court's expectations were not met, judges were not averse to sending juveniles to secure training (or "reform") schools, where they encountered punitive treatment rather than effective rehabilitation or treatment. These decisions to institutionalize were routinely made with little attention to due process of the law. For example, juveniles in most courts did not have the assistance of lawyers, nor did they have a reasonable opportunity to confront the witnesses against them or to challenge the actions of court officials. Juvenile courts also routinely urged—and in some cases required—juveniles to confess their offenses. When juvenile court judges believed that juveniles were not appropriate for juvenile court, they would transfer the juveniles to criminal court, where they would presumably be treated the same as adults.

Two U.S. Supreme Court cases in the 1960s—*Kent v. United States* (1966) and *In re Gault* (1967)—signaled a need to change procedures in juvenile court. In *Kent*, the Court mandated that a judge hold a hearing before transferring a juvenile to criminal court. Morris Kent, Jr., was no angel. The 16-year-old was charged in federal court with housebreaking, robbery, and rape while on probation. When arrested, he admitted committing the crimes and was confined in a receiving home for children. The juvenile court, however, quickly transferred his case to adult criminal court over the very strong objections of his attorney, who argued that Kent could be rehabilitated if kept in a juvenile setting. The U.S. Supreme Court ruled unanimously that the juvenile had a constitutional right not only to the assistance of an attorney but also to challenge the transfer. The Court also gave judges some guidance as to what factors to consider in making a transfer decision. To this day, these factors are usually taken into account before judges send juveniles to criminal courts (see **Table 8.1**). We will discuss juvenile transfers shortly, because they often require input from psychologists and other mental health professionals.

The Supreme Court opinion in *Kent* was a scathing indictment of the juvenile court system as it operated at that time, serving as a precursor of the landmark case that would follow,

Table 8.1 Eight Factors for Judges to Consider in Deciding Whether to Transfer a Juvenile to Criminal Court

1. The juvenile's sophistication, maturity, and general living environment
2. The seriousness of the alleged crime
3. The manner in which the crime was committed
4. Whether the alleged crime was against persons or property
5. The juvenile's prior record with the criminal or juvenile system
6. The prospect of rehabilitation if kept in the juvenile system as well as the prospect of adequate protection of the public
7. The prosecutorial merit of the case
8. If two or more defendants were charged, the benefit of having them tried in the same court

Source: Factors listed in *Kent v. United States* (1966).

In re Gault (1967). In *Gault*, the Court recognized again that the juvenile justice system had seriously failed to fulfill its pledge to provide rehabilitation. Frequently, the juvenile court provided only deprivation of freedom and little else (Grisso, 1997). The Court's remedy was to require many of the same due process rights for juveniles in juvenile court as those applied to adults in criminal court.

Compared to Morris Kent's offenses, Gerald Gault's was minor. He was charged with making an obscene phone call to his next-door neighbor. Gerald had been taken into custody by police, taken to the police station, and subjected to two hearings before a judge who ultimately adjudicated him delinquent and sent him to a juvenile training school, where he could have been kept until his 21st birthday. Gerald was 15 years old at the time of his offense. Although his parents were present at the delinquency hearing, Gerald was not represented by counsel, and his alleged victim did not appear in court to testify against him.

In a lengthy opinion that traced the history of the juvenile court in the United States, the Supreme Court noted that Gerald Gault, like Morris Kent before him, had been subjected to proceedings that could only be characterized as "a kangaroo court"—a term sometimes used for court proceedings that disregard the law or do not uphold its spirit. The Court therefore ruled that juveniles facing delinquency proceedings and possible institutionalization had, at a minimum, the following constitutional rights:

- The right to confront and cross-examine witnesses against them
- The right against self-incrimination (often referred to as a privilege, but actually a right)
- The right to written notice of the charges against them
- The right to the assistance of a lawyer in their defense

The Court did want to preserve the privacy of juveniles, however, noting that closed proceedings could still be the norm in juvenile courts. In a later decision (*McKeiver v. Pennsylvania*, 1971), the Court refused to extend the constitutional right to a jury trial to juveniles. States do have the option of allowing delinquency proceedings to be open, as well as to allow juries in juvenile courts, but very few do.

Following these landmark decisions, juvenile courts became more due process-oriented, but many problems remain to this day. Twenty years after *Gault*, for example, fewer than half the juveniles in juvenile courts were represented by lawyers (Feld, 1988), and legal representation in juvenile court is still sporadic. When juveniles are *not* represented by lawyers, it is likely that they have waived that right. In some cases, this is done on the advice of parents or other authority figures. Juveniles also have a constitutional right to a lawyer during custodial interrogation, but most juveniles waive that right and speak to police without a lawyer present (Grisso, 1998a; Melton, Petrila, Poythress, & Slobogin, 2007; Viljoen, Zapf, & Roesch, 2007). Thus, the validity of waivers—that is, whether juveniles understand the consequences of giving up their rights—is another topic of great interest to researchers to the present day (Eastwood, Snook, Luther, & Freedman, 2016; Rogers, Rogstad, et al., 2010).

In the 1980s and 1990s, the legal system, including juvenile courts, became more due process-oriented but also more punitive toward juveniles. As Viljoen, McLachlan, Wingrove, and Penner (2010) observed, "over the past several decades, the juvenile justice system has evolved to be much more adult-like in nature" (p. 630). Part of this change can be seen in the increases in transfers or waivers to criminal courts, such as what occurred in the *Kent* case. Waivers are not uncommon occurrences in both state and federal courts. State laws vary regarding age and transferable offenses. In the federal system, a juvenile can be tried as

an adult if the juvenile was at least 15 years of age at the time he or she allegedly committed certain transferable offenses, such as violent crimes or controlled substance violations. If the juvenile possessed a firearm during a violent crime, he or she can be treated as an adult as early as age 13.

Waivers or transfers can be achieved in several ways, and not all are equally likely to involve input from psychologists. The transfer at issue in the *Kent* case was a **judicial waiver**, meaning that the judge had to make the decision to send the juvenile to criminal court. As indicated in **Table 8.1**, questions about rehabilitative potential and a juvenile's sophistication and maturity are likely to arise, and therefore a behavioral evaluation is most likely to occur. In a **prosecutorial waiver**, the prosecutor has the option of bringing a case before a criminal or juvenile court. In a **legislative waiver**—also called a **waiver by statute**—the legislative branch of government has preordained that juveniles of certain ages charged with certain crimes will automatically be tried in criminal court rather than in juvenile court. For example, a state law may require that juveniles above the age of 14 will automatically be tried in criminal court if charged with murder or with aggravated assault. Once a case is begun in criminal court, however, a judge—usually at the request of a defense attorney—can send the case to juvenile court, which would be called a **reverse waiver**. Such waivers are relatively rare, however.

In the 1990s, at a time when juveniles faced harsher penalties at younger ages, the issue of their competency to stand trial began to capture the attention of researchers, legal commentators, and some state courts (Kruh & Grisso, 2009; Larson & Grisso, 2012). This was accompanied by a focus on their competencies in a number of other related areas discussed in the previous chapter, such as their competency to plead guilty. This attention has also been fueled by a growing body of research on juvenile cognitive, emotional, and psychosocial development. Recall from the previous chapter that in adults, the competency inquiry focuses on mental health considerations—that is, those found incompetent to stand trial are likely to have some mental disorder, and they are typically restored to competency after a brief treatment period. In the case of the juvenile, competency is more likely to involve developmental as well as mental health considerations. For example, we must ask, “Can a 13-year-old boy charged with aggravated assault appreciate the nature of the charges and the consequences he faces, even if he has no evidence of a mental disorder?” We will discuss this in more detail later in the chapter.

ADOLESCENT DEVELOPMENT AS IT PERTAINS TO THE LAW

In the following pages, we will focus on the contemporary research on adolescent development and how it impacts the legal system's perspectives on adolescent's offending, judgment, and decision making. “Within the past decade . . . juvenile law has increasingly looked to scientific findings regarding the differences between adolescents' and adults' brains to make informed, scientifically based legal decisions in cases involving delinquents” (Luna & Wright, 2016, p. 92). Overall, it is becoming increasingly clear that adolescents cannot be held to the same standards of criminal responsibility as adults. More specifically, research on human development consistently discovers that adolescent cognitive, emotional, and psychosocial capacities are still rapidly maturing, throughout adolescence and even until the mid-20s. To some extent, this has been reflected in court decisions.

“That adolescents fundamentally differ from adults in numerous important ways—biologically, cognitively, psychosocially—is underscored by decades of developmental psychological research” (Cleary, 2017, p. 119). Developmental experts once thought that

the human brain became fully developed by age 12 (Raeburn, 2004). However, contemporary research, especially in the neurobiological realm, has revolutionized the way we think about adolescent development (Cleary, 2017). For example, numerous functional magnetic resonance imaging (fMRI) studies reveal greater brain development during adolescence than in childhood or adulthood (Steinberg, 2017). Based on the rapid brain growth patterns discovered in teenagers, Laurence Steinberg (2014) even suggests that the period of adolescence perhaps should include individuals ranging in age from 10 through 24. He posits that “it is now well established that there are substantial and systematic changes in the brain’s anatomy and functioning during the years between puberty and the early twenties” (p. 5). In essence, we now know that the human brain does not become fully wired until at least age 25, and possibly beyond. It is important, therefore, that we examine more closely the relevant research on adolescent development as it pertains to the law.

Adolescence, especially mid-adolescence, is regarded as a period characterized by sensation seeking, risk taking, strong peer orientation, less-than-mature decision making, and strong, immediate reward seeking. *Sensation seeking* refers to the tendency to pursue novel, exciting, and rewarding experiences. Neurodevelopmental psychologists believe that this motivational drive toward sensation seeking and risk taking is due to a sharp increase in incentive-motivational functioning of the brain’s ventral striatum (Bjork, Lynne-Landsman, Sirocco, & Boyce, 2012). (The ventral striatum is a complex neural circuitry located in the central regions of the brain and plays a prominent role in reward seeking.) Neurodevelopment research has revealed, for example, that the ventral striatum is especially active when engaging in risky-decision tasks (Bjork et al., 2012). During this period, adolescents are still developing impulse control, “a combination that predisposes individuals toward risky behavior” (Steinberg, 2013, p. 516). Examples of risky behavior include unprotected sex, smoking, binge drinking, illicit drug use, driving with excessive vehicle speed, aggressive driving, texting while driving, getting into physical fights, and delinquency. More average risky behavior may involve such things as swimming under perilous conditions, high-diving, surfing, or boating in extremely stormy conditions.

Steinberg (2008) asks two fundamental questions about the heightened risk-taking propensity of teenagers: First, why does risk-taking behavior increase between childhood and adolescence? Second, why does risky behavior decline between adolescence and adulthood? He theorizes that risk taking is unusually high during adolescence because of developmental changes within a complex network of neurological structures in the brain, which he calls the **socioemotional system**. These developmental changes lead to remarkable increases in immediate reward-seeking, stimulation-seeking activity and significant susceptibility to peer pressure. These tendencies result in risk perceptions and appreciations of future consequences that differ significantly from those of adults. Peer affiliation is an essential component of normal development and likely exerts a powerful influence on adolescent decision making, including those decisions considered risky (Albert, Chein, & Steinberg, 2013; Pimentel, Arndorfer, & Malloy, 2015). Peer pressure is especially prominent during the mid-adolescence years (14 to 17). It should be emphasized, however, that there are individual variations in the extent to which adolescents follow these characteristics, but the average adolescent does, in large part, demonstrate many of these behavioral features.

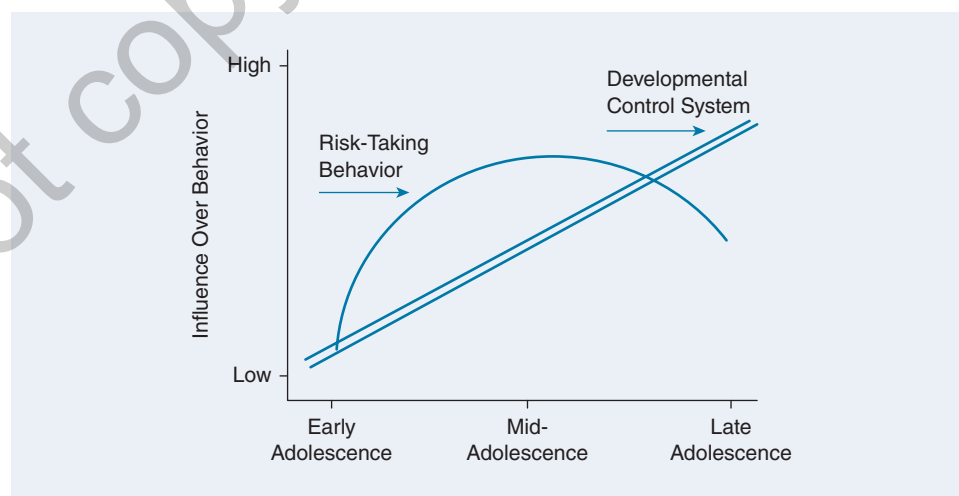
The heightened adolescent inclinations to pursue exciting, impulsive, and risky behavior are not held in check because a neurological control system does not develop as rapidly as the socioemotional system. Steinberg (2008) calls the brain’s behavior-control network the **cognitive control system**. This system is principally located in the frontal region of the brain called the **prefrontal cortex (PFC)**, which gradually matures during adolescence and

into early adulthood. The PFC plays a crucial role in directing executive functions such as forethought, sensible decision making, complex cognitive behavior, planning, judgment and impulse control (Scott, Bonnie, & Steinberg, 2016). It is very instrumental in the skills necessary in exercising legal rights, such as remaining silent after being given *Miranda* warnings or requesting the assistance of a lawyer.

In recent years, a rapidly expanding, neurobiologically based research literature has supported these brain development positions. The research confirms that the fully developed PFC is substantially involved in regulating emotions and impulses. Essentially, among other things, the PFC prevents a person from acting without thinking. A common analogy used by researchers (e.g., Casey, Jones, & Somerville, 2011) is that risky decision making is similar to driving a car, with stimulation and reward seeking being the gas pedal and the PFC being the brakes (Bjork et al., 2012). “The prefrontal cortex is the brain’s brake. It stops us from saying or doing stupid things” (Amen, 2017, p. 14).

Neurodevelopmental science finds that the PFC is not fully developed until around age 25. In fact, the PFC is the last region of the brain to reach maturity (Shulman & Steinberg, 2016). During adolescence and early adulthood, the PFC develops many complex neurological connections with other networks of the brain, especially the limbic system—an area concerned with moods and emotions. As noted by Luna and Wright (2016), “the prefrontal cortex’s unique interconnectivity with the rest of the brain allows it to receive and integrate information in addition to the ability to maintain information on line, supporting its role in directing behavior based on working memory” (p. 102). While the PFC is developing and interconnecting, it is less effective in generating advanced thinking abilities, including weighing risk and reward, and in self-regulation, including impulse control and coordination of emotion and cognition (Scott et al., 2016). This divergent course of brain development is called the **dual-system model** (see **Figure 8.1**). Shulman and her colleagues (E. P. Shulman et al., 2016) summarize the model as follows: “Specifically, it proposes that risk-taking behaviors peak during adolescence because activation of an early-maturing incentive-processing system (the ‘socioemotional system’) amplifies adolescents’ affinity

Figure 8.1 Steinberg’s Dual-System Model



Source: Adapted from Steinberg (2008).

for exciting, novel, and risky activities, while a countervailing, but slower to mature, ‘cognitive control’ system is not yet far enough along in its development to consistently restrain potentially hazardous impulses” (p. 104).

Similar dual-system models of adolescent development have been proposed in recent years. For example, the maturational imbalance model (Casey, Getz, & Galvan, 2008) and the driven dual-system model (Luna & Wright, 2016) have been proposed. However, the dual-system model has received the bulk of the research support and also has drawn the most attention from judges, lawyers, and legal scholars for explaining adolescent delinquent behavior. Consequently, we will focus on this model for understanding juvenile behavior as it pertains to our discussion in this chapter.

Adolescent Cognitive Ability

It is important to emphasize that adolescents can make good decisions, but they are most likely to do so with careful forethought. Such decision making—in both teens and adults—is sometimes referred to as *cold cognition*, as opposed to *hot cognition*, which is spur-of-the-moment, stressful decision making (Steinberg, 2018). By the age of 16, as Steinberg and others have demonstrated, cognitive ability is well established. This is not to say that the decisions made are the “right” ones—but juveniles at that age are no more likely than adults to make bad decisions, under cold cognition. They are, however, more likely than adults to make bad decisions under hot cognition, because their self-regulatory system is not completely developed.

Put another way, adolescents mature cognitively before they mature emotionally or psychosocially (Feld, 2013; Steinberg, Cauffman, Woolard, Graham, & Banich, 2009a, 2009b). Adolescents age 16 or older have basically the same cognitive abilities, including memory, logical reasoning abilities, and verbal skills, as adults (Scott et al., 2016). These cognitive abilities do not change appreciably after that age. Adolescents can learn and retain the material found in classroom subjects well, often much better than adults. Furthermore, just like adults, they “know” and can articulate that binge drinking at a party and then driving is very dangerous behavior.

Problems begin for the adolescent when the socioemotional system kicks in, however. Under low-stress conditions, teens can verbally identify the risks involved in certain behaviors. Under high stress, the socioemotional system is likely to emerge strongly, and the adolescent anticipates immediate rewards and few immediate costs. Often this occurs in situations with peers—the very conditions that are likely to undermine adolescents’ decision-making competence (Steinberg, 2007). “The adolescent brain is bad at some things (impulse control) but very good at others (learning)” (Steinberg, 2016, p. 345).

Shulman et al. (2016) write, “What the dual systems model suggests is that when decision making occurs under conditions that excite, or activate, the socioemotional system (e.g., when decisions are made in the presence of friends, under emotionally arousing circumstances, or when there is a potential to obtain immediate reward) adolescents are more prone than other age groups to pursue exciting, novel, and risky courses of action” (p. 114). In other words, the dual-system perspective emphasizes the context within which the decision making takes place. Adolescent immature judgment is likely to surface, for example, under stressful or threatening conditions. Although we usually think of risk-taking behavior as producing criminal activity (e.g., drunk driving, assault), high-stress conditions also pertain to such things as legal plea bargaining or police interrogation, topics we will cover shortly.

It is also important to emphasize that the adolescent who engages in criminal activity will still be held responsible, despite the fact that his self-regulation skills are not completely

developed. However, this developmental feature has been taken into account in deciding whether to transfer juveniles to criminal court, whether they understand the consequences of waiving their constitutional rights, and, most significantly, in deciding on appropriate sentences.

Adolescent Neuroplasticity

Neuroplasticity is the ability of the brain to change and develop new neural connections throughout the life span. More specifically, the term “refers to the malleability of the brain, observable as changes in neuronal structure and connectivity, typically as a consequence of influences outside the brain” (Lillard & Erisir, 2011, p. 208). Neuroplasticity allows the neurons in the brain to adjust their activities in response to new situations or new experiences. The adolescent brain has tremendous neuroplasticity, which renders adolescence a period of great opportunity and risk (Steinberg, 2014). That is, if adolescents are exposed to positive, supportive environments, they will flourish, but if they experience negative, unsupportive, and toxic environments, “they will suffer in powerful and enduring ways” (p. 9).

Compared to the neuroplasticity of adults, the capacity of the adolescent brain to change in response to learning experiences is considerable. However, studies on neuroplasticity in humans have consistently made it clear that although childhood and adolescence are the critical periods of neuroplasticity, some brain development continues throughout life (Lillard & Erisir, 2011). These neuroplastic changes tend to be less dramatic or as extensive in adulthood, however. In reference to our topic in this chapter, the enormous power of brain neuroplasticity enables adolescents to be significantly better candidates for rehabilitation and treatment in the justice system than adults (Scott et al., 2016). This has great significance, not only in sentencing juveniles but also in making transfer decisions, as discussed previously, or in diverting them from juvenile courts or giving them second chances when they are charged with minor offenses.

We will now move on to how the development of the adolescent brain relates to the law. We begin with two highly relevant areas: adolescent competency to stand trial and criminal culpability.

ADOLESCENT COMPETENCE AND CULPABILITY

“The psychological capacities relevant to competence and culpability are not identical” (Shulman & Steinberg, 2016, p. 75). Both concerns are involved in the processing and sentencing of juveniles as well as adults. Adolescent *competency to stand trial* requires the ability to make informed decisions about legal matters and constitutional rights. This was a main topic of Chapter 7, and many principles discussed in that chapter pertain to adolescents. For our purposes here, we stress that human developmental research consistently demonstrates that competence is significantly less developed in adolescents than in adults. **Criminal culpability**, on the other hand, “centers on the extent to which juveniles should be held responsible for their risky, impulsive behavior, which ultimately influences the degree to which they should be punished for wrongdoing” (Shulman & Steinberg, 2016, p. 75). Basically, the issue of juvenile criminal culpability focuses on this question: To what extent should juveniles be held to the same standards of criminal responsibility as adults? For the moment, we will hold competency aside and deal with culpability.

Criminal Culpability

As described previously, it is now well recognized by most developmental researchers, neuroscientists, and mental health professionals that adolescents differ in sensation seeking, risky behavior and decision making compared with adults as a group (Grisso et al., 2003; Melton et al., 2007, 2018; Steinberg, 2013, 2017). The courts, including the U.S. Supreme Court,

have been slower in accepting these differences. In the Court's desire to protect the constitutional rights of juveniles during the 1960s (e.g., *In re Gault*), it did not fully consider the significant developmental differences between juveniles and adults to understand and exercise their rights, although it is fair to say that these differences had not been brought to the Court's attention. In the 1960s, psychological research on brain development had barely begun. In recent years, however, things are beginning to change. For example, Steinberg (2017) writes, "The American legal system's thinking about the criminal culpability of juveniles has been radically transformed over the past 12 years, largely as a result of the introduction of developmental science into the United States Supreme Court's deliberations about the appropriate sentencing of adolescents who have been convicted of serious crimes" (p. 411). Steinberg goes on to say that although this transformation has been seen mostly in cases involving the constitutionality of capital punishment and life without the possibility of parole for offenders under 18, "the Court's logic in these cases reaffirmed the idea that adolescents are fundamentally different from adults in ways that warrant their differential treatment under the law" (p. 411). Basically, juvenile offenders, due to their developmental immaturity, should be considered less culpable for their criminal actions and, therefore, deserve less punishment than their adult counterparts (Scott et al., 2016). The following four U.S. Supreme Court cases exemplify the legal system's recognition of the research on developmental differences between juveniles and adults and how these important differences should play a role in sentencing.

Relevant U.S. Supreme Court Cases

Roper v. Simmons (2005)—A Death Penalty Case

In early September 1993, in Missouri, 17-year-old Christopher Simmons discussed with his two friends (15-year-old Charles Benjamin and 16-year-old John Tessler) a plan to commit burglary and murder. The plan included breaking and entering, tying up the victim, and eventually throwing or pushing her off a bridge. During the planning, Simmons assured his friends they would get away with it because they were minors. Once the plan was set, the three boys met at about 2:00 a.m. on September 8 to commit the crime. However, soon after the meeting, Tessler decided against participating in the plan. He was later charged with conspiracy, but the state dropped the charge in exchange for his testimony against Simmons.

As planned, Simmons and Benjamin broke into the home of Shirley Crook while her husband was away on a fishing trip. They used duct tape to cover her eyes and mouth and bound her hands behind her back. They then placed the victim in her minivan and drove her to a park. During the drive, the woman was able to free her hands and remove some of the duct tape from her face, but the two boys reinforced the bindings with her purse strap and the belt from her bathrobe and covered her head with a towel. Then they walked her to a railroad trestle, tied her hands and feet together with an electrical cord, wrapped her whole face in duct tape, and pushed her from the bridge into the river below.

Two fishermen found her body that afternoon. Meanwhile, Simmons had started bragging to others about his daring accomplishment. The next day, police arrested him at his high school, took him to the police station, and read him the *Miranda* warning. Simmons waived his right to an attorney, and within 2 hours, he confessed to the murder. He was tried in criminal court, found guilty, and sentenced to death. His companion during the crime, Charles Benjamin, was sentenced to life in prison.

In 2003, 9 years after Simmons was convicted and sentenced to death, the Missouri Supreme Court agreed to review the case. In a 4-3 decision, that court invalidated the death sentence, concluding that juvenile executions violated the Eighth Amendment provision against cruel and unusual punishment under the "evolving standard of decency" test. The

court resented Simmons to life in prison with no chance of parole. The state of Missouri appealed the state supreme court's invalidation of the death sentence, and the U.S. Supreme Court agreed to hear the case.

In a close 5-4 decision, the Court agreed with the Missouri Supreme Court that the execution of juvenile offenders under 18 violated the Eighth Amendment's prohibition against cruel and unusual punishment. More important for our discussion, Justice Kennedy, in writing for the Court's majority, emphasized three important differences that exist between juveniles under 18 and adults. First, as any parent knows, and as scientific and psychosocial studies point out, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions" (*Roper v. Simmons*, 2005, p. 15). Second, he wrote, juveniles "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure" (p. 15). Citing the work of Steinberg and his colleagues (Steinberg & Scott, 2003), Justice Kennedy asserted that the strong social and peer influences on juveniles are "explained in part by the prevailing circumstances that juveniles have less control, or less experience with control, over their own environment" (*Roper v. Simmons*, 2005, p. 15). The third difference between juveniles and adults, according to Justice Kennedy, is that the personality traits of juveniles are less well formed than those found in adults. Because juveniles are more vulnerable to influences, and in light of their comparative lack of control over their impulses, "juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment" (p. 16). Consequently, "once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults" (p. 16). In summary, the U.S. Supreme Court in *Roper* barred states from executing offenders for a murder they committed when younger than 18 because of their reduced culpability. (See **Table 8.2** for a list of this and other Supreme Court cases relating to juveniles.)

Table 8.2 Representative U.S. Supreme Court Cases Relevant to Juveniles

Case Name and Year	Holding/Significance
<i>Kent v. United States</i> (1966)	Juveniles have a right to a hearing before judges can transfer their cases to criminal court.
<i>In re Gault</i> (1967)	Juveniles have constitutional rights similar (but not identical) to those of adults in delinquency proceedings.
<i>In re Winship</i> (1970)	The standard of proof in delinquency hearings is beyond a reasonable doubt.
<i>McKeiver v. Pennsylvania</i> (1971)	Juveniles have no constitutional right to a jury trial in delinquency proceedings.
<i>Breed v. Jones</i> (1975)	It is double jeopardy, and thus a violation of the Fifth Amendment, to adjudicate a young delinquent in juvenile court and then try him in criminal court.
<i>Fare v. Michael C.</i> (1979) <i>J. D. B. v. North Carolina</i> (2011)	Juveniles have the right against self-incrimination during the interrogation stage; the age of a juvenile waiving rights is a crucial factor to consider.

Case Name and Year	Holding/Significance
<i>Roper v. Simmons</i> (2005)	The death penalty is prohibited for those under 18.
<i>Graham v. Florida</i> (2010)	Mandatory life without parole is prohibited for juveniles convicted of crimes other than murder.
<i>Miller v. Alabama and Jackson v. Hobbs</i> (2012)	Mandatory life without parole is prohibited for juveniles convicted of murder.
<i>Montgomery v. Louisiana</i> (2016)	Individuals sentenced to life without parole as juveniles prior to 2012 are entitled to resentencing or a parole hearing.

Despite all the attention paid to this case, it was not the first decided by the Court relating to juvenile executions. That distinction belongs to *Thompson v. Oklahoma* (1988), in which the Court barred the execution of juveniles who committed their crimes at age 15. The following year, the Court heard two companion cases, *Stanford v. Kentucky* (1989) and *Wilkins v. Missouri* (1989), in which juveniles who were ages 17 and 16 challenged their death sentences. In these cases, the Court by a 5-4 majority allowed the death sentences, focusing primarily on the fact that there was no national consensus on this issue and that many death penalty states did allow this type of sentence. When the issue reached the Court in *Roper v. Simmons* (2005) some 15 years later, it was willing to reconsider its earlier decisions. A national consensus against the death penalty for juveniles was emerging, but just as important, research on adolescent development had an impact.

Roper v. Simmons (2005) is a significant case because of the Court's extensive reference to research on the neurological and psychological immaturity of adolescents, rendering them still culpable, but less culpable for their actions. Such research did not find its way into the earlier decisions. Steinberg (2017) points out that "many experts consider *Roper* to be the single most important case in the history of the American legal system's treatment of juveniles" (p. 411).

It is important to stress that the Court's decision did not center on the facts of the case or any legal issues that arose early in Simmons's processing by police or the court. Simmons was convicted of a brutal, premeditated crime, and his conviction was not overturned. As a matter of law, the Court determined that the death penalty was cruel and unusual if applied to someone who was a juvenile at the time of the offense. Note that because the death sentence was no longer available, the decision by the Missouri Supreme Court to give Simmons life without parole survived, and he was resentenced to that in 2003. The reader should ask this: What became of Simmons after the following life without parole cases were decided?

Graham v. Florida (2010)—A Life Without Parole Case

In July 2003, Terrence Graham, age 16, along with three other companions, was arrested for attempted robbery of a restaurant in Jacksonville, Florida. Under Florida law, it is within a prosecutor's discretion whether to charge 16- and 17-year-old juveniles as adults or as juveniles for most felony crimes—an example of the prosecutorial waiver defined earlier. The prosecutor elected to send Graham's case to adult criminal court and charged him with armed robbery and assault and battery. Graham pleaded guilty to both charges and wrote a

letter to the trial court indicating that this was his first time getting into trouble and would be his last.

The trial court withheld adjudication of guilt on both charges, presumably so that Graham would not have a serious conviction on his record, but it sentenced Graham to 3 years of probation, with the first 12 months to be spent in the county jail. Graham served his jail time, but within 6 months after his release, he committed resident armed robbery, another serious crime. He was tried again; the court ruled that he had violated the terms of his probation by committing another crime and sentenced him to life in prison without any possibility of parole. Graham appealed the sentence, arguing that the imposition of a life sentence without parole on a juvenile violated the Eighth Amendment's prohibition against cruel and unusual punishment. When Florida courts did not agree, Graham appealed to the U.S. Supreme Court.

In *Graham v. Florida* (2010), writing for the majority, Justice Kennedy repeated his observations from previous cases that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds” (p. 2026). Several of the same neuroscientific studies that were described in the *amicus* briefs on behalf of Simmons were also summarized in a brief supporting Graham (Luna & Wright, 2016). The Court noted that while juveniles are not absolved of their responsibility for their crimes, their limited culpability and the severity of the life without parole sentence led the Court to conclude that this sentence was cruel and unusual, at least for a non-homicide offense. The Court further pointed out that a sentence of life without parole is at odds with the chance that a maturing adolescent can be rehabilitated to become a mature adult, a comment in line with neuroplasticity research. “Thus, at the core of the Court’s opinion is the understanding that youths cannot be labeled as incorrigible because they have the capacity to mature and develop” (Levick & Feierman, 2016, p. 35). Graham had not been convicted of murder, however. What about juveniles who had been? Shortly thereafter, the Court answered that question.

Miller v. Alabama and Jackson v. Hobbs (2012)—More on Life Without Parole

In July 2003, Evan Miller, along with Colby Smith, killed Cole Cannon by first beating him with a baseball bat and then setting fire to his trailer while he was inside. Miller was 14 years old at the time. In 2004, Miller was tried as an adult for capital murder. The trial court sentenced Miller to a mandatory term of life in prison without parole—mandatory because it was so ordered in the state statute. Miller appealed the sentence, but the Alabama Court of Appeals and the Alabama Supreme Court both denied his petition.

Kuntrell Jackson, along with three companions, robbed a local movie store in Blytheville, Arkansas, in November 1999. One of the boys shot and killed the store clerk during the robbery. All three boys were 14 years old at the time. Jackson was tried and convicted of capital murder and aggravated robbery in July 2003. Like Miller, Jackson was sentenced to a mandatory term of life without the possibility of parole. Also, like Miller, the appeals courts in his state denied his petitions.

The Supreme Court heard both cases jointly, to address the similar question of whether **mandatory life without parole** was constitutional for juveniles charged with a capital offense. The joint cases are most often referred to as *Miller* (2012).

By a vote of 5–4, the Justices struck down *mandatory* life without parole sentences for juveniles convicted of homicide. Writing the majority opinion, Justice Kagan reaffirmed

the view that “adolescents’ lesser culpability resulted at least in part from developmental immaturity and therefore required an individualized sentencing hearing” (Woolard, Vidal, & Fountain, 2015, p. 47). Kagan referred back to *Roper v. Simmons* and *Graham v. Florida*, where the Court had noted that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,” especially in “parts of the brain involved in behavior control” (*Miller v. Alabama*, 2012, p. 9). In fact, the Court affirmed that the scientific evidence in developmental psychology, neuroscience, and the social sciences had become even stronger since those cases were decided. “The evidence presented to us in these cases indicates that the science and social science supporting Roper’s and Graham’s conclusions have become even stronger. . . . It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance” (p. 9). Therefore, the Court ruled that sentencing a juvenile to life without parole was excessive punishment, except in the case of the very rare juvenile offender whose crime reflects “permanent incorrigibility” or “irreparable corruption.” The ruling does not prevent states from imposing life sentences without the possibility of parole for homicide cases, only that a defendant’s age and other relevant factors must be considered in making the sentencing determination.

To this point, in discussing the horrific facts of these cases, we have not focused on the family backgrounds of the juveniles who were convicted. In virtually all cases in which juveniles were given life without parole sentences, their backgrounds were littered with dysfunction and violence. Graham’s parents were addicted to crack cocaine; Miller attempted suicide four times, the earliest time at age 6; Jackson’s mother and grandmother had both killed someone; and so forth. In addition to highlighting the scientific research, the majority of the Supreme Court also indicated that such individual factors must be taken into consideration in deciding on a proper sentence. Mandatory life without parole did not allow this.

Montgomery v. Louisiana (2016)—Is Miller Retroactive?

In *Montgomery v. Louisiana* (2016), Justice Kennedy delivered the 6-3 majority opinion of the Court and once again referred to the importance of developmental differences between juveniles and adults revealed by contemporary science. The Court cited the previous cases of *Roper*, *Graham*, and *Miller* on how juveniles are constitutionally different from adults in their level of culpability. Once these three cases were decided, it was clear that courts had only one option for sentencing a juvenile to life without parole: that would be to impose the sentence only after a careful review of the circumstances and a determination that this particular offender merited it. But what of the approximately 2,000 offenders who had been given that sentence as juveniles, and who remained in prison—people like Henry Montgomery?

At the age of 17, Montgomery killed a deputy sheriff in West Baton Rouge, Louisiana, and was given a mandatory sentence of life without parole. The crime occurred in 1963, so by the time the *Miller* decision was announced in 2012, Montgomery was 69 years old. Should his sentence be reconsidered? The Court said yes, ruling that the *Miller* decision should be applied retroactively to those sentenced prior to 2012. That is, individuals currently serving life sentences for crimes they committed as juveniles may request that their sentences be reconsidered or that they be evaluated for parole. Interestingly, in February 2018, Henry Montgomery appeared before a parole board in Louisiana and was denied release. (See **In Focus 8.1** for more on life without parole.)

IN FOCUS 8.1

Long Sentences for Juvenile Offenders: When Is Punishment Enough Punishment?

It appears that many judges and prosecutors do not want to give up on sentencing juvenile offenders who have killed to long prison terms. Even after the Supreme Court's decisions in the *Graham*, *Miller*, and *Montgomery* cases (all discussed in the text), youthful offenders are facing difficulty at sentencing, and older inmates who were sentenced as juveniles face obstructions at resentencing or before parole boards.

As mentioned in the text, Henry Montgomery, now in his mid-70s, applied for parole in 2018. He was described by advocates as a model inmate who had held prison jobs and had not been troublesome. Recall that as a 17-year-old, he had killed a deputy sheriff. Several of the sheriff's survivors as well as the state sheriff's association opposed his release. The sheriff's daughter said she had met with Montgomery and had forgiven him, but she still felt justice was best served by his remaining in prison. The three-member parole board denied the release, by a vote of 2–1. (Even if the vote had been in the other direction, he would not have been released, because the decision to release had to be unanimous.) In its decision, the parole board indicated that Montgomery had not taken sufficient advantage of rehabilitative programs while in prison. Ironically, during his first 3 decades in prison, such programs were not offered. He would now be eligible to reapply for parole in another 2 years.

There is also anecdotal evidence that when inmates bring up their cases for resentencing, prosecutors look for exceptional circumstances to justify continuing a life without parole sentence for someone convicted as a juvenile. Recall that the Court ruled that life without parole cannot be mandatory, but judges can impose it in exceptional cases.

Finally, some judges are forgoing life without parole but are giving sentences that guarantee that the juvenile they are sentencing never gets out of prison. In a case appealed to the U.S. Supreme Court (*Bostic v. Dunbar*, cert. denied, 2018), a juvenile was given consecutive sentences that would leave him ineligible for release until he reached the age of 112. The Supreme Court denied *certiorari* in the case in April 2018.

Questions for Discussion

1. Consider the present ages of the individuals highlighted in the chapter: Simmons, Miller, Jackson, Graham, and Montgomery. Are their ages at *present* relevant to whether they should be released?
2. As noted in the text, Simmons was spared from execution but resented to life without parole—before 2012, the year Montgomery's case was decided. Therefore, Simmons could do what? Would he likely be successful?
3. Should the Supreme Court place an outright ban on life without parole for juvenile offenders, just as it has banned execution?
4. At this point, states vary in the length of time someone sentenced as a juvenile must serve before being eligible for parole. For example, Nevada and West Virginia allow parole consideration after 15 years; Texas and Nebraska allow it after 40 years. Is 15 years too short a time period? Is 40 years too long a time period?

Both before and after the *Montgomery* decision, states took various measures for dealing with the sentencing of juveniles convicted of murder. Before that decision, for example, courts in 14 states had already said that *Miller* applied retroactively, while those in seven said it did not. After *Montgomery*, states had two options for inmates who had been given mandatory life without parole sentences for crimes committed when they were juveniles: resentence or permit parole hearings. Michigan, for example, chose to require that all affected inmates be resentenced (*Carp v. Michigan*, 2016). Louisiana, as noted previously, allows parole board hearings. Twenty states now have laws banning life without parole; some of these were passed long before the Supreme Court took action. Put another way, not all states have inmates who

were given life without parole sentences as juveniles, mandatory or otherwise. However, the *Montgomery* retroactivity decision affected approximately 2,000 inmates serving time for crimes they committed as juveniles.

The majority opinion in each of the four Supreme Court cases discussed in detail here highlighted a growing body of psychological and brain research. It supports the conclusion that adolescent offenders are qualitatively different from adults in ways that will, for most, predictably change their behavior with maturity and age. Basically, all four cases ruled that youths under age 18 qualify for consideration of reduced culpability for their criminal actions.

As described previously, the four U.S. Supreme Court cases have squarely placed psychology and the neuroscience of adolescent development into the judicial decision-making process and the sentencing of juvenile offenders. However, Steinberg (2017) emphasizes that while developmental psychology played an important role in the Supreme Court's recognizing that adolescent brains are different from adult brains, it was brain science (developmental neuroscience) that probably turned the tide. Historically, the courts have been more strongly swayed in their decision making by the "hard sciences" (e.g., neuroscience) and less influenced by the "soft sciences" (e.g., developmental psychology). Increasingly, though, lower courts are beginning to acknowledge the growing research findings on developmental differences between adolescents and adults in their decision making. "By all indications, the influence of neuroscience on legal decision-making is growing rapidly and references to adolescent brain development are appearing regularly in lower court decisions" (Steinberg, 2017, p. 416). Essentially, it is the combination of both developmental psychology research and neuroscience that is beginning to make major inroads in how the courts view adolescent offenders. "Youth is more than a chronological fact. It is a time of immaturity, irresponsibility, impetuosity, and recklessness" (*Miller v. Alabama and Jackson v. Hobbs*, 2012, p. 13).

JUVENILE COMPETENCY

Most of the cases covered in the previous section related to juveniles tried in adult criminal courts and centered on their degree of culpability compared to adults. As noted, these juveniles were convicted, but the issues focused on their sentencing. There has never been a question that juveniles tried in criminal courts merit the same constitutional protections, including their rights to attorneys and their rights to be competent in all phases of criminal prosecution. Nevertheless, even when tried in criminal court, we must ask about their competency. Therefore, the following material relates to these offenders as well.

Once youths in juvenile court delinquency hearings became entitled to most of the same rights and procedures as adult defendants, states began to recognize that they also must be competent in order to be adjudicated in juvenile court (Murrie & Zelle, 2015). Although no U.S. Supreme Court decision has specifically addressed this, the need for competency was understood.

Legal scholars and developmental psychologists often make a distinction between two types of competence: adjudicative and decisional. Recall from Chapter 7 that *adjudicative competence* refers to the capacity to assist your attorney in preparing for a trial, and to understand the nature of the trial-related proceedings well enough to adequately participate in them—it is most often simply called *competency to stand trial*. However, competency to stand trial also implies *decisional competence*, which refers to the ability to make informed choices about legal and constitutional issues other than those related directly to the trial. It relies on the core idea

that the client is the principal decision maker and the attorney represents the client (Bonnie, 1992). It “involves, among other things, the ability to consider the potential consequences of several options, to make subjective judgments about the desirability and probability of those consequences, and to compare them” (Grisso, 1997, p. 8). Decisional competence encompasses conceptual abilities, cognitive skills, and capacities for rational thinking about legal language and communications.

Both adjudicative and decisional competence are needed of criminal defendants, but juveniles are particularly at risk of lacking the latter. Under the stressful conditions presented by many forensic settings, most juvenile defendants do not have the necessary emotional maturity, experience, abstract legal skills, and patience to make decisions involving possible waivers of important rights and protections when choosing how to plead and whether to accept plea bargains offered by the juvenile or adult criminal court. Specific examples include the juvenile’s ability to understand the meaning and consequences of waiving *Miranda* rights, answering questions during police interrogations, confessing to a crime, or pleading guilty.

Differences between average adults and average adolescents involve psychosocial maturity. That is, compared to the average adolescent, the average adult has greater future orientation, better risk perception, and less susceptibility to peer influence (Grisso et al., 2003). This level of psychosocial immaturity is especially apparent in youths below the age of 15. “The evidence to date strongly has suggested that youths younger than age 15 are at greater risk than older individuals of being incompetent to stand trial or to make important legal decisions that arise before or during criminal trial proceedings” (Shulman & Steinberg, 2016, p. 77). For example, in the MacArthur Foundation’s Juvenile Competence Study (Grisso et al., 2003), juveniles below age 15 performed significantly worse than older juveniles or adults on measures of adjudicative or decisional competencies. This led to the recognition that juvenile competency issues should be assessed in a different way than what is done for adult competencies.

Some adolescents’ competence and capacities to understand, decide, and participate in the legal process may be impaired not only because of cognitive issues, socioemotional immaturity, or delayed development but also because of psychological disorders and intellectual impairment. It seems, though, that lawyers for juveniles are not always alert to these distinctions. Viljoen et al. (2010) studied how juvenile attorneys dealt with possible incompetence in their clients. Almost all said they would spend more time with the client or explain legal procedures more, but just more than half indicated they would raise that issue in court by requesting an evaluation.

Juvenile Psychological Disorders

Having a mental disorder alone is never a sufficient condition for finding adjudicative or decisional incompetence (Murrie & Zelle, 2015). As we saw in Chapter 7, having a mental disorder does not necessarily render someone incompetent to stand trial. “Rather, the symptoms of a mental disorder must interfere with a defendant’s relevant, practical abilities in a way that leaves that defendant unable to meaningfully participate in the adjudicative process” (Murrie & Zelle, 2015, p. 118). In the case of juveniles, disorders are more likely to interfere with that participation. Furthermore, juveniles charged with crime may be even more likely than adults to have these disorders.

Developmental researchers (e.g., Anderson, 2016; Luna & Wright, 2016) point out that adolescence is the most vulnerable period for the emergence of a variety of psychological disorders, such as anxiety disorders, mood disorders, attention deficit hyperactivity disorder

(ADHD), personality disorders, drug abuse, and psychotic disorders. In fact, the average age of onset for serious psychological disorders is 14 (Steinberg 2014). Most of these—except psychotic disorders—are usually not serious enough to result in poor daily functioning, but they may impair or limit juveniles' functioning as defendants. Youths with psychological disorders often demonstrate more pronounced impairment of cognitive and psychosocial capacities than their psychologically healthy peers. This not only places them at increased risk for engaging in impulsive, risky behavior but also makes it less likely that they will have the understanding and decision-making skills to operate within the judicial system (Nagel, Guarnera, & Reppucci, 2016).

As one example, youths with ADHD—a not uncommon diagnosis—“seem somewhat blind to the consequences of their decisions, even as the consequences increase in severity, compared with adolescents without ADHD” (Nagel et al., 2016, p. 125). Therefore, juveniles with ADHD are both more likely to make disadvantageous choices and less likely to perceive the legal consequences of these choices. In fact, a study by Gudjonsson and colleagues (2016) found that the severity of the ADHD condition in adolescents significantly increased the risk of false confessions during interrogation.

Youths in the juvenile or criminal justice system exhibit a high incidence rate of mental or behavioral disorders, with studies reporting incidence rates as high as 70% to 100%, far exceeding the 20% incidence rate for youths in the general population (Redlich, 2007). Some studies show that youths in juvenile detention meet the criteria for mental disorder about three times as much as their community peers (Nagel et al., 2016). Some prevalence studies have revealed that between 20% and 27% of juveniles in the justice system have been diagnosed with severe mental disorders (Koocher & Kinscherff, 2016).

Nagel and her associates (2016) note that there are relatively few legal protections for youths with severe or moderate psychological disorders in the justice system. The U.S. Supreme Court, for example, has never specifically ruled on a juvenile insanity defense, and the juvenile courts have been inconsistent on whether youths should receive the protections of the defense. Currently, only about a dozen states explicitly allow the insanity defense to be considered in juvenile court. If juveniles are tried as adults, the insanity defense is available just as it is to adult defendants, unless, of course, a juvenile is tried in a state that has abolished that defense.

With or without a mental disorder, many juveniles have cognitive impairment. Cognitive impairment may result from psychological disorders, but it also may be a feature of intellectual disability (formerly called mental retardation), or developmental disabilities that leave the defendant with below-average intellectual skills. Approximately 10% of the juveniles in detention qualify as having an intellectual disability, compared to 3% of the juvenile community population (Nagel et al., 2016). In one study of juvenile defendants who were diagnosed with intellectual disability or learning disabilities in Virginia, 70% were still found competent to stand trial (Murrie & Zelle, 2015; Warren et al., 2006).

In the sections below, we will discuss specific legal situations in which the ability of juveniles to understand processes and consequences and make decisions are especially relevant.

Miranda Protections

As explained in Chapter 3, before an interrogation aimed at a confession can take place, law enforcement officers must inform suspects who are in custody of their Fifth Amendment constitutional rights to remain silent, which are summarized in *Miranda* warnings (see **Table 8.3**). There is a basic assumption that the American public is knowledgeable about

Table 8.3 Standard Miranda Rights and Warnings

- You have the right to remain silent.
- If you choose not to remain silent, anything you say can and will be used against you in a court of law.
- You have the right to an attorney.
- If you cannot afford an attorney, one will be appointed for you by the court.
- You can invoke these rights at any time. (*Note:* This is not used in all jurisdictions.)

Note: In many jurisdictions, persons in custody are asked whether they understand these rights and are also asked to sign a waiver if they decide to speak without a lawyer.

what we broadly term “*Miranda* rights” due to widespread exposure to popular media (Zelle, Riggs Romaine, & Goldstein, 2015). Study after study, however, finds that media exposure has not greatly improved our *Miranda* comprehension. Studies demonstrate that “people continue to harbor misconceptions about the meaning and function of *Miranda* rights” (Smalarz, Scherr, & Kassin, 2016, p. 456). Smalarz et al. (2016) conclude, on the basis of their study and others, that “more recent work . . . has converged on the provocative conclusion that once under suspicion, and targeted for interrogation, even well-adjusted, intelligent adults are at risk despite *Miranda*” (p. 458). It appears that many adults understand *Miranda* warnings only slightly better than juveniles. Several research projects continue to show that understanding and appreciating the different parts of the *Miranda* warnings are more complex undertakings than previously assumed (Zelle et al., 2015).

If the problem is acute for adults, it is even more so for juveniles. “The most frequently studied aspect of noncourtroom legal decision-making concerns adolescents’ responses to interrogation by law enforcement officials . . . including individuals’ ability to understand and make decisions about their *Miranda* rights, once in police custody” (Shulman & Steinberg, 2016, p. 77). Juveniles have the same Fifth Amendment protections as adults in this regard (*Fare v. Michael C.*, 1979). However, important age differences have been found in individuals’ (a) comprehension of *Miranda* warnings, (b) decisions to waive the right to counsel, (c) decisions about whether to confess to a crime they have committed, and (d) susceptibility to making false confessions.

Whether one is in custody or not has legal significance because police officers are only required to provide a *Miranda* warning if the individual to be questioned is in custody and not free to leave. When custody is not clear-cut, the courts ask, “Would a reasonable person believe he was free to leave?” In a case involving the questioning of a juvenile in a school setting (*J. D. B. v. North Carolina*, 2011), the Court made it clear that age is a relevant factor that should be considered when using the reasonable-person standard to assess whether a juvenile suspect would have felt that he or she was in custody (Murrie & Zelle, 2015). Police said they were merely interviewing J. D. B., and that he was not restricted from leaving the room in which he sat. The Supreme Court noted, though, that younger individuals were more likely to feel unable to end an interview and leave. As Smalarz et al. (2016) have observed, it is generally unclear to people, and especially juveniles, what conditions have to be met for them to consider themselves free to leave. (See **Case Study 8.1** for more discussion of both *Fare v. Michael C.* and *J. D. B. v. North Carolina*.)

CASE STUDY 8.1

FROM MICHAEL C. TO J. D. B.—QUESTIONS OF INTERROGATION AND CUSTODY

The U.S. Supreme Court case *Fare v. Michael C.* (1979) involved a juvenile's waiver of his right to an attorney during police interrogation. Michael C. was a 16-year-old charged with rape and robbery. After arrest and at the police station, he was told he had a right to see an attorney, but he apparently interpreted this *Miranda* warning as a police trick. Described as immature, distraught, and poorly educated, Michael C. repeatedly asked to see his probation officer instead of a lawyer. He was told his probation officer would be contacted after he answered some police questions. Asked again if he wished to see an attorney, he said he did not.

The U.S. Supreme Court ruled against Michael C., in a 5–4 decision, though the Court did express concern as to whether juveniles have the capacity to fully understand the warnings given to them, and the Court warned judges to consider the social circumstances of the interrogation, including the age, education, intelligence, and background of the youth. Nevertheless, Michael C.'s request to see the probation officer was not considered the equivalent of a request to see a lawyer, and the Court said police did not err in refusing to grant the request.

About 30 years later, J. D. B., a 13-year-old seventh grader, was taken out of his classroom by a uniformed police officer, led to a conference room, and questioned about his involvement in a burglary and theft of a digital camera (*J. D. B. v. North Carolina*, 2011). Two police officers (one a school resource officer) and two representatives of the school administration were in the room, and the door was shut. J. D. B.'s grandmother, who was his legal guardian, was not contacted. The adults engaged him

in small talk over a 45-minute period, and at one point encouraged him to do the right thing and tell police what he knew. After he admitted to the burglary, he was told he didn't have to keep talking and could leave the room if he wanted to. Attorneys later representing J. D. B. argued that he was in custody, that he was not given adequate *Miranda* warnings, and that his confession was not a valid one.

Lower courts had determined that the youth was not in custody when questioned, and therefore that the *Miranda* warning was not even required. The Supreme Court cited psychological research on adolescent development and noted that J. D. B.'s age should have been taken into consideration in deciding whether he perceived himself as free to leave. Because age had not been sufficiently taken into consideration at the trial-court level, the Supreme Court sent the case back to the state courts for a further review of the circumstances surrounding the questioning.

Questions for Discussion

1. The crimes these two juveniles were accused of were very different. Does that matter?
2. Why might Michael C. have asked to see his probation officer rather than a lawyer? Should he have been allowed to do so?
3. What factors would you consider in deciding whether J. D. B. perceived himself to be free to leave the conference room?

Recent research estimates that 90% of juveniles quickly waive their *Miranda* rights before and during interrogation (Murrie & Zelle, 2015). It is apparent that the reason many adolescents quickly waive their *Miranda* rights is that they do not understand them. And even if they say they "understand" them, it appears that they fail to grasp the attorney's role as a personal advocate for them (Zelle et al., 2015). Clearly, there is wide variability in adolescent understanding of the *Miranda* language and its inherent rights. In addition, jurisdictions often have variable language for the *Miranda* warnings themselves, with some giving specific attention to possible difficulty in comprehending them. Some jurisdictions

use a *Miranda* warning specifically designed for juveniles, which, paradoxically, is often more complex than the adult version (Rogers, Harrison, Shuman, Sewell, & Hazelwood, 2007). (**In Focus 8.2** refers to the processing of juveniles taken into custody by federal law enforcement authorities.) Although the U.S. Supreme Court has never ordained that a particular phraseology in the *Miranda* warnings must be used in the case of juveniles or anyone else, **Table 8.3** lists common familiar phraseology—however, familiarity with the words does not necessarily imply comprehension.

A study focusing on adolescent understanding of *Miranda* rights by McLachlan, Roesch, and Douglas (2011) concludes: “Overall, these results complement a growing body of literature suggesting that younger, less intellectually capable adolescents represent a highly vulnerable group of suspects who may be at increased risk of making poor decisions in the interrogation context” (p. 175). Courts, police, and mental health professionals who evaluate the validity of *Miranda* waivers should carefully consider a juvenile’s age, mental status, and intellectual functioning level. This is especially true for adolescents under age 15. “In comparison to adults, juveniles aged 15 and younger have deficits in their legal understanding, knowledge, and decision-making capabilities” (Redlich & Shteynberg, 2016, p. 612).

Researchers have both identified ways of making rights more understandable to juveniles (Eastwood et al., 2016) and developed specific instruments for measuring juvenile (and adult) comprehension of these rights (Rogers et al., 2007, 2009). After extensive study of juvenile comprehension, Grisso and his colleagues have done a considerable amount of work in the development of various *Miranda* measures (Grisso, 1998a). These measures include the Comprehension of Miranda Rights (CMR), the Comprehension of Miranda Rights–Recognition (CMR-R), the Comprehension of Miranda–Vocabulary (CMV), and the Function of Rights in Interrogation (FRI)—all recently revised (N. E. S. Goldstein, Zelle, & Grisso, 2012).

However, research also indicates that the more time juveniles are able spend with their attorneys, the better they understand *Miranda* rights and what they can expect during adjudicative proceedings (Viljoen & Roesch, 2005). Realistically, though, juveniles often have little opportunity to consult with attorneys, because either they typically waive their right to counsel, or if they do have counsel, attorneys for juveniles are usually so overloaded with cases that their time is very limited for providing information to their young clients.

IN FOCUS 8.2

Federal Juvenile Delinquency Act (18 USC § 5033)

Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall immediately advise such juvenile of his legal rights, *in language comprehensive to a juvenile* [italics added], and shall immediately notify the Attorney General and the juvenile’s parents, guardians, or custodian of such custody. The arresting officer shall

also notify the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.

The juvenile shall be taken before a magistrate forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate.

JUVENILE INTERROGATION AND FALSE CONFESSIONS

Ideally, if not realistically, once law enforcement officers have an individual in custody and *Miranda* warnings have been given, interrogation can begin. The goal of interrogation is to obtain evidence for prosecution, particularly, if possible, a confession. Confessions represent potent evidence in the justice system and greatly increases the likelihood of a conviction (Drizin & Leo, 2004). Juvenile confessions are also sought; they limit defense options and foster a system of plea bargains, rather than trials. The central issue, then, becomes settling on a disposition rather than proving guilt beyond a reasonable doubt (Feld, 2013). With respect to obtaining confessions, Feld notes that “the Supreme Court has decided more cases about interrogating youths than any other issue in juvenile justice” (p. 399).

What is missing in the juvenile interrogation literature and practice is an explicit awareness of developmental changes and forces in the adolescent (Cleary, 2017). It is surprising to learn that police interrogators generally use the same interrogation methods to interrogate juveniles as they do with adults (Cleary & Wagner, 2016). In addition, very little research has directly investigated law enforcement approaches to juvenile interrogations (Feld, 2013). We know very little about what happens when law enforcement interrogates juveniles, but a well-cited study by Barry Feld (2013) provides some revealing information. (Recall from earlier in the chapter that Feld found in a previous study that more than half of all juveniles were not represented by lawyers in juvenile court, even 20 years after *In re Gault*.) In the present study, Feld investigated interrogation transcripts of 307 juvenile suspects, ages 16 and 17, most of whom prosecutors had charged with felonies. Feld examined where and when the interrogation was conducted, who was present at the interrogation, how police administered *Miranda* warnings, whether the juveniles invoked or waived their rights, how police interrogated the juveniles, and how the juveniles responded. Most of the juvenile defendants were male (89%).

Feld (2013) found that the vast majority (92.8%) of the youths waived *Miranda* rights, and a majority (77.2%) confessed within 15 minutes after doing so. “The speed and seeming inevitability of these outcomes raise questions about whether the juvenile suspects knew their rights and effectively weighed the resulting options” (Rogers et al., 2016, p. 530). Notably, none of the youths in this study had lawyers present during the interrogation.

Overall, developmental studies have determined that adolescents are ill-equipped to deal with the tactics, psychological manipulation, and stress levels generated by the majority of police interrogations. Moreover, there are no restrictions on who may be interrogated, or how they are interrogated, and there is no recognized interrogative competence akin to adjudicative competence in the legal arena (Cleary, 2017). “However, such a construct(s) is sorely needed and would greatly contribute to our understanding of how juvenile suspects navigate the interrogation process” (p. 124).

Unfortunately, juveniles often fail to appreciate the long-term consequences of making a confession for crimes they did not commit, and these false confessions most often occur during police interrogations. Approximately 47% of juvenile exonerees falsely confessed to crime they did not commit, compared to 13% of adult exonerees (Gross, Jacoby, Matheson, Montgomery, & Patel, 2005; Kassin, Perillo, Appleby, & Kukucka, 2015). The term *exoneree* refers to a person who has been shown to be not guilty for a crime for which he or she was formerly found guilty. The exoneration data—which were obtained from files of the Innocence Project—continually show that adolescents make false confessions more than three times more frequently than adults (Pimentel et al., 2015). For younger exonerees, ages 12 to 15, the false confession rate is even higher, approximating 75%. Research examining

self-reported incidences of false confessions among youths in the United States and Europe has revealed rates ranging from 6% to 19% (Kassin et al., 2015).

Why are adolescents more prone to confess to a crime they did not commit? Empirical studies reveal at least four reasons: (1) emotional and psychosocial immaturity; (2) threatening and/or highly manipulative interrogations; (3) young youths' tendency to comply with authority figures; and (4) social pressure to cover for someone else, known as *reciprocity*.

Emotional and Psychosocial Immaturity

Cleary (2017), citing the research on adolescent development, describes three characteristics of immaturity that render adolescents more prone to false confessions: (1) reward sensitivity, (2) inadequate self-regulation, and (3) limited future orientation. As we learned earlier, the average adolescent is significantly more desirous of immediate rewards than future ones. During the long and stressful experience of interrogation, the average adolescent sees the immediate reward of leaving the interrogation room and going home as a powerfully tempting one. Research by Drizin and Leo (2004), for instance, revealed that "getting to go home" was one of the most common reasons given by adolescents for why they falsely confess to a crime they had not committed. Inadequate self-regulation (self-control) will likely encourage the average adolescent to take the immediate reward of pleading guilty or "whatever" in place of maintaining innocence in the face of the unpleasant experience of interrogation. The lack of future orientation emboldens the adolescent to prefer going home immediately without considering the future but serious consequences of admitting guilt. Adolescents "tend to be focused myopically on short-term gains and losses rather than the longer-term consequences of their actions" (Kassin et al., 2015, p. 253).

Interrogation Tactics

Many of the youths who falsely admitted guilt said they had experienced high-pressure, threatening interrogations by the police. As emphasized by Malloy, Shulman, and Cauffman (2014), "developmental characteristics such as impulsivity, susceptibility to social influence, lower status relative to adults, and immature judgment may explain the greater propensity of adolescents to admit to offenses to which they are accused, especially if psychologically manipulative and high-pressure techniques are used" (p. 182). In another investigation of police interrogations with adolescents, Arndorfer, Malloy, and Cauffman (2015) interviewed 193 male juvenile offenders incarcerated in a secure juvenile justice facility. The subjects ranged in age from 14 to 17 years. The researchers found that high-pressure, threatening interrogations not only resulted in more juvenile false confessions but also prompted significantly more negative perceptions of the police. On the other hand, juveniles who said they made true confessions generally did not express negative perceptions of the police. Interestingly, juveniles who make true confessions usually do not require a lot of persuasion or intimidation to talk (Feld, 2013). They often talk to interrogators easily and freely.

Compliance With Authority Figures

Grisso et al. (2003) suggested that another plausible reason why some juveniles provide false confessions under interrogation is the juvenile's propensity to comply with authority figures, especially the police. Juveniles "questioned by authority figures acquiesce more readily to suggestion during questioning" (Feld, 2013, p. 411). They often seek approval from persons in authority and respond more readily to negative pressure. This tendency is most prominent among youths younger than 15 (Drizin & Leo, 2004). Youths under age 15 are more likely to waive their rights and tell what they have done, even if they have not done it, partly because they are still young

enough to believe they should never disobey authority, especially in situations where the authority figure communicates that it will be easier to admit guilt than not (Kassin et al., 2010, p. 11).

Reciprocity

During adolescence, individuals become highly invested in peer acceptance and support. Research using self-report methods indicates that a significant number of false confessions are given to protect another individual, usually a friend, family member, or peer (Pimentel et al., 2015). Compared to adults, adolescents may be more willing to take responsibility for someone else's wrongdoing or avoid accusing them as a form of payback for that person's friendship and loyalty. If the true offender is an adult who is apt to be tried in adult criminal court with serious consequences, the juvenile may be convinced that he or she should take the fall with less severe consequences.

The age group most likely to falsely confess to someone else's wrongdoing appears to be 13- to 15-year-olds. In one study (Malloy et al., 2014), 17% of the teenage sample admitted making a false confession, largely to protect someone else. This tendency appears to be especially prevalent when a peer friend is present during the interrogation process, though in most situations the suspects would be separated. Moreover, research finds that false confessions motivated by the protection of others are less likely to be retracted than false confessions made for other purposes (Malloy et al., 2014; Pimentel et al., 2015). A good example of a false confession made to protect another person is represented in the court case *Edmonds v. State of Mississippi* (2007), a case that was ultimately settled at the state court level.

Edmonds v. State of Mississippi (2007)

On May 11, 2003, Joey Fulgham was found shot to death in his bed in Longview, Mississippi. When police questioned the victim's widow, Kristi Fulgham, she told them that her 13-year-old half-brother Tyler Edmonds had shot her husband. Police quickly brought Edmonds in for questioning and interrogation, along with his mother. At first, he denied any knowledge of the incident. After luring Edmonds's mother away from the interrogation room, the police brought Kristi Fulgham into the room. She confronted Edmonds and stated he was the person who shot her husband. Edmonds eventually signed a *Miranda* waiver form and gave a videotaped confession in which he said that he had pulled the trigger. Several days later, however, Edmonds stated he had not understood the words on the waiver form and had falsely confessed to the murder. Edmonds was indicted for capital murder and tried as an adult in circuit criminal court.

"In practice, judges invalidate waivers and exclude confessions only in the most egregious circumstances" (Feld, 2013, p. 403). In other words, once a suspect has confessed to a crime, it is extremely difficult to get that confession excluded. When Tyler's lawyer was unable to get the confession suppressed, he sought to bring in an expert witness on the psychology of false and coerced confessions, Dr. Alison Redlich. The trial judge denied that request, saying research on false confessions was not widely accepted in the field.

During the trial, Edmonds testified that Kristi Fulgham told him that she had killed her husband and that if she was convicted, she would likely get the death penalty and would never see her children again. Furthermore, she told him that if he confessed to the murder, nothing would happen to him because he was only 13. Edmonds was convicted of capital murder and sentenced to a life term. An appeals court affirmed the conviction, and Edmonds then appealed to the state's highest court.

The Mississippi Supreme Court ruled that Edmonds had been denied a fair trial on a number of bases. Pertinent to our discussion here, the court said the testimony of Dr. Redlich should have been allowed. As noted, the trial court had not allowed it, and the appeals court had supported the trial court in that ruling.

The Mississippi Supreme Court found these conclusions unwarranted. Citing an *amicus* brief filed with the court of appeals, the court wrote that there were at least 60 experts on false confessions (the trial court had said there was just a handful). Moreover, since 1992, nearly 800 articles related to false confessions and police interrogations had appeared in the professional literature. The supreme court further noted that Dr. Redlich was prepared to testify that Edmonds's confession was consistent with a false confession. Her testimony would have established that false confessions do occur, that juveniles are more likely to confess falsely than adults, that youths' immaturity and heightened suggestibility are traits that contribute to the likelihood of false confessions, that many false confessions result from pressure placed on a vulnerable person by a family member or friend, and that police interrogation procedures such as separating a young person from his parents during interrogation can lead to false confessions. Dr. Redlich also planned to testify that false confessions are often recanted soon after they are made.

The Mississippi Supreme Court therefore concluded that Dr. Redlich's expert testimony should have been admitted as cogent evidence for the defense at the circuit court level. The judgments in the courts below were reversed, and Edmonds was granted a new trial. He was acquitted by a jury in 2008. Kristi Fulgham was convicted of murdering her husband and was sentenced to death. Her death sentence was later set aside, and she was resentenced to life in prison without parole in 2010.

PLEA BARGAINING

Adolescents undergo many developmental changes and legally are viewed as dependent minors who require the consent of parents or guardians when making many critical, significant decisions (Fountain & Woolard, 2018). By contrast, in plea bargaining situations, "adolescents are legally required to make *their own* legal decisions while being held to adult standards of competence" (Fountain & Woolard, 2018, p. 192). However, when they plead guilty, they rarely realize that they forego a variety of legal protections. Plea bargaining research has consistently shown that adolescents—when they are innocent—plead guilty more often than innocent adults (Helm, Reyna, Franz, & Novick, 2018). Malloy et al. (2014) interviewed 14- to 17-year-old males incarcerated for serious crimes and discovered that more than a quarter of the sample (25%) reported making false guilty pleas to legal authorities. Apparently, the juveniles believed that pleading guilty is different from admitting guilt.

Redlich and Shteynberg (2016) note that "a valid plea decision requires an understanding of the plea, the rights one is waiving, and the collateral consequences weighted against the alternatives" (p. 612). Decision-making deficits and developmental immaturity limit these abilities in some adolescents, especially those under age 16. Furthermore, the plea forms that inform defendants of their rights and consequences of pleading guilty are often confusing and unclear: "The forms use complex legal terminology and are written, on average, at reading levels three to six grades higher than the capabilities of most offenders" (p. 612). Consequently, juveniles may be more willing to accept plea offers because they do not fully understand what they are agreeing to nor appreciate the long-term consequences.

We should emphasize that even if defendants are truly guilty, they should understand the consequences of their plea. A plea decision depends on the perceived strength of evidence, the probability of conviction at trial, and the value of the plea offer. By pleading guilty, the defendant is giving up the right to have the state prove every element of the crime beyond a reasonable doubt. Furthermore, there is no guarantee of leniency, even though the prosecutor suggests it will happen. As described by Redlich and Shteynberg (2016), defendants facing the plea decision often have a *Hobson's choice*, which basically refers to no choice at all. The choice: Plead guilty and possibly get out of jail sooner, or risk a harsher fate at trial. Most choose to plead guilty, likely because of the leniency typically attached to reduced

sentences and/or charges. For those who are innocent, even though falsely acknowledging guilt is required, pleading guilty may be the rational option.

When juveniles are represented by attorneys (and not all are, as we saw earlier), the attorney works with them to arrive at a sentencing package that will be in their best interest. In other words, the attorney hopes for probation or a short time in a juvenile facility. The modal disposition for juveniles is probation, typically including special conditions such as regular school attendance, substance abuse treatment, or electronic monitoring. Before agreeing to a guilty plea, the juvenile should be aware of the extent of these conditions as well as what might be encountered in a juvenile facility. A guilty plea also means that the juvenile will have a record. Other consequences may include being required to register as a sex offender, being deported from the country, or being banned from owning a handgun (Fountain & Woolard, 2018). (See **Researchers at Work 8.1** for a description of Fountain & Woolard's study of defense lawyers and their juvenile clients.)

RESEARCHERS AT WORK 8.1

Helping Juveniles Plea Bargain

When juveniles are charged with crimes in juvenile court, the modal response is to plead guilty, just as it is for adults. Also, as for adults, their lawyers are expected to follow the expressed wishes of their clients. As is evident from the research cited throughout the chapter, however, juveniles are even less likely than adults to understand their constitutional rights and to appreciate the consequences of waiving them. In recent years, researchers have paid more attention to the juvenile plea bargaining process in juvenile court and the role played by attorneys.

In a qualitative study, Fountain and Woolard (2018) focused on one urban juvenile court to examine how plea bargaining occurred and how defense attorneys prepared their juvenile clients. The researchers conducted audio-recorded, semi-structured interviews, lasting approximately an hour long, with 23 attorneys who volunteered to participate. The interviews focused on how the plea bargain process worked, how the lawyers prepared their clients, and how they dealt with difficult situations, such as when clients did not seem competent or made decisions that did not seem to be in their best interest. Lawyers were also asked to discuss in detail their most recent case. The attorneys in the sample averaged 11 years of legal experience and were each overseeing approximately 46 juvenile cases.

One common theme was the lack of time the attorneys had for presenting and explaining plea bargaining to their juvenile clients. The plea bargaining

process in this court was a quick one, generally requiring a prompt decision. Plea offers usually were made by the state's attorney on the morning of the "trial" (delinquency hearing)—about 3 hours before it was scheduled. Attorneys reported spending an average of 40 minutes talking to the client, and only two said they had discussed a possible plea with their client before that time. The attorneys also complained about insufficient time to provide the juvenile with necessary information and evaluate their client's decisional competence. One attorney explained, "It's hard to evaluate a child's competency on the fly . . . you know you have to be very careful about how you're explaining things to them because they'll just parrot it back or they'll just say 'yes, yes I understand'" (Fountain & Woolard, 2018, p. 196).

According to the attorneys, the most common explanation for why the juveniles accepted a guilty plea was their desire to go home right away. For example, many were willing to plead guilty in exchange for guaranteed probation so that they could return home that day rather than risk incarceration. A second common theme for accepting a guilty plea was to avoid the stresses of a trial, particularly confronting witnesses. For example, some juveniles were motivated "to avoid the immediate discomfort of listening to witnesses describe their conduct in front of their families and the judge" (Fountain & Woolard, 2018, p. 201). In some cases, juveniles feared being transferred to criminal court if they did not accept the offer to plead guilty.

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With regard to the strategies and approaches taken by the attorneys themselves, the study had interesting findings. For example, there were variations in when the attorneys explained the waivers of rights to their clients; about 60% explained to clients what rights they were waiving only after the client had expressed the wish to plead guilty. Only five attorneys discussed collateral consequences of pleading guilty—such as the possibility of being on a sex offender registry or perhaps not being eligible for military duty. And when faced with difficult situations—such as a juvenile's not understanding, being recalcitrant, or making a decision that might not be in his or her best interest—the attorneys would have preferred a developmentally sensitive approach. In other words, they seemed genuinely aware of the limitations of adolescent decision making. However, to do so would require more time with the client—and that time was not available to them.

Questions for Discussion

1. This study found that the explanation of the rights being waived often happened after juveniles said they wanted to plead guilty, not before. Does the timing matter?
2. In contrast to the great majority of studies cited in this text, this was a qualitative study. The researchers used a software program that allowed them to code and synthesize the information gained from interviews. What advantages do you see in qualitative research that quantitative research (e.g., analysis of statistical data, archival research) does not have?
3. Given the results reported here, how would you improve the plea bargaining process for juveniles?

As indicated in the previous material, a vast amount of psychological literature exists on topics related to the processing of juveniles in both juvenile and criminal courts, and the legal system is beginning to recognize this research. Even juveniles whose cognitive development is on par with that of most adults have delayed socioemotional development, placing them at risk of making faulty decisions in high-stress situations. These high-stress situations relate not only to committing crimes but also to taking part in justice-system processing, such as being interviewed and interrogated by police and participating in plea bargaining. Although juveniles are still held responsible for the serious crimes they commit, their degree of culpability is often less than that of adults. The emotional immaturity characteristic of many juveniles, along with the neuroplasticity of their brain, also suggests that they are amenable to rehabilitation.

Many questions remain unanswered, however. For example, when juveniles are transferred to the adult system and convicted of serious crimes, should the law place outside limits on the amount of time they should serve before being eligible for parole? And because research suggests that the socioemotional brain is not developed until the early 20s, should young adults also be given more consideration at sentencing?

To this point in the chapter, we have focused on juveniles who have been accused of crime and the psychological issues that are relevant to their processing in both the juvenile and adult legal system. We now turn to focusing on children who are victims of or witnesses to crime. Legal and developmental psychologists have conducted studies in this area, and both state statutes and court decisions are relevant to these topics.

CHILDREN AS WITNESSES

In both the criminal and civil justice systems, children are most likely to be called on as witnesses if they themselves have been victimized. They may be victims of crime, family

dysfunction, or child endangerment or neglect. According to Finkelhor (2011), “children are the most victimized segment of the population” (p. 14). In 2011, more than 3.4 million children reportedly experienced abuse (sexual or physical) or neglect in the United States, with at least one-fifth of these reports substantiated. Nearly 40% of the children reported as abused or neglected were under the age of 6. Overall, studies estimate that one in seven children in the United States experiences some form of child maltreatment in his or her lifetime (Finkelhor et al., 2009). When reports are not substantiated, it does not mean that the incident did not occur, however. Although false reporting cannot be eliminated as an explanation, it could be that sufficient evidence was not obtained or that the children were not believed.

Although most research on child testimony pertains to criminal cases, it is important to keep in mind that children also testify in custody proceedings, administrative hearings in which foster care is being considered, and civil suits in which damages are sought, to name a few. Thus, while we focus primarily on the criminal context, the principles discussed apply to many other situations.

Klemfuss and Ceci (2012) note that child testimony is usually the only source of prosecuting evidence in an abuse case—particularly a sexual abuse case—because by the nature of the crime, there are usually no other witnesses. Yet lawyers, judges, and sometimes police have long believed that the information acquired through the interviewing of children and their subsequent testimony is potentially permeated with far more distortion and inaccuracy than information acquired from adolescents and young and middle-age adults (Brainerd & Reyna, 2012). Interestingly, some research indicates that many police officers find children to be more accurate in their descriptions of crime and other incidents than many other professionals do—including eyewitness experts (G. S. Goodman & Melinder, 2007). For example, in one study of experts in forensic psychology or eyewitness testimony (Kassin, Tubb, Hosch, & Memon, 2001), two-thirds of the experts believed that children are generally less accurate than adults. In that same study, 94% of the experts in forensic psychology or eyewitness testimony believed that young children are also more vulnerable than adults to suggestion and other social influences. The perception of children’s reporting inaccuracy extends to the general public and prospective jurors as well (Ross, Dunning, Togliola, & Ceci, 1990). To address whether these beliefs are justified, we will discuss the research on child testimony shortly.

Legal Criteria for Child Testimony

The age at which children may testify as credible and competent eyewitnesses in criminal and civil proceedings has long been controversial. In the past, many jurisdictions stipulated that 14 was the minimum age for delivering competent testimony, with exceptions being made only after a judicial inquiry into a younger child’s testimonial competency. Other jurisdictions regularly allowed 10-year-olds to qualify as competent witnesses. Many states, however, required that the competency of the child witness under 12 (or even 14) be evaluated prior to allowing his or her testimony as evidence.

In recent years, however, numerous statutory changes have made it easier for a child eyewitness to testify. For example, more than half the states have adopted Rule 601 of the Federal Rules of Evidence (Bulkley, 1989), which establishes a rebuttable presumption of competency for children. In other words, children, like adults, are presumed to

be competent to testify. If there is doubt about children's competency because of their age, their competency is evaluated, generally by a developmental psychologist or similar expert. In some states, children as young as age 2 or 3 have testified (Klemfuss & Ceci, 2012; Zajac, O'Neill, & Hayne, 2012). In an interesting recent case (*Ohio v. Clark*, 2015), the U.S. Supreme Court allowed the introduction of hearsay testimony from a teacher who had been told by a 3-year-old child about his abuse. The child himself had been ruled incompetent to testify. The abuser was convicted, but he appealed his conviction, saying that his Sixth Amendment right to confrontation of his accusers was denied. Two appellate courts agreed, but in a unanimous decision, the U.S. Supreme Court did not. (See **Case Study 8.2** for more about this case.)

Most child witnesses are considerably older than 3, though (Zajac et al., 2012). Under Rule 601, the normal developmental differences in memory or narration abilities between children and adults are no longer critical in determining a child's competency. Simply because a child cannot narrate an event, he or she is not precluded from testifying. However, a minimum credibility standard must still be met. Generally, a competent child witness must be able to tell the difference between a lie and the truth and should be able to remember and describe, with some detail, events, even though his or her narration is not on par with that of adults. Child testimony can be rejected "if a reasonable juror could believe that 'the witness is so bereft of his powers of observation, recordation, recollection, and recount as to be so untrustworthy as a witness as to make his testimony lack relevance'" (Bulkley, 1989, p. 212).

If there is doubt about the child's competency, he or she must undergo a screening process. Furthermore, in those jurisdictions that have established a minimum age by statute (e.g., a minimum age of 8 or 10), all children below that age must undergo a testimonial competency screening (Klemfuss & Ceci, 2012) before being allowed to testify. Usually, the child is asked a brief series of questions by the presiding judge in an effort to determine whether he or she understands the oath, knows the difference between truth and lies (often referred to as a *truth-lie competency screening*), and has the capacity to observe and recall events. "Testimonial competence refers to whether a witness has sufficient cognitive ability and moral understanding to provide useful testimony" (Klemfuss & Ceci, 2012, p. 269). If there are still questions about the child's ability to provide legal testimony, the child's competence may be assessed more thoroughly by a child psychologist or other professional.

Competency screening and assessment are of critical importance. If a judge deems a child incompetent to testify, that child's testimony cannot be heard (Klemfuss & Ceci, 2012). If this happens and there is no other evidence to present, the case must be dismissed. As noted previously and in **Case Study 8.2**, in *Ohio v. Clark* (2015), the Supreme Court allowed hearsay evidence by a teacher who had questioned a 3-year-old abuse victim, ruling that it was not testimonial evidence that would provide the defendant a right to confrontation. In addition, if the presiding judge has some concerns about the child's ability but is not convinced that the child is incompetent to testify, the judge may issue a warning to the jury briefly outlining his or her concerns about the child's ability. In most jurisdictions today, however, it is relatively rare that a child is prevented from giving testimony on the grounds of incompetency (Klemfuss & Ceci, 2012). Competency evaluation and screening are not foolproof. In addition, there is little uniformity in actual judicial practices concerning competency evaluation, and judges often make competency decisions based on few guidelines and little formal training (London & Ceci, 2012).

CASE STUDY 8.2

OHIO V. CLARK (2015)—REVEALING ABUSE TO A TEACHER

Darius Clark was a pimp. He sent his girlfriend to Washington, D.C., to engage in prostitution, saying he would take care of her two young children. When 3-year-old L. P. appeared at his preschool with a bloodshot eye and marks on his body, he was questioned informally by his teacher. The child disclosed that Clark—whom he called “Dee-Dee”—had abused him. After several school professionals examined the child, the teacher called a child protection hotline, and a social worker came to the school.

Clark arrived at school, denied he had harmed L. P., and carried the child away. Social workers searched for the family and found L. P. and his younger sister at Clark’s mother’s home. The children were taken to a hospital, where belt marks, bruises, and a black eye were found on L. P. His sister had black eyes, a swollen hand, and a large bruise on her cheek. Two pigtails had been yanked out at their roots.

Prosecutors charged Clark with multiple counts of assault, endangering children, and domestic violence, but he denied being the abuser. Ohio law did not allow the testimony of children under age 10 if they seemed incapable of receiving impressions and relating them in a truthful manner. The trial court conducted a hearing and concluded that 3-year-old L.P. was not competent to testify. However, Ohio law also allowed reliable hearsay evidence—evidence provided by a third party—in some cases, including a situation in which a young abused child could not testify. Prosecutors then put the teacher on the stand, despite the defense attorney’s objections.

After Clark was convicted, he appealed his conviction based on the argument that allowing the teacher to testify violated his Sixth Amendment right to confront witnesses against him. An appeals court and the Ohio Supreme Court both accepted his argument, ruling that the teacher’s testimony was hearsay and should not have been allowed. The state supreme court said the teacher’s primary purpose in questioning L. P. was to gather evidence

for a subsequent prosecution. Because the state had a mandatory reporting law for suspected abuse, the teacher was acting as an agent of the state. She was therefore providing “testimonial” evidence that was based on hearsay.

The U.S. Supreme Court disagreed, with no Justice dissenting. The opinion of the Court was that the teacher’s testimony did not consist of “testimonial evidence” whose primary purpose was to assist in prosecuting. The teacher was responding to an emergency situation. Of relevance to our chapter is the Court’s indication that out-of-court statements by very young children will rarely, if ever, violate the Confrontation Clause of the Sixth Amendment. A young child is not acting to help the prosecution. He or she would simply want the abuse to end.

Questions for Discussion

1. How does the following hypothetical situation differ from the one in the *Ohio v. Clark* case? A 12-year-old victim of an aggravated physical assault confides in a teacher, describing her assailant as her father. The teacher reports this to a child protection hotline, and the father is arrested and charged with aggravated assault, domestic violence, and child endangerment. The 12-year-old refuses to testify against her father, and the prosecutor wants to put the teacher on the stand.
2. *Ohio v. Clark* was a case closely watched by adults who are mandated by laws to report suspected child abuse to authorities. Why was that so? In what ways does the unanimous decision by the U.S. Supreme Court address concerns these adults might have had as a result of the Ohio Supreme Court’s ruling?
3. Many adult professionals are mandated by laws to report suspected child abuse to authorities. Does this include child sexual abuse? What about emotional abuse? Research the statutes in your jurisdiction to answer this question.

Psychological Research on Child Testimony

Two basic questions are posed about the testimony of children: (1) Is it truthful? (2) Is it accurate? The first question addresses whether children are being honest, while the second addresses whether they can describe an event appropriately.

Honesty

Developmental research finds that children's understanding and moral judgments of truth and lies emerge during the preschool years (A. D. Evans & Lyon, 2012). A large collection of data emerging from forensic developmental research on child testimony indicates that the nature of the questioning and the type of memory retrieval are critical variables. For example, Lyon, Carrick, and Quas (2010) found that 4- to 6-year-old children are able to distinguish between true and false statements at a younger age than they are able to articulate an understanding of the concepts of "truth" versus "lie" or "good" versus "bad." "In practical terms, this means that many children will accept true propositions and reject false propositions even though they are incapable of articulating their understanding of the truth, lies, or falsehoods" (Lyon et al., 2010, p. 147). Thus, if some form of an oath is required of young children, they will be incapable of promising to "tell the truth" because they lack the understanding of what "tell the truth" means. However, they are usually able to *recognize* true statements and false statements by age 4 (A. D. Evans & Lyon, 2012). Again, they can do this before they are able to provide a definition or explain the difference between truth and a lie (Lyon & Saywitz, 1999).

Most adults in U.S. society believe they can determine whether someone is lying, especially a child. "Findings reveal first that adults are often confident in their deception detection abilities, and second that adults regularly view behavior such as gaze aversion (avoiding eye contact), fidgeting, nervousness, incoherent responses, and facial expressions as being indicative of someone lying rather than telling the truth" (Gongola, Scurich, & Quas, 2017, p. 44). Many adults believe they are particularly adept at detecting lying in children, primarily because they believe children have not yet developed a convincing lying pattern. This assumption is also notably strong among professionals (e.g., police officers, social workers, mental health workers) because children are believed to exhibit many signs of leakage, defined as verbal or nonverbal indicators of deception. The assumption is that people who are not telling the truth often do not control certain facial, behavioral, and verbal indicators that reveal their deceptive attempts.

In spite of people's belief that they can detect lying, research has demonstrated that a great majority of adults—including experts and professionals—cannot reliably tell when a child (or an adult) is being dishonest (Block et al., 2012; Gongola et al., 2017; G. S. Goodman et al., 2006; Nysse-Carris, Bottoms, & Salerno, 2011; Shao & Ceci, 2011). Some studies indicate that even very young children can maintain at least some types of lies without detection (Gongola et al., 2017). Competency screening for truth telling versus lying does not reliably predict honesty, and thus there have been some cogent arguments for excluding this part of an evaluation (Klemfuss & Ceci, 2012). Overall, studies have consistently shown that adults and experts are no better than chance at determining lying in children or adults. Furthermore, *lying* probably does not mean the same to children and adults.

Some research suggests that children who have been maltreated may have particular difficulty in knowing the difference between honest and dishonest statements. Lyon et al. (2010) discovered that the manner in which maltreated or disadvantaged children are questioned about their understanding of the truth and lies plays a major role in their apparent understanding of the concepts: "Children may understand the wrongfulness of lying but not understand what lying is" (p. 148). However, it appears that most children have a better understanding of the truth than they do a lie, although the reasons for this are unclear.

Secrecy is often the norm in abusive homes, so maltreated children often have different attitudes about truth telling and lying than non-maltreated children (Lyon et al., 2010). This may also be related to low-level or marginal verbal development. According to Lyon et al., “maltreated children might uniquely understand the wrongfulness of lying better than the meaning of lying given a home environment rich in punitiveness but lacking in linguistic stimulation” (p. 143). That is, they first learn that lies are “bad” and are punished, and they later come to understand that lies refer to false statements.

Attorneys and mental health professionals questioning children who often have trouble with the word *lie* would have better luck focusing on asking questions about *truth*. Interestingly, one study (Peterson, Peterson, & Seeto, 1983) discovered that a majority of children under the age of 11 denied ever having told a lie. Ceci and Bruck (1993) have noted, though, that children sometimes do lie when the motivation for doing so is there. The researchers indicate that young children will lie if it is in their best interest or they have been induced to do so: “In this sense, they are probably no different from adults” (p. 433). For example, Bottoms, Goodman, Schwartz-Kenney, and Thomas (2002) found that threats from loved, trusted adults can be powerful barriers to children’s disclosures in forensic contexts. This finding is especially relevant in situations where sexual abusers or other adults often exert strong pressure on child victims not to tell others. It should be noted as well that adolescents are also the perpetrators of sexual abuse against younger children, and the child victim may be pressured by the abuser or by parents not to reveal the abuse.

Despite these concerns about honesty, young children—even preschoolers—are capable of accurately recalling events that are forensically important and relevant. As Ceci and Bruck (1993) observed, “that their reports are more vulnerable to distortion than those of older individuals, and that they can be induced to lie in response to certain motives, is not meant to imply that they are incapable of providing accurate testimony” (p. 433). Most of the research has indicated that young children are able to recall the majority of what they see or hear, even though they may not recall as much detail as older children.

According to Ceci and Bruck (1993), in order to determine the credibility of children’s testimony, it is important to examine the conditions prevalent at the time the initial statement was collected from the child. They believe it is especially important to know how many times the child was questioned, who the interviewers were, the kinds of questions that were asked, and the consistency of the child’s report over a period of time. In concluding an extensive review of the research, they assert,

If the child’s disclosure was made in a nonthreatening, nonsuggestible atmosphere, if the disclosure was not made after repeated interviews, if the adults who had access to the child prior to his or her testimony are not motivated to distort the child’s recollections through relentless and potent suggestions and outright coaching, and if the child’s original report remains highly consistent over a period of time, then the young child would be judged to be capable of providing much that is forensically relevant. (p. 433)

Accuracy as a Function of Age

There has been a general consensus over the years that a child’s age is one of the strongest predictors of eyewitness memory accuracy and completeness (G. S. Goodman, Jones, & McLeod, 2017). On average, young preschoolers tend to offer less information and produce proportionately less accurate information than older children or adults when asked an open-ended or free-recall question, such as “What happened?” (Cordón, Silberkleit, & Goodman, 2016; Paz-Alonso & Goodman, 2016). Young children’s responses to free-recall questions are

usually brief, “although with sufficient rapport and practice in free narrative, even preschoolers may be able to recount more” (Cordón et al., 2016, p. 75). Pozzulo (2017) reports that some studies show that young witnesses (ages 5–6 years) provide about one or two descriptors of a person they witnessed (e.g., hair color, hair length, clothes worn, eye color), children in middle childhood (ages 8–12 years) generally report a few more, and adults usually describe more than that.

In addition, it has been assumed that young children are generally less accurate when asked specific questions, such as “What color eyes did he have?” And when asked misleading questions—such as “He had glasses, didn’t he?” (even though he didn’t)—young children tend to make more errors compared to older children or adults. However, as noted by G. S. Goodman et al. (2017), the accuracy and the quality of information provided are not solely based on children’s age and the questions asked. Social, emotional, cognitive, and cultural factors can significantly influence a child’s willingness and capacity to reveal information in a forensic context. This is especially true when it comes to disclosing the uncomfortable topic of sexual abuse. Although young children offer less information than older children when describing what they saw or experienced, even young children can be accurate under certain conditions.

One of the earliest studies on children’s testimony was a project by Marin and her colleagues (Marin, Holmes, Guth, & Kovac, 1979), which documented that under certain circumstances, young children can indeed be as accurate in eyewitness accounts as adults. Marin’s subjects were divided into four groups: kindergartners and first graders, third and fourth graders, seventh and eighth graders, and college students. When recall memory was requested by open-ended questions (e.g., “What happened?”), older subjects were able to report more material than younger ones. The younger the subject, the less detail he or she provided in describing an incident. Nevertheless, the younger subjects were *accurate* in the incomplete information they reported. When Marin’s task demanded recognition memory (identifying photographs or answering yes or no to a series of questions), younger subjects were just as accurate as the older groups. Furthermore, they were no more easily misled by leading questions than the older subjects.

Very young children (e.g., 3 years of age) seem to provide less accurate information than older children and adults across a variety of testimony tasks (free recall, answers to objective and suggestive questions, and eyewitness identifications; G. S. Goodman & Hahn, 1987; G. S. Goodman & Reed, 1986). In this research, 6-year-olds did not differ from the adults in answering questions correctly, or in identifying an individual, but they did recall less information about the event. In addition to a list of objective (nonleading) questions, the researchers used a list of suggestive questions designed to imply incorrect information to the subjects. Both the 3-year-olds and the 6-year-olds were more influenced by these questions than the adults, indicating that young children may be more suggestible when questioned by an adult. The results do indicate, however, that if 6-year-old children are questioned in a nonsuggestive manner and provided with an unbiased lineup, they are at least as accurate as adult witnesses.

Later research confirmed these earlier findings (Bruck & Ceci, 2009, 2012). In addition, more recent studies indicate that individual differences in children’s language abilities are closely related to the number and accuracy of children’s eyewitness accounts (Klemfuss & Ceci, 2012). In fact, general language skills appear to be more important than vocabulary, especially when it comes to a child’s susceptibility to suggestive or misleading questioning. It should be noted that the majority of the studies on child accuracy and suggestibility have been conducted on children from economically comfortable families, rather than on children from lower-income families. However, a large percentage of abused or maltreated children who appear in court come from lower-income families (Lyon et al., 2010). In addition,

maltreated children are often delayed in cognitive and language development, which may influence the information they provide compared with their non-maltreated peers (Lyon et al., 2010; Lyon & Dorado, 2008). In addition, some may be new English speakers or unable to speak English at all. As emphasized by Klemfuss and Ceci, the ability to understand an interviewer's questions requires a basic level of language skills, and the ability to respond effectively to those questions requires a basic level of productive language ability.

As noted by Pozzulo (2017), young eyewitnesses may be at a disadvantage when estimating the age of a person witnessed. Research has indicated that assessing age outside one's age group is more difficult than estimating the age of someone within one's age group. Children and adolescents may be prone to overestimate an adult's age, for instance. In fact, research suggests that age estimations may be the most inaccurate descriptor provided by children (Dent, 1991; Pozzulo, 2017). Children also have difficulty estimating weight and height (Pozzulo, 2017). Part of this difficulty is probably due to the wide differential between the height and the weight of an adult and those of the child. A child is usually much shorter and lighter than adults and often does not know his or her own height and weight. This information may be especially relevant when the child is describing a sex offender who is unfamiliar to the child.

Lineups

"Most research on children's identification accuracy has focused on their ability to identify a perpetrator's face from lineups" (Poole, Brubacher, & Dickinson, 2015, p. 20). In general, this research has consistently shown that, on average, children (ages 5 and older) as well as adults make correct identifications from lineups in which suspects are present (R. J. Fitzgerald & Price, 2015). Only the very young (under age 5) are less likely than adults to correctly identify the suspect in a suspect-present lineup. When the suspect is not in the lineup, however, young children do not do so well. As observed by R. J. Fitzgerald and Price (2015), "without question, the most influential finding in the child eyewitness identification literature is that children have an increased propensity to choose innocent lineup members from [suspect]-absent lineups" (p. 1229). Young children especially have an inclination to erroneously choose innocent lineup members more often than older children, adolescents, or adults. Put another way, adults, adolescents, and older children are more ready to say, "I don't see the person who did this," while younger children are more likely to identify a supposed perpetrator.

The reasons for this tendency appear to be multiple. Suspect-absent lineups require the eyewitness to both recall a perpetrator and not make an identification if he or she is not present. In suspect-present lineups, the witness only has to identify the perpetrator from memory, an easier task. Developmental differences of the young eyewitness may also be at play. The young child may be less developmentally adept at processing faces holistically (all at once) and may rely more on specific features of the face—such as the nose or eye features—for identification. So the young child may be focusing on a nose or a bushy eyebrow. Perhaps a major reason for the discrepancies in suspect-absent identification pertains to suggestibility embedded in the instructions that are given.

Suggestibility

Considerable research on child witnesses has focused on the extent to which they are influenced by the words of those who are questioning them. As asserted by R. J. Fitzgerald and Price (2015), "concordant evidence from the eyewitness identification literature supports the notion that children's identification decisions can be influenced by social conditions" (p. 1247). Children are at a disadvantage, compared to adults, on suggestibility. In general,

they are less aware than adults of attempts to modify or change their testimony (Poole et al., 2015). Influences that compromise testimonial accuracy in children

include asking specific and misleading questions, pairing props with specific questions, using social incentives during conversations (e.g., verbally reinforcing desired responses), voicing negative stereotypes about an individual prior to interviews, and exposing children to narrative about events they did not experience (either through adults or by mere contact with peers who spontaneously talk about these events. (Poole et al., 2015, p. 3)

Children show improvement in lineup or photo identifications when they receive unbiased instructions, clear lineup rejection options, and little social pressure from authorities.

Reviewing the research in this area, Ceci and Bruck (1993) noted that there appear to be significant age differences, with preschool-age children being more vulnerable to suggestion than either school-age children or adults. These researchers observed that preschoolers were the most suggestible group in the great majority (15 out of 18) of the developmental studies comparing them with older children or adults. However, in a later report, Bruck and Ceci (2009) emphasize that while preschoolers tend to be more susceptible to suggestion than older children, it is largely a matter of degree. “That is, elementary school-age children show significant suggestibility effects even when preschoolers exhibit more suggestibility” (p. 160). In fact, under some conditions, there are no significant age differences at all, and in other conditions, older children are actually more suggestible than young children. For example, a repeated question may be interpreted by older children (but not younger children) as a signal that the original answer was incorrect and needed to be revised. Bruck and Ceci write, “The bottom line is that all age groups are vulnerable to misleading suggestions, even if preschoolers are sometimes disproportionately more vulnerable” (p. 161).

A number of innovations have been tried in recent years to improve children’s lineup performance. So far, these attempts have been inconclusive in demonstrating effectiveness (Poole et al., 2015). Even lineup reforms that have worked with adults have not been shown to improve children’s accuracy.

Reality Monitoring

In addition to studying accuracy and truth telling, research has focused on **reality monitoring**, which refers to a child’s ability to distinguish actual from imagined events. Research to date suggests that children older than age 8 can usually distinguish between what is fantasy and what is “real” (Dunning, 1989). Children as young as 4 to 6 years of age also can reliably distinguish between fantasy and reality (Carrick & Quas, 2006; Ceci & Bruck, 1993). However, when children at this early age were told to imagine that a pretend character was sitting in a box, they began to act as though the pretend character was real quite soon after being told. Twenty-five percent of the children were quickly convinced that the imaginary creature could become real, and many had difficulty “giving up” the creature in their mind after the experiment. This study confirms the fact that the boundaries of fantasy and reality for 4- to 6-year-olds are fragile and quickly can become blurred for them. Similar results have been reported by Bunce and Harris (2008, 2013). Bouchier and Davis (2002) found that emotions—especially fear—also encourage a blurring between fantasy and reality. This finding is especially characteristic of children who show stronger emotional reactions in general (Carrick & Quas, 2006). In summary, the extant research suggests that below the age of 8, the distinction between fantasy and the real world begins

to blur for the average child (Foley & Johnson, 1985), and accuracy in testimony can be expected to decrease. There are many exceptions, of course, and some children can be very accurate in their testimony.

Courtroom Cross-Examination of Children

In the adversarial process of justice, all criminal and civil trials involve a direct examination and a cross-examination, unless the opposing attorney declines to cross-examine. A *direct examination* is the first questioning of a witness by the party (either the plaintiff or the defendant) who called that witness to testify. It provides the opportunity for the witness to tell his or her story. *Cross-examination*, on the other hand, is the questioning of the witness by a party other than the direct examiner. It follows the direct examination. Generally, cross-examination is limited to matters brought out by direct examination and issues affecting the credibility of the witness. The right to cross-examine witnesses is tied to the confrontation clause of the Sixth Amendment.

Cross-examination is a stressful experience for most anyone—professionals or adult laypersons included. It may uncover inaccuracy or inconsistency in the testimony of all witnesses, but child witnesses are especially vulnerable. This is particularly true of those with low levels of self-confidence, those with inadequate cognitive and language skills, and those who have a history of maltreatment. Many child victims of sexual offenses who testified in court found the experience so stressful that it was highly unlikely they would report being a victim again (Zajac, Garry, London, Goodyear-Smith, & Hayne, 2013). Zajac et al. likewise reported that many parents of child witnesses indicated that the cross-examination ordeal was so stressful that they would not put their children through it again.

In criminal trials, defense lawyers face challenges in cross-examining witnesses who elicit sympathy from the jury. They must mount a rigorous defense of their client, but they also must be careful not to appear unsympathetic. This is especially evident in sexual assault cases and cases in which children are victims, but it also can be illustrated by other types of cases. For example, if one's client has been accused of alcohol-impaired driving that resulted in severe injuries to the client's passengers, it will be a challenge to cross-examine the passenger with paraplegia who appears in a wheelchair in the courtroom. In a recent case, the defense attorney remained seated while questioning the witness.

Not all defense attorneys are sensitive to sympathetic witnesses, including children. According to Zajac et al. (2012), “many children who undergo cross-examination are directly—and often repeatedly—accused of lying” (p. 184). Cross-examination may involve the rapid delivery of questions presented with an accusatory tone, implying that the child witness is not telling the truth. Defense lawyers often challenge a child witness's perceptions or understanding of the alleged event, his or her memory of details of the event, or the child's ability to communicate the details to the court. Lawyers further challenge a child's testimony by highlighting inconsistency in his or her statements and emphasizing the child's potential for suggestibility (Zajac et al., 2012). In addition, some lawyers try to confuse the child by using double negatives, meandering sentences, or an esoteric vocabulary (Cunningham & Hurley, 2007a).

In one often-cited study, Gary Wells and his associates (Wells, Turtle, & Luus, 1989) exposed 8-year-olds, 12-year-olds, and college students to a staged criminal event (a videotaped abduction of a child from a playground). One day later, the children and college students were subjected to direct questioning and cross-examination about the event. All age groups were equally accurate about the event during direct examination, but under cross-examination, the 8-year-olds were much less accurate than the 12-year-olds or the college group. The authors attributed this finding to the 8-year-old group's greater susceptibility to

misleading information. For example, during cross-examination, they were asked questions such as “You claimed before that the playground was fairly crowded, is that correct?” (No such claim had been made.) Or they were asked, “In which hand was the man carrying his wallet?” (A wallet was never visible in the scene.) Eight-year-olds were more influenced by these misleading questions than the older witnesses. Ceci, Ross, and Toglia (1987), using 3- and 12-year-olds, found similar results. To summarize, the susceptibility of young children to suggestion and misleading information appears to be influenced by the nature of the task and the context in which it occurs. However, it should be noted that adults also can be strongly influenced by misleading questions. Very young age appears to affect the likelihood that this will occur, but advanced age does as well.

Communication Modality

Another important factor associated with the credibility of child witnesses is communication modality, or the medium through which the child’s testimony is presented. It is clear that children’s ability to answer questions in the threatening atmosphere of the courtroom is likely to differ from their ability to answer the same questions in a less formal or more familiar setting (Bala, 1999; Zajac et al., 2012). “Research findings support these concerns: children find the courtroom environment to be stressful, and their resultant anxiety appears to interfere with their ability to provide complete and accurate recall” (Zajac et al., 2012, p. 191). One of the most stressful aspects of testifying for most children is facing the accused (Cunningham & Hurley, 2007a). If the accused has hurt the child in the past—and may also have threatened consequences for telling—it is natural for the child to be afraid.

Courts are increasingly allowing alternate forms of testimony, particularly in non-criminal cases such as custody proceedings. In criminal cases, this is less likely to occur. The Sixth Amendment gives criminal defendants the right to confront their accusers and to cross-examine any witnesses against them. In cases involving child victims, this can be extremely traumatic to the child. In addition, some studies have found that children’s reports may be significantly less accurate in response to cross-examination compared with direct examination (Fogliati & Bussey, 2015). Children may be more inaccurate during cross-examination because the “practices traditionally employed to cross-examine children not only cause distress to child witnesses, but also rely heavily on leading questions” (Fogliati & Bussey, 2015, p. 10). Children tend to be more prone to inaccurate statements when asked leading questions rather than open-ended ones (Fogliati & Bussey, 2015; Lamb, Malloy, & La Rooy, 2011).

The U.S. Supreme Court has allowed some accommodation but has been reluctant to give blanket approval to alternate forms of testimony. In *Coy v. Iowa* (1988), the Court ruled that a defendant had been denied his right to confrontation because the two 13-year-old girls whom he had allegedly sexually assaulted were allowed to testify behind a screen placed between them and the defendant. In *Maryland v. Craig* (1990), however, the Court allowed closed-circuit television (CCTV) testimony in a case involving a child victim of a sexual assault who was deemed too traumatized to testify in the courtroom. Nonetheless, the Court was closely divided, and the issue remains a controversial one (Orcutt, Goodman, Tobey, Batterman-Faunce, & Thomas, 2001). State courts that have allowed the use of CCTV testimony, however, have generally limited it to cases of child sexual abuse (American Bar Association, 2010; Davies, 1999). Another alternative besides CCTV is a witness or sequestration screen, which is a device positioned on or near the witness box to shield a testifying child witness from seeing the accused in the courtroom (Cunningham & Hurley, 2007b). Even after *Coy v. Iowa*, some judges have allowed such screens in limited circumstances. Some research suggests that CCTV actually results in bias *in favor of the defense* (Ross et al.,

1990; Swim, Borgida, & McCoy, 1993) as well as bias *against the child* who testifies in this way (Orcutt et al., 2001). Other studies have found no significant difference in conviction rates between open-court testimony and CCTV (Davies & Noon, 1991; G. S. Goodman et al., 1998; Murray, 1995). Although the use of CCTV and videotaped testimony is common in England, Scotland, and Australia (McAuliff, Nicholson, Amarilio, & Ravanshenas, 2013), CCTV is the technology most preferred in most states in the United States (American Bar Association, 2010). Approximately 39 states and the District of Columbia have passed statutes that permit the use of CCTV if the child would be significantly traumatized by testifying in the presence of an alleged abuser (National District Attorneys Association, 2012).

In the United States, there has been a discernible trend toward the use of support persons. A **support person** is an adult designated by the court who provides emotional and informational support during the judicial proceedings. It is usually someone who is known to the child victim or witness. In Canada, a support person is someone who is allowed to sit or stand close to a witness younger than 18 years old while he or she testifies (Cunningham & Hurley, 2007b). The support person may be expected to provide three things: (1) emotional support to the child before, during, and after testimony; (2) assistance in reducing stress and anxiety; and (3) reassurance, to increase a child's sense of safety and security (Cunningham & Hurley, 2007b).

In the United States, both federal and state legislation permit the appointment of support persons when the courtroom proceedings involve children. In 2010, President Obama signed a 5-year reauthorization of the Child Abuse Prevention and Treatment Act, requiring all states receiving federal funds for the prevention of child abuse and neglect to provide support persons for children in child welfare cases (McAuliff et al., 2013). Title 18, Section 3509 of the U.S. Code states that "a child testifying at or attending a judicial proceeding shall have the right to be accompanied by an adult attendant to provide emotional support." Note that support persons are different from law guardians, who are appointed in some jurisdictions to protect the child's *legal* interests.

Judges usually have discretion in determining who is qualified to serve as a support person. McAuliff et al. (2013) note that support persons are very common in cases involving child sexual abuse, physical abuse, or neglect, as well as in cases of adult domestic violence. According to a national survey conducted by McAuliff and his colleagues, the consensus is that support persons decrease the child's stress and increase accuracy and credibility in general, but it was also noted that the magnitude of these effects depended on who provided the support, the age of the child, the nature of the case, and the type of emotional or informational support. It is obvious that this is an area in need of further study.

SUMMARY AND CONCLUSIONS

The law has long recognized that children and adolescents are different from adults. Since the first juvenile courts were established more than 100 years ago, the need to protect juveniles and hold them accountable for their actions, but also to recognize that they are less culpable than adults, has been paramount. Unfortunately, these early courts and their policies led to denial of due process rights and the unwarranted deprivation of liberty for many children. In the 1960s and 1970s, a number of decisions by the U.S. Supreme Court called for changes in juvenile courts and juvenile processing that provided more due process protections to juveniles, including but not limited to the constitutional rights to be free from self-incrimination, to be represented by lawyers, and to confront their accusers.

Over the past few decades, developmental psychologists and neuropsychologists have stressed that the long-recognized differences between juveniles and adults can be explained

by differences in brain development. The most often cited model is a dual-system model, which indicates that cognitive and socioemotional skills do not develop in the adolescent at the same pace. According to this view, adolescents reach the same cognitive level as adults—typically around age 16—but do not reach emotional maturity until later, typically in the early 20s. Decision making in adolescents while they are under stress or in the company of peers is particularly affected. This research has begun to be considered at important steps of the juvenile process, such as whether to transfer a juvenile to criminal court. The research also has made its way into court decisions, including those dealing with the controversial issue of life without parole. Mandatory life without parole for offenders who committed their crimes as juveniles has been eliminated throughout the United States, as has execution of those who were under 18 at the time of their crimes.

The great majority of juvenile offenses are not serious ones, but all juveniles charged with crimes—serious or not—are entitled to due process protections. The issue of whether juveniles comprehend their constitutional rights has been studied extensively in the psychological research. Researchers have found that juveniles understand their *Miranda*-related rights even less than adults do. Many juveniles do not understand their lawyer's role. Research also finds that juveniles are more likely than adults to give false confessions or to plead guilty because they want to go home or for other reasons—such as to protect older individuals or to avoid the embarrassment of a delinquency hearing or criminal trial. Researchers also have examined juvenile adjudicative and decisional competence, concluding again that both are more likely to be problematic in juveniles than in adults. Recent studies have started to examine how attorneys respond to this, such as how to evaluate a juvenile's competency or how to best help their clients in the plea bargaining process.

This chapter also has focused on children, specifically on their capacity to serve as witnesses and testify in court about their own victimization. There is wide variation in state laws with respect to age-related testimony. Although children are presumed to be able to testify, many states require all children under certain ages to be evaluated for competency before testifying. These evaluations may be very cursory, however, and conducted by the presiding judge. In other instances, children are sent for a more extensive evaluation if their competency is in doubt. Competency revolves around the issue of whether the child is capable of providing an accurate account of events he or she has witnessed or experienced.

Researchers also have investigated children's performance in pretrial identification procedures, such as lineups. Two main problems have emerged from simulation research in this area. First, though children are able to correctly identify a perpetrator in a lineup in which the perpetrator is present, they are also prone to point out an innocent individual if the perpetrator is not present. Second, young children in particular are suggestible and responsive to prompts from adults overseeing the lineup.

With respect to investigative interviews and courtroom testimony, researchers have examined both honesty and accuracy in children of various ages. Young children have difficulty in understanding what it means to lie but less difficulty in understanding what it means to tell the truth. They may lie to protect someone or because they fear repercussions if they tell the truth. On the other hand, young children are able to be accurate in describing events, even though they provide fewer details than older children and adolescents. In simulated courtroom situations, young children perform well on direct examination but become more confused and give contradictory answers during cross-examination. They are also more likely to be suggestible when faced with misleading questions. Recognizing that courtroom testimony can be highly stressful for children, particularly in cases involving sexual abuse, some courts have allowed alternative methods of testifying, such as via closed-circuit, out-of-court testimony. The great majority of states now allow CCTV testimony if the judge

concludes that in-court confrontation of a child's alleged abuser will be traumatizing. The modal approach today is to provide the child with a support person who will help the child throughout the court process. Even in civil cases, such as child welfare or custody proceedings, providing a support person can be an effective approach to lessening the stress on the child witness.

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