

# Adolescents in the Justice System: A Progress Report on the Restatement of Children and the Law

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## INTRODUCTION

Professor Elizabeth Scott, the chief reporter of the American Law Institute's (ALI) Restatement of Children and the Law,<sup>1</sup> has often observed that the nation's widespread commitment to juvenile justice reform in the twenty-first century should be grounded in two premises: (1) the laws and practices of the juvenile justice system must be grounded in and guided by evolving knowledge about adolescent development; and (2) youth-serving institutions, including the justice system, must collaborate to erase substantial racial disparities in intervention, discipline, and punishment.<sup>2</sup> This Symposium will explore the current draft of the Restatement of Children and the Law with a focus on these two policy imperatives.

Two uniquely qualified and accomplished experts have agreed to comment on the current draft of the Restatement from the perspectives of adolescent development and racial equity. First, Thomas Grisso, Emeritus Professor of Psychiatry at the University of Massachusetts Medical School, addresses the proposed Restatement's approach to the assessment of adolescent decisional capacity, a pivotal feature of the law's evolving effort to

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<sup>1</sup> Note that this Essay cites prior drafts of the Restatement of Children and the Law. The section numbers of the Restatement have been updated since the time of publication.

<sup>2</sup> See, e.g., ELIZABETH S. SCOTT & LAURENCE STEINBURG, RETHINKING JUVENILE JUSTICE 223 (2008) ("Fair punishment and cost-effective crime reduction are the cornerstones of successful youth crime regulation, and a juvenile justice regime grounded in developmental knowledge is more likely to realize these goals than either the traditional or the contemporary regulatory approaches."); Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1378 (2020) ("[W]e are far from realizing the goal of eradicating racial disparities in the juvenile justice and child welfare systems, and lawmakers have focused little on how to address the structural inequalities that influence child outcomes. Our framework recognizes that these aspirations must be front and center.").

ground the law in advancing knowledge about adolescent development.<sup>3</sup> Second, Kristin Henning, Blume Professor of Law at the Georgetown Law Center, reflects on the profound challenge our legal system faces in the effort to achieve unbiased, fair, and effective responses to youthful offending.<sup>4</sup> My assignment is to respond to their respective critiques and proposals.

## I. ADOLESCENT DECISIONAL CAPACITY: COMMENTS ON GRISSO'S ESSAY

Grisso's masterful essay summarizes and assesses the Restatement's provisions pertaining to juveniles' competence for adjudication and their rights relating to police interrogation.<sup>5</sup> Before commenting on Grisso's essay, I want to make a few remarks on the intellectual grounding of the legal concepts and practices enunciated in the pertinent sections of the Restatement that are discussed so thoroughly in Grisso's essay. It is quite a compelling story and an occasion for pride in the accomplishments of our colleagues.

### A. Intellectual and Scientific Background and Context

The key concept addressed in Grisso's essay and in the Restatement is the "decisional capacity" of children and adolescents and its legal significance in police interrogation and criminal adjudication.<sup>6</sup> As we reflect on the contributions of the Restatement, I think it is instructive to view the decisional capacity of children and adolescents (and the evolving body of law that we have "re-stated") as a component of a broader intellectual and scientific accomplishment—the development of conceptual and clinical tools for objective assessment of decisional capacity (or competence) in a variety of legal and ethical settings. I'll trace this important story in four overlapping stages:

1. The first step was pathbreaking research in the 1980s on legal "competence" or decisional capacity of adult patients making *medical decisions*.<sup>7</sup> This research signaled the emergence of the

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<sup>3</sup> See generally Thomas Grisso, *The Restatement of Law on Juveniles' Adjudicative Competence and Rights in Interrogation: Evidence of Progress*, 91 U. CHI. L. REV. 315 (2024).

<sup>4</sup> See generally Kristin Henning, *Advancing Racial Justice Through the Restatement of Children and the Law: The Challenge, the Intent, and the Opportunity*, 91 U. CHI. L. REV. 345 (2024).

<sup>5</sup> See Grisso, *supra* note 3, at 335–36.

<sup>6</sup> See *id.* at 342–43.

<sup>7</sup> See Encyclopedia of Bioethics, *Informed Consent: I. History of Informed Consent*, ENCYCLOPEDIA.COM (2004), <https://perma.cc/FFR7-HZE4>.

informed consent doctrine in medical experimentation and, importantly, in everyday medical practice. This body of research and normative analysis focused initially on adults. Grisso was a leading architect of this early pathbreaking work in collaboration with psychiatrist Paul Appelbaum, now at Columbia Medical School.<sup>8</sup> They formulated interview instruments for (1) assessing a person's understanding of information (about risks, for example), (2) their ability to appreciate the significance of that information, (3) their ability to engage in reasoning about a decision and, finally, (4) their ability to make a choice.<sup>9</sup>

2. Grisso and Appelbaum's pathbreaking work on medical decision-making by adults was extended in the 1980s to specific populations of persons with questionable decisional capacity, particularly persons with mental disorders.<sup>10</sup> This highly influential work was funded by two successive MacArthur Research Networks on Mental Health and the Law (1988–1997) led by my University of Virginia colleague, John Monahan. The main topics explored by these Research Networks were decisional capacity by persons with serious mental illness, use of coercion in treating persons with serious mental illness, and assessment of dangerousness of people with serious mental illness.<sup>11</sup> We referred to these initiatives as “competence,” “coercion,” and “risk,” with a focus on the use of hospitalization in response to dangerousness and incompetence.<sup>12</sup>

3. In turn, in a significant innovation, the conceptual advances and proposed empirical refinements carried out by these two Networks in the 1990s provided the framework for conceptualizing and assessing competence of defendants with mental illness to make decisions pertaining to the defense and disposition

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<sup>8</sup> See generally Thomas Grisso & Paul S. Appelbaum, *Assessing Patients' Capacities to Consent to Treatment*, 319 NEW ENG. J. MED. 1635 (1988).

<sup>9</sup> See *id.* at 1635–36.

<sup>10</sup> See, e.g., Paul S. Appelbaum & Thomas Grisso, *The MacArthur Treatment Competence Study. I: Mental Illness and Competence to Consent to Treatment*, 19 LAW & HUM. BEHAV. 105, 106–08 (1995).

<sup>11</sup> See *id.*

<sup>12</sup> See generally Richard J. Bonnie, Steven K. Hoge, John Monahan, Norman Poythress, Marlene Eisenberg & Thomas Feucht-Haviar, *The MacArthur Adjudicative Competence Study: A Comparison of Criteria for Assessing the Competence of Criminal Defendants*, 25 J. AM. ACAD. PSYCHIATRY & L. 249 (1997) (competence); Nancy S. Bennett, Charles W. Lidz, John Monahan, Edward P. Mulvey, Steven K. Hoge, Loren H. Roth & William Gardner, *Inclusion, Motivation, and Good Faith: The Morality of Coercion in Mental Hospital Admission*, 11 BEHAV. SCI. & L. 295 (1993) (coercion); Paul S. Appelbaum, Pamela C. Robbins & John Monahan, *Violence and Delusions: Data from the MacArthur Violence Risk Assessment Study*, 157 AM. J. PSYCHIATRY 566 (2000) (risk).

of criminal cases against them.<sup>13</sup> Our approach disaggregated competence for criminal adjudication (commonly referred to as “competence to stand trial”) into (i) competence to understand the proceedings and assist counsel and (ii) competence to make specific decisions regarding defense and disposition of the case (including guilty pleas).<sup>14</sup> This approach extended Grisso and Appelbaum’s framework for capacity to make medical decisions.<sup>15</sup> Grisso and I collaborated on this MacArthur Foundation project and assembled a work group to design and carry out studies of competence for adjudication (competence to understand the proceedings and assist counsel) and capacity to make specific decisions in criminal defense.

4. Finally, in a fourth phase of this pathbreaking sequence of research, the themes and concepts explored by the first two MacArthur Foundation Research Networks were extended to children, especially adolescents, by a successor MacArthur Research Network on Adolescent Development and Juvenile Justice (1995–2017). This productive and influential Research Network was chaired by Professor Larry Steinberg and included Scott as well as Grisso. One of the priorities of study for this new Research Network was adjudicative competence of adolescents.<sup>16</sup> Meanwhile, during this whole period, Grisso and his research team at the University of Massachusetts were also investigating the capacity of children and adolescents to understand *Miranda v. Arizona*<sup>17</sup> warnings and stand trial.<sup>18</sup>

As indicated by this brief summary, the Restatement itself is at once a product of, and an extension of, this three-decade period of scientific and conceptual innovation by successive teams of psychologists, psychiatrists, and lawyers. In a sequence

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<sup>13</sup> The framework summarized in this section was initially presented in Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 UNIV. MIA. L. REV. 539, 561–86 (1993) [hereinafter *Beyond Dusky*]; and Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAV. SCI. & L. 291, 302–11 (1992) [hereinafter *A Theoretical Reformulation*]. See also generally Richard J. Bonnie, *Competence for Criminal Adjudication: Client Autonomy and the Significance of Decisional Competence*, 20 OHIO ST. J. CRIM. L. 231 (2023).

<sup>14</sup> Bonnie, *A Theoretical Reformulation*, *supra* note 13, at 302–08.

<sup>15</sup> Bonnie, *Beyond Dusky*, *supra* note 13, at 570–72.

<sup>16</sup> See *Research Network on Adolescent Development and Juvenile Justice*, MACARTHUR FOUND., <https://perma.cc/9H9T-QKDP>.

<sup>17</sup> 384 U.S. 436 (1966).

<sup>18</sup> See, e.g., Denise L. Mumley, Chad E. Tillbrook & Thomas Grisso, *Five Year Research Update (1996-2000): Evaluations for Competence to Stand Trial (Adjudicative Competence)*, 21 BEHAV. SCI. & L. 329, 329–30 (2003).

of highly productive research initiatives conceived and implemented by a sequence of MacArthur Foundation Research Networks, Grisso, Scott, and their colleagues<sup>19</sup> laid the foundation for a widely supported sequence of reforms. Equally important, the MacArthur Research Network on Adolescent Development and Juvenile Justice nurtured and supported additional intellectual collaborations, including especially fruitful ones between Scott and Grisso, and between Scott and Steinberg on other important policy questions relating to adolescent development and the law. In turn, the MacArthur Foundation established a broadly conceived Research Network on Law and Neuroscience (2007–2021) that included a research team, led by Steinberg, charged with further refining the tools for characterizing the psychological and behavioral measures of adolescence to explore their manifestations in the brain.<sup>20</sup>

This is a remarkable story of well-planned and successful scientific collaboration and innovation across multiple domains of behavioral science and law. Indeed, it is surely no exaggeration to say that the justice system and adolescent autonomy chapters of the Restatement (Chapters 3<sup>21</sup> and 4<sup>22</sup>) are rooted in judicial and legislative advances that were, in turn, grounded in pathbreaking intellectual and scientific investments of the MacArthur Foundation.

My account of this history is meant to be a genuine acknowledgement of intellectual and scientific parenthood. The cumulative impact of these MacArthur Research Networks—and their leaders and participants (particularly Grisso and Scott)—is nothing short of remarkable.

The extraordinary impact of this body of research is highlighted by the MacArthur Foundation's investment in dissemination, including a proposal to the National Academies of Sciences, Engineering, and Medicine to convene a scientific study to consolidate these advances in knowledge about adolescent development and draw out their implications for juvenile justice reform.<sup>23</sup> It

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<sup>19</sup> In the spirit of full disclosure, I was a member of the two mental health research networks and the neuroscience network and chaired the National Academies study on Reforming Juvenile Justice.

<sup>20</sup> See *Research Network on Law and Neuroscience*, MACARTHUR FOUND., <https://perma.cc/5SEX-LBJD>.

<sup>21</sup> RESTATEMENT Draft No. 5 Restatement of the Law, Children and the Law pt. 3 (AM. L. INST., Tentative Draft No. 5 2023).

<sup>22</sup> RESTATEMENT Draft No. 5 pt. 4.

<sup>23</sup> NATIONAL ACADS. OF SCIS. ENG'G, & MED., REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 119–37 (2013). Professor Bonnie chaired this study.

should come as no surprise, then, that these scientific developments, and their consolidation in the National Academies report, have had a demonstrable impact on judges and legislators.

## B. Comments on Grisso's Essay and the Restatement

With this historical context in mind, I will now turn to my comments on Grisso's essay. He explores this broader body of work and its impact on the Restatement in two specific contexts—(i) a youth's competence for adjudication in delinquency proceedings and criminal proceedings<sup>24</sup> and (ii) a youth's capacity to make informed decisions in police interrogation.<sup>25</sup>

As Grisso says, the Restatement "reflects recent dramatic reform in juvenile law and practice,"<sup>26</sup> and these legal transformations "are grounded in the developmental characteristics of youth."<sup>27</sup> It is also clear that Grisso believes that this legal transformation is unfinished and that the growing body of developmental evidence sets the stage for the continuing reforms envisioned in the Restatement.<sup>28</sup>

### 1. Competence for criminal adjudication.

The modern history of the law and practice of competence assessment is directly traceable to the conceptual and empirical developments described in my introductory comments. Part I of Grisso's essay for this Symposium tells the story well. The Supreme Court's decisions in *Dusky v. United States*<sup>29</sup> in 1960 and *In re Gault*<sup>30</sup> in 1967 converged to set the stage for focusing attention on the adjudicative competence<sup>31</sup> of juveniles—in juvenile court as well as cases transferred to criminal courts—just as the

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<sup>24</sup> See Grisso, *supra* note 3, at 316–33.

<sup>25</sup> See *id.* at 333–41.

<sup>26</sup> *Id.* at 315.

<sup>27</sup> *Id.* at 341.

<sup>28</sup> *Id.* at 315 ("[T]he Restatement offers guidance for the legal system and process, highlighting the need for continued changes in courts and legislatures not yet in step with prevailing trends in juvenile law.").

<sup>29</sup> 362 U.S. 402 (1960) (per curiam) (holding that due process protects a defendant's right to have a competency evaluation before trial).

<sup>30</sup> 387 U.S. 1 (1967) (holding that the Due Process Clause of the Fourteenth Amendment applies to juvenile defendants and adult defendants alike).

<sup>31</sup> I am referring to what is traditionally called "competence to stand trial," although the concept is broader since it includes competence to assist counsel and to make decisions in cases that do not go to trial, including guilty pleas.

MacArthur Research Networks were nurturing the emerging specialization of forensic psychological assessments for both adults and children.<sup>32</sup> Improved processes and tools for assessing competence for adjudication represent a transformative legal reform that occurred over about twenty-five years.<sup>33</sup>

The Restatement essentially ratifies an important, largely noncontroversial transformation of both law and practice governing criminal prosecution of youth over the past twenty-five years, including the training of forensic experts to assess adolescent defendants, formulate expert opinions, and provide testimony.<sup>34</sup> That development has been interwoven with clinical education of defense lawyers and newly focused judicial education programs for judges and defense attorneys, but the most important development has been the training of experts to provide competence assessments (for both youth and adults).

This has been a transformative period, and developmental research has been especially important in helping to nurture a broad consensus on the need to engage adolescents in their own defense and to assess their competence to do so.

## 2. Police interrogation.

The other portion of Grisso's essay is devoted to the custodial interrogation of children and admissibility of confessions. The background rule is the *Miranda* requirement amplified by *In re Gault*.<sup>35</sup> Importantly, the Restatement embraces two mandatory procedural protections (in the absence of which a juvenile's statement is per se excluded at trial): Under § 14.22, the waiver of

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<sup>32</sup> See Susan LaVelle Ficke, Kathleen J. Hart & Paul A. Deardorff, *The Performance of Incarcerated Juveniles on the MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA)*, 34 J. AM. ACAD. PSYCH. & L. 360, 360 (2006) (noting that the competence-to-stand-trial assessment "for juvenile and adult defendants is based on the legal standard established by the U.S. Supreme Court in *Dusky v. U.S.*").

<sup>33</sup> Conceptual development was followed by developmentally based research, including formulation of the assessment tools and protocols and creation of a subspecialty. This change in practice was planned in a sense by the MacArthur Foundation in a direct line between the Mental Health Criminal Justice Standards Project (published in 1984), the first Research Network on Mental Health Law (1988–2000), and the Network on Adolescence and Juvenile Justice (1995–2017).

<sup>34</sup> See RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 15.30 cmt. a (AM. L. INST., Tentative Draft No. 4, 2022) [hereinafter RESTATEMENT Draft No. 4] (noting that state courts and legislatures "have almost uniformly concluded that due process requires that a youth facing delinquency adjudication must be capable of understanding the proceeding and assisting counsel").

<sup>35</sup> *In re Gault*, 387 U.S. at 55.

rights by a youth under 14 years old is permitted only if the youth does so in the presence of counsel after meaningful opportunity for consultation with counsel.<sup>36</sup> In addition, all police interrogations of a juvenile under custodial interrogation must be video-recorded under § 14.23.<sup>37</sup> These requirements represent an important innovation that is likely to gain traction over time. It is worth noting that twenty states currently require either an attorney or a parent or other interested adult to be present.<sup>38</sup> The Restatement emphatically rejects the parental option because parents' interests may deviate from those of the youth, and parents often encourage cooperation with the police when it is not in the best legal interest of the youth to do so.<sup>39</sup> Grisso strongly endorses the Restatement position.<sup>40</sup> We have turned an important corner. That may be a key contribution of the Restatement. From this perspective, Grisso's overall message seems to be that there is reason for optimism.

### C. Grisso's Closing Lament and a (Hopeful) Response

However, in the closing section of his essay, Grisso laments what he charitably characterizes as slow progress in implementing policies clearly implied by this body of research on youth interrogation, including his own: nothing short of an attorney's presence at a youth's interrogation can afford adequate protection of the juvenile's rights.<sup>41</sup> However, as he also recognizes, it took several decades for the implications of research on adolescent capacities to penetrate the legal literature and protocols for judicial education. As noted above, the pace and impact of reform accelerated in the twenty-first century when the MacArthur Foundation and other similarly minded foundations invested in the critical task of translating developing science into legislation and judicial practice. Once that translation process was underway, progress, as Grisso concedes, "has been remarkable."<sup>42</sup>

Even so, Grisso laments the fact that "about 80% of states allow children ages 10 and younger to be prosecuted."<sup>43</sup> On its face, that is a sobering and disturbing observation. It seems even

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<sup>36</sup> See RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 14.22 (AM. L. INST., Tentative Draft No. 1, 2018) [hereinafter RESTATEMENT Draft No. 1].

<sup>37</sup> See *id.* § 14.23(a).

<sup>38</sup> Grisso, *supra* note 3, at 338.

<sup>39</sup> RESTATEMENT Draft No. 1 § 14.22 cmt. b, reporters' note.

<sup>40</sup> See Grisso, *supra* note 3, at 339.

<sup>41</sup> See *id.* at 342 ("[O]ne can reasonably ask, why did [reform] take so long?").

<sup>42</sup> See *id.*

<sup>43</sup> *Id.* at 343 n.152 (citing .



more disturbing when the Restatement has embraced a minimum age of 10 for delinquency adjudication.<sup>44</sup> However, these statements contain a critical ambiguity. What does it mean to say that a youth 10 or younger is subject to “prosecution”?<sup>45</sup> It is critically important to emphasize that at least thirty states do *not* allow children younger than 12 (at the time of the alleged offense) to be *criminally* prosecuted. In these states, the youth is not subject to criminal punishment at all; juvenile court jurisdiction is exclusive. Moreover, in twenty-one of these states, youths younger than 14 may not be criminally prosecuted and in three of them, criminal court jurisdiction begins at 15. This is a meaningful sign of progress. (As an aside, the black letter in the proposed Restatement endorses 14 as the minimum age of *criminal* court jurisdiction, but the Restatement’s comments acknowledge that many state legislatures have chosen to allow criminal prosecution in cases involving younger teens (e.g., ages 12–13) charged with serious offenses.)<sup>46</sup>

The issue I want to raise is whether the rules governing interrogation and the threshold for being found competent for adjudication in juvenile court currently differ *in practice* (or should differ) when juvenile court jurisdiction is exclusive and the court’s procedures and dispositions are fully governed by the rehabilitative aims of the juvenile system, as specified in § 14.10 of the Restatement.<sup>47</sup> What capacities are required for youths who are subject only to delinquency jurisdiction? In that connection, I will note that Grisso properly recognizes, in the closing section of his essay, that a truly rehabilitative juvenile system—one driven by rehabilitation and public safety objectives rather than just deserts and retribution—is worthy of pursuit, while lamenting the fact that such a fundamental reform of the delinquency system is not on the horizon.

That seems to me to be a question worth discussing. The Restatement takes the view that a youth younger than 10 is not subject to delinquency jurisdiction at all; judicial interventions in such cases would have to be grounded in the applicable statutes on child protection. However, if the youth is at least 10 (and younger than the minimum age of criminal responsibility and therefore not subject to criminal prosecution), what does it mean

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<sup>44</sup> RESTATEMENT Draft No. 4 § 13.10.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* § 15.30 cmt. e, reporters’ note.

<sup>47</sup> *Id.* § 14.10.

to say that the youth is competent for delinquency adjudication? I hope and expect that the Restatement will unequivocally embrace an unequivocal rehabilitative perspective for the twenty-first-century juvenile court when our work is complete in 2024.

## II. ADVANCING RACIAL JUSTICE: COMMENTS ON PROFESSOR HENNING'S PROPOSALS

On behalf of the five reporters for the Restatement, I want to note our deep thanks to Henning for her thoughtful and detailed commentary on the ways in which the Restatement might help our nation root out persistent racial and ethnic disparities and promote racial justice. After acknowledging her indispensable contribution to the Restatement, I will present a progress report on our deliberations—recognizing, of course, that we have to present our ideas to the Council of the ALI and then to the membership as a whole.

### A. Henning's Challenge to the Reporters

Henning's essay highlights pervasive racial disparities in many domains covered by the Restatement,<sup>48</sup> but I will focus my comments here on disparities that occur in policing and criminal adjudication. Specifically, in 2020, police incidents or complaints involving minority youth were three times more likely than those involving white youth to be referred to juvenile court for a delinquency adjudication.<sup>49</sup> In addition, minority youth of color who came to official disciplinary attention in other domains (e.g., in schools and other community settings) were more likely than similarly situated white youth to become entangled with the juvenile and criminal courts.<sup>50</sup>

The likelihood of a harsh disposition is also higher for minority youth than for white youth. Across all offense types, cases involving minority youth are less likely to be diverted, more likely to be detained, and more likely to receive a restrictive placement following juvenile adjudication than white youth.<sup>51</sup> Based on data for 2020 from the Office of Juvenile Justice and Delinquency Prevention, Black youth in particular—who constitute less than 15% of the youth population—accounted for about a third (34.6%) of

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<sup>48</sup> See generally Henning, *supra* note 4.

<sup>49</sup> *Racial and Ethnic Fairness*, OFF. JUV. JUST. & DELINQ. PREVENTION (Jan. 10, 2023), <https://perma.cc/3RJU-FWST>.

<sup>50</sup> Henning, *supra* note 4, at 346.

<sup>51</sup> See *Racial and Ethnic Fairness*, *supra* note 49.

all youth referred to juvenile court, about 40% (38.8%) of all cases formally prosecuted in juvenile court or sent to a detention facility, and more than half (53.3%) of all youth transferred to criminal court.<sup>52</sup>

As members of the bar, we should encourage our legislators and civic leaders to address these problems and their underlying causes. But for the purposes of this essay, the key question is what a restatement on children and the law can or should do to address this problem. The immediate aim of a restatement is not to inspire moral action or social change; its value lies in the document's persuasive authority to judges as a statement of specific legal propositions.<sup>53</sup> Of course, some specific legal rules should be repealed because they have the purpose or effect of disadvantaging young offenders on the basis of race or ethnicity; a legal rule that demonstrably produces injustice should be disavowed or discarded in favor of one that bends toward justice. However, aside from authoritative rules, what tools does a restatement have at its disposal to guide and push the officials who administer and apply otherwise desirable and uncontested legal rules to bend them toward racial justice? As Henning acknowledges, "we cannot expect" a restatement, however righteous its intentions, "to eliminate generations of deeply entrenched biases that drive fears and cause people to criminalize youth of color."<sup>54</sup> Nonetheless, she says, a restatement can "guide . . . the law toward racial justice" by locating and embracing judicial opinions and legal standards that "reduce unnecessary intrusions into the lives of children and offer the greatest procedural protections for all youth when intrusions are necessary."<sup>55</sup> This is an intriguing and important observation, but it is in most settings a hortatory effort to facilitate non-discriminatory enforcement policy and practice, not a statement of a legal rule (unless the restatement actually requires a prospective rule such as the appointment of legal counsel). Much can indeed be done by the responsible administrative officials in the design and intensity of enforcement to reduce unnecessary citizen contact or avoid disparities, even at some sacrifice (in crime reduction). But these initiatives lie outside our assignment, as reporters, charged

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<sup>52</sup> *Id.*; see also Henning, *supra* note 4, at 360 & n.77 (noting that "racial disparities are especially pronounced in delinquency proceedings").

<sup>53</sup> *Frequently Asked Questions*, AM. L. INST., <https://perma.cc/GR3N-E7M7> (noting that while the "Institute looks to identify the best rule on a particular issue," it "takes great care to ensure that Reporters do not impose their own normative vision of the law").

<sup>54</sup> Henning, *supra* note 4, at 347.

<sup>55</sup> *Id.*

with restating the law. Calling attention to challenges and possible tradeoffs in administration of the law is surely a permissible—sometimes even essential—task in drafting the reporters’ notes in a restatement. Indeed, in some contexts—perhaps including deep worries about racial disparities in applications of otherwise sound legal rules—an official comment in the authoritative text of a restatement highlighting the seriousness of the challenge may well be warranted.

Along this line, Henning suggests that a restatement, in its comments, can properly play a consciousness-raising role.<sup>56</sup> This strikes me as a sensible and defensible role for an authoritative comment, especially on issues relating to racial disparities that are rooted in histories of discrimination and neglect. Presumably, the main target for Part 3 of the Restatement, “Children in the Justice System,” is juvenile court and family court judges. Guiding judges to reflect on and nurture racially just enforcement practices for children is a suitable initiative. Just as the Restatement draws upon developmental science to shape the legal rules applicable to children in the justice system, the Restatement can also draw upon new and evolving research to help judges and prosecutors understand how race affects legal outcomes for children. A restatement can also encourage lawyers to think about how disparate racial responses by police, prosecutors, judges, and custodial agencies can be counteracted and erased.

Another profoundly important target of consciousness-raising for the Restatement reporters could be heightening judicial awareness of the deep roots and pervasive impact of racial bias. Even in the eight short years since this Restatement was launched in 2015,<sup>57</sup> ongoing research on racial bias has reminded us how far we have to go to erase these disparities. As Henning has shown, new studies expose the traumatic effects of policing on youth of color and the impact of stereotyped threats and fears on police-youth encounters.<sup>58</sup> As she says, “[i]gnoring this research would ignore the real-world implications of race on the law

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<sup>56</sup> See, e.g., *id.* at 372 (“[T]he Reporters can use the comments and reporters’ notes to help readers appreciate the fears that youth of color experience in their encounters with the police and enhance protections for those youth who are disproportionately targeted by police.”).

<sup>57</sup> Clare Huntington & Elizabeth S. Scott, *The New Restatement of Children and the Law: Legal Childhood in the Twenty-First Century*, 54 *FAM. L.Q.* 91, 92 (2020).

<sup>58</sup> See Henning, *supra* note 4, at 365–66.

and reinforce prevailing racial biases that perpetuate social inequities in the juvenile and criminal legal systems.”<sup>59</sup> Clearly, the training of enforcement and judicial personnel to raise awareness of differential exposures and outcomes is desirable. This is an integral element of consciousness-raising. Moreover, the systematic collection and review of data regarding the racial variations in dispositions is imperative, especially in relation to transfers of youth to criminal courts.

#### B. Racial Disparities in Transfers to Criminal Courts: A Possible Agenda

In the wake of this fruitful Symposium in Chicago in April of 2023, the reporters resumed their work on unfinished sections of the Restatement, particularly the sections governing the transfer of young offenders from juvenile court to criminal court.<sup>60</sup> The Restatement recognizes that Black youths (and other minority youths) are particularly vulnerable to the intimidating presence and coercive practices of police officers and are often disadvantaged in the adjudicative process.<sup>61</sup> The Restatement attempts to guard against these vulnerabilities by providing additional protections to youth in several contexts, including search and seizure,<sup>62</sup> interrogation,<sup>63</sup> and sentencing.<sup>64</sup> Each of these discussions also provides an opportunity to explore the impact of race on the administration of the law.

Transfer to criminal court—like other decision points in the juvenile justice system—is characterized by substantial racial disparities.<sup>65</sup> An important and timely report recently issued by

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<sup>59</sup> *Id.* at 359 (citing Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 73 (2007)).

<sup>60</sup> Whenever I refer to transfer, I am also referring to the practice of reverse transfer—shifting a case from criminal court to juvenile court.

<sup>61</sup> *See, e.g.*, RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 12.10 cmt. a, reporters’ note (AM. L. INST., Tentative Draft No. 3, 2021) [hereinafter RESTATEMENT Draft No. 3] (observing that “youth of color may be particularly vulnerable to coercion when confronted by police and asked to consent to search”); RESTATEMENT Draft No. 4 § 14.10 cmt. i, reporters’ note (acknowledging the “concerns about the potential for risk assessment instruments” used in delinquency dispositions “to propagate racial bias or disparities in the justice system”).

<sup>62</sup> *See* RESTATEMENT Draft No. 3 § 12.10.

<sup>63</sup> *See* RESTATEMENT Draft No. 1 §§ 14.20, 14.23.

<sup>64</sup> *See* RESTATEMENT Draft No. 4 § 15.30.

<sup>65</sup> *See, e.g.*, M. Sickmund, A. Sladky & W. Kang, *Easy Access to Juvenile Court Statistics: 1985–2020*, U.S. DEP’T OF JUST. (2022), <https://perma.cc/RL5F-UU4H>. For example, Black youth were accused in 36% of cases involving crimes against a person in 2020, yet

the National Academies of Sciences, Engineering, and Medicine highlights the need for judges (and prosecutors) to be aware of the cumulative effects of racial bias and disadvantage in successive settings—school discipline, policing, arrest, and detention—on subsequent decisions made by prosecutors and judges, particularly about whether to transfer the youth to criminal court.<sup>66</sup>

Fortunately, the scale of racial bias in the justice system has receded considerably since the 1990s. For example, the total number of judicially transferred youth has declined since judicial transfers were at their peak. The total number of judicial transfers in 2020 (2,900 cases)<sup>67</sup> is less than one-quarter the number of transfers in the peak year of 1994 (13,200 cases).<sup>68</sup> This decrease is attributable primarily to the rollback of highly punitive laws enacted in the 1980s.<sup>69</sup> The bad news is that, in 2020, more than half of all judicially transferred juveniles were Black (1,583 out of the 2,900 cases),<sup>70</sup> even though Black youth accounted for only 24.7% of the 18-and-under population in that year.<sup>71</sup> The proportion of judicially transferred youth who are Black has been steadily increasing for many years—from 39% in 2005 to 53% percent in 2020—while the proportion of judicially transferred youth who are white has been steadily decreasing (from 45% in 2005 to 31% in 2020).<sup>72</sup>

It is important to ask what accounts for this well-documented disproportionate representation of Black youth in transfer decisions. One possibility is that it is rooted in racialized perceptions of older Black youth as being more mature or more hardened than their white counterparts. A particularly vivid and disturbing illustration of this explanation is reported in *State v. Belcher*,<sup>73</sup>

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they accounted for 55.9% of youth transferred from juvenile court to adult court for those offenses. *Id.*

<sup>66</sup> NAT'L ACADS. OF SCIS., ENG'G & MED., REDUCING RACIAL INEQUALITY IN CRIME AND JUSTICE: SCIENCE, PRACTICE, AND POLICY 152–55 (2023).

<sup>67</sup> *Delinquency Cases Judicially Waived to Criminal Court, 1985–2020*, OFF. OF JUV. JUST. & DELINQ. PREVENTION (Jan. 10, 2023), <https://perma.cc/KE6G-MT2X>.

<sup>68</sup> SARAH HOCKENBERRY, U.S. DEP'T OF JUST., DELINQUENCY CASES WAIVED TO CRIMINAL COURT, 2018, at 2 (2021).

<sup>69</sup> *See id.* at 3.

<sup>70</sup> Sickmund et al., *supra* note 65.

<sup>71</sup> Brittany Rico, Paul Jacobs & Alli Coritz, *2020 Census Shows Increase in Multiracial Population in All Age Categories*, U.S. CENSUS BUREAU (June 1, 2023), <https://perma.cc/SS74-TNCV>.

<sup>72</sup> *See id.*

<sup>73</sup> 268 A.3d 616 (Conn. 2022).

where the Connecticut Supreme Court invalidated a lengthy sentence for a 14-year-old Black youth because the sentencing judge characterized the defendant as a “superpredator”—a highly publicized and racialized reference to supposed gangs of teenage criminals.<sup>74</sup> The Connecticut Supreme Court characterized this “superpredator myth” as a “baseless and subsequently discredited theory” that “center[s] disproportionately on the demonization of Black male teens” and undermines the integrity of sentencing.<sup>75</sup>

While racial disproportionality in transfers to criminal court is incontrovertible, the reasons for this disproportionality are less clear. Of course, disproportionality of this magnitude is a serious concern regardless of its cause, but a better understanding of the determinative factors can help guide the development of effective solutions. While this Essay focuses on disparities in the rate of transfers to criminal court, these disparities must also be understood in the wider context of disparities in juvenile justice administration that occur earlier in the process. Specifically, large systematic reviews of research have repeatedly demonstrated substantial differential treatment of Black youth at the earlier stages of processing—at the point of police stops and arrests.<sup>76</sup> This likely occurs because earlier decision points in the juvenile justice system typically involve more discretion and are accordingly more likely to be influenced by unconscious bias and other extralegal factors such as race, while later decision points—such as judicial transfer rulings—are more closely constrained by the specific criteria prescribed in the transfer statutes. Judges making transfer decisions should be aware of the discriminatory patterns that continue to persist in the early stages of the criminal process and take whatever steps they think appropriate to ameliorate them.

The 2023 National Academies report demands ongoing judicial attention. It concludes that “[r]educing racial inequality will involve coordinated reforms across stages of the criminal justice system that will reduce the racial disadvantage that accumulates from police contact, to court processing and sentencing, [and] to correctional supervision.”<sup>77</sup> A critically important decision in this sequence is the decision to undertake a criminal prosecution. The intensive attention now being given to the problem of inequality provides both the challenge and opportunity to address it.

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<sup>74</sup> *See id.* at 630.

<sup>75</sup> *Id.* at 620, 624–25.

<sup>76</sup> NAT'L ACADS. OF SCIS., ENG'G & MED., *supra* note 66, at 152.

<sup>77</sup> *Id.* at 308.