If you are a lawyer or judge interested in leading a Dialogue on Youth and Justice at a high school in your community, follow these steps to help ensure a meaningful experience for you and the students.

STEP 1. IDENTIFY A SCHOOL
Contact a school where your or your friends’ children are students, a school in your neighborhood, or a school where you know members of the teaching staff. Friends and co-workers might also recommend a school that would like to participate in the Dialogue program.

STEP 2. SET UP AN APPOINTMENT FOR YOUR VISIT
Contact the high school principal or head of the relevant department (social studies, history, government, or civics). Explain the program to him or her and offer him or her a copy of the Dialogue materials. Ask if he or she or another teacher in the school would be willing to devote a class session to the Dialogue and schedule a day and time. You will need between 45 and 90 minutes to make the Dialogue a meaningful experience.

STEP 3. DISCUSS YOUR VISIT WITH THE TEACHER
Discuss the ages and experiences of the students. Determine what part of the Dialogue you would like to focus on and provide the teacher with a copy of the materials you wish to discuss. Also consult with the teacher about additional background materials that might help the students. Request that the teacher have name tags or tent cards printed with the students’ first names, and ask for any equipment you might need (a blackboard or flip chart, for example).

STEP 4. PREPARE THE CLASS FOR YOUR VISIT
Ask the teacher to distribute any materials or assign any background readings you want the class to discuss at least one day before your visit.

STEP 5. PREPARE YOURSELF FOR YOUR DAY IN CLASS
Know your subject. Review the Dialogue materials before you go to class and think of additional questions you think will help the students explore the issues raised by the Dialogue. Have a planned outline of where you would like the discussion to go but be prepared to be flexible. Personalize the topic by thinking of experiences from your own practice that you can relate to the students.

STEP 6. FOLLOW UP AFTER THE DIALOGUE
Write a thank-you note to the teacher and the class. Make yourself available to answer questions the class may raise following the Dialogue.
GETTING STARTED
The Dialogue on Youth and Justice is designed for use with high school classrooms and community groups. The Dialogue offers numerous perspectives on the topic of youth and justice, giving you different options for different audiences or classrooms. Parts I and II of the Dialogue focus on the juvenile justice system. Part I looks at the history of juvenile justice in the United States, while Part II takes up the question of whether juveniles should ever be tried as adults. Part III of the Dialogue looks at the constitutional rights of students outside the juvenile justice system, with a particular focus on student rights in a school setting.

In consultation with the teacher or community group leader, decide which part of the Dialogue would be most interesting and appropriate for your Dialogue group.

QUESTIONS FOR REVIEW AND DISCUSSION
Throughout the Dialogue, you will find “Questions for Review.” These questions are designed to help the Dialogue leader check and reinforce student comprehension of important facts, ideas, and concepts introduced in each section of the Dialogue. Use these questions to make sure that all the Dialogue participants are on the same page before proceeding to the “Discussion Questions” that appear at the end of Parts I, II, and III of the Dialogue.

The “Discussion Questions” are designed to introduce open-ended conversations on the topics and will be the focus of your Dialogue. Discussion Questions for Parts I and II begin with a “take a stand” strategy to gauge the initial opinions of the participants on the topics before you begin the discussion. Discussion Questions for Part III ask participants to debate a number of hypothetical scenarios involving student rights.

We encourage you to be open to new directions your conversation may take as you and your group explore the issues introduced in the Dialogue.

THE ABA DIALOGUE PROGRAM
The Dialogue on Youth and Justice is the fifth installment in the ABA Dialogue program. The Dialogue program provides lawyers and judges with the resources they need to engage high school students and community groups in discussion of fundamental American legal principles and civic traditions. Supreme Court Justice Anthony Kennedy introduced the first Dialogue program, the Dialogue on Freedom, at the 2002 ABA Midyear Meeting in Philadelphia. In 2003, the ABA introduced the Dialogue on Brown v. Board of Education to commemorate the 50th anniversary of the Supreme Court's landmark ruling. In 2005, the Dialogue on the American Jury complemented the ABA's American Jury Initiative. In 2006, the Dialogue on the Separation of Powers was introduced. For more information on these Dialogues, visit http://www.abanet.org/publiced/features/dialogues.html.
If you are a young person under the age of 18 and get into trouble with the law, you will probably have your case heard in the juvenile justice system. But this was not always the case. The idea of a separate justice system for juveniles is just over one hundred years old.

ORIGINS OF THE JUVENILE JUSTICE SYSTEM
The law has long defined a line between juvenile and adult offenders, but that line has been drawn at different places, for different reasons. Early in United States history, the law was heavily influenced by the common law of England, which governed the American colonies. One of the most important English lawyers of the time was William Blackstone. Blackstone’s *Commentaries on the Laws of England*, first published in the late 1760s, were widely read and admired by our nation’s founders.

“Infants” and “Adults” at Common Law
In one section of his *Commentaries*, Blackstone identified people who were incapable of committing a crime. Two things were required to hold someone accountable for a crime. First, the person had to have a “vicious will” (that is, the intent to commit a crime). Second, the person had to commit an unlawful act. If either the will or the act was lacking, no crime was committed. The first group of people Blackstone identified as incapable of committing a crime were “infants.” These were not infants in the modern sense of the word, but children too young to fully understand their actions.

Blackstone and his contemporaries drew the line between “infant” and “adult” at the point where one could understand one’s actions. Children under the age of seven were as a rule classified as infants who could not be guilty of a felony (a felony is a serious crime such as burglary, kidnapping, or murder). Children over the age of 14 were liable to suffer as adults if found guilty of a crime.

Between the ages of seven and fourteen was a gray zone. A child in this age range would be presumed incapable of crime. If, however, it appeared that the child understood the difference between right and wrong, the child could be convicted and suffer the full consequences of the crime. These consequences could include death in a capital crime. (A capital crime is a crime for which one might be executed. For examples of children sentenced to death in Blackstone’s time, see the sidebar “Malice Supplies the Age.”)
MALICE SUPPLIES THE AGE

In this excerpt, 18th-century English lawyer William Blackstone describes the English common law doctrine “malice supplies the age.”

But by the law, as it now stands, . . . the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent’s understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in these cases our maxim is, that malitia supplet aetatem (“malice supplies the age”). Under seven years of age indeed an infant cannot be guilty of felony; for then a felonious discretion is almost an impossibility in nature: but at eight years old he may be guilty of felony. Also, under fourteen . . . if it appear to the court and jury, that he . . . could discern between good and evil, he may be convicted and suffer death. Thus a girl of thirteen has been burnt for killing her mistress: and one boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten years actually hanged; because it appeared upon their trials, that the one hid himself, and the other hid the body he had killed; which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil. . . . Thus also, in very modern times, a boy of ten years old was convicted on own confession of murdering his bedfellow; there appearing in his whole behaviour plain tokens of a mischievous discretion: and, as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment.


A New System of Justice for Juveniles

During the nineteenth century, the treatment of juveniles in the United States started to change. Social reformers began to create special facilities for troubled juveniles, especially in large cities. In New York City, the Society for the Prevention of Juvenile Delinquency established the New York House of Refuge to house juvenile delinquents in 1825. The Chicago Reform School opened in 1855. The reformers who supported these institutions sought to protect juvenile offenders by separating them from adult offenders. They also focused on rehabilitation—trying to help young offenders avoid a future life of crime. In 1899, the first juvenile court in the United States was established in Cook County, Illinois. The idea quickly caught on, and within twenty-five years, most states had set up juvenile court systems. The early juvenile courts shared with reform schools the same desire to rehabilitate rather than of punish juvenile offenders. They were based on the legal doctrine of parens patriae (a Latin term that means “parent of the country”). The parens patriae doctrine gives the state the power to serve as the guardian (or parent) of those with legal disabilities, including juveniles. In line with their “parental” role, juvenile courts tried to focus on the “best interests of the child.” They emphasized an informal, nonadversarial, and flexible approach to cases—there were few procedural rules that the courts were required to follow (see sidebar “Original Goals of the Juvenile Courts”). Cases were treated as civil (noncriminal) actions, and the ultimate goal was to guide a juvenile offender toward life as a responsible, law-abiding adult. The juvenile courts could, however, order that young offenders be removed from their homes and placed in juvenile reform institutions as part of their rehabilitation program.

QUESTIONS FOR REVIEW

1. What is the significance of the English common law doctrine, “malice supplies the age”?
2. What were the goals of the early juvenile courts?

ORIGINAL GOALS OF THE JUVENILE COURTS

In 1909, Judge Julian Mack, one of the first judges to preside over the nation’s first juvenile court in Cook County, Illinois, described the goals of the juvenile court:

The child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude. The ordinary trappings of the courtroom are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.

JUVENILE JUSTICE
AND DUE PROCESS OF LAW

Beginning in the 1960s, the United States Supreme Court heard a number of cases that would profoundly change proceedings in the juvenile courts. The first of these cases was *Kent v. United States*, 383 U.S. 541 (1966). Morris Kent first entered the juvenile court system at the age of 14, following several housebreakings and an attempted purse snatching. Two years later, his fingerprints were found in the apartment of a woman who had been robbed and raped. He was detained and interrogated by police and admitted to the crimes. Kent’s mother hired a lawyer, who arranged for a psychiatric examination of the boy. That examination concluded that Kent suffered from “severe psychopathology” and recommended that he be placed in a psychiatric hospital for observation.

The juvenile court judge had authority to “waive jurisdiction” in Kent’s case to a criminal court, where Kent would be tried as an adult. Kent’s lawyer opposed the waiver and offered to prove that if Kent were given proper hospital treatment, he would be a candidate for rehabilitation. The juvenile court did not respond to the motions made by Kent’s lawyer and, without a hearing, waived jurisdiction to the criminal court.

**The Worst of Both Worlds?**

The U.S. Supreme Court agreed to hear Kent’s case and in a majority opinion authored by Justice Fortas, ruled that Kent was entitled to a hearing and to a statement of the reasons for the juvenile court’s decision to waive jurisdiction. In its opinion, the majority also expressed concerns that the juvenile courts were not living up to their promise. In fact, the majority speculated “that there may be grounds for concern that the child receives the worst of both worlds [in juvenile courts]: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.” A particular concern was whether juvenile courts had received the resources, personnel, and facilities they needed to adequately serve youth charged with violations of the law.

A year after the Kent decision, the case of Gerald Gault, a 15-year-old Arizona boy, led to a major change in the way young people’s cases were processed by the juvenile courts. Gerald was accused of making an indecent phone call to a neighbor. At the time, he was also under 6-months’ probation because he had been with another boy who stole a wallet from a woman’s purse. When Gerald’s neighbor complained of the call, police arrived at his home and took him into custody. They left no notice for Gerald’s parents.

Before Gerald’s hearings, neither Gerald nor his parents received notice of the specific charges against him. At the hearings, there were no sworn witnesses and no record was made of the proceedings. Not even the neighbor who had made the complaint about the phone call was present. At the end of the hearings, the judge committed Gerald to Arizona’s State Industrial School until he turned 21, unless he was discharged earlier by “due process of law.” This meant that Gerald might have to spend up to six years at the school. An adult convicted of using vulgar or obscene language would have received a maximum penalty of a $50 fine and imprisonment for no more than two months.

Gerald’s parents petitioned for their son’s release. They argued that he had been denied due process of the law (see sidebar “What Is Due Process?”) and that his constitutional rights to a fair trial had been violated. The case eventually made its way to the Supreme Court, which ruled in favor of Gerald in *In re Gault*, 387 U.S. 1 (1967).

**WHAT IS DUE PROCESS?**

Due process of law means that every person who is party to a legal proceeding is entitled to certain safeguards designed to ensure that the proceeding is fair and impartial. The Bill of Rights in the U.S. Constitution defines many due process rights, including:

- The Fifth Amendment’s guarantees that:
  - No one can be deprived of life, liberty, or property without due process of law.
  - No one can be compelled to be a witness against herself or himself (self-incrimination) in a criminal trial.
  - No one can be tried for a serious crime unless indicted by a grand jury.

- The Sixth Amendment’s rights to:
  - A speedy and public trial.
  - An impartial jury.
  - Notice of the nature and cause of an accusation.
  - Confrontation of adverse witnesses (the right to cross-examine witnesses)
  - Compel witnesses in one’s favor to appear in court.
  - Assistance of legal counsel for one’s defense.

- The Seventh Amendment’s right to trial by jury in most civil (noncriminal) cases.

- The Eighth Amendment’s protections against:
  - Excessive bail.
  - Cruel and unusual punishments.

Beginning in 1967, with its decision in *In re Gault*, the U.S. Supreme Court extended many, but not all, of these due process rights to young people involved in juvenile court proceedings.
Writing for the majority of the Court, Justice Fortas stated that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.” Juveniles subject to delinquency hearings were entitled to key elements of due process to ensure the fairness of their hearings, including:
- Notice of the charges against them.
- A right to legal counsel.
- The right against self-incrimination.
- The right to confront and cross-examine witnesses.

Blurring the Lines Between Juvenile and Criminal Justice

The Supreme Court’s decision in In re Gault was not unanimous. In a dissent, Justice Stewart warned that by requiring many of the same due process guarantees in juvenile cases that are required in criminal cases, the Court was converting juvenile proceedings into criminal proceedings. In doing so, he argued, the Court was missing an important distinction. The object of juvenile proceedings was the “correction of a condition.” The proceedings were not adversarial; juvenile courts functioned as public social agencies striving to find the right solution to the problem of juvenile delinquency. The object of criminal courts, in contrast, was conviction and punishment of those who commit wrongful acts.

Justice Stewart noted that in the nineteenth century, before juvenile courts were established, juveniles tried in criminal courts were given the same due process as adults. They were also subject to the harshest punishments for their crimes, including the death penalty. Juvenile courts were not perfect, Justice Stewart agreed. But by blurring the distinctions between juvenile proceedings and criminal proceedings, the Court was “inviting a long step backwards into the nineteenth century.”

Three years after the Gault decision, the Court took another step toward making procedure in the juvenile courts more like criminal courts. In re Winship, 397 U.S. 358 (1970), involved a 12-year-old boy charged with stealing a $112 from a woman’s purse. The juvenile court decided that “a preponderance of the evidence” established that the boy had committed the theft. To say that someone is guilty of a crime by a “preponderance of the evidence” means that the available evidence (for example, the testimony of witnesses) makes it more likely than not that the person committed the crime. In a standard criminal trial, however, the government has to prove “beyond a reasonable doubt” that the accused committed the crime. “Beyond a reasonable doubt” is a higher standard than “preponderance of the evidence”—it means that the available evidence leaves you firmly convinced of a defendant’s guilt.

One reason that the “beyond a reasonable doubt” standard of proof is required in criminal cases is that a person convicted of a crime can be sentenced to serve time in prison. In the Winship case, the boy charged with stealing from the purse faced up to six years in a juvenile training school. In defending use of the “preponderance of the evidence” standard, supporters of the juvenile court emphasized that the purpose of the training school was not to punish but to rehabilitate the boy. They also argued that it is not necessarily in the best interests of a troubled juvenile to “win” a case if the juvenile is truly in need of a court’s intervention. A majority of the Court rejected these arguments, stating that “good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts.” This was particularly true in cases where the juvenile’s loss of liberty during confinement in a juvenile training school would be comparable to the punishment of imprisonment imposed when an adult is convicted of a crime.
Chief Justice Burger dissented from the majority opinion, joined by Justice Stewart. By moving the juvenile courts closer to procedures used in the criminal trials of adults, the dissenters argued, the Court was also moving away from the original idea of juvenile courts as benevolent and less formal institutions equipped to deal flexibly with the unique needs of juvenile offenders. “I cannot regard it as a manifestation of progress,” Chief Justice Burger asserted, “to transform juvenile courts into criminal courts, which is what we are well on the way to accomplishing.”

**Trial by Jury and Juvenile Justice**
The trend toward extending the due process rights of adult criminal trials to juvenile court proceedings slowed in 1971, with the Supreme Court’s ruling in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). In *McKeiver*, the Court ruled that juveniles are not entitled to trial by jury in a juvenile court proceeding.

An important factor in the Court’s decision was its refusal to fully equate a juvenile proceeding with a criminal proceeding, even if the juvenile’s case involved offenses that would be felonies or misdemeanors under the state’s criminal laws and the juvenile court ordered the youth confined to a secure rehabilitation facility. The Court acknowledged that juvenile courts had not lived up to their promise, in part because of a lack of adequate resources. But the Court was also “reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young.” Trial by jury, the Court feared, would effectively abolish any significant distinction between juvenile and criminal proceedings. “If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system,” the majority opinion concluded, “there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it.”

Three justices joined a dissenting opinion in *McKeiver*. They argued that when a juvenile is tried for offenses based on violations of a state’s criminal law, and when the juvenile faces possible commitment to a state institution for delinquents, a jury trial should be required. “Where a State uses its juvenile court proceedings to prosecute a juvenile for a criminal act and to order ‘confine¬ment’ until the child reaches 21 years of age . . .,” the dissenters stated, “then [the juvenile] is entitled to the same procedural protection as an adult.”

**QUESTIONS FOR REVIEW**
1. What is meant by the term “due process”?
2. Why did the Supreme Court decide not to give juveniles the right to trial by jury?
3. Why were dissenting justices concerned about the
Section I of this Dialogue describes how juvenile court reforms of the late nineteenth century were intended to create a separate system of justice for juveniles that would emphasize rehabilitation over punishment. It also describes how, beginning in the late 1960s, the Supreme Court issued a series of opinions that required juvenile courts to introduce procedures resembling those used in criminal proceedings. In these opinions, a majority of the justices emphasized that they were trying to avoid having youth get “the worst of both worlds”—neither the procedural protections given to adults in the criminal courts, nor the care and emphasis on rehabilitation that juvenile courts were meant to provide.

In each of the Supreme Court’s decisions extending due process protections to juveniles, dissenting justices worried that by making juvenile court proceedings more like criminal court proceedings, the Supreme Court was weakening the justification for a separate juvenile justice system. In the decades since the Supreme Court’s “due process” juvenile justice decisions of the 1960s and ’70s, the question of if—or when—juveniles should be tried as adults has been the subject of much debate.
TRYING JUVENILE OFFENDERS AS ADULTS

Juvenile court judges have always had authority to “waive jurisdiction” over serious juvenile offenders. If a juvenile judge waives jurisdiction, the juvenile offender is transferred to criminal court to be tried as an adult. Beginning in the 1970s, many states made it easier and, in some cases, mandatory for juvenile court judges to transfer juvenile offenders to criminal court. The 2006 National Report on Juvenile Offenders and Victims, published by the U.S. Department of Justice, provides these statistics:

- Since 1992, all states (with the exception of Nebraska) have made it easier to transfer juveniles to criminal courts.
- Thirteen states have set the upper age limit of juvenile court jurisdiction at age 15 or 16. Youth older than this who are accused of crimes are tried as adults in these states.
- A majority of states have established a minimum age below which a child cannot be transferred to a criminal court for trial as an adult. This minimum age ranges from as young as 10 in Kansas and Vermont to as old as 15 in New Mexico. But in 22 states and the District of Columbia, no minimum age is defined, or the minimum age does not apply if a serious crime such as murder is at issue.
- As of 2004, 15 states had “concurrent jurisdiction” provisions. This means that both the juvenile court and the criminal court have original jurisdiction over certain categories of offenses (common examples are murder and other serious offenses against persons, drug offenses, and serious offenses against property such as arson). In states with concurrent jurisdiction laws, the prosecutor decides whether to bring charges in juvenile court or criminal court.
- As of 2004, 29 states had “statutory exclusion” provisions. This means that certain types of offenses—again, serious offenses such as murder are common—are excluded by law from juvenile court jurisdiction.

Changes in state law have made it easier in virtually all jurisdictions to try juveniles as adults when serious offenses are at issue. Criminal justice is much more focused on retribution and punishment for an offense than on rehabilitation of an offender to keep him or her away from a life of future crime. To what extent do these changes in state law reflect changing attitudes toward young people and the juvenile justice system?

QUESTIONS FOR REVIEW

1. What is meant by “waiver of jurisdiction” from a juvenile court to a criminal court?
2. What is the effect of “minimum age” laws?
3. What is the effect of “upper age limits”?
4. In states with “concurrent jurisdiction” laws, who decides whether a juvenile is charged in a juvenile court or a criminal court?
In 1988, the Supreme Court drew a line between “child” and “adult” on the emotionally charged issue of capital punishment. A 15-year-old Oklahoma boy actively participated in the brutal murder of his former brother-in-law. Under Oklahoma law, the boy was a “child,” but the district attorney filed a petition for a finding that the boy had the mental capacity to understand the wrongfulness of his conduct and, therefore, should be tried as an adult. The trial court, finding that there was virtually no hope for the boy’s rehabilitation, certified him to stand trial as an adult. He was tried in criminal court, convicted, and sentenced to death for the crime.

In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), a four-member plurality of the Court ruled that a death penalty for a 15-year-old boy constituted “cruel and unusual punishment” under the Eighth Amendment to the Constitution according to “evolving standards of decency” (see sidebar “What Is a Plurality Opinion?”). In determining this standard, the plurality looked to the 18 states that had defined a minimum age for capital punishment and found that, in all these cases, the minimum age was at least 16. It also looked to the opinions of major legal organizations, including the American Bar Association, which had opposed the juvenile death penalty in *amicus curiae* (“friend of the court”) briefs filed with the Court, and to practices of other nations—including Western Europe, Canada, Australia, and the Soviet Union—where the death penalty for juveniles had been prohibited.

**What Defines Evolving Standards of Decency?**

Justice O’Connor agreed with the plurality that the death penalty in this case violated the Eighth Amendment. She disagreed, however, with the plurality’s analysis of “evolving standards of decency.” While she did not dispute that evolving standards of decency are appropriately used to determine the meaning of “cruel and unusual punishment,” she was reluctant to freeze into constitutional law a standard of decency that might not truly express national consensus. Many states, for example, had abolished or severely restricted use of capital punishment for adults in the years preceding 1972. That year, the Court was asked in *Furman v. Georgia* whether capital punishment violated the Eighth Amendment’s prohibition of “cruel and unusual punishment.” If the Court has decided that a national consensus rejecting capital punishment had developed by 1972, Justice O’Connor noted, it would have been mistaken. Following the *Furman* decision, capital punishment was revived in many states.

Justice O’Connor agreed that the death penalty should not apply in the *Thompson* case for a different reason. The Oklahoma state legislature had decided to authorize capital punishment for murder without setting any minimum age for the punishment. Separately, it had decided 15-year-old murder defendants could be tried as adults in some circumstances. There was no evidence, however, that the Oklahoma legislature gave serious consideration to—or even realized—the fact that by saying some 15-year-olds could be tried for murder as adults, they could also theoretically be subject to the death penalty. Because the Court handles the death penalty differently from any other punishment, giving it far more scrutiny, Justice O’Connor thought the Court should require that the Oklahoma legislature demonstrate that it had carefully considered whether it wanted to make juveniles subject to the death penalty. This approach, Justice O’Connor noted, “allows the ultimate moral issue at stake in the constitutional question to be addressed in the first instance by those best suited to do so, the people’s elected representatives.”
Do Juveniles Have Diminished Personal Culpability?

Less than 20 years after Thompson, the juvenile death penalty came before the Supreme Court again in Roper v. Simmons, 543 U.S. 551 (2005). This time, the Court was asked whether execution of juveniles between the ages of 16 and 18 violated the “cruel and unusual punishments” clause of the Eighth Amendment. A five-member majority of the Court held that it did.

Christopher Simmons, the defendant in the Roper case, was seventeen when he committed his crime and 18 when he was tried and sentenced to death. The crime was brutal. Simmons and another boy, age 15, kidnapped a woman from her home, bound her hands and feet with wire and wrapped her head in duct tape, and threw her from a railroad bridge into a river, leaving her to drown. Shortly after his arrest, Simmons confessed to the crime.

Three years before the Roper case, the Supreme Court had ruled that the execution of a mentally retarded person violates the Eighth Amendment (Atkins v. Virginia, 536 U.S. 304 (2002)). The Atkins decision rested on a finding that mentally retarded individuals have diminished personal culpability, even if they can distinguish between right and wrong. (Culpability means “guilt” or “blameworthiness.”) On the basis of the Supreme Court’s reasoning in Atkins, the Missouri Supreme Court held that Christopher Simmons could not be executed because, as a juvenile, he similarly had diminished personal culpability. It set aside Simmons’s death penalty and resentsentenced him to life imprisonment without possibility of parole.

The U.S. Supreme Court’s majority opinion, which affirmed the decision of the Missouri Supreme Court, found that a majority of states had rejected the death penalty for juvenile offenders. It also found that there was a trend in the states against the juvenile death penalty. It then identified three general differences between juveniles under 18 and adults that “demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders”:

- First, juveniles show a lack of maturity and an underdeveloped sense of responsibility in comparison to adults and thus are more likely to make ill-considered decisions.
- Second, juveniles are more susceptible to negative influences and peer pressure and have a reduced sense of control over their environment.
- Third, a juvenile’s character is not yet fixed. “The reality that juveniles still struggle to define their identity,” said the majority, “means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.”
Together, these factors suggested to the majority that the culpability of juveniles is diminished as compared to adults. This diminished culpability, in turn, weakened two primary justifications for the death penalty. The first justification, retribution, is weakened because it does not make sense to impose the most extreme form of retribution on an offender with lesser culpability. The second justification for capital punishment, deterrence, is similarly weakened, because it is less likely that juveniles will carefully consider the possible impact of their decisions before they act.

A dissenting opinion authored by Justice Scalia strongly questioned this reasoning. Justice Scalia’s dissent argued that in other contexts, studies had indicated that persons under 18 were sufficiently mature to make difficult moral decisions, such as the decision to have an abortion. It noted that the majority was making generalizations about young people, while capital punishment decisions require a jury to make individualized assessments of each defendant. And it argued that there was a difference between the willingness of juveniles to engage in risky or anti-social behavior and the decision of a juvenile to commit murder. “It is entirely consistent to believe that young people often act impetuously and lack judgment,” the dissent argued, “but, at the same time, to believe that those who commit premeditated murder are—at least sometimes—just as culpable as adults.”

Justice O’Connor also wrote a dissent in Roper. She agreed with Justice Scalia’s opinion that even though juveniles in general might have diminished culpability, a particular juvenile offender could have sufficient culpability to warrant a death penalty. But she was equally concerned by the Court’s finding of an emerging national consensus against the juvenile death penalty. A significant number of states still allowed it, and Justice O’Connor worried that the Court was substituting its judgment “for the judgment of the Nation’s democratically elected legislatures.”

QUESTIONS FOR REVIEW
1. Why is the relationship between “national consensus” and “evolving standards of decency” in capital punishment cases?
2. What is meant by “diminished personal culpability”?
3. What do the terms “retribution” and “deterrence” mean? What is their relationship to capital punishment?
INTERNATIONAL LAW AND THE DEATH PENALTY

The majority opinion in Roper v. Simmons looked to international law to support its finding of a consensus against the juvenile death penalty. It noted that Article 37 of the United Nations Convention on the Rights of the Child—ratified by every country in the world except the United States and Somalia—expressly prohibits capital punishment for crimes committed by juveniles under 18. It also stated that only seven countries, including the United States, had executed juvenile offenders since 1990, and that each of these countries, except the United States, had since abolished or publicly disavowed the juvenile death penalty. “In sum,” the majority concluded, “it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.”

Justice Scalia’s dissent disapproved of this turn to foreign law. It noted that in many areas—including the exclusion of illegally seized evidence from trial, the separation of church and state, and right to trial by jury—American law is distinct from most of the world. “What these foreign sources [on the juvenile death penalty] ‘affirm,’ rather than repudiate,” Justice Scalia argued, “is the Justices’ own notion of how the world ought to be, and their diktat that it shall be so henceforth in America.”

DISCUSSION QUESTIONS FOR PART II

TAKE A STAND

Begin your discussion of the issues raised in Part II by asking participants to “take a stand” on the following statements. Designate corners of the room for participants who agree, disagree, or are not sure of their opinion. For each question, ask the participants to move to the corner of the room that reflects their opinion. After your dialogue on the Discussion Questions, you can repeat the “take a stand” activity to see if anyone’s opinions have changed.

“Take a stand” indicating whether you agree, disagree, or are not sure of your opinion on these statements:

- Punishment is more important than reform for juvenile offenders who commit serious crimes such as murder or rape.
- Juveniles are less able than adults to determine the implications of their actions.
- Life imprisonment is less cruel than the death penalty.
- Neither the death penalty nor life imprisonment is an appropriate punishment for juvenile offenders, no matter how serious their offense.

DISCUSSION QUESTIONS

1. Do you think that the move by states to make it easier to try juveniles as adults means that our society has given up on the possibility of reform for young offenders who commit serious crimes? Do you agree that reform is not worth trying for certain serious juvenile offenders?

2. Christopher Simmons was sentenced to life imprisonment when the Missouri Supreme Court ruled that the death penalty could not apply to juveniles who committed their crime under age 18. This means that, absent a pardon from his state’s governor, he will never be released from prison. Is this punishment less “cruel and unusual” than capital punishment? Why or why not?

3. Do you agree with the majority conclusion in Roper v. Simmons that juveniles between the ages of 16 and 18 have diminished personal culpability? Do you agree that a general diminished culpability for juveniles means that juveniles should be categorically excluded from capital punishment? Why or why not?

4. How much weight do you think the U.S. Supreme Court should give to an apparent international consensus against the death penalty for juvenile offenders?

5. The Convention on the Rights of the Child also prohibits the imposition of “life imprisonment without possibility of release” for serious crimes committed by juveniles under the age of 18. Many states in our country still allow such a sentence for a juvenile tried as an adult. Do you think this type of “lifetime sentence” for a juvenile should be prohibited? Why or why not?
The Supreme Court’s decision in *In re Gault* declared that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.” But a series of decisions involving young people and the Constitution has proven that although young people are entitled to constitutional protections, those protections do not always extend as far as they do to adults.

This section of the Dialogue looks at youth rights and the Constitution beyond the juvenile justice system, paying particular attention to youth rights in a school context.

**STUDENT SPEECH AND THE FIRST AMENDMENT**

The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

The rights described in the First Amendment are not absolute, even for adults. Speech can be subject to reasonable time, place, and manner restrictions. For example, a community could pass an ordinance prohibiting sound trucks from driving through a residential neighborhood between the hours of 10 p.m. and 6 a.m. The Supreme Court has also differentiated between political and artistic speech, which is given a high level of protection; commercial speech (such as advertisements), which is given less protection; and obscene speech, which is given little or no protection.

The First Amendment also protects only against restrictions on speech made by “state actors”—individuals acting with government authority. Thus, a city government could not prohibit you from passing out political brochures in a community, but a private employer could prohibit you from distributing political brochures at a workplace.

Public schools occupy a unique position. Although public school officials are clearly “state actors” with government authority, public schools also are assigned the special role of educating and protecting students while the students are in the school’s care.

The tension between the free speech rights of students and the special role of the schools has produced differing results in the Supreme Court. Two cases, *Tinker v. Des Moines Independent School District* and *Hazelwood School District v. Kuhlmeier*, illustrate this tension.
Student Protest and the Tinker Decision

*Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), arose during the United States’ involvement in the Vietnam War. A group of students decided to wear black armbands to school to protest the war. The school heard of their plans and adopted a policy prohibiting students from wearing armbands to school. Students who violated the policy would be suspended until they returned to school without the armbands.

A majority of the Supreme Court held that a school ban on armbands protesting U.S. participation in a war is not constitutional. Writing for the majority, Justice Fortas asserted that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” He classified the wearing of protest armbands as “closely akin to ‘pure speech’ which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment.” The students’ expression of opinion was silent and passive and did not intrude upon the work of the school or the rights of other students. Moreover, the school had singled out one form of symbolic expression—the wearing of armbands—while other students were allowed to wear buttons for political campaigns and other symbolic items. A prohibition on expression of one particular opinion is constitutionally impermissible without a showing that the expression of that opinion would cause “material and substantial interference with schoolwork or discipline.”

Justices Black and Harlan dissented in *Tinker*. Justice Black declared that “if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy or flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary.” While the government cannot regulate or censor the content of speech, Justice Black argued, regulations on when and where certain forms of speech can occur are permissible.

Bong Hits 4 Jesus

In 2007, the Supreme Court will be deciding a new student free speech case, *Morse v. Frederick*. This case involves a student who was suspended for displaying a banner reading “Bong Hits 4 Jesus” during an Olympic Torch Relay outside the student’s school in Juneau, Alaska. The *Tinker* and *Kuhlmeier* cases will almost certainly be revisited, and possibly revised, by the Court’s decision in the case.
Censorship of Students and the Kuhlmeier Decision

The Supreme Court’s view of student free speech rights was more restrictive in Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988). The student editor of a school-based newspaper decided to run two controversial stories. One discussed students’ experiences with teen pregnancy and a second looked at the impact of divorce on students at the school. The school principal reviewed page proofs of the newspaper before it is published. He decided to remove the pages on which these two articles appeared, citing concerns that students described in the teen-pregnancy article might be identified, that discussions of sexual activity and birth control might be inappropriate for some students, and that a father who was criticized in the article on divorce was not given a chance to respond.

In this case, the Supreme Court decided that the principal’s censorship of the articles in the school newspaper was constitutional. In an opinion written by Justice White, the Court stated that the rights of students in a public school “are not automatically coextensive with the rights of adults in other settings.” The school newspaper was part of the educational curriculum of the school’s journalism course and remained under the oversight of teachers and school administrators. It could not, therefore, be described as a public forum for speech. School officials were entitled to regulate the newspaper’s contents in “any reasonable manner.” Moreover, the First Amendment does not require a school to affirmatively promote particular student speech in publications or activities that “the public might reasonably perceive to bear the imprimatur of the school.” The school is not required to disseminate student speech that does not meet the standards established by the school or that might appear to advocate behavior or positions inconsistent with shared social values.

Justices Brennan, Marshall, and Blackmun disagreed. These justices argued that “the mere fact of school sponsorship does not . . . license such thought control in the high school.” They acknowledged that a school had the right to limit the scope of a school-sponsored publication to specific, objectively defined topics such as literary criticism or school sports. But they argued that limiting a publication on the basis of “potential topic sensitivity” is “a vaporous non-standard that . . . chills student speech to which school officials might not object.” They also argued that, even if the majority of the Court was correct in its analysis, the means of censorship used—simply excising the pages of the newspaper on which the offending articles appeared—was much too broad. By ignoring “obvious alternatives” (delaying publication, requiring precise deletions or changes), the principal demonstrated “unthinking contempt for individual rights.”

QUESTIONS FOR REVIEW

1. What is the importance of “state actors” under the First Amendment?
2. Name two reasons why the Supreme Court was willing to uphold a student right to wear protest armbands in Tinker.
3. Name two reasons why the Supreme Court upheld censorship of the school newspaper in Kuhlmeier.

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STUDENT PRIVACY AND THE FOURTH AMENDMENT

The Fourth Amendment protects against “unreasonable” searches and seizures. It was designed to protect against random searches and seizures of persons, homes, and other personal property by government officials looking for evidence of crimes. The “unreasonable” language of the amendment indicates that it does not prohibit all searches and seizures; the key question is the reasonableness of a particular search. To determine the reasonableness of a search, courts have considered whether a person would have a reasonable expectation of privacy in a particular situation. Most people, for example, reasonably expect privacy within their homes. They have a lesser expectation of privacy on a public street.

As with the First Amendment, the Fourth Amendment applies to “state actors”: government officials who are acting in their official capacities. Thus in a school setting, teachers and school administrators may be governed by the Fourth Amendment while the students’ parents (or classmates) would not be. The Supreme Court has concluded that although students do have limited Fourth Amendment rights, within a school setting they have a lesser expectation. Schools have a duty to maintain the discipline, health, and safety of students. In fulfilling this duty, the Court has agreed, schools may need to exert greater control over students than would be acceptable outside the school setting.

Mandatory Drug-Testing Schemes

Some of the most controversial “search and seizure” cases in school settings have involved testing students for use of illegal drugs. In Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002), a school passed a new policy that required any student who participated in extracurricular activities to (1) take a drug test before participating, (2) submit to random drug testing while participating in the activity, and (3) agree to be tested for drugs at any time upon reasonable suspicion.

The Supreme Court decided that a mandatory drug-testing scheme for students participating in extracurricular activities is constitutional. Writing for the majority, Justice Thomas considered the traditional Fourth Amendment question of the “reasonableness” of the search. When looking at the reasonableness of searches in a criminal context, the Court asks whether the government had established “probable cause” for the search. But in the context of safety and health regulations, a search unsupported by probable cause may be reasonable when “special needs” are involved. Public schools are one area where such special needs have been recognized. Schools act as guardians of the students in their care, and students have a diminished expectation of privacy in a school environment. Participation in extracurricular activities requires voluntary submission to additional rules, which further diminishes the expectation of privacy. The worst penalty that could result from the tests was limiting a student’s privilege to participate in extracurricular activities. Finally, drug abuse among students remains a real and immediate concern for schools. Balancing all these factors, the Court found the drug-testing scheme permissible under the Fourth Amendment.

Justices Ginsburg, O’Connor, Souter, and Stevens disagreed. In an earlier case involving the drug testing of student athletes, the Court had upheld the testing because the athletes were distinguished by “their reduced expectation of privacy, their special susceptibility to drug-related injury, and their heavy involvement with drug use.” The four dissenting justices argued that none of those factors applied to the students involved in Pottawatomie County, who were involved in choir, band, and academic teams. Such students have a higher privacy expectation than student athletes, whose sports require communal undress and subject them to physical risks that schools must try to keep to a minimum. Moreover, studies have established that students who participate in extracurricular activities “are significantly less likely to develop substance abuse problems than are their less-involved peers.” The policy in question thus had a double failing if it sought to deter drug use: “It invades the privacy of students who need deterrence least, and risks steering students at greatest risk for substance abuse away from extracurricular involvement that potentially may palliate drug problems.”

QUESTIONS FOR REVIEW

1. Why is the reasonableness of a search important when interpreting the Fourth Amendment?
2. Name three factors in the Court’s decision to random drug testing of students involved in extracurricular activities.
3. How did the dissenting justices in Pottawatomie distinguish between drug testing of student athletes and drug testing of students in nonathletic extracurricular activities?
DUE PROCESS AND THE FOURTEENTH AMENDMENT

The Supreme Court has held that juveniles are entitled to many due process guarantees in a juvenile court setting. But what about in the schools? Schools are able to punish students, and these punishments—including suspension or expulsion—can have real consequences for the students. Should students be given due process rights—including the right to a hearing or the right to tell their side of the story—in school disciplinary hearings?

_Goss v. Lopez_, 419 U.S. 565 (1975), involved a state law that allowed a school principal to suspend a student for misconduct for up to 10 days or to expel the student. The principal was required to notify the suspended or expelled student's parents within 24 hours and explain the reasons for the suspension or expulsion. Expelled students could appeal the decision and have a hearing before the board of education. Suspended students were not given the right to a hearing.

The Supreme Court held that suspension of a student without some form of hearing is not constitutional. The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” In an opinion written by Justice White, the Court declared that by providing the benefit of a public education to its citizens, the state of Ohio had created an entitlement to public education. This entitlement is a property interest protected by the due process clause of the Fourteenth Amendment. That interest cannot be taken away, even if only temporarily, without giving the student at least some opportunity to hear the reasons for the suspension and, if the student denies them, the chance to tell his or her own side of the story.

Chief Justice Burger and Justices Powell, Blackmun, and Rehnquist dissented. The dissenting justices saw the majority opinion’s requirement for a hearing as an “unprecedented intrusion into the process of elementary and secondary education.” They argued that the hearing requirement improperly gave federal courts, rather than educational officials and state legislatures, authority over routine classroom discipline of students. The dissenters also felt that a suspension of no more than 10 days—less than 5 percent of the normal school year—should not assume constitutional dimensions.

QUESTIONS FOR REVIEW

1. What is the difference between suspension and expulsion?
2. How does the phrase “life, liberty, or property” relate to school suspensions?
One of the hallmarks of a democracy is its citizens’ willingness to express, defend, and perhaps reexamine their own opinions, while being respectful of the views of others. If you plan on leading a Dialogue in a high school classroom, here are some ground rules for ensuring a civil conversation:

- Show respect for the views expressed by others, even if you strongly disagree.
- Be brief in your comments so that all who wish to speak have a chance to express their views.
- Direct your comments to the group as a whole, rather than to any one individual.
- Don’t let disagreements or conflicting views become personal. Name-calling and shouting are not acceptable ways of conversing with others.
- Let others express their views without interruption. Your Dialogue leader will try to give everyone a chance to speak or respond to someone else’s comments.
- Remember that a frank exchange of views can be fruitful, as long as you observe the rules of civil conversation.

Note to Dialogue Leaders: Before beginning your Dialogue, distribute these ground rules and review them with the students.

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