

A JUDGE'S GUIDE TO JUVENILES BEFORE THE ADULT CRIMINAL COURT

Steven Weller, J.D., Ph.D.
and Robin E. Wosje, J.D., editors

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THE NATIONAL JUDICIAL COLLEGE
in collaboration with
**THE NATIONAL COUNCIL OF JUVENILE AND
FAMILY COURT JUDGES**



Supported by a grant from the Bureau of Justice Assistance, the Corrections Program Office, the Office of Juvenile Justice and Delinquency Prevention and the State Justice Institute.



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Supported by a grant from the Bureau of Justice Assistance, the Corrections Program Office, the Office of Juvenile Justice and Delinquency Prevention and the State Justice Institute.

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FOREWORD

This benchbook is an outgrowth of a course that was developed by The National Judicial College and The National Council of Juvenile and Family Court Judges under a grant from the Bureau of Justice Assistance, the Corrections Program Office, the Office of Juvenile Justice and Delinquency Prevention and the State Justice Institute. The course, *Children as Adults in Court*, was presented twice in Reno, Nevada for nationwide audiences of judges, and once was presented in Florida, specially tailored to the needs of Florida judges. Significant amounts of research and development went into the creation of the course and the course materials. A special thanks goes to all who contributed to those courses and in particular to the dedicated work of David Gamble of the National Council of Juvenile and Family Court Judges, Steven Weller and Kathy Teller.

This benchbook would not have been possible if not for the efforts of each of the authors. A special thanks goes to Steven Weller as editor for providing a framework and coordinating the styles of the different authors. Further, this benchbook had the benefits of the continued advice and assistance of David Gamble of the National Council of Juvenile and Family Court Judges, Felix F. Stumpf, Amy Williams, as well as Nickie Gunstrom who assisted in proof reading the material. The National Judicial College extends its sincere gratitude to all who contributed to this benchbook.

ACKNOWLEDGEMENT

This benchbook was developed under grant number 1999-MU-MU-0002 from the Bureau of Justice Assistance, the Corrections Program Office, the Office of Juvenile Justice and Delinquency Prevention and the State Justice Institute. The opinions, findings, and conclusions or recommendations expressed in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice or the State Justice Institute. The National Judicial College is most grateful for this expression of support for judicial education and the improvement of justice in our country.

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SECTION I

INTRODUCTION

By Steven Weller, J.D., Ph.D., Hon. Jeffrey Rosinek and Hon. Michael A. Corriero

The purpose of the juvenile justice system is changing nationwide. There has been a shift among the states from a juvenile system with the primary goal of rehabilitating the offender, focusing on offender characteristics, treatment and individualized attention, to a juvenile system with the primary goal of protecting public safety, focusing on offense characteristics, accountability and punishment. The Oregon Code, revised in 1995, is an example. The statement of purpose of the juvenile justice system reads, in part:

The Legislative Assembly declares that in delinquency cases, the purposes of the Oregon juvenile justice system from apprehension forward are to protect the public and reduce juvenile delinquency.... The system is founded on principles of personal responsibility, accountability, and reformation within the context of public safety and restitution to the victims and to the community.¹

One focus of this "get tough" approach to juvenile crime has been to transfer selected cases of juvenile crime to the adult criminal court. Transfer provisions, which vary by state, may include: (1) waiver from the juvenile court by decision of the juvenile court judge; (2) direct filing by the prosecutor for certain types of cases specified by statute; or (3) statutory exclusion of certain types of cases from juvenile jurisdiction. As a result, adult criminal courts are starting to see young defendants in increasing numbers, in some cases with defendants as young as the age of 10.

The National Judicial College has recently presented three courses for adult criminal court judges on dealing with juvenile offenders in adult criminal court. Two of the courses were presented in Reno for nationwide audiences of judges, and one course was presented in Florida, specially tailored to the needs of Florida judges. This benchbook is an outgrowth of those courses.

This benchbook is based on an underlying presumption that there is something different in dealing with juveniles in adult criminal court, and that a case involving a juvenile is not just another criminal case. In this guide, the authors present research on how the two differ and the ways in which the differences might affect how juvenile offenders should be handled in adult criminal court.

The National Judicial College recognizes that there are substantial differences among judges in the amount of discretion they have in dealing with criminal cases. The College encourages you to think about where you have discretion and view this benchbook as providing you with information on how you might use that discretion. The College does

¹ OR. REV. STAT. § 491C.001.

not expect that every judge will be able to use everything that is presented in the benchbook, but hopefully all judges will find some things that they can use.

Research on the Effectiveness of Juvenile Transfer to Adult criminal court

Despite the fact that state legislators wanting to be tough on juvenile crime have tended to pass laws making transfer to adult criminal courts easier and more common, there is no clear evidence that transfer to adult criminal courts is in the best interests of either the juvenile or the public. In fact, a number of recent studies have challenged the efficacy of waiving juvenile offenders to adult criminal court as a means of reducing recidivism. Those studies indicate that juvenile offenders who are transferred to adult criminal court have higher rates of recidivism than do similar juvenile offenders who stay in juvenile court.

A study by Winner, et al. analyzed the probability of re-arrest for matched pairs of juvenile offenders, one who had been transferred to adult criminal court (transfers) and one who had remained in the juvenile system (non-transfers) in the calendar year 1987 in Florida. The matches were determined on the basis of a set of six variables. The study included 2,700 matched pairs of juveniles arrested in 1987 and analyzed re-arrests from 1987 through November 15, 1994, or a period of seven years.² The study found that:

- The probability of re-arrest over all offenses was nearly identical for transfers (42%) and non-transfers (43%);
- For those initially arrested for misdemeanors, transfers had a higher probability of re-arrest than non-transfers;
- For those arrested for felony property crimes, non-transfers had a higher probability of arrest than transfers; and
- For those arrested for all other felonies, the probability of re-arrest was higher for the transfers than for the non-transfers.³

As another part of that study, the same authors analyzed rates of re-offending, seriousness of re-offending and time to re-offense for the same period, for offenders who were at risk of re-offending during all or part of the period (i.e., not incarcerated for the whole period).⁴ They found that:

- The transfers had a higher rate of recidivism than the non-transfers over all crimes, for felonies and misdemeanors, and for all classes of felonies, and the differences were statistically significant for all categories of crimes except the lowest class of felonies;⁵ and

² Winner, L., et al., *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism Over the Long Term*, 43 CRIME & DELINQ. 548 (1997).

³ *Id.* at 551-6.

⁴ Bishop, D., et al., *The Transfer of Juveniles to Criminal Court: Does It Make a Difference?*, 42 CRIME & DELINQ. 171 (1996).

⁵ *Id.* at 179.

- For those who were re-arrested, the elapsed time on the street prior to re-arrest was significantly shorter for the transfers (135 days) than the non-transfers (227 days), and the severity of the offense leading to the re-arrest was significantly greater for the transfers than the non-transfers.⁶

The study concludes that transferring juveniles to adult criminal court aggravated short-term recidivism.⁷

A study by Fagan took a more detailed look at recidivism, including investigating the effects of different kinds of sanctions imposed on juvenile offenders in juvenile and adult criminal courts.⁸ Fagan's study compared juvenile offenders who were charged with robbery or burglary in two states, New Jersey and New York. Two counties in each state were studied, Essex (Newark) and Passaic Counties in New Jersey and Kings (Brooklyn) and Queens Counties in New York. In each county Fagan collected data on a sample of 200 juvenile offenders charged from 1981 through 1982.

The differential handling of juvenile robbery and burglary in New York and New Jersey provided the opportunity for a natural experiment. In New Jersey all juvenile felonies originate in the juvenile court. In New York, first and second-degree robbery and first degree burglary cases for juveniles aged 15 and over originate in the adult criminal court.⁹ The samples from the two states thus provided alternative approaches for the same type of offenses. Further, unlike the two studies discussed above, the placement of the case in juvenile court (in New Jersey) or adult criminal court (in New York) was automatic and did not involve a judge's decision selecting some offenders as more serious. This removed the effects on the research of any potential "systematic biases inherent in the waiver decision."¹⁰

Fagan investigated four measures of recidivism: (1) re-arrest; (2) re-incarceration; (3) time from release to the first new arrest; and (4) the number of arrests after the first re-arrest per year at risk (i.e., on the street) after release. He also investigated the seriousness of the crimes for which the offenders were re-arrested as another measure of recidivism.

Fagan found no significant differences on any of the four measures of recidivism between the juvenile and adult criminal courts for the burglary offenders. For the robbery offenders, however, Fagan found significant differences between juvenile and adult criminal courts on all four measures of recidivism, with the offenders tried in adult criminal court showing significantly *higher* recidivism rates on all measures.¹¹

⁶ *Id.* at 182.

⁷ *Id.* at 183.

⁸ Fagan, J., *The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, 18 L. AND POL'Y 77 (1996).

⁹ *Id.* at 86.

¹⁰ *Id.* at 103.

¹¹ *Id.* at 92.

Fagan also investigated relationship between the severity of sanctions and recidivism in the juvenile and adult criminal courts. He found no relationships, with one exception. There was a relationship between incarceration of the offender and recidivism, with those incarcerated through the adult criminal court showing significantly higher re-arrest rates than those incarcerated through the juvenile court.¹² Over 90% of the offenders in the sample who were incarcerated through the adult criminal court were re-arrested, while 73% of the offenders incarcerated through the juvenile court were re-arrested. The difference may be the result of the correctional context of incarceration in the two types of courts, with juvenile incarceration having a treatment focus and adult incarceration having a retributive focus.

Fagan points out that, if the purpose of transferring juveniles to adult criminal court is to increase punishment and decrease recidivism, it is failing on both counts. The adult criminal court had higher recidivism rates, the re-offending took place more quickly and return to incarceration was more likely.¹³ Further, the trend in juvenile courts is toward a more punishment-oriented approach.¹⁴ The severity of sanctions imposed in juvenile court is about the same as the offender would receive in adult criminal court, except perhaps for the most serious offenses, and the certainty of sanctions is higher in the juvenile court.¹⁵

The lesson that Fagan draws from his research is that judges should reserve adult criminal court for those cases where the sanctions available through the juvenile court are inadequate to respond to the offense.¹⁶ His research also suggests that the harsher sanctions now available through the juvenile court should broaden the view of who is amenable to treatment using the facilities and services available through the juvenile court. There are now substantial punishment options available through the juvenile court if a judge deems that to be necessary for a particular offender. The need for a strong punishment component should thus not necessarily require waiver to adult criminal court or be a bar to sending a case from the adult criminal court to the juvenile court. Extended juvenile jurisdiction also increases the sanctioning effectiveness of the juvenile court.

Ultimately, then, Fagan's research indicates that juvenile court judges should not waive cases from juvenile court to adult criminal court unless clearly necessary. Further, adult criminal court judges should adopt a policy of waiving cases to juvenile court unless the sanctions available to the juvenile court are clearly inadequate to deal with the offense. In the alternative if it is permitted by state statute, they should opt for juvenile rather than adult sanctions in the adult criminal court unless the adult sanction is clearly required.

The most recent study of juvenile transfers is still underway in Florida. While the final results of the study have not yet been published, some preliminary conclusions have been drawn. Overall, the results suggest that transfer in Florida has little deterrent value. In

¹² *Id.* at 93.

¹³ *Id.* at 100.

¹⁴ *Id.* at 102.

¹⁵ *Id.* at 100.

¹⁶ *Id.* at 101.

addition, transfer has not produced the desired benefit of enhancing public safety. Transferred youths were more likely to be incarcerated and to be incarcerated for longer periods than those retained in the juvenile system. Transferred youths also re-offend more quickly and at a higher rate than those retained in the juvenile system.¹⁷

Further, despite the goal to prosecute violent juvenile offenders in adult criminal courts, statistics indicate that of the cases waived to the adult criminal courts, more non-violent offenders were waived than violent offenders. According to the GAO, non-violent offenders comprised 66% of all juveniles waived to adult criminal courts in 1992, and 57% in 1993.

The Need for Special Expertise in Handling Juvenile Transfer Cases

In their upcoming chapter entitled "The Consequences of Transfer," in the soon-to-be-published book, *The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court*,¹⁸ Donna M. Bishop and Charles E. Frazier remark that reverse waiver and "transfer back" options place the burden of decision on where to try the juvenile offender with the adult criminal courts. Bishop and Frazier are critical of this system, arguing that shifting the decision-making process from trained and experienced juvenile court judges to adult criminal court judges makes little sense. First, adult criminal courts are overworked and lack the special expertise in dealing with juvenile offenders. Secondly, adult criminal court judges are generally given little guidance in exercising their discretion to return cases to the juvenile court or to properly impose juvenile sanctions.

Bishop and Frazier pose a number of questions:

- Are offense considerations determinative?
- Should the needs of the offender be considered?
- Is amenability to treatment an important consideration?
- If so, isn't familiarity with the special treatment resources in the juvenile justice arena essential?¹⁹

If all of these questions are *answered* in the affirmative, Bishop and Frazier argue that such decisions are best made by the juvenile judge in the juvenile courts.

Another option to meet the need for specialized consideration of juvenile offenders transferred to adult criminal court is the Youth Part. A Youth Part is a court set aside within the adult system to deal exclusively with the cases of juveniles being prosecuted as adults. The concept of a separate Youth Part can play a significant role in the development of a comprehensive plan, as an apparatus that will facilitate the

¹⁷ Bishop, D., et al., *A Study of Juvenile Transfers to Adult criminal court in Florida*, Natl. Center for Juv. Just., Office of Juv. Just. & Delinq. Prevention (OJJDP), U.S. Dept. of Just. (1999).

¹⁸ Bishop, D. and Frazier, C., *The Consequences of Transfer*, THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT, Fagan J. and Zimring, F, eds. (____).

¹⁹ *Id.*

identification of corrigible youths from incorrigible ones, and that will aid in the identification of those youths who can benefit from an alternative to incarceration program without compromising public safety.

The process of identifying the “malleable” youth is essential to the operation of any juvenile justice system. A Youth Part allows the adult criminal court to concentrate the resources of a probation department and social services agencies in a single entity. These agencies can then play a role in alerting the court to those youths who, in their judgment, possess the potential to make them amenable to counseling or special supervision, assuming that the nature of the offense permits the court to consider such an alternative.

Further, a Youth Part can serve as a focal point for Alternatives to Incarceration (ATI) programs. The court is able to assess how youth respond to intervention and services, which provides an understanding of the youth’s potential prior to sentence. ATI programs allow youths to demonstrate positive changes, so that they are not forever defined by their criminal activity. Additionally, because children learn their moral “codes” through a system of reward and punishment, time spent in a highly structured environment may provide the child with a chance to better understand that behavior generates consequences.

Ethics and Judicial Discretion

Judges seeking to develop legislation to reduce crime among juvenile offenders or to engage in policy discussions concerning the prosecution of children in adult criminal court should consider Canon 4 of the American Bar Association Model Code of Judicial Conduct (governing extra-judicial activities). Applicable excerpts and commentary from Canon 4 follow:

Canon 4. (A) Extra-Judicial Activities in General

A judge shall conduct all of the judge’s extra-judicial activities so that they do not:

- 1) cast reasonable doubt on the judge’s capacity to act impartially as a judge;
- 2) demean the judicial office; or
- 3) interfere with the proper performance of judicial duties.²⁰

The commentary states that “[c]omplete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.”²¹

²⁰ MODEL CODE OF JUDICIAL CONDUCT Canon 4 (1990).

²¹ *Id.*

Canon 4. (C) Governmental, Civic or Charitable Activities

- 1) A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting *pro se* in a matter involving the judge or the judge's interest.²²

The commentary states that “[a]s a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law, and improvement of criminal and juvenile justice. To the extent that time permits, a judge is encouraged to do so, either independently, or through a bar association, judicial conference or other organization dedicated to the improvement of the law.”²³

Judges presiding over cases involving juveniles prosecuted in adult criminal courts should consider themselves active participants in a problem-solving process. At its annual meeting on August 3, 2000, the Conference of Chief Justices adopted Resolution 22 to support the problem-solving process. The purpose of the resolution is to show the chief justices' support for problem-solving courts. This view of judicial responsibility involves three precepts:

- Judges can and should play a role in trying to solve the problems that are fueling caseloads;
- Outcomes, and not just process and precedent, matter; and
- The court's influence can change people's behavior.

Within this atmosphere, individual judges are free to exercise creativity and utilize innovative approaches to decision-making, hopefully to make a difference.

Overview of the Remainder of the Benchbook

The remainder of this benchbook is divided into nine parts, followed by a bibliography and resource section and biographies of the authors. The sections track the sessions presented in the three courses. The organization of the benchbook is as follows:

Section 2: Overview of Juvenile Transfer Laws, by Hon. Jeffrey Rosinek and Steven Weller, J.D., Ph. D.

- ✓ Purposes of juvenile transfer
- ✓ Overview of state laws, including Reverse Waiver

²² *Id.*

²³ *Id.*

Section 3: The Importance of Understanding Juvenile Judgment and Cognition in Determining Competence and Culpability, by Steven Weller, J.D., Ph.D.

- ✓ Legal issues: culpability and sentencing
- ✓ Aspects of juvenile decision-making affecting culpability
- ✓ Problems in assessing remorse in juveniles
- ✓ Effects of family and peer influences on culpability of a juvenile offender

Section 4: Issues of Race and Culture, by Michael L. Lindsey, J.D., Ph.D. and Steven Weller, J.D., Ph.D.

- ✓ The causes of overrepresentation of minority youth
- ✓ Approaches to alleviating minority overrepresentation
- ✓ Cultural influences on the juvenile's behavior at trial
- ✓ Cultural influences on the success of treatment programs

Section 5: Issues of Gender, by Robin E. Wosje, J.D.

- ✓ Special problems in dealing with the female juvenile defendant

Section 6: Child Mental Disorders and Disabilities, by Richard Weiher, Ph.D.

- ✓ Characteristics of child mental disorders
- ✓ Differences in effects of mental disorders on children and adults
- ✓ Criteria for identifying ADHD and other learning disabilities
- ✓ Child development and psychopathology

Section 7: Utilizing Psychological Assessments, by Richard Weiher, Ph.D.

- ✓ When to use psychological evaluations
- ✓ Constructing the order for a psychological evaluation
- ✓ Analyzing the results of a psychological evaluation

Section 8: Special Education Issues, by Professor Joseph B. Tulman, J.D.

- ✓ Federal legal requirements
- ✓ Obtaining evaluations and services

Section 9: Issues in Conducting the Trial, by Hon. Michael A. Corriero and Steven Weller, J.D., Ph.D.

- ✓ The trial process
- ✓ Culture and in-court behavior
- ✓ Other issues

Section 10: Sentencing, by Hon. Michael A. Corriero

- ✓ Sentencing options
- ✓ Federal legal requirements
- ✓ Optimizing the likelihood of success in preventing further criminal activity

Section 11: Juveniles in Adult Prisons and Jails, by Kelly Dedel Johnson, Ph.D. and William Sturgeon

- ✓ Analysis of affect of juveniles being transferred to adult prisons
- ✓ Guidelines and programs to provide for appropriate housing of juveniles in adult prisons

Section 12: Sixteen Hard Questions for every Judge Seeking to Reduce Juvenile Crime, by Michael L. Lindsey, J.D., Ph.D.

Appendices

Bibliography



SECTION 2

OVERVIEW OF JUVENILE TRANSFER LAWS

By Hon. Jeffrey Rosinek and Steven Weller, J.D., Ph.D.

In response to increased violent crime among juveniles, most state legislatures have enacted "get tough" laws to allow a larger number of serious juvenile offenders to be tried and sentenced in adult criminal courts. As a result of transferring cases from juvenile to adult criminal courts, juvenile prosecutions take place in adult criminal courts in all fifty States as well as in the District of Columbia. Although some people hold that transferring youthful offenders may deter other youths from committing violent crimes, the primary purpose of transfer laws has not been to rehabilitate youthful violent offenders but rather to protect the public from them. The proliferation of transfer legislation is based on the premise that the more violent the offender, the more the need for criminal prosecution. Consequently, there is less need for rehabilitation. The changes mandated by these laws have included:

- Lowering the age at which juveniles can be transferred to adult criminal courts;
- Expanding the list of crimes for which juveniles can be transferred; and
- Changing the process for conducting transfer hearings.

In most states, the juvenile judge and the prosecuting attorney are the key players in determining which juveniles are transferred to adult criminal court. In forty-nine states, the juvenile judge has some authority to transfer cases. The judicial waiver is the most common mechanism for transferring juveniles to adult criminal court. In twenty-six states, certain crimes are excluded by law from the jurisdiction of the juvenile court. In thirteen states, the prosecutor has the authority to decide which juveniles stay in the juvenile justice system and which juveniles are sent to adult criminal court.

In the 1980s and early and mid-1990s, the number of juveniles being transferred to adult criminal courts has risen substantially. Only recently has that trend declined.

- Between 1988 and 1992, the number of juveniles transferred to adult criminal courts increased 68% (from 7,005 to 11,778).
- In 1996, the number of transfers dropped by 15% to a total of 10,000.²⁴

One reason for the decline, which occurred after 1994, was that a larger number of serious cases bypassed the juvenile justice system under newly enacted statutory exclusion and prosecutor discretion provisions.

- Transfers of juveniles accused of crimes against persons have doubled.
- Drug offense transfers have also doubled.²⁵

²⁴ Parent, D., et al., *Key Legislative Issues in Criminal Justice: Transferring Serious Juvenile Offenders to Adult Courts*, NATL. INST. OF JUST. RES. IN ACTION, OJJDP, U.S. DEPT. OF JUST. (January 1997).

²⁵ *Id.*

Overview of Transfer Provisions

The purpose of this section is to provide an overview of the variations in statutory provisions nationwide. Judges must be clear as to the detailed statutory provisions of their own states, as this benchbook cannot provide that. At the same time, awareness of statutory provisions in other states may provide judges with some ideas for possible legal reforms in their own states.

Transfer from juvenile court to the adult criminal court has been justified on the grounds that the juvenile court is less able to handle two types of juvenile offenders. The first type is composed of serious violent offenders. The premise behind the transfer of these juvenile offenders to adult criminal court is the belief that the juvenile system is ill equipped to properly handle and effectively punish the violent juvenile offender. The second type is composed of juveniles classified as chronic offenders. These juveniles have repeatedly been before juvenile courts and have not responded to juvenile sanctions and intervention. Juvenile courts conclude that nothing in the juvenile system can help, and that through sanctions, adult criminal courts are better equipped to punish those chronic offenders who continue to be a threat to the public welfare.

Traditionally, transfers to the adult criminal court were used sparingly. Only those juveniles who were considered irredeemable were placed in adult criminal courts. Over the past decade, however, legislators, judges and prosecutors have determined for a variety of reasons that adult sanctions for juveniles is a proper response to the rise in the juvenile crime rate.

All states have provisions for trying certain juveniles as adults in adult criminal court. There are three basic transfer mechanisms: judicial waiver, statutory exclusion, and concurrent jurisdiction. Under judicial waiver provisions, the juvenile court judge has the authority to waive juvenile court jurisdiction and transfer the case to adult criminal court. Waiver provisions vary in terms of the degree of flexibility allowed. Some waiver provisions are entirely discretionary. In other provisions, there is a rebuttable presumption in favor of waiver. In other provisions, waiver is mandatory once the juvenile court judge determines that certain statutory criteria have been met. In most states, judicial waiver provisions are limited by age and/or offense criteria. Twenty-two states, as well as the District of Columbia have at least one provision for transferring juveniles to the adult criminal court for which no minimum age is specified.²⁶ Of those specifying a minimum age, the minimum age for transfer varies from twelve to fifteen.²⁷

From 1992 through 1997, forty-four states as well as the District of Columbia passed laws making it easier for juveniles to be tried as adults. Most states enacted either statutory exclusions or changed existing statutory exclusions. Seven states established exclusion provisions; twenty-eight states expanded the list of crimes eligible for

²⁶ Griffith P., et al., *Trying Juveniles as Adults in Adult criminal court: An Analysis of State Transfer Provisions*, NATL. CENTER FOR JUV. JUST., OJJDP, U.S. DEPT. OF JUST. (1998).

²⁷ *Id.*

exclusion and seven states lowered age limits for exclusion.²⁸ Judicial waiver provisions are also limited to juveniles who are “no longer amenable to treatment.” The specific factors that determine lack of amenability vary, but typically include the juvenile’s offense history and previous dispositional outcomes. When making waiver decisions, many statutes instruct the court to consider the availability of dispositional alternatives for treating the juvenile and the time available for sanctions, as well as public safety and the best interest of the child. Judicial waiver proceedings must adhere to certain constitutional principles of due process established by the Supreme Court in *Kent v. United States*, 383 U.S. 541(1966).²⁹

Transfer Mechanisms: Judicial Waiver

Under judicial waiver mechanisms, a case against a juvenile originates in juvenile court, and cannot be channeled elsewhere without formal approval of the juvenile court judge.

Judicial waiver decisions typically involve the consideration of factors in addition to age and offense. In *Kent v. United States*, 383 U.S. 541 (1966), the Supreme Court outlined eight factors that should be considered by the judge in deciding whether the juvenile court’s jurisdiction should be waived:

- The seriousness of the alleged offense to the community and whether the protection of the community requires waiver;
- Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
- Whether the alleged offense was against persons or against property, with greater weight given to offenses against persons, especially if personal injury resulted;
- The prosecutorial merit of the complaint, specifically, whether there is evidence upon which a grand jury may be expected to return an indictment;
- The desirability of trial and disposition of the entire offense in one court when the juvenile’s associates in the alleged offense are adults who will be charged with a crime in the adult criminal court;
- The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living;
- The criminal history of the juvenile, including previous contacts with law enforcement and the courts, prior periods of probation, and prior commitments to juvenile institutions, among others; and
- The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the juvenile court.

²⁸ Torbet, P. and Szymanski, L. *State Legislative Responses to Violent Juvenile Crime: 1996-1997 Update*, OFF. OF JUST. PROGRAMS, OJJDP, U.S. DEPT. OF JUST. (1998).

²⁹ *OJJDP Statistical Briefing Book: Frequently Asked Questions about Juveniles in Court*, OJJDP, U.S. DEPT. OF JUST. <http://ojjdp.ncjrs.org/ojstatbb/qcourt.html>.

Types of Judicial Waiver

Terminology differs from state to state. Some call the process a “certification,” “bindover,” “transfer,” “decline,” or “remand” for criminal prosecution.³⁰ There are three types of judicial waiver.

1. Discretionary Waiver: a juvenile court judge may waive jurisdiction and transfer the case to adult criminal court, typically based on the factors outlined in *Kent v. United States* 383 U.S. 541 (1966). At the end of the 1997 legislative session, all but five states (Connecticut, Massachusetts, Nebraska, New Mexico, and New York) provided for discretionary waiver of certain juveniles to adult criminal court. During 1996-1997, four states lowered their discretionary waiver age limit, seven states added crimes, and four states added or modified prior record convictions. In 1996, Massachusetts removed its waiver provision in favor of new direct file and exclusion provisions.
2. Mandatory Waiver: a juvenile court judge must waive jurisdiction if probable cause exists that the juvenile committed the alleged crime. At the end of 1998, fifteen states had a mandatory waiver statute.
3. Presumptive Waiver: the burden of proof concerning a transfer decision is shifted from the state to the juvenile, so that certain juveniles must be waived to adult criminal court unless they can prove they are suited to juvenile rehabilitation. As of the end of the 1997 legislative session, fourteen states and the District of Columbia had presumptive waiver provisions that designate a category of offenders in which waiver to adult criminal court is rebuttably presumed to be appropriate. During 1996 through 1997, Kansas and Utah enacted new laws establishing presumptive waiver for certain cases. The rebuttable presumption in these cases applies if the juvenile meets statutory criteria qualifying the case for presumptive waiver treatment. For example, when a State requires the prosecutor to show probable cause to believe that the juvenile actually committed the alleged crime, it is only when the prosecutor meets his initial burden that the juvenile must come forward with evidence of “amenability to treatment” as a juvenile.

Transfer Mechanisms: Statutory Exclusion

This is also known as legislative exclusion or automatic transfer. Through this mechanism certain juvenile offenders are automatically excluded from the original jurisdiction of the juvenile court. Exclusion is generally based on age and offense criteria. One type of exclusion – lowering the upper age of original juvenile court jurisdiction – excludes the largest number of juveniles from juvenile jurisdiction. Some state legislatures have excluded all seventeen year-olds or all sixteen and seventeen year-olds from juvenile jurisdiction, making them adults for the purposes of criminal prosecution.

³⁰ Cintron, L., *Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court*, 90 NW. U. L. REV. 1254, n. 69(1996).

Transfer Mechanisms: Direct File

This is also known as prosecutor discretion or concurrent jurisdiction. The prosecutor decides which court will have jurisdiction over a case when both the juvenile and adult criminal courts have concurrent jurisdiction. At the end of 1997, fifteen states had direct file statutes.

Transfer Mechanisms: Once an Adult, Always an Adult

Under these provisions, once a juvenile is convicted in adult criminal court, all subsequent cases involving that juvenile will be under the jurisdiction of the adult criminal court. Most states with "once an adult, always an adult" provisions simply require criminal prosecution of all subsequent offenses by means of an exclusion or automatic waiver provision. Other states exclude or require waiver of only a broadly defined subset of these cases, such as those involving juveniles of a certain age, or those in which the subsequent offense is sufficiently serious.

Reverse Waiver

Through this mechanism an adult criminal court judge is allowed to transfer "excluded" or "direct filed" cases from adult criminal court to juvenile court for adjudication. Of the thirty-five states with statutory exclusion or concurrent jurisdiction provisions, twenty also have provisions for transferring "excluded" or "direct filed" cases from criminal to juvenile court under certain circumstances. Generally, the court's decision is governed by the same kinds of standards and considerations as those taken into account by a juvenile court in deciding whether to waive jurisdiction.

Six states (Connecticut, Kentucky, Mississippi, Nevada, Tennessee, and Virginia) authorize reverse waiver in some cases, even when a juvenile court judge has already looked into the issues and determined that waiver to adult criminal court is appropriate. Under these circumstances, reverse waiver is usually available only if the juvenile court's decision was substantially groundless (Mississippi), or if other "exceptional circumstances" can be shown (Nevada).

Deciding on Reverse Waiver

Typically the reverse waiver provisions apply to two classes of cases, cases where the prosecutor exercised discretion to file directly in the adult criminal court and cases involving criminal acts statutorily excluded from original juvenile court jurisdiction. Some of the reverse waiver statutes provide little or no guidance to the judges on how to exercise this discretionary power. Other statutes specify that the criteria to be considered for waiver must also be considered for reverse waiver.³¹ Even with those statutes, however, the court is directed to consider the guidelines but not respond to each

³¹ The criteria for waiver were articulated by the U.S. Supreme Court in *Kent v. United States*, 383 U.S. 541 (1966).

consideration separately. Oklahoma is an example. Its statute specifies a set of guidelines and then states:

4. ... the court need not detail responses to each of the above considerations, but shall state that the court has considered each of the guidelines in reaching its decision.³²

Two of the major considerations in determining waiver, and thus in determining reverse waiver, are: (1) "the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court"³³ (referred to in the literature as "amenability to treatment"); and (2) "the prospect for adequate protection of the public"³⁴ (referred to in the literature as "dangerousness"). The ability of the courts to determine either amenability to treatment or dangerousness with any degree of reliability is at present a matter of debate in the social science literature. Still, judges must make those decisions, however imperfectly. The following discussion analyzes the difficulties in determining amenability to treatment and dangerousness and then suggests an alternative approach based on recent research.

Amenability to Treatment

Feld suggests that the first question with regard to amenability to treatment is, "Does any treatment work?"³⁵ Recent research has shown that some treatment programs have had some success, particularly those programs that: (1) address key areas of risk in the youth's life; (2) strengthen ties to persons and organizations that can help promote healthy adolescent development; (3) improve family functioning; (4) modify the social networks of the offender; (5) provide support and adequate supervision for the adolescent; and (6) encourage development of a stake in the community.³⁶ The research to date has not, however, focused on the violent offender, so our knowledge of what works for those offenders is still primitive.³⁷

Amenability is to be determined taking into account the resources presently available to the juvenile court. It is important for the juvenile courts to have access to a variety of resources, including therapy, special education, work programs, advocacy, foster care, residential treatment, vocational treatment and incarceration.³⁸ The time remaining in the

³² OKLA STAT. tit. 10, § 7306-2.6 (1998).

³³ *Kent v. United States*, 383 U.S. 541, 567 (1966).

³⁴ *Id.*

³⁵ Feld, B., *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515 (1978), at 529.

³⁶ Kruh, I. and Brodsky, S., *Clinical Evaluations for Transfer of Juveniles to Criminal Court: Current Practices and Future Research*, 15 BEHAVIORAL SCI. AND THE L. 151 (1998), at 155. Mulvey, E., et al., *The Prevention and Treatment of Juvenile Delinquency: A Review of the Research*, 13 CLINICAL PSYCHOLOGY REV. 133 (1993), at 157.

³⁷ Grisso, T., *Society's Retributive Response to Juvenile Violence: A Developmental Perspective*, 20 L. AND HUM. BEHAVIOR 229 (1996), at 238-9. It is important to remember that over half of the juveniles waived to adult criminal courts nationwide are not violent offenders.

³⁸ Kruh and Brodsky, *supra* note 36, at 155.

juvenile system for the offender is also a factor in determining amenability. Some older offenders may not have enough time left under the jurisdiction of the juvenile court to complete treatment, although juvenile jurisdiction in some states has been extended for treatment purposes beyond the juvenile age, for specified cases.³⁹

Assuming that some treatment programs can have success with some juveniles, Feld raises two issues that must be addressed with regard to amenability to treatment:

- developing a typology of variables that distinguish between juveniles that are amenable to treatment and those who are not under different conditions; and
- measuring where a particular individual ranks on those variables.⁴⁰

Feld suggests that research is not encouraging on the ability of practitioners or the courts to address either of those issues. He states that nobody has succeeded at developing an empirically valid typology of variables that can distinguish between youth amenable to treatment and those not amenable. In addition, he suggests that placing a particular individual in such a classification, were it to be developed, would require extensive and intrusive investigation into the youth's psychological characteristics, family background, social environment, school experiences, responsiveness to prior treatment, prior delinquencies availability of resources, and other factors.⁴¹

Grisso discusses three youth characteristics that can help predict the amenability of an individual to treatment.⁴² The characteristics are: (1) psychological discomfort; (2) potential for adult attachments; and (3) chronicity. Psychological discomfort is the presence of dissatisfaction with one's relationships with others. This dissatisfaction can be a force for bringing about change. The potential for adult attachments, which may be measured by past attachments even if the youth exhibits a present inability to form attachments, is important for the ability of the youth to form a trusting relationship with a helper, such as a counselor or therapist. Chronicity refers to the time of onset of antisocial behavior. A youth whose antisocial behavior started prior to adolescence may be less amenable to treatment than a youth whose antisocial behavior started during adolescence.⁴³

Dangerousness

The literature is equally pessimistic about the ability of the courts to determine the risk to public safety, or dangerousness, of an individual juvenile. Feld pointed out that all attempts to predict risk have tended to greatly overestimate the extent of risk, with 65%

³⁹ *Id.* See also Grisso, T., FORENSIC EVALUATION OF JUVENILES, (Professional Resources Press, 1998).

For an example of a state statute creating extended juvenile jurisdiction, which allows the juvenile court to maintain jurisdiction over offenders for treatment beyond the maximum age of filing in the juvenile court see MINN. STAT. § 260.126 (1997).

⁴⁰ Feld, *supra* note 35, at 535.

⁴¹ *Id.*

⁴² Grisso, *supra* note 37.

⁴³ *Id.*

to 99% of the predictions of dangerousness being false predictions.⁴⁴ The research to date has been limited, and no truly valid tests have been devised.⁴⁵ Further, the research to date has focused on adults, so generalizing the results to juveniles is especially problematic.⁴⁶

There are two approaches to predicting dangerousness, clinical and actuarial.⁴⁷ Feld suggests that the actuarial method, based on empirical correlations of variable with violent behavior, generally produces better predictions of future violence than clinical evaluations. He adds that the only actuarial variables that research to date has shown to have validity are the seriousness of the present offense and the prior criminal record of the offender.⁴⁸ Others, however, believe that clinical evaluations can be useful in predicting dangerousness, particularly where clinical evaluations are based on variables validated by empirical research.⁴⁹

Grisso points out that the context of the offense, as well as its seriousness, should be considered. If the crime was the result of risky, immature choices by the juvenile that placed the offender in a situation likely to lead to violence rather than a deliberate plan to commit a violent act, a lesser assessment of dangerousness might be justified.⁵⁰

Blended Sentencing

Some states provide extensive, separate sanctioning options for juvenile offenders in addition to standard adult sanctions. A recent trend is toward the use of *blended sentences*. Blended sentences involve the power of the court to impose both juvenile and adult sentences. The power may reside in the juvenile court or in the adult criminal court, and the court, depending on the state, may have to choose between the two types of sentences or may be able to impose both types concurrently. Where adult and juvenile sentences are imposed concurrently, the adult sentence is typically suspended unless the offender violates the conditions of the juvenile sentence.⁵¹

In Florida, for example, judges are given three options, sentencing as an adult, sentencing as a juvenile or sentencing under the Youthful Offender statute.⁵² The Florida statute further provides that, in selecting options, the judge must consider a set of criteria identical to that delineated in *Kent v. United States*, 383 U.S. 541 (1966) for waiver of

⁴⁴ *Id.* at 542.

⁴⁵ Kruh and Brodsky, *supra* note 36, at 158.

⁴⁶ *Id.*

⁴⁷ Feld, *supra* note 35, at 543.

⁴⁸ *Id.* at 544.

⁴⁹ See Litwak, T., *On the Ethics of Dangerousness Assessments*, 17 L. AND HUM. BEHAVIOR 479 (1993), asserting that clinical evaluations can be useful in predicting dangerousness, and Grisso, T. and Appelbaum, P., *Structuring the Debate About Ethical Prediction of Future Violence*, 17 L. AND HUM. BEHAVIOR 482 (1993), replying to Litwak that clinical evaluations still must be based on empirical research, at least in terms of relationships between variables.

⁵⁰ Grisso, *supra* note 37, at 241.

⁵¹ Hurst, H., *Crime Scene: Treating Juveniles as Adults*, 33 TRIAL 34(6) (July 1997) at 36-37. Hurst gives an excellent overview of the different approaches and which states have adopted each type of approach.

⁵² FLA. STAT. § 985.233 (1997).

cases to the adult criminal court and specified in some states for deciding on reverse waiver, including the offender's amenability to treatment and threat to public safety.⁵³ Under the Florida statute, the judge, in open court, must place on the record the reasons for the findings and determine whether to keep the individual in adult criminal courts or sentence the juvenile under the appropriate juvenile statute.

Conclusion

While there is a wide variation in statutes among the states, the underlying policy is the same in all states: deal more effectively with violent juvenile crime and protect the public from the chronic juvenile offender. Awareness of how a case has arrived at the adult criminal court is important for judges in considering how treatment of the case in adult criminal court achieves the broader policy purposes of juvenile transfer. Cases waived by a juvenile court judge will typically involve juveniles with long criminal histories who have not responded to juvenile sanctions. The waiver is based on the person rather than a particular crime. In those cases, an adult criminal court sanction that "gets the juvenile's attention" may be necessary. On the other hand, when a juvenile is in adult criminal court because of a statutory exclusion or prosecutorial direct file, the transfer is based on the crime rather than the person. The juvenile so transferred may not have an extensive prior criminal history. In those cases juveniles with no prior criminal history may be amenable to and better served by juvenile treatment sanctions rather than incarceration in an adult correctional facility, even if the crime committed is a violent one. For public policy purposes, it must be remembered that, ultimately, virtually all of the juveniles who go through adult criminal court will return to the streets at ages still within the prime crime-committing years.

⁵³ *Id.*



SECTION 3

THE IMPORTANCE OF UNDERSTANDING JUVENILE JUDGMENT AND COGNITION IN DETERMINING COMPETENCE AND CULPABILITY

By Steven Weller, J.D., Ph.D.

Dealing with youthful offenders who have been waived to adult criminal court raises difficult problems for adult criminal court judges, particularly in making certain legal determinations in the context of adolescent decision-making. This section reviews the literature on juvenile decision-making bearing on two critical areas of judicial decision making in dealing with children as defendants in adult criminal court:

- *determining competence*, including competence to be tried, competence to plead guilty or waive rights, and competence to participate in the trial; and
- *determining culpability*, for the purpose of evaluating sentencing and treatment options.

The Importance of Juvenile Judgment and Cognition in Determining Competence

The issue of competence is a critical issue in all criminal trials. Richard Bonnie proposes three underlying reasons for requiring competence. The first is *dignity*, that it is a violation of our moral values to punish someone who is not accountable for his or her actions. The second is *reliability*, in the sense of avoiding erroneous convictions. The third is *autonomy*, the value we place on self-determination by defendants of how their cases should proceed.⁵⁴

The criteria for determining the threshold question of whether an accused person is competent to stand trial was articulated for federal criminal trials by the United States Supreme Court in *Dusky v. United States*, 362 U.S. 402 (1960). The Supreme Court articulated a two-pronged test: "Whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him."⁵⁵ The principles articulated in *Dusky* were applied to the states in *Pate v. Robinson*, 383 U.S. 375 (1966). Then in *Drope v. Missouri*, 420 U.S. 162 (1975) the Supreme Court held that an individual who was competent at the start of a trial may later be determined not to be competent. The issue of competence must thus be considered throughout the proceedings.

Bonnie suggests that the issue of competence has two components: (1) competence to stand trial, which translates into the competence to assist counsel, without which the accused cannot be tried at all; and (2) the issue of decisional competence, or the ability of

⁵⁴ Bonnie, R., *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAVIORAL SCI. AND THE L. 291, 295-6 (1992). See also Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454 (1967).

⁵⁵ *Id.* at 402.

the accused to make rational choices concerning alternative courses of action.⁵⁶ Decisional competence may be further broken down into three components; (1) the decision to plead guilty; (2) the decision to exert or waive constitutional rights, such as the right to a jury trial; and (3) the decisions regarding choices of strategy during a trial. In Bonnie's framework competence to assist counsel is a threshold question that will determine whether the accused can be tried at all.⁵⁷ Lack of decisional competence, however, may not exclude a person from being tried altogether but may lead the court to override specific choices of the accused or rectify choices by surrogate decision-making.⁵⁸ The question of competence to assist counsel involves the values of dignity and reliability. Decisional competence involves the values of reliability and autonomy.

The issue of competence takes on different dimensions depending on whether adults or juveniles are involved. Scott, *et al.* suggest that there are two components of decision-making, *cognitive* and *judgmental*.⁵⁹ The cognitive component requires the ability to understand information, appreciate the relevance of the information for one's own situation and use the information to weigh the benefits and risks of different options. Cognitive competence is determined by the quality of the process used in decision-making.⁶⁰ The judgmental component encompasses the maturity, experience and independence to make good decisions. At least three factors affect the judgment of adolescents: (1) susceptibility to peer influence; (2) temporal perspective; and (3) willingness to take risks.⁶¹ Judgmental competence must be assessed at least in part by the outcomes of decisions made.⁶²

At the cognitive level of competence, research suggests that adults and adolescents aged 14 or over do not differ significantly.⁶³ In a study of 144 juvenile defendants in South Carolina sent to a psychiatric institute for competency evaluation, none of the youths in the sample under the age of 11 were deemed competent to stand trial, about 25% of the youths aged 11 or 12 were deemed competent to stand trial, and about half of the 13-year-olds were deemed competent. The percentage of youths aged 14 to 16 in the sample who were deemed competent was about equivalent to the percentage competent in the adult criminal population, based on intellectual comprehension.⁶⁴

Scott and her colleagues suggest, however, that adolescents and adults do differ in their judgmental capacities. They point out that adolescents are more likely than adults to

⁵⁶ Bonnie, *supra* note 54, at 294.

⁵⁷ *Id.* at 298.

⁵⁸ *Id.* at 299.

⁵⁹ Scott, E., et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 L. AND HUM. BEHAVIOR 221, 222 (1995).

⁶⁰ *Id.* at 224.

⁶¹ *Id.* at 227.

⁶² *Id.* See also Scott, E., *Judgment and Reasoning in Adult Decision Making*, 37 VILL. L. REV. 1607, 1610 (1992).

⁶³ Scott, *supra* note 58, at 224.

⁶⁴ Cowden, V. and McKee, G., *Competency to Stand Trial in Juvenile Delinquency Proceedings - Cognitive Maturity and the Attorney-Client Relationship*, 33 U. OF LOUISVILLE J. OF FAM. L. 629, 653 (1995). See also Grisso, T., *Juvenile Competency to Stand Trial: Questions in an Era of Punitive Reform*, 12 CRIM. JUST. 4, 9 (1997).

conform to the behavior of peers and to use peer approval or disapproval as a benchmark for making decisions. Adolescents are also more susceptible to the influence of parents.⁶⁵ As to temporal perspective, adolescents are more likely than adults to focus on immediate gains rather than long-term losses.⁶⁶ Finally, adolescents are less risk-averse than adults, in part because adolescents do not perceive all the risks of decisions due to lack of experience.⁶⁷

Under the cognitive, informed consent model of competence, it is assumed that idiosyncratic decisions are made on personal values and must be accepted as a legitimate expression of those values. This assumes that the judgment of the individual is to be accepted. With adolescents, however, personal values at any given time may be highly volatile, due to potentially poor judgment stemming from lack of self-reliance and a clear sense of identity. The values of adolescents may thus not reflect what they will value as adults.⁶⁸

There is even some suggestion that the congruence of adult and older adolescent decision-making under the cognitive model may not hold under all circumstances. Adolescent decision-making can vary by motivation, functioning under stress, and lack of experience to inform understanding, so that even equivalent rational capacities may lead to a different decisional analysis.⁶⁹

Scientific research shows that one of the main reasons why adolescents have difficulty with decision-making is due to the lack of development of the brain's prefrontal cortex.⁷⁰ The prefrontal cortex helps to control and suppress impulses and is critical to good decision-making. The National Institute of Mental Health along with researchers from UCLA have been comparing MRI scans of young adults with those of teens.⁷¹ Research shows that it takes at least twenty years for the prefrontal cortex to form. Therefore, an adolescent's brain development and lessened ability to control impulses and have good judgment should be considered in determining competency.

The following discussion considers how the above characteristics of juvenile decision-making may affect the issue of competence for four aspects of the adult criminal process:

⁶⁵ Scott, *supra* note 59, at 229-30.

⁶⁶ *Id.* at 231. But see Steinberg, L. and Cauffman, E., *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 L. AND HUM. BEHAVIOR 249 (1996), at 267, which points out that research is inconclusive as to the differential effects of time perspective on adult and adolescent decision-making.

⁶⁷ Scott, *supra* note 59, at 231.

⁶⁸ *Id.* at 228. The authors point out that the law even overrides adult judgment in some circumstances, including laws requiring the wearing of seat belts in automobiles and helmets on motorcycles and laws permitting the rescinding of door-to-door sales contracts. See also Steinberg and Cauffman, *supra* note 65, at 255.

⁶⁹ Grisso, T., *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOLOGY, PUB. POL'Y AND L. 3, 18 (1997).

⁷⁰ Weinberger, D., *A Brain is Too Young for Good Judgment*, N.Y. TIMES, March 10, 2001, § A at 13; see also the National Institute of Mental Health at www.nimh.nih.gov.

⁷¹ National Institute of Mental Health, *Teenage brain: a work in progress* (accessed Nov. 12, 2001) <<http://www.nimh.nih.gov/publicat/teenbrain.pdf>>.

(1) the threshold question of competence to assist counsel; (2) the issue of decisional competence to plead guilty; (3) the issue of decisional competence to exert or to waive certain constitutionally guaranteed rights; and (4) the issue of decisional competence to participate with counsel in making decisions concerning aspects of trial strategy.

Competence to Assist Counsel

The *Dusky* test is based on a cognitive model of competence. The competence to assist counsel includes the ability of the accused to: (1) understand the charges against him or her, the process, and the roles of the actors, particularly defense counsel and attorney-client privilege; (2) appreciate the significance of events for one's own case; and (3) recognize and relate relevant information to counsel for a defense.⁷²

Under the common law, competence was determined by an age formula. Children under the age of 7 were, as a matter of law, not competent to stand trial and had no criminal responsibility. For children between the ages of 7 and 13, there was a rebuttable presumption of incapacity, and competence to stand trial had to be proven beyond a reasonable doubt. Children aged 14 and over were treated as adults.⁷³ The common law provisions are very much in line with research results reported above for cognitive competence.⁷⁴

Problems of adolescent judgmental competence, however, may affect the ability of some older adolescents, particularly in the 14 to 16 age group, to competently assist counsel. Adolescent susceptibility to peer influence and distrust of adults may lead the young offender to be less than open or truthful in providing information to his or her attorney.⁷⁵ Further, the juvenile offender may be more prone to changing his or her story to reflect what the juvenile thinks the listener wants to hear.⁷⁶

Adolescents may also have problems with cognitive competence to assist counsel. The adolescent may not fully understand (or believe) the concept of attorney-client privilege and may view the role of the defense attorney as deciding the guilt and punishment of the offender.⁷⁷ This can further inhibit communication between the attorney and the juvenile offender. If these problems are present to a degree that communication between attorney and client cannot take place, the young offender may not be competent to stand trial in adult criminal court.

Competence to Plead Guilty

The decision to plead guilty involves two levels of competence; (1) competence to understand and assure the reliability of the admissions embedded in the plea; and (2)

⁷² Bonnie, *supra* note 54, at 297.

⁷³ Cowden and McKee, *supra* note 64, at 633.

⁷⁴ *Id.* at 653.

⁷⁵ Grisso, *supra* note 69, at 8.

⁷⁶ Grisso, *supra* note 69, at 16.

⁷⁷ *Id.*

competence to understand the long-term consequences of the decision and the rights being given up.⁷⁸ At the cognitive level, adolescents may lack the experience and information to understand the significance of possible exculpatory circumstances and thus fail to convey key facts to their attorney.⁷⁹ Prior experience with the criminal justice system doesn't seem to make any difference in this regard, and with respect to minorities may even lead to greater misunderstanding.⁸⁰

Adolescent judgment can affect the competence to plead guilty. The adolescent may be more likely to focus on the short-term benefits of pleading guilty, such as immediate release, rather than long-term consequences, such as having a criminal record.⁸¹ The adolescent may also be willing to plead guilty rather than be confined awaiting trial. Further, adolescents may place a higher value on peer approval than do adults.⁸² This may result in pleading guilty in order to protect one's peers, even if the individual is not guilty, rather than going to trial if that requires implicating one's peers.

Bonnie points out that lack of decisional competence to plead guilty does not automatically mean that the individual cannot be tried. The lack of decisional competence may be rectified by surrogate decision-making without barring adjudication altogether.⁸³ The most obvious solution is for the judge to reject the plea if the plea seems to be a result of any of the above factors.

Competence to Waive Constitutional Rights

There are a number of basic constitutional rights in the criminal process that an accused may assert or waive, including: (1) the right to remain silent; (2) the right to have a lawyer present during police questioning and to have a lawyer appointed if the accused cannot afford one; (3) the right to counsel or to represent oneself; (4) the right to a jury trial; (5) the right to testify or refuse to testify; and (6) the right to be present at trial.⁸⁴ An important aspect of decisional competence is the ability to make rational choices to waive any of those rights.

Critical to understanding these rights and how to assert them or waive them is understanding what the rights mean. At the cognitive level, adolescents may have a greater tendency than adults to view rights as conditional rights that can be taken away rather than as entitlements.⁸⁵ The right to remain silent, for example, may be interpreted by adolescents as not speaking until they are told.⁸⁶ They also might not understand that they can have a free lawyer appointed for police questioning if they can't afford an attorney. If adequate understanding is lacking, research is mixed as to whether defense

⁷⁸ Bonnie, *supra* note 54, at 311.

⁷⁹ Scott, *supra* note 59, at 232.

⁸⁰ Grisso, *supra* note 69, at 13.

⁸¹ *Id.* at 19.

⁸² Scott, *supra* note 59, at 1650.

⁸³ Bonnie, *supra* note 54, at 299.

⁸⁴ *Id.* at 307.

⁸⁵ Grisso, *supra* note 69, at 8.

⁸⁶ *Id.* at 11.

attorneys or parents are capable of teaching adolescents enough in the context of a criminal proceeding to enable them to decide wisely whether to waive rights.⁸⁷ Again, research indicates that having prior experience with the criminal justice system does not correlate with better understanding of the meaning of these rights.⁸⁸

Adolescent judgment can also affect the competence to waive rights. As noted earlier, the adolescent may focus more on short-term results than long-term consequences. This may lead an adolescent to talk to the police rather than demand an attorney if talking comes with the promise that he or she will then be allowed to go home.⁸⁹ The lack of long-term time perspective may be especially acute for disadvantaged youth, who don't have a vision of long-term life chances.⁹⁰ Peer pressure may lead an adolescent to make decisions against his or her interest, such as to "act up" at trial even if being disruptive may result in being sent out of the trial. Adolescents may also be more likely to make decisions in order to please someone, such as a parent, or to respond to peer influence by rebelling against someone.⁹¹

Again, Bonnie proposes that lack of competence to waive constitutional rights need not prevent adjudication.⁹² The courts may, for example, refuse to allow an individual to waive attorney representation and hold that the defendant is competent to stand trial only if represented. Lack of decisional competence may thus be rectified by surrogate decision-making.⁹³ Even with adults, autonomy and paternalism must sometimes be balanced.⁹⁴ Bonnie also suggests that a higher standard of competence be applied to decisions against the advice of one's attorney than for decisions accepting the attorney's advice.⁹⁵

Competence to Decide on Trial Strategies

A criminal defendant should be able to provide input to his or her attorney on a variety of trial strategies. Some of the trial strategies for which the client should be able to either participate in or override the attorney's decision include, among others: (1) the objectives of representation; (2) developing theories of the defense; (3) deciding how to approach lesser included offenses; (4) forgoing cross examination of prosecution witnesses; and (5) deciding what evidence to present or not present.⁹⁶

Decisional competence to decide trial strategies includes the cognitive ability to: (1) communicate a preference; (2) understand relevant information; (3) appreciate the

⁸⁷ *Id.* at 12.

⁸⁸ *Id.* at 8.

⁸⁹ *Id.* at 19.

⁹⁰ *Id.* at 20.

⁹¹ *Id.* at 19.

⁹² Bonnie, *supra* note 54, at 299.

⁹³ *Id.*

⁹⁴ *Id.* at 300.

⁹⁵ *Id.* at 310.

⁹⁶ *Id.* at 307.

significance of information; and (4) weigh information to reach a rational decision.⁹⁷ It is the ability to make rational choices among alternative courses of action. At the cognitive level, adolescents may not understand how events in one part of the trial affect other parts of the trial, such as the effect of conflicting testimony.⁹⁸ Adolescents may also have difficulty imagining hypothetical situations to predict the consequences of alternative trial strategies.⁹⁹ Issues of judgment can also affect competence in this area. The adolescent may make decisions on the basis of values that may change with added maturity, such as refusing to pursue some areas of defense to protect peers. They may also make decisions contrary to attorney advice solely to assert their autonomy.¹⁰⁰

Grisso suggests that the solution is not necessarily to declare the youthful offender not competent to stand trial. Rather, there is a "need for special protections to avoid adolescents' incompetent participation in their trials."¹⁰¹ If all else fails, those special protections will ultimately have to come from the judge.

Overall, the lesson from the literature on competence appears to be that younger adolescents, under age 12, will present substantial problems of competency in adult criminal court. Adolescents aged 12 to 13 must be treated with caution. Adolescents of age 14 and over, on the average, have the same level of cognitive competence as adults, but their exercise of competent decision-making will be more variable depending on the circumstances. Further, adolescents of age 14 and over still do not have the level of judgment possessed by most adults and may need special protection against wrong decisions. Where the adolescent is competent to stand trial but shows deficiencies in decisional competency, adjudication may not be barred, but the court may still take steps to protect the adolescent. In those circumstances, the decision on competency may be based on the actual decisions made by the youthful offender and not on the person's process of decision-making.

⁹⁷ *Id.* at 305-6.

⁹⁸ Grisso, *supra* note 69, at 8.

⁹⁹ *Id.* at 9.

¹⁰⁰ *Id.* at 19.

¹⁰¹ *Id.* at 20.

Table 3-1 summarizes the analysis of competency for the youthful offender in adult criminal court.

Table 3-1. Summary of Issues of Competence		
Area of Competence	Cognitive Needs	Difficulties for Children Due to Developmental Immaturity
Competence to assist counsel by: <ul style="list-style-type: none"> • Providing relevant information; • Being open and truthful with counsel. 	Ability to: <ul style="list-style-type: none"> • Understand the charges, the process and the roles of the actors, particularly defense counsel and attorney-client privilege; • Relate events to one's own situation; • Recognize and relate relevant information. 	<ul style="list-style-type: none"> • Viewing the defense counsel as the person who will decide what will happen to them may limit openness and truthfulness with counsel; • Inability to relate to adults, including defense counsel, and resulting in withdrawal from the trial; • Changing stories to reflect what the youth thinks each person wants to hear.
Decisional competence to plead guilty	Ability to: <ul style="list-style-type: none"> • Understand the long-term consequences of the guilty plea; • Understand the admissions embedded in the guilty plea. 	<ul style="list-style-type: none"> • Making decisions based on short-term results (e.g. early release on probation) rather than long-term consequences (e.g. having a criminal record or adult status for all crimes); • Failing to recognize possible exculpatory circumstances; • Failing to raise exculpatory evidence that may implicate peers.
Decisional competence to waive rights to: <ul style="list-style-type: none"> • Remain silent in police questioning; • Have an attorney at police questioning; • Counsel or represent oneself; • Have a jury trial; • Not testify against oneself; • Be present at the trial. 	Ability to: <ul style="list-style-type: none"> • Make rational choices; • Understand the consequences of decisions. 	<ul style="list-style-type: none"> • Viewing a right as something conditional that can be taken away rather than as an entitlement (e.g. treating the right to remain silent as not speaking until told to by police); • Not fully understanding rights (e.g. right to free appointed counsel); • Making decisions on short term results (such as being sent home by police) rather than long term consequences; • Making decisions to please or to rebel against someone; • Willingness to "act out" at trial and risk being sent out of the courtroom.
Decisional competence to choose or reject trial strategies, such as: <ul style="list-style-type: none"> • Testifying as defendant; • Presenting or not presenting evidence; • Not cross-examining prosecution witnesses. 	Ability to: <ul style="list-style-type: none"> • Understand and choose among alternative courses of action; • Understand relevant information; • Appreciate the significance of information; • Rationally use information to reach a decision; • Communicate a preference • Understand the long-term effects of decisions. 	<ul style="list-style-type: none"> • Inability to imagine hypothetical situations to predict possible consequences of decisions; • Not understanding how a strategy in one part of the trial can affect other parts of the trial (e.g. the effects of conflicting testimony); • Making decisions on the basis of values that may change with added maturity (e.g. peer pressure); • Making decisions contrary to advice solely to assert one's autonomy.

The Importance of Juvenile Judgment and Cognition in Determining Culpability

Grisso points out that the real task of dealing with youthful offenders should be to identify juveniles who are unlikely to offend again, who have also been victims or are otherwise vulnerable to be led into criminal behavior, or whose choices were the result of immature judgment rather than antisocial tendencies.¹⁰² Zimring adds that trying a juvenile in adult criminal court should be reserved for cases where the sanctions available through the juvenile court are inadequate for that offender.¹⁰³

Moffitt has attempted to create a typology that separates the immature adolescent offender from the truly antisocial one. The typology distinguishes *adolescence limited* antisocial behavior from *life-course persistent* antisocial behavior.¹⁰⁴ It is presented here in detail because, if valid, it could provide the courts with some guidance for deciding which juvenile offenders should remain in adult criminal court and which juvenile offenders would be good candidates for reverse waiver back to the juvenile court. There is, however, an important caveat. The typology was developed primarily with reference to Anglo males. It may be culturally and gender biased, and substantial research is needed to test the validity of the typology and to determine whether and how it applies to females and juveniles from non-Anglo cultures.

Moffitt starts by noting that a small percentage of offenders commit the majority of offenses, and a large percentage of adolescent offenders (about 95%) stop their criminal behavior when they reach adulthood and never engage in criminal behavior again.¹⁰⁵ On the other hand, during adolescence it is the norm (at least for males) to engage in some illegal behavior, and it is statistically aberrant to completely refrain from any illegal behavior.¹⁰⁶ It is the 5% of adolescents who will continue their criminal behavior into adulthood, if they can be identified while still in adolescence, that should justifiably be in adult criminal court. Once the life-course persistent style is fixed, which Moffitt believes happens after childhood but before age 18, adolescent offenders will likely not be amenable to treatment. As Moffitt points out, "Interventions with life-course persistent persons have met with dismal results."¹⁰⁷

According to Moffitt, the life-course persistent antisocial individual exhibits some distinct behavioral characteristics. Antisocial behavior starts in childhood, with early truancy and stealing. As the child grows older, the antisocial behavior continues, but grows to reflect the growing capabilities and changing circumstances of the individual.

¹⁰² Grisso, T., *supra* note 37, at 240.

¹⁰³ Zimring, F., *The Treatment of Hard Cases in American Juvenile Justice: In Defense of Discretionary Waiver*, 5 NOTRE DAME J. OF L. ETHICS AND PUB. POL'Y 267 (1991), at 276.

¹⁰⁴ Moffitt, T., *Adolescence Limited and Life-Course Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOLOGICAL REV. 674 (1993), hereinafter referred to as Moffitt (1993). Moffitt, T., *Adolescence-Limited and Life-Course-Persistent Offending: A Complementary Pair of Developmental Theories*, in Thornberry, T., ed., *DEVELOPMENTAL THEORIES OF CRIME AND DELINQUENCY*, Volume 7 (1997), pp. 11-54, hereinafter referred to as Moffitt (1997). See also Grisso, T., *supra* note 39, at 134.

¹⁰⁵ Moffitt (1993), *supra* note 102, at 676.

¹⁰⁶ *Id.* at 685.

¹⁰⁷ *Id.* at 684.

The individual may be truant at age 10, sell drugs and steal cars at age 16, and engage in robbery and rape at age 22. A key characteristic is that the antisocial behavior occurs across all venues, home, school, stores, work, etc.¹⁰⁸ These youths tend to associate primarily with other antisocial people.¹⁰⁹ They become involved in the underground economy.¹¹⁰ Finally, they are willing to engage in antisocial behavior alone as well as with others,¹¹¹ and commit more loner crimes such as violence or fraud.¹¹²

Moffitt suggests that the antisocial behavior of the adolescent-limited antisocial person is primarily motivated by attempts to enter the adult world. They learn their behavior by mimicking the behavior of their life-course persistent peers, who are admired for having the trappings of maturity, including: (1) independence from parents; (2) their own possessions; and (3) adult status derived from having attorneys, probation officers, social workers and businesses in the underground economy.¹¹³

According to Moffitt, adolescence-limited youths tend not to start committing crimes until they reach adolescence. Further, adolescence limited youth tend not to be consistent in their antisocial behavior. They may, for example, do well in school or at a job. This can result in different people having different assessments of the individual. They exhibit their antisocial behavior sporadically rather than consistently.¹¹⁴ They tend to need peer support for their crimes and are unlikely to commit antisocial acts alone.¹¹⁵ Finally, their criminal acts tend to be aimed at achieving adult status, such as to gain the attention of adults (e.g., through vandalism), to look older (e.g. by smoking and using alcohol) or to tempt fate (e.g., by shoplifting). Their crimes thus symbolize autonomy or adult privilege.¹¹⁶ Table 3-2 summarizes Moffitt's characterizations of adolescent-limited antisocial behavior.

Issue	Manifestations
When	<ul style="list-style-type: none"> • First episode comes in adolescence. • Incidents are sporadic, with gaps when no antisocial behavior occurs.
Where	<ul style="list-style-type: none"> • Antisocial behavior in limited locales or situations. • Prosocial behavior will occur in other locales and situations.
With whom	<ul style="list-style-type: none"> • Antisocial behavior usually involves peers.
What acts	<ul style="list-style-type: none"> • Primarily acts to achieve adult status, such as to (1) gain the attention of adults (e.g., vandalism), (2) look older (e.g., alcohol, smoking) or (3) tempt fate to show independence (e.g., shoplifting). • Acts resulting from bad judgment leading to dangerous situations. • Acts in which the offender plays a small part in relation to peers.

¹⁰⁸ *Id.* at 679.

¹⁰⁹ *Id.* at 683.

¹¹⁰ *Id.* at 687.

¹¹¹ *Id.* at 688.

¹¹² *Id.* at 695.

¹¹³ *Id.* at 687.

¹¹⁴ *Id.* at 686.

¹¹⁵ *Id.* at 688.

¹¹⁶ *Id.* at 695.

It is important to keep in mind that the above behavioral manifestations may not describe the manifestations of life-course persistent and adolescent limited antisocial behavior for minority youth and may overstate the propensity for life-course persistent antisocial behavior among those youth. The absence of the manifestations listed in Table 2 should thus not necessarily rule out treating the juvenile as an adolescent-limited offender, if other circumstances are present to suggest otherwise.

Juvenile Judgment, Culpability, and Sentencing the Juvenile in Adult Criminal Court

State statutes on sentencing juveniles who are convicted of crimes in adult criminal court vary widely in their provisions. Some states merely apply adult sentencing provisions to the juvenile in adult criminal court. The trend recently has been to structure and limit judicial discretion in sentencing by basing sentences on offense categories rather than on offender characteristics and by specifying minimum sentences for some offenses. Those sentencing provisions would also apply to juveniles who were tried in adult criminal court.

Other states provide extensive, separate sanctioning options for juvenile offenders in addition to standard adult sanctions. A recent trend is toward the use of *blended sentences*. Blended sentences involve the power of the court to impose both juvenile and adult sentences. The power may reside in the juvenile court or in the adult criminal courts. The court, depending on the state, may have to choose between the two types of sentences or may be able to impose both types of sentences concurrently. Where adult and juvenile sentences are imposed concurrently, the adult sentence is typically suspended unless the offender violates the conditions of the juvenile sentence.¹¹⁷ In Florida, for example, judges are given three options, sentencing as an adult, sentencing as a juvenile or sentencing under the Youthful Offender statute.¹¹⁸

The Florida statute further provides that, in selecting options, the judge must consider a set of criteria identical to that delineated in *Kent v. U.S.*, 383 U.S. 541 (1966), for waiver of cases to the adult criminal court and specified in some states for deciding on reverse waiver, including the offender's amenability to treatment and threat to public safety.¹¹⁹ In this approach to sentencing, Moffitt's categories of antisocial behavior might be relevant in deciding whether a juvenile offender in adult criminal court should be sentenced as a juvenile and what sentencing options to select.

Adult sentences are determined primarily on the basis of two factors, harm and culpability.¹²⁰ One critical issue thus facing judges in all states in sentencing a juvenile offender is determining the degree of culpability. The degree of culpability is also an important component for deciding aggravating or mitigating circumstances. Culpability

¹¹⁷ Hurst, H., *Crime Scene: Treating Juveniles as Adults*, 33 TRIAL 34(6) (July 1997) at 36-37. Hurst gives an excellent overview of the different approaches and which states have adopted each type of approach.

¹¹⁸ FLA. STAT. § 985.233 (1997).

¹¹⁹ *Id.*

¹²⁰ Feld, B., *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility and Sentencing Policy*, 88 J. OF CRIM. L. AND CRIMINOLOGY 68 (1997), at 101.

is based on the quality of the offender's choice.¹²¹ For example, the penalty for homicide depends on how the offender made the decision to commit the act resulting in the homicide: with premeditation, intentionally in the heat of the moment, recklessly, negligently or accidentally.¹²²

When applied to sentencing juveniles, culpability is another issue that requires an understanding of juvenile behavior and decision-making. Feld suggests that "youthfulness" in itself affects the quality of choice and should be an automatic factor in sentencing.¹²³ He points out that some states have specifically included youthfulness as one factor in determining mitigating circumstances.¹²⁴ North Carolina's statute, for example, includes among its mitigating factors for sentencing:

The defendant's age, immaturity, or limited mental capacity at the time of the commission of the offense significantly reduced the defendant's culpability for the offense.¹²⁵

Feld suggests that the cognitive parity of adults and adolescents (as was discussed earlier in this essay) is not enough to justify the identical sentencing of juveniles and adults.¹²⁶ He points to the research on adolescent decision-making that was discussed earlier in this essay, which shows that the element of judgment is a critical factor in understanding adolescent decision-making.¹²⁷ Feld thus proposes that judgment must be a factor in determining culpability.¹²⁸ Judges must consider not only the criminal act itself, but the quality of the choices associated with the act. A variety of factors relating to judgment affect the quality of choices made by juveniles. Among those factors are impulsiveness and lack of self-control, focus on short-term gains and failure to assess long-term consequences, susceptibility to peer pressure and influence, need for peer support, and a greater willingness to take risks.¹²⁹

Conclusion

The following is a summary of the key points suggested by recent research on adolescent decision-making discussed above.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 102. For the proposition that immaturity should be a factor in punishment, see also Zimring, F., *Juvenile Violence in Policy Context*, 31 VAL. U. L. REV. 419 (1997) at 424, Zimring, F., *Kids, Guns and Homicide: Policy Notes on an Age-Specific Epidemic*, 59 L. AND CONTEMP. PROBS. 25, 36 (1966), and Zimring, F., *supra* note 101 at 279.

¹²⁴ Feld, *supra* note 118, at 116.

¹²⁵ N.C. GEN. STAT., § 15A-1340.16(e)(4), (1997). The courts in North Carolina have held, however, that it was within the judge's discretion to find that age was not a mitigating factor for a 17 year old who committed a homicide. See *State v. Moore*, 78 N.C. App. 77, 337 S.E. 2d 66 (1985).

¹²⁶ Feld, *supra* note 118, at 105.

¹²⁷ *Id.* at 106.

¹²⁸ *Id.*

¹²⁹ *Id.* at 107, 110.

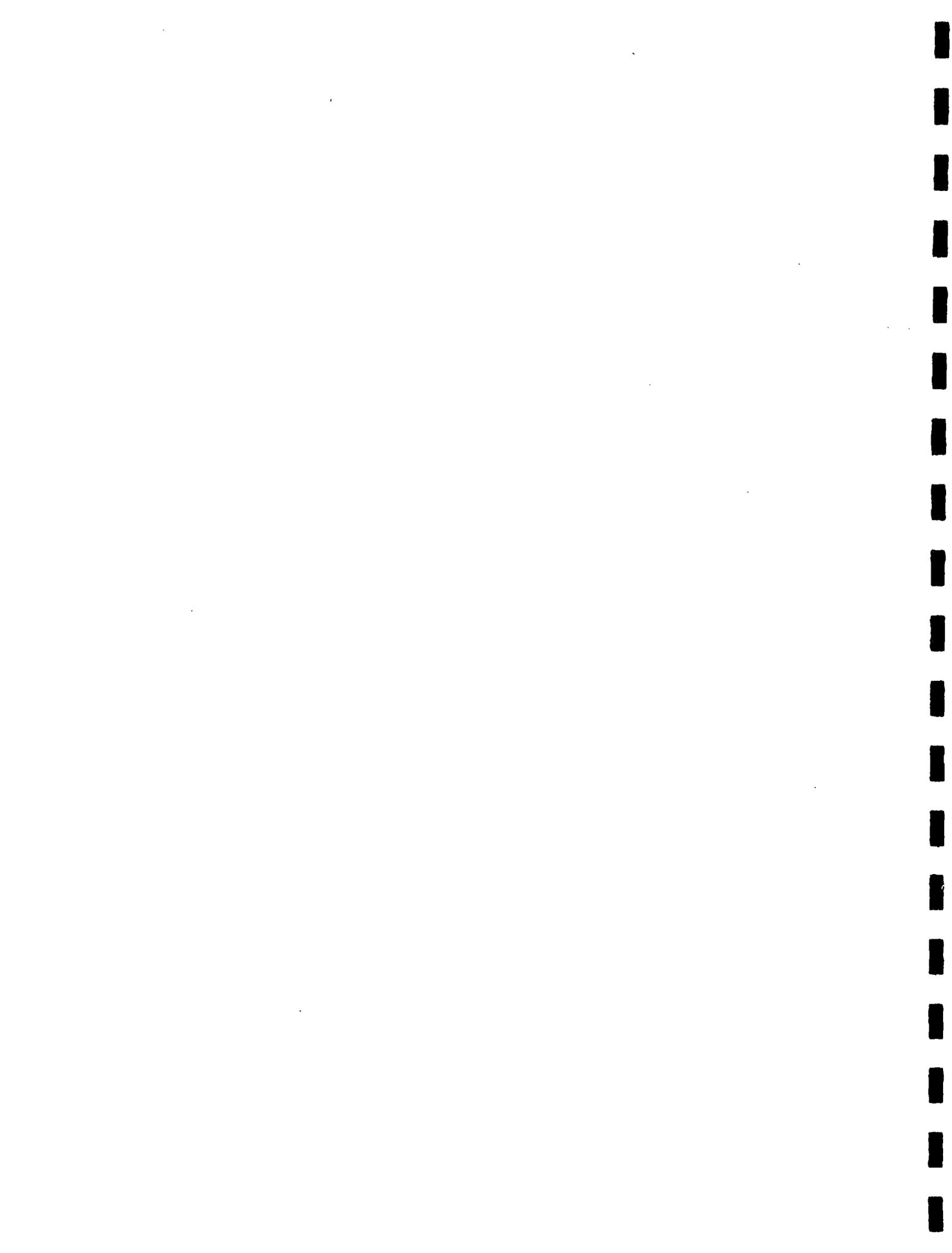
Determining the threshold decision of competence to stand trial. The primary issue is whether the defendant has the competence to assist counsel. Adolescents aged 14 and over tend to have the same reasoning capabilities as adults. Most are thus competent to stand trial. Particularly immature adolescents, however, may not understand the criminal process, especially the meaning of attorney-client privilege, and may have poor judgmental competence. This may inhibit their ability to communicate adequately with counsel.

Determining decisional competence. Judgmental competence may affect the competence of an adolescent to willingly and knowingly plead guilty or waive constitutional rights. It may also affect the competence of the adolescent to participate with his or her attorney in determining trial strategies. Finding lack of decisional competence, however, does not have to serve as a bar to adjudication. The judge may override some decisions of the adolescent while still proceeding with the trial.

Determining culpability for purposes of sentencing. Again, judges should separate the adolescence-limited juvenile from the life-course persistent juvenile. This requires assessing the effects of immaturity of judgment, as opposed to long-term antisocial tendencies, on the criminal act. Adult sanctions should be reserved for life-course persistent antisocial individuals.

Determining cognitive processing and reasoned perceptions. The recent research of MRI scans of teens shows that the full development of their brains, in particular the frontal lobe, does not occur until at least twenty years of age. This undeveloped brain may cause teenager to act impulsively or make decisions which were not based on good decision-making processes. Although not an excuse for conduct, it may at least help to explain the actions.

Finally, the research suggests that judges lean toward keeping cases in the juvenile court when the issue is in doubt. There is evidence that trying these cases in the adult criminal court often leads to results that are worse for the individual and for the safety of the public.



SECTION 4

ISSUES OF RACE AND CULTURE

By Michael L. Lindsey, J.D., Ph.D. and Steven Weller, J.D., Ph.D.

As we enter the new millennium, America has become the most racially diverse and wealthiest nation on the planet. Our gains in economic prosperity, however, are not uniformly shared across society, as whole segments of American communities have become marginalized – seemingly unimportant to society at large. One fundamental aspect of this marginalization is the disparate treatment of persons of color that occurs incrementally across the entire spectrum of America's criminal justice system. This is an issue that permeates American society, and thus its impact on our justice system represents a microcosm of a much larger social phenomenon.

This disparity, rarely a result of clear-cut decisions to provide unfair treatment, threatens to produce in communities in every city and state an unhealthy and counterproductive distrust of the criminal justice system.¹³⁰ As a result, most states have formed commissions appointed by the chief justices of the state supreme courts to research, analyze, make and publish recommendations and findings on the issue of race and gender bias in the state court systems. In part, the impetus for these state chief justice initiatives grew out of the *First National Conference on Eliminating Racial and Ethnic Bias in the Courts*, held in March 1995, in Albuquerque, New Mexico. There were a number of recommendations made at the conference that serve as the basis for action plans among the various states. They include:

- Establishing and operating a commission or task force to study bias in the courts.
- Researching the existence, extent and effects of racial and ethnic bias in the courts.
- Eliminating bias in recruitment and employment of court employees.
- Institutionalizing change by translating findings and recommendations into sustained implementation.
- Staying vigilant against bias by providing informal feedback, formal grievance procedures and ethics.
- Providing diversity training in the courts.
- Protecting the rights of linguistic minorities through the use of interpreters in court proceedings.
- Recognizing racial and ethnicity issues in criminal law and the criminal justice process.
- Clarifying the interrelations of state, tribal and federal courts.
- Achieving a diverse jury.
- Providing equal access in the juvenile justice system.
- Combining gender and race.

¹³⁰ REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS, The Sentencing Project, Washington, D.C., at pg. 1 (October 2000).

- Coordinating the efforts of gender and racial/ethnic task forces in the investigation of bias in the courts.
- Creating a national consortium of task forces and commissions on racial and ethnic bias in the courts.¹³¹

Differing Perceptions of Bias in the System

A recent study conducted by the American Bar Association documented differences in how Anglo and African American lawyers view the presence of racial bias in the justice system.¹³² The following tables present the major findings of that study. The differences in perceptions between African American and Anglo lawyers should be an indicator that racial bias in the justice system is still a problem that needs attention.

The amount of racial bias they believe currently exists in the system:

	AFRICAN AMERICAN LAWYERS	ANGLO LAWYERS
Very Much	52.4%	6.5%
Some	45.2%	55.7%
Very Little	1.2%	29.6%
Don't Know	1.2%	8.2%

How they think the amount of racial bias in the justice system compares to other segments of society:

	AFRICAN AMERICAN LAWYERS	ANGLO LAWYERS
More	22.7%	5.7%
Same	69.6%	40.5%
Less	5.9%	45.8%
Don't Know	1.8%	8.0%

Whether they have witnessed an example of racial bias in the justice system within the past three years:

	AFRICAN AMERICAN LAWYERS	ANGLO LAWYERS
Yes	66.9%	16.1%
No	31.1%	82.4%
Don't Know	2.0%	1.5%

The lawyers polled split sharply on their assessments of the ability of the justice system to eliminate racial bias in the future:

¹³¹ *First National Conference on Eliminating Racial and Ethnic Bias in the Courts*, Albuquerque, New Mexico (March 1995).

¹³² See *Race and the Law*. A.B.A.J., (February 1999). The data came from a telephone survey of 1,002 lawyers who are members of the American or the National Bar Association or both, conducted November 9 through December 3, 1998, by Research USA. Margin of error is ±4.6%.

	AFRICAN AMERICAN LAWYERS	ANGLO LAWYERS
Hopeful	59.1%	80.7%
Pessimistic	38.2%	15.1%
Don't Know	2.7%	4.2%

The article noted that future issues of the AMERICAN BAR ASSOCIATION JOURNAL would address the issue of "race and culture" from other ethnic perspectives, e.g., the Latino National Bar, the National Asian Pacific American Bar, and the Native American Bar Associations.

The Extent of Ethnic and Racial Overrepresentation in the Criminal Justice System

Statistics from communities and the nation as a whole show evidence of the impact of racial disparity at all levels of the criminal justice system. These disparities often have a cumulative effect, whereby decisions made at one stage of the system contribute to increasing disparities at the following stages. For example, if bail practices result in similarly situated minorities being detained before trial at greater rates than Anglos, they will also be disadvantaged at trial and sentencing by having less access to defense counsel, community resources, and treatment options.

The overrepresentation of minorities in the criminal justice system, defined as a higher percentage of minorities in the criminal justice system than in the general population of the jurisdiction, appears to be a national phenomenon. Some of the statistics on ethnic and racial overrepresentation in the criminal justice system show the following:

- Nearly one in three (32.2%) African American males in the age group 20-29 (827,440 African American males) are under criminal justice supervision on any given day (e.g., in prison or jail, on probation or parole).
- African American women have experienced the greatest percentage increase in numbers under criminal justice supervision of all demographic groups in recent years, increasing 78% from 1989 to 1994.
- The proportion of Latinos in state and federal prisons doubled from 1980 to 1993, rising from 7.7% of all inmates to 14.3%.¹³³

With regard to drug policies and racial disparities:

- Drug offenders represented the largest proportional growth of inmates nationally in recent years, increasing by 510% from an estimated 57,975 in 1983 to 353,564 in 1993.
- While African Americans constitute 13% of all monthly drug users, they represent 35% of arrests for drug possession, 55% of convictions, and 74% of prison sentences.

¹³³Mauer, M., and Huling, T. YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER, The Sentencing Project, Washington, D.C. (1995).

- The number of African American women incarcerated for drug offenses in state prisons increased by 828% from 1986 to 1991.

With regard to the impact of incarceration:

- One in seven (14%) African American males are currently or permanently disenfranchised from voting as a result of a felony conviction.
- Research has documented that a first-time arrest for a property crime results in a 7% decline in incomes.¹³⁴

A recent study conducted in California on juvenile transfers, *The Color of Justice: An Analysis of Juvenile Adult Court Transfers in California*,¹³⁵ found that minority youth are over represented at every stage of the juvenile justice system. In interviews with juvenile justice system policy makers, most stated that race was a factor in the decision-making process. In California, minority youth, particularly African American and Latino youth, were consistently more likely to receive harsher dispositions than Anglo youth, and more likely to be committed to state institutions than Anglo youth for the same offenses.

The study was based on data collected from Los Angeles County Probation Department Research Division, Los Angeles County District Attorney's Office, California Youth Authority Research Division, California Department of Justice Criminal Justice Statistics Center, Department of Finance Demographic Research Division and the United States Bureau of the Census. Three years were examined, 1996-98 (arrestees) and 1997-99 (sentencing). The one-year difference takes into account that sentencing occurs substantially after arrest. The purpose of the study was to test the hypothesis that minority youths are disproportionately transferred to adult criminal courts and sentenced to incarceration compared to Anglo youths in similar circumstances.

The findings of the study included the following:

- In 1996, Anglos comprised 25%, Latinos 51%, African Americans 13% and Asians and other races 11% of Los Angeles County's population between ages 10 and 17. *However*, the Los Angeles Probation Department data reveal that Latino, African American, and Asian/other youths accounted for 95% of the cases where youth were found "unfit" for juvenile court and transferred to adult criminal court in 1996.
- Latino youth accounted for the largest percentage of cases found unfit (59%).
- Latino youths are 6 times more likely, African American youths are 12 times more likely, and Asian/other youths are 3 times more likely than Anglo youths to be found unfit for juvenile court and transferred to adult criminal court in Los Angeles County.

¹³⁴ Mauer, M., INTENDED AND UNINTENDED CONSEQUENCES: STATE RACIAL DISPARITIES IN IMPRISONMENT, The Sentencing Project, Washington, D.C., (1997).

¹³⁵ Males, M., and Macallair, D., THE COLOR OF JUSTICE: AN ANALYSIS OF JUVENILE ADULT COURT TRANSFERS IN CALIFORNIA, Justice Policy Institute, (2000).

- Compared to Anglo youths, minority youths are 2.8 times as likely to be arrested for a violent crime, 6.2 times as likely to wind up in adult criminal court, and 7 times as likely to be sent to prison by adult criminal courts.

Reasons For Overrepresentation of Minority Youth in the Criminal Justice System

There have been a variety of possible explanations offered in the literature for the disparity between minority and Anglo youth in the justice system, including:

- Minority youth may have higher crime rates;
- There may be differences in treatment of minorities and Anglos due to prejudice and discrimination against minorities by justice system officials;
- A greater police presence in minority communities may lead to disparities in juveniles arrested; and
- Decisions in the juvenile justice system may be made on criteria that work to the disadvantage of minority youth as compared with Anglo youth.

There is evidence in the literature that minority youth do not commit appreciably more crime than Anglo youths. The overrepresentation of minority youth in the juvenile justice system, where it exists, thus cannot be merely passed off as a reflection of higher crime rates by minority youth. Police around the country seem to be arresting minority youth at a rate higher than their actual crime rate as compared with Anglo youth.

The literature suggests that the explanation for overrepresentation of minority youth lies in a complex set of criteria applied to a variety of decisions throughout the juvenile justice process, from initial apprehension and arrest to final disposition, that lead systematically to different results for minority and Anglo juvenile offenders. Further, the effects can be cumulative, leading to greater disparities in later parts of the juvenile justice process. It is up to the judiciary to assure that these criteria are applied fairly and up to the system as a whole to develop programs and interventions to minimize the discriminatory effects of the criteria.

Among the criteria that can work to the disadvantage of minority youth are: (1) the use of demeanor and appearance by police to decide whether to arrest a juvenile; (2) the use of family considerations, including parental supervision, family criminality and family values, all of which are beyond the control of the juvenile, to determine a variety of decisions, including whether to arrest, detain, refer to court, place in diversion, put on probation and place in out-of-home or secure placement; and (3) the use of prior offense criteria to determine the severity of the sanctions to be applied against the juvenile. Some of these criteria, especially the family situation, may lead justice system officials to consciously opt for more intrusive sanctions for a juvenile offender, e.g., in order to replace lacking parental supervision or provide treatment at state expense.

The extent of overrepresentation of minorities in the justice system and the causes of the overrepresentation is likely to differ from jurisdiction to jurisdiction. Each jurisdiction thus needs to assess its own problems and determine their causes. Once the problems and

causes have been assessed, a variety of interventions may be possible. Possible interventions may include:

- Strategies to assist minority juveniles and their families in dealing with the justice system;
- Strategies to promote better cultural competence within justice system agencies and better collaboration between the justice system and community service providers; and
- Strategies to develop better services to meet the special needs of minority juveniles.

Review of the Literature on Overrepresentation of Minority Youth

Huizinga and Elliot studied self-reports of delinquent behavior in a national sample of 11 to 17-year-olds. Their findings include: (1) only about 24% of all delinquent behavior results in arrest; (2) about 84% of all juvenile offenders are never arrested, and about 80% of all violent juvenile offenders are unknown to the police; (3) the distribution of offenses for juveniles arrested does not reflect the actual distribution of offense behavior, as some offenses have a higher risk of arrest than do others; and (4) minority juveniles are not more delinquent than Anglo juveniles. They conclude, "Overall, these findings suggest that there are few if any substantial and consistent differences between the delinquency involvement of different racial groups." They hypothesize that differential arrest rates between Anglos and minorities may be due to differences in: (1) the ability to avoid apprehension and arrest; (2) the availability of parental and legal support; and (3) the general demeanor of the juvenile.¹³⁶

Krisberg et al. also found that differences in reported rates of criminal behavior between Anglo and minority juveniles were not statistically significant, either in involvement or in incidence (the number of offenses per offender). They also found that there was great variation between jurisdictions, so that local contextual factors may be important.¹³⁷

In a study of juvenile arrests in nine Michigan cities, Wordes and Bynum found disproportionate arrests of minorities in all the study sites. They noted that this was consistent with other studies in finding that minority juveniles were more likely to be arrested and referred to court than were Anglo juveniles. They also found that the disproportion was greater for jurisdictions with smaller minority populations. The major factors reported by police officers in deciding whether to arrest or handle a case informally include:

- Seriousness of the offense;
- Attitude, demeanor and appearance of the juvenile; and
- Family issues such as level of parental supervision, attitude of the parents and cooperation from the parents.

¹³⁶ Huizinga, D. and Elliott, D., *Juvenile Offenders: Prevalence, Offender Incidence, and Arrest Rates by Race*, 33 CRIME AND DELINQ. 206, 223 (1987).

¹³⁷ Krisberg, B., et al., *The Incarceration of Minority Youth*, 33 CRIME AND DELINQ., 173, 205 (1987).

As to why the police may stop a juvenile, "suspiciousness" was cited as a factor, including "a black kid in a white neighborhood." It is clear that some of the above factors can lead to differential treatment of minority and Anglo juveniles.¹³⁸

Burnett found that some of the overrepresentation of minority youth in the juvenile justice system is due to "overzealous police officers acting on less than probable cause or even less than reasonable articulable suspicion." The police expect that their actions will not be questioned. Police will stop minority youth in circumstances where they would not have stopped an Anglo youth. Minority youth are more likely to act furtively on seeing a police car, arousing the suspicion of the police officer. The judge is responsible for assuring that the arrest was made with probable cause.¹³⁹

Fagan, et al. looked at the cumulative effects of minority status at six decision points in the juvenile justice process: apprehension, detention, prosecutorial charging, adjudication, probation and disposition. The research compared differences in treatment of Anglos and minorities for three categories of offenses: violent offenses, serious offenses and other (minor) offenses. The research was conducted in a mid-sized metropolitan area (population 250,000 to 1,000,000) in a western state. Overall, the study found that "the race of juvenile offenders influences decisions to apprehend, detain, charge, adjudicate and punish juveniles who are accused of a range of offenses." It also found that the effects were cumulative through the process, exacerbating the effects of race at the later stages. The differences between minorities and Anglos were more pronounced for the serious and minor offenses than for the violent offenses.

More specifically, for serious or minor offenses the study found:

- For juveniles with no prior record, a higher percentage of minority juveniles were referred to court than were Anglo juveniles (46% of minorities arrested for serious offenses as compared with 29% of Anglos arrested for serious offenses, 9% of minorities arrested for minor offenses as compared with 4% of Anglos arrested for minor offenses);
- For juveniles with prior offenses, Anglos had charges dismissed about one-third of the time while minorities rarely had charges dismissed; and
- Minority juveniles were committed to corrections more often than were Anglo juveniles, even controlling for prior offense history, family structure, age, sex, and legal representation.

The above can lead to cumulative effects. Minorities with no prior record were more likely to be prosecuted than were Anglos, and thus were more likely to end up with a record. Minorities were less likely to have charges dismissed than were Anglos once

¹³⁸ Wordes, M and Bynum, T., *Policing Juveniles: Is There Bias Against Youths of Color?* in MINORITIES IN JUV. JUST., pg. 47-65 (Leonard, K., et al. eds., Sage 1995).

¹³⁹ Burnett, A., *Race and National Origin as Influential Factors in Juvenile Detention*, 3 D.C. L. REV. 355, 371 (1995).

they had a prior record, thus widening the disparity in treatment. Finally, minorities were more likely to be incarcerated than were Anglos.¹⁴⁰

Feld studied the relative effects of race and selected legal variables (severity of offense and prior record) on juvenile justice decisions regarding appointment of counsel, pretrial detention and dispositions involving the use of out-of-home or secure placement. He noted that one possible explanation for minority overrepresentation in the juvenile justice system was that minorities committed more and more serious crimes. He found the following:

- The severity of the present offense and the juvenile's prior record, the strongest explanatory variables in Feld's study, combined were only able to explain one-quarter of the variance in sentencing of juveniles;
- Race had a small but statistically significant independent effect on the use of pretrial detention and out-of-home placement at disposition;
- The use of pretrial detention has an effect on the later use of out-of-home placement at disposition.

Feld also points out that extra-legal variables affecting juvenile justice decisions, such as family status, treatment needs, etc., may lead to racial differences. These variables were not investigated in Feld's study.¹⁴¹

Bishop and Frazier's statewide analysis in Florida of the effects of race on juvenile justice decisions showed that there was persistent overrepresentation of minorities at all stages of the juvenile justice process. The discrimination did not appear to be intentional but rather was the result of variables used in the decision-making process that affected Anglo youth and minority youth differently. They found that the decision at intake to divert a youthful offender or file a delinquency petition, which then has ramifications throughout the process, is based in part on parental and family factors that can work against the minority offender. The likelihood that diversion will be considered as a viable option will be substantially reduced if:

- The parents of the offender cannot be contacted;
- The parents are unable to come for an interview; or
- The parents are viewed as uncooperative.

The same factors may lead to a decision to detain the youth. A minority youth is more likely to come from a family where the parents cannot afford to take time off from work, do not have transportation or distrust authority. That youth will be at a disadvantage in the juvenile justice system. Further, minority youth may not have access to private treatment. Justice system officials may use adjudication as a means to get the youth

¹⁴⁰ Fagan, J., et al., *Blind Justice? The Impact of Race on the Juvenile Justice Process*, 33 CRIME AND DELINQ. 224, 258 (1987).

¹⁴¹ Feld, B., *The Social Context of Juvenile Justice Administration: Racial Disparities in an Urban Juvenile Court* in, MINORITIES IN JUVENILE JUSTICE pg. 66-97 (Leonard K., et al. eds., Sage 1995).

committed to a residential facility or into treatment programs provided at state expense.¹⁴²

Corley, et al. looked at how family factors influence juvenile justice processes and sanctions. The study focused on male offenders. It concludes that youth of color and poorer youth are more at risk for intrusive sanctions due to family factors. The study found that two family factors, *caregiver control* and *family structure*, were important to juvenile justice officials at all stages of the juvenile justice process, intake, case processing, disposition and placement. These factors are extra-legal, that is, unrelated to the severity of the offense or the criminal record of the juvenile.

- Caregiver control is the level of restraint that the caregiver (parent, guardian, etc.) is able to exert over the juvenile and the respect that the juvenile shows toward the caregiver.
- Family structure includes living arrangements, family criminality, priority given to child rearing, transmittal of values such as hard work and education, and the presence of two parents.
- Issues of structure and control sometimes merge -- family structures that reduce control are considered less desirable by justice officials.

The level of caregiver control and family structure are important in the decision to file a petition or handle a case informally and the decision to send a juvenile to probation rather than a residential facility. Lack of caregiver control and family structure that is perceived to reduce control or transmit the wrong values will increase the perception of juvenile justice officials that there is a need for outside controls on the juvenile. If juvenile justice officials do not believe that there will be adequate control over the juvenile, they are less likely to refer the juvenile to diversion programs. Lack of caregiver control also increases the likelihood that the juvenile will be sent to a residential facility.

The family values for which officials look include a high value on child rearing, hard work and education. Criminality of siblings is considered especially problematical, in that it both provides a temptation to the juvenile and shows lack of parental control. Two parent families are preferred to single parent families. As a result, non-traditional family structure, which is more likely to occur in minority families, works against the juvenile.¹⁴³

A study by Devine, et al. of the experiences of five pilot states working under an OJJDP funded initiative to address the problem of disproportionate confinement of minorities through the juvenile justice system provides insight into how a jurisdiction might address the problem. The states all undertook a similar process that involved five steps: (1) determining a lead agency and identifying resources for the initiative; (2) collecting and analyzing juvenile justice data at all decision points in the juvenile process to identify the

¹⁴² Bishop, D. and Frazier, C., *Race Effects in Juvenile Justice Decision Making: Findings of a Statewide Analysis*, 86 J. OF CRIM. LAW AND CRIMINOLOGY 392, 414 (1996).

¹⁴³ Corley, C., et al., *Conceptions of Family and Juvenile Court Processes: A Qualitative Assessment* 18 JUSTICE SYSTEM JOURNAL 157, 172 (1995).

extent and locus of the problem; (3) identifying the underlying causes of the problem; (4) developing interventions to address the problem; and (5) developing methods to measure the impact of the interventions.

The intervention strategies considered under the initiative depended on the contributing factors to minority overrepresentation. Included among the strategies considered were:

- *Advocacy strategies* to help the juveniles and their families better deal with the system, such as (1) providing information, expertise or advocates to the juveniles and their families, and (2) exerting pressure on the system to revise decision-making guidelines and improve services. As an example, one pilot site employed minority juvenile justice specialists to assist minority juvenile offenders throughout the juvenile justice process.
- *Collaboration strategies* to encourage the justice system to work better with community service providers, such as (1) developing collaborative working relationships among justice system and community service agencies, and (2) improving cultural competency among professionals in the system. As an example, one pilot site developed a statewide cultural competency training program for people who interact with juvenile offenders.
- *Alternative resource development strategies*, such as (1) developing diversion programs for minority juvenile offenders, and (2) developing prevention programs within the minority communities. As an example, one state developed a law enforcement option that allowed a police officer to issue a civil citation to a juvenile in lieu of arrest with a sanction of up to 40 hours of community service.¹⁴⁴

Suggestions for Judges Designed to Assist in Reducing Racial, Ethnic, and Gender Bias in the Courts

Judges can provide important leadership in encouraging comprehensive, community-based, collaborative coalitions to partner with those in the administration of justice to assess locally if ethnic minority defendants are treated disparately:

- at arrest;
- at bail/release decision points;
- at the assignment of defense attorneys;
- in diversion decisions;
- in the plea negotiation process;
- in the management of the court docket;
- at sentencing.

¹⁴⁴ Devine, P., et al., *Disproportionate Minority Confinement: Lessons Learned from Five States*, JUVENILE JUSTICE BULLETIN, Office of Justice Programs, OJJDP, U.S. Dept. of Just (December, 1998).

Additionally, judges are asked to consider the following specific recommendations and suggestions that are designed to assist in efforts and strategies to reduce racial, ethnic, and gender bias in the courts.

- Vigorously support the hiring of competent professionals, reflecting the population of clients served, in senior-executive decision-making positions throughout the criminal and juvenile justice systems.
- Have judges and their staff participate in racial, class, and gender diversity training, specifically designed for court personnel.¹⁴⁵
- Request that data be collected within their jurisdiction to determine if ethnic minority defendants are treated disparately at arrest, the bail/release decision, the assignment of the court docket, and sentencing.
- Analyze the use of judicial and prosecutorial discretion as applied with minority and non-minority defendants.
- Participate in continuing education seminars that train staff in ways to improve pre-sentence investigation approaches, alternatives to incarceration, eligibility requirements, etc.
- In collaboration with other criminal justice officials, focus attention on the pre-sentence investigation (PSI) process designed to produce a PSI model that guides the development of client specific plans.
- Work with other criminal justice officials and representatives of ethnic minority communities to design and implement useful and effective alternative sanction programs in order to have a full array of options available to the bench.
- Manage court dockets with an eye toward improving the practical functioning of public defenders' offices.
- Plan for "no court days" to allow increased contact with defendants.
- Foster relationships with the media, especially the print media, to influence the examination of important issues and strategies for reform.¹⁴⁶
- Provide public forums, such as "demonstration courts," to show the public how the court system works, and to communicate zero tolerance for racial disparity.
- Assess whether "jury nullification"¹⁴⁷ is a reaction to perceptions of bias in judges, attorneys, court personnel or court processes.

¹⁴⁵ Cf. Denise, M., and Richardson, J.G., A TOTAL APPROACH TO DIVERSITY: AN ASSESSMENT AND CURRICULUM GUIDE FOR STATE COURTS (National Center for State Courts, 1997); Gonzalez, L., and Richardson, J.G. JUDICIAL MENTORING: STARTING, ORGANIZING, AND SUSTAINING A PROGRAM FOR MENTORING PERSONS OF COLOR TO THE BENCH (National Center for State Courts, 1997); Hewitt, W.E., and Richardson, J.G. MANAGING LANGUAGE PROBLEMS: A COURT INTERPRETING EDUCATION PROGRAM FOR JUDGES, LAWYERS, AND COURT MANAGERS (National Center for State Courts, 1997); Jones, B.J., and Richardson, J.G. THE INDIAN CHILD WELFARE ACT: A CULTURAL AND LEGAL EDUCATION (National Center for State Courts, 1997); Lindsey, M.L. CULTURAL DIVERSITY MANAGEMENT STRATEGIES WITHIN THE JUVENILE JUSTICE SYSTEM (Nestor Consultants, Inc., 1999); Richardson, J.G. BIAS IN THE COURT ! FOCUSING ON THE BEHAVIOR OF JUDGES, LAWYERS, AND COURT STAFF IN COURT INTERACTIONS (National Center for State Courts, 1997).

¹⁴⁶ Flaherty, M., and Biskupic, J.. *Judges protest racial disparity by ignoring sentencing guide: Study – Blacks arrested more often*, THE DALLAS MORNING NEWS, October 11, 1996, at 41A.

¹⁴⁷ Farnham, D., *Jury nullification: history proves it's not a new idea*, CRIM. JUST. Vol. 11, No. 4, (Winter 1997).

- Learn more about the special issues affecting female offenders in the criminal and juvenile justice systems.¹⁴⁸

The Trial Court Performance Standards and Measurement System provide methods designed to assist in assuring that justice is applied fairly and equally.¹⁴⁹ In particular, Performance Area 3: Equality, Fairness, and Integrity provides courts with specific guidelines on how to apply fair and reliable judicial processes. Further, Performance Area 3 provides twenty-three different measures that courts may use to determine whether the court is applying justice fairly and equally. The measures rely on the analysis of case-related information, questionnaires completed by key participants in the court process and the examination of court records.

¹⁴⁸ American Association of University Women, Educational Foundation, Washington, D.C.; Chesney - Lind, M. *The Female Offender: Girls, Women, & Crime* (Sage, 1997); Community Research Associates, *Juvenile Female Offenders: A Status of the States Report OJJDP*, U.S. Dept. of Just. (1998); Green, Peters, & Associates, *Guiding Principles for Promising Female Programming: An Inventory of Best Practices OJJDP*, U.S. Dept. of Just. (October 1996); <http://www.girlspecificprogram.org>; Mann, C.M., *Female Crime and Delinquency* (University of Alabama Press, 1994); Miller, J., *Race, gender, and juvenile justice: An examination of disposition decision-making for delinquent girls*, in *Race, gender, and class in criminology: The intersection gap* (Schwartz, M.D. & Milovanovic, D. ed., Garland 1996); National Criminal Justice Reference Service, and The OJJDP Clearinghouse (800) 638-8736; *Women, Girls & Criminal Justice*, Civic Research Institute, Kingston, N.J.

¹⁴⁹ For additional information about all of the Trial Court Performance Standards and Measurement System see the National Center for State Courts website at www.ncsc.dni.us/RESEARCH/tcps_web/.

SECTION 5

ISSUES OF GENDER

By Robin E. Wosje, J.D.

Crime Rate for Girls

Until very recently, studies regarding juvenile crime focused primarily on boys. However, in the last eight years the U.S. Department of Justice as well as several independent researchers have begun to study juvenile crime statistics with regard to girls. Although girls represent only 27% of the total juvenile arrests made in 1999, delinquency cases involving girls increased by 83% between 1988 and 1997.¹⁵⁰ Important in this statistic is to note that juvenile crime overall is declining.¹⁵¹ Further, the arrest rate for girls was twice the arrest rate for boys from 1981 to 1997.¹⁵²

Around 37% of girls enter the juvenile justice system for status offenses, which include offenses like running away, truancy, or breaking a curfew.¹⁵³ In 1999, girls accounted for 59% of the offenses for running away and 30% of the offenses for curfew.¹⁵⁴ Further, female juvenile offenders represented 17% of the offenses in the violent crime index (murder, forcible rape, robbery, aggravated assault) and 29% of the offenses in the property crime index (burglary, larceny-theft, motor vehicle theft, arson).¹⁵⁵ Table 5-1 depicts these statistics as well as the proportion of arrests in other areas for female juvenile offenders in 1999.¹⁵⁶

¹⁵⁰ CRIME IN THE UNITED STATES 1999, (U.S. Department of Justice 2001).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Snyder, H., *Juvenile Arrests 1999* JUVENILE JUSTICE BULLETIN (OJJDP, U.S. Department of Justice December 2000) *citing* CRIME IN THE UNITED STATES 1999 (U.S. Department of Justice 2001).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

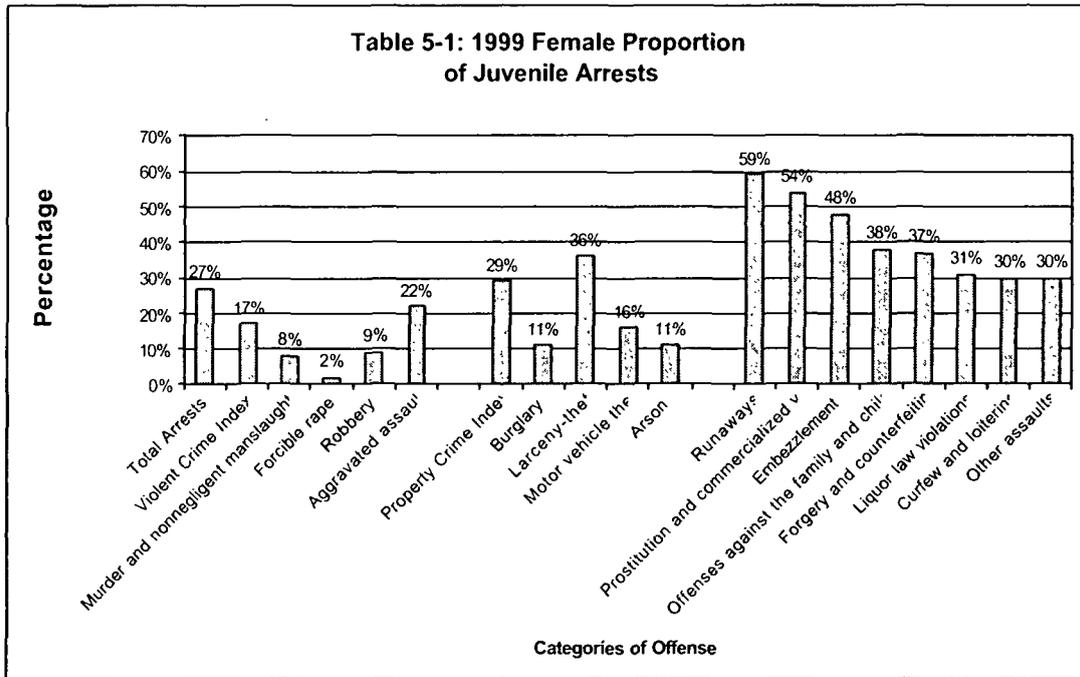
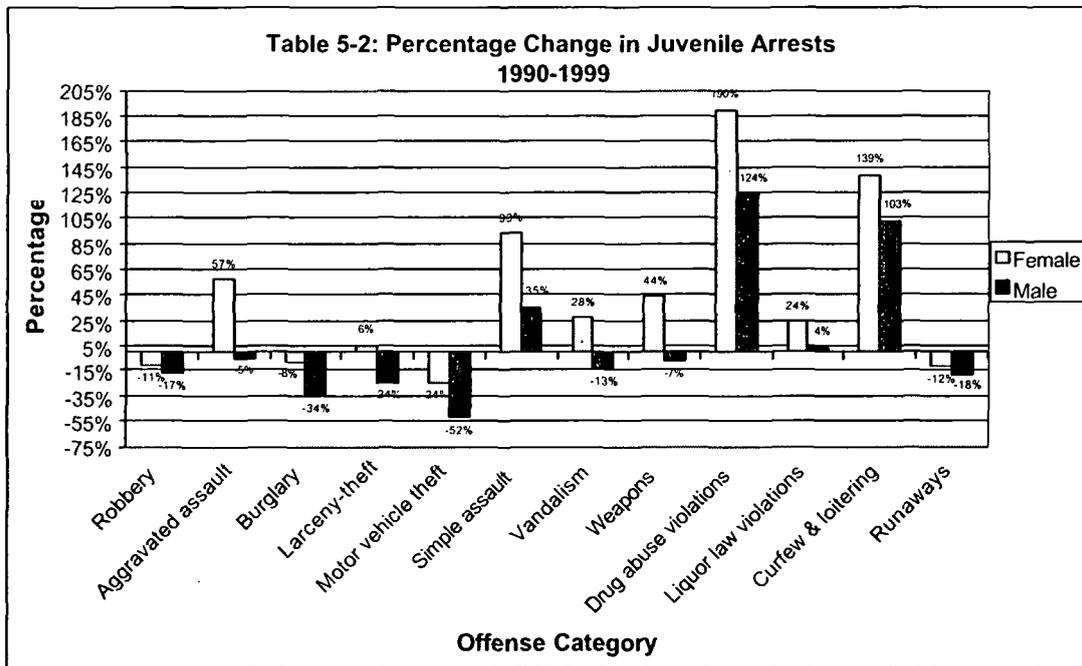


Table 5-2 depicts the changes in arrests between the years 1990 and 1999. According to these statistics, arrests for female juvenile offenders increased more than male juvenile offenders or decreased less than male juvenile offenders from 1990 to 1999.



Characteristics of Female Juvenile Offenders

According to a 1998 report from the Office of Juvenile Justice Delinquency Prevention of the U.S. Department of Justice, the typical female offender is a member of a minority group between the ages of 14 and 16, lives in a poor neighborhood with a high crime rate, has a history of poor academic performance, has used drugs and/or alcohol, and has experienced physical, sexual, and/or emotional abuse.¹⁵⁷ According to another study, there are nine characteristics that girls in the juvenile justice system seem to share. They are:

- Family fragmentation;
- Victimization outside the juvenile justice system;
- Victimization inside the juvenile justice system;
- Serious physical and mental health disorders;
- Separation of incarcerated mothers from their children;
- Widespread school failure;
- Early adolescence as the breaking point;
- Non-violent offenders; and
- Resiliency.¹⁵⁸

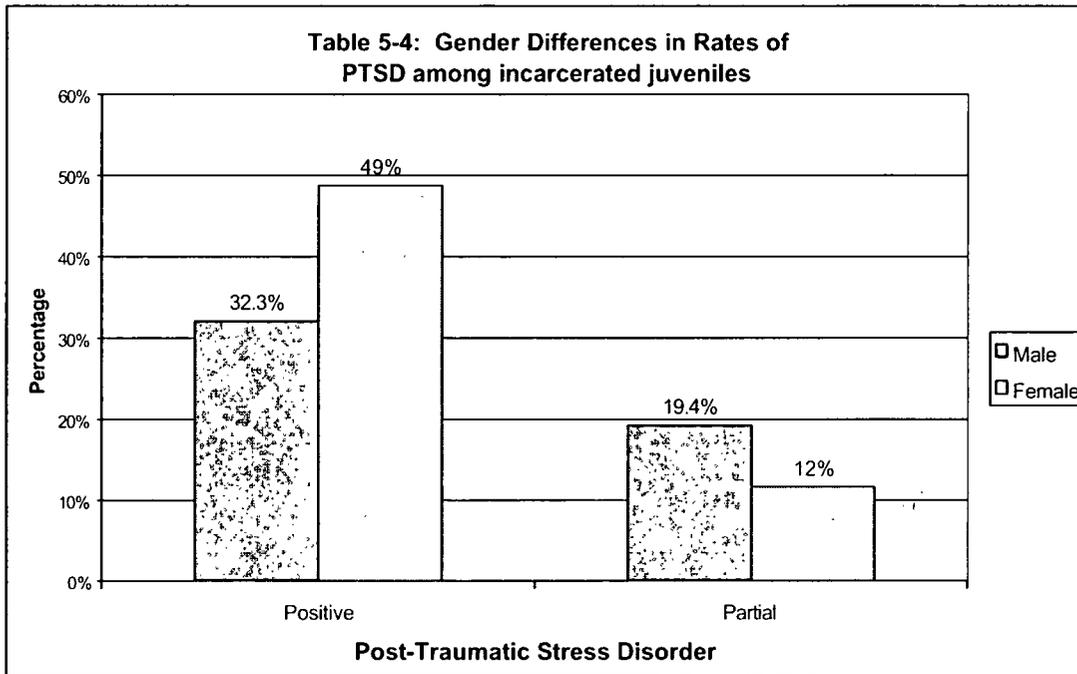
With regard to victimization, high percentages of female juvenile offenders have been victimized or have seen someone killed. Table 5-3 below depicts these percentages by gender. Please note that the following data is self-reporting, therefore, the actual percentages could be much higher.

	Male	Female
Seen Someone Killed	73%	80%
Threat of Physical Harm	68%	70%
Victim of Rape	4%	61%

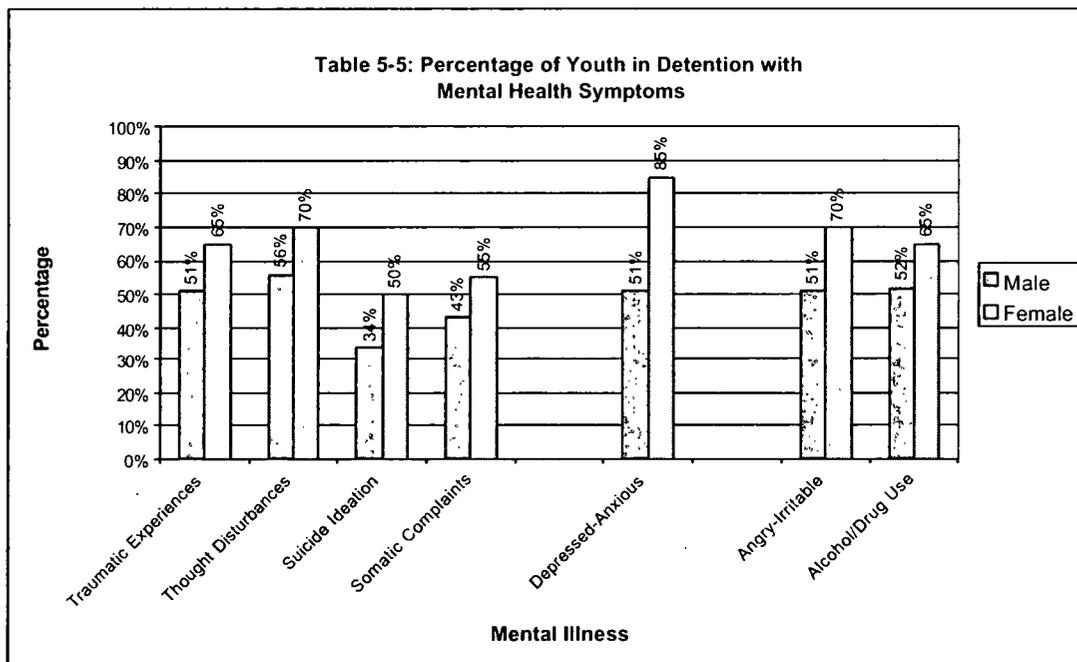
The data on female juvenile offenders in terms of mental health issues is also striking. According to a California study, incarcerated female juvenile offenders have a much higher incidence of post-traumatic stress disorder (PTSD) than their male counterparts. Forty-nine percent of incarcerated female juvenile offenders tested positive for PTSD and an additional 12% of incarcerated female juvenile offenders received a partial diagnosis of PTSD. Table 5-4 depicts these statistics in conjunction with the figures for incarcerated males.

¹⁵⁷ GUIDING PRINCIPLES FOR PROMISING FEMALE PROGRAMMING: AN INVENTORY OF BEST PRACTICES (U.S. Department of Justice, OJJDP 1998). Available at www.ojjdp.ncjrs.org/pubs/principles/contents.html.

¹⁵⁸ Acoca, L. and Dedel, K., NO PLACE TO HIDE: UNDERSTANDING AND MEETING THE NEEDS OF GIRLS IN THE CALIFORNIA JUVENILE JUSTICE SYSTEM (National Council on Crime and Delinquency 1998).



Generally, girls also have higher rates of mental health symptoms such as suicidal tendencies, depression, anxiety, and thought disturbances. Alcohol and drug use are also more prevalent among female youth in detention. Table 5-5 shows the correlation of these percentages between girls and boys in detention.



While reviewing the special problems that exist for girls in the juvenile justice system, it may also be helpful to consider what girls need for healthy development and to recognize that this group faces challenges in meeting those needs. According to a U.S. Department of Justice study, these needs and challenges are as follows:

- Need for physical safety and healthy physical development.
 - Challenged by poverty, homelessness, violence, inadequate health care, inadequate nutrition, and substance abuse.
- Need for trust, love, respect, and validation from caring adults to foster healthy emotional development and form positive relationships.
 - Challenged by abandonment, family dysfunction, and poor communication.
- Need for positive female role models to develop a healthy identity as a woman.
 - Challenged by sexist, racist, homophobic messages, lack of community support.
- Need for safety to explore her sexuality at her own pace for healthy sexual development.
 - Challenged by sexual abuse, exploitation, and negative messages about female sexuality.
- Need to belong, to feel competent and worthy.
 - Challenged by weakened family ties, negative peer influences, academic failure, low self-esteem.¹⁵⁹

Differential Treatment of Female Offenders

Female juvenile offenders are often treated differently, and more severely, for similar situations. In particular, girls are sentenced and confined in ways different than boys. According to a recent report issued jointly by the American Bar Association and the National Bar Association, between 1988 and 1997, detention for female juvenile offenders increased 65%, whereas detention increased only 30% for male juvenile offenders.¹⁶⁰ Additionally, female juvenile offenders are detained for less serious offenses and are more likely to be detained for parole or probation violations.¹⁶¹ In a February 16, 1999 article in the *Christian Science Monitor*, Sheila Peters, a consultant to the Office of Juvenile Justice and Delinquency Prevention, concurred with the detention statistics and stated that the difference in treatment is “due to a lack of appropriate agencies and services designed for [girls].”¹⁶²

¹⁵⁹ GUIDING PRINCIPLES FOR PROMISING FEMALE PROGRAMMING: AN INVENTORY OF BEST PRACTICES, *supra* note 154.

¹⁶⁰ JUSTICE BY GENDER: THE LACK OF APPROPRIATE PREVENTION, DIVERSION, AND TREATMENT ALTERNATIVES FOR GIRLS IN THE JUSTICE SYSTEM (American Bar Association and the National Bar Association May 1, 2001).

¹⁶¹ *Id.* citing THE JUVENILE DETENTION ALTERNATIVE INITIATIVE PROJECT (Annie E. Case Foundation 1995).

¹⁶² Marks, A. *Juvenile Justice not so equal for girls*, CHRISTIAN SCIENCE MONITOR, Feb. 16, 1999.

In particular, this matter is of grave concern with regard to juveniles tried in adult court as even fewer programs exist for female juvenile offenders in the adult female systems. In Michigan, for example, a 14-year-old female was tried as an adult and sentenced to a minimum one-year sentence in an adult female facility. Christie Clore, a 14-year-old, set fire to a house in her neighborhood and was charged with arson under a new Michigan law that requires all juveniles 14 years of age or older to be charged as adults if convicted for the following felonies: murder, arson, rape and assault. The problem, however, came once Clore was convicted. Although Michigan has an appropriate facility as part of an adult correctional facility for boys convicted as adults, it does not have one for girls. Therefore, the judge was forced to sentence her to an adult women's correctional facility.

Gender-Specific Programming

Part of the problem with many of the programs that exist for girls is that they are based on programs designed for boys and focus on security rather than on treatment. Therefore, these programs often do not address the different characteristics and needs of girls. Most programs do not provide sexual abuse treatment or support for pregnant girls or girls with children, nor do they address the special privacy needs of girls including staffing facilities with female correctional officers.

The 1992 Juvenile Justice and Delinquency Act authorizes the receipt of challenge grants to states to develop policies that prohibit gender bias in placement and treatment of juveniles.¹⁶³ Further, the challenge grants are for the establishment of programs specific to female youth that provide health and mental health services as well as physical and sexual abuse treatment, parenting and general education and vocational services.¹⁶⁴

Services, programs and detention facilities must be designed to fit all of these special needs as well as provide educational opportunities for these offenders. The Office of Juvenile Justice and Delinquency Prevention has published a guide to best practices with regard to the needs of female juvenile offenders and has based such practices on 16 model programs.¹⁶⁵ The guide lists the following 20 practices as key to providing appropriate services to female juvenile offenders:

- **Organization and Management:** A gender-specific program that is well-organized and is cohesive and cooperation from the staff may help to calm the chaotic situations from which girls often come. Further, it helps establish good adult role models for the girls.
- **Staffing Pattern:** Providing staff who are charismatic and who may have gone through some of the same experiences that the female offenders have survived is a major factor in providing a positive successful program for girls. Further, the goal should be to staff the programs with the ethnic diversity that shadows the population with which it serves. Providing appropriate staffing positions to men

¹⁶³ 42 U.S.C.A. § 5667c (West 1992).

¹⁶⁴ *Id.*

¹⁶⁵ GUIDING PRINCIPLES FOR PROMISING FEMALE PROGRAMMING: AN INVENTORY OF BEST PRACTICES, *supra* note 154.

is also important. Although some facilities staff all positions with women, male staff provide examples of positive male role models.

- **Staff Training:** Training for staff members to ensure that they have no preconceived ideas or biases about female issues is also important. Further, it ensures that all staff has the same understanding when providing services. The training should include: program understanding, adolescent female development, risks and resiliency, knowledge of culture, and assessment.
- **Intake Process:** The intake process should treat each girl as an individual. The intake process should include the following components: assessment and orientation, culturally relevant information, and a service plan.
- **Education:** Education should include the following areas: academic, women's history and culture, life skills, women's issues, arts-based curriculum, physical development and sexual behavior.
- **Skills Training:** Program components, which may be helpful for skills training include: self-defense training, assertiveness training, self-esteem enhancement, empowerment training, and physical training.
- **Promote Positive Development:** Programs that provide these elements help girls understand that development is a life-long process. This training will help girls learn methods for continuing their development even after they have completed the program. Program elements that assist girls in their future development include those that address: problem solving, positive relationship skills, community-based initiatives, development to womanhood, and the discovery of strengths and abilities.
- **Relationship Building:** Programs should help girls build positive relationships. Two components that assist in building relationship skills are women's issues groups and group therapy.
- **Culturally Relevant Activities:** Providing programs that value diversity help to eliminate stereotypes girls may have had prior to entering the program. Such activities help to promote pride in one's own culture, as well as teaching respect for others. Key components of such training are: dynamics of cultural interaction, language use, protective factors, bilingual staff members, non-Western culture alternatives to treatment, culturally appropriate role models, ethnic identity, adaptation of service delivery according to cultural differences.
- **Career Opportunities:** A successful program should provide role models from career fields to encourage girls to explore career opportunities.
- **Health Services:** Programs that promote comprehensive physical and mental wellness are necessary. Generally, adolescent girls in the juvenile justice system have a history of unmet health needs.
- **Recreational Activities:** Recreational activities help give girls challenging, positive experiences.
- **Responsive Services:** Some programs may require outside support and services to address ethnic populations that are hard to reach. Such outside services are to be provided by culturally similar therapists, peer counselors, etc.
- **Mentoring:** Girls who have entered the juvenile justice system often do not have positive role models in their lives. Mentoring programs provide this important

component to gender-specific programs. These programs should include not only adult mentors but also older girls who are positive role models.

- **Peer Activities:** Activities should be developed to foster positive peer relationships. Often girls come from negative experiences, such as affiliation with gangs.
- **Full Family Involvement:** Parents should be involved in the treatment plan to build positive family support. Program elements that foster positive family support include: discussion groups, home visits, and mother-daughter bonds.
- **Community Involvement:** Successful programs encourage girls to be involved in their communities in positive ways. Such involvement helps to teach girls that they can make real changes in their neighborhoods.
- **Specific Treatment Concerns:** Specific treatment concerns should also be addressed in a gender-specific program such as: substance-abuse issues, prenatal and post-partum care, and well baby and day care.
- **Re-Entry into Community:** No program can be truly effective unless it prepares girls to re-enter the community. Re-entry services that aim at ensuring that female offenders do not return to the juvenile justice system include: aftercare, progressive responsibility components, community involvement, coordination with family, schools, and employers, and monitoring.
- **Evaluation:** One of the most important components is a good solid system of evaluating the program. Evaluations help to ensure that the goals of the program are met. Evaluations also provide valuable research data for other entities which may be involved in creating or modifying their own gender-specific programs.¹⁶⁶

Congress has authorized challenge grants for states to assist them in addressing the issues of gender-specific programming. Additionally, training and technical assistance programs are available through the Office of Juvenile Justice and Delinquency Prevention to assist states to determine if they have programming issues for girls and to train and implement program models that work to alleviate these problems.¹⁶⁷

What can we do?

The Report of the American Bar Association and the National Bar Association ends with a list of twelve goals to help ensure a reduction in the number of female juveniles currently entering the juvenile justice system and programs and services for female juvenile offenders are increased. The twelve goals are:

- Promote community safety by raising national awareness of the underlying factors that place girls at risk of involvement in the juvenile justice system;
- Promote alternatives to detention and incarceration for girls and increase awareness of the harm in detention;

¹⁶⁶ GUIDING PRINCIPLES FOR PROMISING FEMALE PROGRAMMING: AN INVENTORY OF BEST PRACTICES, *supra* note 154.

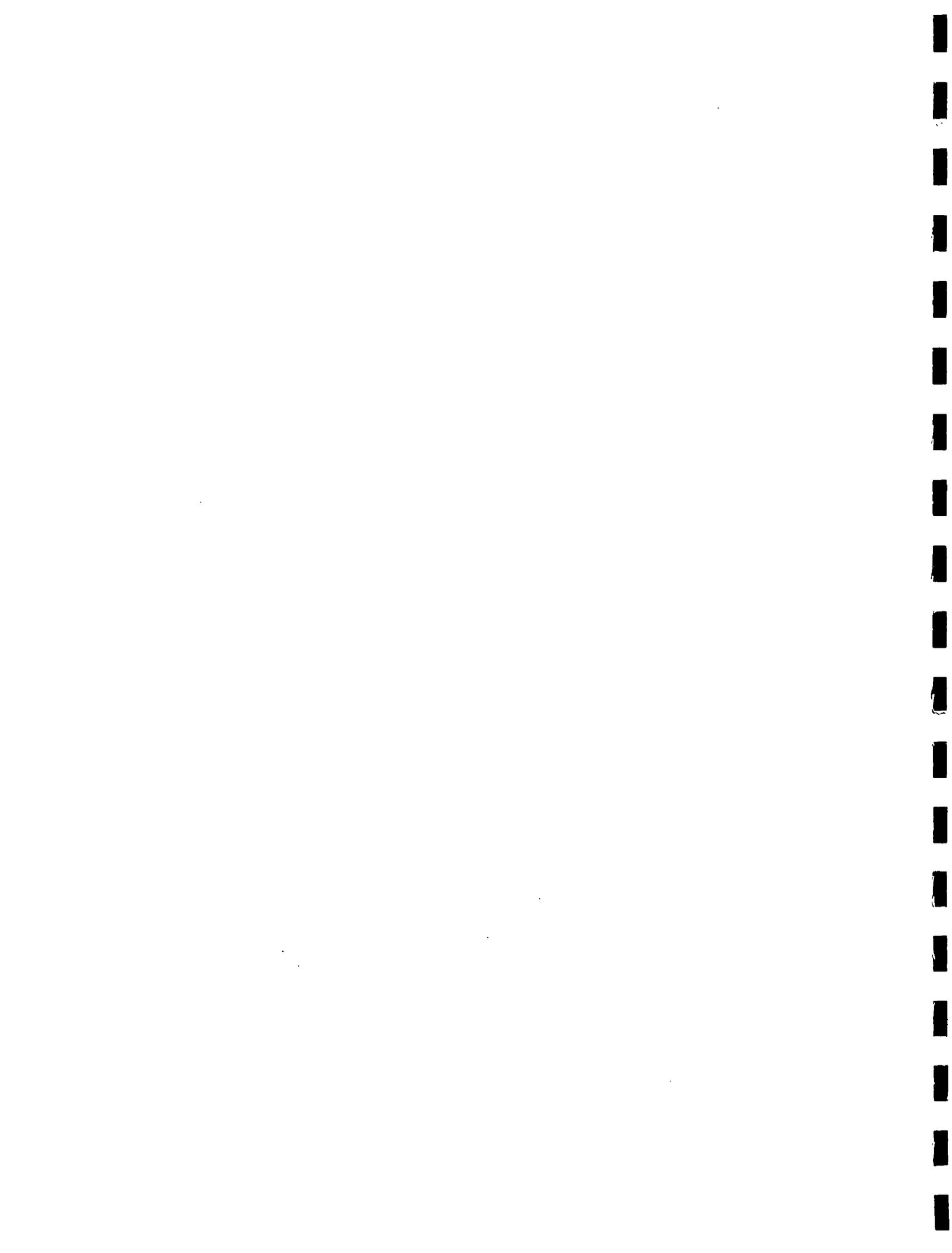
¹⁶⁷ For more information on these grants and programs contact the Office of Juvenile Justice and Delinquency Prevention via the internet at www.jjdp/ncjrs.org/index.html or The National Training and Technical Assistance Center at www.nttac.org.

- Identify, promote and support effective gender-specific, developmentally sound, and culturally sensitive practices with girls;
- Identify policies and practices which avoid ushering girls into juvenile justice facilities for status offenses, charging girls with assault in family conflict situations, detaining girls to “protect” them, and over-utilizing secure facilities for girls, particularly girls who are members of minority groups;
- Promote an integrated system of care for at-risk and delinquent girls and their families based on their competencies and needs;
- Ensure that resources exist to provide multilevel, multidisciplinary training and technical assistance for lawyers, service providers and other justice system personnel;
- Identify and re-evaluate charging and diversion, detention and disposition procedures that do not meet the needs of at-risk or delinquent girls and recommend ways to address these problems;
- Re-evaluate risk and other assessment practices for gender sensitivity, and recommend alternatives that more adequately identify the competencies and needs of at-risk and delinquent girls;
- Assess the adequacy of services to meet the needs of at-risk or delinquent girls and address gaps in services;
- Facilitate communication and collaboration with federal, state, national, and community-based organizations that serve or are concerned about girls;
- Map the flow of girls through the juvenile justice system and identify points at which the system can divert or treat girls more effectively; and
- Collect and review state and local policies and practices to assess the gender impact of decision-making and system structure.¹⁶⁸

Conclusion

The above section provides a quick overview of the current situation of girls in the juvenile justice system as well as methods to eradicate or alleviate these problems. As a judge, one is often limited to the resources in one's jurisdiction. However, for coordinating key members such as correctional officers and treatment providers in your jurisdiction, funds and methods are available that may help to correct the current problems in your system. With the increased number of juveniles being tried in adult criminal court, the problem with juvenile females is likely to become worse before it improves. This section provides you with some guidance as to how your jurisdiction may be able to assess, initiate, or improve gender-specific programming for girls.

¹⁶⁸ JUSTICE BY GENDER: THE LACK OF APPROPRIATE PREVENTION, DIVERSION, AND TREATMENT ALTERNATIVES FOR GIRLS IN THE JUSTICE SYSTEM, *supra* note 157.



SECTION 6

CHILD MENTAL DISORDERS AND DISABILITIES

By Richard Weiher, Ph.D.

Children with mental disorders and/or disabilities have presented law enforcement, the juvenile justice system, and more recently the adult justice system with daunting challenges. The juvenile justice system was created based on the recognition that children were not simply little adults, but qualitatively different in so many parameters of human functioning. Within the juvenile justice system, there remains much active debate on issues of responsibility, culpability, competency, developmental capacity, and numerous other aspects of childhood growth and development that impact decision-making when children break the law. That debate increases in complexity when large portions of the children in court fall outside the norms due to the presence of mental disorders or disabilities. Children coming to the adult criminal courts are likely to present an even greater enigma in a system, which has become accustomed to working only with the adult population.

How do youths differ from adults, and specifically, how do youths with mental disorders and disabilities differ from adults? This section will focus on the effects of mental disorders in children, characteristics of child mental disorders, and the relationship between child development and psychopathology. The following topics will be discussed:

- Childhood Mental Disorders, Including Clinical Syndromes and Personality Disorders;
- Serious Emotional Disturbance;
- Developmental Anomalies;
- Substance Abuse;
- Personality Disorders;
- Mental Retardation;
- Issues of Race, Ethnicity, and Gender;
- Understanding the Classification of Mental Disorders and Disabilities (DSM-IV).

Childhood Mental Disorders, Including Clinical Syndromes and Personality Disorders

Disorders first diagnosed in infancy or childhood are indistinguishable from disorders identified in adolescents and adults, with a few exceptions. The neurobiological disorder, attention-deficit/hyperactive disorder, is identified in early life and can be diagnosed at the age of eight years. Personality disorders, on the other hand, cannot be diagnosed until the age of eighteen years, based on the prevailing thinking that one's personality is in an incomplete state throughout childhood and early adolescence. The bulk of the disorders, however, including mood disorders, anxiety disorders, adjustment disorders, eating and

sleep disorders, schizophrenia and other psychotic disorders, and substance-related disorders are all diagnosed throughout the life span if diagnostic criteria are met.

Among the most frequently diagnosed disorders in youth who become part of the correctional system are attention-deficit/hyperactive disorders, adjustment disorders, mood disorders, and substance abuse disorders. Relying upon data collected by the National Institute of Health, between 40% and 50% of the youth have one or more diagnoses from the above categories.¹⁶⁹ For example, it is believed that approximately 46% of the youth in the correction system have been diagnosed with attention-deficit/hyperactive disorder, compared to 6.5% of the general population. Disorders capable of producing observable impact on mood and behavior that school districts frequently label as seriously emotionally disturbed are diagnosed at a prevalence of 45% of youth in correctional settings. This compares to 10% diagnosed with serious emotional disturbance in the general population. A conservative estimate is that approximately one half of all children coming to court will have a diagnosable disorder. Specific learning disabilities have a prevalency rate of 35% among youth in the criminal justice system compared with 15% of the general population.

Serious Emotional Disturbances

Adjustment Disorders

When there is an identifiable psychosocial stressor present in the life of a child, with resultant symptoms that have an impact on behavior and/or emotions, a diagnosis of adjustment disorder is warranted. The adjustment disorders include the following subtypes: with depressed mood, with anxiety, with disturbance of conduct, with mixed disturbance of emotions and conduct, and with mixed anxiety and depressed mood. Common severe psychosocial stressors in children include divorce, death of a parent, sibling, or other family member, abuse, neglect, removal from the home, discrimination, homelessness, extreme poverty, inadequate health care, and being the victim of a crime. Racial and ethnic minorities, as well as disadvantaged youth, are believed to be at a higher risk of developing an adjustment disorder due to the increased presence of these psychosocial stressors in their young lives. Informal estimates indicate the percentage of adolescent females involved in the justice system that have been victims of molestation and/or sexual assault ranges from 40% to 85%.

Mood Disorders

Mood disorders frequently diagnosed include major depressive disorder, dysthymic disorder, and bipolar disorder.¹⁷⁰

Criteria for major depressive disorder are:

- Depressed mood, frequently tearful, sad, or empty, and in adolescents irritability;

¹⁶⁹ Bullock and McArthur, NATIONAL INSTITUTE OF HEALTH (1994).

¹⁷⁰ DIAGNOSTIC AND STATISTICAL MANUAL IV (American Psychiatric Association, 1994).

- Diminished interest in pleasure;
- Appetite disturbance;
- Sleep disturbance;
- Psychomotor agitation or retardation;
- Fatigue or loss of energy;
- Feelings of worthlessness, guilt, or hopelessness;
- Impairment in concentration skills and decisiveness;
- Recurrent thoughts of death, which may include suicidal ideation.

Dysthymic disorder is chronic (one year duration) and includes the continuous presence of two or more of the following:

- Poor appetite or overeating;
- Insomnia or hypersomnia;
- Low self-esteem;
- Low energy or fatigue;
- Poor concentration or difficulty making decisions;
- Feeling of hopelessness.

There must be an absence of a major depressive episode to make the diagnosis of dysthymic disorder.

Bipolar mood disorders are broken down into subtypes, which include manic or hypomanic episodes. Although manic and hypomanic episodes are very similar in description, a hypomanic episode does not result in severe impairment in social or occupational functioning.

ADHD

Attention-deficit/hyperactive disorder (ADHD) is diagnosed using one of three types:

- Attention-deficit/hyperactivity disorder, combined type;
- Attention-deficit/hyperactivity disorder, predominantly inattentive type;
- Attention-deficit/hyperactivity disorder, predominantly hyperactive impulsive type.

The diagnostic criteria for symptoms of inattention include:

- Failing to give close attention to details or making careless mistakes;
- Difficulty sustaining attention in tasks or play;
- Does not listen when spoken to directly;
- Does not follow through on instructions;
- Difficulty organizing tasks and activities;
- Avoids and/or dislikes tasks requiring sustained mental effort;
- Loses necessary things;

- Easily distracted;
- Forgetful in daily activities.

Symptoms of hyperactivity/impulsivity include:

- Fidgets with hands or feet or squirms in seat;
- Leaves seat in classroom;
- Runs about or climbs excessively;
- Difficulty playing or engaging in leisure activities quietly;
- Is often constantly in motion;
- Talks excessively.

Symptoms of impulsivity include:

- Blurting out answers before questions have been completely asked;
- Difficulty awaiting turn;
- Interrupts others.

Many adolescents coming to the attention of law enforcement officials have behavior patterns consistent with ADHD, but also have a behavioral history consistent with a diagnosis of conduct disorder. The diagnostic criteria for conduct disorder include:

- Aggression to people and animals;
- Destruction of property;
- Deceitfulness or theft;
- Serious violations of rules.

As with the diagnostic criteria for other disorders, there must be a disturbance in behavior sufficient to result in significant impairment in social, academic, or occupational functioning.

Conduct Disorder

This disorder is considered primarily a behavioral disorder. It is however, frequently diagnosed as a co-morbid condition with other disorders such as substance abuse, depression, or ADHD.¹⁷¹

The diagnostic criteria are divided into the following four groupings of behavior (three or more of the following within one year and at least one in the past six months):

Aggression:

- Repeatedly bullies, threatens, or intimidates others;
- Initiates physical fights;

¹⁷¹ *Id.*

- Used a weapon that can cause serious physical harm to others (e.g., a bat, brick, broken bottle, knife, gun);
- Has been physically cruel to people;
- Has been physically cruel to animals;
- Has stolen while confronting a victim (e.g., mugging, purse snatching, extortion, armed robbery);
- Has forced someone into sexual activity.

Destruction:

- Has deliberately engaged in fire setting with the intention of causing serious damage;
- Has deliberately destroyed others' property (other than by fire setting).

Deceitfulness or Theft:

- Has broken into someone else's house, building, or car;
- Often lies to obtain goods or favors or to avoid obligations;
- Has stolen items of nontrivial value without confronting a victim (e.g., shoplifting, but without breaking and entering; forgery).

Serious Rule Violations:

- Often stays out at night despite parental prohibitions, beginning before 13 years of age;
- Has run away from home overnight at least twice while living in parental or parental surrogate home (or once without returning for a lengthy period);
- Often truant from school, beginning before 13 years of age.

The disturbance in behavior causes clinically significant impairment in social, academic, or occupational functioning. Including mild, moderate, or severe specifies severity.

Substance Abuse

Substance abuse is a frequent co-morbid condition with conduct disorder, mood disorder, and attention-deficit disorder diagnosed in adolescents. To be diagnosed with a substance abuse disorder, one or more of the following must occur within a twelve-month period:

- Recurrent substance use resulting in a failure to fulfill major role obligations at school, work, or home;
- Recurrent substance use in situations where it is physically hazardous, such as driving an automobile;
- Recurrent substance related legal problems;
- Continued substance use despite having persistent or recurrent social, legal, or

interpersonal problems.

In adolescents, substance abuse may include alcohol, marijuana, stimulant drugs, depressant drugs, hallucinogens, and other substances capable of inducing impairment in cognition, judgment, impulse control, mood state, and impairment in social, occupational, or academic functioning.

Personality Disorders

Personality disorders have their origins in childhood and adolescence, yet are not diagnosable until age 18. Adolescents may be diagnosed with personality disorder traits or features only. They include the following:

- Paranoid personality disorder traits, a pattern of distrust and suspiciousness;
- Schizoid personality disorder traits, a pattern of detachment from others with a restricted range of emotional expression;
- Antisocial personality disorder, a pattern of disregard for and violation of the rights of others;
- Borderline personality traits, a pattern of instability in interpersonal relationships, self image, with marked impulsivity;
- Histrionic personality disorder traits, a pattern of excessive emotionality and attention seeking;
- Narcissistic personality disorder traits, a pattern of grandiosity, need for admiration, and lack of empathy;
- Avoidant personality disorder traits, a pattern of social inhibition, feelings of inadequacy, and hypersensitivity to negative evaluation;
- Dependent personality disorder traits, a pattern of submissive and clinging behavior related to an excessive need to be taken care of;
- Obsessive-compulsive personality disorder traits, a pattern of preoccupation with orderliness, perfectionism, and control.

Personality is believed to be a pervasive pattern of behavior, beliefs, attitudes, and characteristics that are not transitory or as subject to environmental influences as other types of behavior.

Mental Retardation

The American Association of Mental Deficiencies has set the IQ level for a diagnosis of mental retardation or mental deficiency, the preferred term, at 69 and below. The subtypes of mental retardation are as follows:

- Mild mental retardation, IQ 50-55 to 69;
- Moderate retardation, IQ 35-40 to 50-55;
- Severe mental retardation, IQ 20-25 to 35-40;
- Profound mental retardation, IQ below 10-25.

A problematic issue for judges is the lack of precision in determining an individual's full-scale IQ. The standard error of measurement for the most frequently administered group of tests, the Wechsler Scales, is roughly plus or minus 3.5 points. It has become a standard of practice for most psychologists to list a range of IQ scores obtained and cite a confidence level in addition. For example, an IQ should be reported as follows: full-scale IQ equals 76, with a range of 71 to 83 at the 95 confidence interval. This score becomes especially important when a placement decision regarding a child is based on a published IQ cutoff score for a given facility. Most treatment facilities use the IQ cutoff score of 69 to preclude mixing individuals with IQs falling in the mentally deficient range with those individuals who score above that cutoff. The subsequent section deals with how the psychologist performing evaluations for the court can deal with this problem.

Issues of Race, Ethnicity, and Gender

Differences among boys and girls, Latinos, African Americans, Native Americans, and Asian Americans affect the quantity and quality of information we have about them. When this information is used for the purposes of classification or diagnosis, the practitioner, and indeed the entire court, must be very mindful of these cultural and gender differences in weighing the reliability and accuracy of opinions being formed about these children.

Different cultural backgrounds result in varied definitions of normal behavior versus abnormal behavior, and many medical and psychiatric conditions are manifested in culture-bound ways. The DSM-IV included additional information in its text to alert the reader to cultural variations in behavior and better understand that behavior within its cultural context. There is no perfect system for classification or diagnosis that is free of bias; therefore, we must stay ever vigilant and mindful of our bias.

Understanding the Classification of Mental Disorders and Disabilities (DSM -IV)

The Diagnostic and Statistical Manual on Mental Disorders (DSM-IV) is relied upon heavily in this section. Although the DSM-IV has been criticized for having a number of flaws, it nonetheless is the most widely used classification system in the United States. It has been adopted as a standard system by most hospitals, clinics, licensed treatment facilities, and is included in the clinical training of many mental health providers. DSM-IV uses a multiaxial system, with five Roman numerals designating the axes, each of which includes a separate category of information. By using all five axes, the reader has information not only about the specific diagnoses, but some conditions about the context in which these diagnoses have been made.

Axis I	Clinical syndromes and other conditions that may be a focus of clinical attention;
Axis II	Personality disorders and mental retardation;
Axis III	General medical conditions;
Axis IV	Psychosocial stressors and environmental problems;

Axis V Global assessment of functioning (GAF).¹⁷²

In using the above classification system with an adolescent, for example, on Axis I the clinical disorder or syndrome is listed. Examples of this may include ADHD, substance abuse, adjustment reactions, mood disorders, conduct disorder, and many of those conditions described previously. Axis I is designated for clinical conditions usually warranting treatment, rehabilitation, or remediation.

Axis II lists personality disorders or, in the case of children and adolescents, personality disorder traits or features, which could include narcissistic personality traits, antisocial personality traits, dependent personality traits, etc. On Axis II, mental retardation is listed.

Axis III contains a description of general medical conditions that are pertinent in understanding the whole individual. In adolescents, such medical conditions, which could include asthma, diabetes, and seizure disorders, may have symptoms, which interact with the mental disorders identified in Axes I and II.

Axis IV lists the psychosocial stressors present in the individual's life. This contextual information is extremely important in understanding how or why an individual may be experiencing some types of disorders, such as post-traumatic stress disorder, adjustment reactions, or mood disorders. Psychosocial stressors listed could include death or loss of a family member, sexual or physical abuse, illiteracy, economic problems, and other psychosocial and environmental problems.

Axis V is a numerical rating based on a 0 to 100 point scale of how well the individual is functioning psychologically, socially, and occupationally. Scores ranging from 0 to 40 indicate persistent danger to self and impairment in several areas of functioning. Individuals with a GAF of 60 and above have moderate to mild symptoms, with individuals at 80 and above showing no or minimal symptoms.

The multi-axial assessment provides a composite description of the disorder, the presence or absence of problematic personality traits, a statement of relevant health problems, the presence or absence of severe psychosocial stressors or environmental problems, and a numerical rating of how well the individual is functioning in light of the four problem areas identified. This information is useful in arriving at a disposition where treatment, rehabilitation, or remediation is being considered.

Understanding a child's psychological makeup, especially the presence of any disorders or disabilities, is invaluable in crafting a disposition, which benefits both the community and the child. A classification system provides labels, but not necessarily insight or understanding of the uniqueness of the individual child. No assessment is complete without a listing of the child's attributes and strengths as a person, in making decisions as to how to best move that child from the point of a criminal act to being able to function as a contributing member of the community without incurring repeated arrests or referrals.

¹⁷² *Id.*

No classification system can capture the creativity, hopes, dreams, aspirations, humor, and inherent worth of the developing young person who has become part of the justice system. That task belongs to the mental health expert, other professionals, and family who provide information to the court.



SECTION 7

UTILIZING PSYCHOLOGICAL ASSESSMENTS

By Richard Weiher, Ph.D.

Ordering psychological evaluations in juvenile court is commonplace, and in many jurisdictions common as well in adult criminal courts. The use of the psychological evaluation is enhanced when the court has a clear understanding of what to expect from the evaluation, the limitations of the evaluation, and drafting the order for an evaluation with sufficient specificity to provide detailed and relevant information to aid in disposition decisions. This section focuses on the following:

- Overview of psychological assessment procedures;
- The Clinical Interview;
- Administration scoring and interpretation of psychological tests;
- Questions to be answered by psychological evaluation;
- Issues of gender, race, and culture;
- Critical analysis of the psychological report.

Overview of Psychological Assessment Procedures

Standards for conducting psychological evaluations have been published by the American Psychological Association (1985), and are included in all clinical training programs leading to licensure to practice clinical psychology. Ethical guidelines require compliance with these standards, which have been incorporated into the licensing laws in most jurisdictions. Although there is a good deal of variability in schools of thought underlying the selection of specific psychological tests, the standards require a common body of information to be collected and reported to the court in such a way that the results are comprehensible, reliable, valid, and replicable. The following procedures are most commonly employed in conducting a psychological evaluation:

- Review of relevant documents, which may include previous assessments, educational records, medical records, court reports, and documents relating to the circumstances of the court proceeding;
- Face-to-face clinical interview of the child;
- Collection of relevant family background, preferably obtained from a parent or guardian;
- Administration of relevant psychological instruments;
- Conferring with other professionals involved in the evaluation of the child.

The Clinical Interview

Although the bulk of the above procedures are self-explanatory, the clinical interview requires some elucidation. The clinical interview typically assesses two time spans, history and current psychological functioning. The history-taking portion of the

interview elicits information from the child on developmental background, education, health, family composition and functioning, social development and social relations, legal history, substance use history, previous trauma and/or emotional losses which may constitute the presence of psychosocial stressors, mental health evaluations and interventions, family history of mental disorders and substance use, spiritual or religious background, relevant cultural factors, and in some cases employment history. This list details the common or standard outline for the interview, with variations possible depending upon the referral question. For example, when the order requests an assessment of risk or violence potential, the content of the interview has to be adapted to provide a focus on the child's behavioral history with weapons, exposure to violence within and outside the family, youth gang affiliation, presence of violence in the youth's culture, and appraisal of related risk factors.

The current psychological functioning of the child is accomplished through the mental status examination, behavioral observations made during the evaluation, and the use of tests. The mental status examination typically includes the following components:

- General appearance of the child, including age, gender, race, ethnicity, physical growth, hygiene, clothing, and physical markings including piercings, tattoos, scars, etc.;
- Behavior during the interview, with a focus on alertness, eye contact, attention span, motor level, mannerisms, and facial expression;
- Manner of relating to the interviewer, including cooperation and willingness to disclose information;
- Affect and mood, with an emphasis on detecting depression, anger, anxiety, fear, and suspiciousness;
- Speech, regarding quantity, volume, rate, and presence of impediments;
- Thought processes, including thought association and stream of thought or consciousness;
- Content of thought, including the presence of delusions, obsessions, phobias, and emotional content;
- Perception, including hallucinations and illusions;
- Presence of suicidal/homicidal ideation;
- Cognitive assessment, including orientation, memory, and intellectual functioning;
- Self insight;
- Judgment.

Intellectual functioning during the mental status portion of the evaluation typically taps general knowledge, abstract reasoning, problem solving, and judgment. This is a cursory estimate of intellectual functioning only for the purpose of ruling out any intellectual impairment. When any questions remain concerning the intellectual functioning ability of the child, specific instruments are administered which will be described in greater detail later.

During the course of the history taking and mental status portions of the evaluation, the evaluator is able to determine what psychological tests need to be administered, who else should be interviewed (such as a parent, sibling, or another professional), and whether any referrals need to be made to other specialists to conduct additional assessments such as neuropsychological evaluations, medical evaluations, sex offender specific evaluations, and the like.

Administration, Scoring, and Interpretation of Psychological Tests

In the course of conducting the clinical interview and mental status examination, additional psychological functioning information needs to be obtained. The evaluator selects a battery of tests. These tests frequently fall into categories such as:

- Neuropsychological screening;
- Intelligence testing;
- Personality assessment;
- Academic achievement testing;
- Behavior checklists;
- Specialized assessment, such as ADHD scales, sex offender specific scales, substance abuse and learning disabilities assessment.

Psychological tests frequently used in court-ordered evaluations are listed below. This is not intended to be an exhaustive list of all psychological instruments, rather commonly used instruments administered on a national basis.

- Beck Depression Inventory – II;
- Bender Gestalt Test;
- California Psychological Inventory (CPI);
- Child Behavior Checklist – Achenbach;
- Children's Depression Inventory (CDI);
- Denver Development Screening Test;
- Draw-A-Person Test;
- Edwards Personality Profile;
- House-Tree-Person Test;
- Illinois Test of Psycholinguistic Abilities (ITPA), Revised;
- Jessness Inventory;
- Kaufman Assessment Battery for Children;
- Millon Adolescent Clinical Inventory (MACI);
- Minnesota Multiphasic Personality Inventory – Adolescent (MMPI-A);
- Peabody Individual Achievement Test (PIAT);
- Peabody Picture Vocabulary Test (PPVT);
- Raven's Progressive Matrices;
- Reynolds Adolescent Depressive Scale (RADS);
- Rorschach Inkblot Test;
- Rotter Incomplete Sentence Blank;

- Stanford Binet Intelligence Scale, Fourth Edition;
- Vineland Adaptive Behavior Scales;
- Visual Motor Integration Test (VMI);
- Wechsler Adult Intelligence Scale (WAIS-III), Ages 16 through 74;
- Wechsler Intelligence Scale for Children (WISC-III), Ages 6 through 16;
- Wechsler Abbreviated Scale of Intelligence (WPPSI), Ages 6 through 89;
- Wide Range Achievement Test (WRAT-3).

Questions to be Answered by Psychological Evaluation

Typical questions included in judge's orders are as follows:

- Does the child have any mental disorders and, if so, what are they?
- Does the child have learning disabilities and, if so, what is the level of severity and will it impact a placement decision?
- Is there substance addiction/dependence?
- What type or level of mental health intervention does the child require? This may include outpatient, day treatment, residential, acute psychiatric hospitalization, substance abuse placement, sex offender treatment, group home placement or other types of remedial interventions.
- What is the prognosis for this child's treatment?
- What is the social/emotional maturity level of this child?
- Is this child competent in a legal sense to understand the nature of the proceedings, assist his or her attorney, and understand the nature of his or her act or behavior resulting in the court proceeding?
- What is the child's intelligence level and adaptive level of functioning?
- Has this child received optimum benefit from the juvenile justice system?
- Is the child sufficiently motivated to participate effectively in interventions ordered?
- Is there additional assessment needed by other specialists?

The above examples of questions to be answered by a psychological evaluation can also serve as the basis for drafting an order for an evaluation.

Issues of Gender, Race, and Culture

The psychological assessment of a racial or ethnic minority child requires special consideration in selecting a testing battery, as well as in conducting the interview. Although most licensed mental health professionals will have had training in working with diverse populations of children, there remain serious barriers to obtaining valid and reliable evaluation results when assessing this population. This is apparent in the initial rapport building with the child who may initially be very unwilling to disclose personal information to someone outside his or her culture or ethnic group. If the evaluator is capable of establishing sufficient rapport to elicit cooperation from the child, there remains the task of accurately interpreting material provided by that child. The crucial

element is that the evaluator remain constantly vigilant to his or her bias in interpreting clinical material from a child and, equally important, understand the importance of acknowledging the potential for reduced validity and reliability in conclusions and opinions as a result of conducting a cross-cultural evaluation. A professor once said, "You do not have to be a one-armed man to evaluate one-armed subjects, but you must be extra thorough and conscientious in understanding the world in which that individual lives and how it is different from your own."

Michael Lindsey elucidates the skills required in his article entitled *Culturally Competent Assessment of African American Clients*.¹⁷³ His points about evaluating an African American client are certainly relevant for the assessment of other cultural or racial minority children as well. Since the published tests have typically not been normed using large numbers of ethnic and racial minorities, it is through extrapolation only that any conclusions can be drawn. In the following topic on the psychological report, this item will be discussed in greater detail.

Critical Analysis of the Psychological Report

Jay Ziskin, psychologist and attorney, in the preface to the third edition of his book entitled *Coping with Psychiatric and Psychological Testimony* wrote that psychiatric and psychological evidence in the legal process "frequently does not meet reasonable criteria of admissibility and should not be admitted in a court of law, and if admitted should be given little or no weight."¹⁷⁴ The fact that a psychologist could offer this opinion and base it upon numerous citations of flaws inherent in the test construction of many psychological instruments is a challenge to the profession to do a better job. It is in that spirit that I propose the following components to the psychological evaluation report:

- Identifying information and the reason for evaluation including the order from the court for the psychological evaluation;
- Interview data summary with capsule statements containing each of the subjects described earlier comprising the content of the history-taking interview;
- Mental status examination results;
- Results from each of the psychological tests, with a statement of the measure of reliability of all scores reported;
- Necessary limitations or qualifications of any conclusions or opinions, especially when issues of gender, race, and ethnicity are relevant;
- Behavioral observations made throughout the evaluation;
- Diagnostic impression utilizing DSM-IV or similar classification system;
- Recommendations for intervention appropriate to the evaluation findings;
- Specific statement addressing the referral question contained in the order to conduct the evaluation.

¹⁷³ Lindsey, M., *Culturally Competent Assessment of African American Clients*, J. OF PERSONALITY ASSESSMENT, 70(1), 43-53 (1998).

¹⁷⁴ Ziskin, J., *Coping with Psychiatric and Psychological Testimony*, Vol. 1, 3rd Ed. (Law and Psychology Press, 1975).

The evaluator seeks convergent validity in arriving at a summary opinion. The data collected throughout the evaluation from a variety of sources should support the concluding statement. To achieve replicability, an independent evaluator given the same data should be able to make an identical or similar conclusion. It is the task of the mental health professional to present the data in such a manner that this is possible.

A Final Note

The findings of mental disorders summarized in a diagnostic statement are crucial to answering the question posed in the order. Of equal importance is the ability of the child to benefit from the intervention. It is thus imperative that the report includes a summary of the attributes, strengths, and capabilities of the child that will contribute to the prognosis of the intervention succeeding, for the sake of the child and the community.

SECTION 8

SPECIAL EDUCATION ISSUES

By Joseph Tulman, Esq.

Introduction

One of the areas of law that is rarely utilized by juvenile defendants and their attorneys as well as the judicial system is the area of special education law. The United States government has enacted the Individuals with Disabilities in Education Act (IDEA) to ensure that every child receives a proper education especially if such child has a disability. As one would expect, a large percentage of juvenile defendants suffer from disabilities, which have not been addressed by their parents or the school system. Further, many juvenile defendants have not even been properly tested to determine if they have a learning disability. Oftentimes juvenile defendants are evaluated by a psychologist but rarely are educational disabilities tested or considered. Below you will find some of the major federal provisions and definitions of special education law. Thereafter is a list of ten things a judge may be able to do to assist these juvenile offenders under the IDEA.

The Individuals with Disabilities Education Act

Under the Individuals with Disabilities Education Act (IDEA), each state must provide a "free appropriate public education" to all children between the ages of three and twenty-one, inclusive, who have disabilities and who reside within the state.¹⁷⁵ To be eligible under the IDEA to receive services, a child (1) must have a disability specifically enumerated in the Act and (2) must require, as a result of that disability, special education.¹⁷⁶ The term "free appropriate public education" means "special education," provided without cost to the parent, designed to meet "the unique needs of a child with a disability."¹⁷⁷ In addition to academic instruction, the child may be entitled to services necessary to "assist a child with a disability to benefit from special education."¹⁷⁸

The special education process involves several discrete steps, including identification, evaluation, programming and placement. First, states are obligated to have a system by which all children with disabilities residing within the state are "identified, located and

¹⁷⁵. P.L. 105-17, Sec. 612 (a)(1)(A); 34 C.F.R. 300.121, 300(a). Note that the amendment now specifically includes children "who have been suspended or expelled from school."

¹⁷⁶. P.L. 105-17 Sec. 602 (3)(A) 34 C.F.R. 300.7(a)(1). The specific disabilities are: mental retardation, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, and specific learning disabilities.

¹⁷⁷. P.L. 105-17 Sec. 602 (8), (25).

¹⁷⁸. P.L. 105-17 Sec. 602 (22); 34 C.F.R. 300.22(b).

evaluated.¹⁷⁹ Once identified, the child must be evaluated to determine whether the child has a disability and, if so, to determine the child's educational needs.¹⁸⁰

If the evaluations establish that the child is eligible for special education and related services, school personnel, including teachers and evaluators, together with the parent and with the child, must develop an Individualized Education Program (IEP) to remediate the child's weaknesses.¹⁸¹ The IEP is a written document which states the specific special education, related services, and transition services to which the child is entitled.¹⁸² The Supreme Court has held that an IEP must both (1) comply with the procedures under the Act and (2) be substantively sufficient to confer some educational benefit to the child in order to be "appropriate" within the meaning of the Act.¹⁸³

Once the IEP is developed, an educational placement for the child must be made.¹⁸⁴ The placement decision must be made annually, must be based on the child's IEP, and must be as close to the child's home as possible.¹⁸⁵ In determining the placement, school personnel must ensure that the child is, to the maximum extent appropriate, educated with children who are not disabled.¹⁸⁶

If school system personnel do not meet the obligations under the Act to appropriately identify, evaluate, program for, or place a child with a disability, the parent can pursue private special education and related services at public expense. Under the IDEA, the parents are entitled to enforce the procedural and substantive rights regarding a child's education, but a child who is eighteen years old or above may independently assert IDEA rights. When a parent inquires about a child's lack of progress in school, school system personnel should inform the parent of these special education rights (including the right to have the child evaluated).

¹⁷⁹ P.L. 105-17 Sec. 612 (a)(3); 34 C.F.R. 300.125.

¹⁸⁰ P.L. 105-17 Sec. 614 (a)(1)(B). Assuming the child is eligible for services, the school must re-evaluate the child at least every three years. P.L. 105-17 Sec. 614 (a)(2)(A).

¹⁸¹ P.L. 105-17, 614 (d)(2)(A); 34 C.F.R. 300.342.

¹⁸² P.L. 105-17, 614 (d)(1)(A); 34 C.F.R. 300.340(a), the IEP must include (1) a statement of the child's present level of educational performance; (2) a statement of annual educational goals and objectives; (3) the special education and related services which will be provided; (4) an explanation of the extent to which the child will not be able to participate with nondisabled students in regular education; (5) any modifications the child requires in order to participate in the administration of statewide assessments; (6) the projected dates for the commencement and the completion of services; (7) transition services (if age appropriate); and (8) a statement of how progress will be measured.

¹⁸³ *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 206-207 (1982). The Act is replete with procedural protections designed to ensure the parent's informed, equal participation in the process, such as notice, consent, the right to an independent evaluation of the child's needs, and the right to challenge the school's proposed placement and program. P.L. 105-17, 615. In *Rowley*, the Court held that "Congress placed every bit as much emphasis upon compliance with the procedures ... as it did upon the measurement of the resulting IEP against a substantive standard." at 205-206.

¹⁸⁴ P.L. 105-17, 614 (f).

¹⁸⁵ 34 C.F.R. 300.552.

¹⁸⁶ P.L. 105-17, 612 (a)(5), 602(29); 34 C.F.R. 300.26.

The Americans with Disabilities Act (ADA)

The ADA is a comprehensive anti-discrimination law protecting people with disabilities. A principal purpose behind the act is to reduce over-institutionalization of people with disabilities. Title II of the ADA makes the act applicable to all state and local governments, including all sub-divisions. Thus, the ADA proscribes discrimination by, for example, all police departments, probation departments, prosecutors, school boards, and courts. Substantive actions taken or decisions made by judges are likely governed by the ADA's anti-discrimination mandates.

- “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.
- ADA regulations prohibit the use of “criteria or methods of administration” that have the effect of excluding or otherwise discriminating. 28 C.F.R. § 35.130(b)(3).
- The regulations require the administration of “services, programs, and activities in the most integrated setting appropriate to the needs of the qualified individuals with disabilities.” *Id.* at § 35.130(d).
- Public entities are required to evaluate and modify services, policies, and practices that do not or may not meet the non-discrimination mandates of the ADA. *Id.* at § 35.130(a).
- As to communications, the regulations require that a public entity accommodate persons with disabilities in order to ensure communications that are essentially equally effective with communications with non-disabled participants, applicants, and members of the public. *Id.* at § 35.160(a). The accommodations might necessarily include providing auxiliary aids and services. *Id.* at § 35.160(b)(1).
- In *Olmstead v. L.C.*, 119 S.Ct. 2176 (1999), the Supreme Court addressed the question whether unwarranted institutionalization of people with mental disabilities violates Title II of the ADA. A majority of the justices answered with a “qualified ‘yes’”. *Id.* at 2180-81.

The ADA does apply to prisons and to access by people with disabilities to programs, services, and benefits that allow for a person to shorten incarceration time. *Pennsylvania Department of Corrections v. Yeskey*, 118 S.Ct. 1952 (1998).

Top Ten Things a Judge Can Do Under IDEA

1. Determine the child's special education status.

Determine if the child is in school, if the child has previously been identified as needing special education, and if the child had an Individualized Education Program (IEP) in the last educational placement. This information may be critical for determining whether the school system has an obligation to educate and serve a student aged 18-21 in an adult correctional facility.¹⁸⁷

2. Find a way to get the child evaluated for special education eligibility.

Insist that the parent have the child evaluated; or tell a probation officer to push for the evaluation, or refer the child yourself to school system personnel for comprehensive current evaluations.¹⁸⁸ Upon request, school system personnel must assess the child, without charge, in all areas of suspected disability. Thus, by pushing special education evaluation, a court can ensure that -- without charge to the parent *or to the court* -- comprehensive evaluations have been completed. Left to their own systems and means, delinquency and adult criminal courts often fail to obtain *any* evaluation of a child. When the court does obtain its own evaluation (regarding a child in adult criminal court), the evaluation is likely to be a forensic screening regarding competency or amenability to rehabilitation or perhaps a clinical psychological evaluation addressing the child's cognitive level (IQ) and basic diagnoses. Through the special education process, the parent and the child are entitled, as noted above, to evaluations relevant to any area of suspected disability. In addition to a complete psycho-educational, speech/language, hearing, and vision testing, the child may also have, for example, a clinical psychological evaluation, an occupational and physical therapy evaluation, a neurological and/or psycho-neurological evaluation, an evaluation of adaptive functioning and non-verbal intelligence, and a complete vocational evaluation.

3. Ensure that someone acquires and organizes for the court the child's educational records.

Particularly for disposition (in delinquency cases), for sentencing (in criminal cases), and for transfer (between delinquency and adult criminal court), the judge should see the child's educational history.¹⁸⁹ Typically, one will discern a failure by school system personnel over a period of many years, beginning in early elementary school, to identify the child as eligible for special education services and a failure to provide the child with required special education services. The court should insist that an advocate for the child or an expert appointed by the court prepare a chart to provide for the court a summary of the child's school history. (Reviewing clearly-documented evidence that educators responsible for the child failed for a period of years -- in violation of federal, state, and local law -- to provide comprehensive services to the child, how can one conclude that a child is not amenable to services?)

¹⁸⁷ 20 U.S.C. § 1412 (a)(1)(B)(ii); 34 C.F.R. § 300.311 (a).

¹⁸⁸ See e.g., 34 C.F.R. § 300.532 regarding evaluation procedures and your local school regulations regarding referral for special education by a judicial officer.

¹⁸⁹ See 34 C.F.R. § 300.560 *et seq.*

4. Appoint an educational expert to advise the court.

Locate an educational psychologist or other professional with expertise in psycho-educational matters (*i.e.*, education-related disabilities and special education evaluations and services). An expert can review the child's educational history (including current and past evaluations), review the child's current and past IEPs (or the lack thereof), evaluate the child's current educational placement and services (or the lack thereof), and help the court and the parties to find appropriate and comprehensive services for the child.

5. Push the parent (or a child who is 18 or older) to hire a special education lawyer.

One may have trouble initially finding attorneys who know and practice special education law and, in particular, finding attorneys willing to represent (regarding special education) parents of young people who have cases in the delinquency or adult criminal court. With some persistence, however, one can find and develop these connections, particularly as lawyers learn that attorneys' fees are available at market rate for parents who prevail in special education matters against the school district.¹⁹⁰

6. Understand what "special education," "free appropriate public education" (FAPE), "related services," and "transition services" are.

The services available through the school system to a child with education-related disabilities are comprehensive and meaningful. Provided and supervised properly, these services can help the child become stable, safe, and productive. Thus, the court should view these services as an alternative to incarceration and to punitive handling of the child through the criminal or delinquency system. The court can make attendance or residence at a special education placement and participation in special education services a condition of probation or pre-trial release.

7. Insist that the child have a current, appropriate Individualized Education Program (IEP) and a current notice of placement.

Order that school system personnel (or personnel from another public agency responsible for providing educational services to students in adult correctional facilities) develop an IEP for the child.¹⁹¹ Order representatives from appropriate linking agencies -- *i.e.*, agencies that provide certain transition services -- to be present at the development of the IEP.¹⁹² Insist that school system personnel (or personnel from another public agency responsible for providing educational services to students in adult correctional facilities) issue a notice of placement that specifies the child's current special education school placement.

¹⁹⁰ 34 C.F.R. § 300.513.

¹⁹¹ See 20 U.S.C. § 1414 (d)(6), 34 C.F.R. §§ 300.311 (b) and (c) (relating to the development of IEPs for children with disabilities in adult prisons) and 20 U.S.C. § 1412 (a)(11)(c) (allowing the state to designate a public agency, other than the school system, to provide educational services for children with disabilities in adult prisons).

¹⁹² See, *e.g.*, 34 C.F.R. § 300.344 (b) (regarding transition services participants); *but see* 34 C.F.R. § 300.311 (b)(2) (limiting the obligation to provide transition services).

8. Use the bully pulpit and the court's authority creatively to ensure that the child gets needed services (special education services, related services, and transition services).

The special education law (*i.e.*, the IDEA) does require that a party exhaust administrative remedies prior to obtaining relief from a court; nonetheless, a judge in a delinquency or criminal case (or a transfer hearing) can insist that parents, probation officers, and others responsible for the child take necessary actions. Moreover, if school system personnel fail to provide an IEP and special education, related services, and transition services, they are in effect likely interfering with the child's ability to comply with the court's order to attend school. A non-party who interferes with a party's ability to comply with a court's order (and with statutory requirements like mandatory school attendance) may be in civil contempt and/or subject to the court's authority under its own rules to enforce compliance with its orders. Simply summoning school system authorities to answer the court's questions about the absence of special education, related, and transition services for a child may be sufficient to get people moving to serve the child. Remember two key concepts from case law regarding special education remedies when school system personnel fail to provide free and appropriate special education services: (1) placement of the child by the parent in private facilities at public expense; (2) compensatory education services to make up for time and education lost by the child. By obtaining these remedies through the special education administrative hearing process and using them strategically in relation to the child's criminal matter, an advocate for the child can increase dramatically the potential for identifying and securing, for sentencing purposes, legitimate and practical alternatives to incarceration. Courts should be aware of these possibilities and encourage such outcomes. (See #10, below.)

9. Ensure that a child resides in the least restrictive environment consistent with both community safety and education of the child.

As noted above, comprehensive special education, related, and transition services can substitute for harsh treatment of a child in a delinquency or criminal incarceration setting. A judge may determine that a child requires placement that is not community-based. However, special education law may provide a residential treatment alternative that, as a practical matter, secures the community's protection from the child while ensuring that the child receives special education, related, and transition services. If a child with education-related disabilities needs twenty-four-hour supervision to ensure educational progress, school system personnel must provide that level of care. Thus, a court in a delinquency or criminal matter should insist that school system personnel initiate and complete this residential placement process prior to the court's disposition or sentencing date. To facilitate the child's ultimate placement, the court -- prior to disposition or sentencing -- can issue orders for the child to be released temporarily for the purpose of attending interviews at potential placements. (Placement in a residential treatment center is less restrictive than a hospital or, of course, a prison.)

10. Recognize that, by ensuring that the child receives education and treatment, you have advanced an outcome that ultimately is best not only for the child and the child's family, but also for the court and for the community.

Ensuring that a young person has opportunities to become competent and productive and to fulfill legitimate aspirations is the best outcome for everyone involved. Education reduces recidivism. Over the years, courts have allowed school system authorities to shift responsibility for maintaining and training children with serious behavioral problems from the school system to the courts and to the juvenile delinquency system. More recently, that shift has been increasingly to the adult criminal system. The court can require that school system personnel resume responsibility for the child, thus shifting much of the burden back. Whenever appropriate, the court -- in its discretion -- can maintain supervision of the child and of the education/treatment process by making attendance and participation in the special education placement a condition of probation. Unlike disposition or sentencing orders, special education programs (IEPs) are a product of a team of people that includes the parent and the child, expert evaluators, teachers and school system administrators. That team can modify and adjust the IEP at any time to increase its efficacy. IEPs can, and often do, contain extensive behavior management programs; individual, group, and family counseling; small teacher: student ratios (including one-on-one, when appropriate); recreational and therapeutic recreational activities, mentoring, tutoring, job coaching, and other services that are, in reality, not available in incarceration settings.



SECTION 9

ISSUES IN CONDUCTING THE TRIAL

By Hon Michael A. Corriero and Dr. Steven Weller

The Trial Process

The court proceeding can be intimidating for a juvenile going to court. The difficulties for the juvenile (and for many adults as well), include: (1) complicated proceedings that, without explanation, greatly test the juveniles' ability to understand the legal process and what is "happening" to them; (2) unhelpful and unfriendly staff; and (3) an apparent lack of interest by justice system practitioners about the specific merits of an individual's case.

Rational and efficient court processes and operations are important to the effectiveness of the court in meeting the needs of juveniles, families and victims. When court processes are slow, confused, unpredictable or appear to be irrational, the effectiveness of the court in dealing with the juvenile offender may be impaired in the following ways:

- The relationship between the sanctions imposed by the court and the criminal act may be lost on the juvenile;
- The juvenile may be less likely to develop the respect for the justice system that is necessary if the sanctions imposed by the court are to have any long term effect; and
- The juvenile may have difficulty understanding and participating in the process.

Delay and confusion also make it difficult for families of the juvenile, particularly non-English speaking families, to participate effectively in the process in order to get the most effective treatment for the needs of the juvenile, and for victims to get proper restitution and adequate closure.

The court must consider whether the process and the court's actions are understandable to the juvenile, the family and the victim, and whether the court's actions are of a quality that engenders respect for the court. This includes assuring that the flow of events and the quality of each court event are such that events take place when scheduled without frustrating continuances, the juvenile, family and victims can see progress at each step, and the court operates in a manner to allow orderly and thoughtful consideration of each individual's case.

Some critical problems that need to be addressed in dealing with juvenile offenders include the following.

- There is often inadequate fact-finding at trials, due to the desire to move cases along;

- In many courts there is over-reliance on plea bargaining without adequate explanation to the juvenile of his or her rights and the consequences of the guilty plea and without adequate oversight by the judge;
- Many lawyers and judges place low priority on criminal cases involving juveniles. Also, juvenile cases may be used as training for new lawyers by some prosecutor's and public defender's offices.¹⁹³

Personal interviews of twenty-four juveniles who were adjudicated delinquent and sent to out-of-home placements yielded the following insights into what difficulties they had and what they wanted out of the judicial process.

- The juveniles had a great deal of confusion about the roles of all the people in the courtroom;
- Among the aspects of the court process that impeded understanding for the juveniles were long words, the myriad of rules and procedures, people speaking too fast and things happening too quickly;
- The inability of the juvenile to talk to the prosecutor, the judge and his or her attorney decreased satisfaction;
- The juveniles reported having difficulty processing all the information around them. They needed more time and wanted the professionals to have more patience with them;
- The juveniles wanted more consistency from the professionals, particularly in regard to what was expected from the juvenile;
- The juveniles wanted more of an opportunity to tell the judges about themselves.¹⁹⁴

Culture and In-Court Behavior

Culture can have an important effect on the in-court behavior of litigants. The discussion that follows reviews the research findings on the effects of culture on in-court behavior for one cultural group, Latinos.¹⁹⁵ It is likely that other cultural groups face similar problems.

For many Latinos, a number of problems reflecting cultural misunderstandings can arise in court, including difficulties surrounding the use of official language and interpreters, and the meaning ascribed to an individual's demeanor.

¹⁹³ Geraghty, T., *Justice For Children: How Do We Get There?* 88 J. OF CRIM. L. AND CRIMINALITY 190, 241 (1997).

¹⁹⁴ Huertter, R. and Saltzman, B., *What Do "They" Think? The Delinquency Court Process in Colorado as Viewed by the Youth*, 69 DENV. U. L. REV. 345, 358 (1992).

¹⁹⁵ See Weller, S. and Martin, J., *A JUDGE'S GUIDE TO CULTURALLY COMPETENT RESPONSES TO LATINO FAMILY VIOLENCE* (Center for Public Policy Studies, 1998).

Language and Interpreters

In addition to the delays that can result when too few interpreters are available to a court system, other aspects of language translation, the use of interpreters, and cultural misunderstanding are often encountered in cases involving Latinos with limited English skills, including the following.

- First, interpreters may be intimidating to the offender by being too loud, aggressive or disrespectful.
- Second, using family members as interpreters can be problematical. The family member may screen things out and not translate everything.
- Third, court interpreters often are unaware of cultural and language nuances and are often unable to translate into an appropriate vernacular. This may be particularly serious for the potentially numerous Latinos who came from more rural areas of Mexico and other nations of Latin America and also might not be literate even in Spanish. There may be nuances in the meaning of what a person says that the interpreter who is not familiar with the particular subculture of the person may miss.
- Fourth, translating court terminology into Spanish terms that the defendants and their families can understand might be a problem, especially for people with limited education. Difficulties making court appearances may be one of the more obvious results of misunderstanding. Moreover, although some Latinos appearing in court might not understand what is happening to them, they may be reluctant to speak up in court, fearing that speaking up might show disrespect for the judge and the law.

Demeanor

Cultural body language can be difficult to understand and might give rise to misunderstandings of a litigant's demeanor.

- A reserved demeanor might not mean that the person has nothing to say.
- A sense of stoicism and acceptance of fate and consequence might result in a failure to raise a defense. This may be interpreted as disrespect and disinterest.
- An important disadvantage in court for monolingual Spanish-speaking litigants might be that they cannot learn what to expect by watching the cases that precede their case. As one consequence they will not understand what is happening in other cases and will not know how similar cases are being handled. They also will not know what affects the judge positively and negatively.
- A Latino juvenile might appear in court with peers or family members. This may make it hard for the juvenile to admit guilt. Judges may become impatient with this if they do not understand the dynamic that leads to the refusal to plea bargain.

Significance for Judges

A judge may need to take the time needed to make sure that the juvenile really understands what is happening in court. Presentation of ideas and concepts in a way that is culturally understandable may be important. For example, judges might need to make sure that the conditions of a treatment order are clear and understood by all parties. Similarly, judges should understand the limitations that might be placed on the court process due to language difficulties, such as:

- Monolingual Spanish-speaking litigants may not want to show disrespect or look like they do not understand and may nod in agreement at everything, even though they might not understand the complexities of the proceeding;
- The verbatim interpretation of a judge's words may be inadequate to convey meaning to the litigants;
- It may be difficult to translate court terminology where there is no similar terminology in vernacular Spanish.

Where interpreters are used, the judge should instruct the interpreter not to try to imitate inflection or body language. It is important for the judge to look at the witness and not the interpreter, so that the judge can assess body language.

Table 9-1 summarizes some of the problems that Latinos might have in dealing with the courts and the significance for judges dealing with Latino juveniles in adult criminal court.

Table 9-1. Culture and In-Court Behavior			
Cultural Issues	Indicator Questions	Potential Legal Effects	Significance for Judges
Language difficulty	Did the juvenile have difficulty finding out where to go or what to do in court?	Missing court appearances Inability to knowingly waive rights	Judges need to assure that the offender really understands what is happening in court.
	Does the juvenile have difficulties with the English language?	Inability to participate knowingly in one's defense	Judges need to know how to assess the accuracy of translations of the statements of the offender.
Cultural reserve or acceptance of one's fate	Is the juvenile nodding understanding without real comprehension?	Non-participation in court	Judges need to avoid bias based on expectations of behavior or dress in court.
	Is the juvenile not speaking in court?		
Support or pressure from peers or family	Are there peers or family members in court?	Assumption of disrespect for the court	Judges need to avoid bias based on expectations of behavior or dress in court.
	Did the juvenile refuse to plead guilty to please peers or family?	Assumption of lack of remorse	

The Role of the Family and the Guardian *ad Litem*

Two issues of particular importance in juvenile proceedings that could have applicability to dealing with juveniles in adult criminal court are the role of the family and the possible appointment of a guardian *ad litem*. The American Bar Association Juvenile Justice Standards, Standards Relating to Pretrial Court Proceedings, address the role of the family in great detail.¹⁹⁶ The standards provide that the parents' primary role is to be present on behalf of their child.¹⁹⁷ Further, parents are encouraged to take an active

¹⁹⁶ Shepherd, R. Jr., ed., THE ABA JUVENILE JUSTICE STANDARDS, ANNOTATED 257 (1996).

¹⁹⁷ See Appendix B for a partial list of the ABA Juvenile Justice Standards.

interest in their child's case. If necessary, parents should be provided with interpreter services. If there is no parent to assist with the juvenile case or if there is a conflict of interest between the juvenile and the parents, a guardian *ad litem* should be appointed. The guardian *ad litem* shall act in the same manner as would a concerned parent.

Other Trial Issues

The following is a checklist of other issues that the judge should consider with regard to the trial of a juvenile in adult criminal court:

- Competency. Consideration of a court-ordered evaluation to determine a youth's competence to stand trial. Assessing competency issues and waiver of Miranda rights.
- Culpability. Understanding the common law defense of infancy (immaturity), and the doctrine of diminished responsibility.
- Guardian *ad litem*. Consideration of appointment of a Guardian *ad litem* in the absence of appropriate parental involvement.
- Dynamics of Group Offending. Understanding peer pressure and its impact on culpability – the impact of gang involvement.
- The juvenile as "informer". Understanding issues regarding the willingness of juveniles to inform on their friends.
- Jury Selection. Counsel should be permitted to address issues concerning age considerations during the *voir dire* of prospective jurors.
- Guilty Pleas. Pleas should be subject to an individualized and searching inquiry into the voluntary, knowing and intelligent exercise of the youth's rights. A youthful defendant should be advised in open court by the judge of the conduct with which he is charged, the rights he is relinquishing, the possible sentence and consequences of the plea (the collateral consequences).
- Communicating effectively. The importance of developing an appropriate rapport with juvenile offenders and the use of developmentally appropriate language should be considered by the judge.
- The media. Generally, the press will have the same access to trials involving youths in the adult criminal justice system as they have with adult prosecutions. However, it can be argued that access to pre-trial and sentencing phases may be limited where confidential or privileged social and psychological information is being presented. The best way to deal with the media is to present a clear, articulate reason for everything you do.

SECTION 10

SENTENCING¹⁹⁸

Hon. Michael A. Corriero

The General Principles of Juvenile Sentencing

The following section contains my views on the sentencing of juveniles in adult criminal court. Below are the general principles that I believe should be used to sentence juveniles:

- We must develop and implement a process that serves to "identify," with precision, violent, dangerous and chronic juvenile offenders;
- "Punishment" of children should be imposed not only for retribution but as an opportunity to educate and provide skills and services;
- The process of identification and punishment must be flexible enough to recognize and accommodate juveniles who have the capacity to change their behavior by participation in alternative to incarceration programs;
- There must be a mechanism to remove, in appropriate cases, the stigma of a conviction from those juvenile offenders who can demonstrate their willingness to conform their behavior to society's standards even after incarceration.

Virtually all children sentenced as "juvenile offenders" in adult criminal court, with the exception of those convicted of murder, will return to society by the age of 21.¹⁹⁹ This fact alone highlights the importance of an effective juvenile sentencing policy. When sentencing juveniles under 16 years of age, judges have a special obligation to protect society through the initiation of preventive measures leading to the rehabilitation of the child.²⁰⁰

Chief Justice William Rehnquist, in his concurring opinion in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 107 (1979), stated: "[A] court concerned with juvenile affairs serves as a rehabilitative and protective agency of the State."

¹⁹⁸ This Section includes an adaptation of Corriero, M., *Sentencing Children Tried and Convicted As Adults*, which is reprinted with permission from the *Criminal Justice Journal*, Summer 1999, Vol. 7, No. 1, published by the New York State Bar Association, One Elk Street, Albany, New York 12207.

¹⁹⁹ The Juvenile Offender Law of New York provides as a maximum sentence for most serious "J.O." offenses, other than murder, an indeterminate sentence of a minimum of three years, four months to ten years. A 14- or 15-year-old convicted of manslaughter in the first degree or robbery in the first degree, for example, and sentenced to a maximum term, can return to society at as early as 18 years old and generally no later than 21. He will "max" out of his sentence, assuming he earns good time, after serving six years and eight months.

²⁰⁰ The Juvenile Offender Law of New York was enacted as part of the Omnibus Crime Control Bill of 1978 (Laws of 1978, ch. 481). This law removed from the jurisdiction of the Family Court all 13-, 14- and 15-year-olds accused of serious violent offenses. See Warner, E., *THE JUVENILE OFFENDER HANDBOOK* (1999).

All judicial sentences are based on cultural and individual assumptions about the nature of life and the values of our society. Even though retribution has gained favor as the dominant sentencing rationale for adults in recent years, and "accountability" is a familiar refrain for youthful miscreants, the pragmatic realization that children convicted of serious crimes will return to society as still relatively young men and women, lends critical support to the goal of *rehabilitation* as the underlying rationale for juvenile sentences.²⁰¹ There are many critics of the "rehabilitative ideal," however, who argue that it is an unattainable illusion, given the present state of our knowledge about criminal behavior. I do not agree that rehabilitation is unattainable. The idea that the ultimate goal of sentencing juveniles ought to be rehabilitation is surely a value preference. The law speaks of rehabilitation of children because it is desirable to proceed as if it were possible. The rehabilitative approach, however, is not *merely* a theoretical preference. Rather, it is based on the commonsense belief that children are developmentally different than adults. Children are malleable, less committed to their misconduct and more susceptible to the impact of positive influence than are adults. Consequently, in my view, it is possible for a judge to influence a child's behavior. If we consider rehabilitation, therefore, not as "curing" an illness or "changing" character but, instead, as a process that enables a child to "develop" character, then we will be able to craft a juvenile sentence in a constructive way. It is therefore appropriate for a judge to maximize his interaction with the youths who appear before him as a means of deterrence and rehabilitation. For this reason, the juvenile sentencing proceeding, as an interactive process, may acquire greater emotional and dramatic overtones than an adult sentencing proceeding.²⁰²

Unfortunately, there are few statutory or common law guidelines concerning what a judge can or cannot say or do at a sentencing proceeding. Sentencing is largely left to the broad discretion of a sentencing judge, and his or her decision will not be disturbed unless it is beyond permissible statutory parameters or violates constitutional values.²⁰³

The dilemma of the American sentencing judge is qualitatively unique. Because our system of criminal justice has embraced, to a degree, unequalled elsewhere the rehabilitative ideal that punishment should fit not the crime, but the particular criminal, the sentencing judge must labor to fulfill the dual and sometimes conflicting roles of judge and clinician. Entrusted with enormous discretion, she or he is expected to "individualize" the sentence imposed to suit the character, social history, and potential for recidivism of the offender. Yet, because of the general absence in our system of meaningful procedures for the appellate review of sentences, the judge is denied standards by which to determine any particular sentence or by which to learn what decisions fellow judges have reached in similar situations.²⁰⁴

²⁰¹ See generally Campbell, A., *LAW OF SENTENCING* (2d ed. 1991).

²⁰² My perspective is based upon my experience as the presiding judge of Manhattan's Youth Part, which adjudicates the cases of all juvenile offenders indicted in New York County. Admittedly some of the lessons I have learned and the conclusions I have drawn may be, to that extent, parochial. I leave it to the reader to judge whether my conclusions resonate with yours.

²⁰³ See *Williams v. New York*, 337 U.S. 241 (1949).

²⁰⁴ Coffee, J., *The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice*, 73 *MICH. L. REV.* 1362, 1362-63 (1975).

The *American Heritage Dictionary* defines "rehabilitate" as "1. To restore. (a handicapped or delinquent person) to useful life through education and therapy. 2. To reinstate the good name of. 3. To restore the former rank, privileges or rights of."²⁰⁵

Education plays an important role in the process of rehabilitation. Frank Tobin, a teacher at the Cook County Temporary Detention Center School, provides valuable insight into the purpose of a juvenile sentence. For Frank Tobin, in a criminal act, the violence is one thing, the circumstances are a second thing, and the person still another. "People say you're criminals," Frank tells the students one morning. "And if you believe that, you're doomed. Oh, you may have committed a crime, you may have done something terrible. And you need to account for that, and sometimes that accounting is heavy. But everything you do is not criminal. You are more than a single act, and you have a life ahead of you that is more than one bad act. Your job is to find a way to live beyond the worst thing you ever did."²⁰⁶

At the turn of the century, Judge Ben Lindsey, known as the father of the Colorado Juvenile Court, established the quintessential "style" of a judge dealing with children. He behaved and acted in such a manner as to create a rapport and intimacy with the children who came before him, so that he could act as a catalyst for change in their behavior. He stated:

This should be accomplished as a wise and loving parent would accomplish it, not with leniency on the one hand or brutality on the other, but with charity, patience, interest and what is most important of all, a firmness that commands respect, love and obedience, and does not produce hate or ill-will.²⁰⁷

One hundred years later, these words and the sentiments they represent may seem out of place when the brutality of juvenile crime has shocked a nation. On the other hand, the concept of the judge as a formidable force in shaping the lives of the juveniles appearing before him or her is perhaps even more compelling now than it was a century ago. The community brings its adolescent offenders to the courts, and the community expects that the court will deal with these children swiftly, effectively and constructively.

A juvenile sentencing proceeding should be a dynamic, interactive process, which serves as a guide for the child's rehabilitation; it should be educational and motivational. The judge's remarks during the sentencing process should help the juvenile to understand the behavior that brought him or her to this moment, to give the juvenile the opportunity to explain any mitigation as to his or her role in the crime. It should be more than a perfunctory pronouncement of the length of a sentence; it should include the "why" of the sentence. It should be used as an opportunity to advise the youth of his or her

²⁰⁵ AMERICAN HERITAGE DICTIONARY 1096 (New College ed. 1976).

²⁰⁶ See Ayers, W., *A Kind and Just Parent* THE CHILDREN OF JUVENILE COURT 49 (1997).

²⁰⁷ This quote has been attributed to Judge Ben B. Lindsey, although my research has not revealed its source. For further information concerning Judge Lindsey, see Larsen, C., *THE GOOD FIGHT: THE LIFE AND TIMES OF BEN B. LINDSEY* (1972).

responsibilities to society. The hearing should reflect the judge's attempt to initiate change in the child's behavior by causing that child to recognize and understand the claims of society. A youth should be told what is expected of him or her to regain status in the community at the moment of sentence or in the future. The proceeding should be designed to give the youth encouragement and the strength to begin maturity.²⁰⁸

Federal Judge Marvin Frankel, in describing the character of the sentencing process, said that most judges, after reading a pre-sentence report, arrive at some tentative sentence, "which is probably the sentence later imposed in 90 percent or so of all the cases."²⁰⁹ Thus, in many cases, the formal sentencing proceeding in the courtroom becomes merely a formality.

The juvenile sentencing proceeding should be far more than a mere formality. It should be utilized to evaluate carefully a defendant's character, not only as it is reflected by a jury's verdict or in probation reports, but also as it is revealed in any statements the youth chooses to make at the time of sentence. The sentencing proceeding is the mechanism during which the judge may assess, in light of all available information, the child's prospects for rehabilitation and restoration to a useful place in society. This can be accomplished through communication between the youth and the judge. Of course, this interaction must be within statutory limits and constitutional boundaries.

The Sentencing Protocol

The process of determining a young person's potential is carried out in stages:

- Information is gathered about the youth. (e.g., documentation of youth's family, school and social history as part of a pre-pleading investigation);
- The youth's background and support network are carefully evaluated;
- A plan is developed to test the willingness and the ability of the youth to modify his behavior.

Federal Rules of Criminal Procedure, Rule 32(c)(3)(c) explicitly affords the convicted defendant two rights: (1) to make a statement on his own behalf and (2) to present any information in mitigation of punishment.²¹⁰ Focusing on this federal statutory right, the U.S. Supreme Court, in *Green v. United States*, 365 U.S. 301 (1961), declared that before sentencing a defendant in a criminal case, trial judges should unambiguously address themselves to the defendant, leaving no room for doubt that the defendant has been

²⁰⁸ The approach I am advocating at the sentence hearing is just as applicable at the time a plea is entered. In accepting pleas from juvenile offenders and during the plea allocation, I often find it helpful in understanding a youth's behavior to not only ask *what* a youth has done to violate the law, but also *why* he did it, how he now feels about his behavior, what he wants to do with the rest of his life, and how he intends to accomplish his goals.

²⁰⁹ Frankel, M., *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 36 (1973).

²¹⁰ Fed. R. Crim. P. 32(c)(3)(c) provides in part: "Before imposing sentence, the court must: (c) address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of sentence."

issued a personal invitation to speak prior to sentence. Merely affording defendant's counsel an opportunity to speak does not meet the requirements of the federal procedure. Thus, as in the federal system, this section imposes a duty on the sentencing judge to ask the defendant whether he or she wishes to make a statement--that is, to affirmatively invite the defendant to speak.²¹¹

In order that a juvenile's right to address the court be fully realized, there should be the utmost freedom of communication between the court and the youth at the time of allocution, limited only by constitutional bounds.²¹² It may be argued that a juvenile under 16 years of age may be so intimidated by court surroundings and the significance of the proceeding that he or she will be unable to speak coherently in his or her defense. However, in order to render meaningful a child's opportunity to speak and influence the sentence, it is the court's responsibility to ensure that the atmosphere of the proceeding is conducive to the child taking advantage of the right, if he or she so chooses.

In order to utilize the juvenile sentencing hearing as an aid to the court in designing a sentence, which balances the needs of the child with society's need for protection, and in assigning responsibility, the sentencing judge should set forth his view of the culpability of the convicted defendant. In addition, the judge should clearly articulate those factors he or she is weighing in determining the appropriate sentence, so that the youth is fully aware of those variables. In this way, the youth gains insight into the behavior so that the prospects of rehabilitation might be enhanced.²¹³ Indeed, such a candid, open process would make the statutory right of the child to make a plea in mitigation more meaningful, by providing the youth with an opportunity to explain his or her behavior, express his or her feelings and perhaps accept responsibility.

²¹¹ *Id.* at 307 n. 2.

²¹² See generally *Williams v. New York*, 337 U.S. 241 (1949).

²¹³ Such a procedure comports with ABA STANDARDS FOR CRIMINAL JUSTICE SENTENCING. STANDARD 18-5.19 states:

(a) The rules of procedure should provide that sentence be imposed in open court in the presence of the offender.

(b) The rules should provide that a sentencing court, when imposing sentence, should state or summarize the court's findings of fact, should state with care the precise terms of the sentence imposed, and should state the reasons for selection of the type of sanction and the level of severity of the sanction in the sentence.

(c) The statement of reasons may be relatively concise when the level of severity and type of sanction are consistent with the presumptive sentence, but the sentencing court should always provide an explanation of the court's reasons sufficient to inform the parties, appellate courts, and the public of the basis for the sentence.

Judge Marvin Frankel, in another context, expressed the rationale for an explanation of the court's reason for the sentence in this way: "The question 'Why?' states a primitive and insistent human need. The small child, punished or deprived, demands an explanation. The existence of a rationale may not make the hurt pleasant, or even just. But the absence, or refusal, of reasons is an hallmark of injustice." ABA STANDARDS FOR CRIMINAL JUSTICE SENTENCING, 3d ed., 212-213 (1994).

Essential Tools in the Process

Psychologists tell us that children learn their moral codes and adjust their behavior in response to a discrete system of reward and punishment. They learn a code of morality, and develop a conscience through the reaction of their parents and teachers to their conduct. The same system of reward and punishment ought to be applied in dealing with the offenses of juveniles. They should, in appropriate circumstances, be permitted to "prove" themselves, to earn probation and avoid the stigma of a felony conviction. Many youths who appear in adult criminal court can benefit from strict supervision and psychological counseling. Such guidance can help them demonstrate their willingness to conform to society's moral standards, thereby earning their way out of a jail sentence and onto a more promising path.

In recognition of these concerns and principles, a process can be employed to test the child's willingness to conform his or her behavior. Essential tools in the process are:

- The deferred sentence -- Postponement of sentence while the youth participates in an alternative to incarceration program;
- The conditional nature of the sentence -- If the court learns that a defendant has violated the terms of the deferred sentence, the court may impose a stricter sentence;
- Validation of the youth's compliance with the terms of the deferred sentence. For example, in the Youth Part, in order to validate the child's progress, the court closely monitors performance in the alternative to incarceration programs. Youth Part staff (the judge's law clerk and secretary) make weekly phone calls to the child's program counselor, and every three to four weeks the child must appear in the Youth Part for a formal program report.

Mitigating Factors

As stated, the primary purpose of the judge's invitation to the defendant to speak at sentencing is to give the defendant an opportunity to be heard on the subject of mitigation. Mitigating factors indicative of a child's potential for rehabilitation have traditionally included remorse and acceptance of responsibility. How often has a sentencing judge read in a juvenile's probation report: The defendant appears to have taken responsibility for his or her actions and negative associations. This is the first step towards maturity and a positive adjustment.

A criminal conviction is an official condemnation--the idea of "blame" reinforces this for the public and provides the individual with the *incentive* to develop responsibility.²¹⁴ The idea of individual responsibility and accountability is just as important in the administration of juvenile justice as it is in the adult justice system. Acknowledgment of

²¹⁴See Feld, B., *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. OF CRIM. L. & CRIMINOLOGY 68 (Fall 1997). The author has drawn heavily from Professor Feld's views concerning the virtue of youths affirming responsibility for their misbehavior.

conduct that is blameworthy and a youth's appreciation of its blameworthiness is a demonstration of his or her insight into his or her behavior. "Affirming responsibility encourages a young person to learn the virtues of moderation, self-discipline and personal accountability"²¹⁵--all necessary qualities to live peacefully and constructively. It reinforces a young person's obligation to change behavior to conform to the rules of a democratic society.

In terms of sentencing and the protection of the public, a child's affirmation of responsibility is a crucial first step in the process of rehabilitation. It is a fair indicator of a child's potential to change. Psychologists tell us that amenability to treatment is significantly lessened without affirmance of responsibility.²¹⁶ When a youthful defendant acknowledges his or her own responsibility for a crime and exhibits remorse, the task for the sentencing judge is to determine whether it is a genuine expression. Convincing evidence of remorse and acceptance of responsibility may properly be considered in mitigation of the sentence.²¹⁷

A judge, however, should carefully avoid any suggestion in his or her comments to the youth or the youth's attorney that he or she is *penalizing* or *will penalize* the youth for his silence as to these factors. A sentencing judge should not *enhance* the sentence of a defendant who does not acknowledge responsibility for his or her acts; to do so would be deemed a violation of the defendant's constitutional privilege against self-incrimination.²¹⁸ Thus, in the interactive juvenile sentencing process, a conflict may arise between two principles of American criminal law.

The first is the Fifth Amendment privilege against self-incrimination. The second is the principle that a court may consider all available information in formulating a sentence and may properly grant lenity to those . . . who show contrition for their crimes and take steps toward rehabilitation and re-establishment as good and responsible members of society.²¹⁹

The problem can become particularly acute when a defendant's lawyer or the youth seeks compassion, closure or, more importantly, discretionary statutory relief such as youthful offender treatment or a certificate of relief from disabilities. Indeed, an interactive juvenile sentencing process may have an impact on such forms of relief, due to the manner in which they are granted.

²¹⁵ *Id.* at 126.

²¹⁶ This statement is based on conversations with Stephen P. Herman, M.D., a specialist in child psychiatry.

²¹⁷ See *Gollaher v. United States*, 419 F.2d 520, 530 (9th Cir. 1969); *United States v. Floyd*, 496 F.2d 982, 989 (2d Cir. 1974); *People v. Albanese*, 464 N.E.2d 206 (Ill. 1984); *State v. Farnham*, 479 A.2d 887 (Me. 1984). See also *People v. Hayes*, 115 A.D.2d 910 (3d Dep't 1985); *People v. Wamsanz*, 245 A.D.2d 919 (3d Dep't 1997); *People v. Duff*, 216 A.D.2d 689 (3d Dep't 1995); *People v. Pinsonneault*, 116 A.D.2d 849 (3d Dep't), *lv. denied*, 67 N.Y.2d 888 (1986).

²¹⁸ See *United States v. Miller*, 589 F.2d 1117, 1137 (1st Cir. 1978); *Le Blanc v. United States*, 391 F.2d 916 (1st Cir. 1968).

²¹⁹ See *Roberts v. United States*, 445 U.S. 552, 557 (1980); *United States v. Santamaria*, 788 F.2d 824, 827 (1st Cir. 1986).

In New York, the judge has discretion to make a finding that the juvenile is a "youthful offender."²²⁰ As noted in *People v. Cruickshank*, 105 A.D.2d 325, 334-35 (3d Dep't 1985), "Youthful offender status 'permits the court to mete out fair punishment for a young adult's crimes and transgressions yet mitigates future consequences in recognition of, *inter alia*, the youth's lack of experience and the court's hope for his future constructive life."²²¹ Eligible youths include juvenile offenders as well as youths who are charged as adults and who are less than 19 years of age.²²² A youthful offender finding is of great import for the child. If a youthful offender finding is made, the criminal conviction is vacated and is "replaced" by that finding. When a sentence is imposed, the youthful offender finding and sentence merge into a youthful offender adjudication.²²³ There is no criminal conviction, and upon entry of the youthful offender adjudication, all official records are deemed confidential.²²⁴

The determination of whether an eligible youth is either a youthful offender or a convicted felon thus has serious, lifelong implications. If a youth is not otherwise precluded from eligibility by statutory criteria such as age or a prior record, the court has an *affirmative duty* to exercise its discretion--that is, to proceed to a consideration of whether a youthful offender adjudication is appropriate in a given case, and to announce that determination at sentence.²²⁵ While there is no specific statutory formula, which a judge must follow in exercising discretion, factors to be considered upon an application for youthful offender treatment include:

the gravity of the crime and manner in which it was committed, mitigating circumstances, defendant's prior criminal record, prior acts of violence, recommendations in the presentence reports, defendant's reputation, the level of cooperation with authorities, *defendant's attitude toward society and respect for the law, and the prospects for rehabilitation and hope for a future constructive life.*²²⁶

Courts have also held that a defendant's *expression of remorse* may be considered in determining youthful offender status.²²⁷ Denial of youthful offender treatment based upon factors including "lack of remorse" has never been considered an abuse of discretion.²²⁸ In essence, a youth's *expression* at the time of sentence of his or her realization of the seriousness of his or her conduct thus may be a factor, which affects the

²²⁰ N.Y. CRIM. PROC. LAW § 720.10(2).

²²¹ *Aff'd sub nom.* 67 N.Y.2d 625 (1986) *citing* *People v. Gordon S.*, 89 A.D.2d 912, 913 (2d Dep't 1982).

²²² N.Y. CRIM. PROC. LAW § 720.10(2) excludes from eligibility certain youths based upon their prior record or the crime for which the youth stands convicted. *See also* Preiser, *supra* note 211 at 391.

²²³ *See* Preiser, *supra* note 211 at 390.

²²⁴ *See* Preiser, *supra* note 211 at 401.

²²⁵ N.Y. CRIM. PROC. LAW §§ 720.15, 720.35; *see also* Preiser, *supra* note 211 at 401.

²²⁶ *See* *People v. Robinson*, 110 A.D.2d 939 (3d Dep't 1985); *People v. Mendoza*, 57 A.D.2d 846 (2d Dep't 1997); *see also* Preiser, *supra* note 211 at 405.

²²⁷ *See* *People v. Cruickshank*, 105 A.D.2d 105 A.D.2d 325, 334 (3d Dep't 1985), *aff'd sub nom.* 67 N.Y.2d 625 (1986) (emphasis added); *People v. Shrubsall*, 167 A.D.2d 929 (4th Dep't 1990).

²²⁸ *See* *People v. Pinsonneault*, 116 A.D.2d 849 (3d Dep't), *lv. denied*, 67 N.Y.2d 888 (1986).

²²⁹ *See* *People v. Duff*, 216 A.D.2d 689 (3d Dep't 1995); *People v. Hayes*, 115 A.D.2d 910 (3d Dep't 1985); *People v. Wamsganz*, 245 A.D.2d 919 (3d Dep't 1997).

judge's exercise of discretion regarding youthful offender adjudication. When neither the trial record nor the defendant, either through counsel or personally, offers any basis for mitigation, the defendant will encounter greater difficulty in attempting to persuade the court that he or she is entitled to leniency simply because of the defendant's youth.

A similar situation may arise regarding the court granting a certificate of relief from disabilities. Such certificate may be issued by the court but only if the relief to be granted is consistent with the rehabilitation of the eligible offender--that is, when it will be an aid to rehabilitation.²²⁹ When the record does not indicate mitigation or the prospect of rehabilitation, issuance of such certificate would likely be deemed an inappropriate exercise of discretion, notwithstanding the youth of the defendant.

Unfortunately, procedure and substance often do not neatly coalesce when dealing with juveniles prosecuted in adult criminal courts. There is traditionally tension between the *parens patriae* approach predominant in the juvenile courts and the adversarial structure of the adult criminal courts. This tension can become most apparent when a judge seeks to determine the rehabilitative potential of a youth convicted after a trial, through the youth's awareness of his or her culpable behavior. If a judge during the pendency of a criminal proceeding has been able to establish and develop an appropriate rapport with a child defendant, an invitation to speak at sentence can help a child squarely face the difficulties that caused his or her behavior.²³⁰ A judge who succeeds in developing such a connection with a youth, who encourages a child to believe in himself or herself and to believe that he or she has the power to change current circumstances, can thereby initiate the process of the child's reintegration into the community.

This approach admittedly can cause tension between the child's lawyer who is desirous of protecting the child's legal options--seeing the child as a client--and the sentencing judge. A judge should be sensitive to the danger that efforts to view such a child as redeemable, to provide him or her with an opportunity in the sentencing process to acknowledge his or her responsibility as a "first step" toward rehabilitation, may be perceived as an impermissible attempt to obtain a confession of guilt in exchange for a lighter sentence. No defendant, young or old, should be penalized for refusing to admit guilt after a verdict.

Nevertheless, while a juvenile is certainly free to continue to assert his or her innocence after a conviction, reality and common sense require the sentencing judge to act upon the presumption that the convicted defendant is guilty. A judge at sentencing has a right to ask a convicted youth what happened and why, to assess the youth's insight into his or her behavior as a basis for measuring the prospects for rehabilitation. Of course, a child has a right to decline to answer and should not be penalized for doing so. The evil to be

²²⁹ N.Y. CORRECT. LAW § 702(1)(b); *United States v. Dinapoli*, 557 F.2d 962 (2d Cir. 1977).

²³⁰ The psychological defense mechanism of denial is generally more developed in adults than children, according to Steven P. Herman, M.D., *supra*, note 188, a specialist in child psychiatry. Consequently, a child is more likely to admit responsibility if a relationship of trust exists between a child and adult inquiring as to the child's behavior.

avoided is turning the sentence hearing into a *bargaining process*--i.e. in exchange for acceptance of responsibility, the court will grant a lighter sentence.

A judge, however, should not be required to tiptoe through due process pitfalls in order to use the sentence hearing as an opportunity to educate the convicted youth as to his or her societal obligations and to determine if the young offender possesses the insight that portends future improvement.

A sentencing judge should carefully consider the wisdom and caution expressed by the Ninth Circuit Court of Appeals in *Gollaher v. United States*, 419 F.2d 520 (9th Cir. 1969). It is worth repeating:

This case presents a dilemma, which every trial judge faces at the time of sentence. It is almost axiomatic that the first step toward rehabilitation of an offender is the offender's recognition that he was at fault. In the present state of the criminal law, there is no doubt that punishment is still a consideration in the imposition of sentence. . . . But to the extent that rehabilitation is the objective, no fault can be found of the judge who takes into consideration the extent of a defendant's rehabilitation at the time of sentence.

If the trial judge makes no mention of his or her thoughts on this subject, any sentence within legal limits will stand against attack. But, if the judge tells the defendant what he has in mind, the judge can anticipate an attack upon the sentence similar to the one at hand. No matter how artfully it may be put, the defendant will know that if he or she acknowledges that he or she has come to recognize his or her guilt, this may well result in a lesser sentence. The juvenile is then up against a hard choice of whether to forgo some potential attacks upon the judgment or to face a stiffer sentence. If the youth makes the latter choice, and the conviction is upheld, he is forced to rely upon the action of the Board of Parole. If the youth is, in fact, innocent, then he or she must have faith that this will ultimately be established and act accordingly. On the other hand, after the defendant has been convicted, the judge must proceed upon the basis that the defendant is guilty.

*Justice is better served by a forthright disclosure of the state of mind of the judge. While the considerations thus exposed are difficult, at least the defendant has the advantage of knowing what they are and can make decisions accordingly. A proper sentence takes into consideration the kind of crime committed and the kind of person who committed it.*²³¹

In sum, the juvenile sentencing procedure should be a restorative process--a process of reconciliation of the child with society, a process of "soul awakening instead of soul debasing."²³² It should be consciously designed to create an atmosphere that permits an assessment of the child's moral character, demonstrating the values of truth and integrity within the justice system, as well as cautious optimism for a positive future.

²³¹ *Id.* at 530 (emphasis added).

²³² *See supra* note 198.

The Role of the Judge

Adjudication as an Interactive Process. The sentencing proceeding should be an interactive process, which serves as a guide for the child's rehabilitation. The judge's remarks should help the juvenile understand the behavior that brought him or her to this moment in life. The proceeding should include the "why" of the sentence; it should be used as an opportunity to advise the youth of his or her responsibilities to society.

Understanding the Juvenile's Prospects for Rehabilitation. Deferring or postponing sentence permits the court to monitor the youth's performance, allows the court to measure the prospects of rehabilitation and, therefore, provides insight as to an appropriate sentence.



SECTION 11

JUVENILES IN ADULT PRISONS AND JAILS

By Kelly Dedel Johnson, Ph.D. and William Sturgeon

Authors of earlier chapters of this guide have thoroughly reviewed the empirical research demonstrating the failure of transfer provisions to provide either specific or general deterrence to juvenile crime. Despite this evidence that adult correctional programs, as they are currently designed, do little to rehabilitate youth, the fact remains that a significant proportion of youth who are processed through the adult court system go on to become inmates in adult correctional facilities. The purpose of this chapter is to present the most current research on the prevalence of juveniles in adult facilities and to discuss the reasons that many youth struggle in these environments. Put simply, the very characteristics that make the competency of juvenile defendants an issue in court re-appear as stumbling blocks in the correctional environment.

Only a small proportion of juveniles who commit crimes are transferred to the criminal justice system to stand trial as an adult. However, while the numbers of juveniles affected by transfer mechanisms remains relatively small, the consequences of the transfer decision (and the potential for incarceration) are significant. Thus, the impact of incarcerating juveniles with adults in facilities whose physical designs, inmate management techniques, and programs have been developed around the needs of adult inmates deserves careful consideration.

A current and accurate enumeration of juveniles confined in adult prison and jails is essential to understand the issues of youth in adult facilities. Using a combined sample of juveniles transferred to adult courts in 1990, 1992, and 1994, Snyder and Sickmund showed that, nationally, only half of the youth who are prosecuted as adults make bail (or are released through some other mechanism) prior to the disposition of their cases.²³³ The other half remains in custody in local jails pending trial. Rates of release on bail varied significantly according to offense type. Oddly, public order offenders were least likely to be released (19%), while property offenders were most likely to be released (74%).²³⁴ Even though a youth's offense may not be serious or violent, a large proportion of youth remain incarcerated, with little or no programming, pending trial. Whereas some prison systems have developed specialized youthful offender programs, most jails have yet to do so.

Overall, 64% of juveniles who were tried as adults were convicted — the defendant pled guilty to a felony in 51% of all cases, 5% pled guilty to a misdemeanor, and 8% were convicted of a felony in a jury trial. Of the 36% who were not convicted, most often, the case was dismissed.²³⁵ Most of the youth who were convicted of felonies were sentenced

²³³ Snyder, H., and Sickmund, M., *Juvenile Offenders and Victims: 1999 National Report*, OJJDP, U.S. Dept. of Just. (1999).

²³⁴ *Id.* at 174.

²³⁵ *Id.*

to prison. Overall, 68% were incarcerated (49% in state prison, 19% in jail), 31% were sentenced to probation, and 1% were required to pay a fine. The authors found that alternative sanctions (i.e., dispositions other than incarceration or probation) were rarely imposed for juveniles in adult courts.²³⁶

Although not the case across all offense types, juveniles who were transferred to adult courts and convicted of murder were usually sentenced to longer prison terms than their adult counterparts. In 1994, the average prison sentence imposed for a juvenile convicted of murder was 23 years and 11 months, fully 2 years and 5 months longer than the average prison sentence imposed for an adult convicted of murder.²³⁷ Such disparities have also been found among the more serious person offenses, such as homicide, rape, robbery, etc.

The actual setting in which a juvenile, when convicted as an adult, will serve his or her time varies by state. The proportion of time served in either a juvenile or adult facility is governed by the state's type of sentencing practice.²³⁸

1. Straight adult incarceration. Juveniles under 18 are incarcerated with adult inmates in adult facilities, with little differentiation in housing or programming. In most states, juveniles are allowed to be housed in state correctional facilities with adult offenders, although some do attempt to classify house offenders according to age and size.
2. Graduated incarceration. Juveniles, though sentenced as adults, are incarcerated in juvenile or separate adult facilities until they reach a certain age (usually 18), when they may be transferred to an adult facility to serve the remainder of their sentence, or may be released.
3. Segregated incarceration. Juveniles (and young adults) are assigned to specific facilities that may have specialized programming that goes beyond what is available to the adult general population. In general, youth are separated into age groups, 18 to 21 or 18 to 25 years.

A number of states' correction departments (Alaska, Arizona, Colorado, Florida, Louisiana, Nevada, Ohio, Pennsylvania, Texas, Washington, and West Virginia, to name a few) have taken responsibility for young offenders by creating specialized programs for youthful offenders. Sometimes these separate facilities or housing units do little more than segregate the juvenile population; however, in a few states, the physical separation is supplemented with specialized age-specific programming and staff training designed to meet the needs of younger inmates. Characteristics of effective specialized programs and staff training will be discussed later in this chapter.

²³⁶ *Id.* at 175.

²³⁷ *Id.* at 178.

²³⁸ Torbet, P., et al., *State Responses to Serious and Violent Juvenile Crime*, OJJDP, U.S. Dept. of Just. (1996).

Thus, in most states, there are a variety of mechanisms by which a juvenile can be incarcerated in a jail or prison with adult inmates. At midyear 2000, there were over 1.9 million people incarcerated in the nation's prisons and jails, with prisons holding two-thirds of the incarcerated population and jails holding one-third.²³⁹ The number of inmates incarcerated in privately-operated prisons increased over 9% between 1999 and 2000, reaching a population of 76,010.²⁴⁰

Although the correctional population in adult jails and prisons continues to rise, the number of juveniles in these facilities has decreased slightly over the past years.²⁴¹ Among the 1.3 million inmates in state prisons at midyear 2000 were a total of 3,915 prisoners who were under age 18. The table below shows the recent decline in the juvenile state prison population over the past five years:

Year	Total	Male	Female
1995	5,309	--	--
1998	4,863	4,668	195
1999	4,194	4,027	167
2000	3,915	3,714	174

Note: -- not available
Source: Beck and Karberg (2001).

In 2000, the states with the highest population of state prison inmates under age 18 were Florida (n=466), Connecticut (n=382), New York (n=264), North Carolina (n=263), and Texas (n=261). While the overall numbers may be small, this population of juvenile offenders in long-term adult facilities creates special management and programming challenges for prison administrators.

In addition to the number of juveniles housed in the nation's prisons, there are a significant number of youth who are housed in adult jails. At midyear 2000, 7,615 persons under age 18 were incarcerated in an adult jail,²⁴² with 80% of these having been convicted, or awaiting trial, as adults. The number of juveniles held as adults in jail has fluctuated considerably in the past five years. In 1995, there were 5,900 youth held in the nation's jails as adults, increasing to 8,598 in 1999. These increases are likely due to the number of states that have expanded the mechanisms by which juveniles could be tried as adults. However, the recent decreases in the number of youth incarcerated in adult prisons, while undoubtedly influenced by demographic shifts, may also reflect some jurisdictions' reluctance to convict and sentence juveniles to adult prisons.

The number of juveniles housed in an adult facility on any given day represents only a small proportion of the number of juveniles who actually experience jail or prison. In

²³⁹ Beck, A. and Karberg, J., *Prison and Jail Inmates at Mid-Year 2000*, Bureau of Justice Statistics, U.S.

Dept. of Just. (2001).

²⁴⁰ *Id.* at 4.

²⁴¹ *Id.* at 6.

²⁴² *Id.*

1997, there were approximately 7,400 youth admitted to prison.²⁴³ (There are currently no national estimates on the number of youth admitted to jail, but given the larger one-day-count in these facilities and the shorter length of stay, we can assume the number of youth admitted to jail is much higher than the number admitted to prison). The number of youth admitted to prisons more than doubled between 1985 and 1997, primarily due to the substantial increases among violent offenders.²⁴⁴ As a proportion of all under-18 admissions, violent offenses accounted for 52% in 1985 and 61% in 1997, with the largest increases witnessed for juveniles convicted of robbery and aggravated assault.²⁴⁵ The table below shows estimates of the numbers of youth admitted to state prison, by race and offense type. It is particularly interesting to note the large increases in juveniles sentenced to adult prison for drug offenses. Similar data have also been used to examine the disproportionate confinement of minority youth in adult correctional facilities.²⁴⁶

Most Serious Offense	1985		1990		1997	
	Anglo	African American	Anglo	African American	Anglo	African American
Total	1,300	1,900	1,500	3,300	2,600	4,300
Violent Offenses	440	1,180	470	1,650	1,400	2,730
Murder	80	120	70	250	170	260
Sexual Assault	80	160	60	110	160	140
Robbery	160	710	130	810	580	1640
Aggravated Assault	90	140	140	400	390	540
Property Offenses	770	600	890	780	940	670
Burglary	510	390	540	350	610	360
Larceny/Theft	110	120	120	150	130	100
Motor Vehicle Theft	50	60	120	180	70	100
Drug Offenses	20	30	50	720	120	640
Public-Order Offenses	50	80	60	130	120	230

Note: All data are estimated. Data are not disaggregated by Hispanic origin. Includes only those with a sentence of more than one year. Other offense types not shown in detail. Source: Strom, 2000.

Interestingly, the issues raised in the preceding chapters of this guide highlighting the challenges to a juvenile's competency to fully participate in adult court proceedings are the very issues that challenge their ability to function well in the adult correctional system. The general picture is one of mutual unsuitability—the juvenile may not be properly equipped (cognitively, emotionally, etc.) to adjust to the conditions of an adult prison or jail; and the facility itself may not be properly equipped (age-specific

²⁴³ Strom, K., *Profile of State Prisoners Under Age 18, 1985-1997*, Bureau of Justice Statistics, U.S. Dept. of Just. (2000).

²⁴⁴ *Id.* at 1.

²⁴⁵ *Id.* at 5.

²⁴⁶ The reader is referred to an excellent resource, The Justice Policy Institute, for more information.

programming, nutritional needs, staff training, educational requirements, etc.) to oversee the incarceration of juveniles safely and productively. As stated in a recent piece by Butts and Mitchell,

The symbol [of criminal court transfer] may have a high price. Sending more youth to adult court may not significantly result in more punishment for more offenders, but it may mean longer pretrial delays, more pretrial incarceration (with few services to address youth problems), greater population management problems in adult prisons and jails, and greater exposure of youth to adult inmates.²⁴⁷

It is important to consider the elements of effective programs for juvenile offenders, so that a thoughtful decision can be made about a particular adult correctional program's suitability to house a young offender. Basic standards for facility accreditation by the American Correctional Association (ACA) were recently updated to include specific recommendations for adult facilities that house juveniles. In general, the ACA prohibits the confinement of juveniles in adult facilities, except when the laws of a jurisdiction permit such confinement. In these cases, accreditation is dependent on compliance with a multitude of standards. Among those recently approved are:²⁴⁸

- Juveniles should be housed in specialized units, except if they pose undue risk of harm to others or if a qualified mental health professional indicates they would benefit from placement outside the specialized unit;
- Facilities should have a classification plan for youthful offenders to determine the level of risk and program needs in a developmentally-appropriate fashion. These plans should consider the physical, mental, social, and educational maturity of the juvenile;
- Adequate program space should be provided to meet the physical, social and emotional needs of juveniles and should allow for personal interactions and group-oriented activities;
- Juvenile offenders in specialized units in adult facilities should have no more than incidental contact with adult inmates; and
- Staff should be trained in key areas (e.g., adolescent development, education programming, crisis intervention and prevention, nutrition, cognitive-behavioral interventions, etc.) to ensure they can meet the developmental, safety, and other needs of juvenile offenders.

Standards from professional organizations, such as these from the ACA, clearly indicate that "best practices" would suggest a total separation of juvenile offenders from adult inmates. However, recognizing that mixed-age populations are permitted by legislation in

²⁴⁷ Butts, J. and Mitchell, O., *Brick by Brick: Dismantling the Border Between Juvenile and Adult Justice*, CRIMINAL JUSTICE 2000: BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS, Friel, C., eds. (2000).

²⁴⁸ American Correctional Association, *Revisions to Standards*, Winter Conference, 2000.

most states, the ACA guidelines lend insight to the basic requirements for the safe and appropriate housing of juvenile offenders in an adult correctional agency. In today's increasingly overpopulated correctional facilities, inmate transfers are common mechanisms used to control crowding and gang issues, etc. In addition, inmates may be transferred to new facilities to gain access to different programming. However, readjusting to a new facility is very difficult for youth, and many correctional staff feel that frequent transfers may be damaging and may unwittingly reinforce patterns of negative behavior.²⁴⁹ Thus, facilities need to have a range of security options, living space arrangements, and programming opportunities to minimize the need for transfers.²⁵⁰ Another issue that must be considered is the availability of job opportunities within the institution for young inmates. These employment opportunities foster skill development and allow the inmates to earn money to purchase items from prison commissaries. Because some of the younger inmates are under the age of eighteen, and most states have legal prohibitions about children under the age of eighteen working with or in proximity to machinery, many job opportunities are not available to youthful offenders.

In addition to the structural and policy-based features of effective correctional programs for juvenile offenders, there are several characteristics of program delivery that attend to the unique developmental needs of adolescents which are required of adult correctional programs seeking to be effective with juveniles. Psychologists specializing in adolescent psychology have described the way in which developmental milestones can be achieved in a criminal justice setting. In order to be effective with juvenile offenders, correctional programs must teach juveniles how to improve their decision-making and how to recover from their common histories of victimization by meeting the following needs:²⁵¹

1. Meet adolescents' need to feel competent at something. Criminal justice programs must provide an opportunity for success and must nurture and celebrate each youth's growing confidence in his or her abilities. Most juveniles in adult facilities have not traditionally found success in school or in obtaining non-criminal employment. Thus, more progressive, developmentally-appropriate program approaches are required to prepare youth for legitimate/legal work.
2. Meet adolescents' need to be in charge. Effective programs emphasize choice-making and provide genuine opportunities for youth to be involved in designing the day-to-day program structure and carrying out required tasks. Sanctions for misconduct must be seen as fair and sensible and must be applied equitably.
3. Meet adolescents' need to appreciate the strength of their families. Nearly all youth who are incarcerated in adult facilities will eventually return to the

²⁴⁹ Alarcon, F. *Programming, Staffing, and Managing the Violent Juvenile Offender*, CORRECTIONS TODAY, July, 2001.

²⁵⁰ *Id.*

²⁵¹ Beyer, M., *Experts for Juveniles at Risk of Adult Sentences*, MORE THAN MEETS THE EYE: RETHINKING ASSESSMENT, COMPETENCY, AND SENTENCING FOR A HARSHER ERA OF JUVENILE JUSTICE, Puritz, P., Capozello, A., and Shang, W., eds. (2000).

community. Programs that work to empower families to support their children, and help youth to embrace the positive qualities of their families will help youth to make peace with prior experiences of victimization, hurt, and disappointment.

4. Meet adolescents' need to belong. Quality criminal justice programs adopt the positive features of gang membership that provide youth with recognition, encouragement, and hope for the future. This non-violent peer group offers youth the chance to feel valued by pro-social peers and adults.

Programming must be directly responsive to individual developmental needs. Beyer states, "When interventions are not designed to meet unique individual needs, the delinquent is often blamed for failing."²⁵² Thus, a singular focus on prior criminal history would be shortsighted; instead, one must examine the ability of a particular sanction to teach the child what he or she needs and to provide opportunities to mature along the developmental pathway.

A defining feature of many delinquents' careers is the failure of the school systems to engage them and provide opportunities for success both academically and socially. Through individualized education services with low teacher-student staffing ratios, effective programs for juvenile offenders meet the needs of youth with histories of school failure by providing stimulating classes, offering opportunities to experience success in school, and nurturing relationships between students and teachers.²⁵³ In addition to school failure, juvenile offenders often have significant mental health problems. Sorting out the various emotional needs and recovery issues of adolescents requires specially trained staff who are fair, non-defensive, and open to helping youth who feel they have been treated unfairly.²⁵⁴

Security staff in adult facilities must also be prepared to meet adolescents' dual needs for nurturance and opportunities for independence. Beyer states, "Most adolescents are intolerant of anything that seems unfair and reject what might be offered as assistance when they mistrust the adults in charge."²⁵⁵ Further, because most adolescents exhibit uneven patterns of progress (i.e., they are likely to appear more mature, and then to regress, before making progress) and typically do not exhibit sound decision-making skills under stress, staff must be able to use positive reinforcement, rather than punishment, to encourage rehabilitation.²⁵⁶

In general, treatment programs in adult correctional facilities have not been realigned to become meaningful to juvenile inmates. A 1999 study of adult correctional facilities in Kansas found that, while program placements were sometimes made based on age, the programs themselves were developed to meet the needs of adult inmates who represent

²⁵² Byer, M., *Recognizing the Child in the Delinquent*. Paper presented at the "Juveniles in Adult Court Training Conference," March 24-26, 2001, Miami, Florida (2001).

²⁵³ *Supra* note 242

²⁵⁴ *Id.* at 17.

²⁵⁵ *Id.* at 18.

²⁵⁶ *Supra* note 243.

the vast majority of the treatment population.²⁵⁷ Further, none of the facilities had received special funding or training to tailor treatment interventions specifically to the needs of juveniles. The fundamental flaw with this “one-size-fits-all” approach is that programs in adult prisons are not designed to understand and work with the specific developmental tasks that each youth must master. For example, substance abuse programs are designed around the issues leading adults to addiction and use; therefore, interventions that make sense in terms of adults’ thinking styles, relationships, identity development, etc. are not well suited for juvenile offenders, in which the causes and correlation of addiction are qualitatively different.

In addition to featuring the proper developmental perspective to improve the opportunities for successful rehabilitation, adult correctional facilities must also have the ability to provide the full range of educational service to which all youth under age 18 (or 21, for some services) are legally entitled. (The particular special education entitlements under federal law were reviewed in an earlier chapter of this guidebook.) Specific state regulations may, in some cases, expand eligibility and may have particular relevance to education services provided in adult facilities. Thus, it is important that each adult correctional system be well versed in its obligation to provide special education services. Nelson, et al. posit that education programs for juveniles in adult facilities are generally less adequate than programs in juvenile institutions. Because the typical inmate in an adult facility is not school-aged, education programming generally features adult basic education, GED programs, vocational programming and post-secondary programming.²⁵⁸ In contrast, most juveniles in adult facilities require teachers with expertise in elementary and post-secondary instruction. While it is unlikely that many of these youth will return to school upon their release from the facilities, it is critical to their future success that education programming is age-appropriate and responsive to any special education needs that might be present. Some states have been persuaded to develop separate programs for youthful offenders by the cost-effectiveness of centralizing mandated education services.

In 1998, a national-level survey was conducted to estimate the availability of programs that had been specifically designed to respond to the needs of younger inmates housed in adult prisons and jails.²⁵⁹ The program offerings of the adult correctional systems generally focused on education and basic counseling services. However, other types of essential programs were much less prevalent---substance abuse programming tailored to young offenders was available in only 56% of correctional systems; sex offender programming for juveniles in only 26%, and violent offender treatment for juvenile offenders in only 40% of correctional systems. The dearth of adolescent substance abuse treatment programs is especially troubling given the centrality of this issue to many youth’s involvement in crime.

²⁵⁷ Bayens, G., *Confining Juveniles in Adult Jails and Prisons in Kansas: An Inquiry Into Correctional Policy*, 13 AM. JAILS 2, 51-57 (1999).

²⁵⁸ Nelson, C.M., et al., *SPECIAL EDUCATION IN THE CRIMINAL JUSTICE SYSTEM* (Merrill Publishing Company 1987).

²⁵⁹ Austin, J., et al., 2000. *Juveniles in Adult Prisons and Jails: A National Assessment*, Bureau of Justice Assistance, U.S. Dept. of Just. (2000).

This survey also examined the physical conditions of confinement of youth in adult jails and prisons. Of the 181 facilities responding to the survey, only 13% maintained separate facilities or units for youthful offenders. By far, the more common practice appeared to be that no differentiation was made between adult and juvenile housing units. A total of 21 states reported housing juveniles with adult inmates. For juveniles in these states' facilities, 51% were housed in a dormitory setting, 30% in a single cell, and 19% in a double cell. Ensuring the safety of youth in mixed-age housing units is challenging, as evidenced by their high rates of victimization while in jail or prison (to be discussed in more detail later).

Most adult correctional systems attempt to ensure the safety and security of inmates and staff by using objective classification instruments. Most of these instruments do not take into account the special needs or maturation issues presented by adolescent inmates.²⁶⁰ Although these systems normally go through extensive validation research, the number of juvenile offenders housed in the facilities (and thus in the research samples) is too small to ensure the instruments' proper functioning and fairness to young inmates. Because most classification instruments for adult inmates over-classify youth (i.e., place them in a more restrictive custody level than is necessary), and because most juvenile classification instruments fail to account for the nuances of the adult correctional environment, a clear need exists for classification instruments specifically tailored for juvenile inmates in adult correctional facilities.

One of the key factors affecting an offender's classification is his or her involvement in institutional misconduct. Most correctional facilities have a behavior management system designed to encourage compliance and to discourage negative or aggressive behavior. However, in adult facilities, these systems are developed to be meaningful to adults, and may not be as effective with juvenile offenders. Evidence of higher rates of institutional misconduct in adult facilities among juveniles as compared to adults suggest that the management systems designed to encourage and reward positive behavior in these facilities are not properly aligned for juvenile inmates. Further, the misconduct of younger inmates often amounts to technical violations of institutional rules (as opposed to predatory, violent behavior). The actual behavior, in a different context, amounts to "kids being kids," but is considered to be a rule violation in adult institutions. These technical violations, or minor misconduct reports, can have significant negative consequences upon reclassification, and may result in future placement in a higher security level with more aggressive adult inmates.

In Arkansas, for example, inmates under age 18 had rates of disciplinary infractions that were 9% higher than department averages.²⁶¹ In Georgia, the rate of youthful offenders involved in institutional misconduct was 15%, compared to 7.5% for the adult inmate population in the same facilities.²⁶² In Oklahoma, juvenile inmates had an average of 2.6

²⁶⁰ *Id.* at 65.

²⁶¹ NIC Information Center, *Offenders Under Age 18 in State Adult Correctional Systems: A National Picture* National Institute of Corrections (1995).

²⁶² *Id.* at 4.

rule violations, compared to 1.4 rule violations per adult inmate.²⁶³ While there are no national studies examining this trend, anecdotal evidence suggests that juveniles in adult facilities exhibit higher rates of institutional misconduct than their adult counterparts. More critical than the actual statistics, however, are the possible explanations for why this occurs.

One possible explanation is the high proportion of juvenile offenders with learning disabilities who are incarcerated in adult prisons and jails. While the relative frequency of learning disabilities among juvenile versus adult offenders has not been ascertained, younger offenders have had more limited experience (and maturity) in negotiating the correctional environment and may not have fully developed necessary coping strategies. Some states have specific legislation that prohibits the use of certain behavior management techniques with juvenile offenders--techniques that are rather commonplace in adult facilities. For example, California state law prohibits, among others, the use of interventions likely to cause physical pain, the use of noxious sprays or gases, and interventions that subject the child to verbal abuse, ridicule, or humiliation.²⁶⁴ In addition, youth with special education needs often exhibit behavior that appears to be intentionally non-compliant when it is actually a symptom of the youth's disability. For example, a child with attention deficit disorder may make decisions impulsively, fail to appreciate consequences, have a low threshold for frustration, and have difficulty listening or following directions.²⁶⁵ Based on the outward manifestations of behavior, a juvenile offender with this type of disability in a correctional setting is at risk of being reported for various disciplinary infractions.

Learning disabilities are not the only characteristics that increase the likelihood of a juvenile inmate's involvement in institutional misconduct. There are several characteristics of adolescents, in general, that make it more difficult for them to comply with institutional rules. Many of these characteristics have been reviewed in prior chapters of this guidebook to illustrate the challenges to a juvenile's competence to stand trial in adult courts. Viewed from a slightly different perspective, they clearly have a relationship to the way in which a juvenile offender might behave in a correctional setting:²⁶⁶

- Because of their stage of cognitive development, adolescents cannot think ahead, nor can they imagine unwanted outcomes. Instead, they are oriented only to the present and cannot use worst-case scenarios to inform their behavior. This failure to appreciate the consequences of their actions can have the outward manifestation of deliberate non-compliance.
- In terms of moral development, adolescents are "fairness fanatics." Because they can become stuck in an irresolvable fairness dilemma, they are not likely to use

²⁶³ *Id.* at 4.

²⁶⁴ Warboys, L., et al, *California Juvenile Court Special Education Manual*, Youth Law Center (1994).

²⁶⁵ *Id.* at 65.

²⁶⁶ Characteristics of adolescent cognitive and moral development are adapted from Beyer, M., *Adolescents are often too immature to assist in their own defense*. Paper presented at NLADA Conference, June 19, 1999, Seattle, Washington.

disciplinary hearings to their advantage. For example, if a juvenile is written up for participating in a fight in the dining hall, when he feels he was “just in the wrong place at the wrong time” and not an aggressor, he will not be able to weigh his options at a disciplinary hearing because he cannot get over the feeling that “it’s unfair.”

- Similarly, adolescents value loyalty to their family and friends above all else and their moral code deems that it is wrong to benefit by blaming someone else. Thus, even when a truthful statement of someone else’s involvement in an incident would benefit the youth, he or she will not be likely to “snitch.”
- Adolescents rarely have the cognitive capacity to evaluate several options simultaneously. Especially if the youthful offender has a learning disability and has difficulty processing verbal or written information, his or her ability to understand and follow lengthy rules of conduct may be limited.
- Finally, immature thinking patterns mean that juveniles only consider the outcome they want and do not weigh the costs and benefits associated with a particular decision. This impulse is seen most often in juvenile arrestees’ tendency to “say anything you want so I can go home,” but clearly has relevance to the way in which he or she will conduct himself with correctional staff, and older, manipulative, and predatory inmates.

In addition, anecdotal information suggests that youthful offenders may intentionally commit rule violations to gain placement in administrative segregation units. While normally a deterrent to adult inmates’ misconduct, the solitary, protected nature of disciplinary isolation can afford a juvenile inmate the opportunity to escape difficulties experienced in the housing units, to be alone (a classic developmental need of adolescents), or to lockdown to build a “tough-guy” image to impress peers both inside and outside the institution. Some youthful offenders believe that “doing time” in administrative segregation gives them status among the general inmate population, which they may consider essential to guard against victimization by older inmates.

At this point, the relationship between young offenders’ cognitive capacities and thinking styles and their involvement in institutional misconduct is mostly theoretical. Correctional staff have reported that misconduct by young inmates appears to be linked to their immaturity, and that staff responses to misconduct are less effective with juveniles, than with adults.²⁶⁷ One correctional officer said, “Policies and procedures were developed [knowing] that adults understand the consequences. Juveniles don’t understand them. [For example,] four weeks is an eternity to them. They don’t understand time.”²⁶⁸ A deeper examination of the issues surrounding juvenile offenders’ difficulties and lack of success in the adult system is required to fully understand what is not working and why it is not working.

A major issue that is more fully understood, and well-documented by empirical research, is the risk of physical harm that juvenile offenders face when they are incarcerated in adult jails and prisons. Put simply, young offenders “are abused more regularly and

²⁶⁷ Human Rights Watch, *No Minor Matter: Children in Maryland’s Jails* (1999).

²⁶⁸ *Id.*

driven to desperation more quickly” when they are incarcerated in adult facilities.²⁶⁹ A recent report by Human Rights Watch reported that, among other things, inmates with the following characteristics are more likely to be the victims of sexual assault by other inmates: young, small in size, physically weak, first offenders, and those who are unassertive or not aggressive.²⁷⁰ The ability to be physically overpowered is an obvious risk factor. Less obvious is the risk for newly incarcerated first offenders. “Lacking allies, unfamiliar with the unwritten code of inmate rules, and likely to feel traumatized by the new and threatening environment, they are easy prey for experienced inmates.”²⁷¹ The youthful offenders’ lack of maturity, social sophistication, and their inability to adjust to the social environment of the prison can also add to their vulnerability. Prisons have developed their own social sub-cultures, and inmates must have the maturity and ability to recognize and develop the social skills necessary to survive.

Juveniles in adult institutions are 500% more likely to be sexually assaulted, 200% more likely to be physically abused by staff, and 50% more likely to be attacked with a weapon than their counterparts incarcerated in juvenile facilities.²⁷² In addition to being at grave risk of abuse by others, the suicide rate among juveniles incarcerated in adult prisons is 7.7 times higher than that among youth in juvenile correctional facilities.²⁷³ Beyer notes, “Suicidal adolescents are different from suicidal adults. Adolescents can swing quickly from a “normal” emotional state to killing themselves, often in reaction to a seemingly minor event. Adolescents frequently unintentionally kill themselves. Consequently, surveillance (the most common preventative measure in adult facilities) is not sufficient to prevent suicide among adolescents. Activity, positive relationships between staff and youth, and counseling (which are all unlikely in an adult facility) are necessary aspects of adolescent suicide prevention.”²⁷⁴

In conclusion, despite a weighty stack of evidence showing the negative consequence of incarcerating juveniles in adult facilities, a significant number of the nation’s youth continue to be faced with prison and jail sentences as a result of being transferred to the adult criminal courts. If at all, such sentences need to be imposed with the utmost thoughtfulness, considering not only the characteristics of the juvenile (especially his or her emotional maturity and level of cognitive development), but also the level of readiness of the adult system to meet, conscientiously, the unique developmental needs of juvenile offenders. Among the key questions used to evaluate a particular program’s ability to house juvenile offenders safely and productively are:

²⁶⁹ Ziedenberg, J. and Schiraldi, V., *The Risks Juveniles Face When They Are Incarcerated As Adults* The Justice Policy Institute (1997).

²⁷⁰ Human Rights Watch, *No Escape: Male Rape in US Prisons* (2001).

²⁷¹ *Id.*

²⁷² Fagan, J., et al., *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 JUV. & FAM. CT. J. 2, 10 (1989).

²⁷³ Flaherty, M., *An Assessment of the National Incidence of Juvenile Suicide in Adult Jails, Lockups, and Juvenile Detention Centers* (Community Research Forum 1980).

²⁷⁴ *Supra* note 242.

- Does the facility have entirely separate housing for adolescent offenders? Are custody classification and housing decision-making processes guided by instruments that have been validated on the juvenile population?
- Is the contact between juvenile and adult inmates, at most, incidental?
- Has the staff been trained thoroughly in non-punitive methods of behavior management, adolescent psychology, and can they provide non-punitive structure that does not rely on the use of force?
- Are treatment and education programs attuned to the specific developmental needs and tasks presented by the youthful offender? Do they have separate curricula and treatment approaches from what is used for the adult inmates?
- Does the facility have clear and consistent policies for the immediate review of all reported youth-on-youth or staff-on-youth abuse? Further, are crisis intervention protocols responsive to the ways in which juveniles respond to stress and express distress?

As stated earlier, a number of state correctional systems have recently developed specialized facilities and/or units designed to meet the security, programming, and treatment needs of juvenile offenders. Those that appear to be most effective share a number of similar traits.²⁷⁵

The youthful offenders are housed separately from the adult offenders. Separate housing can certainly be justified on a very practical and operational basis. By keeping this unique population together:

- Specialized programmatic activities that are geared to deal with the issues of this population can be purchased and delivered *en masse*;
- Staff can be selected and trained to work exclusively with juveniles;
- Specific staffing patterns can be developed to address the needs of the youthful offender facility/unit; and
- The ability to control adult predatory inmate contact with youthful offenders is enhanced.

The agency has reviewed and, if necessary, created new policies and procedures to accommodate the juvenile population and to expand the array of options available to manage them. The youthful offender program should be established by policy and should include specific mandates for some of the more ambiguous areas of correctional practices. For example:

- Policies surrounding the use, sale, or trafficking of tobacco products to youthful offenders;
- Policies surrounding the provision of extra food and snacks designed to meet the nutritional needs of young offenders; and
- Policies surrounding how staff will be selected for the youthful offender program and content-specific training requirements. All staff must be required to complete a specialized youthful offender training program before they are permitted to

²⁷⁵ Adapted from Glick, B. and Sturgeon, W., (1998). *No Time to Play: Youthful Offenders in Adult Correctional Systems* (American Correctional Association 1998).

work in the program. The quality of staff training is a key determinant of a program's effectiveness. Working with young offenders is qualitatively different from working with adult inmates, and is often more demanding. Staff must be well prepared to work with youthful offenders. Further, programs that use either volunteers or staff specially selected report that the program comes together more quickly, and that there are fewer incidents.

The programmatic activities are age-specific and responsive to the developmental needs of the youthful offender population. The programs are selected to meet the educational, emotional, cognitive, and social development levels of the juvenile inmates. Programs are supported by assessment instruments (classification, needs, education, etc.) that have been normed and validated on juvenile offenders in adult correctional settings. (In most cases, where agencies have tried to adapt adult testing instruments and adult programs, the results have been disappointing.)

A daily schedule is followed consistently. Daily schedules have proven to be very helpful in the day-to-day operations of youthful offender programs, as they lend structure to the program and permit both staff and offenders to know exactly where they need to be, when and what will be expected of them. For youth who do not have a GED or high school diploma, education must be the cornerstone of the daily activities. Education must be geared to the youthful offender population by offering small classes, age-appropriate instructional strategies and materials (low-level/high-interest), and must provide access to quality special education programming for eligible offenders.

Clearly, the decision to sentence a juvenile to an adult prison or jail will have dramatic consequences for both the individual and the correctional system. A critical review of the system's ability to protect the youth from harm and to deliver age-appropriate rehabilitative services should guide the court's decision-making.

SECTION 12

SIXTEEN HARD QUESTIONS FOR EVERY JUDGE SEEKING TO REDUCE JUVENILE CRIME

By Michael L. Lindsey, J.D., Ph.D.

1. Does your state transfer many youth who are not chronic or violent offenders to stand trial in adult criminal courts— despite the overwhelming evidence that such transfers actually increase future offending?
2. Is your state locking up more and more juvenile offenders in adult jails and prisons – significantly heightening their risks for suicide, sexual assaults and physical beatings and exposing them to daily contact with career criminals?
3. Does your state spend the bulk of its juvenile justice resources to incarcerate youthful offenders – despite the high costs at juvenile correctional facilities and even higher recidivism rates?
4. What percentage of youth incarcerated in your state's juvenile corrections facilities are non-violent offenders without a record of chronic delinquency?
5. Does your local juvenile justice agency offer the one type of intervention proven to dramatically reduce recidivism among chronic adolescent offenders – intensive, family-focused counseling delivered by trained therapists using clear treatment protocols to identify and address the factors propelling a young person toward crime?
6. Do your state and local juvenile justice agencies provide close supervision and effective counseling/support services for youth returning to the community following incarceration – the youth population most likely to commit serious crimes?
7. Does your community provide constructive responses to less serious offenses by youth – recruiting local volunteers and engaging community-based organizations to employ “restorative justice” strategies like youth aid panels, family group conferencing, drug courts, and teen courts that hold young people accountable while connecting them to positive resources in the community?
8. Has your local juvenile justice agency developed a flexible menu of “intermediate sanctions” – day treatment programs, evening reporting centers, weekend detention, evening curfews, community service projects, etc. to ensure appropriate, predictable, and proportionate responses when youth break the law repeatedly?
9. Is your local juvenile probation agency overwhelmed with cases – with probation officers required to supervise far more than the maximum caseload (30:1) recommended by juvenile justice experts?
10. Do your state and local juvenile justice agencies carefully measure results of their programs in terms of recidivism and cost-effectiveness – and do they direct scarce funding to strategies and programs that work?
11. Does your local juvenile justice system treat minority youth more harshly than white youth and violate the rights of youth by confining juvenile offenders in overcrowded or otherwise substandard conditions or by failing to fully inform youth before allowing them to waive their rights to legal representation and against self-incrimination?

12. Does your state/locality deliver high-quality prevention programs for all or most high-risk infants and toddlers and their families – strategies proven to sharply reduce future offending?
13. Are your local schools wasting prevention dollars on programs and strategies that have never demonstrated success in reducing delinquent and/or substance abuse behaviors, rather than targeting these dollars to strategies with strong evidence of effectiveness?
14. Does your community provide coordinated, high-quality services for troubled youth at extreme risk for delinquency – or do child welfare, mental health, special education, and juvenile justice bureaucracies work separately (or at cross purposes) even when they are dealing with the same troubled young people?
15. Are high-quality after-school programs and other positive youth development opportunities available for all or most teens in your community – particularly teens in less disadvantaged neighborhoods where crime is prevalent and positive adult supervision can be scarce?
16. Has your community mobilized its leadership to analyze and address the local youth crime challenge – collecting data on critical risk factors (gang involvement, gun availability, substance abuse, domestic violence, and others) and developing and implementing comprehensive plans to reduce juvenile crime rates?

APPENDIX A

SELECTED PROVISIONS OF SPECIAL EDUCATION LAW

Special Education 20 U.S.C. § 1401(25)

The term 'special education' means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including--

- (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
- (B) instruction in physical education.

Free Appropriate Public Education (FAPE) 20 U.S.C. § 1401(8)

The term 'free appropriate public education' means special education and related services that--

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program (IEP) required under section 1414(d) of this title.

Related Services 20 U.S.C. § 1401(22)²⁷⁶

The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

Transition Services 20 U.S.C. § 1401(19)²⁷⁷

The term 'transition services' means a coordinated set of activities for a student, designed within an outcome-oriented process, which promotes movement from school to post-

²⁷⁶ See also 34 C.F.R. § 300.24.

²⁷⁷ See also, 34 C.F.R. § 300.29.

school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. The coordinated set of activities shall be based upon the individual student's needs, taking into account the student's preferences and interests, and shall include instruction, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

Exception to FAPE for certain ages

34 C.F.R. § 300.122²⁷⁸

(a) General. The obligation to make FAPE available to all children with disabilities does not apply with respect to the following:

(2)(i) Students aged 18 through 21 to the extent that State law does not require that special education and related services under Part B of the Act [*i.e.*, the IDEA] be provided to students with disabilities who, in the last educational placement prior to their incarceration in an adult correctional facility --

(A) Were not actually identified as being a child with a disability under Sec. 300.7; and

(B) Did not have an IEP under Part B of the Act.

(ii) The exception in paragraph (a)(2)(i) of this section does not apply to students with disabilities, aged 18 through 21, who --

(A) Have been identified as a child with a disability and had received services in accordance with an IEP but who had left school prior to their incarceration; or

(B) Did not have an IEP in their last educational setting but who had been actually identified as a "child with a disability" under Sec. 300.7.

FAPE requirements for students with disabilities in adult prisons

34 C.F.R. § 300.311²⁷⁹

(a) Exception to FAPE for certain students. Except as provided in Sec.300.122 (a)(2)(ii), the obligation to make FAPE available to all children with disabilities does not apply with respect to students aged 18 through 21 to the extent that State law does not require that special education and related services under Part B of the Act be provided to students with disabilities who, in the last educational placement prior to their incarceration in an adult correctional facility --

²⁷⁸ See also 20 U.S.C. § 1412 (a)(1)(B).

²⁷⁹ See also 20 U.S.C. § 1412 (a)(1); 20 U.S.C. § 1414 (d)(6).

(1) Were not actually identified as being a child with a disability under sec. 300.7; and

(2) Did not have an IEP under Part B of the Act.

(b) Requirements that do not apply. The following requirements do not apply to students with disabilities who are convicted as adults under State law and incarcerated in adult prisons:

(1) The requirements contained in Sec. 300.138 and Sec. 300.347 (a)(5)(i) (relating to participation of children with disabilities in general assessments).

(2) The requirements in Sec. 300.347 (b) (relating to transition planning and transition services), with respect to the students whose eligibility under Part B of the Act will end, because of their age, before they will be eligible to be released from prison based on consideration of their sentence and eligibility for early release.

(c) Modifications of IEP or placement. (1) Subject to paragraph (c)(2) of this section, the IEP team of a student with a disability, who is convicted as an adult under State law and incarcerated in an adult prison, may modify the student's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

(2) The requirements of Sec. 300.340 (a) and 300.347 (a) relating to IEPs, and 300.550(b) relating to LRE, do not apply with respect to the modifications described in paragraph (c)(1) of this section.

Transfer of parental rights at age of majority

34 C.F.R. § 300.517²⁸⁰

(a) General. A state may provide that, when a student with a disability reaches the age of majority under State law that applies to all students (except for a student with a disability who has been determined to be incompetent under State law) --

(2) All rights accorded to parents under Part B of the Act transfer to the students who are incarcerated in an adult or juvenile, State or local correctional institution.

(3) Whenever a State transfers rights under this part pursuant to paragraph (a)(1) or (a)(2) of this section, the agency shall notify the individual and the parents of the transfer or rights.

²⁸⁰ See also 20 U.S.C. § 1415 (m).

Enforcement
34 C.F.R. § 300.587²⁸¹

(e) Divided State agency responsibility. For purposes of this part, if responsibility for ensuring that the requirements of this part are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons is assigned to a public agency other than the SEA pursuant to Sec. 300.600 (d), and if the Secretary finds that the failure to comply substantially with the provisions of Part B of the Act or this part are related to a failure by the public agency, the Secretary takes one of the enforcement actions described in paragraph (b) of this section to ensure compliance with Part B of the Act and this part, except --

(1) Any reduction or withholding of payments to the State under paragraph (b)(1) of this section is proportionate to the total funds under section 611 of the Act to the State as the number of eligible children with disabilities in adult prisons under the supervision of the other public agency is proportionate to the number of eligible individuals with disabilities in the State under the supervision of the State educational agency; and

(2) Any withholding of funds under paragraph (e)(1) of this section is limited to the specific agency responsible for the failure to comply with Part B of the Act or this part.

Responsibility for all educational programs

34 C.F.R. § 300.600²⁸²

(d) Notwithstanding paragraph (a) of this section, the Governor or another individual pursuant to State law may assign to any public agency in the State the responsibility of ensuring that the requirements of Part B of the Act are met with respect to students with disabilities who are convicted as adults under State law and incarcerated in adult prisons.

²⁸¹ See also 20 U.S.C. § 1416.

²⁸² See also 20 U.S.C. § 1412 (a)(11).

APPENDIX B

SELECTED PROVISIONS OF THE ABA JUVENILE STANDARDS

6.5 The role of parents.

A.

1. Except as provided in subsection B, the parent of a delinquency respondent should have the right to notice, to be present, and to make representations to the court either pro se or through counsel at all stages of the proceedings;
2. Parents should be encouraged by counsel, the judge, and other officials to take an active interest in the juvenile's case. Their proper functions include consultation with the juvenile and the juvenile's counsel at all stages of the proceedings concerning decisions made by the juvenile or by counsel on the juvenile's behalf, presence at all hearings, and participation in the planning of dispositional alternatives. Subject to the consent of the mature juvenile, parents should have access to all records in the case. If the juvenile does not consent, the court should nevertheless grant the parent access to records if they are not otherwise privileged, and if the court determines, *in camera*, that disclosure is necessary to protect the parent's interests.

B. The court should have the power, in its discretion, to exclude or restrict the participation of a parent whose interests the court has determined are adverse to those of the respondent, if the court finds that the parent's presence or participation will adversely affect the interests of the respondent.

C. Parents should be provided with necessary interpreter services at all stages of the proceedings.

People in the Interest of J.F.C., 660 P.2d 7 (Colo. App. 1982). The presence of the juvenile's parent or parents is of "critical significance" to the knowing and intelligent waiver of a constitutional right of the juvenile. (Citing Standard 6.5).

6.6 "Parent" defined.

The term "parent" as used in this part includes:

- A. The juvenile's natural or adoptive parents, unless their parental rights have been terminated;
- B. If the juvenile is a ward of any person other than a parent, the guardian of the juvenile;
- C. If the juvenile is in the custody of some person other than a parent, such custodian, unless the custodian's knowledge of or participation in the proceedings would be detrimental to the juvenile; and
- D. Separated and divorced parents, even if deprived by judicial decree of the respondent juvenile's custody.

6.7 Appointment of guardian *ad litem*.

- A. The court should appoint a guardian *ad litem* for a juvenile on the request of any party, a parent, or upon the court's own motion:
 - 1. If the juvenile is immature as defined in Standard 6.1 B.2;
 - 2. If no parent, guardian, or custodian appears with the juvenile;
 - 3. If a conflict of interest appears to exist between the juvenile and the parents; or
 - 4. If the juvenile's interest otherwise requires it.
- B. The appointment should be made at the earliest feasible time after it appears that representation by a guardian *ad litem* is necessary. At the time of appointment, the court should ensure that the guardian *ad litem* is advised of the responsibilities and powers contained in these standards.
- C. The function of a guardian *ad litem* is to act toward the juvenile in the proceedings as would a concerned parent. If the juvenile is immature, the guardian *ad litem* should also instruct the juvenile's counsel in the conduct of the case and may waive rights on behalf of the juvenile as provided in Standard 6.3. A guardian *ad litem* should have all the procedural rights accorded to parents under these standards.

D. The following persons should not be appointed as guardian *ad litem*:

1. The juvenile's parent, if the parent's interest and the juvenile's interest in the proceedings appear to conflict;
2. The agent, counsel or employee of a party to the proceedings, or of a public or private institution having custody or guardianship of the juvenile; and
3. An employee of the court or of the intake agency.

In re Lisa G., 127 N.H. 585, 505 A.2d 1, 5 (1986). The role of guardian *ad litem* cannot be performed by "employees of the court or of other institutions with custody of the juvenile" because of their possibly adverse interest. (Citing Standard 6.7 D).

E. Courts should experiment with the use of qualified and trained non-attorney guardians *ad litem*, recruited from concerned individuals and organizations in the community on a paid or volunteer basis.



BIBLIOGRAPHY

- Adams, Gerald (editor), *At Risk Adolescents: Variations and Contexts, Part II*, 14 J. ADOLESCENT RES.2 (April 1999).
- American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994).
- Baskin, D., et al., *Ethnicity and Psychiatric Diagnosis*, 37 J. CLINICAL PSYCHOL. 3, 529-537 (July 1981).
- Benson, Peter L., ALL KIDS ARE OUR KIDS: WHAT COMMUNITIES MUST DO TO RAISE CARING AND RESPONSIBLE CHILDREN AND ADOLESCENTS, (Josey-Bass Publishers, 1997).
- Berkman, H., *Court To Take On Sentencing Rules*, NAT'L L.J. (January 15, 1996).
- Boyd-Franklin, Nancy, & Franklin, A.J., BOYS INTO MEN: RAISING OUR AFRICAN AMERICAN TEENAGE SONS, (Penguin Putman, Inc., 2000).
- Bullock, L. M., & McArthur, P., *Correctional Special Education: Disability Prevalence Estimates and Teacher Preparation Programs*, 17 EDUC. & TREATMENT CHILDREN 347-355 (1994).
- Canino, G.J., et.al., *Reliability of Child Diagnosis in a Latino Sample*, 26 ACAD. CHILD & ADOLESCENT PSYCHIATRY 4, 560-565 (1987).
- Carlo, Gustavo (editor), *Prosocial and Moral Development in Early Adolescence, Part II*, 19 J. EARLY ADOLESCENCE 2 (May 1999).
- Champion, D.J., THE U.S. SENTENCING GUIDELINES: IMPLICATIONS FOR CRIMINAL JUSTICE, (Praeger, 1989).
- Chase, Nancy D., BURDENED CHILDREN: THEORY, RESEARCH, AND TREATMENT OF PARENTIFICATION, (Sage Publications, 1999).
- _____, *Connecticut Takes Middle Road In Juvenile Justice Overhaul*, 26 CRIM. JUST. NEWSL. 14 (July 17, 1995).
- Corriero, M., *Tolerance and Respect for Children: A Judicial Philosophy*. 5 J. L. & POL'Y 167-175 (1996).
- Dana, R.H., MULTICULTURAL ASSESSMENT PERSPECTIVES FOR PROFESSIONAL PSYCHOLOGY, (Allyn and Bacon, 1993).

Dawson, R.O., *An Empirical Study of Kent Style Juvenile Transfers To Criminal Court*, 23 ST. MARY'S L.J. 4 (1972).

DeAngelis, T., *Ethnic-minority issues recognized in DSM-IV*, THE MONITOR (1994).

Dilulio, J.J., et.al., PERFORMANCE MEASURES FOR THE CRIMINAL JUSTICE SYSTEM (U.S. Department of Justice October, 1993).

Dimock, H.G., INTERVENTION AND COLLABORATION: HELPING ORGANIZATIONS TO CHANGE (Pfeiffer & Company, 1993).

Fagan, J., & Deschenes, E.P., *Determinants of Judicial Waiver Decisions for Violent Juvenile Offenders*, 81 NW UNIVERSITY SCH. L. 2 (Summer 1990).

Fagan, J., et al., *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 CRIME & DELINQ. 2 (April 1987).

Faludi, Susan, STIFFED: THE BETRAYAL OF THE AMERICAN MAN (William Morrow and Company, 1999).

Fields, G., *Blacks now a majority in prisons*, USA TODAY, December 4, 1995.

Frankel, M.E., CRIMINAL SENTENCES, LAW WITHOUT ORDER (Hill and Wang, 1973).

Garbarino, James, LOST BOYS: WHY OUR SONS TURN VIOLENT AND HOW WE CAN SAVE THEM (The Free Press, 1999).

Giedd, Jay N., et.a.l., *Brain Development During Childhood and Adolescence: a Longitudinal MRI Study*, 2 NATURE AM. INC.10 (October 1999).

Glick, B., Goldstein, A.P., MANAGING DELINQUENCY PROGRAMS THAT WORK (American Correctional Association, 1995).

Glover, D., DIVERSITY IN THE COURTS: A GUIDE FOR ASSESSMENT AND TRAINING, (Federal Judicial Center, March 1995).

Grisso, et al., YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE (The University of Chicago Press, 2000).

Grossman, Dave, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY (Little, Brown and Company, 1995).

Gurian, M., THE GOOD SON: SHAPING THE MORAL DEVELOPMENT OF OUR BOYS AND YOUNG MEN (Penguin Putnam, Inc., 1999).

Haddigan, M., *Reforming Juvenile Justice in Arkansas*, YOUTH TODAY (July/August, 1994).

Hechtman, Lily (editor), DO THEY GROW OUT OF IT?: LONG-TERM OUTCOMES OF CHILDHOOD DISORDERS (American Psychiatric Press, Inc., 1996).

Hill, Shirley H., AFRICAN AMERICAN CHILDREN: SOCIALIZATION AND DEVELOPMENT IN FAMILIES (Sage, 1999).

Hine, Thomas, THE RISE AND FALL OF THE AMERICAN TEENAGER (Avon Books, Inc., 1999).

Howell, J.C., GUIDELINES FOR IMPLEMENTING THE COMPREHENSIVE STRATEGY FOR SERIOUS, VIOLENT, AND CHRONIC JUVENILE OFFENDERS (Office of Juvenile Justice and Delinquency Prevention, May 1995).

In re Gault, 387 U.S. 1, 87 S.Ct. 1428 (1967).

Jackson, G., EXEMPLARY PROGRAMS IN CRIMINAL JUSTICE (National League of Cities, 1994).

Jones, M.A., Krisberg, B., IMAGES AND REALITY: JUVENILE CRIME, YOUTH VIOLENCE AND PUBLIC POLICY (National Council on Crime and Delinquency, June 1994).

Juvenile Justice and Delinquency Prevention (JJDP) Act of 1974, 42 U.S.C. 5601 et seq., as amended by the Juvenile Justice and Delinquency Amendments of 1988, subtitle F of Title VII of Public Law 100-690, §223(a)(23).

_____, JUVENILE JUSTICE RACIAL DISPROPORTIONALITY WORK GROUP: REPORT TO THE WASHINGTON STATE LEGISLATURE (State of Washington, Office of the Administrator for the Courts December, 1994).

Kay, Philip (editor), THINGS GET HECTIC: TEENS WRITE ABOUT THE VIOLENCE THAT SURROUNDS THEM (Simon & Schuster, 1998).

Kivel, Paul, BOYS WILL BE MEN (New Society Publishers, 1999).

Koon v. U.S., 94-1664.

Korem, D., *Youth Gangs: Problem No Longer Limited to Poor, Inner-City Areas*, THE DALLAS MORNING NEWS, January 14, 1996.

Krener, P.G., & Sabin, C., *Indochinese Immigrant Children: Problems in Psychiatric Diagnosis*, 24 J. AM. ACAD. OF CHILD PSYCHIATRY 4, 453-458 (1985).

Leonard, K.K., et.al., MINORITIES IN JUVENILE JUSTICE (Sage Publications, 1995).

- Lindsey, L. M. *Culturally Competent Assessment of African American Clients*, 70 J. PERSONALITY ASSESSMENT 1, 43-53 (1998).
- Macallair, D., REDUCING DETENTION POPULATIONS THROUGH ADVOCACY AND CASE MANAGEMENT (Center on Juvenile Justice, Paper presented at the annual conference of the National Juvenile Detention Association, 1995).
- Mann, C.R., *A Minority View of Juvenile Justice*, 51 WASH. & LEE L. REV. 2, 465-477, (Spring, 1994).
- Mattessich, P.W., COLLABORATION: WHAT MAKES IT WORK (Amherst H. Wilder Foundation, 1992).
- Mauer, M., & Huling, T., *Young Black Americans and the Criminal Justice System: Five Years Later*, THE SENTENCING PROJECT (October 1995).
- McGarrell, E.F., *Trends in Racial Disproportionality in Juvenile Court Processing: 1985-1989*, 39 CRIME & DELINQ. 1 (January 1993).
- Meddis, S.V., *Balancing the Scales of Justice: Bill Would Even Cocaine Sentencing*, USA TODAY, November 8, 1995.
- Meddis, S.V., *Trenches of Drug War Deeper in Some Cities*, USA TODAY, June 23, 1994.
- Meddis, S.V., *Violence Robs Nation's Youth*, USA TODAY, June 1, 1995.
- Melendez v. U.S.*, 95-5661.
- Mershon, J.L, JUVENILE JUSTICE: THE ADJUDICATORY AND DISPOSITIONAL PROCESS (National Council of Juvenile and Family Court Judges, 1991).
- Monsey, B., et.al., WHAT WORKS IN PREVENTING RURAL VIOLENCE (Amherst H. Wilder Foundation, 1995).
- Montemayor, et al., ADOLESCENT DIVERSITY IN ETHNIC, ECONOMIC, AND CULTURAL CONTEXTS (Sage Publications, 2000).
- Montgomery, I.O., et.al., WHAT WORKS: PROMISING INTERVENTIONS IN JUVENILE JUSTICE (Office of Juvenile Justice and Delinquency Prevention, October 1994).
- New York Department of Probation, ALTERNATIVE TO DETENTION (Prepared for the A.E. Casey Foundation, June 1995).
- NEW YORK TIMES NEWS SERVICE, *Massachusetts Enacts One of the Toughest Youth-Gun Laws in the U.S.*, THE DALLAS MORNING NEWS, December 17, 1995.

Oppel, R.A., Jr., *Scared of Life: Children Too Are Living in Fear of Violence*, THE DALLAS MORNING NEWS, March 13, 1994.

Parent, D., *Conditions of Confinement Inside America's Juvenile Institutions*, 1 JUVENILE JUSTICE 1, (Spring/Summer 1993).

Parent, D., et.al., *CONDITIONS OF CONFINEMENT: JUVENILE DETENTION AND CORRECTIONS FACILITIES* (Office of Juvenile Justice and Delinquency Prevention, August, 1994).

Pesce, C., *Minn. Puts 'Hammer' on Juvenile Criminals*, USA TODAY, June 3, 1994.

Pollack, William, *REAL BOYS: RESCUING OUR SONS FROM THE MYTHS OF BOYHOOD* (Henry Holt and Company, 1998).

_____, *PUBLIC OPINION REGARDING THE JUVENILE JUSTICE SYSTEM IN VIRGINIA* (Survey Research Laboratory, Virginia Commonwealth University, October 1995).

Puritz, P., et.al., *A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS* (American Bar Association, 1995).

_____, *QUALITY ASSURANCE: GOALS, OBJECTIVES AND STANDARDS FOR JUVENILE DETENTION FACILITIES AND PROGRAMS* (1994).

Rice, Philip F., *THE ADOLESCENT: DEVELOPMENT, RELATIONSHIPS AND CULTURE* (Allyan and Bacon, 1999).

Rosado, Lourdes M., *KIDS ARE DIFFERENT: HOW KNOWLEDGE OF ADOLESCENT DEVELOPMENT THEORY CAN AID DECISION-MAKING IN COURT* (American Bar Association Juvenile Justice Center, 2000).

Sagor, R., *HOW TO CONDUCT COLLABORATIVE ACTION RESEARCH* (Association for Supervision and Curriculum Development, 1992).

Sattler, M. S., *ASSESSMENT OF CHILDREN* (3d ed., Jerome M. Sattler, Publishers Inc. 1992).

Schwartz, I.M., et al., *COMBATING JUVENILE CRIME: WHAT THE PUBLIC REALLY WANTS* (Center for the Study of Youth Policy, University of Michigan, April 1992).

Snyder, H.N., Sickmund, M., *JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT*, (National Center for Juvenile Justice, 1995).

STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING (American Psychological Association, 1985).

Stevenson, Howard C., *Missed, Dissed, and Pissed: Making Meaning of Neighborhoods Risk, Fear and Anger Management in Urban Black Youth*, 3 CULTURAL DIVERSITY AND MENTAL HEALTH 1, 37-52 (1997).

_____, A STUDY OF OVERCROWDING IN THE DALLAS COUNTY JUVENILE DETENTION CENTER (Texas Juvenile Probation Commission, October 15, 1993).

_____, *Study: Young Blacks Being Locked Up At Alarming Rates*, LAS VEGAS REV. J. (October 5, 1995).

Sue, D., & Sue, S., *Cultural Factors in the Clinical Assessment of Asian Americans*, 55 J. CONSULTING & CLINICAL PSYCHOL. 4, 488-495 (1987).

_____, *Texas Governor Signs Bill To Make Juvenile Code Stricter*, 26 CRIM. JUST. NEWSL. 11 (June 1, 1995).

Timms, E., *Debate on Drugs: As Number of Offenders in Prison Rises, Disparity in Penalties Creates Controversy*, THE DALLAS MORNING NEWS, December 17, 1995.

Timms, E., *Poll Finds Wide Concern About Drugs*, THE DALLAS MORNING NEWS, December 12, 1995.

Traver, N., *That Get-Tough, Kill Kids, And Popular Crime Bill*, YOUTH TODAY, (January/February 1994).

U.S. v. Armstrong, 95-157.

Watson, T., & Cauchon, D., *Atlanta: A testing ground for crime bills*, USA TODAY, June 3, 1994.

Willette, A., *Walls of fear rising—and falling*, USA TODAY, July 18, 1995.

Winer, M., & Ray, K., *COLLABORATION HANDBOOK* (Amherst H. Wilder Foundation, 1994).

Zimring, Franklin E., *AMERICAN YOUTH VIOLENCE* (Oxford University Press, 1998).

Ziskin, J. *COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY* (Vol. 1, 3d ed., Law and Psychology Press, 1975).

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