



# JOURNAL

JOURNAL OF THE CENTER FOR FAMILIES, CHILDREN & THE COURTS

VOLUME 5 ❖ 2004

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The *Journal of the Center for Families, Children & the Courts* is a periodical dedicated to publishing a full spectrum of viewpoints on issues regarding children, families, and the interplay between these parties and the courts. Focusing on issues of national importance, the journal encourages a dialogue for improving judicial policy in California.



# JOURNAL

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The *Journal of the Center for Families, Children & the Courts* welcomes submissions addressing contemporary issues in family and juvenile law, the administration of family and juvenile courts, and the provision of court-connected services to children and families. The journal seeks to foster dialogue among various practical and academic disciplines, and so invites contributions from the fields of law, court administration, medicine and clinical psychology, the behavioral and social sciences, and other disciplines concerned with the welfare of children and families.

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## Editor's Note

The Judicial Council of California and the Administrative Office of the Courts are pleased to present Volume 5 of the *Journal of the Center for Families, Children & the Courts*.

In this issue we focus on trends and developments in the juvenile court. From its inception in 1926, the Judicial Council signaled its interest in reviewing court procedures involving juveniles in California and, by 1930, had visited juvenile courts in other states and made recommendations for changes to the juvenile justice system to reduce the number of delinquent children in the state. The Judicial Council, in partnership with California's local trial courts and juvenile court judges, continues to demonstrate its dedication and commitment to the best interest of this state's children and families through innovative programming and cutting-edge judicial policy.

The articles in the focus section offer a range of issues meant to encourage a dialogue on how the courts can best serve the children and families who come into the juvenile court system. Leading off, Diane Nunn and Christine Cleary offer a glimpse into California's early treatment

of juveniles and the juvenile court of the past, tracing the key legislation and case law that helped shape the court we know today. Then Barbara Kaban and Judith C. Quinlan discuss children's insufficient understanding of legal

***Trends & Developments in the Juvenile Court:***  
*Innovative programming and cutting-edge judicial policy to serve the best interest of California's children and families.*

terminology, particularly as it pertains to plea proceedings. They give many suggestions and sample colloquies to enhance children's understanding of legal proceedings. Judge Leonard P. Edwards looks at the shortcomings of the traditional adversarial process in resolving child protection and related family issues and introduces mediation as a viable alternative. He discusses best practices for a successful mediation program. Next, Don Will, Alexa Hirst, and Alison Neustrom introduce current efforts to define data standards for juvenile dependency court and review available sources of information on children in the system. They identify key research and performance issues that a juvenile dependency information system should address. Ana España and Tracy Fried take a close look at the educational challenges facing foster children and discuss systemic impediments to their educational achievement, pointing out the expanding role of the juvenile court in addressing educational issues. Judge James R. Milliken (Ret.) and Gina Rippel follow with a proposal that effective case management and immediate treatment for substance-abusing parents can improve outcomes for children who enter the

dependency system because of their parents' drug and alcohol problems. The San Diego County Dependency Court Recovery Project is presented as a successful, cost-effective model program. Then Davin Youngclarke, Kathleen Dyer Ramos, and Lorraine Granger-Merkle present a systematic review of studies assessing the impact of Court Appointed Special Advocates (CASAs) and suggest that CASA programs may positively influence particular process variables. In the last article focused on trends and developments in the juvenile court, Dr. David E. Arredondo argues that decision-makers must understand the principles of child development in order to fashion developmentally appropriate sanctions for children and youth who come into the juvenile justice system. He offers sanctioning strategies for special juvenile offender populations, including girls, the mentally ill, and transgenerationally involved youth.

We have reserved the Issues Forum in this volume for a discussion on juveniles and the death penalty. Though the U.S. Supreme Court recently issued its decision barring the death penalty for offenders who were under the age of 18 when their crimes were committed, debate on the issue has not abated. After providing a brief background on both the state and Supreme Court cases, we have reprinted the entire oral argument before the U.S. Supreme Court in the case of *Roper v. Simmons*, in the hope of further delineating the issues and contributing to an ongoing healthy debate on this very important matter.

In our Perspectives section we include the remarks by Judge Leonard P. Edwards upon receiving the 2004 William H. Rehnquist Award for Judicial Excellence in the Great Hall of the U.S. Supreme Court. He shares his thoughts on the juvenile court and the children and families it serves. And we are pleased to include in this volume a selection of poems and artwork that were submitted to our 2003 Children's Art and Poetry Contest by children and youth with experiences in the California court system. The contest was part of the celebration of the 100th anniversary of the creation of California's juvenile courts.

Finally, with this volume we bid a fond farewell to Corby Sturges, journal editor since Volume 2, who continued to work with us on this volume after his move to another country. We are so grateful to have had the opportunity to work with Corby—a brilliant editor, wonderful person, great new dad, and master of the *Bluebook*. We wish him all the best in this new chapter of his life.

We hope that the journal is meeting its goals of publishing a full spectrum of viewpoints and encouraging productive scholarly discussions on issues concerning children and families in the court system. As always, we welcome your comments and suggestions on ways we can improve this publication to better meet your needs.

—Chris Cleary

# Contributors

**DAVID E. ARREDONDO, M.D.**, is the medical director of EMQ Children and Family Services and founding director of the Office of Child Development, Neuropsychiatry, and Mental Health, an affiliate of the National Council of Juvenile and Family Court Judges. He conducts research reviews on a broad range of topics and provides consultations and training to professionals and programs across the country. Arredondo's primary focus is the transferring of knowledge of early childhood brain development, the effects of trauma, and current thinking about children's mental health to practitioners in various disciplines. He is a graduate of Harvard College and Harvard Medical School.

**CHRISTINE CLEARY** is the journal's editor in chief. Before coming to the AOC Center for Families, Children & the Courts, she spent many years as an attorney in private practice doing civil litigation and juvenile dependency appellate work. One of her dependency cases, *In re Precious J.*, 50 Cal. Rptr. 2d 385 (Cal. Ct. App. 1996), resulted in the reversal of a judgment terminating an incarcerated mother's parental rights because the social services agency failed to provide reasonable reunification services. More recently Cleary was the managing attorney at the Child Care Law Center in San Francisco.

**HON. LEONARD P. EDWARDS** was appointed to the Superior Court of California, County of Santa Clara, in 1981 and has spent the majority of his judicial career on the juvenile court bench. He currently serves as supervising judge of the juvenile dependency court. Judge Edwards is the 2003–2004 Judicial Council of California Jurist of the Year and the recipient of the 2004 William H. Rehnquist Award for Judicial Excellence sponsored by the National Center for State Courts. He is a past president of the National Council of Juvenile and Family Court Judges and a past member of the Judicial Council of California. He and his wife, Professor Inger Sagatun-Edwards, are co-authors of *Child Abuse and the Legal System* (Wadsworth 1995).

**ANA ESPAÑA** is supervising attorney of the San Diego County Public Defender's dependency section. She has represented children in dependency proceedings for more than 20 years. España is active on both state and local levels on behalf of foster youth. She is a member of the Judicial Council's Family and Juvenile Law Advisory Committee, the California State Bar Committee on the Delivery of Legal Services, the board of directors of the California CASA Association, and the San Diego Juvenile Court Policy Group, Rules Committee, and Education Task Force.



**TRACY FRIED, M.S.W.**, focuses on instituting systemic change to improve educational outcomes for underserved youth. In 2000, she developed the San Diego County Office of Education's Foster Youth Services program. Fried was a recipient of the 2004 Golden Bell award sponsored by the California School Board Association and has been recognized in a White House Task Force Report on Disadvantaged Youth and numerous other national and state publications for her work in the Foster Youth Services program. She received her master's degree from the University of Southern California in 1994.

**LORRAINE GRANGER-MERKLE, M.S.**, is a Marriage and Family Therapist intern with the Center for Creative Transformation in Fresno. She is particularly interested in working with families in crisis and abused children. She holds a master's degree in marriage and family therapy and a bachelor's degree in news-editorial journalism. She previously worked for 20 years in international broadcasting and research-based broadcast consulting.

**ALEXA HIRST** is a master's degree candidate in public policy at Harvard University's John F. Kennedy School of Government and is a consultant with the Center for Applied Research, a management consulting firm in Philadelphia. Before returning to graduate school, she was a senior research analyst at the AOC Center for Families, Children & the Courts, where she specialized in studies of topics such as domestic violence and case complexity in California's juvenile and family courts. Until 2001, she worked on evaluations of problem-solving courts at the Urban Institute in Washington, D.C. Hirst received her bachelor's degree in psychology from Harvard College in 1997.

**BARBARA KABAN, J.D., M.B.A., M.ED.**, is deputy director of the Children's Law Center in Lynn, Massachusetts. A recipient of a 1998 Soros Justice Fellowship, she graduated *magna cum laude* from Boston College Law School and received an M.B.A. from Boston University and an M.Ed. in educational psychology from Harvard University. She provides direct representation to children and youth in delinquency and educational matters. Kaban is also a member of the criminal appellate panel and has argued before the Appeals and Supreme Judicial Courts. She regularly lectures on effective advocacy practices in juvenile delinquency cases. Her publications include *When Police Question Children: Are Protections Adequate?* (with Ann E. Tobey, 1 J. CENTER CHILDREN & CTS. 151 [1999]) and *An Overview of Disposition Process in Delinquency Cases* (with Francine Sherman, in JUVENILE LAW BASICS 205 [Debra S. Krup ed., Mass. Continuing Legal Educ., 1999]).

## *Contributors, continued*

**HON. JAMES R. MILLIKEN (RET.)** was the presiding judge of the Superior Court of San Diego County's juvenile division from 1996 until his retirement in 2003. Beginning in 2002 he also served as the supervising judge of its family court. Judge Milliken received a J.D. from California Western School of Law. He was a civil trial attorney with the San Diego firm of McInnis, Fitzgerald, Rees, Sharkey & McIntyre for 18 years before his appointment to the superior court in 1988. He is currently a partner in DiFiglia & Milliken, a private dispute resolution practice, where he also consults on management of juvenile cases, particularly dependency cases, for courts in other jurisdictions.

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TRENDS &  
DEVELOPMENTS  
IN THE JUVENILE  
COURT



*Illustration, page 1:*

**“BEGINNING AND END”**

I named my peace “beginning and end.” It says how I was scared in the beginning and how I came through in the end. My mom had to go to court to see if she was getting us back. We sat in the back and my mom had to sit in the front. They threw different statements at her. She would listen. At the end we left the room. She came out later and told us that we couldn’t go home with her. I was sad. We got placed with our Foster Mom in guardianship. It is a good placement for us. And we still see our mom sometimes. Now I am not as scared or sad or frustrated about what will happen.

**ASHLEY L.**

*Age 13*

*2003 Children’s Art & Poetry Contest*

# From the Mexican California Frontier to Arnold-Kennick

## *Highlights in the Evolution of the California Juvenile Court, 1850–1961*

Steeped in the traditions of English common law, *enriquecida con* (enriched with) Mexican civil jurisprudence, and wrapped in Old West stubborn individuality, California’s legal system evolved its own unique concept of justice. Nowhere is that uniqueness better demonstrated than in the evolution of the treatment of children in the California courts. This article traces the development of California’s juvenile law reform from the mid-19th century to the mid-20th, highlighting key legislation and case law critical to the shaping of modern juvenile dependency and delinquency jurisprudence.

### PRE-JUVENILE COURT ERA

There was no legal system for protecting abused children in 1850, when the California Supreme Court issued a writ of habeas corpus to bring “five females, one of whom was the ‘Queen of the Bay,’ about 14 years of age, and the others, who were ‘daughters of chiefs,’” before the court to determine whether Captain Snow of the schooner *Jupiter* had any right to detain the five girls, whom he had kidnapped from the Marquesas Islands and “treated with great cruelty” as they made their way to the port of San Francisco.<sup>1</sup> The girls were so anxious to escape the abuse they jumped overboard, only to be rescued from drowning by their abusers, who continued to hold them in captivity.<sup>2</sup> Snow did not even pretend to have a legal right to detain the girls, so the court discharged them from his custody, and they were eventually returned to their own country.<sup>3</sup> There is no indication that Snow faced any charges for the egregious harm he imposed on the girls, nor is there evidence that the girls were given any protection other than removal from Snow’s custody.

In fact, mid-19th-century California did not have much of a formal legal system at all, much less a juvenile court system. Unlike other states that had established governments prior to their admission into the union, California formed a government in the middle of the great political and legal chaos that followed the Mexican War and the discovery of gold—first adopting a Constitution in fall 1849,<sup>4</sup> then entering statehood a year later with a fledgling government and a patchwork of legal customs and traditions influenced by Spanish colonialists, Mexican *alcaldes* (local judges), American expatriates

DIANE NUNN

CHRISTINE CLEARY

*Center for Families, Children & the Courts*

This article traces the threads of juvenile law reform from the mid-19th century, when chaos reigned on the Mexican California frontier, to the mid-20th century at the point when California passed the Arnold-Kennick Juvenile Court Law, presaging the revolutionary reforms ushered in by the U.S. Supreme Court’s decision in *In re Gault*. It highlights key legislation and case law critical to the shaping of modern juvenile dependency and delinquency jurisprudence while attempting to place developments in context with the politics and public sentiment of the time.

*The authors thank and acknowledge the dedicated juvenile court judges and other court personnel in California whose extraordinary work and commitment to the children of this state have moved California from a past where children’s*

*Continued on page 4*

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*Center for Families, Children & the Courts*

*Continued from page 3*

*best interests were not always considered to a present where excellence, innovation, and active concern for children have transformed the juvenile court into a continuing source of pride to those of us who work in the court system. The authors also thank Angus Macfarlane, a retired San Francisco probation officer, who generously shared his unpublished "History of California's Juvenile Court" with us. It was his meticulous research that uncovered most of the vintage newspaper articles and illustrations that we used in this article, and he freely offered his time and thoughts whenever we had questions. ■*

with common law or civil law backgrounds, and miners with their own traditions of "mining camp" law.<sup>5</sup>

But the judicial system adopted in California's first Constitution most closely resembled that of Mexico—the Supreme and appellate courts corresponding to the Mexican Tribunal Superior and Courts of the Second Instance, superior courts corresponding to the Mexican Courts of the First Instance, and municipal courts corresponding to the Mexican *alcalde* courts.<sup>6</sup> That theoretical structure actually gave way to a simple system of *alcalde* justice at the community level in sparsely populated California.<sup>7</sup> Each village (*pueblo*) elected an *alcalde*, generally the most respected person in the community, who functioned as the local judge and mayor.<sup>8</sup> The administration of justice was "paternalistic and benevolently dictatorial": the *alcalde* could rule as he saw fit, "unfettered by substantive standards (legal rules) for the resolution of conflicts."<sup>9</sup> It was a popular system, offering "a locally controlled justice system with extremely easy access," unburdened by legal technicalities.<sup>10</sup> That system of community-oriented paternalism would make its mark on the legal treatment of children in California.

It would be another half century before the juvenile court movement took root and began to spread in the United States, eventually reaching California. Meanwhile, California was grappling with the effects of the Gold Rush: exponential overall population growth; small towns that lost much of their adult male populations to the lure of the mines; disorganized community life "hardly conducive to a stable family life and the raising of children."<sup>11</sup> In its first legislative session, held in San Jose from December 15, 1849, to April 22, 1850, California's new Legislature passed a host of statutes to bring some order to the chaos,<sup>12</sup> among them acts authorizing the Clerk of the Supreme Court to rent a courtroom in San Francisco,<sup>13</sup> defining the rights of husband and wife,<sup>14</sup> and adopting the Common Law of England as the rule of decision in all California courts.<sup>15</sup> In those few months the Legislature covered most of the critical issues facing the young state but failed to produce any laws directly focused on its children. Its "Act concerning Crimes and Punishments," however, did establish that a child under the age of 14 "shall not be found guilty of any crime"<sup>16</sup> but could be found to have the sound mind necessary to manifest an intention to commit a crime if that child "knew the distinction between good and evil."<sup>17</sup> In September 1850, after that first legislative session, California was formally admitted into the Union.<sup>18</sup>

#### DEVELOPMENT OF POLICY ON DEPENDENT CHILDREN

Concern was growing for children arriving in California whose parents had died on the rigorous trip west, leaving them without care and support.<sup>19</sup> On February 21, 1851, the San Francisco Orphan Asylum opened its doors, becoming the first organized charity on the West Coast.<sup>20</sup> Several other orphanages were established in the ensuing decades.<sup>21</sup>



In 1870, California passed its first adoption law, modeled on New York's law.<sup>22</sup> Before its enactment adoptive parents were forced to use a fictitious apprenticeship to secure children, which, when applied to babies, was characterized as "absurd and repulsive" by the code commissioners who drafted the adoption provisions.<sup>23</sup> Adoption as a proceeding was unknown in common law but had been recognized under the civil law of Rome and was a rite practiced by Native Americans.<sup>24</sup> And the alcalde courts in early California kept busy with "guardianship problems" that were often resolved with what in effect were "private adoptions."<sup>25</sup> For example, an alcalde might draft documents for an illegitimate child's mother who wished to renounce her parental rights to another woman or to a couple.<sup>26</sup> It is likely that a desire for a more regular procedure in matters of guardianship and adoption than the informal and paternalistic involvement of the local alcalde influenced California's lawmakers to enact one of this nation's first adoption laws, despite the absence of adoption proceedings under the common law.<sup>27</sup>

The child welfare movement began on the East Coast and found its way to California in 1874 with the establishment of the Boys and Girls Aid Society in San Francisco.<sup>28</sup> The society cared for neglected, dependent, and delinquent children and worked informally to encourage compliance with the compulsory education law of 1874.<sup>29</sup> It also advocated legislation affecting children, successfully promoting

a bill in 1878<sup>30</sup> that made it unlawful to jail children under 16, and then gaining passage of a statute in 1883<sup>31</sup> that allowed police and the courts to put juvenile offenders under supervised probation.<sup>32</sup>

Around this same time activists in California tackled the problem of direct intervention on behalf of abused and neglected children;

the public and religious organizations that received and cared for these children did not actively intervene on their behalf but only assumed care after they had been legally placed in institutional custody.<sup>33</sup> No mechanism at that time provided for direct intervention between a child and his or her parent or caretaker when that child was being abused; but in New York in early 1874, Elbridge Gerry, attorney for Henry Bergh, founder of the Society for the Prevention of Cruelty to Animals (SPCA), had successfully secured a writ of habeas corpus on behalf of a child who was severely beaten by her step-

mother.<sup>34</sup> The court had placed the child with the Sheltering Arms, an institution for homeless children, and eventually approved of her placement in a foster home.<sup>35</sup>

This action led to the formation of the Society for the Prevention of Cruelty to Children (SPCC) by Gerry and Bergh, drawing on their experience with protecting animals at the SPCA.<sup>36</sup> The president of the San Francisco SPCA, eager to test this approach in the California courts, intervened on behalf of 3-year-old Harry Sebastian, who had been taken in by a circus performer and forced to perform in a bareback riding act after his impoverished mother was persuaded to sign over custody of the child.<sup>37</sup>



After overwhelming evidence of cruelty and abuse was presented to the court, Harry was remanded to the custody of his birth father, who had been making every effort to reunite with the child.<sup>38</sup> Shortly thereafter, in late 1876, San Francisco's own SPCC was incorporated and shared offices with the SPCA.<sup>39</sup>

On March 30, 1878, under pressure from children's advocacy groups, the Legislature passed two bills to protect children.<sup>40</sup> The first, "An Act for the protection of children, and to prevent and punish certain wrongs to children," made it a misdemeanor to allow any child under age 16 to enter or "remain in any saloon or place of entertainment where any spirituous liquors, or wines, or intoxicating or malt liquors are sold, exchanged, or given away, or at places of amusement known as dance-houses and concert saloons, unless accompanied by a parent or guardian."<sup>41</sup> It also provided for punishment of anyone "having the care, custody, or control" of any child under 16 who allowed the child to beg.<sup>42</sup> The bill gave the court authority to order a child to "an orphan asylum, society for the prevention of cruelty to children, charitable or other institution" if that child was (1) found begging, (2) found wandering with no apparent home or caretaker, (3) found destitute because he or she was an orphan or had a "vicious parent" who was incarcerated, or (4) found frequenting the company of thieves, prostitutes, houses of prostitution, "dance-houses," "concert saloons," theaters, or other such establishments without a parent or guardian.<sup>43</sup> And, finally, the act prohibited imprisonment of any child under 16.<sup>44</sup> The other bill passed that same day, "An Act relating to children," made it a crime to sell, apprentice, or otherwise allow a child to perform, beg, or engage in any "obscene, indecent, or immoral purpose."<sup>45</sup> Again the court was given the authority to commit to an orphan asylum or another appropriate placement any child whose caretaker was convicted under the act.<sup>46</sup> These bills seemed to reinforce the paternalistic, *parens patriae* approach typical of the small-town alcalde: the court was given wide discretion to fashion a solution for each individual abused, neglected, or delinquent child.

#### DEVELOPMENT OF POLICY ON DELINQUENT CHILDREN

There is ample evidence that the years between 1850 and 1860 were chaotic, rowdy, and dangerous in California—for children and adults alike. Attempts by the Legislature to rein in the Wild West atmosphere included

- an act establishing Judges of the Plains, who attended "all rodeos or gathering of cattle" to settle disputes about the ownership of "any horse, mule, jack, jenny, or horned cattle";<sup>47</sup>
- an act setting the age of majority of males and females—males at 21 years, and females at 18 years;<sup>48</sup>
- an act prohibiting "barbarous and noisy amusements on the Christian Sabbath";<sup>49</sup>
- an act providing "for the better observance of the Sabbath," requiring businesses to close on Sunday;<sup>50</sup> and
- an act protecting female children under 17 years from being "procure[d]," caused, or employed to dance, promenade, or otherwise exhibit themselves "for hire, drink, or gain, in any drinking saloon, dance celler [sic], ball room, public garden, public highway, or in any place whatsoever (theaters excepted) where two or more persons [were] assembled together."<sup>51</sup>

In 1858 there was enough of a problem with children under 18 "leading an idle or immoral life" that the Legislature established the San Francisco Industrial School to detain, manage, reform, educate, and maintain the children committed to its care.<sup>52</sup> Under the act, children could be committed to the Industrial School if they were "vagrants, living an idle or dissolute life"; if they were convicted of any crime or misdemeanor; or, in the case of children under 14, if after trial it appeared that "such child has done an act which, if done by a person of full age, would warrant a conviction of the crime or misdemeanor charged."<sup>53</sup> It was up to the discretion of the police judge<sup>54</sup> or court of sessions<sup>55</sup> to determine whether commitment

to the Industrial School was more “suitable” than the punishment authorized by law<sup>56</sup>—at that time juveniles were often jailed with adult offenders.<sup>57</sup>

Two years later the Legislature, responding to public sentiment against putting juveniles in adult prisons, authorized the building of a state reform school in Marysville.<sup>58</sup> But the school did not last long because San Franciscans were not willing to send their children there and there were no funds to transport children from other parts of the state.<sup>59</sup> The result was that the more-serious juvenile offenders continued to be housed in prisons with adults.<sup>60</sup> Between 1850 and 1860 more than 300 children under age 20 served time in state prisons, and by 1886 there were 184 prisoners under 21 years old.<sup>61</sup> Meanwhile, the San Francisco Industrial School was increasingly housing more-serious juvenile offenders, though it was unable to accommodate more than a small share of the state’s total, and was taking on more of a correctional role, eventually becoming unsuitable for less-serious juvenile offenders.<sup>62</sup> Despite this, children who were not serious offenders continued to be ordered to the Industrial School because there just were no other options.

#### WAYWARD SARAH

##### A Little Girl Who Stayed Out Late at Nights

Sarah Feeley, an auburn-haired miss of 13 summers, was consigned to the Industrial School by Judge Hornblower yesterday. Sarah’s mother and the arresting officer testified that the girl had a mania for hanging around the doors of cheap theaters at night when she should be in bed. She was not depraved, but it was considered a wise step to have her placed in some institution where the danger of contact with bad companions would be avoided until she made up her mind to become tractable.

Sarah wept bitterly as she was led away from the courtroom to be sent to the school, and she was assured that the length of her stay there would depend altogether on her own behavior.<sup>63</sup>

Sarah’s situation was typical of girls committed to the Industrial School—the largest percentage of girls were committed to the institution for leading an idle and dissolute life or were “unmanageable” and surrendered by their parents or guardians.<sup>64</sup> By this

time girls committed to the Industrial School were housed in a separate facility, the Magdalan Asylum, operated by the Sisters of Mercy.<sup>65</sup>

The problem of how to manage youthful offenders continued to plague local authorities. A look at the media from that time highlights the problems. These stories ran in the *San Francisco Chronicle*:

#### A BOY STABBER

##### A Young Hoodlum Makes Use of a Knife

John Murphy, a thirteen-year-old hoodlum, who spends half his time in the clutches of the police, stabbed a boy in the Everett House yesterday during a quarrel. The knife penetrated the boy’s back, inflicting an ugly although not dangerous wound. Young Murphy fled, but was soon afterward caught by a policeman and locked up in the City Prison charged with assault with intent to commit murder.<sup>66</sup>

#### YOUTHFUL DEPRAVITY

##### A Miss of Fourteen Shocks Old Police Officers

Ida O’Rourke is a chipper little creature of 14 years or less, with a pert look in her eye that captivates the boys, of whom she is very fond. Ida dresses neatly, the feather in her hat is very red and the heels of her shoes high and polished, and it requires considerable financial engineering on the part of Ida’s parents, who own a candy store on Sixth Street, to keep the daughter in style. Of late Ida has been ungrateful, stayed out late at night, and as the last alternative her mother caused her arrest as a vagrant. Ida was decoyed into the southern police station yesterday afternoon by the officer who had the warrant, and when she saw her freedom was at an end she stamped, raved and tore her hair and said naughty things that shocked even the oldest officers. Sargeant [sic] Falls, turning to a reporter who was an observer, said: “For eight years I heard tough people take on, but this fourteen-year-old girl is the liveliest specimen of humanity I ever saw.”

Ida will be taken to the Police Court this morning and will probably be sent to the House of Correction.<sup>67</sup>

A public still dissatisfied with the treatment of delinquent, homeless, and impoverished children

forced the Legislature to take steps to address their plight.<sup>68</sup> By 1881 more than 50,000 children were not “reached” by the regular public schools.<sup>69</sup> This was a significant number, considering that in 1880 California’s total population of school-age children was less than 250,000.<sup>70</sup> In 1884, a legislative commission urged the establishment of a state reform school in Whittier and an industrial school in Preston.<sup>71</sup> It took five years for the Legislature to act on the recommendations of the commission. On March 11, 1889, the Senate and Assembly passed two acts concerning children—one to establish the Preston School of Industry,<sup>72</sup> and one to establish a State Reform School for juvenile offenders in Los Angeles County.<sup>73</sup>

#### *Preston School of Industry Established*

The Legislature appropriated \$160,000 for the Preston School to purchase land (of at least 100 acres but no more than 300 acres); to build, furnish, and supply the school; and to cover all of the school’s expenses.<sup>74</sup> Governance of the school was vested in the State Board of Prison Directors, which was authorized in the legislation to use convict labor and supplies from the Folsom and San Quentin Prisons to build the school.<sup>75</sup> But convicts were not allowed to mingle with any of the boys committed to the school.<sup>76</sup> Nor could children committed to the school be clothed in “convict stripes”; while at the school, they were to be clothed in military uniforms and subject to daily military drills.<sup>77</sup> The school was to provide a course of study comparable to that offered in the public schools, with an ultimate goal of qualifying children who had been committed to the school “for honorable and profitable employment after their release from the institution.”<sup>78</sup> Boys could be committed to the school if they were under 18, over 8, and had been found guilty of an offense punishable by a fine, imprisonment, or both, if the court or magistrate thought the child “would be a fit subject for commitment.”<sup>79</sup> The board had the authority to conditionally dismiss a child from the school by binding him over “by articles of indenture” to any “suitable” person who agreed to take on his education and

instruct him in an art or a trade.<sup>80</sup> A boy who was deemed “incorrigible” could be removed from the school, returned to the court that committed him, and possibly sent to state prison.<sup>81</sup>

#### *Whittier State Reform School Established*

The appropriation to establish a reform school was \$200,000, to purchase land (no less than 40 and no more than 160 acres) and to build, equip, and maintain the school and its grounds.<sup>82</sup> Unlike the Preston School, the reform school was to be built to accommodate both boys and girls, though ensuring “the absolute exclusion of all communication of any kind or character between the sexes.”<sup>83</sup> It was to care for children between 10 and 16 who had been convicted of any crime that, if committed by an adult, would have been punishable by imprisonment in the county jail or penitentiary.<sup>84</sup> The court was mandated to commit children to the reform school in lieu of the penitentiary (except in capital cases) but had discretion to choose between the school and county jail.<sup>85</sup> The court also had the option of committing children under 16 directly to the school instead of trying them when that was recommended by the grand jury.<sup>86</sup> In addition, the court had the discretion, with the consent of the accused, to stop a trial at any stage of the proceedings and commit the child to the school.<sup>87</sup> Finally, the reform school also was open to children between 10 and 18 who (1) demonstrated “incorrigible and vicious conduct” that rendered control of the child beyond the power of the parent or caretaker; (2) were vagrants or demonstrated incorrigible or vicious conduct and had a parent incapable or unwilling to exercise control of the child; or (3) had a father who was dead, had abandoned the family, was “an habitual drunkard,” or had failed to support the child and the child’s mother or guardian was unable to provide proper care and support.<sup>88</sup> And, in a foretelling of what was to come in the modern juvenile court, the Legislature granted the right to any child accused of an offense punishable by imprisonment to a private examination and trial “to which only the parties to the case and the parent or guardian of the accused and their attorneys shall be

admitted,” unless the parent, guardian, or legal representative of the child demanded a public trial.<sup>89</sup>

The school was established in Whittier, and in 1893 the Legislature amended the establishment act to officially name it “The Whittier State School.” It changed the ages of children eligible for commitment to between 8 and 18;<sup>90</sup> it also changed the period of commitment from between one and five years to “a period embracing his or her minority, unless sooner discharged by law.”<sup>91</sup> The act allowed for an “honorable dismissal” when a child at the school was deemed to be “so reformed as to justify his discharge.”<sup>92</sup> A child could be conditionally dismissed by being indentured to a “suitable person” or returned to his or her parents or another “reputable person” conditioned on “the proper custody, care, education, and moral and industrial training” of the child.<sup>93</sup> After the opening of the Preston and Whittier schools, the San Francisco Industrial School closed its doors.<sup>94</sup>

#### CASE LAW DEVELOPMENT BEFORE THE CREATION OF THE JUVENILE COURT

During the decades between 1870 and 1900 some of the most interesting court cases emerged as California’s youthful judicial system struggled with the question of how to treat children under the law. In 1876, the Supreme Court ruled in *Ex parte Ah Peen*<sup>95</sup> that a 16-year-old child “leading an idle and dissolute life”<sup>96</sup> in San Francisco, without parental control—his parents unknown—could be committed to the Industrial School without a jury trial because the purpose was not to punish him for any criminal behavior but to reform and train him “with a view to his future usefulness when he shall have been reclaimed to society, or shall have attained his majority.”<sup>97</sup> The court emphasized that because Ah Peen’s parents had abandoned him, “the State, as *parens patriae*, has succeeded to his control, and stands *in loco parentis* to him.”<sup>98</sup> In effect, the State stood in the shoes of his parents and made the kind of decisions that one would expect parents to make for a child who was incapable of properly controlling himself.

By contrast, 20 years later, in 1897, when in *Ex parte Becknell* the Supreme Court reviewed its first

juvenile proceeding where a 13-year-old boy convicted of burglary had been committed to the Whittier State School without a jury trial, it found a violation of the California Constitution’s guarantee of a right to a jury trial.<sup>99</sup> The court unanimously held that the “boy cannot be imprisoned as a criminal without a trial by jury.”<sup>100</sup> It also ruled against giving guardianship of the boy to the Whittier School in the absence of a finding of parental unfitness.<sup>101</sup>

Those two cases set the stage for a showdown on the right to a jury trial for juveniles that would not occur for another quarter century, when the California Supreme Court decided that there was no such right in *In re Daedler*.<sup>102</sup> Though the holding in *Daedler* is authority, debate on the issue continues even today.<sup>103</sup>

#### GROWING NEED FOR JUVENILE COURT

Increased immigration and burgeoning populations in Los Angeles and San Francisco led to a growing problem for police trying to manage recalcitrant children.<sup>104</sup> With inadequate placement facilities and the absence of a funded probation system, judges and attorneys resorted to legal fictions to avoid sending children to prison: district attorneys refused to file charges following the arrest of a youngster, and judges either dismissed cases after they were filed or ordered indefinite continuances to avoid disposition.<sup>105</sup>

The inadequacy and ineffectiveness of the legislative steps taken to address the needs of dependent and delinquent children before the turn of the century are amply demonstrated in this *San Francisco Chronicle* article from September 24, 1897:



## A CHILD CONFINED IN A COUNTY JAIL

### NINE-YEAR-OLD BOY'S FATE

#### THREE DAYS IN PRISON AT LOS ANGELES

##### Sentence of a Mischievous Pasadena Lad—Among Hardened Criminals

LOS ANGELES, September 23.—“I want my mamma. I want to go home. I don't like this place. Please let me go home!” And between pitiful pleadings the little tones quaver, sound out again and then sink into the sobbings and moans of a terrified little child. It was the voice of Harry Haas, a nine-year-old Pasadena boy, detained in the County Jail charged with petit larceny.

There are men in the jail who have cut throats and devised and executed all manner of evil, and have brought sorrow on themselves and those who love them without hesitation, but as those sad words come to their ears and they realize that a little child has been put in the same vile place as themselves they become indignant and are full of pity.

Harry has given the Pasadena police considerable trouble. He used to unhitch horses tied to curbstones and take rides, and he kept one animal belonging to Seventh-Day Adventists three days during their recent encampment. His latest offense was taking a shovel from the Park nursery, of which W. N. Campbell is secretary. The latter caused the child's arrest, and Justice Rossiter ordered him confined for three days. The boy's father offered to send him to his grandparents in Kansas. He does not appear to be a vicious child, only thoughtless and mischievous.<sup>106</sup>

By the end of the 19th century there was widespread disillusionment with reform schools that did not reform and with dysfunctional systems to protect abused and neglected children.<sup>107</sup> This frustration drove a movement to enact child labor and compulsory education legislation in an attempt to bring the welfare of children to the forefront.<sup>108</sup> But most of the legislation enacted to direct the care and control of children in California before 1900 was primitive and without any means of enforcement.<sup>109</sup> For example, probation was offered as an option to juveniles, but there were no probation supervisors;

and though education was compulsory, there were no attendance officers to enforce the law.<sup>110</sup>

## BIRTH OF THE JUVENILE COURT

The effort to create a juvenile court was just one part of a larger movement at the turn of the century to contend with the problems facing children in that era.<sup>111</sup> Compulsory education was seen as at least a partial solution to the problems of children laboring in sweatshops and mines and of keeping children off the streets and out of jails and prisons.<sup>112</sup> Education was also seen as a cure for social problems ranging from poverty and crime to unemployment, abuse, and neglect.<sup>113</sup> Massachusetts passed the first compulsory education law in 1852, followed by a rush of states accepting that approach to welfare reform in a time of great concern about children.<sup>114</sup> California passed its own compulsory education law in 1874.<sup>115</sup> By 1930 most states required that children attend school at least until they were 14, and many set the age at 16.<sup>116</sup> Other measures seen as justified steps toward ensuring that children enjoyed a childhood and recognizing the special needs and interests of children included raising the age when a person could marry and age-based curbs on access to tobacco, alcohol, and related substances.<sup>117</sup>

With compulsory education came a focus on truancy; school attendance was seen as a means of protecting children from the “vices, temptations, and distractions of the street.”<sup>118</sup> Courts and schools joined to “identify, regulate, and sanction school absence.”<sup>119</sup> A need for increased court jurisdiction followed—to struggle with “incorrigibles, run-aways, and recalcitrants ... and the social control of women.”<sup>120</sup> So truancy predated the juvenile court as a mechanism to control children and hold their parents or caretakers accountable.<sup>121</sup>

## THE NATIONAL MOVEMENT FOR A JUVENILE COURT

Judge Ben Lindsey in Colorado established the first de facto juvenile court jurisdiction under a state truancy law passed in 1899, just before the enactment

**BEN LINDSEY: “THE KID’S JUDGE”**

Judge Ben Lindsey is widely known for his work as a founder and champion of the juvenile court in this country but is not generally recognized for the other work he did as a “child policy entrepreneur.”<sup>1</sup> In addition to founding the juvenile court in Denver, Colorado, he established the first juvenile and domestic relations court in the United States and gained passage of a strong child labor law in Colorado.<sup>2</sup> But his high-profile progressive politics got him ousted from the Colorado juvenile court after he was targeted by the powerfully influential Ku Klux Klan, and he subsequently suffered a politically charged disbarment.<sup>3</sup> After relocating to Los Angeles, he temporarily served as an advisor to Cecil B. De Mille on a script dealing with reform schools and took a bit part in a film portraying a juvenile court judge.<sup>4</sup> He had been admit-



ted to the California Bar and was eventually elected to Los Angeles County’s superior court.<sup>5</sup> But despite wanting to serve again on the juvenile court, he was never given the opportunity.<sup>6</sup> This didn’t stop Lindsey—within a few years of his judgeship he drafted and introduced legislation that created the Children’s Court of Conciliation, making it harder for couples to divorce if children were involved.<sup>7</sup> Under the legislation, the Court of

Conciliation had jurisdiction over a divorce case for 30 days, during which the parties, their attorneys, a mediator, and the judge would attempt to save the marriage.<sup>8</sup> The court was successful and led to conciliation courts in other counties<sup>9</sup>—supporting the arguable claim that Ben Lindsey pioneered the first family mediation services in California’s court system.

1. See Michael Grossberg, *Changing Conceptions of Child Welfare in the United States, 1820–1935*, in *A CENTURY OF JUVENILE JUSTICE* 19 (Margaret K. Rosenheim et al. eds., Univ. of Chicago Press 2002).

2. CHARLES LARSEN, *THE GOOD FIGHT* 54, 72 (Quadrangle Press 1972).

3. *Id.* at 204–17.

4. *Id.* at 217.

5. *Id.* at 218, 235.

6. *Id.* at 236.

7. *Id.* at 238–39.

8. *Id.* at 240.

9. *Id.* at 241.

of Illinois’ landmark Juvenile Court Act.<sup>122</sup> After his first year on the bench, Lindsey was frustrated with inadequate appropriations and an ineffectual structure of industrial and reform schools for rehabilitating “incorrigible” children; he saw the options as little more than “junior prisons” and was further frustrated that children often spent months in adult jails before being sentenced to the reform or industrial schools.<sup>123</sup> Looking for a viable solution to the problem, Lindsey stumbled onto the School Law of 1899 and saw a creative opportunity when he read:

Every child between the ages of 8 and 14 years, and every child between 14 and 16 years, who cannot read and write the English language or is not engaged in some regular employment, who is an habitual truant from school, or who is in attendance at any

public, private or parochial school and is incorrigible, vicious, or immoral in conduct, or who habitually wanders about the streets and public places during school hours, having no business or lawful occupation, shall be deemed a juvenile disorderly person, and be subject to the provisions of this act.<sup>124</sup>

Lindsey saw the possibility in that statutory language for the court, under the *parens patriae* mantle, to assert jurisdiction over children not as criminals but as wards of the state in need of correction.<sup>125</sup> He persuaded the district attorney to file all complaints against children under the School Law and started the first informal juvenile court in the nation.<sup>126</sup>

But Illinois is largely credited with passing the first juvenile court law in the country.<sup>127</sup> The Chicago Women’s Club, with the help of other women,

including activists from the settlement-house movement, drove the legislation. After working years on different child welfare projects, it approached the Chicago Bar Association in 1898, concerned that children were being housed in prisons with dangerous adult inmates.<sup>128</sup> The bar association drafted legislation for a juvenile court, carefully presenting it so it would not be identified as a “woman’s measure.”<sup>129</sup> It narrowly passed on April 14, 1899, and went into effect on July 1 of that year.<sup>130</sup> The new law was rough at best—it had no provisions for private hearings or confidential records and included an unfunded probation system and no detention homes for children.<sup>131</sup> But it did contain important provisions: the right to a jury trial for anyone tried under the act,<sup>132</sup> designation of a special judge and a special courtroom in each circuit court to handle juvenile matters, notice requirements, authority to appoint probation officers, and a prohibition against jailing children under 12 with adults.<sup>133</sup> The act was to be liberally construed to carry out its purpose: “That the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents, and in all cases where it can properly be done, the child be placed in an improved family home and become a member of the family by legal adoption or otherwise.”<sup>134</sup> During the years it took to shape the character of the juvenile court that we know today, other states came on board with their own juvenile court legislation.

A significant boost to the juvenile court movement came with President Theodore Roosevelt’s endorsement of the concept in his message to Congress on December 6, 1904: “No Christian and civilized community can afford to show a happy-go-lucky lack of concern for the youth of to-day; for, if so, the community will have to pay a terrible penalty of financial burden and social degradation in the tomorrow.”<sup>135</sup> Congress responded promptly with passage of a juvenile court law for Washington, D.C.<sup>136</sup>

### CALIFORNIA’S JUVENILE COURT

The need for a juvenile court in California was evident. Frustration had grown in the courts and the

community. This piece in the *Los Angeles Times* articulated the problem:

#### BOY CRIMINAL HE PERPLEXES COURT

Another of the boy criminals that the courts don’t know what to do with was taken before Judge Smith yesterday for stealing a bicycle. He is a gawky, dirty-faced little youngster named Frank Fisher, 15 years old. He looks about 10 years. Judge Smith obviously didn’t know what to do with an infant charged with a crime punishable by imprisonment in the penitentiary. He ordered the trial postponed.<sup>137</sup>

California was the seventh state to pass legislation establishing a juvenile court.<sup>138</sup> The movement for a juvenile court converged in the political, economic, and social center of the state, San Francisco.<sup>139</sup> The principal architect of the movement was Doctor Dorothea Moore of the California Club. Dr. Moore had been an active participant in the Chicago juvenile court movement, and the California Club was modeled on the Chicago Women’s Club, which had had such a profound influence on Chicago’s juvenile court.<sup>140</sup> Again, as in Chicago, women and women’s organizations—the California Club of San Francisco, settlement-house workers, the State Federation of Women’s Clubs, the Commonwealth Club, the Boys and Girls Aid Society, and others—spearheaded the legislation, joining forces to persuade legislators to pass the bill.<sup>141</sup> But when it finally passed in February 1903, it had been greatly weakened by a compromise that left the bill’s probation officers unfunded.<sup>142</sup>

#### 1903 JUVENILE COURT LAW

The legislation was modest—it applied to children under 16, both dependent and delinquent, who were not already inmates at any state or private institution or reform school.<sup>143</sup> A “dependent child” was defined as any child

found begging, or receiving or gathering alms..., or being in any street, road, or public place for the purpose of so begging, gathering, or receiving alms;...



found wandering and not having any home or any settled place of abode, or proper guardianship, or visible means of subsistence; . . .

found destitute, or whose home, by reason of neglect, cruelty, or depravity on the part of its parents, guardian, or other person in whose care it may be, is an unfit place for such child; . . .

[who] frequents the company of reputed criminals or prostitutes, or [who] is found living or being in any house of prostitution or assignation . . . ;

[who] habitually visits, without parent or guardian, any saloon [or] place of entertainment where any spirituous liquors, or wine, or intoxicating or malt liquors are sold, exchanged, or given away[;]

[who] is incorrigible[;] or

[who] is a persistent truant from school.<sup>144</sup>

A “delinquent child” was defined as any child who violated any state or local law.<sup>145</sup> The law applied to all counties in the state, each of which was to designate a judge to hear juvenile cases.<sup>146</sup> Juvenile cases were to be heard at special sessions, and only those who came under the act could be present at the special session.<sup>147</sup> Any California citizen could bring a petition before the superior court on behalf of a dependent child in the county, asking that the court assume jurisdiction over the child.<sup>148</sup> The court would then issue a citation requiring the child and his or her caretaker to appear before the court. If the caretaker failed to appear, the court could initiate contempt-of-court proceedings and issue an arrest warrant.<sup>149</sup> If the court found the child to fit the definition of *dependent* under the act, it had the authority to commit the child to the care of a “reputable citizen” or to an appropriate institution for “such time during its minority as the court may deem fit.”<sup>150</sup> The court also had the authority to appoint probation officers, but they would serve without compensation from the state.<sup>151</sup> The probation officer was to conduct any investigation required by the court, to represent the interests of the child when the case was heard, to furnish the court with any information and assistance it required, and to take charge of the child

before and after trial.<sup>152</sup> The probation officer had the discretion to bring the child before the court at any time for any further action deemed appropriate by the court.<sup>153</sup>

When children under 16 were arrested, they were brought before a police judge or justice of the peace, who could continue the hearing, assign a probation officer, and allow the child to remain home subject to visits by the probation officer; or, if the judicial officer deemed it in the best interest of the child, commit the child to an institution, reform school, or suitable family home, or appoint a guardian. If the court ordered the child removed from his or her home, the case was certified and bound over to the superior court for a hearing, just as though the child had been brought in under a dependency petition.<sup>154</sup> The superior court then had a full arsenal of tools available to it, from the “friendly supervision” of a probation officer to commitment of the child to a state reform school or jail, with the exception that no child under 12 could be committed to jail.<sup>155</sup> And when children were sentenced to confinement in an institution with adult inmates, the act made it unlawful to house them in “the same room or yard or enclosure” with the adults or to allow the children to be within the sight or presence of an adult inmate.<sup>156</sup> Finally, records and testimony from juvenile court proceedings were not admissible as evidence against a child in any court proceeding other than those in juvenile court.<sup>157</sup> The law, echoing Illinois’, was to be liberally construed to carry out its purpose: “[t]hat the care, custody, and discipline of a child shall approximate as nearly as may be that which should be given by its parents, and in all cases where it can be properly done, the child be placed in an approved family home, with people of the same religious belief, and become a member of the family by legal adoption or otherwise.”<sup>158</sup>

### *Implementation of the Law*

The counties of Los Angeles, Alameda, and San Francisco pioneered implementation of the legislation.<sup>159</sup> Those counties that did not implement the legislation found themselves in a quandary when it

came to handling juvenile crime. An article published in the *San Diego Union* on July 1, 1903, puts it in perspective:

**THE NEED OF A JUVENILE COURT**  
**A Case in Which the New Law Will Probably**  
**Have to Be Invoked**

The cases of two boys charged with burglary before Judge Anderson yesterday afternoon, brought before the officers of the law the necessity of establishing a juvenile court in this city, as provided by the last legislature. While the boys were caught red-handed, the judge could inflict no punishment and can only send them to the reform school on complaints by their parents.

The reason is that the last legislature passed an act providing that the board of supervisors establish in each county a court for the trial of all youthful offenders. It also prohibits the incarceration [sic] of these youthful offenders in any jail or police station without an order from the juvenile court. These courts have been established in San Francisco and Los Angeles, and the necessity for one here is apparent.

Yesterday Officer Cooley arrested two boys, Tilo Lugo and Arthur Chatrand for entering the store of William Bryant at the foot of D Street during the night, and stealing a quantity of fireworks and fruit. Lugo, the older boy has been up before and is considered incorrigible. He “boosted” the smaller boy through the transom, and together they got away with considerable plunder. On account of the new law, Judge Anderson could do nothing, so he dismissed them with a severe lecture. As the parents of the boys have not made application for committing them to the reform school, nothing can be done in the matter at present.<sup>160</sup>

*An Era of Amendments*

In 1904 the Board of Charities and Corrections recommended that the juvenile court be expanded to all counties in the state.<sup>161</sup> Then amendments in 1905 more fully developed the county probation system and provided salaries for probation officers in some counties.<sup>162</sup>

The law was further expanded in 1909, increasing the bases for asserting jurisdiction over minors,

providing for detention homes, providing salaried probation officers, setting specific procedures for committing children to Preston or Whittier, and specifying the superior court of each county as the site of the juvenile court.<sup>163</sup> New grounds for jurisdiction included

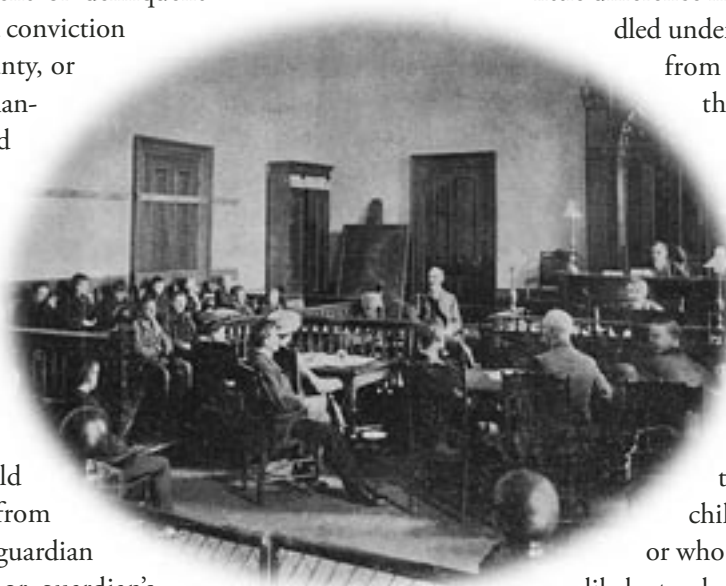
- a child’s persistent refusal to obey “the reasonable and proper order or directions of his parents or guardian”;<sup>164</sup>
- a child whose father was dead or had abandoned the family or was “an habitual drunkard” or had failed to provide for the child, and it appeared that the child was destitute and without a suitable home or the means to obtain a living, or that the child was in danger of “being brought up to lead an idle or immoral life”; or where both parents were dead, or the mother, if living, could not provide for the child;<sup>165</sup>
- a child who habitually used alcohol, smoked cigarettes, or used opium, cocaine, morphine, or any other similar drug without the direction of a physician.<sup>166</sup>

In addition, the expanded law extended the upper age limit of qualifying children from 16 to 18<sup>167</sup> and of children who could be committed to the Preston and Whittier state schools to 21.<sup>168</sup> Salaries were set for all probation officers, ranging from \$5 per month in rural counties with small populations to \$225 per month in densely populated urban counties.<sup>169</sup> The new law heavily relied on the assistance of probation officers to aid the court in making its dispositional decisions.

In no case could a child under age 14 who was charged with a felony be sentenced to the penitentiary unless he or she had first been sent to a state school and proven incorrigible.<sup>170</sup> Nor could a child under 8 or a child who suffered from a contagious disease be committed to a state school.<sup>171</sup> The court was required to be “fully satisfied” that any child’s mental and physical condition was such that the minor would be likely to benefit from the “reformatory educational discipline” of the schools.<sup>172</sup>

Significantly, the 1909 legislation included the right to a private hearing in any dependency or delinquency case upon the request of the child or his or her parents or guardian.<sup>173</sup> The court's order declaring a child a dependent or delinquent could not be deemed a conviction of crime.<sup>174</sup> Every county, or city and county, was mandated to provide and maintain a detention home for dependent and delinquent children—to be conducted as a home, not a penal institution.<sup>175</sup> Further, the legislation included a provision that a child could not be taken from his or her parent or guardian without the parent's or guardian's consent unless the court made a finding that the custodian was incapable, or had failed or neglected to provide properly for the child, or unless the child had been on probation with the parent or guardian and failed to reform, or unless the welfare of the child required removal from the parent's or guardian's custody.<sup>176</sup>

Unlike the Illinois statute, none of California's early juvenile laws provided for a jury trial in delinquency cases. But the 1909 Juvenile Court Law had a specific joint jurisdiction provision stating that a jury demand by a defendant between the ages of 18 and 21 who was accused of a felony would be handled by trying the minor in regular criminal court; then, on conviction, with application by and consent of the minor, the juvenile court could receive evidence as to whether the child should be managed as a delinquent and given probation or committed to a state school.<sup>177</sup> If a minor committed to a state institution under those circumstances proved "incurable," he or she could be returned to superior court for sentencing to the penitentiary.<sup>178</sup>



### *Dependent and Delinquent Children Treated the Same*

Though the juvenile court law addressed both dependent children and delinquent children, there was little difference in the way they were handled under the law. It appears that, from a policy standpoint, the Legislature viewed both categories as posing the same threat or potential threat to the community. As the Supreme Court stated in *Nicholl v. Koster*, "[t]he main purpose of the act [was] to provide for the care and custody of children who ha[d] shown, or who from lack of care [we]re likely to develop, criminal tendencies, in order to have them trained to good habits and correct principles."<sup>179</sup>

Thus the early focus of the juvenile court was not on protecting children from their abusive caretakers as much as it was to save them from becoming criminals.<sup>180</sup>

### *Growing Dissatisfaction With the Law*

But how did the juvenile law play in the counties? By 1910 there was significant dissatisfaction, at least in San Francisco.<sup>181</sup> According to some critics, it was "more difficult, more expensive, more uncertain, and less permanent" to protect dependent children under the new law than it had been under the old guardianship proceedings in probate court.<sup>182</sup> The problem seemed to be that the San Francisco courts frequently invoked the juvenile court law to deal with unfit parents—placing children in temporary commitments while compelling their parents to be moral or to avoid divorce.<sup>183</sup> The cost of temporarily committing the children increased court costs tenfold in an eight-year period.<sup>184</sup> There were also serious disputes over processing procedures for de-

pendent and delinquent children, over whether parents should be held more accountable, and over state and supplementary aid issues.<sup>185</sup>

The statute's validity was challenged in 1912 on the ground that it conflicted with the section of California's Constitution requiring that "[e]very act shall embrace but one subject, which subject shall be expressed in its title."<sup>186</sup> The court upheld the validity of the statute, stating:

Ultimately, of course, the act seeks to prevent ... dependency or delinquency. One method of doing this is to take the child out of the custody of the person who has caused or permitted it to become dependent or delinquent. Another is to punish the person who is responsible for the condition which is sought to be cured. Both methods are directly related to the final purpose of protecting the growing generation from conditions detrimental to its welfare.<sup>187</sup>

As more counties implemented the law, discontent grew and by 1914 had reached a critical level.<sup>188</sup> Amendments in 1911<sup>189</sup> and 1913<sup>190</sup> had done very little to quell opposition to the law by judges, probation officers, and others involved in juvenile court work.<sup>191</sup> The 1911 amendments had expanded the reach of the legislation to everyone younger than 21 years.<sup>192</sup> That expansion invited a challenge in 1912 by a probation officer in Sacramento against the county auditor for failing to pay her for her services.<sup>193</sup> The auditor defended the county's refusal to pay in part on the ground that the legislation was unconstitutional because it embraced females over 18 and under 21 as "minor children," while the Civil Code specified that females of 18 were adults.<sup>194</sup> The court responded that the Legislature had the right to classify people according to age for the purpose of dealing with them as dependent or delinquent within the juvenile law: "The road to ruin is as accessible to a female under the age of twenty-one as it is to a male. To accomplish the beneficent objects of the law the state may properly reach out its saving hand to rescue males and females alike who are on the downward path. No sound reason can be sug-

gested why the state may not do this to save a female under the age of twenty-one if it may do so to rescue and save a male of that age."<sup>195</sup>

The fact that the Legislature had designated a person as a minor or as an adult was immaterial.<sup>196</sup> The court enthusiastically embraced the purpose of the juvenile law: "These juvenile courts, which are in fact but an extension of the jurisdiction of the superior courts, are the creation of modern philanthropic endeavor, and are designed to and in fact do provide a most excellent means of restraining and reforming wayward persons who, unchecked, may become a menace to society."<sup>197</sup>

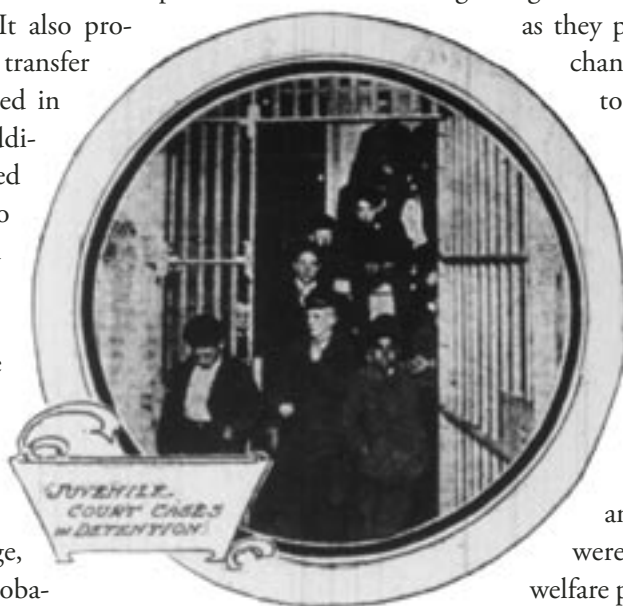
But displeasure with the legislation continued. There appeared to be an underlying conflict in finding a solution to the problems, with community reformist groups on one side and judges and probation officers on the other.<sup>198</sup> Court officers were particularly wary of having their hands tied by specifically prescribed procedures in juvenile cases.<sup>199</sup> One judge summed up the feeling of court personnel: "I sincerely trust no attempt will be made to prescribe the exact processes that the court should follow in these cases. The legislature should lay down the essentials which are to govern. That ground has generally been covered ... beyond that the legislature should not circumscribe the exercise of judicial authority in these cases."<sup>200</sup>

That attitude is understandable given the alcalde-type justice system that had been in place for years. But through the mediation efforts of the Board of Charities and Corrections, all sides finally reached some common ground on desirable juvenile court jurisdiction and procedures, which led in 1915 to the enactment of an overhaul of the Juvenile Court Law. The amended law left many areas "open for differences of interpretation and the growth of divergent practices,"<sup>201</sup> which may explain why opposition was limited.

#### 1915 JUVENILE COURT LAW

The 1915 Juvenile Court Law maintained the bases of jurisdiction included in 1909 and added a category for "insane, or feeble-minded" children who

could not be properly controlled by their parents or guardians and posed a danger to others.<sup>202</sup> By then the Legislature had also established the California School for Girls in Ventura, where all girls housed at the Whittier State School were transferred<sup>203</sup> and where all girls were to be committed under the 1915 law.<sup>204</sup> No boys younger than 16 were to be committed to the Preston School of Industry, and no boys over 16 were to be committed to the Whittier State School.<sup>205</sup> The law set out specific procedures for handling complicated delinquency cases, with provisions for offenders under age 18 and for offenders who fell between the ages of 18 and 21.<sup>206</sup> The court was given jurisdiction over both boys and girls until they were 21 unless the child “reformed” or unless a girl was married with the permission of the court.<sup>207</sup> It also provided for the interdistrict transfer of cases that had been filed in the wrong county.<sup>208</sup> In addition, it provided a detailed procedural mechanism to declare children free from their parents’ custody and control; as in modern juvenile jurisprudence, once the court made an order freeing a child from his or her parents’ custody and control, it had no power to set aside, change, or modify the order.<sup>209</sup> Probation officers and the probation committee in each county assumed greater responsibilities for supervising children, controlling the detention homes, submitting annual reports, and assisting the court.<sup>210</sup> And the 1915 Juvenile Court Law provided, for the first time, for the appointment of referees to “hear the testimony of witnesses and certify to the judge of the juvenile court their findings upon the case submitted to them, together with their recommendation as to the judgment or order to be made in the case in question.”<sup>211</sup> The court could then follow the recommendation of the referee, make its



own order, or set aside the findings and order a new hearing.<sup>212</sup> But the legislation set no qualifications for the referees,<sup>213</sup> though it did specify that female referees should be appointed where possible to hear the cases of female minors.<sup>214</sup> Finally, the legislation included a provision requiring that any girl over age 5 who came under the provisions of the law must be dealt with, as far as possible, in the presence of a woman probation officer or other woman staff person; this also applied to the transportation of female children.<sup>215</sup>

### *Great Procedural Disparity Among Counties*

Except in cases where children were freed from their parents’ custody and control, court officers were given great discretion to handle petitions as they pleased, as well as to modify, change, and set aside orders, and to dismiss petitions.<sup>216</sup> This, in part, led to a great procedural disparity among counties, particularly between the large urban centers and the small rural counties.<sup>217</sup> Juvenile courts developed quickly in the three most heavily populated counties—San Francisco, Los Angeles, and Alameda. These counties were dealing with special child welfare problems generated in part by high populations of immigrant children facing adverse living conditions and societal standards of health, housing, school attendance, and parental supervision that often differed from the standards in their countries of origin.<sup>218</sup> In addition, well-organized advocacy groups in these urban communities promoted a greater focus on the reform of child protection standards.<sup>219</sup> By contrast, the small rural counties were dealing with large numbers of dependent children because of scarce family resources and the high-risk occupations—lumbering, mining, dredging—available to men in those areas, who

often perished on the job.<sup>220</sup> The divergent county practices frustrated the Board of Charities and Corrections, which was attempting to build consistent practices grounded in the law.<sup>221</sup> In one report the board complained: “Every county in California is a law unto itself in social matters and there is a wide diversity in understanding and administering county problems affecting dependents and delinquents.”<sup>222</sup>

### *Appellate Courts Attempt to Help Shape the Law*

Meanwhile, the state’s appellate courts were attempting to address the diversity of administration through case law. In *People v. Wolff*, a defendant convicted of murder and sentenced to death appealed his conviction in part on the ground that he had been only 16 years old when the crime was committed, claiming that the juvenile court erred when it remanded him to the superior court for a criminal trial: “[A] person under eighteen years of age cannot be prosecuted or punished for the crime of murder and ... can be dealt with only as a ward of the juvenile court.”<sup>223</sup> In rejecting the claim, the California Supreme Court clarified that a juvenile court judge had the power under the law to remand a case for criminal proceedings if the judge were to conclude that “such person is not a fit subject for further consideration” under the juvenile court law.<sup>224</sup>

And the California Supreme Court in *In re Daedler* resolved the unsettled question of a minor’s entitlement to a jury trial in juvenile court proceedings.<sup>225</sup> Daedler, who was found by the juvenile court to have committed a murder when he was 14 and who had been committed to the Preston School of Industry, brought a petition for writ of habeas corpus before the court, claiming that the juvenile court law was unconstitutional because it denied him the right to a jury trial on the charges.<sup>226</sup> The court, relying on its holding in *Ex parte Ah Peen*<sup>227</sup> and rejecting its holding in *Ex parte Becknell*,<sup>228</sup> denied Daedler’s application, stating: “The processes of the Juvenile Court Law are, as we have seen, not penal in character, and hence said minor has no inherent right to a trial by jury in the course of the application of their beneficial and merciful provisions to his case.”<sup>229</sup>

But in *In re Edwards* the court reined in the juvenile court, holding that it had no right to withhold the custody of an 8-year-old boy from his parents without a specific finding of abandonment that complied with the statute’s requirement that the child had been “left in the care and custody of another by his parent or parents without any provision for his support ... for the period of one year with intent to abandon said person.”<sup>230</sup> The court held that other findings would have sufficed to justify taking the child from the custody of his parents, but none had been made.<sup>231</sup> The child’s mother in this case had “strenuously endeavored by legal means, and by means which were not at all times strictly legal, to gain control of her child that she might exercise parental control over him.”<sup>232</sup>

### JUDICIAL COUNCIL ESTABLISHED

When the Judicial Council was created by constitutional amendment in 1926, it launched with great expectations.<sup>233</sup> Ballot arguments in favor of the amendment explained:

One of the troubles with our court system is that the work of the various courts is not correlated, and nobody is responsible for seeing that the machinery of the courts is working smoothly. When it is discovered that some rule of procedure is not working well it is nobody’s business to see that the evil is corrected. But with a judicial council, whenever anything goes wrong any judge or lawyer or litigant or other citizen will know to whom to make complaint, and it will be the duty of the council to propose a remedy, and if this cannot be done without an amendment to the laws the council will recommend to the legislature any change in the law which it deems necessary.<sup>234</sup>

There was little opposition to the amendment, which was approved by “a very large majority” along with other measures favorable to the judiciary.<sup>235</sup> Of course, from its inception the Judicial Council had its hands full with the problems of all courts in the state and did not focus specifically on the juvenile court for many years to come. But almost immediately the Judicial Council began collecting statistics

on all of the state's courts, including the juvenile court.<sup>236</sup> And it began looking around the country to see if systems in other jurisdictions could be adopted in California. By 1930, the Judicial Council had examined an "improved procedure" for domestic relations cases in place in Detroit, where, because of additional court-ordered money being collected for dependent wives and children, "the number of delinquents hailed into court [was] less than otherwise would [have been] the case . . ."<sup>237</sup>

### 1937 JUVENILE COURT LAW

In 1937 the juvenile court law was rolled into the newly created Welfare and Institutions Code, which encompassed the state department of social welfare, the state department of institutions, the juvenile court, orphans, child-care agencies, indigents, the disabled, the mentally ill, the elderly, and oversight of private, county, and state institutions.<sup>238</sup> Though the earlier juvenile court law was repealed, many of the new statutory provisions were "substantially the same" as the 1915 law and were to be "construed as restatements and continuations thereof, and not as new enactments."<sup>239</sup> Some new provisions filled gaps in the earlier statute and some broke new ground, including

- Establishment of a California Bureau of Juvenile Research "for the clinical diagnosis of the inmates of the Whittier State School" and other state institutions, to "carry on research into the causes and consequences of delinquency and mental deficiency, and . . . inquire into social, educational, and psychological problems relating thereto."<sup>240</sup>
- Creation of a more fully developed mechanism for declaring a child free from the custody and control of his or her parents, including more specified situations where such a declaration would be appropriate: having parents who were "habitually intemperate" for at least one year prior to the filing of a petition; having parents who had been convicted of a felony and imprisoned where the felony was "of such a nature as to prove the unfitness of the parents to have the future custody and control of

the child"; having parents who were found in a divorce action to have committed adultery when "the future welfare of the child [would] be promoted by an order depriving such parents of the control and custody of the child"; or having parents who had been declared "feeble-minded or insane" when the parents would not be capable of properly supporting or controlling the child.<sup>241</sup>

- Establishment of forestry camps as an alternate facility for wards of the juvenile court who were "amenable to discipline other than in close confinement."<sup>242</sup> Boys committed to the forestry camps could be required to work on the buildings and grounds, on clearing forest roads for fire prevention or firefighting, on forestation or reforestation of public lands, or making fire trails and fire breaks.<sup>243</sup>

### *Juvenile Court Characterized by Informal Procedures*

Juvenile court growth in California remained largely local, varying considerably from community to community, throughout the first half of the 20th century.<sup>244</sup> It was characterized by informal procedures and individual accommodations reminiscent of the justice dispensed by the local alcalde in early California. The informal handling of juvenile offenders was a matter of some pride in many counties, particularly in the rural counties, where the local law enforcement and court personnel often knew the child, his or her parents, and a great deal about the family's background.<sup>245</sup> Edwin Lemert offers the following explanation of the early informality in juvenile procedures:

Such officials not infrequently are part of a web of reciprocal social and economic relationships that may involve parents, relatives, and friends of youths coming to their attention. The fact that "word gets around" and that law agents have to "live with" or face these people daily inclines them to handle youth gingerly or to be sincerely concerned with keeping the youth and his family from embarrassment and avoidable difficulty. Furthermore, in

some areas the detached residence of sheriffs' deputies more or less requires that they be judges as well as policemen. The sheriff himself, as an elective official, is usually more interested in serving people and keeping peace between them than in making arrests. There are also indications that cultural differences dispose police and probation officers in ranch and agricultural counties to greater tolerance for youthful deviance along certain lines than is true for urban areas. Paradoxically, there is also a tendency for people in these communities to be more punitive than their urban counterparts when they do take formal action, or when certain kinds of offenses are committed.<sup>246</sup>

Even though California had experienced a half century of juvenile court law and procedure, the informality of the early, alcalde-dominated California justice system was notably evidenced in the juvenile court as late as 1958 in the following examples:

- A 1957 probation survey of 36 responding judges indicated that, in juvenile matters, two-thirds of them customarily relied on prehearing conferences, which were held *ex parte* and *in camera* with the probation officer only—to the exclusion of parents, arresting officers, defense attorney, and school officials.<sup>247</sup>
- About half of the judges surveyed saw their role in juvenile matters as “talking with and counseling the parents and the child”—the least-mentioned task was ruling on evidence and objections.<sup>248</sup>
- A 1958 study indicated that judges in 46 counties routinely granted continuances in juvenile matters as a dispositional tool; this was more prevalent in the rural counties.<sup>249</sup>
- In 1958, no more than 22 judges statewide held statutorily mandated detention hearings prior to detaining youth. And when such a hearing was held, it was often in the presence of the probation officer alone.<sup>250</sup>

Many judges, particularly in the small counties, embraced the *parens patriae* role and, as one judge explained, acted “like a father who takes immediate

action when his son is in trouble, without undue concern for legalities.”<sup>251</sup> Others, uncomfortable or uninterested in juvenile proceedings, delegated their responsibilities to probation officers unless the case was very serious or high profile.<sup>252</sup> In either case the result was a juvenile court operating informally with an extralegal approach.<sup>253</sup>

### *Little Impact From Judicial Review*

Judicial review had very little impact on the uniform development of the California juvenile court in the first half of the 20th century.<sup>254</sup> There were several reasons for this:

- The juvenile court was so specialized—in its operational procedures, clientele, and conception—that the effect of an appellate opinion on a juvenile court judge operating under different conditions, with different clientele, was nominal at best.<sup>255</sup>
- There was an explicit sanctioning of procedural disparities in some of the appellate opinions themselves.<sup>256</sup> For example, in *Marr v. Superior Court*, the court was dismissive of a claim that the juvenile court did not have jurisdiction over a child because of a defect in an allegation of the petition, stating, “nicety of procedure is not required in juvenile court matters.”<sup>257</sup>
- There were very few juvenile court appeals. Between 1906 and 1960 there were only 115, an average of about 2 appeals per year.<sup>258</sup>
- The appeal process itself was hampered by records so sparse that appellate court officers could not make informed decisions.<sup>259</sup>
- Only a few of the appellate cases were directly relevant to the organization and operation of the courts.<sup>260</sup>

But during the decade between 1950 and 1960 some appellate judges indicated concern about the direction of the California juvenile court. In reversing an order to transfer two juvenile court cases from Los Angeles County to Ventura County, the appel-



late court stated: “While proceedings in the juvenile court are for the welfare of boys and girls, still they deprive individuals of liberty. Therefore, the administration of this law must conform to constitutional guarantees of due process of law. From the record in these two cases it is hard to say who testified, who evaluated the testimony, if any, or who made the findings; or whether or not we have here some sort of assembly-line administration of the juvenile court law.”<sup>261</sup> And in *In re Cardenas Contreras*, the appellate court complained in frustration:

While the juvenile court law provides that adjudication of a minor to be a ward of the court shall not be deemed to be a conviction of crime, nevertheless, for all practical purposes, this is a legal fiction, presenting a challenge to credulity and doing violence to reason. Courts cannot and will not shut their eyes and ears to everyday contemporary happenings. [¶] It is common knowledge that such an adjudication when based upon a charge of committing an act that amounts to a felony, is a blight upon the character of and is a serious impediment to the future of such minor. . . . True, the design of the Juvenile Court Act is intended to be salutary, and every effort should be made to further its legitimate purpose, but never should it be made an instrument for the denial to a minor of a constitutional right or of a guarantee afforded by law to an adult.<sup>262</sup>

This appellate grumbling was a harbinger of reform to come. Because the Legislature had responded piecemeal to problems with the juvenile law from 1915 to 1960, the existing law was an unwieldy checkerboard of inconsistencies, duplications, and archaic practices unresponsive to the needs of a more modern, more populated California.<sup>263</sup> To illustrate, between 1941 and 1959, 53 new provisions were added to the law and 149 amendments were passed, but only 20 provisions were repealed.<sup>264</sup>

#### ESTABLISHMENT OF THE CALIFORNIA YOUTH AUTHORITY

Among the significant new provisions during those years was the establishment of the California Youth Authority (CYA) in 1941.<sup>265</sup> Intended to “protect

society by substituting training and treatment for retributive punishment of young persons found guilty of public offenses,”<sup>266</sup> the legislation directed criminal courts to commit youthful offenders to an administrative authority rather than to prison and gave juvenile courts the discretion to do the same.<sup>267</sup> Though inspired by the American Law Institute’s model Youth Correction Authority Act, California’s legislation diverged from the model in some meaningful ways that affected the state’s juvenile courts.<sup>268</sup> First, commitments under California’s law were not mandatory above a specified age; they were optional under the joint jurisdiction of the juvenile courts and the CYA.<sup>269</sup> Second, probation was kept within the local court system rather than converted to a state-controlled system.<sup>270</sup> Shortly after the CYA was launched, numerous problems with the Whittier State School for Boys surfaced and were made public, including a serious problem with runaways, two suicides, and a significant problem with top management turnover.<sup>271</sup> Public concern led to the transfer of the administration of all three correctional schools (Whittier, Preston, and Ventura) to the CYA in 1942.<sup>272</sup> Thus, while the CYA had been formed with the idea of providing individualized treatment to youthful offenders, it was almost immediately saddled with the administration of three institutional albatrosses that quickly seized the bulk of its time and energy.<sup>273</sup>

The Youth Authority law withstood a constitutional challenge in 1943, when the Supreme Court held in *In re Herrera* that the law was not unconstitutionally discriminatory even though a minor could remain in custody longer than an adult convicted of the same offense and that an offender under 23 years of age could be committed to the Authority.<sup>274</sup> The court reasoned:

The great value in the treatment of youthful offenders lies in its timeliness in striking at the roots of recidivism. Reaching the offender during his formative years, it can be an impressive bulwark against the confirmed criminality that defies rehabilitation, for it is characteristic of youth to be responsive to good influence as it is susceptible to bad. Youth

does not of course end abruptly to be superseded by maturity, and maturity comes more slowly to some than to others. It is a matter of practical necessity, however, and one of legislative discretion, to fix theoretical lines where there are no real ones, and there is no abuse of such discretion when the theoretical lines are not unreasonable.<sup>275</sup>

#### 1949 ATTEMPT TO REVISE THE JUVENILE COURT LAW

An attempt to revise the juvenile court law in 1949 under the auspices of the Special Crime Study Commission on Juvenile Justice failed, possibly because of a particularly tense political year in Sacramento, together with an inexperienced commission.<sup>276</sup> But another likely reason for the failure was the magnitude of the commission's proposal: "to convert the juvenile court into a family court, with district rather than county jurisdiction."<sup>277</sup> Among the recommendations of the commission were

- creation of a family and children's court to "provide uniformly competent and socially informed judicial services throughout the State for all cases where the welfare of families, children and youth is the question at issue";<sup>278</sup>
- a Judicial Council study of the conduct and administration of justice by juvenile courts with recommendations for the improvement of services;<sup>279</sup>
- denial of bail to minors to "clearly establish the right and responsibility of the judge of the juvenile court to protect the welfare of a minor by detaining or releasing him only under conditions conducive to his welfare and to clarify the law by affirming that there is no right to obtain the release of a minor other than by application to the juvenile court and with the court's approval that said release would be in the interests of the minor's welfare";<sup>280</sup>
- Judicial Council consideration, in its study of the administration of justice in the juvenile court, of "whether provision should be made for a youth

court with exclusive jurisdiction over persons between the ages of sixteen and twenty" who are charged with a criminal offense;<sup>281</sup> and

- creation of child-care centers at local schools "to furnish adequate supervision to the children of working mothers."<sup>282</sup>

There was strong resistance to the proposal for the creation of a family and children's court, notably from Governor Earl Warren, who feared the plan would lead to fragmentation of the court system.<sup>283</sup> Phil S. Gibson, the Chief Justice of the California Supreme Court and Chair of the Judicial Council, shared his concern.<sup>284</sup> So while many of the commission's recommendations reached the Legislature, they arrived not as a unified package but as numerous separate bills, which were dealt with in a piecemeal fashion and continued the pattern of "legislation by amendment."<sup>285</sup> One of the resolutions adopted by the Legislature requested that the Judicial Council "undertake a study of the conduct and administration of justice by the juvenile court in this State, and the feasibility and desirability of enlarging the jurisdiction thereof."<sup>286</sup> The resolution did not include a request to study the concept of creating a youth court.<sup>287</sup> The Judicial Council complied by setting up a standing committee to conduct the study and, in 1954, concluded that, while there was an "urgent need for improvement in the processing, treatment, care and training of juveniles... no fundamental change in the Juvenile Court Law or in its application or administration by the courts appears warranted."<sup>288</sup>

Notably, a primary focus on the protection of the community as opposed to the protection of the child was still present in 1949. In its final report, the Special Crime Study Commission noted that "in the attempt to rehabilitate and reeducate we must not forget, in our interest in the particular child, the requirement that the community must be protected. Unreasonable chances should not be taken at the expense of the safety or protection of the citizenry."<sup>289</sup> And it further cautioned: "We assume, perhaps too readily, that everything can be reached through envi-

ronmental conditions. This is not an entirely sound approach. Natural endowment, that which comes with birth, and its potential capacity for good or evil cannot be entirely disregarded.”<sup>290</sup> On the other hand, the commission recognized the need to improve the environmental conditions of children and, in a startling example of prescience, acknowledged the need for “more attention to environmental conditions during early childhood and the period of adolescence.”<sup>291</sup>

#### INCREASING PRESSURE FOR REFORM

By the late 1950s reform for the juvenile court was in the wind—the court simply had failed to evolve with modern conditions and the need for change was critical. A number of issues particularly concerned policymakers and advocates. The fabric of *parens patriae* was fraying. While the alcalde-type judge, who made decisions without concern for due process, was a specter of the past, significant problems remained. Cases were heard too quickly, too many children were being detained, the media was pouncing on cases and publishing names, and employers, including the armed services, were discriminating against children with juvenile court records.<sup>292</sup> Procedural issues—detention policy, juvenile arrest practices, the legal rights of juveniles (especially the right to counsel), and management of the burgeoning number of juvenile traffic offenses—dominated the calls for reform.<sup>293</sup>

The question of legal rights for children was a touchstone issue in the battle for reform. There was a movement afoot to address the “arbitrariness” of juvenile judges by challenging the traditional concept of the juvenile court as “a parental surrogate acting in loc[o] parentis, with the nonpunitive objectives of reformation and the inculcation of ‘habits of industry’ advanced as the paramount justification for its expansive jurisdiction and summary procedures.”<sup>294</sup> Judicial officers largely conceded that juveniles deserved the right to a hearing and notice of the hearing but denied the need for additional rights—to counsel, to warnings against self-incrimination, to bail, to a jury trial, and to other rights guaranteed in

the Constitution—because of the “benevolent purposes” of the court.<sup>295</sup>

Then, in 1956, the California Supreme Court weighed in on the issue in *People v. Dotson*, embracing the *parens patriae* doctrine in holding that, while a defendant in a criminal proceeding was entitled to legal representation at every stage of the proceeding, juvenile court proceedings were not criminal in nature, so the fact that a minor was not represented by counsel was not a denial of due process unless the minor was taken advantage of or treated unfairly, resulting in a deprivation of rights.<sup>296</sup>

One of the first to take up the gauntlet against the juvenile court status quo in California was Robert Fraser, an Orange County attorney who took on representation of a girl held in detention without access to her mother or Fraser because she was considered a material witness against her father in a criminal child molestation case.<sup>297</sup> Fraser was finally successful with a petition for writ of habeas corpus, but not until the child had testified against her father.<sup>298</sup> Fraser found that the Welfare and Institutions Code included few legal rights for children. Out of concern for the lack of legal rights for children he started appealing cases similar to the first, without good results. Finally he persuaded the Orange County Bar Association to introduce a resolution at the 1958 Conference of State Bar Delegates to amend the juvenile court law to give children the same rights afforded a defendant in a criminal case:<sup>299</sup> jury trials, right to counsel, bail, criminal rules of evidence in contested hearings, and proper notice for all proceedings.<sup>300</sup> The resolution passed but languished because the State Bar Association failed to act on it.

#### *1957 Governor’s Special Study Commission on Juvenile Justice*

Meanwhile, attorneys all over the state were expressing frustration. The juvenile court made them feel that, although they were technically “allowed” in court, they had no real right to be present in juvenile court proceedings. Many also disagreed with the informal, backroom procedural approach that governed juvenile cases.<sup>301</sup> So when Governor Goodwin J.

Knight appointed a Special Study Commission on Juvenile Justice in 1957 and charged it with exploring the need for a revision of the juvenile court law, there was some enthusiasm for the commission's work.<sup>302</sup> Governor Edmund (Pat) Brown renewed the commission appointments when he took office in 1958, and the commission issued its final report in November 1960.<sup>303</sup>

The commission found significant problems with the existing juvenile court system: there were no "well-defined, empirically derived standards and norms to guide juvenile court judges, probation, and law enforcement officials in their decision making."<sup>304</sup> Instead, juvenile cases were being decided under a wide variety of systems and policies that seemed "to depend more upon the community in which the offense [was] committed than upon the intrinsic merits of the individual case."<sup>305</sup> Other problems were cited:

- Basic legal rights were not being uniformly or adequately protected.<sup>306</sup>
- The relative independent status of juvenile justice agencies led to inconsistencies in philosophy, coordination, and administration.<sup>307</sup>
- The system of rehabilitative services was ineffective, in part because of a large increase in the number of children in the system.<sup>308</sup>
- Children were being excessively detained, often when unwarranted.<sup>309</sup>
- There were numerous inconsistencies and ambiguities within the juvenile court law.<sup>310</sup>

The commission's report made 31 recommendations that, if implemented, were bound to radically change the juvenile court system. Perhaps most important, it recommended three categories for juvenile court jurisdiction: (1) dependent, neglected, or abandoned children; (2) children whose behavior "clearly implies a tendency towards delinquency," such as truants, runaways, and incorrigibles; and (3) children who violate state, local, or federal criminal laws.<sup>311</sup> Giving "dependent" children a category of their own was truly a major change. Before, the

differentiation was merely "implied" in the law by the requirement that neglected children were to be segregated from delinquent children in detention facilities.<sup>312</sup>

Another revolutionary recommendation was that every juvenile and his or her parents should be advised by the court of their right to counsel and right to the appointment of counsel if indigent.<sup>313</sup> In so recommending, the commission commented, "We find no grounds to support the contention that the presence of counsel will destroy the protective philosophy of the juvenile court or seriously alter the informality of the proceedings."<sup>314</sup>

The report's other recommendations included confidential juvenile court proceedings and filings, recording of all stages of the juvenile court hearing, notice to parents of every new petition or supplemental petition, bifurcated hearings, elimination of "double jeopardy" for minors, minimum procedural rules, imposition of minimum qualifications for referees, requirement of detention hearings within 48 hours of detaining a child, placement of probation services under county administration, establishment of a Judicial Council advisory board of juvenile court judges to develop rules of practice and procedure, and provision for statewide and regional conferences for juvenile court judges and referees.<sup>315</sup>

In making its recommendations, the commission relied on a set of principles consistent with the basic juvenile court philosophy, which had widespread public acceptance. Among them were the following:

- The juvenile court should avoid intervening in the parent-child relationship unless there is a sound basis for such action.
- Children and parents have the right to a fair hearing and to the protection of their legal and constitutional rights.
- Children should be protected from unnecessary separation from their parents.
- The juvenile court law should be uniformly applied throughout the state, with clearly defined procedures.

- No child, whether delinquent or dependent, should be taken into custody or detained without reasonable cause.
- The juvenile court should have reasonable assurance that meaningful rehabilitation services will be provided in the cases of dependent or delinquent children.
- The juvenile court must adequately protect the child and the community.
- The juvenile court should work to increase the status of probation departments and to take advantage of the clinical knowledge and skills of treatment specialists.<sup>316</sup>

Finally, the commission proposed a juvenile court law statute.<sup>317</sup> The commission noted, however, that “there will remain a need to develop further details of practice and procedure. In our opinion, this can best be accomplished by the courts themselves utilizing the rulemaking powers conferred upon the Judicial Council by the Constitution.”<sup>318</sup>

#### PASSAGE OF THE 1961 ARNOLD-KENNICK JUVENILE COURT LAW

After overcoming significant resistance from probation, judges, police, and others, in part by agreeing to compromises attractive to the various stakeholders,<sup>319</sup> the commission’s legislation was introduced as Senate Bill 332 in the 1961 legislative session.<sup>320</sup> Legislators felt ambivalent at best and were generally skeptical about the proposed changes.<sup>321</sup> But the challenge of gaining support for the bill got a boost from an unexpected quarter when Judge Richard Eaton of the Shasta County court testified before the Senate Judiciary Committee that he expected youngsters who appeared before him to admit to the charges against them. If they did not, his practice was to send them to detention until they were ready to provide the requisite admissions.<sup>322</sup> He also opined that the presumption of innocence in juvenile proceedings “produces a result as absurd as any other presumption of law contrary to fact.”<sup>323</sup> Dumbfounded senators quickly moved the bill out of committee.<sup>324</sup> It passed

in the Legislature and was signed by the Governor on July 14, 1961.<sup>325</sup> Codified at Welfare and Institutions Code sections 500–945, the new law, which became known as the Arnold-Kennick Juvenile Court Law, took effect on September 15, 1961.<sup>326</sup>

The landmark legislation was termed “the earthquake of 1961” by one judge.<sup>327</sup> It dramatically changed the structure of the juvenile courts, probation departments, and even police and sheriff’s departments and public defender’s offices.<sup>328</sup> Suddenly the juvenile court was run like a court rather than like a counseling service or an administrative agency.<sup>329</sup> Minors were afforded important new rights in the statute, including

- significant new notice provisions, for both a minor of 14 and older and his or her parents, at every stage of the proceedings;<sup>330</sup>
- the right to be represented at every stage of the proceedings by counsel and, for indigent minors charged with misconduct that would have constituted a felony if committed by an adult, mandatory appointment of counsel;<sup>331</sup> and
- the right to proof of the allegations in the petition by a preponderance of legally admissible evidence at a hearing before being held as a dependent or delinquent under the law.<sup>332</sup>

The expanded purpose of the new law was

to secure for each minor under the jurisdiction of the juvenile court such care and guidance, preferably in his own home, as will serve the spiritual, emotional, mental, and physical welfare of the minor and the best interests of the State; to preserve and strengthen the minor’s family ties whenever possible, removing him from the custody of his parents only when his welfare or safety and protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents.<sup>333</sup>

An order declaring a minor to be a ward of the juvenile court was not to be deemed a conviction of

a crime, nor could a juvenile court proceeding be deemed a criminal proceeding.<sup>334</sup>

So here for the first time we began to see movement toward the “best interest of the child” standard and an easing of the rhetoric of intervention to prevent criminality. Protections had been built into the legislation both for the rights of the children and for their parents, and there was a growing focus on preserving the family relationship wherever possible. A true revolution had begun.<sup>335</sup>

All did not eagerly embrace the law, as this article in the *Merced County Star* demonstrates:

#### **Judges Holding Back on New Juvenile Court Law**

There was every indication that [two judges] along with the county probation department will not fully abide by the law until challenged by the Supreme Court. [One judge] stated, “We have paid attention to the new law except in felony cases. Eventually we will be challenged . . . .”<sup>336</sup>

With time those bound by the law adjusted to its requirements, though to this day many local jurisdictions, while conforming to the broad strokes of the law, have marked local proceedings with their own unique stamp, often commensurate with the personality of the judge, the relationship between social services and the court, or other factors that vary from jurisdiction to jurisdiction.

Six years after California passed the Arnold-Kennick law, the U.S. Supreme Court issued its decision in *In re Gault*, holding, largely in line with California’s new legislation, that at the jurisdictional phase of juvenile court proceedings due process compelled (1) adequate notice; (2) advice to the minor and his or her family of the right to counsel, including appointment of counsel if unable to afford to pay for an attorney; and (3) a privilege against self-incrimination and the right to confront and cross-examine witnesses.<sup>337</sup> The Court also suggested that there be a right to appeal, to an adequate record of the proceedings, and to a finding by the court or a statement of reasons for its decision, in an effort to avoid saddling the reviewers on appeal

with the need to reconstruct the record.<sup>338</sup> It further approved of the handling of juveniles separately from adults, of the confidentiality of records, and of the need to avoid stamping a “delinquent” with the stigma of criminality.<sup>339</sup> The Court specifically criticized the juvenile court’s use of the *parens patriae* doctrine in the *Gault* case to “rationalize the exclusion of juveniles from the constitutional scheme,”<sup>340</sup> opining that “its meaning is murky and its historic credentials are of dubious relevance.”<sup>341</sup> And, in a sharper colloquy, the Court stated:

Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. . . . The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.<sup>342</sup>

But though *Gault* has been credited with signaling the end of the *parens patriae* approach in delinquency proceedings,<sup>343</sup> the truth is not quite so simple. California’s juvenile courts have continued to struggle with the challenge of maintaining a child-friendly informal atmosphere in the courtroom while ensuring that each child or youth entering the system is accorded every right guaranteed by the state and federal Constitutions. Growing public sentiment against youth violence has led to increasing pressure to more stringently punish youthful offenders. Many are being tried as adults and sentenced to adult prisons for the crimes they have committed. But other detention models and dispositional approaches are being explored. Juvenile court judges—both in the dependency and delinquency courts—still grapple with their dual charge of protecting the community while at the same time acting in the best interest of the children and youth who come before them.

The decades from 1960 to the beginning of the 21st century bristled with exciting reforms in the

juvenile court. New discoveries about child abuse dramatically reshaped the dependency system. There is promise of positive change in the delinquency system based on new research on the adolescent brain. State trial court funding and unification in California have had significant impact on the trial courts, including the juvenile court. And the Judicial Council has increasingly taken an active role in partnering with both the trial and appellate courts to improve the administration of justice for cases involving children. But the four decades from *Gault* to the 21st century are a story for another day.

## NOTES

1. *Ex parte* The Queen of the Bay et al., 1 Cal. 157, 157–58 (1850).
2. *Id.* at 158.
3. *Id.*
4. Nathaniel Bennett, *Preface* to 1 REPORTS OF CASES DETERMINED IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, at v, vii (1851).
5. WILLIAM J. PALMER & PAUL P. SELVIN, THE DEVELOPMENT OF LAW IN CALIFORNIA 3–13 (West Publ'g Co. 1983) (1954).
6. *Id.* at 11.
7. *Id.*; see also Bennett, *supra* note 4, at vii.
8. DAVID J. LANGUM, LAW AND COMMUNITY ON THE MEXICAN CALIFORNIA FRONTIER 30, 37–40 (Univ. of Okla. Press 1987).
9. *Id.* at 30.
10. *Id.* at 30–31.
11. EDWIN M. LEMERT, SOCIAL ACTION & LEGAL CHANGE: REVOLUTION WITHIN THE JUVENILE COURT 32 (Aldine Publ'g Co. 1970).
12. See 1850 Cal. Stat. *passim*.
13. Act of Feb. 28, 1850, ch. 22, 1850 Cal. Stat. 76.
14. Act of Apr. 17, 1850, ch. 103, 1850 Cal. Stat. 254 (establishing California's community property system).
15. Act of Apr. 13, 1850, ch. 95, 1850 Cal. Stat. 219 (adopting the common law “so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of the State of California”).
16. Act of Apr. 16, 1850, ch. 99, § 4, 1850 Cal. Stat. 229, 230.
17. *Id.* § 3, 1850 Cal. Stat. at 229.
18. Act of Sept. 9, 1850, ch. 50, 9 Stat. 452 (1850) (admitting California into the Union), *reprinted in* THE CONSTITUTIONS OF CALIFORNIA, THE UNITED STATES, AND RELATED DOCUMENTS, 2001–02 EDITION 93 (Cal. State Senate 2001).
19. Angus Macfarlane, History of California's Juvenile Court, ch. 33, at 7 (n.d.) (unpublished manuscript, on file with the *Journal of the Center for Families, Children & the Courts*).
20. *Id.* The San Francisco Orphan Asylum changed its name to Edgewood in 1944 and has been serving children continuously for 153 years, making it the oldest continuing charity on the West Coast. *Id.* at 8.
21. *Id.* ch. 33, at 7–10, ch. 34, at 1–5.
22. Act of Mar. 31, 1870, ch. 385, 1869–1870 Cal. Stat. 530; see 1 CAL. JUR. *Adoptions* § 2, at 418–19 (1921).
23. 1 CAL. JUR., *supra* note 22, at 419.
24. *Id.*
25. LANGUM, *supra* note 8, at 241. This makes sense because the Mexican judicial system derived from Roman civil law through Spain. *Id.* at 145.
26. *Id.*
27. See Infoplease, *Adoption Trends*, at [www.infoplease.com/ipa/A0881281.html](http://www.infoplease.com/ipa/A0881281.html) (stating that 17 states enacted adoption legislation between 1851 and 1873; by 1929 all states had adoption statutes).
28. LEMERT, *supra* note 11, at 33.
29. *Id.* at 34.
30. Act of Mar. 30, 1878, ch. 520, § 4, 1877–1878 Cal. Stat. 812, 813.
31. Act of Mar. 15, 1883, ch. 91, 1883 Cal. Stat. 377.
32. *Id.*; see also LEMERT, *supra* note 11, at 34.
33. Macfarlane, *supra* note 19, ch. 34, at 3.
34. JOHN E.B. MYERS, A HISTORY OF CHILD PROTECTION IN AMERICA 135 (Xlibris 2004).

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35. *Id.*
  36. *Id.*
  37. Macfarlane, *supra* note 19, ch. 34, at 4.
  38. *Id.* at 3–4.
  39. *Id.* at 4.
  40. *See id.* at 6–7.
  41. Act of Mar. 30, 1878, ch. 520, § 1, 1877–1878 Cal. Stat. 812, 812.
  42. *Id.* § 2.
  43. *Id.* § 3, 1877–1878 Cal. Stat. at 812–13.
  44. *Id.* § 4, 1877–1878 Cal. Stat. at 813.
  45. Act of Mar. 30, 1878, ch. 521, 1877–1878 Cal. Stat. 813.
  46. *Id.* § 3, 1877–1878 Cal. Stat. at 814.
  47. Act of Apr. 25, 1851, ch. 131, 1851 Cal. Stat. 515.
  48. Act of May 10, 1854, ch. 39, 1854 Cal. Stat. 44.
  49. Act of Mar. 16, 1855, ch. 46, 1855 Cal. Stat. 50.
  50. Act of Apr. 10, 1858, ch. 171, 1858 Cal. Stat. 124.
  51. Act of Mar. 17, 1860, ch. 119, 1860 Cal. Stat. 86.
  52. Act of Apr. 15, 1858, ch. 209, 1858 Cal. Stat. 166.
  53. *Id.* § 10, 1858 Cal. Stat. at 169.
  54. Police courts were created under the authority of section 8½ of article XI of the California Constitution and derived jurisdiction from city charters—the jurisdiction varied according to the charter provisions. *See* LARRY L. SIPES, COMMITTED TO JUSTICE: THE RISE OF JUDICIAL ADMINISTRATION IN CALIFORNIA 120 (Admin. Office of the Cal. Courts 2002). Police courts had “exclusive jurisdiction” of all misdemeanors punishable by fine or by imprisonment and all violations of city ordinances in cities where there was a police court. *See* Act of Mar. 5, 1901, ch. 81, 1901 Cal. Stat. 95. Appeals from police court decisions were taken to the superior court. *Id.* § 11, 1901 Cal. Stat. at 97.
  55. Courts of sessions were established in every county and consisted of the county judge acting as presiding judge and two justices of the peace acting as associate justices. The court of sessions had jurisdiction over all public offenses committed in the county except murder, manslaughter, and arson, which were transferred to the district court. *See* Act of Mar. 11, 1851, ch. 1, §§ 62–63, 66–67, 1851 Cal. Stat. 2, 18–19.
  56. Act of Apr. 15, 1858, ch. 209, § 10, 1858 Cal. Stat. at 169.
  57. LEMERT, *supra* note 11, at 33.
  58. *Id.* at 32–33; Act of Apr. 18, 1860, ch. 234, 1860 Cal. Stat. 200.
  59. LEMERT, *supra* note 11, at 32–33.
  60. *Id.*
  61. *Id.*
  62. *Id.* at 33. In 1876, the U.S. Navy transferred the *Jamestown*, a training ship, to the City of San Francisco to supplement the San Francisco Industrial School by providing training in seamanship and navigation for boys of eligible age. But by 1879 the ship was returned to the navy because of mismanagement amid “a hue and cry that the *Jamestown* was a training ship for criminals.” CAL. YOUTH AUTH., ABOUT THE CYA (State of Cal. 2000), at [www.cya.ca.gov/About/history.html](http://www.cya.ca.gov/About/history.html).
  63. *Wayward Sarah*, S.F. CHRON., Sept. 8, 1887, at 4; *see* Macfarlane, *supra* note 19, ch. 36, at 4.
  64. Daniel Macallair, *The San Francisco Industrial School and the Origins of Juvenile Justice in California: A Glance at the Great Reformation*, 7 U.C. DAVIS J. JUV. L. & POL’Y 1, 37–38 (Winter 2003).
  65. *Id.* at 34–35.
  66. *A Boy Stabber*, S.F. CHRON., Jan. 18, 1888, at 3; *see* Macfarlane, *supra* note 19, ch. 36, at 7.
  67. *Youthful Depravity*, S.F. CHRON., Feb. 7, 1888, at 3; *see* Macfarlane, *supra* note 19, ch. 36, at 7.
  68. Macfarlane, *supra* note 19, ch. 36, at 7.
  69. *Id.*
  70. 1 Tenth Census of the United States, 1880, pt. 2, at 563. At that time the actual number of children in California between the ages of 5 and 17 was 216,393. *Id.*
  71. Macfarlane, *supra* note 19, ch. 36, at 7.
  72. Act of Mar. 11, 1889, ch. 103, 1889 Cal. Stat. 100.
  73. Act of Mar. 11, 1889, ch. 108, 1889 Cal. Stat. 111.
  74. Act of Mar. 11, 1889, ch. 103, §§ 2, 4–6, 1889 Cal. Stat. at 100–01.
  75. *Id.* §§ 3, 6, 1889 Cal. Stat. at 101.



76. *Id.* § 8, 1889 Cal. Stat. at 102.
77. *Id.* § 9.
78. *Id.* § 12.
79. *Id.* § 15, 1889 Cal. Stat. at 103.
80. *Id.* § 18, 1889 Cal. Stat. at 104.
81. *Id.* § 19, 1889 Cal. Stat. at 104–05.
82. Act of Mar. 11, 1889, ch. 108, §§ 4–5, 30, 1889 Cal. Stat. 111, 112–13, 120.
83. *Id.* § 14, 1889 Cal. Stat. at 115.
84. *Id.* § 16.
85. *Id.*
86. *Id.* § 17.
87. *Id.* § 18, 1889 Cal. Stat. at 116.
88. *Id.* § 20.
89. Act of Mar. 23, 1893, ch. 222, §§ 15, 1893 Cal. Stat. 328, 332.
90. *Id.* at §§ 1, 9, 1893 Cal. Stat. at 330.
91. *Id.* § 9, 1893 Cal. Stat. at 330.
92. *Id.* § 10.
93. *Id.* § 11, 1893 Cal. Stat. at 331.
94. Macallair, *supra* note 64, at 56.
95. *Ex parte* Ah Peen, 51 Cal. 280 (1876).
96. *Id.*
97. *Id.* at 281.
98. *Id.* (emphasis in original).
99. *Ex parte* Becknell, 51 P. 692, 693 (Cal. 1897).
100. *Id.*
101. *Id.*
102. *In re* Daedler, 228 P. 467 (Cal. 1924).
103. See *In re* Javier A., 206 Cal. Rptr. 386, 395–430 (Cal. Ct. App. 1984) for a lengthy discussion on the debate about the right to a jury trial for juveniles. The case traces the history of the issue from early English common law through modern California juvenile court law.
104. LEMERT, *supra* note 11, at 36.
105. *Id.*
106. *A Child Confined in a County Jail: Nine-Year-Old Boy's Fate*, S.F. CHRON., Sept. 24, 1897, at 4; see Macfarlane, *supra* note 19, ch. 37, at 4.
107. LEMERT, *supra* note 11, at 34–35.
108. *Id.* at 35.
109. *Id.*
110. *Id.*
111. Bernardine Dohrn, *The School, the Child, and the Court*, in A CENTURY OF JUVENILE JUSTICE 267, 267–68 (Margaret K. Rosenheim et al. eds., Univ. of Chicago Press 2002).
112. *Id.*
113. Michael Grossberg, *Changing Conceptions of Child Welfare in the United States, 1820–1935*, in A CENTURY OF JUVENILE JUSTICE, *supra* note 111, at 3, 29.
114. *Id.* at 29.
115. Act of Mar. 28, 1874, ch. 516, 1873–1874 Cal. Stat. 751.
116. Grossberg, *supra* note 113, at 29.
117. *Id.*
118. Dohrn, *supra* note 111, at 270–71.
119. *Id.* at 272.
120. *Id.*
121. *Id.* at 272–73.
122. *Id.* at 272; CHARLES LARSEN, *THE GOOD FIGHT* 28–29 (Quadrangle Press 1972).
123. LARSEN, *supra* note 122, at 28.
124. *Id.* at 28–29.
125. *Id.* at 29.
126. *Id.*
127. David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in A CENTURY OF JUVENILE JUSTICE, *supra* note 111, at 42.
128. Macfarlane, *supra* note 19, ch. 37, at 3, 8.
129. *Id.* ch. 37, at 8.
130. Tanenhaus, *supra* note 127, at 42.
131. *Id.* at 42–43 (citations omitted).

- NOTES 132. The Illinois Juvenile Court offered a jury trial to youthful offenders for more than 60 years. The right to a jury trial was eliminated in Illinois with the passage of its Juvenile Court Act of 1966. *See People ex rel. Carey v. White*, 357 N.E.2d 512, 514 (Ill. 1976).
133. Act of Apr. 21, 1899, 1899 Ill. Laws 131, *reprinted in* 2 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY, 1866–1932, at 506 (Robert H. Bremner ed., Harvard Univ. Press 1971) [hereinafter 2 CHILDREN AND YOUTH IN AMERICA].
134. Act of Apr. 21, 1889, § 21, 1899 Ill. Laws at 137.
135. 2 CHILDREN AND YOUTH IN AMERICA, *supra* note 133, at 357 (quoting *Proceedings of the Conference on the Care of Dependent Children Held at Washington, D.C., January 25, 26, 1909*, S. Doc. No. 60-721, at 17–18 (1909)).
136. *Id.*
137. *Boy Criminal: He Perplexes Court*, L.A. TIMES, May 13, 1903, § 2, at 2; *see Macfarlane, supra* note 19, ch. 38, at 9.
138. I.J. SHAIN & WALTER R. BURKHART, GOVERNOR'S SPECIAL STUDY COMM'N ON JUVENILE JUSTICE, A STUDY OF JUVENILE JUSTICE IN CALIFORNIA 4 (State of Cal. 1960).
139. Macfarlane, *supra* note 19, ch. 41, at 1.
140. *Id.*
141. LEMERT, *supra* note 11, at 37–38.
142. *Id.* at 38. In a 1904 newspaper article on San Francisco's only probation officer, a reporter complained about the unfunded status of probation officers:
- So it goes, day after day and month after month. All the great credit that is due Miss Stebbins for her humanitarian work should be given her. She is the only probation officer in San Francisco; she is not paid by the municipality. The expenses of her department are paid by several philanthropists. Los Angeles, with but little more than one-third of the population of San Francisco, had three probation officers regularly in the employ of the municipality. However, Miss Stebbins does not despair. She goes about her work with unfailing enthusiasm and interest, with a friendly hand here and a kind word there, bringing the breath of hope and ambition and help to many a dark life, waiting for a time to come when the community shall at last appreciate the work that is being done for the regeneration of the criminal elements, and shall afford her the assistants she has earned and needs to carry on her work. (*The Girl Probation Officer of the Juvenile Court*, S.F. CHRON., May 1, 1904 (Magazine), at 4.)
- That same article noted that 1,000 cases came through the San Francisco juvenile court in its first eight months of operation and that 36 of those cases involved girls. *Id.*
143. Act of Feb. 26, 1903, ch. 43, § 1, 1903 Cal. Stat. 44, 44.
144. *Id.*
145. *Id.*
146. *Id.* § 2, 1903 Cal. Stat. at 44–45.
147. *Id.*
148. *Id.* § 3, 1903 Cal. Stat. at 45.
149. *Id.* § 4.
150. *Id.* § 5, 1903 Cal. Stat. at 46.
151. *Id.* § 6.
152. *Id.*
153. *Id.*
154. *Id.* § 7, 1903 Cal. Stat. at 46–47.
155. *Id.* §§ 8–9, 1903 Cal. Stat. at 47.
156. *Id.* § 9, 1903 Cal. Stat. at 47–48.
157. *Id.* § 12, 1903 Cal. Stat. at 48.
158. *Id.* § 13.
159. LEMERT, *supra* note 11, at 38.
160. *The Need of a Juvenile Court*, SAN DIEGO UNION, July 1, 1903, at 6; *see Macfarlane, supra* note 19, ch. 38, at 10.
161. LEMERT, *supra* note 11, at 38.
162. Act of Mar. 22, 1905, ch. 610, §§ 11–15, 1905 Cal. Stat. 806, 810–12.
163. Juvenile Court Law, ch. 133, 1909 Cal. Stat. 213.
164. *Id.* § 1(11).
165. *Id.* § 1(13), 1909 Cal. Stat. at 214.
166. *Id.* § 1(15).
167. *Id.* § 1, 1909 Cal. Stat. at 213.
168. *Id.* § 5, 1909 Cal. Stat. at 216.
169. *Id.* §§ 10–10z, 1909 Cal. Stat. at 217–18.
170. *Id.* § 20, 1909 Cal. Stat. at 223–24.
171. *Id.*, 1909 Cal. Stat. at 224.
172. *Id.*

173. *Id.* § 23.
174. *Id.*
175. *Id.* § 25, 1909 Cal. Stat. at 225.
176. *Id.* § 27, 1909 Cal. Stat. at 226.
177. *Id.* § 18, 1909 Cal. Stat. at 221–22.
178. *Id.*, 1909 Cal. Stat. at 222.
179. Nicholl v. Koster, 108 P. 302, 303 (Cal. 1910).
180. See Marvin Ventrell, *Evolution of the Dependency Component of the Juvenile Court*, 49 JUV. & FAM. CT. J. 17 (Fall 1998).
181. LEMERT, *supra* note 11, at 39.
182. *Id.* (quoting 5 TRANSACTIONS OF THE COMMONWEALTH CLUB OF CALIFORNIA 214 (1910)).
183. *Id.*
184. *Id.*
185. *Id.*
186. *In re* Mabel Maginnis, 121 P. 723, 724 (Cal. 1912).
187. *Id.* at 726.
188. LEMERT, *supra* note 11, at 40.
189. Act of Apr. 5, 1911, ch. 369, 1911 Cal. Stat. 658.
190. Act of June 16, 1913, ch. 673, 1913 Cal. Stat. 1285.
191. LEMERT, *supra* note 11, at 40.
192. Act of Apr. 5, 1911, § 1, 1911 Cal. Stat. at 658.
193. Moore v. Williams, 127 P. 509, 510 (Cal. Ct. App. 1912).
194. *Id.*
195. *Id.* at 513.
196. *Id.*
197. *Id.* at 510.
198. LEMERT, *supra* note 11, at 40.
199. *Id.*
200. *Id.* at 41 (quoting 5 TRANSACTIONS OF THE COMMONWEALTH CLUB OF CALIFORNIA 248 (1910)).
201. *Id.*
202. Juvenile Court Law, § 1(12), 1915 Cal. Stat. 1225, 1226.
203. Act of June 14, 1913, ch. 401, 1913 Cal. Stat. 857. NOTES
204. Juvenile Court Law, § 8(e), 1915 Cal. Stat. at 1232.
205. *Id.*
206. *Id.* §§ 6, 7, 1915 Cal. Stat. at 1229–30.
207. *Id.* § 12, 1915 Cal. Stat. at 1235.
208. *Id.* § 13.
209. *Id.* §§ 1(14), 15–15g, 1915 Cal. Stat. at 1226, 1236–38.
210. *Id.* § 17b, 1915 Cal. Stat. at 1239–40.
211. *Id.* § 19, 1915 Cal. Stat. at 1242.
212. *Id.*
213. It was not until 1971 that candidates for referee positions were required to have been lawyers for at least five years before their appointment. Act of Aug. 19, 1971, ch. 640, § 1, 1971 Cal. Stat. 1258, 1259–60 (amending CAL. WELF. & INST. CODE § 553 (1972)).
214. Juvenile Court Law, § 19, 1915 Cal. Stat. at 1242.
215. *Id.* § 24, 1915 Cal. Stat. at 1248.
216. *Id.* §§ 8–9, 1915 Cal. Stat. at 1231–32.
217. See LEMERT, *supra* note 11, at 42–46.
218. *Id.* at 43.
219. *Id.*
220. *Id.* at 42 (citations omitted).
221. *Id.* at 46.
222. *Id.* (quoting CAL. BD. OF CHARITIES & CORR., NINTH BIENNIAL REPORT 119 (1920)).
223. People v. Wolff, 190 P. 22, 23 (Cal. 1920).
224. *Id.* at 24.
225. *In re* Daedler, 228 P. 467 (Cal. 1924).
226. *Id.* at 468.
227. *Ex parte* Ah Peen, 51 Cal. 280 (1876).
228. *Ex parte* Becknell, 51 P. 692 (Cal. 1897).
229. *Daedler*, 228 P. at 472.
230. *In re* Edwards, 284 P. 916, 920 (Cal. 1930) (citation omitted).
231. *Id.* at 919.
232. *Id.*

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233. SIPES, *supra* note 54, at 28.
234. *Id.*
235. *Id.*; JUDICIAL COUNCIL OF CAL., FIRST REPORT TO THE GOVERNOR AND THE LEGISLATURE 49 (1927), *in* JUDICIAL COUNCIL BIENNIAL REPORTS, 1ST–9TH (1927–1943).
236. JUDICIAL COUNCIL OF CAL., THIRD REPORT TO THE GOVERNOR AND THE LEGISLATURE 25, app. H (1931), *in* JUDICIAL COUNCIL BIENNIAL REPORTS, *supra* note 235.
237. *Id.* at 57.
238. Act of May 25, 1937, ch. 369, 1937 Cal. Stat. 1005.
239. *Id.* § 2.
240. *Id.* §§ 500–509, 1937 Cal. Stat. at 1019–20.
241. *Id.* § 700(c)–(f), 1937 Cal. Stat. at 1031–32.
242. *Id.* §§ 900–911, 1937 Cal. Stat. at 1054–56.
243. *Id.* § 903, 1937 Cal. Stat. at 1054–55.
244. LEMERT, *supra* note 11, at 59.
245. *Id.* at 60 (citations omitted).
246. *Id.* at 61. For example, drinking, fighting, or sexual experimentation may be overlooked, while damaging ranch equipment or stealing cattle could elicit a strong, punitive reaction. *Id.* at 61 n.2 (citation omitted).
247. *Id.* at 73.
248. *Id.*
249. *Id.* at 74.
250. *Id.* at 74–75.
251. *Id.* at 75 (citation omitted).
252. *Id.*
253. *Id.*
254. *Id.* at 78.
255. *Id.*
256. *Id.*
257. *Marr v. Superior Court*, 250 P.2d 739, 742 (Cal. Ct. App. 1952) (citation omitted).
258. LEMERT, *supra* note 11, at 78.
259. *Id.* at 79.
260. *Id.*
261. *In re Alexander*, 313 P.2d 182, 184 (Cal. Ct. App. 1957).
262. *In re Cardenas Contreras*, 241 P.2d 631, 633 (Cal. Ct. App. 1952).
263. LEMERT, *supra* note 11, at 82.
264. *Id.* at 83 n.37.
265. *Id.* at 49; *see* Youth Correction Authority Act, ch. 937, 1941 Cal. Stat. 2522.
266. *Id.* at 49–50 (citing CAL. YOUTH AUTH., REPORT ON CALIFORNIA LAWS RELATING TO YOUTHFUL OFFENDERS 75 (State of Cal. 1965)).
267. *Id.* at 50; *see* Youth Correction Authority Act, §§ 1731.5–1736, 1941 Cal. Stat. at 2526.
268. LEMERT, *supra* note 11, at 50–51.
269. *Id.* at 51.
270. *Id.*
271. *Id.* at 52.
272. *Id.*
273. *Id.* at 52–53.
274. *In re Herrera*, 143 P.2d 345 (Cal. 1943).
275. *Id.* at 348 (citations omitted).
276. LEMERT, *supra* note 11, at 84–85.
277. *Id.* at 85.
278. SPECIAL CRIME STUDY COMM’N ON JUVENILE JUSTICE, FINAL REPORT 13 (State of Cal. 1949) [hereinafter FINAL REPORT].
279. *Id.* at 15.
280. *Id.* at 20.
281. *Id.* at 24. In justifying this recommendation the commission suggested that a “youth court would recognize the wholesome drive of the adolescent to take on the full responsibility of an individual with personal rights and responsibilities without throwing him into the too frequently sordid surroundings and practices of the ordinary criminal courts and without denying to him the training and corrective measures provided for persons under the jurisdiction of the juvenile court.” *Id.*
282. *Id.* at 49.
283. LEMERT, *supra* note 11, at 85.
284. *Id.*

285. LEMERT, *supra* note 11, at 86.
286. JUDICIAL COUNCIL OF CAL., FIFTEENTH BIENNIAL REPORT TO THE GOVERNOR AND THE LEGISLATURE 26 (Dec. 31, 1954) (citing 1949 Cal. Stat. 3289).
287. *Id.*
288. *Id.*
289. FINAL REPORT, *supra* note 278, at 7.
290. *Id.*
291. *Id.* at 7–8.
292. LEMERT, *supra* note 11, at 88.
293. *See generally id.* at 89–106.
294. *Id.* at 98.
295. *Id.*
296. *People v. Dotson*, 299 P.2d 875, 877 (Cal. 1956).
297. LEMERT, *supra* note 11, at 99.
298. *Id.*
299. *Id.* at 99–100.
300. *Id.* at 100.
301. *Id.* at 101.
302. *Id.* at 107–08.
303. *Id.* at 108.
304. GOVERNOR'S SPECIAL STUDY COMM'N ON JUVENILE JUSTICE, REPORT, PART I: RECOMMENDATIONS FOR CHANGES IN CALIFORNIA'S JUVENILE COURT LAW 12 (Nov. 1960).
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.* at 18.
312. *Id.* at 19.
313. *Id.* at 26.
314. *Id.* at 27.
315. *Id.* at 23–49.
316. *Id.* at 10–11.
317. *Id.* at 51.
318. *Id.* at 49.
319. LEMERT, *supra* note 11, at 126–42.
320. *Id.* at 151.
321. *Id.* at 153.
322. *Id.* at 153–54.
323. *Id.* at 154 (citation omitted).
324. *Id.* at 154–55.
325. *See* Act of July 14, 1961, ch. 1616, 1961 Cal. Stat. 3459.
326. *Id.*; *see* THE EVOLUTION AND ROLE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION COMMISSIONS 1 (Juvenile Justice & Delinquency Prevention Comm'rs Resource Manual 1991), *available at* [www.bdcorr.ca.gov/fsod/jjdp\\_handbooks/jjdp\\_handbook\\_2000/html\\_files/jjdp\\_handbook\\_evolution\\_role.htm](http://www.bdcorr.ca.gov/fsod/jjdp_handbooks/jjdp_handbook_2000/html_files/jjdp_handbook_evolution_role.htm).
327. LEMERT, *supra* note 11, at 160.
328. *Id.* at 165.
329. *Id.* at 166.
330. Act of July 14, 1961, §§ 554, 627, 630, 633, 637, 658–660, 1961 Cal. Stat. at 3466, 3474–76, 3479. Counsel, on the other hand, did not have the right to be advised of events in the proceedings, but that right was added in 1967 following the *Gault* decision. *See* Act of July 5, 1967, ch. 507, § 1, 1967 Cal. Stat. 1852.
331. Act of July 14, 1961, §§ 633–634, 1961 Cal. Stat. at 3475. The statute did not mention the need for a knowing waiver of the right to counsel, nor did it provide for mandatory appointment of counsel if the minor was charged with misconduct that would have been a misdemeanor if committed by an adult; but the *Gault* case addressed both and led to amendments in 1967 making appointment of counsel mandatory in all delinquency cases “whether he is unable to afford counsel or not unless there is an intelligent waiver of the right to counsel.” Act of Aug. 23, 1967, ch. 1355, §§ 4, 10, 1967 Cal. Stat. 3192, 3193, 3195.
332. Act of July 14, 1961, §§ 700–702, 1961 Cal. Stat. at 3481–82. Questions as to whether constitutionally prohibited, illegally obtained evidence could be used to sustain a finding of delinquency under the statute led to amendments in 1967 requiring that minors be given *Miranda*-type warnings and notice of their right to have counsel and

- NOTES ensuring their privilege against self-incrimination and right to confrontation and cross-examination of witnesses. Act of Aug. 23, 1967, ch. 1355, §§ 1–3, 1967 Cal. Stat. at 3192–93.
333. Act of July 14, 1961, § 502, 1961 Cal. Stat. at 3460.
334. *Id.* § 503.
335. The sixties proved to be a time of great change and turmoil, both on the streets and in the courts and Legislature. While the Legislature was making significant progress in promulgating statutory due process rights for both criminal defendants and juveniles, the Judicial Council was focused on improving the administration of justice in California's courts. When, in 1961, the Judicial Council appointed its first Administrative Director of the Courts, a position created by constitutional amendment, the council quickly moved to establish the Administrative Office of the Courts (AOC), which gave it new power to delegate the responsibility of carrying out the details of policy. SIPES, *supra* note 54, at 76–77. The council finally had the means to effectuate its vision of “simplifying and improving the administration of justice . . .” *Id.*
336. LEMERT, *supra* note 11, at 164 (quoting *Judges Holding Back on New Juvenile Court Law*, MERCED COUNTY STAR, Nov. 11, 1961, page unknown).
337. *In re Gault*, 387 U.S. 1, 13, 33, 41, 55–57 (1967). In its decision, the Court cited both New York's and California's legislation requiring appointment of counsel in juvenile cases. *Id.* at 41.
338. *Id.* at 58.
339. *Id.* at 22–25.
340. *Id.* at 16.
341. *Id.*
342. *Id.* at 18.
343. *See* Ventrell, *supra* note 180, at 28.

## CREDITS

- Page 5: Oct. 20, 1891, Indenture Agreement Between the Boys and Girls Aid Society and Mrs. J. W. Daniels Regarding Elozu Jenkins, to Expire Jan. 9, 1895. BANC MSS C-A 170. Courtesy of The Bancroft Library, University of California, Berkeley.
- Page 9: *A Child Confined in a County Jail*, reproduced by permission of Hearst Communications, Inc., from S.F. CHRON., Sept. 24, 1897, at 4.
- Page 11: Photograph courtesy of Redpath Chautauqua Collection, Special Collections Department, University of Iowa Libraries, Iowa City, Iowa.
- Page 15: Scene in Judge Murasky's Juvenile Courtroom, ca. 1904. BANC MSS C-A 170. Courtesy of The Bancroft Library, University of California, Berkeley.
- Page 17: Photograph reproduced by permission of Hearst Communications, Inc., from *The Girl Probation Officer of the Juvenile Court*, S.F. CHRON., May 1, 1904 (Magazine), at 4.

# Rethinking a “Knowing, Intelligent, and Voluntary Waiver” in Massachusetts’ Juvenile Courts

**I**t was a typical morning in delinquency court. The halls were crowded with boys, girls, and the adults who accompanied them. Harried attorneys searching for their clients pushed through the crowd. Attorney Jones rushed over to her 13-year-old client and announced, “I have a great deal for you. The district attorney is willing to give you a CWOFF for 12 months with the following conditions: attend school daily without incident, do 40 hours of community service, and pay any restitution owed. Of course, it’s up to you if you want to take the deal. But, as you know, we don’t have a good case for trial. Do you want to take the deal?” The boy looked at his mother, who mumbled, “I don’t want to come back here again and waste another whole day.” The boy nodded yes, and the attorney continued: “I have to explain this form to you—it’s a plea form. In order to take the deal, you have to waive your rights. You’re giving up your right to a trial, understand?” The boy nodded yes. “The judge will ask questions to make sure you understand what you’re doing—that you’re waiving your rights. He’ll ask you if you have had any drugs or alcohol that interfere with your ability to understand what you’re doing today. He’ll also ask you if anyone coerced or threatened you to waive your rights. Just answer the questions, ‘Yes, Your Honor. No, Your Honor.’ Okay, you have to sign this form, which states that you understand the rights you are waiving. Your mother also has to sign. Oh, they’re calling your name; we have to go into court. Just sign quickly—and, remember, you’re agreeing to waive your rights.”

As they walked into court, the boy sheepishly waved to the judge. Attorney Jones hissed, “What are you doing?” The boy replied, “I’m waving my right.”

This example highlights what judges, defense attorneys, and prosecutors already know: that children in juvenile courts are waiving their rights, accepting dispositions, and participating in colloquies they do not understand. Justice requires that children, and the parents or interested adults who theoretically guide them, make reasoned and informed decisions. With courts and legislators increasingly emphasizing accountability and punishment in the juvenile justice system, the stakes for children have never been higher. Ensuring that children understand the implications of the rights they are waiving and the dispositions they are accepting is essential to safeguarding the fundamental fairness of the juvenile court proceeding.

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Justice requires that children make reasoned and informed decisions when waiving their constitutional rights during the tendering of a plea. Yet each day in juvenile courts throughout this country children are waiving their rights, accepting dispositions, and participating in colloquies they do not understand.

This article examines children’s understanding of legal terminology commonly used in Massachusetts’ juvenile court proceedings, particularly during the tendering of a plea.

The authors conducted an empirical study of court-involved children’s understanding of legal terminology. The results of this study indicate that colloquies and waiver forms routinely used in Massachusetts’ juvenile court proceedings are replete with words and phrases that court-involved

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children do not understand. On average, participants in the study did not understand 86 percent of the legal terminology routinely used in plea proceedings in Massachusetts' juvenile courts. Although prior instruction and court experience improved performance, the average rate of correct responses only increased from 2 to 5 out of 36 possible words and phrases. This dismal performance raises serious concerns about the validity of children's juvenile court waivers.

Based on the results of the study, the authors offer suggestions for attorneys and judges who practice in the juvenile justice system. The article concludes with a sample "child-friendly" colloquy intended to enhance children's understanding of plea proceedings and give judges the information they need to certify, with confidence, that a child's plea is knowingly, intelligently, and voluntarily made.

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This article examines children's understanding of legal terminology commonly used in Massachusetts' juvenile court proceedings, particularly the terminology used during the tendering of a plea. The first section of the article describes the origin and evolution of juvenile court proceedings and examines the due process requirements for a defendant in Massachusetts, whether adult or child, to waive his or her constitutional rights when tendering a plea. The second section presents the results of a pilot study designed to assess whether children understand the words and phrases commonly used in Massachusetts' juvenile court proceedings and whether experience and instruction improve comprehension. The final section discusses the implications of the research results and suggests modifications for juvenile court procedures and practices.

### PLEA PROCEEDINGS IN THE JUVENILE COURT

In 1899, Illinois' Act to Regulate the Treatment and Control of Dependent, Neglected and Delinquent Children established the first juvenile court in the United States.<sup>1</sup> The court was conceived as a nonadversarial forum in which concerned adults would craft dispositions in the best interest of the child. By the end of World War II, all 48 states had juvenile courts based on the "best-interest" model.<sup>2</sup> This beneficent concept of juvenile court proceedings was premised on the belief that children were less mature, capable, and culpable than adults; it envisioned "a fatherly judge [who] touched the heart and conscience of the erring youth by talking over his problems [and] by [providing] paternal advice and admonition . . ."<sup>3</sup> The emphasis was on treatment and rehabilitation rather than punishment; the court theoretically balanced the best interest of the child with that of the state, typically to the detriment of the child's due process rights.<sup>4</sup>

In 1967, the United States Supreme Court noted that this "gentle conception" lacked validity when it addressed the appeal of 15-year-old Gerald Gault's sentence of six years' incarceration on a misdemeanor charge, for which an adult would merely have suffered a fine.<sup>5</sup> The Court recognized that, under the guise of a benevolent juvenile court, children were suffering a deprivation of liberty without due process of law.<sup>6</sup> Relying on the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution, the Court affirmed children's right to counsel, their right to confront and cross-examine their accusers, and their privilege against self-incrimination.<sup>7</sup> In 1969, the Court established that allegations of delinquency had to be proved beyond a reasonable doubt.<sup>8</sup> Although the Court stopped short of granting juveniles the right to a jury trial in delinquency proceedings,<sup>9</sup> it held that due process and fundamental fairness required the extension of rights and protections enjoyed by adult defendants to juveniles facing delinquency proceedings.<sup>10</sup> When contrasting the *parens patriae*<sup>11</sup> philosophy with due process, the Court observed that "the actuality of fairness, impartiality and orderliness—in



short the essentials of due process—may be a more impressive and more therapeutic attitude as far as the juvenile is concerned.”<sup>12</sup>

#### MASSACHUSETTS’ JUVENILE COURTS

In Massachusetts, children are afforded the full panoply of due process rights and protections enjoyed by adults. Children have the right to a jury trial, and the Massachusetts Rules of Criminal Procedure apply to juvenile court proceedings.<sup>13</sup> A “child” subject to prosecution in the Massachusetts juvenile courts is defined as an individual between the ages of 7 and 17.<sup>14</sup> In 2003, over 32,000 delinquency complaints were filed against more than 13,000 Massachusetts children.<sup>15</sup> However, 99 percent of their cases were resolved prior to trial by the child’s tendering of a plea.<sup>16</sup>

A child’s offer of an admission or guilty plea is a significant step in the Massachusetts juvenile justice process. It represents a decision by the child to forgo a trial and to acknowledge that the violations of law charged against him or her are true. Judges and attorneys recognize that children are often confused and anxious when they come to court. They also recognize that a large number of court-involved children suffer from academic failure, learning disabilities, and mental illness. Yet judges and attorneys routinely certify that children have ostensibly made an informed decision to waive their constitutional rights because they have signed a plea form and provided seemingly appropriate responses during the plea colloquy.

Due process requires that the child defendant make a “knowing, intelligent, and voluntary” waiver of his or her constitutional rights with knowledge of the charge and the possible consequences of the plea.<sup>17</sup> The judge must affirm for the record, by means of an adequate colloquy, that the child participated in and understood the nature and ramifications of the decisions he or she made.<sup>18</sup> The colloquy—a conversational exchange between the judge and the defendant—should not be, but often is, a mechanical performance in which the judge and the child merely recite formulaic words. In a procedurally sound colloquy, the judge should ensure that the

child actually comprehends the process in which he or she is participating.<sup>19</sup> An inadequate colloquy violates constitutional due process requirements and should result in a vacated plea.<sup>20</sup>

A plea is made “knowingly” and “intelligently” when a child understands the elements of the charges against him and the procedural protections he is forgoing by tendering a plea.<sup>21</sup> At a minimum, the judge must inform the child that he is waiving the constitutional right to trial, the right to confront his accusers, and the privilege against self-incrimination.<sup>22</sup> In addition, the judge or the defense attorney must explain the elements of the charged crime, or the child must admit to the facts constituting the crime.<sup>23</sup>

A “voluntary” waiver requires that the child tender the plea free from coercion, inducements, or threats.<sup>24</sup> The judge must be satisfied that the child was neither forced to offer a plea nor under the influence of substances that could impair his judgment or affect his ability to participate in the proceedings.<sup>25</sup> The judge should also inquire of the child or the attorney whether the child suffers from any mental illness that might impair his ability to participate in the proceeding.<sup>26</sup> The law prescribes no particular recitation, but it cautions judges to conduct a “real probe of the defendant’s mind.”<sup>27</sup>

#### PREPARING THE CHILD FOR THE PLEA PROCEEDING

The attorney for a child must ensure that the client, despite his or her tender years, fully understands the nature and ramifications of the juvenile court proceedings. The attorney must assume the role of educator as well as advisor when preparing the child for the proceedings and decisions in which the child must participate.

Ideally, a defense attorney meets with the young client in the privacy of the attorney’s office to review the facts of the case and to inform the child and his or her family about the nature of juvenile court proceedings. At a minimum, these discussions should include an explanation of the elements of the charged crime; an assessment of the strengths and weaknesses of both the child’s and the prosecutor’s cases; an explanation

of what happens during a trial, including the roles of participants and the burden of proof; a description of the difference between a jury trial and a “bench” trial; an explanation of possible outcomes ranging from “dismissed” or “not guilty” to commitment to the state juvenile correctional agency; an explanation of waiver forms that must be signed if the child decides to tender a plea and of the colloquy that the court must elicit before accepting a plea; and a description of what probation entails and the possible ramifications of probation violations. In practice, such comprehensive discussions rarely occur.

Typically, overburdened defense attorneys and prosecutors negotiate a plea bargain on the day of a required court appearance. The defense attorney then finds the child in the crowded hallways of the juvenile court and quickly “explains” the “deal” and the plea process to the child and parent. If the child decides to accept the “deal,” both the parent and child sign a waiver of the right to trial and a tender-of-plea form that outlines the terms and conditions of the disposition. The defense attorney briefly describes the colloquy the judge must conduct to affirm for the record that the child is making a “knowing, intelligent, and voluntary” waiver of his or her constitutional rights before accepting the plea.

#### THE PLEA PROCEEDING

A busy Massachusetts juvenile court may have over 100 cases scheduled on a “delinquency” day.<sup>28</sup> Thus, there is intense pressure on all court personnel, including judges and attorneys, to process cases quickly and efficiently. A plea proceeding requires more time than most pretrial hearings because it involves a sequence of events: a reading of the charge, a recitation of the underlying facts surrounding the charge, a plea colloquy conducted by the judge, and oral presentations by the attorneys in support of their recommended dispositions. If all goes smoothly, the proceeding lasts approximately 5 minutes; if there is disagreement over the dispositional terms, the proceeding may last 10 or more.

Typically, the colloquy takes less than 2 minutes. Although there are exceptions, judges generally use

language that mimics the legal words and phrases found in the waiver form. When a child provides a “wrong” answer or is so confused that he or she is unable to respond, judges many times attempt to clarify their statements by repeating the question more slowly or loudly. If that does not work, some judges struggle to find alternative wording for the concepts they are trying to communicate (e.g., using “proof to a moral certainty” as a substitute for “beyond a reasonable doubt”). Others send the child out of the courtroom, admonishing the attorney to “explain things to your client.”

Currently, the tender-of-plea form used in Massachusetts’ juvenile courts mirrors the form used in district court for adults. It is a standard-size sheet of paper with single-spaced text printed on both sides. The juvenile court version substitutes the word *child* for *defendant* and *adjudication* for *guilty*, but there are no differences in the language used to describe the waiver of constitutional and statutory rights. The front page of the form contains identifying information, such as the child’s name and court docket number. Section I of the form contains the child’s tender of plea, including an admission to the charged offenses and proposed dispositional terms. If the prosecutor disagrees with the terms, he or she enters recommendations in the space provided. In Section II, the court indicates acceptance of the child’s tender of plea or, in Section III, the court may reject the child’s dispositional terms and write in terms the court finds acceptable. The child’s attorney, the prosecutor, and the judge must sign the front page of the form.

The reverse side of the Massachusetts form consists of sections containing the child’s waiver of rights, the defense attorney’s certification that the waiver of rights was explained to the child, and the judge’s certification that the child was addressed in open court and made a knowing, intelligent, and voluntary waiver of his or her constitutional and statutory rights. The child and parent or guardian must sign and date the form under the section labeled “Child’s Waiver of Rights.” This section consists of the following:

**SECTION IV CHILD’S WAIVER OF RIGHTS (G.L.C. 119, S. 55A ) & ALIEN RIGHTS NOTICE (G.L.C 278, S. 29D)**

I, the undersigned child, understand and acknowledge that I am voluntarily giving up the right to be tried by a jury or a judge without a jury on these charges.

I have discussed my constitutional and other rights with my attorney and my parents or guardian. I understand that the jury would consist of six or twelve jurors chosen at random from the community, and that I could participate in selecting those jurors, who would determine unanimously whether or not I was delinquent/a youthful offender (*circle one*). I understand that by entering my plea of delinquency/youthful offender (*circle one*) or admission, I will also be giving up my right to confront, cross-examine, and compel the attendance of witnesses; to present evidence in my defense; to remain silent and refuse to testify or provide evidence against myself by asserting my constitutional right against self-incrimination, all with the assistance of my defense attorney; and to be presumed innocent until adjudicated delinquent/youthful offender (*circle one*) by the prosecutor beyond a reasonable doubt.

I am aware of the nature and the elements of the charge or charges to which I am entering my guilty plea or admission. I am also aware of the nature and range of the possible commitment, sentence or sentences.

My plea of delinquency/youthful offender (*circle one*) or admission is not the result of force or threats. It is not the result of assurances or promises, other than any agreed-upon recommendation by the prosecution, as set forth in Section I of this form. I have decided to plead delinquent/youthful offender (*circle one*) or to admit to sufficient facts, voluntarily and freely.

I am not now under the influence of any drug, medication, liquor or other substance nor am I aware of any other factor that would impair my ability to fully understand the constitutional and statutory rights that I am waiving when I plead delinquent/youthful offender (*circle one*).

I understand that if I am not a citizen of the United States, an adjudication of delinquency/youthful offender or admission to sufficient facts for this offense may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.

This form purports to inform the child of the constitutional rights being waived and to affirm that the child is doing so knowingly and voluntarily. However, the written waiver cannot substitute for the oral colloquy.<sup>29</sup> A signature on a form is just one of several factors that “bespeak the defendant’s intention to consummate the plea bargain.”<sup>30</sup> Ultimately, the advisements must be made “on the record, in open court.”<sup>31</sup>

#### A STUDY OF CHILDREN’S UNDERSTANDING OF THE PLEA PROCEEDING

A growing body of research literature suggests that children differ from adults in their legal decision making because they fail to appreciate the consequences of the decisions they are required to make. Little attention has been paid to another problem

that may influence children’s legal decision making: the terminology adults use when addressing children about court proceedings and the decisions they are required to make. This pilot study gathered empirical data on the understanding of legal terminology by court-involved children, particularly when tendering a plea.

#### PROCEDURE

To assess children’s understanding of legal terminology, Kaban developed a questionnaire listing 36 words and phrases selected from the Massachusetts tender-of-plea form and colloquies observed in juvenile court proceedings (see Table 1). The questionnaire was administered to 98 children who agreed to participate in the study.

Interviewers orally presented each participant with the words and phrases and asked each to choose one of the following responses: “I don’t know that

word/phrase at all,” “I have seen or heard that word/phrase but don’t know its meaning,” or “I think I know the meaning and it is . . .” If the child chose the last option, he or she was instructed to define the word or phrase only as it related to court proceedings.

**Table 1. Words and Phrases in Study Questionnaire**

| Word                       | Definition                 | Difficulty Level |
|----------------------------|----------------------------|------------------|
| Assurance                  | Being certain              | 8                |
| Commitment                 | Confinement                | 12               |
| Compel                     | To force                   | 10               |
| Comply                     | Obey                       | 16               |
| Convict                    | Find guilty                | 6                |
| Counsel                    | Lawyer                     | 12               |
| Cross-examination          | To question carefully      | 6                |
| Default                    | Failure to act             | 10               |
| Deportation                | Removing from country      | 8                |
| Disposition                | Arrangement                | 12               |
| Exceed                     | Go beyond                  | 8                |
| Exclusion                  | Shutting out               | 10               |
| Hearing                    | Court session              | 6                |
| Impair                     | Damage                     | 13               |
| Naturalization             | Becoming a citizen         | 12               |
| Plea*                      | n/a                        | 8                |
| Pursuant                   | In accordance              | 12               |
| Recipient                  | One who gets               | 10               |
| Restitution                | Payment for loss           | 12               |
| Right                      | Legal claim                | 8                |
| Sentence                   | Court punishment/jail term | 4                |
| Statutory                  | By law                     | 13               |
| Sufficient                 | Enough                     | 8                |
| Tender                     | To offer                   | 13               |
| Trial                      | A court process            | 4                |
| Waiver                     | Release of a right         | 16               |
| <b>Phrases</b>             |                            |                  |
| Admit to sufficient facts  |                            |                  |
| Bail warning               |                            |                  |
| Beyond a reasonable doubt  |                            |                  |
| Burden of proof            |                            |                  |
| Joint recommendation       |                            |                  |
| Jury trial                 |                            |                  |
| Presumption of innocence   |                            |                  |
| Proof to a moral certainty |                            |                  |
| Surety surrender           |                            |                  |
| Tender of plea             |                            |                  |

\* *The Living Word Vocabulary* defines *plea* as “appeal.” Kaban scored responses correct if the child described a “deal” or a “bargain” made between defendant and prosecution that resolved the case.

To assess the accuracy of the children’s responses, Kaban compared their answers to definitions provided in *The Living Word Vocabulary*.<sup>32</sup> This compendium of 44,000 words is the product of a nationwide study of 320,000 children in grades 4, 6, 8, 10, 12, and freshman and senior years of college. Each word is followed by one or more brief definitions coupled with an assessment of the definition’s difficulty level. The difficulty level is a determination of the school grade at which a majority of children accurately defined that word. For example, *restitution*, defined as “payment for loss,” is a word defined correctly by a majority of 12th graders. In contrast, *sentence*, defined as “court punishment” or “jail term,” is a word defined correctly by a majority of 4th graders.

Assessing the difficulty level of the phrases proved more difficult. For example, the phrase “beyond a reasonable doubt” contains three words that are at a 6th-grade difficulty level: *beyond*, *reasonable*, and *doubt*. Similarly, “burden of proof” contains words at 6th- and 4th-grade difficulty levels, respectively. Yet both phrases refer to abstract concepts that many adults serving on juries struggle to define. Although we did not assign a specific difficulty level to each phrase, interviewers asked participants in the study to place the phrases on the same continuum and, if they thought they knew the meaning, to define the phrase.

#### THE “UNINSTRUCTED” GROUP

On randomly selected mornings in September 2001, a trained interviewer<sup>33</sup> approached children waiting in the hallway of a Massachusetts juvenile court. The interviewer asked them to volunteer for a study to determine children’s understanding of court proceedings. Out of 73 children approached, 69 agreed to participate (the “uninstructed” group). The interviewer, a former elementary school teacher who was attending law school, told each child to define the words and phrases only as they related to court proceedings. The interviewer provided no further information other than this instruction. The interviewer read the list of words and phrases out loud, one at a time, and recorded each participant’s oral responses.

The 69 participants were court-involved boys and girls who previously had been arraigned but whose cases had not yet been adjudicated. No information regarding their prior experience with plea proceedings was obtained. Participants ranged in age from 9 to 17, with 74 percent of the group between ages 14 and 16. The mean age was 14.9 years. Sixty-one participants (88 percent) were male, and eight (12 percent) were female. Participants reported they were in grades 3 through 10; 59 percent were in grades 8 through 10. The mean school grade was 8.3. Sixteen percent of the group were African American, 17 percent Asian, 41 percent Caucasian, and 25 percent Hispanic. (See Table 2.)

**THE “INSTRUCTED” GROUP**

To more closely replicate the instructions that children should receive from their attorneys before participating in a plea colloquy, the study also included a group who received similar instructions before answering the questionnaire.

In winter 2002, Kaban visited a Massachusetts juvenile detention facility for boys detained on serious felony charges. Facility staff introduced her as an attorney who was there to explain court proceedings to them. Kaban instructed the boys as a group regarding court proceedings from arraignment to disposition; the difference between a bench trial and a jury trial; the meaning of “pleading out”; and the legal rights that are waived when a defendant tenders a plea. Kaban also explained that a judge must conduct a colloquy before accepting a plea. Throughout the two one-hour sessions, she encouraged the boys to ask questions. At the end of each session, Kaban explained that she was conducting a study of children’s understanding of court proceedings and asked for volunteers. Out of the 50 boys present during the instructional sessions, 29 agreed to participate (the “instructed” group).<sup>34</sup>

Like the uninstructed group, these participants were told to define the words and phrases only as they related to court proceedings. The interviewers individually administered the questionnaire to each participant, reading the words and phrases out loud,

one at a time, and recording each participant’s oral responses. Unlike the uninstructed group, who were interviewed in the hallways of the juvenile court, these participants were able to sit down at a table in a quiet corner of the detention facility while completing their questionnaires. In addition, the interviewers asked these participants more detailed questions

**Table 2. Demographic Characteristics of Study Groups (N = 98)**

|                        | Uninstructed Group (n = 69) |      | Instructed Group (n = 29) |      |
|------------------------|-----------------------------|------|---------------------------|------|
|                        | n                           | %    | n                         | %    |
| <b>Gender</b>          |                             |      |                           |      |
| Boys                   | 61                          | 88.4 | 29                        | 100  |
| Girls                  | 8                           | 11.6 | 0                         | 0    |
| <b>Race</b>            |                             |      |                           |      |
| Caucasian              | 28                          | 40.6 | 9                         | 31   |
| Hispanic               | 17                          | 24.6 | 6                         | 20.7 |
| Asian                  | 12                          | 17.4 | 1                         | 3.4  |
| African American       | 11                          | 15.9 | 13                        | 44.8 |
| <b>Grade in school</b> |                             |      |                           |      |
| 3                      | 1                           | 1.4  | 0                         | 0    |
| 6                      | 2                           | 2.9  | 1                         | 3.4  |
| 7                      | 6                           | 8.7  | 2                         | 6.9  |
| 8                      | 11                          | 15.9 | 8                         | 27.6 |
| 9                      | 17                          | 24.6 | 9                         | 31.6 |
| 10                     | 13                          | 18.8 | 8                         | 27.6 |
| 11                     | 7                           | 10.1 | 1                         | 3.4  |
| 12                     | 5                           | 7.2  | 0                         | 0    |
| Not in school          | 6                           | 8.7  | 0                         | 0    |
| Missing                | 1                           | 1.4  | 0                         | 0    |
| Mean grade in school   | 8.3, sd = 3.06              |      | 8.8, sd = 1.14            |      |
| <b>Age</b>             |                             |      |                           |      |
| 9                      | 1                           | 1.4  | 0                         | 0    |
| 11                     | 1                           | 1.4  | 0                         | 0    |
| 12                     | 2                           | 2.9  | 0                         | 0    |
| 13                     | 7                           | 10.1 | 0                         | 0    |
| 14                     | 15                          | 21.7 | 3                         | 10.3 |
| 15                     | 11                          | 15.9 | 10                        | 34.5 |
| 16                     | 25                          | 36.2 | 13                        | 44.8 |
| 17                     | 7                           | 10.1 | 3                         | 10.3 |
| Mean age               | 14.9, sd = 1.56             |      | 15.5, sd = .83            |      |

about their prior court experiences. All 29 reported past experience in tendering pleas.

Participants in the instructed group ranged in age from 14 to 17, with 79 percent of the group between ages 15 and 16. Their mean age was 15.5 years, and all 29 participants were male.<sup>35</sup> Group members reported that they were in grades 6 through 11; 87 percent were in grades 8 through 10. The mean school grade was 8.8. Forty-five percent were African American, 3 percent Asian, 31 percent Caucasian, and 21 percent Hispanic. (See Table 2.)

Participants in neither group were asked whether they had ever repeated a grade in school or received special education services. An informal survey of the children's ages and reported grades in school suggested that at least 25 percent of each group experienced educational difficulties.

#### SCORING

All participants in both the uninstructed and the instructed groups received the same questionnaire. To ensure consistent interpretation of the participants' definitions, Kaban scored all responses. If the child reported not knowing the word or phrase at all, he or she received a score of zero; a score of one was given if the child reported having heard or seen the word or phrase before but did not give a definition; and a score of two was given if the child provided a definition. We summed the resulting scores to construct aggregates of the total number of definitions that the children provided, regardless of their accuracy, as well as the total number of *correct* definitions provided.

#### STUDY FINDINGS

Most participants in this study did not understand the majority of words and phrases presented to them. (See Tables 3 and 4.) On average, members of the uninstructed group provided 10 out of 36 possible definitions. However, they defined an average of only 2 terms correctly—that is, they understood only 5.5 percent of the commonly used legal terms. On average, members of the instructed group

provided 18 definitions but averaged only 5 correct definitions, a mere 14 percent of the commonly used legal terms. A sample of study participants' responses (see Table 5) illustrates the level of misconception and confusion children experience when confronted with commonly used legal terminology.

None of the children in the uninstructed group accurately defined any of the following words or phrases:

|                                   |                       |
|-----------------------------------|-----------------------|
| <i>burden of proof</i>            | <i>pursuant</i>       |
| <i>disposition</i>                | <i>tender</i>         |
| <i>joint recommendation</i>       | <i>statutory</i>      |
| <i>naturalization</i>             | <i>tender of plea</i> |
| <i>presumption of innocence</i>   | <i>waiver</i>         |
| <i>proof to a moral certainty</i> |                       |

Likewise, none of the children in the instructed group correctly defined any of the following words or phrases:

|                                   |                         |
|-----------------------------------|-------------------------|
| <i>assurance</i>                  | <i>statutory</i>        |
| <i>disposition</i>                | <i>surety surrender</i> |
| <i>presumption of innocence</i>   | <i>tender</i>           |
| <i>proof to a moral certainty</i> | <i>tender of plea</i>   |
| <i>pursuant</i>                   |                         |

This result is not surprising, given that the difficulty of a majority of the terms was at the 10th-grade level or higher, while the average participant was at the 8th-grade level. (See Tables 1 and 2.) For all participants, the most commonly understood words were *sentence* (4th-grade difficulty level) and *deportation* (8th-grade difficulty level). Thirty-eight percent of the uninstructed group and 69 percent of the instructed group gave correct definitions for *sentence*, while 23 percent of the uninstructed group and 48 percent of the instructed group provided correct definitions for the word *deportation*.

The phrases proved most challenging for all participants in the study. Although children in both groups attempted to define the phrases, their answers were overwhelmingly incorrect. For example, "jury trial" was the phrase most frequently defined in both groups; 51 percent of the uninstructed group and 93 percent of the instructed group reported that

**Table 3. Responses to Court-Terminology Survey and Accuracy of Definitions: Uninstructed Group (n = 69)**

|                            | Did Not Provide a Definition |    | Provided a Definition |    | Definition Was Correct |    |
|----------------------------|------------------------------|----|-----------------------|----|------------------------|----|
|                            | n                            | %  | n                     | %  | n                      | %  |
| <b>Words</b>               |                              |    |                       |    |                        |    |
| Assurance                  | 57                           | 83 | 12                    | 17 | 3                      | 4  |
| Commitment                 | 31                           | 45 | 38                    | 55 | 1                      | 1  |
| Compel                     | 68                           | 99 | 1                     | 1  | 1                      | 1  |
| Comply                     | 52                           | 75 | 17                    | 25 | 11                     | 16 |
| Convict                    | 24                           | 35 | 45                    | 65 | 12                     | 17 |
| Counsel                    | 48                           | 70 | 21                    | 30 | 5                      | 7  |
| Cross-examination          | 49                           | 71 | 20                    | 29 | 8                      | 12 |
| Default                    | 44                           | 64 | 25                    | 36 | 9                      | 13 |
| Deportation                | 39                           | 56 | 30                    | 44 | 16                     | 23 |
| Disposition                | 56                           | 81 | 13                    | 19 | 0                      | 0  |
| Exceed                     | 62                           | 90 | 7                     | 10 | 4                      | 6  |
| Exclusion                  | 57                           | 83 | 12                    | 17 | 2                      | 3  |
| Hearing                    | 28                           | 41 | 41                    | 59 | 4                      | 6  |
| Impair                     | 58                           | 84 | 11                    | 16 | 2                      | 3  |
| Naturalization             | 59                           | 86 | 10                    | 14 | 0                      | 0  |
| Plea                       | 33                           | 48 | 36                    | 52 | 4                      | 6  |
| Pursuant                   | 62                           | 90 | 7                     | 10 | 0                      | 0  |
| Recipient                  | 61                           | 88 | 8                     | 12 | 3                      | 4  |
| Restitution                | 59                           | 86 | 10                    | 14 | 3                      | 4  |
| Right                      | 29                           | 42 | 40                    | 58 | 7                      | 10 |
| Sentence                   | 19                           | 28 | 50                    | 72 | 26                     | 38 |
| Statutory                  | 53                           | 77 | 16                    | 23 | 0                      | 0  |
| Sufficient                 | 54                           | 78 | 15                    | 22 | 3                      | 4  |
| Tender                     | 59                           | 86 | 10                    | 14 | 0                      | 0  |
| Trial                      | 21                           | 30 | 48                    | 70 | 6                      | 9  |
| Waiver                     | 58                           | 84 | 11                    | 16 | 0                      | 0  |
| <b>Phrases</b>             |                              |    |                       |    |                        |    |
| Admit to sufficient facts  | 46                           | 67 | 23                    | 33 | 2                      | 3  |
| Bail warning               | 42                           | 61 | 27                    | 39 | 1                      | 1  |
| Beyond a reasonable doubt  | 51                           | 74 | 18                    | 26 | 1                      | 1  |
| Burden of proof            | 60                           | 87 | 9                     | 13 | 0                      | 0  |
| Joint recommendation       | 59                           | 86 | 10                    | 14 | 0                      | 0  |
| Jury trial                 | 34                           | 49 | 35                    | 51 | 10                     | 14 |
| Presumption of innocence   | 52                           | 75 | 17                    | 25 | 0                      | 0  |
| Proof to a moral certainty | 65                           | 94 | 4                     | 6  | 0                      | 0  |
| Surety surrender           | 60                           | 87 | 9                     | 13 | 1                      | 1  |
| Tender of plea             | 66                           | 96 | 3                     | 4  | 0                      | 0  |

**Table 4. Responses to Court-Terminology Survey and Accuracy of Definitions: Instructed Group (n = 29)**

|                            | Did Not Provide a Definition |    | Provided a Definition |     | Definition Was Correct |    |
|----------------------------|------------------------------|----|-----------------------|-----|------------------------|----|
|                            | n                            | %  | n                     | %   | n                      | %  |
| <b>Words</b>               |                              |    |                       |     |                        |    |
| Assurance                  | 13                           | 45 | 16                    | 55  | 0                      | 0  |
| Commitment                 | 4                            | 14 | 25                    | 86  | 3                      | 10 |
| Compel                     | 25                           | 86 | 4                     | 14  | 1                      | 3  |
| Comply                     | 18                           | 62 | 11                    | 38  | 7                      | 24 |
| Convict                    | 6                            | 21 | 23                    | 79  | 12                     | 41 |
| Counsel                    | 13                           | 45 | 16                    | 55  | 2                      | 7  |
| Cross-examination          | 14                           | 48 | 15                    | 52  | 2                      | 7  |
| Default                    | 5                            | 17 | 24                    | 83  | 10                     | 34 |
| Deportation                | 10                           | 34 | 19                    | 66  | 14                     | 48 |
| Disposition                | 15                           | 52 | 14                    | 48  | 0                      | 0  |
| Exceed                     | 19                           | 66 | 10                    | 34  | 5                      | 17 |
| Exclusion                  | 18                           | 62 | 11                    | 38  | 3                      | 10 |
| Hearing                    | 6                            | 21 | 23                    | 79  | 7                      | 24 |
| Impair                     | 22                           | 76 | 7                     | 24  | 4                      | 14 |
| Naturalization             | 24                           | 83 | 5                     | 17  | 3                      | 10 |
| Plea                       | 2                            | 7  | 27                    | 93  | 3                      | 10 |
| Pursuant                   | 20                           | 69 | 9                     | 31  | 0                      | 0  |
| Recipient                  | 18                           | 62 | 11                    | 38  | 5                      | 17 |
| Restitution                | 21                           | 72 | 8                     | 28  | 4                      | 14 |
| Right                      | 3                            | 10 | 26                    | 90  | 2                      | 7  |
| Sentence                   | 1                            | 3  | 28                    | 97  | 20                     | 69 |
| Statutory                  | 12                           | 41 | 17                    | 59  | 0                      | 0  |
| Sufficient                 | 13                           | 45 | 16                    | 55  | 9                      | 31 |
| Tender                     | 23                           | 79 | 6                     | 21  | 0                      | 0  |
| Trial                      | 0                            |    | 29                    | 100 | 1                      | 3  |
| Waiver                     | 15                           | 52 | 14                    | 48  | 3                      | 10 |
| <b>Phrases</b>             |                              |    |                       |     |                        |    |
| Admit to sufficient facts  | 14                           | 48 | 14                    | 48  | 7                      | 24 |
| Bail warning               | 13                           | 45 | 16                    | 55  | 3                      | 10 |
| Beyond a reasonable doubt  | 16                           | 55 | 13                    | 45  | 6                      | 21 |
| Burden of proof            | 21                           | 72 | 8                     | 28  | 1                      | 3  |
| Joint recommendation       | 22                           | 76 | 6                     | 21  | 2                      | 7  |
| Jury trial                 | 2                            | 7  | 27                    | 93  | 10                     | 34 |
| Presumption of innocence   | 19                           | 66 | 10                    | 34  | 0                      | 0  |
| Proof to a moral certainty | 26                           | 90 | 3                     | 10  | 0                      | 0  |
| Surety surrender           | 25                           | 86 | 4                     | 14  | 0                      | 0  |
| Tender of plea             | 28                           | 96 | 1                     | 4   | 0                      | 0  |



they knew the meaning of the phrase. Yet only 14 percent of the uninstructed group and 34 percent of the instructed group defined the phrase correctly. As shown by their responses, such as “come to court on date” (age 13) and “go in front of the judge” (age 16), children in the uninstructed group failed to appreciate the difference between a jury trial and pretrial court appearance. Although the instructed group received detailed information about jury trials just prior to the administration of the questionnaire, including that jury decisions must be unanimous and that the burden of proof is beyond a reasonable doubt, most did not retain this information. A typical definition of “jury trial” was “people from the neighborhood come and tell whether you’re guilty or not” (age 15).

#### DIFFERENCES IN UNDERSTANDING RELATIVE TO AGE, INSTRUCTIONAL STATUS, AND ETHNICITY

We analyzed the data to determine whether participants’ understanding of legal terminology was related to age (16 and older versus 15 and younger), ethnicity (Caucasian, Asian, Hispanic, African American), or instructional status (uninstructed versus instructed). We did not examine gender differences because there were too few girls in the sample.

First, the study focused on age. We hypothesized that older children would exhibit greater understanding of legal terminology than younger children because of their higher educational attainment and longer life experience. Ethnicity was of interest because of recent attention to the overrepresentation of minority children in the juvenile justice system.<sup>36</sup> We hypothesized that if minority children were less likely than nonminority children to understand the legal terminology used in juvenile court proceedings, that might adversely affect the decisions they made about their cases and lead to a higher rate of incarceration. Instructional status provided an opportunity to test the assumption that if court-involved children receive instruction from an attorney prior to the plea proceeding, they understand the rights they are waiving and the ramifications of the decisions they are making.

**Table 5. Sample Definitions Provided by Study Participants**

#### **Admit to sufficient facts**

“Admit to something you didn’t do” (age 14)

#### **Beyond a reasonable doubt**

“Gut feeling” (age 16)

“When someone is acting suspicious” (age 13)

“Don’t hardly believe yourself” (age 16)

#### **Counsel**

“Person who sits in front of the computer” (age 14)

“D.A.” (age 16)

“Probation type” (age 16)

“People who listen to you in court” (age 18)

#### **Cross-examination**

“Taking a drug test” (age 16)

“Attorney will talk to you about it” (age 14)

#### **Default**

“What it used to be and you change it” (age 15)

“A mistake” (age 16)

#### **Disposition**

“Positioned in wrong place” (age 13)

“Not in proper position” (age 16)

“Bad position” (age 16)

#### **Joint recommendation**

“You are in trouble with two cases” (age 14)

“Both mother and father spend time with their children a half year each” (age 14)

#### **Plea**

“When you want to get it over with so you plead guilty” (age 15)

“Like police” (age 15)

#### **Presumption of innocence**

“If your attorney feels you didn’t do it” (age 15)

#### **Pursuant**

“When lawyer is really into the case” (age 16)

#### **Restitution**

“Time spent somewhere” (age 18)

#### **Right**

“To the right direction” (age 14)

“Right about something” (age 14)

#### **Trial**

“Go in front of the judge” (offered by four subjects ranging from ages 14 to 16)

Univariate analyses of variance revealed no significant interactions between ethnicity and instructional status; ethnicity and age; instructional status and age; or ethnicity, instructional status, and age. (See Table 6.) Therefore, these variables did not confound the analyses of the interaction between the independent variables (age, ethnicity, and instructional status) and the dependent variables (what participants thought they knew and what they actually knew).

### *What Children Thought They Knew*

First, we assessed what participants *thought* they knew. This was a measure of the total number of definitions provided by participants regardless of accuracy. We analyzed the total number of definitions provided for all the words and phrases with respect to participant age, ethnicity, and instructional status to determine whether differences within and between groups, if any, were statistically significant. Our assessments relied on the analysis of variance, a statistical technique that looks for relationships among variables by analyzing sample means. Following convention, we regarded relationships as meaningful, or statistically significant, if their  $p$  values were less than or equal to .05—that is, there was a probability of only 5 percent or less that the covariation was due to chance.

Within the uninstructed group ( $n = 69$ ), age did not affect the total number of definitions provided by

participants. However, among the instructed group ( $n = 29$ ), older children provided significantly more definitions than did younger children ( $F = 7.24$ ,  $p = .012$ ). Overall, the instructed group provided significantly more definitions than the uninstructed group ( $F = 16.08$ ,  $p = .000$ ). The relationship between the total number of definitions provided and ethnicity was also statistically significant ( $F = 2.65$ ,  $p = .054$ ), with the significant differences occurring between Caucasians and Hispanics (mean difference = 6.22,  $se = 1.99$ ,  $p = .013$ ) and Caucasians and Asians (mean difference = 7.57,  $se = 2.52$ ,  $p = .013$ ).<sup>37</sup> In both instances, Caucasians provided more definitions than the other ethnic groups.

### *What Children Actually Knew*

Next, we assessed what participants *actually* knew. This was a measure of the number of correct definitions provided by the participants for all the words and phrases. We analyzed this number with respect to participant age, ethnicity, and instructional status to determine whether differences within and between groups, if any, were statistically significant.

The number of correct definitions was significantly different between age groups ( $F = 6.38$ ,  $p = .014$ ), instructional status ( $F = 14.85$ ,  $p = .000$ ), and ethnicities ( $F = 3.61$ ,  $p = .017$ ). Within both groups, older children provided significantly more correct

**Table 6. Participants' Total and Correct Responses by Age, Ethnicity, and Instructional Status**

|                  | Uninstructed Group ( $n = 69$ ) |                                 |                                |                    | Instructed Group ( $n = 29$ ) |                                 |                                |                    |
|------------------|---------------------------------|---------------------------------|--------------------------------|--------------------|-------------------------------|---------------------------------|--------------------------------|--------------------|
|                  | $n$                             | Average No. of Answers Provided | Average No. of Correct Answers | Standard Deviation | $n$                           | Average No. of Answers Provided | Average No. of Correct Answers | Standard Deviation |
| <b>Ethnicity</b> |                                 |                                 |                                |                    |                               |                                 |                                |                    |
| African American | 11                              | 9.8                             | 1.9                            | 1.57               | 13                            | 17.6                            | 4.0                            | 3.67               |
| Caucasian        | 28                              | 13.8                            | 3.6                            | 2.36               | 9                             | 21.2                            | 7.3                            | 4.71               |
| Hispanic         | 17                              | 7.6                             | 1.0                            | 1.36               | 6                             | 14.3                            | 4.2                            | 5.91               |
| Asian            | 12                              | 7.2                             | 1.6                            | 3.17               | 1                             | 18.0                            | 6.0                            | —                  |
| <b>Age</b>       |                                 |                                 |                                |                    |                               |                                 |                                |                    |
| 15 and younger   | 37                              | 9.4                             | 1.8                            | 2.28               | 13                            | 14.4                            | 3.5                            | 3.67               |
| 16 and older     | 32                              | 11.2                            | 3.1                            | 2.58               | 16                            | 21.1                            | 6.5                            | 4.86               |

definitions than younger children. Members of the instructed group provided significantly more correct definitions than members of the uninstructed group. Within the uninstructed group, significant differences existed between Caucasians and Hispanics, with Caucasians providing significantly more correct definitions than Hispanics. Within the instructed group there were no significant differences between ethnic groups in the number of correct definitions provided.

#### INFLUENCE OF WORD DIFFICULTY LEVEL ON THE RATE OF CORRECT RESPONSES

Finally, we separated the 26 words into subsets by level of difficulty. Fourth- and 6th-grade words were classified as the “easy” words ( $n = 5$ ); 8th- and 10th-grade words, the “moderate” words ( $n = 10$ ); and 12th-grade and post-high school words, the “difficult” words ( $n = 11$ ). To assess whether the results differed depending on the difficulty level of the words, we analyzed the number of correct responses within each subset in conjunction with age, ethnicity, and instructional status.

##### *Easy Words*

Participants’ understanding of the easy words differed widely among age groups ( $F = 4.60, p = .035$ ), ethnicities ( $F = 4.50, p = .006$ ), and instructional status ( $F = 5.94, p = .017$ ). Within the entire sample ( $N = 98$ ), older children provided more correct definitions for the easy words than did the younger children. With regard to ethnicity, the significant differences were between Caucasians and Asians (mean difference =  $.95, se = .31, p = .014$ ) and Caucasians and Hispanics (mean difference =  $.97, se = .25, p = .001$ ). In both instances, Caucasians gave more correct definitions for the easy words than did Asians or Hispanics. Overall, the instructed group provided more correct definitions for the easy words than the uninstructed group ( $F = 5.94, p = .017$ ).

##### *Moderate Words*

The participants’ understanding of the moderate words was significantly different among age groups

( $F = 7.02, p = .01$ ), ethnicities ( $F = 4.34, p = .007$ ), and instructional status ( $F = 17.89, p = .000$ ). Within the entire sample, older participants provided more correct definitions for the moderate words than did the younger participants. Similarly, the instructed group provided more correct definitions for the moderate words than did the uninstructed group. The largest differences relating to ethnicity existed between Caucasians and African Americans (mean difference =  $.95, se = .34, p = .031$ ). The difference between Caucasians and Hispanics approached statistical significance (mean difference =  $.84, se = .34, p = .078$ ). In both instances, Caucasians gave more correct definitions than did African Americans and Hispanics.

##### *Difficult Words*

There were no significant differences in older and younger participants’ understanding of the difficult words. However, participants’ understanding of the difficult words significantly differed among ethnicities ( $F = 3.98, p = .011$ ) and instructional status ( $F = 9.58, p = .003$ ). The significant differences existed between Caucasians and Asians (mean difference =  $.71, se = .27, p = .049$ ) and Caucasians and Hispanics (mean difference =  $.60, se = .22, p = .04$ ). In both instances Caucasians performed significantly better than either Asians or Hispanics. Overall, the instructed group provided more correct definitions for the difficult words than the uninstructed group.

In summary, members of the instructed group and Caucasians in both groups provided significantly more correct responses in all difficulty categories. Older participants provided significantly more correct responses than younger participants for the easy and moderate words. However, the age difference in performance disappeared with the difficult words; they were too hard for even the older participants.

#### DISCUSSION

The results of this study indicate that colloquies and waiver forms routinely used in Massachusetts’ juvenile courts are replete with words and phrases that court-involved children do not understand. Even

educated participants with prior experience in the court system failed to correctly define 86 percent of the words and phrases presented. However, their inability to provide an accurate definition for a legal term is not the only cause for concern. The data indicate that even when children think they know the meaning of a word, they often mistake it for a similar-sounding word, apply nonlegal definitions, or rely on some portion of the word to trigger associations to a possible, and often incorrect, meaning. These results raise serious concerns about the validity of children's waivers accompanying the tendering of a plea.

Prior to analyzing the data, we hypothesized that older participants would exhibit greater understanding of legal terminology than younger participants because of their more advanced educational status and life experiences. The data for the easy and moderate words supported this hypothesis. The problem, however, is that more than 40 percent of the words routinely used in juvenile court proceedings are the difficult words (12th-grade level or higher); regardless of age, this subset of words exceeded the grasp of all participants. If we consider words with a difficulty level at or higher than 10th grade, almost 60 percent of the words routinely used in juvenile court proceedings exceed the average 8th-grade educational status of study participants. This discrepancy highlights the need to modify the language used in court and on forms to more closely match the educational status and cognitive abilities of court-involved children.

The study also looked at whether minority children are more disadvantaged in the juvenile justice system than Caucasian children in their understanding of words and phrases used in court proceedings. The representation of minority children in the instructed group was noticeably greater than in the uninstructed group. (See Table 2.) This pattern is consistent with statewide data indicating that minority children in Massachusetts are more likely than nonminority children to be detained while their cases are pending.<sup>38</sup> In the uninstructed group, Caucasian participants exhibited greater understanding of the

words and phrases than did minority participants. However, with instruction and experience (i.e., the instructed group) minority children are no more and no less disadvantaged than their Caucasian counterparts.

Judges, attorneys, and children all believe that children know more than they actually do about court proceedings and the rights they are waiving during the tendering of a plea. Although the study indicates that experience and instruction improve performance, the instructed group provided only 5 correct definitions out of a possible 36. This dismal lack of comprehension should be a wake-up call for attorneys, judges, and other court personnel who interact with court-involved children. They cannot rely on the child's affirmative response to the question "Do you understand?" when discussing rights the child is waiving or the disposition he or she is accepting. Court-involved children routinely misinterpret the information the adults are trying to impart. Practices and procedures must be modified to ensure that children accurately understand court proceedings and the ramifications of their decisions when tendering pleas.

## IMPLICATIONS FOR PRACTICE

Obviously, a defense attorney's hurried explanation delivered just prior to a court appearance in the high-stress environment of the court corridor is not sufficient to ensure that the child fully understands the consequences of his or her legal decisions. In addition, a judge eliciting rote responses to questions that children are not likely to understand elevates form over substance and makes a hollow ritual out of the process of establishing a knowing, intelligent, and voluntary waiver of constitutional and statutory rights.

The need to fulfill statutory and constitutional requirements makes it incumbent on attorneys and judges to adapt their behavior and explanations to the abilities of the children with whom they interact. Attorneys must acknowledge their role as educators and modify the language they use when speaking with children. Their vocabulary should not exceed

an 8th-grade difficulty level. Concepts should be explained more than once and in a variety of ways to ensure comprehension. In addition, attorneys should inquire about, and understand, children’s educational strengths and weaknesses. Many court-involved children suffer from learning disabilities. It is important to know whether a particular child has a reading disability, a receptive language handicap, borderline intelligence, or other deficits that may affect his or her ability to absorb and retain information. That knowledge will assist the attorney when determining the most effective means of communicating with that child. For example, a child with a reading disability may need information delivered orally, whereas a child with a receptive language disability may need to see the information in writing before he or she can process and retain it. If English is not the child’s primary language, or not the language spoken at home, information should be communicated in the other language. Attorneys, like judges, need to probe the child’s understanding rather than accept the affirmative nod or one-word response to the “Do you understand?” inquiry. They should ask the child to explain, in his or her own words, the concepts they are trying to communicate. This will give the attorney an opportunity to identify and clarify points of confusion.

Courts also have a responsibility to assist in the instruction of court-involved children. Throughout the country, trial courts use videos to educate potential jurors about court proceedings. Similarly, the Edmund D. Edelman Children’s Court in the Superior Court of Los Angeles County makes videos available to familiarize children, ranging in age from preschool to high school, with child welfare proceedings. Such practices could be easily replicated in courts hearing delinquency cases. Children and their families spend hours waiting in the halls of juvenile courts for their cases to be called. Videos, available in a variety of languages, could provide information that would augment and reinforce explanations provided by the child’s attorney.

Ultimately, however, it is the judge who must affirm for the record that the child has made a

knowing, intelligent, and voluntary waiver of his or her constitutional rights with knowledge of the charge and the consequences of the plea. Regardless of the attorney’s affirmation or the child’s signature on a court form, it is the judge’s responsibility to ensure that a child understands the decisions he has made and waives his rights intelligently and voluntarily.

In particular, judges should adapt the language they use during the plea colloquy to the abilities of the child. The modified child-friendly colloquy in the appendix to this article recognizes that many court-involved children suffer from academic failure or learning disabilities. Their ability to retrieve information when confronted with open-ended questions is often compromised. Therefore, the proposed colloquy consists of many questions requiring only brief or one-word responses. However, other questions do require the child to explain key concepts in his or her own words. For instances when the child is unable to do so, the proposed colloquy offers sample explanations using vocabulary, whenever possible, in the 4th- to 8th-grade difficulty range. The tone is informal, and the sentence structure communicates one idea at a time. Although a child-friendly colloquy may be more time consuming, it should enhance the child’s understanding of the proceedings and allow judges to certify, with confidence, that the child’s plea is intelligently and voluntarily made.

## CONCLUSION

With courts and legislators increasingly emphasizing accountability and punishment in the juvenile justice system, the stakes for children have never been higher. If the system is going to hold children accountable for their waivers of rights and pleas, judges and attorneys must modify the language used in court proceedings to more accurately reflect the cognitive abilities and language skills of court-involved children. The results of this study indicate that colloquies and waiver forms routinely used in Massachusetts’ juvenile court proceedings are replete with words and phrases that court-involved children do not understand. Even educated

and experienced children failed to correctly define 86 percent of the commonly used legal terminology. The data also indicate that even when children think they know the meaning of a word, they often mistake it for a similar-sounding word, apply a nonlegal definition, or rely on some portion of the word to trigger associations to a possible, but often incorrect, meaning. The results of this study raise serious concerns about the validity of children's pleas. It is our hope that it will prompt judges and attorneys to modify practices to ensure the fundamental fairness of the juvenile court plea proceeding.

## NOTES

1. Act to Regulate the Treatment and Control of Dependent, Neglected and Delinquent Children, ch. 23, 1899 Ill. Laws 130 (1899). *See also* JOHN C. WATKINS, *THE JUVENILE JUSTICE CENTURY: A SOCIOLEGAL COMMENTARY ON AMERICAN JUVENILE COURTS* 45 (Carolina Acad. Press 1998).
2. WATKINS, *supra* note 1.
3. *In re Gault*, 387 U.S. 1, 26 (1967).
4. *Id.* at 15–16.
5. *Id.* at 26.
6. *Id.* at 49–50.
7. *Id.*
8. *In re Winship*, 397 U.S. 358, 364 (1970).
9. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).
10. *Gault*, 387 U.S. at 49–50.
11. For a discussion on this subject, *see* Helen Cavanaugh Stauts, *Parrens Patriae: The Federal Government's Growing Role of Parent to the Needy*, 2 J. CENTER FOR FAM. CHILD. & CTS., 139–52 (2000).
12. *Gault*, 387 U.S. at 26.
13. *See* MASS. GEN. LAWS ch. 119, §§ 55A, 56; MASS. R.CRIM.P. 1 (“These rules govern the procedure in all criminal proceedings . . . in all delinquency proceedings . . .”).
14. MASS. GEN. LAWS ch. 119, § 52.
15. Massachusetts Court System, Juvenile Court Department, Fiscal Year 2001 Statistics, *available at* www.state.ma.us/courts/courtsandjudges/courts/juvenilecourt/2003stats.html.
16. *Id.*
17. *See* *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Commonwealth v. Foster*, 330 N.E.2d 100, 108 (Mass. 1975).
18. *See* *Ciummei v. Commonwealth*, 392 N.E.2d 1186, 1189 (Mass. 1979).
19. *See Foster*, 330 N.E.2d at 160.
20. *See* *Commonwealth v. Andrews*, 728 N.E.2d 327, 330 (Mass. 2000) (plea was invalid owing to lack of discussion or acknowledgment of the elements of the crime charged); *Foster*, 330 N.E.2d at 160 (conviction invalid where record showed no inquiry on questions of voluntariness and understanding); *Commonwealth v. Fernandes*, 459 N.E.2d 787, 791–92 (Mass. 1984) (conviction reversed); *Commonwealth v. DeCologero*, 726 N.E.2d 444, 448 (Mass. App. Ct. 2000) (finding set aside because colloquy was insufficient to establish that plea was intelligently made); *Commonwealth v. Correa*, 686 N.E.2d 213, 217 (Mass. App. Ct. 1997) (colloquy was deficient because of judge's failure to advise defendant on the nature, the elements, or the penalties of the charge). *See also* *In re J.M.*, 769 A.2d 656, 659 (Vt. 2000) (failure of juvenile court to conduct a plea colloquy required a reversal of the finding of delinquency).
21. *Correa*, 686 N.E.2d at 216.
22. *Id.*
23. *Id.*
24. *Commonwealth v. Duest*, 572 N.E.2d 572, 576 (Mass. App. Ct. 1991).
25. *Correa*, 686 N.E.2d at 216.
26. *Id.*
27. *See Fernandes*, 459 N.E.2d 787 at 790; *Commonwealth v. Quinones*, 608 N.E.2d 724, 732 (Mass. 1993).
28. Massachusetts' juvenile courts hear child welfare, Children in Need of Services (CHINS), and delinquency matters. Delinquency cases are usually scheduled on one or two specific days each week.
29. *See* *Commonwealth v. Colon*, 789 N.E.2d 566 (Mass. 2003).
30. *See* *Commonwealth v. Grant*, 689 N.E.2d 1336, 1339 (Mass. 1998).

31. *Commonwealth v. Rodriguez*, 755 N.E.2d 753, 757 (Mass. App. Ct. 2001).
32. EDGAR DALE & JOSEPH O’ROURKE, *THE LIVING WORD VOCABULARY: A 44,000 WORD VOCABULARY INVENTORY* (World Book—Childcraft Int’l 1981).
33. Three interviewers were used in this pilot study. All three were law students; one was a former elementary school teacher. All three had experience working with children and were trained in the administration of the questionnaire by Barbara Kaban.
34. Although this group was smaller than the uninstructed group, the sample size was sufficient to allow for statistical analyses of differences across and between the two groups.
35. We did not have easy access to a facility for girls, and so this portion of the study was limited to boys.
36. For a discussion of this subject, see Judith A. Cox & James Bell, *Addressing Disproportionate Representation of Youth of Color in the Juvenile Justice System*, 3 J. CENTER FOR FAM. CHILD. & CTS. 31–43 (2001).
37. Throughout the study we used Tukey’s Tests to test for differences between Caucasians, African Americans, Hispanics, and Asians. This test is performed in conjunction with a one-way analysis of variance, post hoc, to determine where the differences, if any, lie. It operates with three or more samples and their mean, testing the mean of each population against the mean of every other population.
38. ROBIN DAHLBERG, AM. CIVIL LIBERTIES UNION, *DISPROPORTIONATE MINORITY CONFINEMENT IN MASSACHUSETTS: FAILURES IN ASSESSING AND ADDRESSING THE OVERREPRESENTATION OF MINORITIES IN THE MASSACHUSETTS JUVENILE JUSTICE SYSTEM* (2003).

## APPENDIX

**“CHILD-FRIENDLY” COLLOQUY**

My name is Judge *[name]*. What's your name?

You are in court because you have been charged with committing a crime. Your lawyer tells me that you want to work out a solution to your case without going to trial. That solution is called a “plea.” Before I accept your plea, I must ask you a few questions to make sure you understand what you are doing today. If you don't understand my questions or anything I say, please tell me. If I don't understand anything you say, I will tell you.

How old are you?

Where were you born?

Do you go to school?

What school do you go to?

What grade are you in?

*[Or:]* What was the last grade you were in when you went to school?

Who is here with you today?

Was *[parent or guardian]* present when you talked to your lawyer today?

Did you have enough time to talk to your *[parent or guardian]* about the decisions you are making today?

Did you have enough time to talk to your lawyer about the decisions you are making today?

Did you take any medicine today? Did you take any medicine yesterday?

*[If yes:]* What medicine did you take?

Did you use any drugs yesterday or today?

Did you drink alcohol yesterday or today?

*[If the answer is yes to any of the three previous questions:]*

Does the medicine/drug/alcohol make it hard for you to understand what I am saying to you today?

Please tell me what you have been charged with doing. *[If the child does not answer correctly, the judge should explain the charges to the child. The judge should then explain the elements of the charge that the prosecutor would have to prove for the child to be adjudicated delinquent.]*



When you offer a plea, you are admitting that you violated the law. When you admit to violating the law, there is a range of consequences that I can impose, from placing you on probation to committing you to the Department of Youth Services.

Do you know what happens when someone is placed on probation?

*[If the child answers yes, ask:]* Tell me what you think happens when someone is placed on probation.

*[If the child does not answer correctly, the judge should provide the following explanation:]*

When you are placed on probation, you will have a probation officer who will check up on you. You will also have a set of conditions that you must obey. For example, you may have a curfew—that is a time each night when you must be at home. Another condition may be that you have to go to school every day and not get in trouble when you are in school. The probation officer may come to your house or your school to check up on you. If you do not do what you have agreed to do when on probation, you can be brought into court on a probation violation and you may face more serious consequences.

One of the more serious consequences a child can face is commitment to the Department of Youth Services. Tell me what you think happens when someone is committed to the Department of Youth Services.

*[If the child’s explanation is inaccurate, provide the following explanation:]*

When you are committed to the Department of Youth Services, you are taken away from your family and placed in the custody of the Department of Youth Services. The Department of Youth Services is commonly called DYS. Have you heard of DYS?

When you are committed to DYS, you are committed to age 18. Once you are committed to DYS, DYS decides which program will best meet your needs. DYS can place you in a program where you can’t go outside unless you are supervised by staff members. Or DYS can place you in a less secure program where you can come and go more freely. DYS decides where you will go and how long you will stay in the program. You will have to live at the program DYS selects, and you may have to stay there for months or even for years. The decision about how long you will stay in the program depends on your behavior once you are there.

Now please tell me in your own words what happens when someone is committed to DYS.

When you offer a plea as you are doing today, you give up certain rights. You give up the right to a trial. Please tell me what you know about a trial. *[Whatever response the child provides probably will not be a full or accurate description of a trial. The judge should then provide the following information.]*

## APPENDIX

You can have a trial with only a judge, like myself. Or you can have a trial with a jury. A jury is made up of 6 or 12 grownups who don't know you or anyone involved in the case. You would help your lawyer choose the people on the jury. It is the jury's job to listen to the evidence and decide whether you are guilty or not guilty. You don't have to say anything during the trial if you don't want to. After the jury hears all the evidence, they decide if you are guilty or not guilty. The jury members all have to agree on their decision.

If you decide to have a trial with only a judge, then only one person, the judge, listens to the evidence and decides whether or not you are guilty.

In a trial, the judge or the jury must assume you are innocent. It is the prosecutor's job to prove that you are guilty. The prosecutor must prove you are guilty beyond a reasonable doubt. That means that the judge or the jury, after listening to all the evidence, must be certain you did [*recite elements of the crime*] before they can find you guilty. If they are not certain, they must assume that you are innocent.

When you decide to give up your right to a trial, it means you are giving up several important rights. For example, it means that you won't hear what the witnesses against you would say. It means that your lawyer won't get a chance to question those witnesses. And it also means that you won't get a chance to call your own witnesses to tell your side of what happened. Do you understand that you are giving up these rights?

Do you have any questions for me about a trial?

Do you want to give up your right to a trial today?

Has anyone promised you anything to make you give up your right to a trial?

Has anyone forced you to give up your right to a trial?

Has anyone threatened you to make you give up your right to a trial?

*[Judge affirms for the record that the child has made a knowing, intelligent, and voluntary waiver of the right to a trial and signs the waiver portion of the tender-of-plea form.]*

Your lawyer wrote down what you are willing to agree to do in order to end your case today. The prosecutor wrote down what [*he/she*] thinks you should do. If I do not agree with what your lawyer has written down, you can change your mind and still have the right to go to trial. Do you understand that?

*[To the prosecutor:]* Please state the facts of the case.

*[To the child:]* Did you understand what the prosecutor said?

Is that basically what happened?

After hearing the facts of the case and assuring myself that *[child’s name]* understands what *[he/she]* is doing today, I am going to:

(a) accept the terms and conditions suggested by the child *[or: agreed to by the child and the prosecutor]*. Those terms and conditions include *[recite terms and conditions]*.

*[Child’s name]*, please tell me what you have agreed to do today. *[If child cannot recite all the conditions, repeat any condition that is omitted.]*

If you don’t do everything you agreed to do today, you can be brought back into court and committed to the Department of Youth Services. Do you have any questions about what you have agreed to do?

(b) I do not agree with what your lawyer has suggested you are willing to do to end your case today. I would order the following terms and conditions *[recite terms and conditions]*.

*[Child’s name]*, you don’t have to accept the terms and conditions I would order. You can change your mind and go to trial. Before you make up your mind, I am going to give you a few minutes to talk to your lawyer.

Will you accept what I would order?

*[Child’s name]*, please tell me what you have agreed to do today. *[If child cannot recite all the conditions, repeat any condition that is omitted.]*

If you don’t do everything you agreed to do today, you can be brought back into court and committed to the Department of Youth Services. Do you have any questions about what you have agreed to do?

By agreeing to this plea you are admitting to this court that you did what you were charged with doing. You told me you were not born in the United States *[or: You told me that you were born in the United States, so this probably does not apply to you.]* It is my job to tell you that if you were not born in the United States or are not yet a citizen of the United States, admitting to these facts may mean that you have to leave this country. Or if you leave the United States to visit another country, you may not be able to come back into this country. Or it could mean that you may not be able to become a citizen when you get older. Do you have any questions for me about what I have just told you?

*[Name of attorney]*, are there any other questions that I should ask *[name of child]* to ensure that *[he/she]* fully understands this proceeding?

*[Name of child]*, do you want to ask me anything about what I have said or what you have agreed to do?



# Mediation in Child Protection Cases

*A petition filed with the child protection court alleges that Mary, a 5-year-old child, needs the court's protection. Mary's mother is addicted to methamphetamine, which prevents her from adequately caring for her daughter: she has been unable to protect Mary from witnessing the ongoing domestic violence that the father has inflicted on her; she refuses to leave the father's home despite offers of assistance; and the home is so dirty that it is unsafe for the child to live there. Both mother and father appear in court and deny the allegations. The court appoints each parent an attorney and appoints Mary an attorney who will also serve as her guardian ad litem. At the first hearing, the court places Mary in the temporary care of her maternal grandparents.*

*At the next hearing the parents request a trial regarding the truth of the allegations made by the social worker in the petition. The court refers the parties and attorneys to mediation. The parents, the maternal grandparents, the social worker, and the attorneys all participate in the mediation session. A domestic violence victim advocate accompanies the mother. After the mediation session, the parties return to court and some changes are made to the petition. Thereafter, the parties admit to the court that the allegations in the petition are true, thus resolving the jurisdictional issues. They also agree with the dispositional recommendations and the case plan for each parent that was developed in the course of the mediation process.*

*The court declares the child to be under the protection of the juvenile court, and each parent is ordered to receive family reunification services. Mary is placed with her grandparents. The court sets a review date in the future to monitor Mary's well-being and the progress made by her parents in addressing their separate case plans. The mother's case plan states that she will live separately from the father and will enter a substance abuse treatment program. The father's case plan states that he will participate in a domestic violence intervention program. The court further orders that both Mary and the mother participate in individual counseling.*

This example illustrates the use of mediation in child protection (juvenile dependency) cases, a practice that has increased substantially in America's juvenile courts over the past five years. There are several reasons for its growing popularity, but the principal one is that it works: mediation produces agreements that are acceptable to all parties, do not sacrifice child safety, and are more effective and longer lasting than court orders after contested hearings.

**HON. LEONARD P. EDWARDS**

*Superior Court of California,  
County of Santa Clara*

The use of court-based mediation in child protection (juvenile dependency) cases has spread widely over the past five years. As a substitute for contested judicial hearings, mediation produces more effective, longer-lasting agreements that protect child safety on terms acceptable to all the parties. Mediation also offers participants opportunities unavailable in contested hearings. Parents, attorneys, social workers, and others work together, asking and answering questions, airing concerns, and ultimately crafting a resolution of the family's unique problems.

Following an overview of child protection proceedings and their goals, this article describes the legal structure and judicial role in those proceedings, and then details the shortcomings of the traditional adversarial process in resolving child protection and related family issues. The article offers mediation as a salutary alternative to judicial proceedings, discussing mediation's growth and impact on both

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the parties and the court system and recommending best practices for a successful mediation program.

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But mediation accomplishes much more. Unlike a contested hearing, the mediation process offers parents the opportunity to say what is on their minds, air their grievances, and grieve the losses that they have been experiencing. It gives the attorneys a forum in which they can work together to identify and solve problems without pressure from the court process or the hindrance of evidentiary rules. Other family members can participate in the mediation process to help determine the best plan for the child. Mediation offers a context in which to work out the details of a child safety plan and thereby tailor an effective resolution addressing the family's unique needs. It enables everyone to complete the process with a sense of accomplishment—a feeling that their combined efforts have produced something of value for the child and family—as well as a stake in the outcome that they had a hand in creating.

The first sections of this article discuss child protection proceedings, the goals they attempt to accomplish, their legal framework, and the shortcomings of the traditional adversarial process in resolving child protection and related family issues. Next, the article discusses the impact of court-based child protection mediation<sup>1</sup> on both the parties and the court system and recommends best practices for a successful mediation program. This section also describes the growth of mediation from the perspectives of participants in the child protection system. The article concludes by arguing that mediation has the potential to change the environment in which the court system addresses child protection cases to the benefit of all concerned.

## CHILD PROTECTION PROCEEDINGS

Child protection proceedings<sup>2</sup> are state-initiated legal actions undertaken to address the needs of children who have been abused or neglected by their parents or caretakers and who require protection and safe, permanent homes. These proceedings typically are heard in the juvenile or family courts of a court system.<sup>3</sup> Federal and state laws govern child protection proceedings. The federal Child Abuse Prevention and Treatment Act of 1974 (CAPTA),<sup>4</sup> the Adoption Assistance and Child Welfare Act of 1980 (AACWA),<sup>5</sup> and the Adoption and Safe Families Act of 1997 (ASFA)<sup>6</sup> establish the federal funding structures for state child protection systems and mandate that those systems seek to protect abused and neglected children, provide services to them and to their families, and establish permanent homes for them in a timely fashion.

State statutes define how state child protection and child welfare agencies shall provide protection for children, deliver preventive services to families in need so that children need not be unnecessarily removed from their homes, and provide services to families whose children have been removed so that the family can be safely reunited. State statutes also establish time frames for the determination of a permanent plan for the child. The permanent plans in both federal and state laws are the return of a child to a parent, adoption, guardianship, or a placement in a permanent, stable home (such as the home of a relative

or a foster or group home). Placement in a foster or group home is the least-favored permanent plan.

Under this statutory structure the state agents (child protection and social workers) have multiple roles. They must protect children; investigate suspected abuse or neglect; provide services to families to prevent removal of the child; prevent further harm to the child; and, if removal is necessary, facilitate reunification or, when required, a permanent placement in a timely fashion. These multiple roles are potentially in conflict with one another and present unique challenges to these state agents.

### THE LEGAL STRUCTURE OF CHILD PROTECTION CASES

Both federal and state laws direct that the juvenile court provide oversight for the implementation of child protection laws. With the passage of the AACWA in 1980, the juvenile court gained a significantly greater role in the nation's child protection system. Under the AACWA, as amended, the court must review any action taken by the child protection agency to remove a child from parental care without the parent's consent to ensure that such a removal was necessary to protect the child's welfare.<sup>7</sup> In addition, the court must determine whether the agency is fulfilling its legal mandates throughout each case from beginning to end. This oversight responsibility requires the court to make findings regarding the adequacy of services provided by the agency to the family. These so-called reasonable efforts findings<sup>8</sup> must be made throughout the entire case, including (1) when a child is removed, to determine whether the family received adequate preventive services to prevent removal; (2) when a case is reviewed after removal, to determine whether the family received adequate reunification services; and (3) when a permanent plan has been established, to determine whether the agency has taken adequate steps to reach a timely permanent plan.<sup>9</sup>

The judge also has to perform more traditional judicial functions, making factual and legal findings and ensuring that the parties receive due process throughout the court proceedings. In this regard

the judge must make findings regarding notice to all parties, legal representation, trial rights, admissibility and sufficiency of evidence, and the right to appeal the court's decisions.

### JUDICIAL PROCEEDINGS IN CHILD PROTECTION CASES

Child protection proceedings are complex, involving numerous parties and attorneys, multiple hearings, and unique legal issues. The parties include the parents, the child, and the agency that has initiated the legal action on the child's behalf.<sup>10</sup> Each of these parties may be represented by an attorney; the child is represented by an attorney, a guardian ad litem, or both.<sup>11</sup> Other interested persons may participate in the proceedings, including relatives, foster parents or caretakers, legal guardians, stepparents, boyfriends or girlfriends, de facto (psychological) parents, the child's Court Appointed Special Advocate (CASA), service providers, and representatives from Indian tribes to whom the family is related. Some of these interested persons may have attorneys representing them.

As described in the case history beginning this article, if a child has been removed from parental care, the first hearing is the shelter care or removal hearing.<sup>12</sup> This usually takes place within a few days after the child's removal. At this hearing the judge reads and explains the legal papers (the petition) that have been filed on behalf of the child; reviews the legal process with the parties; ensures that each party, including the child, is represented; determines where the child will live until the next hearing; inquires about possible Indian heritage;<sup>13</sup> and determines what visitation parents and other family members will have with the child if the court orders removal of the child from parental care.

At the next hearing, the jurisdictional or adjudication hearing, the judge determines whether the statements in the petition are true.<sup>14</sup> It is similar to the trial stage in other legal proceedings. Before the hearing is held, the social worker has usually prepared a report documenting the reasons that the child needs the protection of the court. The parents or guardian may agree with the allegations in the

petition and, after an inquiry by the court regarding legal rights, the court may find that the statements in the petition are true.<sup>15</sup> If the parents disagree with some or all of the allegations, they may ask for a trial, at which the judge hears evidence, including reports and testimony, and then rules whether the allegations are true.

If the petition is found to be true, the case then proceeds to a dispositional hearing, at which the court addresses the plan for the child and parents.<sup>16</sup> The judge decides whether the child will be declared to be under the protection of the juvenile court, whether the child will be removed from the care of one or both of the parents, and, if removed, where the child will be placed. The judge also decides what visitation parents and relatives will have with the child and what services, if any, each parent should complete to address the issues that brought the child to the attention of the court.<sup>17</sup>

To oversee the parents' efforts to reunify with their child and the agency's efforts to assist in the reunification process, the court reviews the case every six months or, if necessary, more frequently.<sup>18</sup> At these review hearings the court monitors all aspects of the case, including the parents' progress, the child's well-being, visitation with the parents and other family members, and the agency's efforts to assist the parents and fulfill other court orders.

The law mandates that a child removed from parental care must have a permanent home within one year of removal if possible. But if the child cannot be returned to either parent during that time, the juvenile court must hold a hearing to determine the child's permanent home.<sup>19</sup> The preferred permanent plan is an adoptive home (after termination of parental rights). The next preferred permanent plan is creation of a legal guardianship. If the child cannot be returned to either parent, and adoption and guardianship are not possible, the court may have to place the child in a foster or group home. This is the least preferred permanent plan and requires continued court oversight of the child until a permanent home is identified or until the child becomes an adult.

#### THE IMPACT OF JUVENILE COURT OVERSIGHT

Juvenile court oversight of child protection cases has both positive and negative aspects. Court oversight has brought standards and accountability to the child protection system. The court now reviews social worker decisions regarding removal and placement of children and services for families according to legal standards, and all parties have a forum in which their complaints can be heard and reviewed. Court oversight of permanency has resulted in increased permanent plans for children, particularly adoptions, and shorter periods of time in foster care in many cases.

On the other hand, court oversight is both expensive and cumbersome. The cost of hiring lawyers and having social workers spend a substantial part of their workday in court is significant. The legal process takes time, and, often, permanency is not achieved in a timely fashion because of legal delays. Furthermore, there has been no appreciable decline in the numbers of children in out-of-home care since the juvenile court assumed oversight responsibility of child protection cases—in fact, the numbers have risen.<sup>20</sup>

The legal process is also ill suited to address the social and family problems that are the essence of child protection cases. The Anglo-American legal system is founded on the adversarial process, a process that seeks truth from the presentation to the judge of different positions by contesting parties. The adversarial process provides an opportunity for each party to present his or her position to the judge and also for each party to examine the other party and any witnesses regarding their position. During cross-examination, a party (usually through an attorney) can ask questions of witnesses or parties in an effort to demonstrate the weaknesses in their testimony.

But the adversarial process, and cross-examination in particular, can be a brutal and terrifying experience, especially for someone inexperienced in the law. Simply testifying in court is difficult, especially for nonprofessionals. To be asked questions, at times in an aggressive or sarcastic tone, about personal



problems and family matters compounds the difficulty. When the ultimate issues that the court will decide are whether allegations of abuse or neglect are true, whether parents have been performing well in their efforts to reunify with their child, and whether parental rights to a child should be terminated, the court process and cross-examination can be a nightmare. Some commentators argue that the adversarial process seeks neither truth nor the best answer for the parties before the court.<sup>21</sup>

### THE ROLE OF THE CHILD WELFARE AGENCY

Until the passage of the AACWA in 1980, the juvenile court was seldom involved in child protection proceedings. In many jurisdictions the juvenile court became involved with a family only if the child welfare agency decided to terminate parental rights. Otherwise, the removal of children, the delivery of service, and the time frame for permanency all remained within the discretion of the agency.

The AACWA significantly changed the goals of the child welfare system, the federal funding of foster care at the state level, and the federal government's expectations of agency operations. It also required child welfare agencies to justify many of their decisions in proceedings before the juvenile court. It is difficult to estimate which branch of government was less pleased with the new relationship created by the AACWA—the agencies or the juvenile court—but the agencies clearly were more profoundly affected.<sup>22</sup> Not only were they required to change the ways in which they were conducting their child protection and child welfare operations, but they were also required to justify their actions to another branch of government in a new environment.

The court system presents problems for child protection agencies that they continue to struggle with today. First, in order to participate in court proceedings, they have had to create and maintain staff familiar with the law. This has meant hiring lawyers to present the agency position in court as well as developing legal expertise among the social

worker staff to interpret court orders. Second, to obtain approval for their actions, child protection agencies have been required to learn how legal decisions are made, how evidence must be gathered, and how court procedures dictate the presentation of evidence. Third, they have had to learn about the formality of court proceedings, the power of the judge, and the power that attorneys have to shape court proceedings.

For the line social worker, the formality of court proceedings and the adversarial process have presented the most difficult problems. Nothing in their training prepares social workers for evidence collection, report writing, and direct and cross-examination under the rules of evidence. Many social workers find the court process to be an overly formal setting, demeaning and inhospitable, where the truth is sacrificed for procedural rules and the free exchange of information and ideas is difficult, if not impossible.<sup>23</sup> Some have concluded that, in practice, court proceedings work as a barrier to achieving the goals of the law.<sup>24</sup>

### THE ROLE OF MEDIATION

Even though courts and agencies have struggled for years to implement the federal law, there has been noticeable success in the last 10 years. Those courts that have proven to be the most successful in meeting the mandates have followed identified best practices<sup>25</sup> and have developed collaborative relationships with their local child protection agencies.<sup>26</sup> Often a lead judge or an agency director has reached out to form a working partnership between the court and agency. On occasion, judicial leadership has resulted in court improvement and better results for the children and families appearing before the court. Under either scenario, these model courts have been able to improve court practices and administrative procedures, introduced model programs—including mediation—and developed positive working relationships among all members of the court system. They have also been successful in reducing the numbers of children under court supervision and the time it takes to place children in permanent homes.<sup>27</sup>

### CHILD PROTECTION MEDIATION

Child protection mediation is a process in which specially trained neutral professionals facilitate the resolution of child abuse and neglect issues by bringing together, in a confidential setting, the family, social workers, attorneys, and others involved in a case.<sup>28</sup> The creation and expansion of child protection mediation has been one of the most significant developments in national court improvement efforts. It has had a positive impact on the overwhelming majority of courts that have introduced it and made it a part of the court process.<sup>29</sup>

At the Superior Court of California, County of Santa Clara, where the author sits as a judge, three juvenile court judicial officers preside over the cases of approximately 3,000 children. Child protection mediation has been practiced in this large urban court for more than 10 years.<sup>30</sup> In the Santa Clara juvenile dependency court, all parties and attorneys participate in mediation. Family members, significant friends, and professionals are also invited to participate.

Any case can be referred to mediation at any stage of the proceedings from the initial hearing up to and including the establishment of a permanent plan including termination of parental rights. No cases are excluded in principle from the mediation process. Mediation is based on a very simple premise: a confidential discussion among the parties may lead to positive results. As the director of the Santa Clara County Family Court Services has observed, "It can't do any harm to talk about the case, and it may produce some positive results."<sup>31</sup> In practice, however, the court does not refer all cases to mediation—only those where difficult issues have been identified and the case may end up in trial.

The Santa Clara County court practices confidential mediation. Except for the reporting of new allegations of child abuse or neglect, all communications in the mediation session are confidential and inadmissible in any subsequent court proceedings. Two mediators, a man and a woman, conduct each mediation. The mediators explain to all parties the mediation process and its goal, which is to come up with a plan that all

the parties, attorneys, social worker, and CASA agree is best for the child and safe for all involved participants. In this sense, the mediation process is goal oriented and not a process seeking agreement for its own sake.

To ensure a high-quality mediation process, Santa Clara County mediators are well-qualified professionals who have undergone extensive training.<sup>32</sup> The court sets aside three and a half hours for each mediation session, and the parties may return on two or three occasions to complete the process. Sometimes a case will be set for an entire day if the issues are particularly complex. The court requires all attorneys and parties to attend each session. If the child can make an informed choice, he or she has the right to participate in the mediation process.<sup>33</sup> Otherwise, the attorney-guardian ad litem appears on the child's behalf. The Santa Clara County mediation process is also safe and fair for all participants. Several years ago, Family Court Services staff (mediators) met with leaders from the domestic violence advocacy community to discuss protocols and procedures that would enable victims of domestic violence or intimidation to participate in mediation safely. Local protocols were developed and have now been used for more than five years.<sup>34</sup> Child protection mediation in Santa Clara County operates in a manner consistent with national and state guidelines.<sup>35</sup>

The mediation process at the Santa Clara County court consists of four stages: (1) orientation to the process, (2) fact finding and issue development, (3) problem solving, and (4) agreement/disagreement and closure. Although the mediators expect to hear out each participant fully, when solutions and agreements are being addressed, they consistently ask each party whether the agreement will serve the best interest of the children involved.<sup>36</sup>

There are several different models of mediation across the country. The key elements that distinguish these models are the participants in the process, the types of cases that qualify for mediation, the aspects of the mediation process that may be disclosed to nonparticipants, the ability of mediators to make recommendations to the juvenile court, the number of participating mediators, and the mediators' degree

of neutrality, including their ability to set goals for the participants. Other factors affecting the quality of a particular mediation program include the mediators' training and experience, the length of each mediation session, the number of sessions before the case returns to court, local practice protocols that ensure a fair and safe mediation process (particularly for participants involved in domestic violence), the required participants, and the time parties must wait before participating in mediation.

Over the past decade best-practice standards have been developed to help provide guidance to new and growing programs. In 1995, the California Juvenile Dependency Court Mediation Association recommended standards of practice for court-connected juvenile dependency mediation. These standards helped the development of more than 20 county-based juvenile dependency mediation programs in California. The Judicial Council of California adopted these practice standards first as a standard of judicial administration and then incorporated them into a rule of court, which became effective January 1, 2004.<sup>37</sup>

#### GROWTH OF MEDIATION

Formal mediation in the court system has a relatively short history. Mediation in child protection cases has been used in several court systems, including Miami, Florida, and the state of Connecticut, for almost two decades. California passed the first mandatory mediation statute in child custody cases in 1980.<sup>38</sup> Los Angeles, Orange, and Santa Clara Counties have long used mediation,<sup>39</sup> yet it was not an accepted best practice until recently. One of the first acknowledgments that alternative dispute resolution techniques, and mediation in particular, were appropriate for child protection cases occurred in 1995 with the publication of the *Resource Guidelines* by the National Council of Juvenile and Family Court Judges (NCJFCJ).<sup>40</sup>

Once mediation became more widely known, it quickly became a recognized best practice. Mediation in child protection proceedings has grown in popularity over the past 10 years and has been implemented in court systems throughout the

country.<sup>41</sup> This occurred for a number of reasons. First, mediation works. Almost all court systems that have implemented mediation report excellent results.<sup>42</sup> Second, mediation has been carefully evaluated by a number of commentators and court systems.<sup>43</sup> For example, in the Santa Clara County court, 75 percent of the cases referred to mediation resulted in complete resolution of all issues, 17 percent resulted in resolution of part of the issues, and only 8 percent did not have resolution of any issue.<sup>44</sup> Third, there is general satisfaction among all participants in the mediation process,<sup>45</sup> including both the parents and professionals.<sup>46</sup>

The use of mediation in child protection cases has widespread support. The NCJFCJ's Permanency Planning for Children Department has identified mediation as a best practice.<sup>47</sup> Mediation has also been involved in many court improvement initiatives in states across the country.<sup>48</sup> The recognition that mediation is a best practice has resulted in significant national and state interest in the mediation program at the Superior Court of Santa Clara County.<sup>49</sup> As a part of the Model Courts Project,<sup>50</sup> the Permanency Planning Department has provided technical assistance to many courts around the country, including site visits to the Santa Clara County court by numerous court teams. The Model Courts Project of the Permanency Planning Department includes 25 courts of varying sizes throughout the nation. At this time, 23 out of 25 courts have implemented a mediation program in child protection cases.<sup>51</sup> Furthermore, several state legislatures have identified mediation as a best practice and encouraged its development in local juvenile court systems.<sup>52</sup>

#### MEDIATION'S IMPACT

Child protection mediation is much more than an alternative dispute resolution technique that helps to resolve difficult child protection cases. For the child protection court system in the Santa Clara County court, mediation has profoundly changed the legal culture. It has changed the way in which the participants in the court system approach child protection cases, the way that these participants relate to each

other, and their attitudes toward the resolution of issues. Mediation has revealed some of the deficiencies of the traditional court process, particularly the adversarial process, which can lead to inferior results for children and families. Mediation is now a credible method of addressing child protection issues in the Santa Clara County juvenile court.

The impact of mediation in Santa Clara County was not instantaneous. Many participants in the child protection system had doubts about the efficacy of mediation. Some believed that mediation would sacrifice child safety in the interest of making agreements. Others believed that the court process, with settlement conferences and trials, was a preferable means of resolving these cases. Some attorneys and judicial officers admitted that they did not want to give up their control of the process. Many social workers were fearful of any process that involved attorneys.<sup>53</sup>

As more parties participated in mediation and the results proved satisfactory to all members of the court system, mediation became firmly established as an important part of the court process. Legendary stories of cases that “could not possibly settle” were frequently discussed, testifying to the effectiveness of the process. In one case, just before the commencement of a scheduled five-day trial, the judge ordered the parties to participate in a mediation session. The attorneys resisted, claiming that the case could not settle. After the mediation, the attorneys returned to the judicial officer and apologized for their earlier resistance. The attorneys were somewhat chagrined to discover that not one of them had understood all the facts in the case. Once all of the facts were revealed during mediation, the case rapidly settled.<sup>54</sup>

As the mediation process compiled more successes over time, the court culture began changing. Attorneys, social workers, and judicial officers began to ask for mediation. Instead of insisting on their position and demanding a trial to vindicate that position, attorneys began to look to the mediation process as a means to identify a solution that would satisfy all parties and produce better, longer-lasting results for everyone.

Not all cases referred to mediation settled, but even for those few that did not, mediation had a positive impact on both the parties and the attorneys. As a result of mediation, the issues that were tried in court were more carefully identified, and the emotional overlay was reduced because the parties already had a full opportunity to express their grievances and concerns. Testimony at trial was more focused and to the point because the mediation process had sharpened the issues for both attorneys and the parties.

The culture change has extended beyond the processing of cases. Personal relationships among attorneys are much more friendly and respectful than before the advent of mediation.<sup>55</sup> This is understandable. The attorneys regularly participate in mediations together and are able to share in the success of an agreement that is satisfactory for each of their clients. They also have a hand in shaping the final agreement that the family will live by in the months and years to come. Perhaps more significantly, from the perspective of court operations, relations between attorneys and social workers have improved. Mediation enables social workers to engage in problem solving with the other members of the court system. They, too, have more positive experiences working with attorneys to resolve difficult factual issues and design better, more effective case plans and workable visitation arrangements. Instead of the harsh experience of being cross-examined at trial on their efforts, social workers find attorneys in mediation to be respectful of their work.<sup>56</sup> The mediation process also helps social workers develop better relationships with their clients. The informal atmosphere in the mediation setting fosters better communication between social workers and parents and helps the parents understand the role of the social worker.

Judges in Santa Clara County have found that mediation is helpful from a number of perspectives. First, it resolves most cases with detailed solutions that would be difficult, if not impossible, to reach in the context of a trial. Second, it saves court resources. Third, it helps set a more positive tone in the juvenile court environment, where difficult and emotional issues are addressed on a daily basis. Fourth,

by providing a setting open to questions from any participant, it makes the court process easier to understand for all participants, particularly the parents.<sup>57</sup> Perhaps most significantly, the parents have expressed their satisfaction with the mediation process. They report that, unlike courtroom proceedings, mediation enables them to be heard and understood, often for the only time in the court process.<sup>58</sup>

## CONCLUSION

The past 25 years have seen dramatic changes in the laws regarding child protection, family reunification, and permanent placement. America's juvenile and family courts now oversee and monitor child protection cases from beginning to end. These changes have led to the growth of large child protection court systems, with more judges, staff, attorneys, and guardians ad litem. There have also been significant changes within child protection and social service agencies as they have had to adjust to increased involvement in the court process.

It has become clear since the passage of the AACWA in 1980 that traditional court processes are not ideal for the resolution of family problems. The adversarial process, which involves cross-examination of witnesses, evidentiary rules, and other legal procedures, does not provide an environment conducive to truth finding or to the effective resolution of cases. Moreover, the process is perceived as hostile and uncaring by the parties and leads them to believe that they are not being heard or understood by decision-makers.

Child protection mediation, particularly when it is implemented according to best practices, can provide an opportunity for families and professionals to discuss difficult, emotion-laden issues in a protected setting with professional assistance. In mediation, family members can express their pain and concerns in a manner unavailable in the court process. They can then join with professionals and begin to make decisions about what is best for their children.

Child protection mediation has been successful from all perspectives. It resolves most cases referred by the court, and even those that do not resolve come

back to court in a better posture for trial or further settlement discussions. The resolutions reached in mediation are more detailed and better tailored to the needs of the family and children than decisions that a court might render after a trial. Participants find the mediation process productive and helpful. In addition, mediation has a positive impact on the court environment. Relationships among attorneys, and between attorneys and social workers, have improved because of their participation in mediation. Parents are more satisfied because the process allows them to air their grievances and concerns. Finally, mediation produces better results for children. When all of the adults in their lives, including the professionals who have been assigned to work on their cases, come to an agreement on the best plan for a child, this means that everyone will be working together toward a common goal. Mediation is a significantly positive process for child protection cases, one that has quickly grown to become a national best practice for juvenile courts.

1. Court-based child protection mediation is different from social service-based child welfare mediation, in which the child protection agency meets with the parents and a mediator in an effort to determine a permanent plan for the child. *See* JEANNE ETTER & DIANA ROBERTS, *CHILD WELFARE MEDIATION AS A PERMANENCY TOOL* (TFC Press 1996).
2. A variety of terms are used to refer to child protection proceedings: juvenile dependency, juvenile court, child welfare, and children-in-need-of-protection (CHIPs) proceedings. This article uses the term "child protection proceedings."
3. In this article, the term "juvenile court" is used to refer to the court with oversight responsibility for child protection cases. In some jurisdictions the family court, children's court, or dependency court is designated as the court with the oversight responsibility.
4. Child Abuse Prevention and Treatment Act of 1974 (CAPTA), Pub. L. No. 93-247, 88 Stat. 4 (codified as amended in scattered sections of 42 U.S.C.).

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5. Adoption Assistance and Child Welfare Act of 1980 (AACWA), Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).
6. Adoption and Safe Families Act of 1997 (ASFA), Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).
7. See 42 U.S.C. § 672(a)(1) (2000 & Supp. 2004).
8. “Reasonable efforts” is a term of art referring to the quantity and quality of services rendered by the child protection or social service agency in fulfilling the law’s requirements. What is considered reasonable in each factual situation will be different. The judge determines whether the agency has met the community’s standards for reasonableness. Leonard P. Edwards, *Improving Implementation of the Federal Adoption Assistance and Child Welfare Act of 1980*, 45 JUV. & FAM. CT. J. 3, 6 (1994) [hereinafter *Improving Implementation*]. See 42 U.S.C. § 671(a)(15)(B) (2000 & Supp. 2004) (requiring every state to have a plan providing that *reasonable efforts* shall be made to preserve and reunify the family before placing a child in foster care and to make it possible for a child to safely return home).
9. *Id.* at 4–6.
10. The name of the agency varies in different jurisdictions (e.g., Department of Children’s Services, Department of Human Services, Department of Family and Children’s Services, Department of Family Services).
11. A guardian ad litem (GAL) is appointed to represent the child’s best interest as opposed to the child’s desires. CAPTA, *supra* note 4, requires that all children who are the subject of child protection proceedings be represented by a GAL. CAPTA, Pub. L. No. 93-247, § 4(B)(2)(G), 88 Stat. 4, 7 (codified as amended at 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000 & Supp. 2004)). In some states, an attorney also represents the child or the child’s interests. In others, the attorney performs both the attorney and GAL functions. See Leonard P. Edwards, *Improving Juvenile Dependency Courts: Twenty-Three Steps*, 48 JUV. & FAM. CT. J. 1, 7–8 (1997); Leonard P. Edwards & Inger Sagatun, *Who Speaks for the Child?*, 2 U. CHI. L. SCH. ROUNDTABLE 67, 70 (1995).
12. NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES (NCJFCJ), RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES 29–44 (1995) [hereinafter RESOURCE GUIDELINES]. This book describes in detail each hearing in the court process.
13. Indian Child Welfare Act of 1978 (ICWA), Pub. L. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–1963 (2000 & Supp. 2004)).
14. RESOURCE GUIDELINES, *supra* note 12, at 45–52. For an example, see the case history beginning this article.
15. This was the result in the case history beginning this article. The resolution resulted from discussions at the mediation session. The changes in the petition language resulted in the removal of allegations with which the parents disagreed. After the changes, there were still sufficient facts to justify state intervention on behalf of the child.
16. RESOURCE GUIDELINES, *supra* note 12, at 53–63.
17. In the case history the parents were given separate case plans with different goals. These were developed in the context of the mediation session, with full input from each parent and the attorneys.
18. RESOURCE GUIDELINES, *supra* note 12, at 65–76.
19. *Id.* at 77–86. See 42 U.S.C. § 675(5)(C) (2000 & Supp. 2004) (requiring a permanency hearing to be held no later than 12 months after a child enters foster care, and not less frequently than every 12 months thereafter).
20. Approximately 250,000 children were in foster care in the early 1980s. Children’s Bureau, U.S. Dep’t of Health & Human Servs., Population Flow Exhibit 8, Substitute Care Trends 1980–1994 (2001), at [www.acf.hhs.gov/programs/cb/dis/vcis/ii08.htm](http://www.acf.hhs.gov/programs/cb/dis/vcis/ii08.htm). In 2001 there were almost 550,000. CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT 1 (Mar. 2003), at [www.acf.hhs.gov/programs/cb/publications/afcars/report8.pdf](http://www.acf.hhs.gov/programs/cb/publications/afcars/report8.pdf).
21. “[C]ounsel having objected to a piece of documentary evidence, which appeared to be relevant to the case but inadmissible in law, the judge asked: ‘Am I not to hear the truth?’ an enquiry which sounds reasonable enough, but which attracted the somewhat startling answer: ‘No, Your Lordship is to hear the evidence.’” PETER MURPHY, MURPHY ON EVIDENCE 1 (Blackstone Press 5th ed. 1995).
22. “There’s a lot of tension between CPS and the court. CPS workers are somewhat enraged with the court. They have trouble accepting that the court can’t act on ‘I want’ or ‘I feel.’ Workers sometimes wind up resentful of the court because it imposes deadlines, requires reports, orders appearances, and they feel overwhelmed. . . .  
“[Caseworkers] have a history of poor relationships with the court. When it goes to court everyone reads the caseworker’s report and says ‘Where’s the proof?’ When things are dropped in the petition, the workers

say ‘Doesn’t anyone read our reports?’ Caseworkers aren’t thinking about evidence and legal limits.” CTR. FOR POLICY RESEARCH, ALTERNATIVES TO ADJUDICATION IN CHILD ABUSE AND NEGLECT CASES 20 (1992).

23. “Some judges think they know more about each case than the social worker who has handled it. And some agencies routinely frustrate judges by giving out too little information on the cases at hand.” EDNA MCCONNELL CLARK FOUND., KEEPING FAMILIES TOGETHER: THE CASE FOR FAMILY PRESERVATION 34 (1985).

24. See, e.g., Leonard P. Edwards & Steve Baron, *Alternatives to Contested Litigation in Child Abuse and Neglect Cases*, 33 FAM. & CONCILIATION CTS. REV. 275 (1995), reprinted in RESOURCE GUIDELINES, *supra* note 12, app. B at 131, 133.

25. Many of these best practices were collected in the RESOURCE GUIDELINES, *supra* note 12. See also Edwards, *Improving Juvenile Dependency Courts*, *supra* note 11.

26. The literature has described some of the courts that have been successful. See generally AM. BAR ASS’N, CTR. ON CHILDREN & THE LAW, ONE COURT THAT WORKS (1993); AM. BAR ASS’N, CTR. ON CHILDREN & THE LAW, A SECOND COURT THAT WORKS (1995); PERMANENCY PLANNING FOR CHILDREN DEP’T, NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, STATUS REPORT 2002: A SNAPSHOT OF THE CHILD VICTIMS ACT MODEL COURTS PROJECT (2003) [hereinafter NCJFCJ STATUS REPORT]; Edwards, *Improving Implementation*, *supra* note 8.

27. MARY MENTABERRY, U.S. DEP’T OF JUSTICE, MODEL COURTS SERVE ABUSED AND NEGLECTED CHILDREN (1999) (OJJDP Fact Sheet No. 90), available at [www.ncjrs.org/txtfiles1/fs-9990.txt](http://www.ncjrs.org/txtfiles1/fs-9990.txt).

28. CAL. R. CT. 1405.5(b)(1) (2004). “‘Dependency mediation’ is a confidential process conducted by specially trained, neutral third-party mediators who have no decision-making power. Dependency mediation provides a nonadversarial setting in which a mediator assists the parties in reaching a fully informed and mutually acceptable resolution that focuses on the child’s safety and best interest and the safety of all family members. Dependency mediation is concerned with any and all issues related to child protection.” *Id.* See also ALICE B. OTT, NAT’L RESOURCE CTR. FOR FOSTER CARE & PERMANENCY PLANNING, TOOLS FOR PERMANENCY, TOOL NO. 3: CHILD WELFARE MEDIATION, at [www.hunter.cuny.edu/socwork/nrcfcpp/downloads/tools/cwm-tool.pdf](http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/tools/cwm-tool.pdf). “[P]arties engage in a mutual effort to discover solutions that will maximize the degree to which everyone’s interests are met,

rather than attempting to obtain their objectives by promoting their own positions, rebutting others’ arguments, and threatening to bring their power to bear on each other . . .” *Id.*

29. The benefits of mediation are numerous: (1) there is full or partial agreement in at least 70 percent of the cases, (2) participants strongly believe mediation saves time and money, (3) mediated case plans—with more detailed service and visitation arrangements—are more creative than litigated case plans, (4) participants prefer mediation to litigation, (5) parents find that mediation gives them an opportunity to be heard and understood, and (6) professionals also support mediation, sometimes after initial resistance. JOHN LANDE, NAT’L CTR. FOR STATE COURTS, CHILD PROTECTION MEDIATION, available at [www.ncsconline.org/D\\_ICM/readings/icmerroom\\_Lande.pdf](http://www.ncsconline.org/D_ICM/readings/icmerroom_Lande.pdf).

30. For a more comprehensive description of child protection mediation in Santa Clara County, see Leonard P. Edwards et al., *Mediation in Juvenile Dependency Court: Multiple Perspectives*, 53 JUV. & FAM. CT. J. 49 (Fall 2002) [hereinafter *Multiple Perspectives*].

31. *Id.* at 51. Steve Baron is director of Family Court Services in Santa Clara County and the person most responsible for starting child protection mediation in the county. He began mediating child protection cases in 1990 on an experimental basis with cases originating in the author’s juvenile dependency court. In addition, he says, “You can talk about essentially anything as long as the participants are capable of articulating their interests and desires. Talking does not equal agreeing, but talking and listening to one another usually produces constructive results even in the absence of an agreement. Mediation usually results in families experiencing a lowered sense of hostility and alienation and a heightened sense of participation and inclusion as well as a greater sense of understanding of the child’s needs, the workings of the system, and the points of view of the other participants.” *Id.*

32. Minimum experience and training requirements for California dependency mediators are described in Rule 1405.5(e) of the California Rules of Court (2004).

33. *Id.* at 1405.5(d)(2)(B) (2004). “The child has a right to participate in the dependency mediation process accompanied by his or her attorney. If the child makes an informed decision not to participate, then the child’s attorney may participate. If the child is unable to make an informed choice, then the child’s attorney may participate.” *Id.*

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34. For a domestic violence advocate's perspective on child protection mediation in Santa Clara County, see *Multiple Perspectives*, *supra* note 30, at 61.
35. CAL. R. CT. 1405.5 (2004); SUSAN SCHECHTER & JEFFREY L. EDLESON, FAMILY VIOLENCE DEP'T, NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE AND CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PROCEDURE §§ 23, 48 (1998), available at [www.ncjfcj.org/dept/fvd/publications/main.cfm?Action=PUBGET&Filename=eftvintr.pdf](http://www.ncjfcj.org/dept/fvd/publications/main.cfm?Action=PUBGET&Filename=eftvintr.pdf).
36. *Multiple Perspectives*, *supra* note 30, at 51. "After everyone feels heard, it is helpful for mediators to keep bringing the participants back to the issue of what is best for the child, i.e., 'How do you think we can resolve this particular issue in a way that is best for the child? ... Please talk about how you think your plan will affect the child .... Tell us what your concerns are about the child.'" *Id.* This approach is different from some mediation models in which the mediator is seen as entirely neutral and having no stake in the outcome. See Bernard Mayer, *Conflict Resolution in Child Protection and Adoption*, 7 MEDIATION Q. 69 (1985).
37. CAL. R. CT. 1405.5 (2004).
38. 1980 CAL. STAT. 48, § 5, codified as amended at CAL. FAM. CODE § 3160 et seq. (West 2004).
39. The Superior Courts of Los Angeles and Orange Counties first used mediation in child protection cases in, respectively, 1983 and 1987. For a history of the 21 mediation programs in California counties, see JUDICIAL COUNCIL OF CAL., ADMIN. OFFICE OF THE COURTS, COURT-BASED JUVENILE DEPENDENCY MEDIATION IN CALIFORNIA, RESEARCH UPDATE, at 1 (Mar. 2003) [hereinafter RESEARCH UPDATE]. For the growth of child protection mediation in other states, see Gregory Firestone, *Dependency Mediation: Where Do We Go From Here?*, 35 FAM. & CONCILIATION CTS. REV. 223 (1997).
40. The *Resource Guidelines* included a short article on alternative dispute resolution techniques in an appendix. See Edwards & Baron, *supra* note 24.
41. "A majority of jurisdictions have implemented various alternative dispute resolution models." AM. BAR ASS'N, CTR. ON CHILDREN & THE LAW, COURT IMPROVEMENT PROGRESS REPORT: 2003 NATIONAL SUMMARY 25 (2003) [hereinafter COURT IMPROVEMENT PROGRESS REPORT].
42. See, e.g., Lou Trosch et al., *Child Abuse, Neglect, and Dependency Mediation Pilot Project*, 53 JUV. & FAM. CT. J. 67 (Fall 2002); Sharon Townsend et al., *System Change Through Collaboration: Eight Steps for Getting From There to Here*, 53 JUV. & FAM. CT. J. 19 (Fall 2002); RESEARCH UPDATE, *supra* note 39, at 2–3.
43. NANCY THOENNES & JESSICA PEARSON, CTR. FOR POLICY RESEARCH, MEDIATION IN FIVE CALIFORNIA DEPENDENCY COURTS: A CROSS-SITE COMPARISON 11–12 (1995).
44. *Multiple Perspectives*, *supra* note 30, at 52.
45. *Id.*
46. Barbara Davies et al., *A Study of Client Satisfaction With Family Court Counseling in Cases Involving Domestic Violence*, 33 FAM. & CONCILIATION CTS. REV. 324 (1995); Trosch et al., *supra* note 42, at 74.
47. MENTABERRY, *supra* note 27; see also NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, ADOPTION AND PERMANENCY GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 7, 28, 31 (2000) ("Family group conferencing and mediation programs have been incorporated into many Model Court jurisdictions").
48. NCJFCJ STATUS REPORT, *supra* note 26, at 272–75; COURT IMPROVEMENT PROGRESS REPORT, *supra* note 41.
49. See, e.g., Letter from Susan Storcel, director of child protection mediation in the Circuit Court of Cook County, Illinois, to Leonard P. Edwards (Nov. 13, 2003) (on file with author): "Our mediation program was formally launched in February 2001, but it actually was conceived in August 2000, in Santa Clara County, when Judge Bishop, Gina Abbateamarco, and I made a site visit.... The growth of our program is astonishing. In calendar year 2003, we will have received more than 300 referrals compared to 106 in 2002. The program has been embraced by judges, most attorneys in the building, and our Department of Children and Family Services and private social service agencies." See also The Child Protection Mediation Program, Child Protection Division, Circuit Court of Cook County, at [www.CAADRS.org/adr/CookChildPro.htm](http://www.CAADRS.org/adr/CookChildPro.htm).
50. The Child Victims Act Model Courts Project is funded by the Office of Juvenile Justice and Delinquency Prevention in the U.S Department of Justice. A model court is defined as a "real-time 'laboratory' for implementing and evaluating court improvements. Like change itself, 'Model Court' is more a process than a 'thing.' The Model Courts provide an opportunity for practices, collaborations, innovations, and other systems changes to be pilot-tested and refined as part of ongoing systems change efforts." NCJFCJ STATUS REPORT, *supra* note 26, at 1.
51. *Id.*



52. See, e.g., CAL. WELF. & INST. CODE § 350(a)(2) (West 2004). Each juvenile court is encouraged to develop a dependency mediation program that acts as a problem-solving forum in which all interested persons develop a plan in the best interest of the child that emphasizes family preservation and strengthening. The Legislature finds that mediation of these matters assists the court in resolving conflict and helps the court intervene in a constructive manner in those cases where court intervention is necessary.

53. *Multiple Perspectives*, *supra* note 30, at 56.

54. *Id.* at 51. “Just getting all the key participants together at the same place and time in a structured setting to sit down and, with the help of skilled mediators, systematically talk things through, exchange the most current, accurate, and relevant case information, and clear up misinformation, serves to resolve a lot of problems.” *Id.* (quoting Steve Baron).

55. *Id.* at 58. “Another significant factor in the success of dependency mediation is the cooperative attitude towards mediation that has developed over the years between the various attorney offices.” *Id.* (quoting Mike Clark).

56. *Id.* at 56. “It has been my experience and that of other social workers that mediation can resolve contested issues in a manner satisfactory to all parties even with cases that appear destined for trial. The use of mediation allows all parties, especially the parents, to feel heard and to leave the process with their dignity and self-respect intact. It also goes a long way towards preserving the relationship between the Agency and the parents, which ultimately most benefits the children.” *Id.* (quoting Nicole Gould).

57. *Id.* at 63–64.

58. *Id.* at 59. “I felt so much better about everything after the mediation.” “The mediation was a good thing.” “I think that without the mediation it would be a long time before I could really be civilized with them.” *Id.* (quoting parents); see also THE ESSEX COUNTY CHILD WELFARE MEDIATION PROGRAM: EVALUATION RESULTS AND RECOMMENDATIONS, 5 TECHNICAL ASSISTANCE BULL. 41 (Dec. 2001) (“I think they were all willing to work with me and I really appreciated it and also the great concern they showed for my children.” “It was my first mediation and I want to comment on how well I feel they treated me and handled the situation. They were very helpful to me and very nice people.”)



# Information Needs in Juvenile Dependency Court

Decisions made in juvenile dependency court<sup>1</sup> have far-reaching effects on the lives of children and families, but empirical information on the experience of children and families in the court is limited. Agencies other than the court—including education, mental health, probation, social services, and correctional agencies—collect data on children in the child welfare and juvenile dependency systems, but their data collection efforts are focused on their own reporting requirements and research needs. For its part, the juvenile court has generally focused its studies on court operations. As a result, the court lacks sufficient information on the effect of its own practices and decisions on the safety, permanency, and well-being of the children under its jurisdiction. This lack of information severely hampers the court's ability to manage its caseload, assess the effectiveness of services, advocate for resources, or provide information to the public.<sup>2</sup>

A national consensus on the need for information collection and performance measurement in juvenile dependency court is developing. Recent reports from the Pew Commission on Children in Foster Care<sup>3</sup> and from a consortium of the National Center for State Courts, the American Bar Association (ABA), and the National Council of Juvenile and Family Court Judges<sup>4</sup> recommend detailed performance measures based on systematic data collection for dependency court. Research staff and others from the Administrative Office of the Courts (AOC), Center for Families, Children & the Courts (CFCC) prepared this article to assist those involved in defining performance measures and information collection standards for California's juvenile dependency court system. The article reviews the current efforts to define data standards for dependency court, examines the current sources of information available on children in the dependency system, and identifies the key research and performance issues in California that an information system for juvenile dependency must address.<sup>5</sup>

## INFORMATION NEEDS IN CALIFORNIA'S JUVENILE DEPENDENCY COURT

There are no national guidelines on collecting data and calculating performance measures for the juvenile dependency court. While the data collection system for child welfare agencies is federally mandated and funded, individual juvenile dependency courts have developed data collection systems and outcome measures on the state or local level. The result is wide disparity in the capabilities of

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The California juvenile dependency court often lacks basic information on the effect of its practices and decisions on the safety, permanency, and well-being of the children under its jurisdiction. Recent performance measures for juvenile dependency court developed by the American Bar Association, the National Center for State Courts, and the National Council of Family and Juvenile Court Judges indicate growing consensus that dependency courts should collect and report data to assess their performance. This article reviews the current efforts to define data standards for dependency court, reviews the current sources of information available on children in dependency, and identifies the key research and performance issues in California that an information system for juvenile dependency must address.

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those systems and definitions of data elements. Recent AOC research projects<sup>6</sup> indicate that the data collection systems used by many dependency courts

- do not measure the number of children under juvenile court jurisdiction;
- do not measure whether hearings take place within the mandated time frames;
- do not track the placements of children under the court's jurisdiction;
- do not provide data on whether court-based interventions, such as allocating more time to hearings, dependency mediation, or dependency drug court, have an impact on placement outcomes;
- do not provide data on measures related to the need for resources in the juvenile court, including how many children in the state transfer from the dependency system to the delinquency system, how many children under juvenile court jurisdiction have parents who are involved in other family or juvenile court cases or who are incarcerated, and how many children and parents require services in a language other than English; and
- do not use standardized measures for data collection, making it impossible to compare data among courts.

#### PERFORMANCE MEASURES FOR JUVENILE DEPENDENCY COURTS: A DEVELOPING CONSENSUS

In 1990 the National Center for State Courts published its *Trial Court Performance Standards*, which give guidelines on 5 general and 68 specific performance measures for the courts.<sup>7</sup> Few of these measures are specific to juvenile court. In 1995 the *Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* was published by the National Council of Juvenile and Family Court Judges.<sup>8</sup> This document, which has served as the basis for many initiatives to improve juvenile dependency court operations, includes a short statement on information collection:

Court staff should operate a computerized data system capable of spotting cases that have been seriously delayed, and capable of measuring court progress in case flow management. This information system should maintain statistics on the length of time from case filing to case closure. The system should also monitor the length of key steps in the litigations, such as petition to adjudication, petition to disposition, and termination of parental rights petitions to final written findings of fact and conclusions of law.<sup>9</sup>

In 1993 the federal Statewide Automated Child Welfare Information Systems (SACWIS) program began developing national guidelines and providing funding to state child welfare agencies for case management and reporting.<sup>10</sup> These guidelines currently reflect the measures on foster-care placement and other outcomes defined in the Adoption and Safe Families Act (ASFA)<sup>11</sup> and in the Child and Family Services Reviews.<sup>12</sup> The development of data collec-

tion standards and performance measures for dependency courts that are coordinated with the federal child welfare standards has proceeded since then. In 2004, the ABA, National Center for State Courts, and National Council of Juvenile and Family Court Judges released *Building a Better Court: Measuring and Improving Court Performance and Judicial Workload in Child Abuse and Neglect Cases*.<sup>13</sup> This document proposes a range of performance measures that

are based on court operations and linked to the outcomes defined by ASFA (see below). Also in 2004, the Pew Commission on Children in Foster Care recommended that dependency courts adopt those performance measures:

Every dependency court should adopt the court performance measures developed by the nation's leading legal associations and use this information to improve their oversight of children in foster care.<sup>14</sup>

## COURT PERFORMANCE MEASURES

Source: Reprinted by permission from CTR. ON CHILDREN & THE LAW, AM. BAR ASS'N ET AL., BUILDING A BETTER COURT: MEASURING AND IMPROVING COURT PERFORMANCE AND JUDICIAL WORKLOAD IN CHILD ABUSE AND NEGLECT CASES 9-11 (David & Lucile Packard Found. 2004).

### PERFORMANCE MEASURE 1: SAFETY

**Goal 1: Children should be safe from abuse and neglect while under court jurisdiction.**

**Safety Outcomes Are:**

- Children are, first and foremost, protected from abuse and neglect.
- No child should be subject to maltreatment while in placement.
- Children are safely maintained in their homes whenever possible and appropriate.

**What Courts Should Measure:**

1. Percentage of children who do NOT have a subsequent petition of maltreatment filed in court after the initial petition is filed.
2. Percentage of children who are the subject of additional allegations of maltreatment within 12 months after the original petition was closed.

### PERFORMANCE MEASURE 2: PERMANENCY

**Goal 2: Children should have permanency and stability in their living situations.**

**Permanency Outcomes Are:**

- Children have permanency and stability in their living situations.
- The continuity of family relationships and connections is preserved for children.

**What Courts Need to Measure:**

1. Percentage of children who reach legal permanency (by reunification, guardianship, adoption, planned permanent living arrangement, or other legal categories that correspond with ASFA) within 6, 12, 18, and 24 months from removal. Specific time lines for this measure should be adapted to jurisdictional time lines.
2. Percentage of children who do not achieve permanency in the foster care system (e.g., court jurisdiction ends because the child reaches the age of majority).
3. Percentage of children who re-enter foster care pursuant to court order within 12 and 24 months of being returned to their families.
4. Percentage of children who return to foster care pursuant to court order within 12 and 24 months of being adopted or placed with an individual or couple who are permanent guardians.
5. Percentage of children who are transferred among one, two, three, or more placements while under court jurisdiction. Where possible, this measure should distinguish placements in and out of a child's own home from multiple placements in a variety of environments.

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## COURT PERFORMANCE MEASURES

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### PERFORMANCE MEASURE 3: DUE PROCESS

**Goal 3: To deal with cases impartially and thoroughly based on evidence brought before the court.**

**Due Process Outcomes Are:**

- Enhancement of due process by deciding cases impartially and thoroughly, based on evidence brought before the court.

**What Courts Need to Measure:**

1. Percentage of cases in which both parents receive written service of process within the required time standards or where notice of hearing has been waived by parties.
2. Percentage of cases in which there is documentation that notice is given to parties in advance of the next hearing.
3. Percentage of cases in which the court reviews case plans within established time guidelines.
4. Percentage of children receiving legal counsel, guardians ad litem or CASA volunteers in advance of the preliminary protective hearing or equivalent (Percentage within established time guidelines? Percentage within 0–5 days? 6–10 days? More than 10 days?).
5. Percentage of cases where counsel for parents are appointed in advance of the preliminary protective hearing or equivalent (Percentage within established time guidelines? Percentage within 0–5 days? 6–10 days? More than 10 days?).
6. Percentage of cases in which legal counsel for children changes (as well as number of changes in counsel if possible).
7. Percentage of cases where legal counsel for parents changes (as well as number of changes in counsel if possible).
8. Percentage of cases where legal counsel for parents, children, and agencies are present at each hearing.
9. Percentage of children for whom all hearings are heard by one judicial officer (as well as two, three or more judicial officers if that information is available).

### PERFORMANCE MEASURE 4: TIMELINESS

**Goal 4: To enhance expedition to permanency by minimizing the time from the filing of the petition or protective custody order to permanency.**

**Timeliness Outcomes Are:**

- Expedition of permanency by minimizing the time from the filing of the petition or protective custody order to permanency.

**What Courts Need to Measure:**

1. Average or median time from filing of the original petition to adjudication.
2. Average or median time from filing of the original petition to disposition.
3. Percentage of cases that are adjudicated within 30, 60, 90 days after the filing of the dependency petition.
4. Percentage of cases that receive a disposition within 10, 30, 60 days after the dependency adjudication.
5. Average or median time from filing of the original petition to permanent placement.
6. Average or median time from filing of the original petition to finalized termination of parental rights.
7. Percentage of cases for which the termination petition is filed within 3, 6, 12, 19 months after the dependency disposition.
8. Percentage of cases that receive a termination order within 30, 90, 120, 180 days after the filing of the termination petition.
9. Percentage of cases for which an adoption petition is filed within 1, 3, 6 months after the termination order.
10. Percentage of cases for which the adoption is finalized within 1, 3, 6, 12 months after the adoption petition.
11. Percentage of hearings (by hearing type) not completed within time frames set forth in statute or court rules. Where possible, the reason(s) for non-completion should also be captured (e.g., party requesting postponement).

### PERFORMANCE MEASURE 5: WELL-BEING

[This measure has not yet been defined.]

## SOURCES OF INFORMATION ON CHILDREN IN DEPENDENCY

The children under the jurisdiction of the juvenile court are involved with many different agencies, which has led to the fragmentation of data and research in these systems. Based on reports to the AOC Judicial Branch Statistical Information System (JBSIS), the majority of courts collect information on petitions, hearing dates and outcomes, and other events, such as juvenile dependency mediation. The county child welfare agency maintains records and reports on the child's out-of-home placements and the progress of the child's case plan, while local school districts and mental health agencies collect specific information on the educational and mental health services provided to the child or parents. If the child has been in delinquency court, the county probation department or the California Youth Authority maintain key information on the child.

## DATA COLLECTION IN THE COURTS

Local courts in California maintain individual case management systems for dependency cases, but the information kept by the systems varies widely and is often not comparable across courts.

At the statewide level, JBSIS provides the courts a framework for data collection and reporting on dependency. Courts report aggregate statistics to JBSIS on measures related to the juvenile court. The measures include, for a given time period, counts of dependency filings and dispositions; numbers of children under the courts' supervision; the length of cases in broad categories of 18 months, three years, five years, and more than five years; and counts, by hearing type, of hearings, mediations, and settlement conferences. JBSIS can collect information on some of the dependency hearing timelines: whether review hearings did or did not take place within 6 months, 12 months, and 18 months, and whether termination-of-reunification-services hearings did or did not take place within 12 months.

All the data elements in JBSIS are "snapshot," or point-in-time, statistics. The statistics are drawn

from individual court case management systems that vary widely in the depth of detail collected. All courts report total filings and dispositions to JBSIS. As of this writing, approximately three-quarters of courts are reporting some of the detailed measures listed above, primarily counts by hearing type, while fewer than 20 percent are reporting timeliness or other measures.<sup>15</sup>

## *Court Statistics Reports*

Every year the AOC publishes the *Court Statistics Report*.<sup>16</sup> Nationally, several organizations compile and reanalyze state-level data on case processing. The National Center for State Courts, the Conference of State Court Administrators, the State Justice Institute, and the Bureau of Justice Statistics participate in the Court Statistics Project, which has published several documents describing court case processing, including *State Court Caseload Statistics*<sup>17</sup> and *Examining the Work of State Courts*.<sup>18</sup> The statistics on dependency court reported in these publications are restricted to filings and dispositions.

## CHILD WELFARE DATA

Governmental agencies at the federal and state levels are mandated to collect and compile state-level data on child abuse, neglect, foster care, and adoption rates.

## *Data Reported at the Federal Level*

Federal legislation requires that state child welfare agencies comply with several guidelines, called the "SAC-WIS standards,"<sup>19</sup> which specify comprehensive<sup>20</sup> data collection and compliance with the Adoption and Foster Care Analysis Reporting System (AFCARS)<sup>21</sup> and the National Child Abuse and Neglect Data System (NCANDS).<sup>22</sup> The requirements specify that agencies collect and report certain case-level data on a semiannual basis. The U.S. Department of Health and Human Services' Administration for Children and Families (ACF) collects the data on child maltreatment for NCANDS and the data on foster care and adoption for AFCARS.

ACF publishes analyses of AFCARS data on its Web site. Its annual report, *Child Welfare Outcomes*,

is based on both AFCARS and NCANDS data.<sup>23</sup> The Children's Bureau also publishes these data in its annual report, *Child Maltreatment*,<sup>24</sup> and the Child Welfare League of America organizes and disseminates data (including data from NCANDS and AFCARS) through its National Data Analysis System.<sup>25</sup>

#### *Data Reported by the State of California*

The California Department of Social Services administers the state's child welfare services and reports to AFCARS and NCANDS through its Child Welfare Services/Case Management System (CWS/CMS).<sup>26</sup> The system, which has been fully operational since the end of 1997 and meets SACWIS standards, contains child-level data on the status, demographics, and placement history of all foster-care children in the state. Child welfare services in all 58 counties and the California Department of Social Services' Adoption Program district offices enter data into CWS/CMS.

#### *State Child Welfare Data Accessible to the Courts and the Public*

A partnership between the California Department of Social Services and the Center for Social Services Research (CSSR) at the University of California at Berkeley has made aggregate data from the CWS/CMS child welfare system accessible to the public and other agencies.<sup>27</sup> The Department of Social Services extracts quarterly data from CWS/CMS, and CSSR uses the data to create cohort<sup>28</sup> files and make data and research highlights available on a variety of topics, including child abuse referrals, placement indicators by foster-care cohort, adoption trends, caseload flow, and exits from foster care per year. CSSR also reports the Child and Family Service Review performance measures for each county and a revised version of these measures based on cohort files for counties.

The data reported on the CSSR Web site is the most comprehensive source of information for California juvenile courts on the children under their jurisdiction. While CSSR does not report specific court measures such as petition and hearing dates, it

does provide summaries in the form of detailed base-lines and trends on the children under dependency court jurisdiction. Trend tables of this data that are of most interest to the courts have been published by the CFCC in the California Juvenile Statistical Abstract<sup>29</sup> and made available to dependency court judicial officers and staff throughout the state.

The Department of Social Services releases its own aggregate quarterly reports of AFCARS data and statistics on foster care, adoptions, out-of-home care, and other programs.<sup>30</sup> These data are not longitudinal and do not explicitly include information about the court's role in child welfare.

#### *Research Using Child Welfare Data*

Services offered by child welfare agencies have been the subject of considerable research. The Chapin Hall Center for Children at the University of Chicago has explored child welfare issues and has developed a national agenda for child abuse and neglect prevention. Chapin Hall also maintains the Multi-state Foster Care Data Archive, which contains 11 years of foster-care case history data from California, Illinois, Michigan, Missouri, New Jersey, and New York. In addition, Chapin Hall is tracking the histories of over one million children who were placed in state-funded out-of-home care. Chapin Hall publishes analyses of many of these data.<sup>31</sup>

The Urban Institute has published policy analyses of issues such as kinship-care policies,<sup>32</sup> child welfare expenditures,<sup>33</sup> and the role of noncustodial fathers in child welfare case management.<sup>34</sup> The Annie E. Casey Foundation sponsors initiatives and research in the child welfare field, including self-evaluations of its *Family to Family* Foster Care Initiatives<sup>35</sup> and publishes *Kids Count*,<sup>36</sup> an annual compilation of child well-being indicators. One study from the Bay Area Social Services Consortium has explored the relationship between child welfare agencies and the courts.<sup>37</sup>

Little is known about the long-term outcomes for children in the child welfare system, particularly those who age out of the system. The U.S. Department of Health and Human Services' Administration for Children and Families, in conjunction



with the National Data Archive on Child Abuse and Neglect at Cornell University, is conducting the first nationally representative longitudinal study using data collected directly from parents, children, and social service personnel.<sup>38</sup> This study, the National Survey of Child and Adolescent Well-Being,<sup>39</sup> will follow for several years a group of children who enter the child welfare system to assess their behavioral and social status and to document the services their families need and are given. The Center for Social Services Research, using state child welfare data, has begun to track outcomes for emancipated foster children by linking some administrative data from other state agencies.<sup>40</sup>

### *Other Data*

*Independent-Living Services Data.* California child welfare agencies are mandated to provide independent living skills training to children 16 or older who will be aging out of the foster-care system.<sup>41</sup> The U.S. General Accounting Office recently published an evaluation of independent living services across the country for which it surveyed 50 states and the District of Columbia about their independent living services and conducted a more in-depth analysis of programs in four states.<sup>42</sup>

*Mental Health Treatment Data.* The California Department of Mental Health oversees publicly funded mental health treatment in the state and administers Medi-Cal (Medicaid) funding for mental health services.<sup>43</sup> In its Medi-Cal Eligibility Data System, the department tracks the number of children who are eligible for Medi-Cal mental health services because they are disabled, are in the foster-care system, or are recipients of Temporary Aid to Needy Families (TANF). Data are also collected on children in the juvenile justice system who receive services in secure facilities. In addition, since 1998, the department has collected detailed data through the Children and Youth Performance Outcome Measurement System on children with serious, persistent mental illness who have received or will receive 60 or more days of publicly funded services. Courts can use the depart-

ment's published analyses<sup>44</sup> to track the proportion of children in foster care who are receiving mental health services and the average mental health expenditure per foster-care child.

*Educational Services Data.* In California, public school districts (including schools for children who are wards of the court) collect various student-level data. The districts then aggregate and report school-level performance indicators to the California Department of Education. In addition to standardized test results, all schools collect data on academic performance, staffing, expenditures, school enrollment, course enrollment, and dropout and graduation rates.<sup>45</sup> The department also collects detailed student-level data on children in special education programs through the California Special Education Management Information System.<sup>46</sup> The Department of Education publishes analyses of many of these data, and the RAND Corporation posts many of them on its Web site.<sup>47</sup> None of these education-related sources provides direct information on children in dependency.

## DEFINING A DEPENDENCY INFORMATION SYSTEM IN CALIFORNIA

California's 1997 *Court Improvement Project Report* included this statewide recommendation for dependency courts:

Recommendation 18: F&J [Family and Juvenile Advisory Committee] improvement planning should include as a priority the development of data entry and reporting protocols for dependency actions. All juvenile courts statewide should be able to use automated information systems to collect and analyze standardized, basic information on the dependency caseload. The goal should be a system capable of timely, accurate, coordinated, and useful case identification, tracking, and scheduling. Such systems should ensure appropriate confidentiality of the case records and party identification.<sup>48</sup>

Now that a consensus on national performance measures for juvenile dependency court is developing,

designing information systems and collecting standardized information in California are becoming more feasible. It is worth reviewing the advantages of consistently collecting data and reporting performance measures on every dependency court in the state.

- The performance measures and data required to produce them can provide standard measures, defined and collected in a standardized way by all courts, of cases and hearings in the state. At present no such measures exist, and resource allocations are not directly based on these basic components of court workload.
- Performance measures provide a benchmark to measure progress. Basic guidelines for dependency court were incorporated into the California Standards of Judicial Administration in 1997;<sup>49</sup> yet there is no system to measure courts' progress in meeting these guidelines.
- Performance measures give the dependency court ownership of its reporting and assessments. While statistical performance measures give a limited picture of a court's or program's effectiveness, making decisions on resources or technical assistance based on data designed and collected by the juvenile court for those purposes is preferable to making those decisions based on data collected for other purposes such as financial records, personnel data, general filings data, or data from other agencies.
- Performance measures alone cannot establish causal relationships between court action and the safety, permanency, and well-being of children in foster care. However, they can be used to assess the broad effects of court interventions and to identify areas where more-focused evaluations may be required.

The authors propose the following recommendations for implementing performance measures in dependency courts based on their research and interviews of court professionals:

**1. More nationwide research on the implementation of performance measures and other standardized**

**data is needed.** The performance measures proposed by the ABA and National Center for State Courts have not been systematically tested in the courts. The publications discussed in this article give very little guidance on how the proposed performance measures could be used by the courts and what modifications to the proposed measures might be necessary. Before implementing performance measures on a statewide basis, California dependency courts must pilot the measures and track the experiences of other courts around the country that are piloting the measures.<sup>50</sup>

2. **The information collected by courts should be tied to standardized, statewide statistical reporting.** As courts implement performance measures, JBSIS will need to be revised. Statewide statistical reporting should provide information on a case and cohort level, rather than aggregate statistics for all children in the dependency system.<sup>51</sup>
3. **Courts should not duplicate the information collection of the local department of social services.** However, the courts must be able to link information at the child level to the placement information on the same child kept by the county department of social services. Overcoming the barriers to linking court and social services data is the key to the success of the effort to implement standardized information collection in the courts. Few court-based or AOC initiatives to link court and social services data for specific projects have resulted in agreements to share information.<sup>52</sup>
4. **Courts need to carefully consider which measures should be implemented as part of a case management system and which are more suited to research studies.** The overall cost of tracking information on every case in a management system is usually quite high; moreover, the more complex the case management system the lower the quality of the data in it tends to be. A case management system may be well suited to recording the events in a case, such as hearings. Other proposed measures, such as the percentage of

cases in which both parents receive written service of process, may be extremely resource intensive to capture for every hearing and may be better measured through small random samples of cases taken at periodic intervals.<sup>53</sup>

**5. Any implementation of performance measures must take into account the courts in less-populated counties.** Fifty percent of dependency courts in California had fewer than 200 dependency filings in 2003, and 25 percent had fewer than 50 filings.<sup>54</sup> Courts with relatively few filings experience much greater yearly variation in any given statistical indicator than do larger courts. Any system using performance measures to assess these individual courts must use statistical techniques to account for the volatility of indicators in small courts.

**6. Performance measures should be considered within the context of demographic information.** Reporting a set of consistent measures for all 58 superior courts in California has many advantages. However, the demographics and environments of the 58 counties are not comparable, so it is important to collect consistent data on the income, race or ethnicity, and language needs of children and families in dependency court and use those variables to conduct additional analysis of the performance measures. Many of these demographic and social variables are already collected through CWS/CMS.

**7. Information beyond that proposed by the ABA needs to be collected in California's dependency courts.** Issues in dependency court that are not addressed by the proposed nationwide performance measures but will have an impact on the outcomes measured include the following:

*Families with multiple cases in juvenile dependency court and other court departments.* Families with multiple cases can experience inefficient case processing, duplicate services, difficulty navigating the court system, and conflicting orders. The experiences of these families in dependency court may be very different from those of other

families and may have a significant impact on a court's performance measures. The CFCC's Unified Courts for Families Program Mentor Court Project is currently developing models for identifying and measuring performance outcomes for families with multiple cases.

*Children who are or have been involved in delinquency proceedings.* The movement of children between the dependency and delinquency systems has a major impact on both the court and the children it supervises; however, these crossover cases have never been systematically identified. The CFCC is currently working with a group of courts to quantify crossover cases and evaluate their processing.

*Court interventions used in cases.* Court interventions should be identified in every case. Each dependency court oversees a range of interventions for children and parents. Those working in a collaborative-court model<sup>55</sup> may provide a diverse set of interventions such as youth court, youth violence court, mental health court, juvenile drug court, family drug court, and other programs focused on balanced and restorative justice for families and children in both the delinquency and dependency systems. Juvenile courts may also oversee dependency mediation, a Court Appointed Special Advocate (CASA) program (available in more than one-half of California's counties), family group conferencing, and many other court-connected services. These court interventions need to be systematically identified so that their impact on court performance measures and dependency outcomes can be quantified.

## CONCLUSION

Data collection and the use of statistical indicators are not deeply engrained in dependency court culture. However, given adequate resources, a statistical measurement system can be developed in California that is based on the most recent national consensus, incorporates measures of key state initiatives in unified

courts for families and dependency-delinquency crossover cases, and adjusts for the known problems of performance measures, such as accurate measurement in small courts and the imposition of burdensome data collection requirements. A well-designed system of performance measures could give the California juvenile court consistent, statewide information on its impact on the lives of the children under its jurisdiction and foster accountability to the public.

and do not seek to address the many needs of court professionals who work with families in guardianship, mental health, or family court cases.

## NOTES

1. The term “juvenile dependency court,” as used here, encompasses court professionals from local juvenile courts in California—including court administrators, judicial officers, court staff, and attorneys—as well as attorneys, analysts, and research staff of the Administrative Office of the Courts.

2. The National Child Welfare Resource on Legal and Judicial Issues of the American Bar Association Center on the Children and the Law provides updated information on state juvenile court projects related to data collection and automation at [www.abanet.org/child/cipcatalog/home.html](http://www.abanet.org/child/cipcatalog/home.html).

3. PEW COMM'N ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE 13 (May 18, 2004) [hereinafter FOSTERING THE FUTURE], *available at* <http://pew-fostercare.org/research/docs/FinalReport.pdf>.

4. CTR. ON CHILDREN & THE LAW, AM. BAR ASS'N ET AL., BUILDING A BETTER COURT: MEASURING AND IMPROVING COURT PERFORMANCE AND JUDICIAL WORKLOAD IN CHILD ABUSE AND NEGLECT CASES (David & Lucile Packard Found. 2004) [hereinafter BUILDING A BETTER COURT], *available at* [www.ncsconline.org/WC/Publications/Res\\_CtPerS\\_TCPS\\_PackGde4-04Pub.pdf](http://www.ncsconline.org/WC/Publications/Res_CtPerS_TCPS_PackGde4-04Pub.pdf).

5. This article was developed through literature reviews and interviews with juvenile court staff and experts, followed by an analysis of court needs. First, the authors reviewed existing research to locate information gaps and ongoing juvenile court research initiatives around the country. Next, they interviewed juvenile court professionals and CFCC staff who work with California's juvenile courts to identify additional research questions and information needs. Finally, the many research questions identified through the literature review and interviews were narrowed to those most relevant to the work of the courts. The article's findings primarily relate to dependency court

6. Research projects at the AOC that failed to locate consistent data in juvenile dependency courts in California include the Caseload Study for Trial-Level Court-Appointed Dependency Counsel, Interim Report 2003; Court-Based Juvenile Dependency Mediation in California (2002); and the Court Improvement Program Reassessment (forthcoming Summer 2005).

7. NAT'L CTR. FOR STATE COURTS, TRIAL COURT PERFORMANCE STANDARDS & MEASUREMENT SYSTEM (2001; modified Jan. 23, 2005), *available at* [www.ncsconline.org/D\\_Research/TCPS/Contents.htm](http://www.ncsconline.org/D_Research/TCPS/Contents.htm).

8. VICTIMS OF CHILD ABUSE PROJECT, NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES (Spring 1995), *available at* [www.ncjrs.org/pdffiles/resguid.pdf](http://www.ncjrs.org/pdffiles/resguid.pdf).

9. *Id.* at 20.

10. For information on SACWIS, see [www.acf.hhs.gov/programs/cb/dis/sacwis/about.htm](http://www.acf.hhs.gov/programs/cb/dis/sacwis/about.htm).

11. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified at scattered sections of 42 U.S.C. (2000 & Supp. 2004)).

12. For information on Child and Family Services Reviews, see [www.acf.hhs.gov/programs/cb/cwrp/index.htm](http://www.acf.hhs.gov/programs/cb/cwrp/index.htm).

13. BUILDING A BETTER COURT, *supra* note 4.

14. FOSTERING THE FUTURE, *supra* note 3, at 17.

15. Cal. Admin. Office of the Courts, Judicial Branch Statistical Information System, accessed Mar. 2005.

16. JUDICIAL COUNCIL OF CAL., 2004 COURT STATISTICS REPORT, *available at* [www.courtinfo.ca.gov/reference/3\\_stats.htm](http://www.courtinfo.ca.gov/reference/3_stats.htm).

17. COURT STATISTICS PROJECT, STATE COURT CASELOAD STATISTICS, 2003 (Nat'l Ctr. for State Courts 2004), *available at* [www.ncsconline.org/D\\_Research/csp/2003\\_Files/2003\\_SCES.html](http://www.ncsconline.org/D_Research/csp/2003_Files/2003_SCES.html).

18. BRIAN OSTROM ET AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2003 (2003), *available at* [www.ncsconline.org/D\\_Research/csp/2003\\_Files/2003\\_Main\\_Page.html](http://www.ncsconline.org/D_Research/csp/2003_Files/2003_Main_Page.html).

19. *See supra* note 10.

20. *Comprehensive*, in this context, means that data collection must include child welfare services, foster-care and adoption assistance, family preservation and support services, and independent living services.

21. For information on AFCARS, see [www.acf.hhs.gov/programs/cb/dis/afcars/index.htm](http://www.acf.hhs.gov/programs/cb/dis/afcars/index.htm). The cited Web page describes AFCARS as follows: “The SACWIS functions as a ‘case management’ system that serves as the electronic case file for children and families served by the States’ child welfare programs. One of the reports that is produced from SACWIS is the AFCARS data sent to ACF. In order to qualify for SACWIS funding, States’ systems must, among other things, meet the AFCARS requirements in 45 CFR 1355.40. States that develop a SACWIS with Federal funding must not collect the AFCARS data from a separate information system once the SACWIS is operational.”

22. The authors were unable to find a single source explaining the National Child Abuse and Neglect Data System (NCANDS). The best description of the system is found in *Child Maltreatment 2000*, CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2000, available at [www.acf.hhs.gov/programs/cb/publications/cm00/index.htm](http://www.acf.hhs.gov/programs/cb/publications/cm00/index.htm).

23. Child Welfare Outcome reports are available on the Children’s Bureau Web site at [www.acf.hhs.gov/programs/cb/publications/cwo.htm](http://www.acf.hhs.gov/programs/cb/publications/cwo.htm).

24. CHILD MALTREATMENT 2000, *supra* note 22.

25. For more information on the National Data Analysis System, see [www.cwla.org/ndas.htm](http://www.cwla.org/ndas.htm).

26. California’s CWS/CMS is described in detail at [www.childsworld.ca.gov/ChildWelfa\\_355.htm](http://www.childsworld.ca.gov/ChildWelfa_355.htm).

27. Child Welfare Services (CWS/CMS) reports are available at <http://cssr.berkeley.edu/CWSCMSreports/>.

28. A cohort file contains information on the subgroup of children who entered out-of-home care during a defined period—for example, the first quarter of 2003.

29. The California Juvenile Statistical Abstract, published by the Center for Families, Children & the Courts at [www.courtinfo.ca.gov/programs/cfcc/resources/publications/articles.htm#juvenile](http://www.courtinfo.ca.gov/programs/cfcc/resources/publications/articles.htm#juvenile), makes many of the data sources reviewed in this section accessible to court staff. The full report will be available on the above Web site in summer 2005.

30. Descriptive statistics from CWS/CMS are available at [www.dss.cahwnet.gov/research/Children`s\\_405.htm](http://www.dss.cahwnet.gov/research/Children`s_405.htm).

31. For publications from the data set, see [www.chapinhall.org/home\\_new.asp](http://www.chapinhall.org/home_new.asp). For more information on the data set, see FRED WULCZYN ET AL., AN UPDATE FROM THE MULTISTATE FOSTER CARE DATA ARCHIVE: FOSTER CARE DYNAMICS 1983–1998 (Chapin Hall 2000), available at [www.chapinhall.org/category\\_editor\\_new.asp?L2=66](http://www.chapinhall.org/category_editor_new.asp?L2=66).

32. AMY JANTZ ET AL., THE CONTINUING EVOLUTION OF STATE KINSHIP CARE POLICIES (Urban Inst., Dec. 2002), available at [www.urban.org/UploadedPDF/310597\\_state\\_kinship\\_care.pdf](http://www.urban.org/UploadedPDF/310597_state_kinship_care.pdf).

33. URBAN INST., *The Cost of Protecting Vulnerable Children, CARING FOR CHILDREN: FACTS AND PERSPECTIVES* (Nov. 2002), available at [www.urban.org/UploadedPDF/310586\\_FactPerspectives.pdf](http://www.urban.org/UploadedPDF/310586_FactPerspectives.pdf).

34. FREYA SONENSTEIN ET AL., URBAN INST., STUDY OF FATHERS’ INVOLVEMENT IN PERMANENCY PLANNING AND CHILD WELFARE CASEWORK (U.S. Dep’t of Health & Human Servs., Aug. 2002), available at <http://aspe.hhs.gov/hsp/CW-dads02/>.

35. For more information on the *Family to Family* reform initiative, see [www.aecf.org/initiatives/familytofamily/](http://www.aecf.org/initiatives/familytofamily/).

36. For more information on *Kids Count*, see [www.aecf.org/kidscount/](http://www.aecf.org/kidscount/).

37. SARAH CARNOCHAN ET AL., CHILD WELFARE AND THE COURTS: AN EXPLORATORY STUDY OF THE RELATIONSHIP BETWEEN TWO COMPLEX SYSTEMS (Bay Area Soc. Servs. Consortium, U.C. Berkeley, Dec. 2002), at <http://cssr.berkeley.edu/bassc/>.

38. For more information on the survey, see [www.ndacan.cornell.edu/NDACAN/AboutNDACAN.html](http://www.ndacan.cornell.edu/NDACAN/AboutNDACAN.html).

39. Admin. on Children, Youth & Families & Cornell Univ., National Survey of Child and Adolescent Well-Being (in progress). For information about the survey’s data set, see [128.253.104.22/NDACAN/Datasets/Abstracts/DatasetAbstract\\_111.html](http://128.253.104.22/NDACAN/Datasets/Abstracts/DatasetAbstract_111.html).

40. BARBARA NEEDELL ET AL., CTR. FOR SOC. SERVS. RESEARCH, YOUTH EMANCIPATING FROM FOSTER CARE IN CALIFORNIA: FINDINGS USING LINKED ADMINISTRATIVE DATA (May 2002), available at <http://cssr.berkeley.edu/childwelfare/researchdetails.asp?name=youth>.

41. CAL. WELF. & INST. CODE §§ 366.21(f), 16501.1(f)(14) (West 2004).

42. HEALTH, EDUC. & HUMAN SERVS. DIV., U.S. GEN. ACCOUNTING OFFICE, FOSTER CARE: EFFECTIVENESS OF INDEPENDENT LIVING SERVICES UNKNOWN, PUB. NO.

- NOTES GAO/HEHS-00-13 (Nov. 1999), *available at* [www.gao.gov/new.items/he00013.pdf](http://www.gao.gov/new.items/he00013.pdf).
43. *See* [www.dmh.cahwnet.gov](http://www.dmh.cahwnet.gov).
44. Medi-Cal Specialty Mental Health Services Reports are available at [www.dmh.ca.gov/SADA/default.asp](http://www.dmh.ca.gov/SADA/default.asp).
45. California Department of Education reports are available at [www.cde.ca.gov/ds/](http://www.cde.ca.gov/ds/).
46. *See* California Department of Education Reports, *supra* note 45.
47. *See* <http://ca.rand.org/stats/education/education.html>.
48. NAT'L CTR. FOR STATE COURTS, CALIFORNIA COURT IMPROVEMENT PROJECT REPORT (Apr. 1997), *available at* [www.abanet.org/ftp/pub/child/carpt.txt](http://www.abanet.org/ftp/pub/child/carpt.txt).
49. CAL. STDS. JUD. ADMIN. § 24.5.
50. *See supra* note 2. Permanency by the Numbers: Improving Dependency Caseflow Management Through Data Driven Strategies, a conference presented by the National Center for Adoption Law and Policy at Capital University Law School and the Pew Commission on Fostering Results, Oct. 2004, also provided a venue for information exchange on the development of dependency measures.
51. Information by event gives, for example, a count of the number of hearings resulting in termination of parental rights. Information by case and cohort gives, of all cases filed during a specified time period, the percentage of cases in which parental rights were terminated as of a specified date.
52. *See* BUILDING A BETTER COURT, *supra* note 4, at 20.
53. *Id.* at 53. *Building a Better Court* does not recommend the use of a case management system for collecting all performance-measure data.
54. COURT STATISTICS REPORT, *supra* note 17, at 58.3.
55. The AOC Collaborative Courts Web site, [www.courtinfo.ca.gov/programs/collab/](http://www.courtinfo.ca.gov/programs/collab/), defines collaborative courts.

# The Expanding Role of the Juvenile Court in Determining Educational Outcomes for Foster Children

The juvenile court system has not been a good parent. More than 500,000 children nationwide are in foster care.<sup>1</sup> Approximately 20,000 of those children age out of the system every year.<sup>2</sup> A review of studies tracking the educational outcomes of foster children reveals that these children often have serious academic deficiencies. For example, depending on the research study, 26 to 40 percent of foster children repeat one or more grades, and 30 to 96 percent are below grade level in reading or math.<sup>3</sup> High school graduation rates vary between 20 and 63 percent.<sup>4</sup> By contrast, 84 percent of children in the general population graduate from high school.<sup>5</sup> Earning a high school diploma makes a real, long-term difference in the lives of disadvantaged children; without it, they leave care poorly equipped to cope with the challenges they will face as young adults living on their own.<sup>6</sup>

Former foster children have expressed dissatisfaction with the educational services they received while in the system. For example, Roberta A., who attended nine different schools while in foster care, remembers being in honors classes before entering the system but ending up with assigned worksheets and busywork below her educational level while attending an alternative education program. Iisha B., who lived in a group home, says she was a 10th grader doing 4th-grade level work. Jeff E., who also lived in a group home, wanted to be a biologist but says he did not get the upper-level science classes he needed. Jennifer M., a former foster youth who had more than 20 placements, says she loved math but believes that her skill level dropped the longer she stayed in the system.<sup>7</sup>

## THE CURRENT SYSTEM

Historically, judges, advocates, and placing agencies have paid little attention to the educational services that children in their caseloads receive.<sup>8</sup> Training on how to advocate in the educational system on behalf of foster children has been virtually nonexistent for social workers, probation officers, and substitute care providers, such as group homes and foster parents.<sup>9</sup> Few requirements are placed on substitute care providers to ensure proper educational involvement and support for children in their care. And though attorneys

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Children in foster care often face a cadre of challenges that hinder their ability to succeed academically. This article reviews the literature on educational outcomes for foster children and discusses those challenges, arguing that shortcomings in training, advocacy by the courts and related institutions, and systemwide coordination impede educational achievement. The article also reviews new legislative initiatives and the expanding role of the juvenile courts in matters affecting the education of foster children. Using San Diego County as an illustration, it concludes that greater collaboration among the courts, schools, placing agencies, and care providers will help improve educational outcomes for foster children. ■

representing children may become experts in juvenile court practice, they are often unfamiliar with the protections afforded to children under education laws, such as those supporting school stability or special education.<sup>10</sup> This lack of knowledge is significant in that the educational experiences of most children in foster care are negatively affected by placement changes, and anywhere between 30 and 41 percent of children in foster care receive some sort of special educational services.<sup>11</sup>

The complete consequences of neglecting the educational needs of foster children are not precisely known because little data in this area are collected or maintained by child welfare systems.<sup>12</sup> As a result, the mandated health and education passport<sup>13</sup> for children in care generally contains little, if any, educational information.<sup>14</sup>

When asked why more attention is not placed on education, child welfare professionals generally respond, "Because education is the school's job."<sup>15</sup> With social workers and advocates focused primarily on family reunification and permanency planning, the educational progress of foster children has simply not received adequate attention.

Multiple changes in placement and the lack of advocacy on behalf of these children take a toll on their chances for academic success. Two case scenarios illustrate some of the obstacles that directly affect the educational progress of foster children:

- Ten-year-old Mary G. was living in a foster home and enrolled in the local public school, where she was assessed for special educational services. It was determined that she qualified for adaptive physical education, resource help, and speech therapy; an Individualized Education Program (IEP)<sup>16</sup> outlining these services was developed for her. Her disabling condition was listed as "learning handicapped." No behavior problems were indicated in the classroom. Two months later, Mary was moved to a group home in a different school district ostensibly because of behavior problems in the foster home. A new IEP was immediately developed, and she was placed in the group home's on-site school.

No services were included. Her disabling condition was also changed to "emotionally disturbed." It was later learned that her prior educational information did not transfer with her, and that the surrogate parent who consented to the reassessment and signed Mary's new IEP had never met her, had never spoken to anyone about her, and had not attended her IEP meeting.

- Seventeen-year-old Ryan D. experienced multiple changes in placement while in foster care. He had attended more than six different high schools. While in his last group home, Ryan was told that he had earned only 12 credits toward graduation, yet 44 were required. Within months he would turn 18 and be removed from his group home. Ryan's behavior in the group home was also problematic. He felt depressed, angry, and hopeless about his future.

#### EFFECTS OF MULTIPLE PLACEMENT CHANGES ON EDUCATIONAL SUCCESS

Changes in placement that result in multiple school transfers hinder the ability of foster children to succeed academically. In a real way, these children fall through the cracks. When school changes occur, education records do not always transfer in a complete or timely manner; meanwhile the child stays out of school for days or weeks at a time or is placed in inappropriate classes while waiting for the school to receive the records. Sometimes a child will move so often that his or her records are lost or misplaced, causing the child to lose credits or to repeat classes. In some cases, no one formally withdraws the child from the previous school, with the result that the child appears truant and his or her grades are lowered. Some of these children have even been referred to school attendance review boards.<sup>17</sup>

In one study, 42 percent of the foster children surveyed indicated that they had experienced delays in school enrollment while in foster care. The delay was often attributed to lost or misplaced school and immunization records. Of those children, more than half



said the delay resulted in nonattendance at school for anywhere from two to four weeks.<sup>18</sup> Another study, administered over a 10-week period, showed that 3 out of 31 group-home children had waited more than 20 days before entering school, and that 10 attended no school at all during the full 10-week study period.<sup>19</sup>

School mobility, even without the complications of out-of-home placement, is negatively related to school difficulties. One study shows that, by 4th grade, mobile students are an average of four months behind their classmates on standardized tests and, by 6th grade, are as much as one year behind.<sup>20</sup> In another study, students who had changed schools at least six times between 1st and 12th grades were 35 percent more likely to fail a grade than students who didn't move or had moved just a few times during the period.<sup>21</sup> Multiple changes in school placement during high school can significantly lower the student's chances for graduation.<sup>22</sup>

Multiple school transfers can affect foster children's ability to access services available to other children. For example, children who undergo transfers often are not evaluated for or do not access special school services such as 504 plans,<sup>23</sup> special education programs, or gifted and talented programs. By the time teachers begin to identify and respond to specific academic deficits or strengths, the child may have moved to a different school.<sup>24</sup>

Multiple changes in school placements are also frustrating for children who want to participate in extracurricular school activities. For example, many youth want to play on high school sports teams but end up missing either all or part of the season because of a new placement. Foster children complain about missing school friends and teachers, as well as the difficulty of constantly adjusting to new teachers, classes, and friends.<sup>25</sup> Sadly, children in foster care are not often given the opportunity to fulfill their dreams or have a sense of normalcy in their lives.

#### LACK OF ADVOCACY ON BEHALF OF FOSTER CHILDREN

Inattention to the educational needs of foster children, coupled with a subsequent failure in advocacy

by those involved in their lives, has fostered myriad problems for these children.

As discussed above, the available research reveals that far too many foster children achieve below grade level in reading or math and fail to graduate from high school. It may be true that a child's experience before entering foster care is partly to blame for these educational concerns.<sup>26</sup> But this condition also persists because social workers, care providers, attorneys, and other advocates have paid inadequate attention to the child's educational needs and often lack the training to advocate effectively. While a child is in foster care, often no one pays consistent attention to the child's educational development. Children placed in alternative education programs either have no one representing their educational interests or are represented by district-appointed surrogate parents who fail even to meet them or to review their educational records before making decisions for them. Finally, a child's social worker or attorney frequently fails to attend IEP team meetings or other important school conferences.

Children placed in large group homes with associated or on-site schools are often required to attend those schools despite previous successes in regular public school placements.<sup>27</sup> These alternative education programs tend to be nonpublic<sup>28</sup> or juvenile court schools.<sup>29</sup> Youth who attend these types of programs miss out on regular high school experiences and often cannot access the continuum of comprehensive educational services available at the local school campus. Though many group-home children require alternative school settings, many others placed there do not.

Furthermore, a nonpublic school placement is among the most restrictive of educational programs. It is designed to serve children who cannot function in a regular public school environment. Nonpublic schools tend to be separated from the regular public school campus and located either on the grounds of the group home or nearby. Placement in these programs is normally the result of an IEP team decision. But many children who are not eligible for special education services (and thus without IEPs)

or for whom eligibility is debatable end up placed in nonpublic schools.<sup>30</sup> In addition, some children who have been found appropriately eligible for special education services are inappropriately placed in nonpublic schools, which may be more restrictive than necessary. Few children enrolled in associated or on-site schools are integrated into the public school for any part of the day.<sup>31</sup>

Few advocates raise concern about the appropriateness of an educational placement. The lack of training and advocacy skills among those involved in the lives of these children compounds the problem of inattention, with the effect that advocacy for children in the system is inadequate overall.

Two complementary changes can markedly improve the situation in California. First, legislative and other initiatives have already taken place and are beginning to change the educational landscape for foster children. Second, some jurisdictions have already seen improved advocacy and interagency coordination among the courts, social services, probation, substitute care providers, and schools. The concluding sections of this article highlight these developments as they occurred in San Diego County and show that they are vital to the provision of appropriate educational services for foster children.

## RECENT PUBLIC AND PRIVATE INITIATIVES

Federal, state, and private initiatives begun in the last decade focus on improving educational outcomes for foster children.

### ADOPTION AND SAFE FAMILIES ACT

The federal Adoption and Safe Families Act regulations, which took effect March 2000, require states to undergo child and family service reviews. These federal reviews consider seven general outcomes related to child safety, permanency, and well-being in determining a state's overall performance in child protection cases. One outcome to be measured is whether children receive appropriate services to meet their educational needs. States risk losing federal

funds if they are not achieving these outcomes, including meeting the educational needs of children in care.<sup>32</sup>

### FAMILY TO FAMILY INITIATIVE

The *Family to Family* initiative is rapidly expanding to cities across the country. Designed in 1992 by the Annie E. Casey Foundation and child welfare leaders, the initiative promotes significant reform by urging the development of a family-centered, neighborhood-based foster-care system. Cities participating in the *Family to Family* initiative have committed themselves to the following outcomes:

- fewer children in institutional and congregate care
- shift of resources from congregate and institutional care to family foster care and family-centered services across all child- and family-serving systems
- shortened stays in out-of-home placement
- more planned reunifications
- fewer reentries into care
- fewer placement moves experienced by children in care
- more siblings placed together in the number of children placed away from their own families<sup>33</sup>

Success in any of these outcomes should help reduce the mobility of foster-care children among schools and have a corresponding positive effect on educational achievement.

### McKINNEY-VENTO HOMELESS ASSISTANCE ACT

The 2001 reauthorization of the McKinney-Vento Act, part of the federal legislation known as "No Child Left Behind," provides significant protections for homeless children and youth.<sup>34</sup> One statutory definition of "homeless children and youths" includes those who are "living in emergency or transitional shelters" or "awaiting foster care placement."<sup>35</sup> Under this definition, foster children who are initially detained or have been moved and are awaiting

a permanent placement should receive protections under the act. These protections require local school districts to do the following:

- To the extent feasible, permit the child to attend his or her school of origin (school where last enrolled or school attended when permanently housed) until the end of any academic year in which the child moves into permanent housing; or permit the child to enroll in any public school that other students living in the same attendance area are eligible to attend. School placement decisions must be made on the basis of the child's "best interest."<sup>36</sup>
- Provide or arrange for transportation to and from the school of origin when the school is within the district. When the child moves to a different district, the act requires the new district and the district of origin to agree on a method for sharing transportation, responsibility, and costs.<sup>37</sup>
- Designate an appropriate staff person as a liaison to assist homeless children. Among other things, the liaison must ensure that homeless students are enrolled in, and have full and equal opportunity to succeed in, schools in the district.<sup>38</sup>
- Immediately enroll the homeless child. This is required even if the child is unable to produce records normally required for enrollment, such as previous academic records, medical records, proof of residency, or other documentation.<sup>39</sup>
- Institute a process to promptly resolve disputes. Pending resolution of a dispute about school placement, the district must immediately enroll the child in his or her school of choice.<sup>40</sup>

Recent nonregulatory guidance from the U.S. Department of Education confirms that children who are "awaiting foster care placement" are considered homeless and eligible for McKinney-Vento services. Children who are already in foster care, on the other hand, are not considered homeless under the act. The guidance suggests that school district liaisons confer and coordinate with local public social

service agency providers in determining how best to assist homeless children and youth who are awaiting foster-care placement.<sup>41</sup>

#### CALIFORNIA INITIATIVES

In California, the Legislature contracted with the American Institutes for Research (AIR) for three research reports—issued in 1998,<sup>42</sup> 2001,<sup>43</sup> and 2003<sup>44</sup>—that focused on nonpublic school placements and funding and the policies and procedures affecting the educational placement of group-home children. These reports led to compelling recommendations to the Legislature and state agencies on improving educational outcomes for foster children. Among other things, AIR has recommended that California

- improve its interagency coordination across local education, social services, mental health, and probation agencies as this coordination pertains to the provision of appropriate education services for foster children;<sup>45</sup>
- develop an independent oversight board at the state and county level, focusing on ensuring that the work of those agencies providing education services are meeting the needs of children in foster care;<sup>46</sup>
- develop a statewide data system that can be easily and quickly accessed by group-home and education authorities across the state;<sup>47</sup>
- expand the California Foster Care Ombudsman Office to include educational concerns under its purview;<sup>48</sup> and
- clearly define roles and unambiguously assign ultimate responsibility for the education of children in foster care to the Department of Education and its county and local agencies.<sup>49</sup>

Some of these recommendations have resulted in legislative change (as described later), but others remain to be addressed.

In addition, the 1998 California Budget Act expanded the Foster Youth Services program (FYS),

an education-based program that provides support to enhance the success of group-home children in school.<sup>50</sup> The local county office of education or school district operates FYS. One of the core elements of FYS is interagency collaboration. FYS providers work with social workers, probation officers, group-home staff, school staff, and community service agencies to train staff, as well as to influence and support school success. Currently, 53 California counties have FYS coordinators, and the goal is to expand this program to all 58 counties.

Effective January 1, 2004, the Governor of California approved Assembly Bill 490,<sup>51</sup> a far-reaching bill that requires child welfare, probation, schools, and the juvenile courts to work together to improve educational outcomes for children in care. Among other things, the bill mandates the following:

- All pupils in foster care must have a meaningful opportunity to meet the challenging state pupil achievement standards to which all pupils are held.
- County placing agencies must promote educational stability by considering in placement decisions the child's school attendance area.
- A foster child must be permitted to remain in his or her school of origin for the duration of the school year when a placement changes if that is in the child's best interest.
- A comprehensive public school must be considered the first school placement option for foster children.
- Local educational agencies must designate a staff person as a foster-care education liaison to ensure proper placement, transfer, and enrollment in school for foster children.
- The county social worker and probation officer must notify the local educational agency when the child is leaving the school.
- A school district must deliver the child's education information and records to the next educational placement within two days of receiving a transfer request from a county placing agency.

- A foster child must be immediately enrolled in school even if all the typically required school records, immunizations, or school uniforms are not available.
- A foster child not must be penalized for absences resulting from placement changes, court appearances, or related court-ordered activities.

If done effectively, implementation of this bill will have a powerful impact on enhancing the educational outcomes for children in the foster-care system.

### *The Expanding Role of the Juvenile Court*

The California juvenile courts have assumed a greater role in ensuring that the educational needs of foster children are addressed. Effective January 1, 2001, section 24 of the California Standards of Judicial Administration acquired new subsections (g) and (h), which provide guidance to juvenile courts on the educational rights of children. Among other things, they require the juvenile court judge to

- (1) [t]ake responsibility, with the other juvenile court participants at every stage of the child's case, to ensure that the child's educational needs are met... [;]
- (2) [p]rovide oversight of the... agencies to ensure that a child's educational rights are investigated, reported, and monitored... [;]
- (3) [r]equire that court reports, case plans, assessments, and permanency plans... address a child's educational entitlements and how those entitlements are being satisfied, and contain information to assist the court in deciding whether the right of the parent or guardian to make educational decisions for the child should be limited....<sup>52</sup>

In addition, the Judicial Council of California has adopted rules and forms concerning the education of children in foster care.<sup>53</sup> Some juvenile courts have assembled multidisciplinary task forces to focus attention on ways their counties can improve educational outcomes.<sup>54</sup>

Since January 1, 2003, the juvenile courts have been required to appoint a "responsible person" who has the legal authority to make educational decisions for a child when the court has removed this authority from the parents.<sup>55</sup> Similarly, social service and

probation agencies are required to consider whether or not to limit the authority of the parent or guardian to make education decisions for the child and, if so, whether there is a responsible person available to assume this role.<sup>56</sup> In most cases, the person to be appointed will likely be the foster parent or relative caretaker. When those persons are not available, juvenile courts should look to appropriate noncustodial relatives, nonrelative extended family members, mentors, and Court Appointed Special Advocates (CASAs). In cases where the court cannot identify a responsible person to advocate for a child and the child may be eligible for special educational services or already has an IEP, the court must then refer the child to the local school district for appointment of a surrogate parent. Recent amendments to California law governing the appointment of district surrogates now require them to meet the child and review the child's educational records.<sup>57</sup> The Judicial Council of California has promulgated a form to assist the courts with the implementation of these laws.<sup>58</sup>

### *Developments in San Diego County*

Systemic reform begins with the vision and strong support of the juvenile court presiding judge. San Diego County has been fortunate to have not only strong support from the bench but also a powerful working relationship with schools, social services, and probation, as well as with other public and private agencies. This close collaboration has significantly enhanced educational services and outcomes for foster children in this county.

In 1999, the supervising dependency court judge, along with a group of representatives from the children's law office, social services, and schools, raised concern about the education that 80 group-home children were receiving from their on-site nonpublic school. There was concern that the nonpublic school lacked sufficient curriculum, educational materials, and supplies. Textbooks were outdated, computers were old and in disrepair, and there was little in the way of educational software. Some believed the school lacked qualified teachers and aides; there was a reported lack of supervision as well as alleged

inappropriate discipline. Kids were bored, unchallenged, and regularly disruptive in the classroom. For two years, this group worked to improve the nonpublic school. Finally succumbing to pressure, the school closed its doors. With only eight weeks' notice, the local school district took over. School staff painted the classrooms; purchased new furniture, textbooks, computers, and supplies; enhanced the curriculum; recruited skilled, motivated teachers; and opened Alta Vista Academy.

Since that time, students have progressed academically and behaviorally. Several are now attending the local comprehensive public school campus. Many others are moving to lower levels of care, such as foster homes, or are being returned to their parents. The group home reports that the children's behavior has improved significantly. And, finally, district-wide student test results in writing, reading, and math are among the top in the district. Last year the school received the "Golden Bell Award" for excellence from the California School Board Association (CSBA). This annual award recognizes outstanding educational programs around the state. The success of Alta Vista Academy has motivated other school programs around the county to improve their efforts on behalf of foster children.

The presiding judge of the San Diego County juvenile court, along with members of the county's board of supervisors, has also created the San Pasqual Academy, a state-of-the-art residential education program serving foster youth aged 14 to 18. Only youth seeking placement in the academy are considered, and successful candidates are selected after a careful review by the residential provider, social services, and the school. Most of the youth selected are in a plan of long-term foster care in which reunification with family members is no longer an option. Younger siblings of enrolled youth are also carefully considered. The students live in cottages staffed by house parents. The academy's high school has developed an exceptional education program that offers a full array of academic curricula. If the academy does not offer a class requested or needed by a youth, he or she attends the local community college. As part

of the school experience, students are encouraged to participate and become involved in extracurricular activities, such as intramural and interscholastic athletics, student government, cheerleading, drama, and school clubs. All seniors are required to complete a senior portfolio.<sup>59</sup> Through the San Diego Workforce Partnership,<sup>60</sup> students are given opportunities to develop work experience both on and off campus. In the academy's third year of operation, over 95 percent of its departing seniors received a high school diploma.

### RECOMMENDATIONS FOR REFORM: LESSONS FROM SAN DIEGO COUNTY

Over the past five years the San Diego County juvenile court, working closely with its partners, spearheaded a number of efforts aimed at improving educational outcomes for foster children. Below are examples of what the court has done, or is doing, to encourage and develop collaboration among all those who work to improve the lives of these children. They are offered here to policymakers as recommendations for reform.

- 1. Under the leadership of the juvenile court, create a multidisciplinary education task force to focus exclusively on enhancing education outcomes for foster children in your county.** Involve leaders from your local FYS program (see below), schools, social services, probation, children's attorneys, CASAs, and substitute care providers, as well as current and former foster children, in this effort. As part of the work of the task force, members should visit local educational programs that serve foster children, conduct focus groups with children in those programs, and talk with care providers seeking their views on how to support foster children in education. In San Diego County, all work in the area of education reform is either initiated by or reported to the juvenile court education task force. Making these efforts will help inform task force members on what needs to be done, and what is being done, to enhance education outcomes for foster children in your county.
- 2. Provide systemwide training on education laws and outcomes for foster children, as well as the roles and responsibilities of juvenile court judges and attorneys, placing agencies, substitute care providers, and schools.** Early on in the San Diego County court's efforts, the local Foster Youth Services program hosted a forum, inviting stakeholders to come together to address the educational needs of foster children. The presiding juvenile court judge, county school superintendent, and a member of the local board of supervisors hosted the forum. Over the last few years training has been continually provided across all disciplines to help ensure that system participants understand education laws and the importance of making education a priority. Last year, the presiding judge closed the dependency courts for an afternoon and required attorneys, judges, and others to participate in training related to the education of foster children.
- 3. Work closely with your local FYS program.** The goal of FYS is to improve policies and practices affecting the education of children in group-home care. With the support and involvement of its advisory board, FYS staff has developed an educational database that currently contains more than 8,500 educational records of foster children.<sup>61</sup> The database is Web based and accessible to social services, probation, juvenile courts, attorneys, and substitute care providers. It receives weekly downloads from CWS/CMS to include health, education, and placement information. Unlike the CWS/CMS system, which is closed, the database allows the multiple agencies with responsibilities to specific children secured access to relevant student information. It has also been a mechanism by which the juvenile court informs agencies as to who holds education rights for children in its care. FYS is also acting as an educational liaison for group-home children by communicating with, and linking together, group-home providers, schools, social services, and probation. To support these efforts, a juvenile court order allows these agencies to share educational information with each other.

**4. Develop county and court protocols that help ameliorate the effects of changes in school placements.** For example, in San Diego County, FYS staff and the advisory board developed an inter-agency agreement between schools, social services, probation, and group homes. Based on current law, the interagency agreement defines the role and responsibilities of each of these agencies. The agreement specifically details how educational information should be obtained and transferred and how schools should be notified of new students placed in group-home care. These protocols help each agency understand not only its own specific duties and tasks but also the duties and tasks of its agency partners. This results in a more comprehensive, efficient, and coordinated effort on behalf of children.

**5. Using the law as your framework, work with placing agencies to develop internal policies and procedures that clearly delineate the responsibilities and duties of workers.** At a minimum, these policies and procedures should

- a. inform workers of the educational rights of foster children, as well as the workers' responsibility, in appropriate circumstances, to determine whether the educational rights of parents or guardians should be limited and, if so, who should be appointed to assume those rights;
- b. promote school stability whenever possible;
- c. require a complete health and education summary for every child, as well as sufficient education information in each court report;
- d. if a transfer should occur, require that the child be checked out of school and ensure that the old school transfer education records to the new school in a timely manner; and
- e. urge workers to become more involved in advocating on behalf of children in educational settings.

Last year, the San Diego County Health and Human Services Agency (HHSA) distributed a special notice to all its workers, informing them of

laws pertaining to the education of foster children as well as of new, required policies and procedures that support the educational success of children in their caseloads. For example, FYS and HHSA have developed protocols and forms to assist with the proper withdrawal of children from school to prevent the problem of lowered grades when schools are not informed that a child has changed a school placement. An HHSA manager is now requiring that all new applications of children being considered for group-home placement include complete health and education information and that all group-home providers help children with homework and support academic success. And, more recently, HHSA has assigned internal education liaisons in all six regions<sup>62</sup> of San Diego County to work closely with FYS liaisons and foster-youth school district liaisons so that all liaisons become more informed of school services in their areas and are better able to provide support to social workers.

These activities, along with the development of educational programs such as the San Pasqual and Alta Vista academies, have resulted in better outcomes for San Diego County's foster youth. Indeed, the high school completion rate for foster youth in San Diego County has increased from a low 51 percent in 1998 to nearly 75 percent in 2004.<sup>63</sup>

Because of the innovations in San Diego County, there are happy endings to the two scenarios described earlier in this article. Mary's attorney intervened and successfully advocated for the revision of her IEP to include appropriate services, including a change from her previous designation as emotionally disturbed, that more accurately reflect her neurological deficits. She was also returned to public school, where she has succeeded academically. Concerned for Ryan's situation, the educational liaison for the local FYS program searched for every bit of high school seat time she could find in his school records and ultimately identified 24 credits. Ryan was immediately enrolled in adult education courses, which he took simultaneously while attending his last high school. He graduated in an emotional ceremony in front of his supporters and peers.

The education of foster children is finally beginning to receive the attention it has long deserved. San Diego County's experience shows the progress possible when juvenile courts take a leadership role in bringing stakeholders together to improve educational outcomes. Visionary and capable leadership, coupled with highly functional collaborative teams, can ensure that all children in foster care have the opportunity to develop the skills necessary to meet the state academic achievement standards to which all students are held. The California court system can become better parents. Its children deserve no less.

## NOTES

1. Children's Bureau, U.S. Dep't of Health & Human Servs., National Adoption and Foster Care Statistics, at [www.acf.hhs.gov/programs/cb/dis/afcars/publications/afcars.htm](http://www.acf.hhs.gov/programs/cb/dis/afcars/publications/afcars.htm).
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3. ELISABETH YU ET AL., IMPROVING EDUCATIONAL OUTCOMES FOR YOUTH IN CARE: A NATIONAL COLLABORATION, at vii (Child Welfare League of Am. Press 2002).
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6. See THOMAS PARRISH ET AL., AM. INSTS. FOR RESEARCH, EDUCATION OF FOSTER GROUP HOME CHILDREN, WHOSE RESPONSIBILITY IS IT?: STUDY OF THE EDUCATIONAL PLACEMENT OF CHILDREN RESIDING IN GROUP HOMES (FINAL REPORT) [hereinafter GROUP HOME CHILDREN] 1-4 (2001) (submitted to Cal. Dep't of Educ. 2001), available at [www.csef-air.org/publications/related/LCI\\_final.pdf](http://www.csef-air.org/publications/related/LCI_final.pdf).
7. Mary Curran-Downey, *How It Looks From Inside Foster Care*, SAN DIEGO UNION-TRIBUNE, Feb. 29, 2000, at B-1.
8. GROUP HOME CHILDREN, *supra* note 6, at 1-1; BURLEY & HALPERN, *supra* note 4, at 1.
9. YU ET AL., *supra* note 3, at 18.
10. See McKinney-Vento Homeless Assistance Act, 42 U.S.C. §§ 11431-11435 (2000 & Supp. 2004) (as amended by the McKinney-Vento Homeless Education Assistance Improvements Act of 2001, Pub. L. No. 107-110, §§ 1031-1034, 115 Stat. 1989 (2002)); Individuals With Disabilities Education Act, 20 U.S.C. §§ 1400-1481 (2000 & Supp. 2004); Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2000); Act of Oct 12, 2003, ch. 862, 2003 Cal. Stat. {\_\_\_\_}, available at [www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_0451-0500/ab\\_490\\_bill\\_20031012\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0451-0500/ab_490_bill_20031012_chaptered.pdf).
11. YU ET AL., *supra* note 3, at 5.
12. For example, the mandatory California case management system (CWS/CMS) used by social workers has very few data fields requiring educational information, and those fields are often not completed.
13. All children placed in foster care in California must have a case plan that includes a summary of the health and education information or records of that child. See CAL. WELF. & INST. CODE § 16010 (West 2004).
14. GROUP HOME CHILDREN, *supra* note 6, at 1-3, 3-1, 3-4.
15. *Id.* at 1-7.
16. Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1481 (2000 & Supp. 2004), every state that receives federal education funds is required to prepare an individualized educational program (IEP) for each student who qualifies for special education. The IEP is the central tool used by public schools to ensure that their disabled students receive a free appropriate public education (FAPE). The IEP reports on the child's current education performance and establishes annual and short-term objectives for improving that performance. It also describes any specially designed instruction and services that will enable the child to meet those objectives. *Id.* at § 1414(d). The school district is required to provide the services necessary to enable the child to meet his or her educational objectives. *Id.*
17. J.K. Slater & C.T. Smith, Cal. Dep't of Educ., *Meeting the Educational Needs of Foster Children in California: Strategies for Improving Academic Success* (1993), 27 HASTINGS CONST. L.Q. 4 (2000) (giving figures from a survey of school mobility among California foster-care youth). For the statutory basis of school attendance review boards, see CAL. EDUC. CODE §§ 48320-48324 (West 2004).
18. ADVOCATES FOR CHILDREN OF N.Y., INC., EDUCATIONAL NEGLECT: THE DELIVERY OF EDUCATIONAL



SERVICES TO CHILDREN IN NEW YORK CITY'S FOSTER CARE SYSTEM 36–37 (2000), [www.advocatesforchildren.org/pubs/FCrep7-11.doc](http://www.advocatesforchildren.org/pubs/FCrep7-11.doc).

19. GROUP HOME CHILDREN, *supra* note 6, at 1-7.

20. Linda Jacobson, *Moving Targets*, EDUC. WEEK, Apr. 4, 2001, at 32, [www.edweek.org/ew/articles/2001/04/04/29mobility.h20.html](http://www.edweek.org/ew/articles/2001/04/04/29mobility.h20.html).

21. David Wood & Neal Halfon, *Impact of Family Relocation on Children's Growth, Development, School Function, and Behavior*, 270 JAMA 1334, 1338 (1993).

22. Russell W. Rumberger & Katherine A. Larson, *Student Mobility and the Increased Risk of High School Dropout*, 107 AM. J. EDUC. 1 (1998); Kathleen McNaught, *Education Advocacy in Child Welfare Cases: Key Issues and Roles*, 21 ABA CHILD L. PRAC. 129, 134 (Nov. 2002); Jacobson, *supra* note 20, at 32–34.

23. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2000), is a civil rights statute protecting individuals with disabilities from discrimination in programs and activities that receive federal funds. A 504 plan is crafted for a student with substantial mental or physical impairments that limit one or more major life activities. The plan outlines special accommodations to the student's educational program and is designed according to individual need.

24. YU ET AL., *supra* note 3, at 5, 13; CTR. WITHOUT WALLS, *THE EDUCATIONAL NEEDS OF CHILDREN IN FOSTER CARE: THE NEED FOR SYSTEM REFORM* (1998), [www.advocatesforchildren.org/pubs/foster.doc](http://www.advocatesforchildren.org/pubs/foster.doc).

25. YU ET AL., *supra* note 3, at 13; Jacobson, *supra* note 20, at 32–34; ADVOCATES FOR CHILDREN OF N.Y., INC., *supra* note 18, at 42–43.

26. Jacobson, *supra* note 20, at 32–34.

27. A group home may not require placement of a youth in a nonpublic school that is owned and operated by that group home. CAL. EDUC. CODE § 56366.9 (West 2004).

28. A nonpublic school (NPS) is a private, alternative special education school available to a local educational agency and parents. An NPS contracts with the local education agency to provide programs for youth who generally cannot function in a regular public school. Youth are placed in these programs as a result of an IEP team decision. *See* CAL. EDUC. CODE §§ 56034, 56366.

29. A juvenile court school is a public alternative school that serves youth in juvenile halls, juvenile ranches, group

homes, and other institutional settings. *See* CAL. EDUC. CODE §§ 48645–48645.6. NOTES

30. GROUP HOME CHILDREN, *supra* note 6, at 3-26.

31. One explanation for the inappropriate placement of youth in nonpublic schools may be that, until recently, the state fully reimbursed local school districts their educational costs for group-home youth who attend nonpublic schools but offered little additional aid for public school placement of these same youth. In part because of this funding system, school administrators often supported placement in a nonpublic school. Group-home providers also tended to prefer placement in the associated or on-site school, particularly when the provider owned or operated that school. Fortunately, these funding provisions have been modified to eliminate any fiscal incentive to place youth in nonpublic schools. *See* Act of Aug. 11, 2004, ch. 216, 2004 Cal. Stat. {\_\_\_\_}, *available at* [www.leginfo.ca.gov/pub/03-04/bill/sen/sb\\_1101-1150/sb\\_1108\\_bill\\_20040811\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_1101-1150/sb_1108_bill_20040811_chaptered.pdf).

Although there are many excellent alternative education programs in California, concerns do exist regarding the quality of education some of them provide. One reason for concern is that the state's certification and monitoring processes for nonpublic schools have tended to focus on a program's *facility* and *access* to required curriculum standards but did not generally consider factors concerning the *quality* of the program. Youth complain that some alternative education programs are deficient in educational resources and curriculum. They also complain about the quality of teachers and contend that teachers fail to prepare them for higher education. On September 30, 2004, California Governor Schwarzenegger approved the Act of Sept. 30, 2004, ch. 914, 2004 Cal. Stat. {\_\_\_\_}, *available at* [www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_1851-1900/ab\\_1858\\_bill\\_20040930\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_1851-1900/ab_1858_bill_20040930_chaptered.pdf). Through its mandates, this act will significantly increase the monitoring and accountability of nonpublic school education by state and local educational agencies.

32. 45 C.F.R. §§ 1355.31–1355.37 (2003); McNaught, *supra* note 22, at 130.

33. Annie E. Casey Found., *Family to Family: Tools for Rebuilding Foster Care*, *available at* [www.aecf.org/initiatives/familytofamily/overview.htm](http://www.aecf.org/initiatives/familytofamily/overview.htm).

34. McKinney-Vento Homeless Education Assistance Improvements Act of 2001, Pub. L. No. 107-110, § 1032, 115 Stat. 1425, 1989 (2002) (codified at 42 U.S.C. §§ 11431–11435 (2000 & Supp. 2004)).

- NOTES
35. *Id.* § 11434a(2). Other definitions of *homeless children and youths* in section 11434a(2) include
- (A) ... individuals who lack a fixed, regular, and adequate nighttime residence ... ; and
- (B) ...
- (i) children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative accommodations; [or] are abandoned in hospitals ... ;
- (ii) children and youths who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings ... ;
- (iii) children and youths who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and
- (iv) migratory children ... who qualify as homeless for the purposes of this part because the children are living in circumstances described in clauses (i) through (iii).
36. *Id.* § 11432(g)(3).
37. *Id.* § 11432(g)(1)(J)(iii).
38. *Id.* § 11432(g)(6).
39. *Id.* § 11432(g)(3)(C)(i).
40. *Id.* § 11432(g)(3)(E).
41. The full text of the guidance can be obtained on the Department of Education Web site at [www.ed.gov/policy/elsec/guid/list.jhtml](http://www.ed.gov/policy/elsec/guid/list.jhtml).
42. THOMAS PARRISH ET AL., SPECIAL EDUCATION: NON-PUBLIC SCHOOL AND NONPUBLIC AGENCY STUDY (Am. Insts. for Research 1998).
43. GROUP HOME CHILDREN, *supra* note 6.
44. THOMAS PARRISH ET AL., POLICIES, PROCEDURES, AND PRACTICES AFFECTING THE EDUCATION OF CHILDREN RESIDING IN GROUP HOMES (FINAL REPORT) (Am. Insts. for Research 2003) [hereinafter POLICIES, PROCEDURES, AND PRACTICES].
45. GROUP HOME CHILDREN, *supra* note 6, at 5-2.
46. POLICIES, PROCEDURES, AND PRACTICES, *supra* note 44, at VI-6.
47. GROUP HOME CHILDREN, *supra* note 6, at 5-2.
48. POLICIES, PROCEDURES, AND PRACTICES, *supra* note 44, at VI-5.
49. *Id.* at VI-7.
50. See CAL. EDUC. CODE §§ 42920–42925.
51. Act of Oct. 12, 2003, ch. 862, 2003 Cal. Stat. {\_\_\_\_}, available at [www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_0451-0500/ab\\_490\\_bill\\_20031012\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0451-0500/ab_490_bill_20031012_chaptered.pdf).
52. CAL. STDS. JUD. ADMIN. § 24(h)(1)–(3).
53. CAL. R. CT. 1456(c), 1499; Judicial Council of Cal. Form JV-535 (*Order Limiting Parent's Right to Make Educational Decisions for the Child and Appointing Responsible Adult as Educational Representative—Juvenile*) (2004); Judicial Council of Cal. Form JV-536 (*Local Educational Agency Response to JV-535—Appointment of Surrogate Parent*) (2004). These rules and forms have been amended to reflect changes in the law.
54. For example, task forces have been formed in Los Angeles, Orange County, and San Diego.
55. CAL. WELF. & INST. CODE § 361 (West 2004).
56. *Id.* §§ 358.1, 366.1, 727.2.
57. CAL. GOV'T CODE § 7579.5 (West 2004).
58. Judicial Council of Cal. Form JV-535 (2004).
59. The senior portfolio includes an extensive written research paper. Students are also required to present their work orally.
60. Created under a Joint Powers Agreement by the City and County of San Diego, the San Diego Workforce Partnership coordinates job training and employment programs. At San Pasqual Academy, the Partnership links with Casey Family Programs, Access, Inc., Junior Achievement, and Creative Learning Systems to create a comprehensive work readiness program. For more information, see [www.sandiegoatwork.com](http://www.sandiegoatwork.com).
61. Approximately 8,000 youth are in the San Diego child dependency system. The information contained in the database also includes delinquency youth who are in foster care.
62. The San Diego Health and Human Services Agency has organized itself into six separate geographical regions; central, north central, north inland, north coastal, south, and east.
63. Jennifer Vigil, *Fostering New Lives*, SAN DIEGO UNION-TRIBUNE, Aug. 16, 2004, available at [www.signonsandiego.com/uniontrib/20040816/news\\_1m16foster.html](http://www.signonsandiego.com/uniontrib/20040816/news_1m16foster.html).

# Effective Management of Parental Substance Abuse in Dependency Cases

The primary goal of the child protection and juvenile dependency system is to make sure that each child is placed in a safe, permanent home as quickly as possible. Children often come into the system because of their parents' drug or alcohol addiction. The parents' substance abuse problems must be remedied before children can be reunified with the family. If this goal is not attainable, the court needs to determine that fact early enough in the processing of the case so that the child can actually be adopted while still young enough and psychologically healthy enough to ensure the likelihood of adoption.

Child protection statutes reflect this goal, but parental substance abuse is difficult to treat. A comprehensive management program to assist the court in complying with statutory timelines is essential. Parents must be given a structured approach to overcoming their substance abuse, and courts must be provided specific information about parental compliance with reunification orders. The court can then proceed with timely permanent placement: reunification for children with recovering parents and adoption for children of noncompliant parents.

## THE CONNECTION BETWEEN PARENTAL SUBSTANCE ABUSE AND DEPENDENCY

"All children wake up in a world that is not of their own making, but children of alcoholics and other drug-addicted parents wake up in a world that doesn't take care of them."<sup>1</sup> Indisputably child abuse and drug abuse are intertwined: "Children whose parents abuse alcohol and other drugs are nearly three times as likely to be abused, and more than four times as likely to be neglected, than children whose parents are not substance abusers."<sup>2</sup> According to national surveys, 40 to 80 percent of children who come to the attention of the child welfare system live with a substance-abusing parent.<sup>3</sup> To deal with this epidemic, courts must order treatment for all substance-abusing parents.

Parents are entitled to a finite statutory time, usually one year, to remedy their substance abuse problems in order to have their children returned. But courts do not always have accurate information about parental compliance with reunification orders because of ineffective management of these cases,

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Child protection petitions present a particular challenge when there is parental drug and alcohol addiction. The vast majority of juvenile dependency cases involve parental substance abuse. This article argues that the majority of dependency cases involving substance-abusing parents are mismanaged to poor results, often leaving children in foster care until the age of majority. It also discusses the developmentally damaging nature of foster care, the very institution we rely on to alleviate child abuse. And, finally, it proposes that well-managed substance abuse treatment is a pragmatic approach to these problems. Effective assessment and enrollment in treatment coupled with accurate reporting of parental compliance allow courts to ensure permanent placement within the

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one-year federal- and state-mandated time frames. Well-managed dependency cases improve outcomes by increasing the numbers of children both reunified and adopted. The added costs of providing drug treatment and case management are offset by savings from significantly shortened stays in foster care, which can result in both improved outcomes and more effective allocation of resources. ■

which can lead to prolonged foster-care stays for children while courts and social workers attempt to determine whether parents are progressing in sobriety and complying with court orders.

Effectively dealing with this primary problem means that treatment must be regular and organized, with daily-scheduled outpatient sessions, not weekly, voluntary self-help meetings. This presents a serious challenge under the current juvenile dependency system. According to a 1997 Child Welfare League of America survey of state child welfare agencies, 67 percent of the parents whose children were in the child protection system required substance abuse treatment services, but the agencies were able to provide treatment to only 31 percent of the families who needed it.<sup>4</sup> The survey further revealed that in states where treatment was available, a parent often had to wait a year to receive it.<sup>5</sup> Parents must be able to access treatment immediately if they are to “get clean and sober” and successfully reunify with their children within statutory time limits. Ordering drug treatment is futile if drug treatment services are not available; in such cases, through no fault of their own, parents are effectively forced to disobey the court order because they cannot find treatment. And, because the unavailability of drug treatment services renders the reunification order ineffective and unenforceable, juvenile courts are, in effect, acting as institutional enablers, unwittingly assisting the parent in prolonging his or her addiction. Ultimately, the greatest harm is to the children in these cases, who continue to bounce from foster home to foster home, waiting for their parents to recover so they can go home. The current system prolongs and reinforces parent-child separations and undermines the dignity and authority of the court.

## THE IMPACT OF FOSTER CARE ON A CHILD'S PSYCHOLOGICAL DEVELOPMENT

When a child is removed from his or her parent as a result of abuse or neglect, the child welfare system commonly turns to foster care as a temporary measure to ensure the child's safety. But, often, pre-permanency foster care is far from temporary. Despite the federal statutory timelines allowing up to 18 months for reunification,<sup>6</sup> in 2002 the average length of time a child remained in foster care was 32 months.<sup>7</sup>

### DISRUPTION OF ATTACHMENT TO PRIMARY CAREGIVER

Reducing the amount of time children remain in foster care is critical, because inevitably children left adrift in the system end up with psychological problems caused by these disruptions. Substantive research confirms the developmental importance of the child's psychological attachment to a primary caregiver, “the deep and enduring connection established between a child and caregiver in the first several years of life.”<sup>8</sup> For children, the primary function of attachment is to provide a safe environment that allows them to grow and develop as differentiated individuals.<sup>9</sup> A securely attached child has

a strong sense of trust, which will influence his or her future relationships. The early stage of attachment developed through physical contact between caregiver and infant enables the child to later feel capable of becoming autonomous from his or her primary caregiver.<sup>10</sup> The child can explore the environment with confidence because the attachment provides a “secure base” to which the child can return.<sup>11</sup> Without this base, a child lacks emotional stability and is not capable of taking the necessary risks for further cognitive and emotional development.<sup>12</sup>

If this attachment is broken, the child may face serious consequences throughout his or her development.<sup>13</sup> Disrupted attachment for children tends to manifest in antisocial behaviors; aggression; the inability to experience genuine trust, intimacy, and affection; and a lack of empathy and remorse.<sup>14</sup> This constellation of symptoms is considered a factor in the development of criminal behavior in other settings.<sup>15</sup> Research suggests a direct link between a person’s level of empathy and the propensity to commit a crime.<sup>16</sup> Indeed, in 1995, 17 percent of this country’s prison population consisted of former foster children.<sup>17</sup> It can be expected that many of those children suffered from problems characterized by a lack of empathy, resulting from foster-care experiences that were either too lengthy or included too many placement changes.

#### IMPAIRED ABILITY TO BOND OR CONNECT

Children also require stability and continuity in their care and relationships in order to grow and develop.<sup>18</sup> Foster care, however, is often characterized by frequent moves from placement to placement, which further impair the child’s ability to attach to a caregiver and develop normally.<sup>19</sup> A child placed in a foster home naturally attempts to attach to the foster parent. But if the child experiences a series of broken attachments caused by moves from one placement to another, the child’s attachments become “increasingly shallow and indiscriminate.”<sup>20</sup> These children “tend to grow up as persons who lack sustained warmth in their relationships.”<sup>21</sup>

When the juvenile dependency system fails to facilitate a child’s need to form and maintain secure attachments, the child gradually becomes averse to forming attachments with people because he or she expects that these attachments inevitably will be broken.<sup>22</sup> This has profound implications when the child leaves the foster-care system with an inability to form bonds and care for others, not just for the developing individual but also for society.

#### CHILD’S DEVELOPMENTAL STAGE AND TIME IN PLACEMENT

To fully comprehend the developmental impact of foster care on abused and neglected children, those involved in making placement decisions must understand that a child’s perception of time differs from an adult’s.<sup>23</sup>

Children do not measure time by a calendar; they have, as Goldstein et al. have noted, “their own built-in time sense, based on the urgency of their instinctual and emotional needs and on the limits of their cognitive capacities.”<sup>24</sup> “The younger the child, the shorter the time interval before a leave-taking will be experienced as a permanent loss accompanied by feelings of helplessness, abandonment, and profound deprivation.”<sup>25</sup> An infant is not capable of anticipating the future and so has no way of knowing whether he or she has been abandoned when the caregiver is absent.<sup>26</sup> “Emotionally and intellectually, an infant or toddler cannot stretch her waiting more than a few days without feeling overwhelmed by the absence of her parents.”<sup>27</sup> Only after the infant grows and learns that the caregiver will consistently return from brief absences does he or she become capable of anticipating the future and feel secure during short separations. And as children mature into adolescence, they are better able to tolerate separation from their parents because they have developed a greater capacity to retain memories and anticipate the future.<sup>28</sup>

It follows, then, that placement decisions need to reflect the child’s sense of time and thereby protect the child’s sense of security. This is most critical when the child is younger than 3 years old.<sup>29</sup> It

isn't just federal timelines that dictate how quickly a court needs to determine the child's long-term placement—it is also the need to protect the child's psychological well-being.

### AVOIDING OR REDUCING THE USE OF FOSTER CARE

Because pre-permanency foster care may be developmentally damaging to children, it is essential to explore all other alternatives before resorting to the use of foster care. Alternatives include

- thorough searches for relatives and family group conferences to identify appropriate placements within the extended family, and provision of stipends for the child's care during the placement;<sup>30</sup>
- family preservation programs to strengthen placements within extended families; and
- drug treatment programs that focus on the needs of the entire family and include placement of mothers and children together in secure settings.

All these approaches serve to avoid the negative effects of nonrelative foster placements for children by developing placements within extended families. When programs incorporating these approaches exist in the community, they may provide a viable alternative to nonrelative care.

Substance abuse treatment models that focus on treatment of the entire family do exist, but in small numbers. One of the most promising alternatives to foster care for these families is SHIELDS for Families in Los Angeles. SHIELDS has achieved great success in providing comprehensive services to families dealing with substance abuse. The program targets not only the substance-abusing parent but also other family members affected by the abuse, including drug-exposed infants and other siblings. The success of this program is extremely encouraging.<sup>31</sup>

A critical component of other promising programs is that children of the substance-abusing parent live in the treatment facility with their recovering parent; obviously such placement must be consistent with

a professional risk assessment for child safety. These models are highly beneficial because they allow the family to remain intact during drug treatment, thus promoting healthy parent-child attachment and avoiding the use of foster care. Parents attend parenting and child development classes to learn the skills they need to raise a healthy child. Additionally, the entire family receives structure and services to mitigate the damage of parental substance abuse.

### THE SAN DIEGO COUNTY EXPERIENCE—A CASE STUDY

Although foster care is not a preferred placement option, sometimes it is unavoidable. When it is the only viable alternative, the juvenile courts should take steps to minimize the developmental damage caused by out-of-home placement. The experience of the San Diego County dependency court's Recovery Project may offer guidance.

Applying the proposed reforms, San Diego County has virtually eliminated long delays to permanent placement. The increased use of family group conferences,<sup>32</sup> thorough family investigations, and intensive, court-monitored drug and alcohol treatment has lessened children's exposure to the psychological trauma of nonrelative care and lengthy placement in long-term foster care.

Prior to April 1998, approximately 80 percent of dependency cases in San Diego County involved alcohol or drug abuse by one or both parents.<sup>33</sup> Immediate and effective treatment was not available for parents, so the court extended deadlines for compliance with reunification plans. As a consequence, rather than providing prompt and definitive intervention, the previous system allowed families to drift for unacceptably long periods, discouraging parental rehabilitation and aggravating parent-child separations. San Diego County also was far from compliant with statutory time frames; statistics indicate it took more than 34 months to close 50 percent of the dependency cases.<sup>34</sup> That meant children and adolescents spent years in foster care. More than 50 percent of the children in foster care

had three or more changes in placement, causing them further trauma and psychological problems.<sup>35</sup>

On April 13, 1998, San Diego County's juvenile court implemented the Dependency Court Recovery Project (DCRP).<sup>36</sup> The primary goal of the project was to provide coordinated, comprehensive, and timely drug and alcohol services as a means of facilitating either reunification or permanency planning for families. Central to the project was the concurrent implementation of the Substance Abuse Recovery Management System (SARMS).

#### SARMS: SUBSTANCE ABUSE RECOVERY MANAGEMENT SYSTEM

SARMS is an extensive case management system operated through the county's contract with an independent nonprofit agency that specializes in drug and alcohol case management. SARMS makes alcohol and drug treatment immediately available to all parents in the dependency system who need these services. The treatment plan, also called the "recovery services plan," is developed by a recovery-specialist caseworker. In each of the dependency departments, a judge is responsible for enforcing the SARMS orders unless and until the parent moves on to dependency drug court. Every two weeks, the judge receives a report indicating compliance with treatment regimens and the results of the last two weeks' drug tests. Every 30 days the court holds hearings to review the parent's progress in treatment.

In the SARMS program parents who relapse or fail to attend treatment as ordered are held in contempt of court for violation of their reunification plans. The first noncompliant event garners a judicial reprimand; subsequent noncompliance may result in a sanction of 24 to 36 hours in custody. These proximally administered, judiciously applied sanctions—consequences for relapse along with positive reinforcement for good behavior in the form of accelerated visitation opportunities with children—substantially increase parental sobriety and the probability of reunification. Those parents who have more than one relapse event are referred to drug court.

#### DEPENDENCY DRUG COURT

The dependency drug court is designed to help SARMS participants who are having difficulty meeting their substance abuse treatment goals. Reserved for multiple relapses, it provides greater judicial oversight and a supportive group atmosphere in a three-phase program that takes nine months to complete.<sup>37</sup> Participation is voluntary and subject to the drug court judge's approval. Participants must make a commitment to follow their treatment plans and appear at the dependency drug court sessions on a regular basis.

The dependency drug court's higher level of court supervision and peer support encourage substance-abusing parents to cooperate more fully with the program. Parents continue in the treatment program specified by their recovery services plan. Court reports, including drug test reports, are then made weekly. Parents receive praise for compliance and tokens for successive periods of continuous sobriety. As in SARMS, failure to comply with drug court orders results in sanctions. Examples of noncompliant events include a "dirty test," an unexcused absence, or failure to comply with SARMS or treatment program activities. But in fact, drug court participants often appear more frequently than their program requires because drug court offers them significant encouragement from each other, as well as from the drug court judge. A social worker is available at the sessions to answer questions about visitation, housing problems, or other issues regarding their reunification plans. A lawyer also attends to answer any legal questions the parents may have and to represent their legal interests, if necessary.<sup>38</sup>

#### THE GOOD NEWS FROM SAN DIEGO COUNTY

As of October 2003, after five years of operation, SARMS had 1,253 parents enrolled, and 80 percent of those parents were compliant with their recovery service plans.<sup>39</sup> A recent review of the dependency cases of 2,812 children whose parents participated in the SARMS program during the period between April 1998 and July 31, 2002, revealed that the average

amount of time from the assumption of jurisdiction to a permanent placement plan was 16.2 months; the average time from assumption of jurisdiction to reunification was 8.8 months.<sup>40</sup> This is a significant improvement from the 45.7 months it was taking prior to the implementation of SARMS.<sup>41</sup> These numbers strongly indicate that active court management of the drug and alcohol treatment portion of the reunification plan dramatically shortens pre-permanency foster-care stays.

### *Improved Child Outcomes*

Formal statistics were not kept before the implementation of the Dependency Court Recovery Project, but five years into the project 56 percent of the children studied were reunified with their parents, 24 percent were adopted, and 8 percent were placed in guardianship.<sup>42</sup> The court used foster care as a permanent placement in only 12 percent of the cases during this time.<sup>43</sup> In short, the Dependency Court Recovery Project protected a significant number of children from the psychological damage attributable to prolonged nonrelative foster care. To date, San Diego County has experienced negligible recidivism in the cases where children were reunified with a parent who got clean and sober.<sup>44</sup>

The parents who are able to recover from addiction do so because treatment is available at the outset and alternatives to recovery are removed. When reunification is feasible, it occurs at the earliest possible time; when reunification fails, more children are adopted because permanent placement decisions are made at the earliest possible time. "Reasonable services" are provided in every case; families receive them in a timely manner, and the court has a record of those services. The prognosis for all children in San Diego County's dependency system is improved, and the costs of both long-term and short-term foster care are lowered.

### *Significant Cost Saving*

The Center for Substance Abuse Treatment<sup>45</sup> (CSAT) contracted for a specific retrospective study of 50 dependency cases processed in the San Diego County juvenile court prior to the institution of the Dependency Court Recovery Project.<sup>46</sup> These 50

cases were compared to 50 cases processed in the DCRP using intensive case management.<sup>47</sup> The total cost of foster-care services for the 50 pre-DCRP cases was \$2,730,806.<sup>48</sup> The total cost of all such similar services for the 50 DCRP cases was \$1,150,384, for a cost saving of \$1,580,502.<sup>49</sup> This amounted to a 58 percent reduction in foster-care costs for the managed cases as compared to the county's former method of doing business.

## LESSONS LEARNED FROM SAN DIEGO COUNTY

Though federal and state legislatures mandate specific time frames in which courts must determine permanent placement for a child, juvenile courts must strive to further reduce the time children remain in unstable, out-of-home placements. Courts can shorten the period each family is under the court's jurisdiction by intensively managing parents' compliance with their reunification plans, especially those of substance-abusing parents.

The experience in the San Diego County program also showed that, to shorten the time a substance-abusing family is under the court's jurisdiction, the court must ensure

- thorough assessments;
- immediate treatment options;
- clear court orders;
- motivational substance abuse case management;
- a compliance reporting system; and
- sanctions for noncompliance.

### THOROUGH ASSESSMENTS

Whenever substance abuse is an issue in a dependency case, the court must order a thorough assessment by a trained recovery specialist to be completed within a strict time frame. This enables recovery specialists to prescribe individualized treatment. If the assessment indicates a substance problem, the parent and recovery specialist develop a treatment plan to be



incorporated in the court-ordered reunification plan. The recovery specialist then makes sure the parent is enrolled in treatment. This has the practical effect of connecting the parent with the treatment program.

#### ENSURING IMMEDIATE TREATMENT OPTIONS—FINANCING THE PROGRAM

As discussed earlier, immediate availability of high-quality drug and alcohol treatment services is essential to limiting the time children spend in foster care. Lack of treatment has historically been the biggest impediment to parental success. Funding for both treatment and case management could be made available through savings generated by decreased stays in foster care. As a recent report released by the Pew Commission on Children in Foster Care noted,

Simply put, current federal funding mechanisms for child welfare encourage an over-reliance on foster care at the expense of other services to keep families safely together and to move children swiftly and safely from foster care to permanent families, whether their birth families or a new adoptive family or legal guardian.<sup>50</sup>

In San Diego County, savings in the local share of foster-care expenditures have exceeded the amounts spent on treatment and case management.<sup>51</sup> Those savings convinced the San Diego County Board of Supervisors, beginning in 1998, to authorize an annual expenditure in excess of \$2 million for case management of substance-abusing parents with children under juvenile court jurisdiction<sup>52</sup> and another \$2 million annually for treatment.<sup>53</sup> This level of funding allowed the court to order more than 1,500 parents per year into the SARMS program.<sup>54</sup>

Consequently, the court could adhere to statutory timelines and shorten average stays in foster care for the children of these parents by more than 50 percent.<sup>55</sup> This resulted in a saving of more than \$30,000 annually in Title IV-E<sup>56</sup> money per family from an expenditure of \$3,400 per year for case management and treatment for each parent in the

program.<sup>57</sup> Average time from detention to permanent placement was under 16 months.<sup>58</sup>

States are required to match federal IV-E dollars for foster care.<sup>59</sup> In California, over 30 percent of the foster-care match is local county general fund money, with the remainder coming from the state. The \$4-million-plus in total treatment and case management money spent on SARMS was initially and continues to be from a combination of state and local funding sources controlled by the San Diego County Board of Supervisors, which has been willing to appropriate funds for the project because of the savings in foster-care costs and the improved permanent placement outcomes for children. The population of children in post-permanent-placement foster care—children who have not been reunified or adopted—has dropped in San Diego County from 2,500 in 1997 to fewer than 1,800 in 2003.<sup>60</sup>

Ultimately, large sums of federal foster-care money under Title IV-E can be saved with aggressive front-end loading of treatment services in dependency cases for addicted parents. Definitive placement decisions can be made within the one-year federal and state guidelines.<sup>61</sup> Currently, states that reduce their foster-care expenditures lose the federal match associated with the reduction, “even though keeping children out of foster care can require substantial investments in early intervention, treatment, and support once a child leaves foster care.”<sup>62</sup> The Pew Commission on Children in Foster Care has recommended allowing states to “reinvest” those saved federal dollars in other child welfare services if they safely reduce the use of foster care.<sup>63</sup> Our goal should be to convince the U.S. Department of Health and Human Services to accept the commission’s recommendation and offer financial incentives to states so that savings generated by shortened stays in foster care brought about by aggressive case management may be used to fund ongoing drug treatment and management. This would create a “win-win” situation where the courts can both improve outcomes for children and families and reduce the overall foster-care population.

### CLEAR COURT ORDERS

A clear court order, written in simple, direct language that parents understand, is necessary for the success of this program. It should direct the parent to stay clean and sober and follow the treatment plan developed with the recovery specialist. It mandates drug testing in conformity with the recovery specialist's directions and explains that contempt proceedings and sanctions will follow noncompliance.

### MOTIVATIONAL SUBSTANCE ABUSE CASE MANAGEMENT

A motivational case management approach is essential to maximizing the opportunity for reunification in each case involving parental substance abuse. The case manager acts as a coach to support parents through the treatment process. A systemic rather than a piecemeal approach is necessary. Every case needs this approach to make sure parents are connected to treatment and have an optimal chance for success. Parental substance abuse of epidemic proportions cannot be eradicated by selecting only a portion of the population of addicted parents to receive treatment. A comprehensive approach is required because it is impossible to tell in advance which parents will recover. Often, we are successful with someone who is a "repeat customer." Only an across-the-board mandate for participation by all addicted parents will maximize the number of those who actually succeed in recovery.

### COMPLIANCE REPORTING SYSTEM

Timely and accurate reports of the parents' progress in their treatment programs, submitted by the agency providing case management services, are critical. San Diego County, as described earlier, contracts with a nonprofit agency specializing in alcohol and drug treatment to operate the SARMS program. This agency provides case management services for each client and biweekly reports on the parent's progress to the court and Children's Services; objective weekly drug tests are done in every case. The agency is separate from Health and Human Services and Children's Services. Social workers are not responsible for

this aspect of the case. The social worker assigned to each case through Children's Services remains the principal case manager and is responsible for overall case management.

### SANCTIONS FOR NONCOMPLIANCE

Further, there must be a simple, well-defined procedure for citing noncompliant parents for contempt of court. Legal counsel representing the government must thoroughly understand how to prove contempt on a declaration of noncompliance by the recovery specialist. A parent must receive immediate consequences for a noncompliant event, and the court must be able to swiftly incarcerate recalcitrant parents. In San Diego County cases where parents "admit" noncompliance, they serve no more than

#### **System of Sanctions Challenged**

A San Diego father, Otis J., who had been ordered to participate in the SARMS program as part of his reunification plan, challenged the juvenile court's authority to find him in contempt of the court's reunification order and incarcerate him after he failed to submit proof that he had attended a required 12-step program. In December 2004, the Court of Appeal, Fourth Appellate District, decided the case of *In re Olivia J.*, upholding the power of the juvenile court to sanction noncompliance with drug and alcohol abstinence orders under the court's ordinary contempt powers. The court held that a willful violation of such court orders could be punished by incarceration. But the validity of that holding is in question, as the California Supreme Court accepted the case for review on March 16, 2005.\* A decision by the court had not issued at the time of this article's publication.

It is the position of the authors that if parental drug use lengthens dependent children's stays in foster care, the court has a legal obligation to use its authority to elicit compliance with such orders. A court's ability to take that position will be determined by the California Supreme Court.

\* *In re Olivia J.*, 108 P.3d 862 (Cal. 2005).

24 to 36 hours in local custody. Without these elements, the program cannot function efficiently or effectively.

Positive reinforcement for good behavior and provision of other supportive services in the form of job readiness and assistance with acquisition of housing and other services are important elements of the recovery plan; indeed, they are arguably more important in recovery than sanctions. This is particularly true as parents have success in maintaining sobriety. In practice, custody time is infrequently used and is necessary only occasionally. Sanctions are analogous to the “timeouts” used for disciplining children.

The sanctions for relapse should be nonjudgmental, brief, and not overly punitive. San Diego County’s juvenile court imposes the following sanctions:

- First noncompliant event: Judicial reprimand
- Second noncompliant event: From three to five days in jail, a monetary fine, or both
- Third noncompliant event: From three to five days in jail and/or an offer of voluntary participation in dependency drug court

If noncompliance is determined at the next 6- or 12-month review hearing, a permanency planning hearing may be scheduled.

The goal of the court is not to punish parents but to make them realize the seriousness of the situation and motivate them to take the steps necessary to reunify with their children. This is an opportunity for the court to establish boundaries with these parents, often a foreign concept to drug abusers and alcoholics. To teach parents that there are consequences for their actions, the sanctions must be immediate and relate to the noncompliant behavior. In San Diego County, a special hearing is set immediately following notification to the juvenile court of the parent’s noncompliance with the treatment plan. After the first finding of noncompliance, the court restates the order in simple and direct terms to ensure that the parent understands the order and the consequences of noncompliance. The court then verbally reprimands the parent for the noncompliant event.

#### SPECIAL CHALLENGES WITH YOUNG PARENTS

Working with substance-abusing parents differs significantly from working with other populations. Judges must be aware of these differences if they are to effectively reunify families. The court should work with these parents in accordance with their level of development, which recent research tells us lags behind their chronological age.<sup>64</sup>

The authors have seen many parents in dependency cases between the ages of 18 and 25 who finally address the issue of their alcohol or other drug abuse problems only to realize that they do not have the skills necessary to cope with the adult world. While their peers were progressing through normal adolescence—discovering talents, building relationships, taking on responsibility—these young people missed out because substance abuse narrowed their circle of friends, their level of involvement, their emotional and spiritual growth.

It is not effective for a court simply to include in the reunification plan an order requiring the parent to get clean and sober and remain so for six months. The parents need help and encouragement throughout the program because this is likely the first time in their lives that they have assumed responsibility for themselves. Just as teenagers are not developmentally capable of getting clean and staying sober by themselves, substance-abusing parents who are developmentally far behind their peers are likewise incapable of staying clean without support.<sup>65</sup> By holding such parents responsible for their actions, the judge acts as a person who cares enough to say no when they engage in behavior that endangers their children. Such intensive case management is needed for the parents to become capable of caring for themselves and their children.

If the parent is not serious about dealing with his or her addiction, the court must help the parent get serious. Children should not be left in foster care indefinitely while their parents violate court orders and the court fails to act. The court has the authority and responsibility to change what happens in these children’s lives. Battling addiction is extremely

difficult. To do justice for the families under its jurisdiction, the juvenile court must fulfill its duty to help substance-abusing parents get clean and sober.

#### PROMISING NEW PROJECT IN BALTIMORE, MARYLAND

A program for early assessment, enrollment in treatment, and case management for addicted parents of children in foster care, similar to San Diego County's Dependency Court Recovery Program, is currently being developed in Baltimore, Maryland.<sup>66</sup>

In Maryland, foster-care funding under Title IV-E is 50 percent state money and 50 percent federal. The Maryland state government has agreed to invest savings in state foster-care expenditures created by shortened stays in foster care in ongoing treatment and case management for at-risk families.<sup>67</sup>

#### CONCLUSION

Based on current statistics, pre-permanency foster care continues to be utilized across the country as a temporary solution to child abuse and neglect. The national rate of children placed in foster care continues to be unacceptably high. In 2002, roughly 532,000 children were in foster care.<sup>68</sup> These numbers are particularly disturbing in light of the developmental damage that may result when a child is placed in foster care. Throughout the United States, nonrelative foster care frequently is poorly managed in terms of the length of time children remain in out-of-home placements. It is up to the courts to take an active role in minimizing the use of foster care through judicial management of reunification plans. Cost savings and better outcomes will follow for those jurisdictions that take this step.

Statistics also make it clear that to fulfill the purpose of child dependency systems, juvenile courts must aggressively address the substance abuse issues of the parents who come under their jurisdiction.<sup>69</sup> An analysis of San Diego County's approach to this problem shows that immediate access to individualized alcohol and drug treatment, in conjunction with strict court management of reunification plans,

promises beneficial outcomes. Courts and policy-makers must seek out and implement modalities that prevent or mitigate the negative effects of temporary and transient foster care. Any reduction in the amount of time it takes to make a permanent placement decision benefits the child by minimizing his or her time in foster care. When time in foster care is minimized, costs of foster care are reduced. Savings in foster-care costs make more funds available for treatment and case management.

The prevalence of parental drug and alcohol addiction and the preliminary success of the SARMS program suggest positive outcomes are possible for children and their families if courts strictly adhere to statutory time frames and enforce compliance with court-ordered reunification plans. The SARMS program and the dependency drug court shorten the length of time children remain in foster care and successfully reunify families. These programs offer a challenging and rewarding means to achieving the primary goal of the juvenile dependency process: to provide a timely and appropriate permanent placement for each child who enters juvenile court supervision. Juvenile courts are responsible for ensuring the safety and well-being of the children in their jurisdictions. They must honor this duty by taking an active role to achieve the ultimate systemic objective of protecting vulnerable children.

#### NOTES

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9. *Id.*

10. *Id.*

11. See *id.* See generally ELIZABETH MEINS, SECURITY OF ATTACHMENT AND THE SOCIAL DEVELOPMENT OF COGNITION (Taylor & Francis Group 1997) (covering how infant-caregiver attachment relates to child development); JOHN BOWLBY, A SECURE BASE: PARENT-CHILD ATTACHMENT AND HEALTHY HUMAN DEVELOPMENT (Basic Books 1989) (series of lectures by a prominent British psychiatrist exploring the nature and importance of early child-caregiver bonds).

12. See generally BOWLBY, *supra* note 11; PAT SABLE, ATTACHMENT AND ADULT PSYCHOTHERAPY 15 (Jason Aronson 2000) (citing Mary D. Salter Ainsworth, *Attachments Beyond Infancy*, 44 AM. PSYCHOLOGIST 709 (1989)); John Bowlby, *Separation Anxiety*, 41 INT'L J. PSYCHOANALYSIS 89 (1969); Robert Karen, *Becoming Attached*, THE ATLANTIC, Feb. 1990, at 35.

13. There are methods to reduce this disruption and preserve the attachment even with the use of foster care. These will be discussed in a later section.

14. LEVY & ORLANS, *supra* note 8, at 3–4.

15. Dave Robinson et al., *A Review of the Literature on Personal/Emotional Need Factors* (Corr. Serv. of Can., Mar. 1998), at [www.csc-scc.gc.ca/text/rsrch/reports/r76/r76e\\_e.shtml](http://www.csc-scc.gc.ca/text/rsrch/reports/r76/r76e_e.shtml).

16. *Id.*

17. LEVY & ORLANS, *supra* note 8, at 214.

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19. LEVY & ORLANS, *supra* note 8, at 215.

20. JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 19 (Free Press 1996).

21. *Id.*

22. STEINHAEUER, *supra* note 18, at 24.

23. GOLDSTEIN ET AL., *supra* note 20, at 41; see also David E. Arredondo, *Principles of Child Development and Juvenile Justice: Information for Decision-Makers*, 5 J. CENTER FOR FAM. CHILD. & CTS. 131 (2004) (“The reason that a year seems interminably long for a 4-year-old is that a year is, subjectively, one-fourth of his life”).

24. GOLDSTEIN ET AL., *supra* note 20, at 9.

25. *Id.* at 42.

26. *Id.* at 41.

27. *Id.*

28. EVERETT M. RESSLER, UNACCOMPANIED CHILDREN: CARE AND PROTECTION IN WARS, NATURAL DISASTERS, AND REFUGEE MOVEMENTS 175 (Oxford Univ. Press 1988).

29. GOLDSTEIN ET AL., *supra* note 20, at 41.

30. Title IV-E of the Social Security Act offers federal funding for every income-eligible child who is placed in foster care. 42 U.S.C. § 674(a) (2000 & Supp. 2004). And there is a legislative preference for placement with an adult relative over a nonrelated caregiver “provided that the relative caregiver meets all State child protection standards.” *Id.* § 671(a)(19). But foster-care maintenance payments under the federal statutes may be made only to state-licensed foster family homes, impeding the likelihood of placement with a relative. See *id.* § 672(b), (c). Oregon’s non–Title IV-E state-funded foster-care program was challenged on the ground that the state denied foster-care benefits for kinship placements of children who were not eligible for foster-care assistance under Title IV-E. *Lipscomb v. Simmons*, 962 F.2d 1374 (9th Cir. 1992). The 9th Circuit Court of Appeal en banc held that Oregon’s policy of restricting state-only foster-care funds to nonrelatives was rationally related to a legitimate policy decision: “to spend more money per child not placed with relatives while depriving some children of the option of

- NOTES living with relatives—instead of paying less money per child but enabling more children to live with relatives . . .” *Id.* at 1380. The court concluded that Oregon, “finding itself in an imperfect budgetary environment, believed that it ha[d] allocated its limited resources in the best possible way in order to accomplish the goals of its foster care program.” *Id.* at 1384. However, ensuring stipends to relatives who care for children who otherwise would be in foster care makes good sense and would benefit children.
31. In 1988, 1,200 children born at Martin Luther King Hospital in south-central Los Angeles were drug-exposed. By contrast, in 1994, only 300 children were born exposed to drugs. HEALTH PROJECT, EVALUATION SUMMARY (1997), at <http://healthproject.stanford.edu/koop/shields/evaluation.html> (discussing the SHIELDS for Families Project, which won the 1995 C. Everett Koop Award).
32. See, e.g., Robert Victor Wolf, *Promoting Permanency: Family Group Conferencing at the Manhattan Family Treatment Court*, 4 J. CENTER FOR FAM. CHILD. & CTS. 133 (2003).
33. JAMES R. MILLIKEN, SUPERIOR COURT OF CAL., COUNTY OF SAN DIEGO, THE DEPENDENCY COURT RECOVERY PROJECT: PROJECT SUMMARY AND CURRENT HIGHLIGHTS 1 (Mar. 2001) (on file with the *Journal of the Center for Families, Children & the Courts*).
34. *Id.*
35. *Id.*
36. *Id.* at 2.
37. Each of the three phases is 90 days long. In phase 1, participants must appear in drug court once a week; in phase 2, once every two weeks; and in phase 3, once a month.
38. For example, when the parent first agrees to participate in dependency drug court or when a sanction is ordered for noncompliance.
39. JAMES R. MILLIKEN, SUPERIOR COURT OF CAL., COUNTY OF SAN DIEGO, THE DEPENDENCY COURT RECOVERY PROJECT: JUVENILE DEPENDENCY COURT REFORM 4 (Oct. 2003) (on file with the *Journal of the Center for Families, Children & the Courts*).
40. SUPERIOR COURT OF CAL., COUNTY OF SAN DIEGO, DEPENDENCY COURT RECOVERY PROJECT: SARMS DATA SUMMARY, APRIL 13, 1998, THROUGH July 31, 2002, at 1 (July 2002) (on file with the *Journal of the Center for Families, Children & the Courts*).
41. MILLIKEN, *supra* note 39, at 22.
42. DEPENDENCY COURT RECOVERY PROJECT, *supra* note 40, at 1.
43. *Id.*
44. A future goal of the Dependency Court Recovery Project in San Diego County is to follow up with these families to determine the long-term outcomes of this program.
45. A division of the U.S. Department of Health and Human Services’ Substance Abuse and Mental Health Services Administration (SAMHSA).
46. DAVE CRUMPTON ET AL., NPC RESEARCH, INC., ANALYSIS OF FOSTER CARE COSTS FROM THE FAMILY TREATMENT DRUG COURT RETROSPECTIVE STUDY: SAN DIEGO COUNTY, CALIFORNIA 5 (2003) (on file with the *Journal of the Center for Families, Children & the Courts*).
47. *Id.*
48. *Id.* at 1.
49. *Id.*
50. PEW COMM’N ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE 13 (May 18, 2004), available at <http://pewfostercare.org/research/docs/FinalReport.pdf>; see also William C. Vickrey, *A Better Life for Foster Youth*, S.F. CHRON., May 18, 2005, at B9.
51. CRUMPTON ET AL., *supra* note 46, at 1.
52. Interview with Kimberly Bond, Chief Operating Officer, Mental Health Systems, Inc., in San Diego (June 23, 2004).
53. Interview with John Oldenkamp, Project Manager, San Diego County Drug and Alcohol Services, in San Diego (June 24, 2004).
54. Interview with Kimberly Bond, *supra* note 52.
55. NANCY K. YOUNG ET AL., CTR. FOR CHILDREN & FAMILY FUTURES, INC., FAMILY DRUG TREATMENT COURTS: SYNOPSIS OF PROCESS DOCUMENTATION AND RETROSPECTIVE OUTCOME EVALUATION FOR SAN DIEGO SUPERIOR COURT 12 (Oct. 2003) (on file with the *Journal of the Center for Families, Children & the Courts*).
56. Title IV-E of the Social Security Act is a permanently authorized, open-ended federal entitlement program that guarantees reimbursement to the states for a portion of the costs of maintaining children in foster care. See PEW COMM’N ON CHILDREN IN FOSTER CARE, *supra* note 50, at 13. Nationwide federal IV-E foster-care expenditures for fiscal year 2004 were estimated at \$4.8 billion. *Id.*

Title IV of the Social Security Act is administered by the Department of Health and Human Services. The Administration for Public Services, Office of Human Development Services, administers social services under Title IV, Parts B and E. Title IV appears in the United States Code as Title 42, chapter 7, subchapter IV, sections 601–687 (42 U.S.C. §§ 601–687 (2000 & Supp. 2004)). See SocialSecurityOnline, Compilation of the Social Security Laws, n.1, at [www.ssa.gov/OP\\_Home/ssact/title04/0400.htm](http://www.ssa.gov/OP_Home/ssact/title04/0400.htm).

57. CRUMPTON ET AL., *supra* note 46, at 12 (for the \$30,000-per-family annual savings figure); interview with John Oldenkamp, *supra* note 53 (provided the figure that treatment costs were \$2,000 per parent annually); e-mail from Kimberly Bond, Chief Operating Officer, Mental Health Systems, Inc. (June 23, 2004) (provided information that case management costs were \$1,400 per parent annually) (on file with the *Journal of the Center for Families, Children & the Courts*).

58. YOUNG ET AL., *supra* note 55, at 13.

59. 42 U.S.C. § 674 (2000 & Supp. 2004); see also PEW COMM'N ON CHILDREN IN FOSTER CARE, *supra* note 50, at 19.

60. MILLIKEN, *supra* note 39, at 4.

61. See ASFA, § 302, 42 U.S.C. §§ 627(a)(2)(B), 672(d), 675(5)(C) (2000 & Supp. 2004); CAL. WELF. & INST. CODE § 361.5 (West 2004).

62. PEW COMM'N ON CHILDREN IN FOSTER CARE, *supra* note 50, at 25.

63. *Id.*

64. Catherine Seward, *Substance Abuse Disrupts Maturing Process* (2001), at [https://64.71.146.119/articles/topics/categories/subabuse/sub\\_abuse\\_disrupts.html](https://64.71.146.119/articles/topics/categories/subabuse/sub_abuse_disrupts.html) (on file with the *Journal of the Center for Families, Children & the Courts*).

65. *Id.*

66. The Family Recovery Project is being launched by the Family League of Baltimore City, Inc. At the time this publication went to press, the Family League had issued a request for proposals seeking an entity to provide intensive and time-limited family preservation services to families with children at imminent risk of out-of-home placement. See [www.flbcinc.org](http://www.flbcinc.org).

67. Interview with Stephanie Franklin, Family Recovery Program Director, at the Family League of Baltimore City, Inc. (Apr. 13, 2004).

68. CHILDREN'S BUREAU, *supra* note 7.

69. Banks & Boehm, *supra* note 2.

NOTES





# A Systematic Review of the Impact of Court Appointed Special Advocates

**W**e have celebrated the 100th anniversary of California's juvenile court, and yet we continue to struggle with our system of intervention on behalf of abused and neglected children who have been removed from their homes. For the past 27 years, volunteers working in Court Appointed Special Advocate (CASA) programs have played an important role in helping abused and neglected children get through the dependency process. This article summarizes the findings of 20 studies assessing the impact of CASA programs on (1) the activities of child representatives, (2) the dependency process, and (3) case outcomes and reentry into foster care. It combines and interprets statistical information in an effort to make the information easily accessible to judges, lawyers, social workers, policymakers, child welfare professionals, social scientists, and the general public.

## VOLUNTEER ADVOCACY FOR FOSTER CHILDREN

The sheer volume of children in foster care challenges our ability to meet their needs. According to the Adoption and Foster Care Analysis and Reporting System (AFCARS), on September 30, 2001, 542,000 children were in foster care in the United States.<sup>1</sup> That year, 290,000 entered foster care and 263,000 exited.<sup>2</sup> Half of the children who went home in 2001 had been in care longer than 12 months, 9 percent for more than five years.<sup>3</sup>

Attorneys and social workers are understandably under strain as they try to advocate for foster children. It is at times difficult for them to meet children's needs because of large workloads or lack of training in child development and the family context. The CASA program provides some relief to this overtaxed system, offering children in the dependency system reliable advocates who have been well trained and are assigned to them for the duration of their cases.

## COURT APPOINTED SPECIAL ADVOCATES

The Child Abuse Treatment and Prevention Act (CAPTA) of 1974 formally recognized the importance of providing independent representatives for children in court proceedings by mandating that each child have a guardian ad litem (GAL).<sup>4</sup> GALs are appointed by the court to represent the best interests of children in abuse and neglect cases. A GAL can be an attorney or a trained

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The federal Child Abuse Treatment and Prevention Act of 1974 mandated that children in dependency proceedings be assigned guardians ad litem to represent their best interests in court. Attorneys often fill this role, but communities increasingly are using trained volunteers, often called Court Appointed Special Advocates or CASA volunteers, who are assigned by the court. This systematic review analyzes the results of all studies to date, both published and unpublished, assessing the impact of CASA programs. Twenty studies of controlled comparisons

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with objective outcomes are discussed. Available evidence suggests that CASA programs have a favorable impact on some important process indicators. Data regarding the impact of CASA programs on the ultimate outcomes for foster children remain lacking.

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volunteer who investigates the case, monitors its progress, and represents the child in court. Subsequent reauthorizations have upheld the central principle that children must be represented independently.<sup>5</sup> The purpose of the guardian ad litem is to obtain a firsthand understanding of the situation and needs of the child and to make recommendations to the court concerning the child's best interests.<sup>6</sup> By contrast, county workers are asked to try to meet the needs of both victim and perpetrator, which puts them in an inherently conflicted role. They are frequently asked to develop and simultaneously prepare contingent plans for permanent removal of the child from the home and for permanent reunification of the child and original guardian. This is akin to having the same attorney act as both prosecutor and defender on the same case.

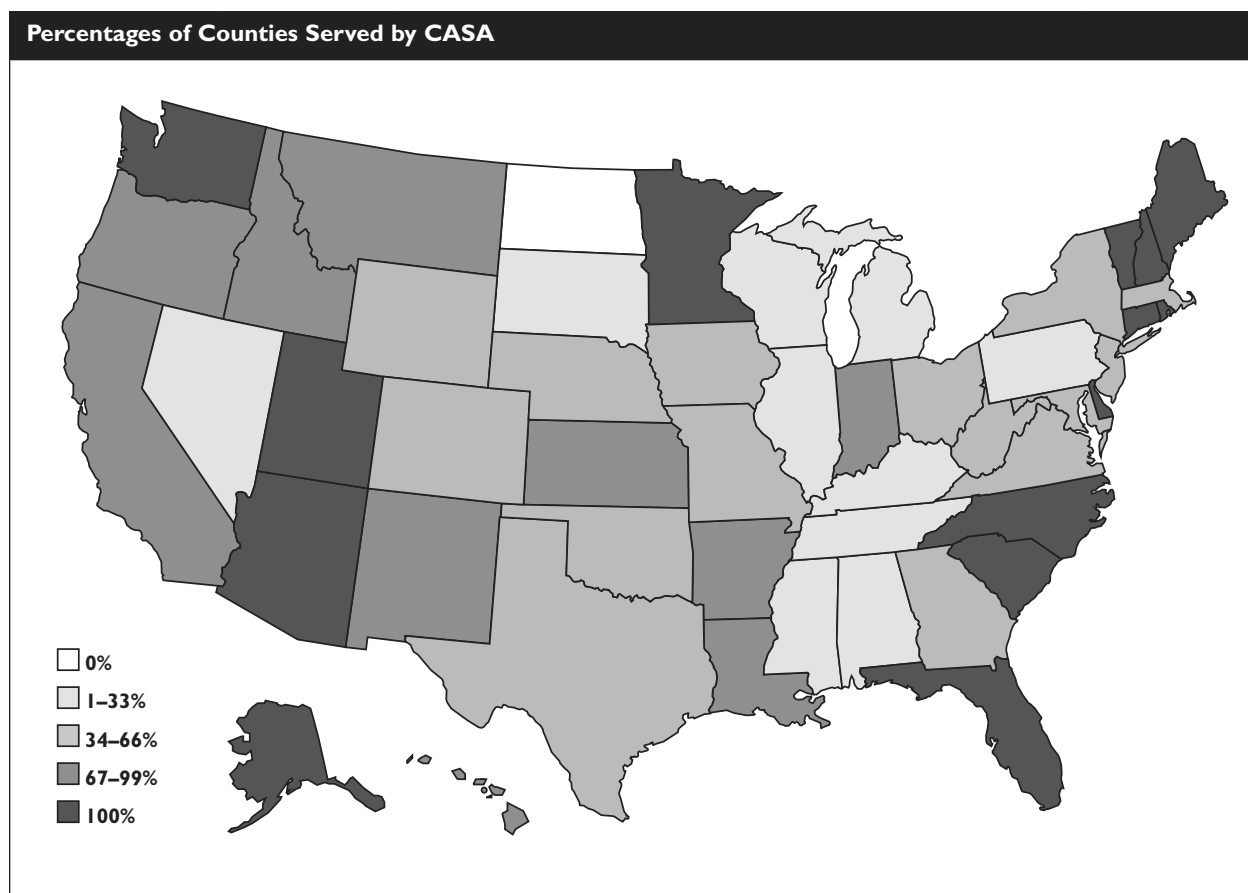
The guardian ad litem's primary duty is to provide independent evaluation and representation of the best interests of the children he or she is appointed to support. The qualifications for guardians ad litem vary widely among the states, however, as do their additional duties and responsibilities in dependency cases. Differences also exist across counties within the same state.

The concept of the CASA volunteer originated with Seattle, Washington, Superior Court Judge David W. Soukup, out of frustration with the lack of available information about the children whose futures he was determining. The core components of Judge Soukup's 1977 pilot program are essentially the same today: a judge appoints carefully selected, well-trained lay volunteers to represent the best interests of children in court. CASA volunteers typically handle just a few cases at a time so they can provide in-depth, firsthand information to judges and referees to assist in sound decision making.

The need for CASA advocacy increased as a result of the Adoption Assistance and Child Welfare Act of 1980, which mandated a greater emphasis on permanent placement,<sup>7</sup> and the Adoptions and Safe Families Act of 1997, which shortened timelines to encourage the speedy adoption of children for whom reunification or guardianship is not an option.<sup>8</sup> The U.S. Congress encouraged the further expansion of CASA programs with the Victims of Child Abuse Act of 1990, which states that a "court-appointed special advocate shall be available to every victim of child abuse or neglect in the United States that needs such an advocate."<sup>9</sup>

CASA volunteers are uniquely positioned to advocate for the best interests of children. They are typically assigned just a few cases and are involved for a case's duration. Social workers and attorneys may change, but the CASA volunteer provides support with continuity. Siblings often are assigned to one CASA volunteer, who can then help advocate for the group with coherence and strive to keep siblings together as foster-care placement decisions are made. Moreover, CASA volunteers are focused on the well-being of the children without having to serve the interests of the parents, the county child protective services unit, or the state.

CASA programs have grown considerably over the years. What began as a pilot program with 110 volunteers advocating for 498 children<sup>10</sup> has grown



to 930 CASA programs—at least one in every state plus the District of Columbia and the U.S. Virgin Islands.<sup>11</sup> A force of approximately 70,000 volunteers spoke for an estimated 280,000 children in 2002.<sup>12</sup> Though coverage varies from state to state, CASA programs are present in 1,698 (54 percent) of the 3,144 county entities in the contiguous United States, Alaska, Hawaii, and the Virgin Islands.<sup>13</sup> (See figure.) North Dakota has a state CASA association but no CASA volunteers working with children there, and Puerto Rico has no CASA program.

In part, CAPTA was intended to ensure independent, individual representation and advocacy for abused and neglected children.<sup>14</sup> Revisions to the act specify the CASA volunteer's role in providing the court with detailed information on the child and other duties.<sup>15</sup> Nevertheless, there is still variation among programs in how the CASA volunteer fits into the dependency process.

The design of each particular CASA program depends on local preferences and court rules as well as federal and state statutes.<sup>16</sup> The primary difference among programs is whether the CASA volunteer is also the guardian ad litem or works in conjunction with an attorney who performs the GAL responsibility. The relationship of CASA volunteer to attorney may be as an equal member of a team or as a subordinate member. CASA volunteers may also work alone without a guardian ad litem, but this is rare. Ideally, the pairing of CASA volunteers and attorneys balances the strengths and weaknesses of each. For example, an attorney may have excellent legal skills, and a CASA volunteer is likely to have first-hand knowledge of the child.<sup>17</sup>

There are five basic activities that a CASA volunteer may perform. As a fact-finder and investigator, a CASA volunteer conducts a thorough, independent investigation of all the information relevant to the

case. As a courtroom representative, a CASA volunteer reports the facts to the court in written or oral format with associated recommendations. As a case monitor, he or she ensures that all court-ordered services are being provided to the child and promptly notifies the court if they are not. As a mediator and negotiator, a CASA volunteer helps solve problems through collaboration and cooperation to assist in bringing families together. Finally, as a resource broker, a CASA volunteer seeks out and advocates for services that will help establish a strong support network for the child.<sup>18</sup>

#### OTHER MODELS OF VOLUNTEER ADVOCACY

Although CASA programs provide most of the volunteer assistance to foster-care youth and are the subject of this review, two other organizations should be noted: foster-care review boards and citizen review panels. The current study does not include evaluations of these programs.

The Adoption Assistance and Child Welfare Act of 1980 mandated that juvenile and family courts review all cases involving abused or neglected children every six months.<sup>19</sup> Foster-care review boards (FCRB) were created in response to overwhelmed court systems that were unable to handle the resulting increases in caseloads following this legislation.<sup>20</sup> FCRB volunteers review cases and have the authority to meet with the involved parties and make recommendations to the court. These meetings often have an informal discussion format, which is less intimidating than a court hearing. At the policy level, information from this process is used to suggest courses of action in dependency cases and also modifications in state legislation and agency policy.<sup>21</sup>

In the 1996 amendment to CAPTA, the federal government mandated the creation of citizen review panels (CRPs) for states seeking funding under CAPTA.<sup>22</sup> Each state is to have a minimum of three CRPs to provide citizen oversight in order to ensure that the state is meeting the goal of protecting children from abuse and neglect.<sup>23</sup> CRPs' functions and scope of work are purposefully broad in keeping

with this goal. The panels are composed of individuals who reflect the communities they are working to protect.<sup>24</sup> Generally, they monitor compliance with CAPTA and Title IV-E foster-care and adoption programs and evaluate fatalities occurring in foster care, as well as perform any other functions of the child protective service agency as they see fit.<sup>25</sup>

#### SYSTEMATIC REVIEW METHODOLOGY

A systematic review uses a rigorous method for identifying all relevant studies on a given topic, without regard for the findings of those studies, and then summarizes the results in an objective manner.

Three previous attempts have been made to summarize existing research on the impact of CASA advocacy. Heuertz<sup>26</sup> and Youngclarke<sup>27</sup> simply listed findings, providing little interpretation or integration. Litzelfelner attempted to summarize groups of findings but provided little comprehensive interpretation.<sup>28</sup> None of these reviews used a standardized methodology to systematically locate both published and unpublished comparative studies in this area.<sup>29</sup> The current study both identifies existing research systematically and presents a methodology for mathematically aggregating and interpreting the findings.

#### SEARCH STRATEGY

We attempted to identify and acquire copies of all published and unpublished original comparative studies conducted since 1977 on the effectiveness of CASA programs and similar trained-volunteer child advocacy programs in the United States.<sup>30</sup> Our initial search criteria were broad so we could conduct an especially sensitive search for research in this area. All studies with original data and purporting to be about the effectiveness of volunteer interventions were obtained and examined.

#### SELECTION CRITERIA

Studies must have met three methodological criteria to be included. They must have presented primary data<sup>31</sup> rather than summaries of data published

elsewhere or theoretical overviews. In addition, studies must have involved a comparison to a control group of children without volunteer advocates. In other words, each evaluation had to have included a control group. Finally, studies were included if they assessed any objective measures of activities performed on the child's behalf, specific court processes, or child outcomes.<sup>32</sup> Subjective assessments were excluded, specifically satisfaction of participants and self-ratings of effectiveness.

#### METHODS OF REVIEW

We reviewed almost 70 studies, but only 20 met the criteria for inclusion.<sup>33</sup> We evaluated the studies under consideration for methodological quality and appropriateness for inclusion without consideration of their results.

**Methodological quality.** The best way to comprehensively interpret studies with contradictory findings is to take into account the methodological quality, or level of evidence, of each individual study. Even large studies can produce misleading results when their methodologies are weak. This is especially true in evaluations research that relies on review of records. We used an adaptation of the Levels of Evidence scale developed by the Oxford Centre for Evidence-Based Medicine to rate methodological quality.<sup>34</sup> Under this system, the methodological quality of a study is given a rating between level 1 and level 5, with level 1 indicating the highest quality and level 5 the lowest.<sup>35</sup>

Overall, the quality of the available studies was not ideal. Social services provided in the "real world" are generally difficult to evaluate because they are not typically designed and implemented as research projects. Random assignment to treatment groups (which prevents selection bias, assuring that the groups are similar prior to treatment) and "blind" assessment of outcomes (which prevents measurement bias of outcomes) are not often feasible in existing programs. Such programs are designed primarily to provide services, with evaluation given a lower priority. Even when ideal research strategies are attempted, they

often collapse under the pressure for programs to provide good care to vulnerable children.

**Drawing conclusions.** For each outcome we describe the findings, statistical significance, and methodological quality of individual studies and calculate weighted summary estimates.<sup>36</sup> Then we provide our conclusion about the effect of CASA programs on each of the outcomes after considering all of these factors. Our conclusions are necessarily subjective because the studies are so different that a formal meta-analysis is impossible; therefore, we have provided all information on which these conclusions were based.

In addition to combining data for descriptive purposes, we considered two pieces of information when interpreting contradictory findings: the statistical significance of the original findings and the methodological quality of the studies involved. However, statistical significance in this case cannot be used as a definitive standard against which to measure the importance of the findings because many reports were purely descriptive in nature and included no formal statistical analyses.<sup>37</sup> Consequently, the driving force in our conclusions is methodological quality.

The methodological quality of each study is noted for two reasons. First, we attempted to explain contradictory findings by exploring the methods of the studies that produced them. Findings of a study with a higher level of evidence override contradictory findings of a study with a lower level of evidence. Second, methodological bias tends to exaggerate effect sizes, so that a small difference in truth appears quite a bit larger if the study is of poorer quality. Therefore we provide levels of evidence to help interpret the observed effect sizes.

#### SUMMARY OF THE IMPACT OF CASA PROGRAMS

Twenty studies that examined a total of 6,079 cases met the inclusion criteria listed above. Only eight have been published in indexed journals. The rest are reports submitted to government offices, foundations, or educational institutions.<sup>38</sup> Table 1 describes the included

studies; the numbers assigned to the studies listed in the table are referenced in the discussions below.

### QUALITY OF STUDIES

Only one study, a randomized controlled trial (1), is rated level 1 on the Levels of Evidence scale. A majority of the studies in this review, 12 observational studies of outcomes in naturally existing groups that are inherently different in important ways, are level 2. Seven studies, at level 4, include some observational

cohort<sup>39</sup> studies with serious methodological flaws beyond what is typical of a cohort study. For instance, several of these studies examined only a small proportion of cases in the cohort, and those were chosen in a systematically biased manner, such as allowing the attorneys and CASA volunteers to choose which of their cases to submit for examination. Others relied exclusively on secondary data compiled by foster-care review boards although the accuracy or completeness of the information could not be verified.

**Table 1. Reviewed Studies of CASA Programs' Impact**

| Study   | Study Population  | Comparison Group   | Level of Evidence |
|---|---|--|-------------------|
| 1. Shareen Abramson, <i>Use of Court-Appointed Advocates to Assist in Permanency Planning for Minority Children</i> , 70 CHILD WELFARE 477-87 (July-Aug. 1991)  | Amicus advocate (n = 60)  | Attorney (n = 62)  | 1                 |
| 2. SHERRIE S. AITKEN ET AL., CSR, INC., FINAL REPORT ON THE VALIDATION AND EFFECTIVENESS STUDY OF LEGAL REPRESENTATION THROUGH GUARDIAN AD LITEM (1993) (report to the Admin. on Child., Youth & Fams., Dep't of Health & Human Servs.)   | CASA (n = 127)  | Private attorney (n = 191)<br>Staff attorney (n = 88)                        | 4                 |
| 3. Cynthia A. Calkins & Murray Millar, <i>The Effectiveness of Court Appointed Special Advocates to Assist in Permanency Planning</i> , 16 CHILD & ADOLESCENT SOC. WORK J. 37-45 (Feb. 1999)  | CASA (n = 68)   | Attorney (n = 121)   | 2                 |
| 4. LARRY CONDELLI, CSR, INC., NATIONAL EVALUATION OF THE IMPACT OF GUARDIANS AD LITEM IN CHILD ABUSE AND NEGLECT JUDICIAL PROCEEDINGS (1988) (report to Nat'l Ctr. of Child Abuse & Neglect for the Admin. of Child., Youth & Fams.)  | CASA and attorney (n = 50)<br>CASA only (n = 48)  | Private attorney (n = 49)<br>Staff attorney (n = 71)<br>Law student (n = 27) | 2                 |
| 5. Michael Cook, <i>Court Appointed Special Advocates: Administrative Structural Impediments to the Use of the CASA Program by Juvenile Dependency Court Judges</i> (2000) (unpublished Ph.D. dissertation, Univ. of La Verne), available at <a href="http://www.lib.umi.com/dissertations">www.lib.umi.com/dissertations</a> | CASA (n = 45)   | Attorney (n = 203)   | 2                 |
| 6. Donald N. Duquette & Sarah H. Ramsey, <i>Using Lay Volunteers to Represent Children in Child Protection Court Proceedings</i> , 10 CHILD ABUSE & NEGLECT 293-308 (1986)  | Trained private attorney (n = 15)<br>Trained law students (n = 16)<br>Trained lay volunteers (n = 22) | Attorney (n = 38)  | 2                 |
| 7. Patrick Leung, <i>Is the Court-Appointed Special Advocate Program Effective? A Longitudinal Analysis of Time Involvement and Case Outcomes</i> , 75 CHILD WELFARE 269-84 (May-June 1995)   | CASA (n = 66)   | Attorney (n = 107)<br>Attorney, child on CASA waiting list (n = 24)          | 2                 |
| 8. Pat Litzelfelner, <i>The Effectiveness of CASAs in Achieving Positive Outcomes for Children</i> , 79 CHILD WELFARE 179-93 (Mar.-Apr. 2000)   | CASA (n = 119)  | Attorney (n = 81)  | 2                 |

**Table 1. Reviewed Studies of CASA Programs' Impact**

| Study  | Study Population  | Comparison Group  | Level of Evidence |
|--|---|---|-------------------|
| 9. RUTH G. McROY, EAST TEXAS CASA: A PROGRAM EVALUATION (Univ. of Texas at Austin, Apr. 1998)  | CASA (n = 11)   | Attorney (n = 11)   | 4                 |
| 10. RUTH G. McROY & STEPHANIE SMITH, CASA OF TRAVIS COUNTY EVALUATION: FINAL REPORT (Univ. of Texas at Austin, Apr. 1998)  | CASA (n = 46)   | Attorney (n = 46)   | 2                 |
| 11. OREGON GOVERNOR'S TASK FORCE ON JUVENILE JUSTICE, STATE COMM'N ON CHILDREN & FAMILIES, EFFECTIVE ADVOCACY FOR DEPENDENT CHILDREN: A SYSTEMS APPROACH (1994)  | CASA only (n = 82)<br>CASA and attorney (n = 44)                        | Attorney (n = 652)<br>No attorney, no CASA (n = 1,056)                | 4                 |
| 12. John Poertner & Allan Press, <i>Who Best Represents the Interests of the Child in Court</i> , 69 CHILD WELFARE 537-49 (Nov.-Dec. 1990)   | CASA (n = 60)   | Staff attorney (n = 98)   | 2                 |
| 13. MICHAEL POWELL & VERNON SPESHOCK, ARIZONA COURT APPOINTED SPECIAL ADVOCATE (CASA) PROGRAM, INTERNAL ASSESSMENT (1996)  | CASA (n = 130)<br>CASA (n = all dependent children in county with CASA) | Attorney (n = 179)<br>Attorney (n = all dependent children in county) | 4                 |
| 14. SUSAN M. PROFIET ET AL., CHILD ADVOCATES INC., GUARDIAN AD LITEM PROJECT (1999)  | Volunteer GAL and attorney (n = 100)                                    | Attorney only or CASA only (n = 42)                                   | 2                 |
| 15. GENE C. SIEGEL ET AL., NAT'L CTR. FOR JUVENILE JUSTICE, ARIZONA CASA EFFECTIVENESS STUDY (2001) (report to the Arizona Sup. Ct., Admin. Off. of the Cts.)  | CASA (n = 139)  | GAL (n = 143)   | 2                 |
| 16. STEPHANIE SMITH, TEXAS DEP'T OF PROTECTIVE & REGULATORY SERVS., CASA OF TRAVIS COUNTY EVALUATION FINAL REPORT (1993)   | CASA (n = 307)  | Attorney (n = 306)  | 4                 |
| 17. KAREN C. SNYDER ET AL., THE STRATEGY TEAM, LTD., A REPORT TO THE OHIO CHILDREN'S FOUNDATION ON THE EFFECTIVENESS OF THE CASA PROGRAM OF FRANKLIN COUNTY (Ohio Child. Found. 1996)  | CASA (n = 30)   | Private attorneys (n = 24)  | 2                 |
| 18. JANICE S. WAIDE & ROBERT C. HARDER, OFFICE OF JUDICIAL ADMIN. OF TOPEKA, IMPACT OF COURT APPOINTED SPECIAL ADVOCATES AND CITIZEN REVIEW BOARDS ON KANSAS JUVENILE COURTS (1997)  | Districts with CASA and/or CRB <sup>a</sup> programs                    | Districts without   | 4                 |
|  | CASA (n = 61)   | No CASA or CRB program (n = 277)                                      |                   |
| 19. Victoria Weisz & Nghi Thai, <i>The Court Appointed Special Advocate (CASA) Program: Bringing Information to Child Abuse and Neglect Cases</i> , 8 CHILD MALTREATMENT 204-10 (Aug. 2003), available at <a href="http://www.sagepub.co.uk/journalIssue.aspx?pid=105487&amp;jiid=6074">www.sagepub.co.uk/journalIssue.aspx?pid=105487&amp;jiid=6074</a> | CASA (n = 21)   | Attorney, child on CASA waiting list (n = 20)                         | 4                 |
| 20. E. Sue Wert et al., <i>Children in Placement (CIP): A Model for Citizen-Judicial Review</i> , 65 CHILD WELFARE 199-201 (Mar.-Apr. 1986)  | CIP <sup>b</sup> program (n = 149)                                      | No CIP program (n = 140)  | 2                 |
|  | Post-CIP implementation (n = 117)                                       | Before implementation of CIP (n = 90)                                 |                   |

<sup>a</sup>CRB = citizen review board.

<sup>b</sup>CIP = Children-in-Placement project.

Several reports discuss the difficulty of interpreting findings because of two known confounding variables: CASA volunteers were generally assigned to the most difficult cases (those children whose histories involved the most severe abuse or whose parents have more serious social and psychological problems); and CASA volunteers often were assigned only after a child's case had already been in the system for an inordinate length of time. Even if CASA advocacy is extremely effective, if the children receiving CASA services were in unusually difficult situations to begin with, the effects of the services may not be apparent in the final comparisons. For these reasons, two studies stand out from among these 20 as being more valid than the others: the Calkins (3) and Abramson (1) studies are the only two evaluations that compare two groups of children who were similarly situated at the time they began working with a CASA volunteer.

#### COMBINED EFFECTS ON OUTCOME VARIABLES

Study outcomes were divided into three categories: activities of children's representatives (attorneys and CASA volunteers), court processes, and child outcomes. First, we examined the activities of the children's representatives to determine whether CASAs are more likely than other representatives to serve functions specified in CAPTA. These activities include collecting information by making contact with the child and family, being present and available during court proceedings, and making information formally available to the court through reports.

Second, we examined court processes—the events that transpired during the time the children's cases were open. Process is represented by four variables. The number of continuances may represent how smoothly the case progressed through the court and is certainly a factor in court costs. Number of services ordered is a process variable<sup>40</sup> that may help families achieve reunification or prevent future abuse and neglect. Finally, the total number of placements and the child's length of time in the system are important variables that reflect the child's experience and are suspected to predict child well-being in the future.

Third, we identified those outcome variables that represent the child's status at the end of his or her time in care and beyond. This category includes placement at case closure (adoption, reunification, guardianship, long-term foster care) and the rate of reentry into the system. None of the studies examined true child-oriented outcomes, such as the future physical safety or mental health of the children studied.

#### *Activities of Children's Representatives*

Two studies estimated the percentage of representatives who made contact with the child during the case (2, 19; both level 4 evidence). Both reported that CASAs were more likely than attorneys to have contact with the child. However, one did not address statistical significance, and the other had such a small sample size that the observed difference did not achieve statistical significance despite a large absolute difference. Another study reported the number of hours of contact between representatives and children (6; level 2 evidence). In this study, lay volunteers had more hours of contact with the child than did attorney guardians ad litem, both in cases dismissed before the preliminary hearings and those that went beyond the preliminary hearing. These differences were statistically significant. See Table 2 for a summary of the activities of children's representatives.

In addition to requiring children's representatives to obtain a firsthand understanding of the child's situation through direct contact, CAPTA specifies that they make recommendations to the court.<sup>41</sup> Being present during court proceedings and providing written or oral reports to the court about the case may accomplish that task. Three studies reported the percentage of court proceedings at which the child's representative was present, and their results are contradictory. One small study of higher quality (17; level 2 evidence) showed that children whose cases were assigned to CASA-guardian ad litem teams were significantly more likely to be represented during proceedings than were children whose cases were assigned only to private attorneys. However, two larger studies with samples drawn from several states nationwide reported the opposite finding



**Table 2. Relationship Between CASA Representation and Activities of the Child Representative**

| Study                              | Level of Evidence | Contact Child  | Hours of Contact | Court Appearance | Mother in Court | Written Reports | Oral Reports   |
|------------------------------------|-------------------|----------------|------------------|------------------|-----------------|-----------------|----------------|
| Condelli                           | 2                 |                |                  | ↓                |                 |                 |                |
| Duquette                           | 2                 |                | ↑                |                  |                 |                 |                |
| Snyder                             | 2                 |                |                  | ↑                | ↑               | ↑               |                |
| Aitken                             | 4                 | ↑              |                  | ↓                |                 | ↑               | ↔              |
| Weisz                              | 4                 | ↑              |                  |                  |                 |                 |                |
| Combined—all (CASA vs. comparison) |                   | 92% vs. 44%    | 7.8 vs. 4.7      | 50% vs. 82%      | 42% vs. 24%     | 77% vs. 21%     | 71% vs. 77%    |
| Combined—levels 1 and 2            |                   | None available | 7.8 vs. 4.7      | 45% vs. 74%      | 42% vs. 24%     | 45% vs. 0%      | None available |
| Conclusion                         |                   | ↑              | ↑                | ↓                | ↑               | ↑               | ↔              |

Arrows indicate general direction: ↑ = more; ↓ = less; ↔ = no difference.

(2, 4; levels 2 and 4 evidence). In one study the finding is statistically significant, while in the other statistical significance is not addressed. Both the aggregate of all data and the combined higher-level data suggest that CASA volunteers are less likely to appear in court than attorneys. The reason is unclear to the authors, although one possible explanation is that no states require CASAs to appear in court, though they are highly encouraged to, while some states mandate that attorneys appear. Another possible factor is that CASAs are volunteers, often with job obligations that prevent them from appearing.

Three studies examined the degree to which child representatives made oral or written reports to the court (2, 17, 19). All three found that CASA volunteers were far more likely than attorneys to file written reports. One of these studies also reported that CASA volunteers and attorneys were equally likely to offer an oral report (2; level 4 evidence). In another study, judges reported that more-complete information was presented orally at the judicial hearing when a CASA volunteer was assigned (19; level 4 evidence).

Another way that CASA volunteers can help provide information to the court is to encourage

family involvement. One study (17; level 2 evidence) reported that mothers whose children had CASA volunteers were far more likely to appear in court than mothers of children without CASA volunteers (42 percent versus 24 percent).

Overall, cases assigned to CASA volunteers were more likely to involve direct contact between the child and the child's representative and were more likely to have written reports filed with the court. In addition, mothers of CASA children were more likely to appear in court. While some uncertainty remains, the weight of the data suggests that CASA volunteers were less likely than attorneys to appear in court. These findings seem to suggest that CASA volunteers do fulfill the task of collecting and providing original information to the court even if they do not participate directly in court proceedings.

### *Dependency Processes*

Three studies examined whether the appointment of a CASA volunteer affected the number of continuances during the course of a case (8, 12, 17; all level 2 evidence). None reported any significant differences in the number of continuances between cases with

CASA volunteers and cases without. However, one study (8) reported that, among closed cases only, there were significantly fewer continuances in the CASA group (1.1 versus 2.9; closed cases). While this is an interesting exception, it is not sufficient to override the conclusion that CASA volunteers do not reduce

the number of continuances during a case. See Table 3 for a summary of dependency processes.

Seven studies examined the number of services ordered for children and families (4, 6, 8, 12, 15, 17, 18). Six were level 2 evidence, and one was level 4 evidence. All but one study found a higher number

**Table 3. Relationship Between CASA Advocacy and Dependency Processes**

| Study                              | Level of Evidence | Continuances | Services Ordered | Placements  | Time in System       |
|------------------------------------|-------------------|--------------|------------------|-------------|----------------------|
| Calkins                            | 2                 |              |                  | ↓           | ↓                    |
| Condelli                           | 2                 |              | ↑                | ↔           | ↑                    |
| Cook                               | 2                 |              |                  |             | ↑                    |
| Duquette                           | 2                 |              | ↑                |             |                      |
| Leung                              | 2                 |              |                  | ↔           |                      |
| Litzelfelner                       | 2                 | ↔            | ↑                | ↓           | ↔                    |
| McRoy & Smith                      | 2                 |              |                  | ↓           | ↓                    |
| Poertner                           | 2                 | ↔            | ↑                | ↔           |                      |
| Profflet                           | 2                 |              |                  |             | ↓                    |
| Siegel                             | 2                 |              | ↑                | ↔           | ↔                    |
| Snyder                             | 2                 | ↔            | ↓                |             |                      |
| McRoy                              | 4                 |              |                  | ↑           | ↑                    |
| Oregon                             | 4                 |              |                  |             | ↓                    |
| Powell                             | 4                 |              |                  |             | ↓                    |
| Smith                              | 4                 |              |                  | ↑           | ↑                    |
| Waide                              | 4                 |              | ↑                |             | ↑                    |
| Combined—all (CASA vs. comparison) |                   | 1.5 vs. 1.7  | 8.3 vs. 5.2      | 4.0 vs. 3.8 | 27.5 vs. 25.4 months |
| Combined—levels 1 and 2            |                   | 1.5 vs. 1.7  | 9.0 vs. 6.9      | 3.2 vs. 3.5 | 23.9 vs. 20.0 months |
| Conclusion                         |                   | ↔            | ↑                | ↓           | ↔                    |

Arrows indicate general direction: ↑ = more; ↓ = less; ↔ = no difference.

of services ordered for cases assigned to CASA volunteers. The exception (17) was unique in that all physical abuse cases were excluded from the study.

One study (4) went a step further, examining the degree to which appropriate services were ordered. Appropriate services are those that matched the requirements of the case plan. For instance, if a child had been removed because the parent had a substance abuse problem, then substance abuse treatment would have been considered an appropriate service. This study reported that 46 percent of appropriate services were ordered in cases with CASA-attorney teams, compared to 32 percent in cases with an attorney only. This was a statistically significant difference.<sup>42</sup>

Nine studies explored the total number of placements (3, 4, 7–10, 12, 15, 16). The findings are mixed: some investigators found that children with CASA volunteers had fewer placements, some reported essentially no difference, and some reported that children with CASA volunteers had more placements than children without CASA volunteers. Results from only three of these studies are statistically significant: two (3, 10; level 2 evidence) demonstrate a reduction of placements for CASA program children, and one (9; level 4 evidence) demonstrated an increase in placements of children with CASA volunteers. When the data from all studies are combined, the number of placements appears similar. When level 4 evidence is excluded, summary data suggest a slight reduction in number of placements. Despite the small absolute difference, we strongly considered the contribution of the Calkins study (3) in concluding that the use of CASA volunteers does reduce the number of placements. Calkins is important because it is the only one of the studies to control for two important confounders: the children in the CASA and comparison groups were equivalent in terms of the severity of their abuse, and in each case the CASA volunteer or attorney guardian ad litem was assigned within 90 days.

Twelve studies examined children's overall time in the system (3–5, 8–11, 13–16, 18). Again the findings are mixed: some studies report reduced time in the system for children with CASA volunteers, some

show no difference, and others report increased time. Considering all data, there does not appear to be an overall difference. Excluding the five studies with level 4 evidence (9, 11, 13, 16, 18), the children with CASA volunteers were in the system slightly longer. Overall we conclude that there is no consistent difference.

However, one can draw an alternative conclusion by relying exclusively on the methodological strength of the Calkins study, which selected CASA and non-CASA children who were equivalent in the severity of their abuse histories and which explicitly included only those CASA cases where the CASA volunteer had been assigned early in the case. Calkins (level 2 evidence) reported a statistically significant reduction in both the number of placements (3.3 in the CASA group versus 4.6 in the comparison group) and the amount of time in the system (31 months versus 40 months).

### *Child Status Outcomes*

Several studies explored children's final placements. Permanent placement (adoption, reunification, or guardianship) is generally considered a success, but long-term foster care is not. Eleven studies reported the proportion of children who had achieved permanent placement by the end of the study periods (1–4, 6, 8, 10, 12, 14–16).

Seven (1, 2, 8, 12, 14–16) reported the proportion of children adopted. Most of these, one of which is the only randomized trial in the review (1), found that adoption was more likely among CASA-supported children than the non-CASA-supported children. The aggregate data plus the findings of the randomized trial provide convincing evidence that CASA volunteers do increase the probability of adoption. See Table 4 for a summary of child status outcomes.

The increase in adoption does not seem to be reciprocated by decreases in the other categories, confounding intuitive sense. Only 4 of the 11 studies (1, 2, 12, 15) simultaneously examined all four child status endpoints. For example, the Calkins study compared only CASA versus non-CASA reunification percentages and made no mention of adoption, guardianship, or

long-term foster care. Though we cannot make definitive statements about how the other three categories differed, we suspect that the increase in adoption comes from small decreases across the other three categories.

Nine studies suggest that family reunification is equally likely overall for children with CASA advocacy versus those without (1, 2, 3, 6, 9, 12, 14–16). Again the aggregate data and the randomized trial support this conclusion.

The evidence on guardianship (1, 2, 4, 9, 12, 14, 15) was mixed, with the total numbers suggesting that it is equally likely for children with CASA vol-

unteers as without. The randomized trial (1) reported a statistically significant reduction in the proportion of children whose final placement was guardianship, but it is the only study to report this finding.

Seven of the studies describe the proportion of children who failed to achieve permanent placement and remained in long-term foster care (1, 2, 8, 10, 12, 15, 16). The children with CASA volunteers were equally likely as children without CASA volunteers to be in long-term foster care at the end of the study period. However, again, the only randomized trial in the review reported a statistically significant

**Table 4. Relationship Between CASA Advocacy and Child Status Outcomes**

| Study                              | Level of Evidence | Adoption    | Reunification | Guardianship | Foster Care | Reentry    |
|------------------------------------|-------------------|-------------|---------------|--------------|-------------|------------|
| Abramson                           | 1                 | ↑           | ↔             | ↓            | ↓           | ↓          |
| Calkins                            | 2                 |             | ↑             |              |             |            |
| Condelli                           | 2                 |             |               | ↔            |             |            |
| Duquette                           | 2                 |             | ↑             |              |             |            |
| Litzelfelner                       | 2                 | ↓           |               |              | ↔           |            |
| McRoy & Smith                      | 2                 |             | ↓             | ↑            | ↔           |            |
| Poertner                           | 2                 | ↑           | ↓             | ↔            | ↓           | ↓          |
| Proffitt                           | 2                 | ↑           | ↓             | ↑            |             |            |
| Siegel                             | 2                 | ↑           | ↔             | ↔            | ↔           |            |
| Aitkins                            | 4                 | ↔           | ↔             | ↔            | ↔           |            |
| Powell                             | 4                 |             |               |              |             | ↓          |
| Smith                              | 4                 | ↔           | ↓             |              | ↑           |            |
| Combined—all (CASA vs. comparison) |                   | 22% vs. 14% | 42% vs. 42%   | 16% vs. 16%  | 22% vs. 24% | 6% vs. 11% |
| Combined—levels 1 and 2            |                   | 28% vs. 22% | 40% vs. 45%   | 14% vs. 14%  | 16% vs. 17% | 9% vs. 16% |
| Conclusion                         |                   | ↑           | ↔             | ↔            | ↔           | ↓          |

Arrows indicate general direction: ↑ = more; ↓ = less; ↔ = no difference.

reduction in the number of children in long-term foster care and a very large reduction (13 percent versus 59 percent of case plans) for open cases.

With regard to the likelihood of guardianship and foster care, we concluded that there is no difference between the CASA and non-CASA groups. The combined percentages for all studies and for studies with higher levels of evidence were similar.

Relying principally on the results of the Abramson study (1) allows one to reach other conclusions about the effect of CASA involvement on reductions in guardianship and long-term foster care with a resulting increase in adoption. Because children were randomly assigned to the CASA and non-CASA groups, it is fairly certain that the groups were similar on variables likely to affect final placements, so the differences can be attributed to the effects of the CASA volunteer assignment. None of the other studies can make this assertion.

Three studies examined reentry into the foster-care system after case closure (1, 12, 13). All three (one level 1 evidence, one level 2, and one level 4) reported fewer cases of reentry among children with CASA volunteers during study periods ranging from 18 months to eight years. The risk of reentry in CASA cases is about half that of other foster children. This finding is consistent and the difference is large. Therefore, this may be the most important outcome assessed in this study.

## DISCUSSION OF STUDY FINDINGS

This systematic review indicates that children who have CASA support do about as well, and in some important ways better, than those represented solely by an attorney. The results are especially encouraging considering that CASA volunteers tend to be assigned to more complex and difficult cases. Though there is just a small body of available literature with generally poor methodological quality, this review shows promise for determining the measurable impacts of assigning CASA volunteers to dependency cases. The findings are consistent across all three domains examined in this study: activities of the child's repre-

sentative, the dependency process, and child status outcomes.

First, the involvement of a CASA volunteer in a case, compared to advocacy by an attorney alone, appears to improve representation of the child. CASA volunteers are much more likely to have face-to-face contact with the children and their care providers. Perhaps owing to their small caseloads (usually one or two cases), CASA volunteers spend more time working on behalf of the children and are far more likely to file written reports with the court. The continuity of representation and documentation may be important when one considers the high turnover of county social workers and the rotation of private attorneys through the dependency court.

Second, though the results were mixed, it was consistently found that children represented by a CASA advocate had more services ordered and more actually implemented and that they tended to have slightly fewer placements. The combined data suggest a small trend in increased time in the system, but the methodological strength of the Calkins study leads us to believe that there is actually a trend in the opposite direction when CASA volunteers are assigned early in the case. An enticing, yet unreplicated finding by Litzelfelner is that closed CASA cases had fewer continuances within the duration of the case. Considering how frustrating continuances can be, this process variable calls for more study.

Finally, and perhaps the most immediately useful result given the current legislative environment and the number of children in foster care, children with CASA support are more likely to be adopted than those with other representation. This may interest county governments given their adoption targets from the federal government and the funding consequences of not meeting those targets.<sup>43</sup> The most profound finding is that children with CASA support appear to be less likely to reenter the foster-care system once their cases are dismissed. The rate of reentry into foster care is consistently reduced by half in these studies.<sup>44</sup> This finding alone could drive the expansion of CASA programs nationwide to address the nagging problem of more than one-half million children in foster care

and high rates of reentry—AFCARS data indicate that 10.3 percent of children who entered foster care in fiscal year 2000 were reentering the system within 12 months of being discharged.<sup>45</sup>

In interpreting the findings in this review, one should remember that CASA volunteers are often assigned to the more complex and difficult cases where children are more profoundly abused. Three studies explicitly indicated that the cases of children assigned CASA volunteers were more challenging: the children experienced higher rates of institutionalization, more severe abuse, more emergency removals, and more sexual abuse; and they were in the system longer (2, 5, 15). Further, some studies' comparison groups were made up, in part, of children on waiting lists who had been referred to CASA but not yet assigned volunteers. If CASA programs tend to triage referrals and assign volunteers to the most severe cases, that would leave a less-severe residual group from which researchers gathered comparison cases. With these confounders in mind, one could argue that the finding of no difference between groups can actually be interpreted as a positive impact—that the “most severe” cases have been reduced to a “less-severe” status during CASA representation.

The need to determine the measurable impact of CASA advocacy is not merely academic, nor is it simply to satisfy curiosity. Rather, there are immediate and practical applications of knowing how CASA programs work, with whom, when, and under what circumstances. One compelling reason that exemplifies the critical nature of this information lies in the method of assigning volunteers to specific cases. Courts do not have the luxury of giving every child this support, so deciding who gets a CASA volunteer requires some form of triage and is generally based on a broad spectrum of informal formulas. However, there is variation in these formulas, and they are too often based on untested assumptions and subjective experiences. Therefore, this review attempted to synthesize empirical information from a variety of studies on the impact of CASA programs with the explicit goal of improving decisions about the distribution of this limited resource.

The confluence of social science and the legal system does not always provide the right forum for effective exchange of information. Social science and legal practitioners generally read different literature, attend different types of conferences, and are responsible for knowing and using different information. Legal personnel want information that is fast and factual while academics lean toward exhaustive discussions of findings that often interpret results speculatively and tentatively. Systematic reviews like this one may offer a compromise permitting shared expertise in both domains because the reader is presented with information collected from many different studies.

None of these studies measured what we considered to be real well-being outcomes for children, such as quality of life or attainment of academic potential. Most of the outcomes explored here are of arguable relevance to the well-being of children, although many believe that these process events will lead to positive outcomes. Perhaps the only outcome with clear external relevance is reentry into the court system; and, notably, each of the studies that explored reentry reported that children who had been assigned to CASA volunteers were approximately 50 percent less likely to reenter the dependency system.

There are limitations to this review process as well as limitations to the individual studies used.<sup>46</sup> However, these limitations do not preclude critical appraisal of the literature to understand what the current best evidence is of CASA programs' impact on the lives of children in dependency.

It remains a problem that studies purporting to measure outcomes of CASA advocacy are actually measuring the process of court intervention. Processes, or intermediate outcomes, are easier to measure because these data are typically present in the existing dependency record. Long-term outcomes, directly measuring the well-being of the child, are far more difficult to assess because they usually require additional data collection systems and follow-up. The study of intermediate markers of child well-being significantly limits our ability to make sure-footed conclusions about the relevant impact of these

heterogeneous programs. None of the studies provided direct information about the welfare of children. Some are taking on this challenge. Child Advocates, Inc., is currently completing a five-year longitudinal study comparing children served only by child protective services to children who also received the services of a CASA program and is examining true child outcomes.<sup>47</sup> Preliminary findings suggest that CASA volunteers positively affect children's self-esteem, their attitudes about the future, and their ability to work with others, as well as help control deviant behavior.<sup>48</sup> The children's caregivers also appear to benefit in the areas of communication and family rituals.<sup>49</sup> Patterns of communication and rituals in families are general markers for the overall health of the family system.<sup>50</sup> Details about the methodology of the study and effect sizes for these findings have not yet been released, but this appears to be the first attempt to assess true child outcomes.

Other researchers have found that negative process events, such as multiple foster-care placements, are associated with increased problems<sup>51</sup> and that these findings are true for adulthood outcomes as well.<sup>52</sup> In Arizona, the National Center for Juvenile Justice is currently involved in a study that follows children from dependency cases to identify whether CASA advocacy reduces the probability that children become juvenile delinquents.<sup>53</sup>

We hope that this research and future research will provide much-needed information to help guide judicial decision making. The advantage of integrating empirical relationships into the decision-making process is well documented.<sup>54</sup> Nevertheless, we still struggle with inadequate empirical evidence and a lack of direct coherent communication between social scientists and the courts.

## CONCLUSION

It is encouraging to see that children with CASA support do as well, and in some cases better, than those children who are represented solely by an attorney. Nevertheless, readers should be cautious not to overinterpret the findings of this and other studies.

Examination of the impact of this advocacy remains at the process level and does not yet reveal evidence of indisputably positive outcomes. Although it may be argued that children who have a better process will likely have better outcomes, there is no scientific evidence to prove this assumption.

The findings of this systematic review suggest that particular process variables may be positively influenced by the assignment of a CASA volunteer. Specifically, CASA volunteer assignment might be considered under the following circumstances: when more contact is needed with the child and the family, to increase the chances that the mother appear in court, to provide written reports, to get more services, to reduce number of placements and perhaps time in the dependency system, to increase the likelihood of adoption, and to reduce the odds that the child will reenter foster care once the case is dismissed.

1. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT 1 (2003), at [www.acf.hhs.gov/programs/cb/publications/afcars/report8.pdf](http://www.acf.hhs.gov/programs/cb/publications/afcars/report8.pdf). (AFCARS stands for Adoption and Foster Care Analysis and Reporting System.)

2. *Id.* at 2–3.

3. *Id.* at 3.

4. Child Abuse Prevention and Treatment Act of 1974 (CAPTA), Pub. L. No. 93-247, § 4(B)(2)(G), 88 Stat. 4, 7 (codified as amended at 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000 & Supp. 2004)).

5. Child Abuse Prevention, Adoption, and Family Services Act of 1988, Pub. L. No. 100-294, sec. 101, § 8(b)(6), 102 Stat. 102, 111; Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. 104-235, § 107(b)(2)(A)(ix), 110 Stat. 3063, 3073; Keeping Children and Families Safe Act of 2003, Pub. L. 108-36, § 114(b)(1)(B)(vii), 117 Stat. 800, 810.

6. 42 U.S.C. § 5106a(b)(2)(A)(xiii).

7. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified as amended at 42 U.S.C. §§ 670–679b).

NOTES

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8. Adoptions and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C. (2000 & Supp. 2004)).
  9. Victims of Child Abuse Act of 1990, Pub. L. No. 101-647, § 216, 104 Stat. 4789, 4794 (codified at 42 U.S.C. § 13012 (2000 & Supp. 2004)).
  10. Nat'l CASA Ass'n, History of CASA (Aug. 2003), at [www.casanet.org/download/ncasa\\_publications/history-casa.pdf](http://www.casanet.org/download/ncasa_publications/history-casa.pdf).
  11. Nat'l CASA Ass'n, Frequently Asked Questions About CASA (n.d.), at [www.casanet.org/download/ncasa\\_publications/frequently-asked-questions-about-casa.pdf](http://www.casanet.org/download/ncasa_publications/frequently-asked-questions-about-casa.pdf).
  12. Nat'l CASA Ass'n, National Statistics 2004 (2004), [www.casanet.org/download/ncasa\\_publications/casa-stat-sheet-2-04.pdf](http://www.casanet.org/download/ncasa_publications/casa-stat-sheet-2-04.pdf) (on file with the authors).
  13. Because some programs serve more than one county, we conducted a telephone survey of all state programs to determine how many counties have CASA program resources available to their dependent children.
  14. 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000 & Supp. 2004).
  15. Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, §§ 103(a)(1)(A), 107, 110 Stat. 3071, 3079.
  16. Michael S. Piraino, *Lay Representation of Abused and Neglected Children: Variations on Court Appointed Special Advocate Programs and Their Relationship to Quality Advocacy*, 1 J. CENTER CHILDREN & CTS. 63, 64 (1999), available at [www.courtinfo.ca.gov/programs/cfcc/pdffiles/063-072.pdf](http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/063-072.pdf).
  17. LARRY CONDELLI, CSR, INC., NATIONAL EVALUATION OF THE IMPACT OF GUARDIANS AD LITEM IN CHILD ABUSE OR NEGLECT JUDICIAL PROCEEDINGS 1-2 to 1-4 (1988) (report to Admin. for Children, Youth & Families, Dep't of Health & Human Servs.).
  18. SHERRIE S. AITKEN ET AL., CSR INC., FINAL REPORT OF THE VALIDATION AND EFFECTIVENESS STUDY OF LEGAL REPRESENTATION THROUGH GUARDIAN AD LITEM 2-5 to 2-11 (1993) (report to the Admin. for Children, Youth & Families, Dep't of Health & Human Servs.); KAREN C. SNYDER & JOHN D. DOWNING, THE STRATEGY TEAM, LTD., A REPORT TO THE OHIO CHILDREN'S FOUNDATION ON THE EFFECTIVENESS OF THE CASA PROGRAM OF FRANKLIN COUNTY: PHASE ONE 13-15 (Ohio Children's Found. 1995).
  19. Adoption Assistance and Child Welfare Act of 1980 § 101(a)(1), 42 U.S.C. § 675(5)(B) (2000 & Supp. 2004).
  20. Pat Litzelfelner, *The Use of Citizen Review Boards With Juvenile Offender Cases: An Evaluation of the Effectiveness of a Pilot Program*, 52 JUV. & FAM. CT. J. 1 (2001).
  21. See, e.g., CITIZEN'S FOSTER CARE REVIEW Bd. PROGRAM, STATE OF MICHIGAN, ANNUAL REPORT (2001) (supporting the authors' statement of the function of the foster-care review boards).
  22. Child Abuse Prevention and Treatment Act Amendments of 1996 § 107(c)(1), 42 U.S.C. 5106a (2000 & Supp. 2004).
  23. See *id.*
  24. See *id.* § 107(c)(2).
  25. See *id.* § 107(c)(4)(A).
  26. LINDA HEUERTZ, NAT'L CASA ASS'N, EVALUATIONS/REVIEWS OF CASA AND GAL PROGRAMS/MODELS WITH PROCESS AND/OR OUTCOME MEASURES (1996), at [www.casanet.org/program-management/evaluation/96-eval-study.htm](http://www.casanet.org/program-management/evaluation/96-eval-study.htm).
  27. Davin Youngclarke, *A Systematic Review of the Literature on the Effectiveness of Court Appointed Special Advocates* (Cal. Court Appointed Special Advocate Ass'n 2002), at [www.calcasanet.org/ResourceLibrary/article\\_SystematicReview.htm](http://www.calcasanet.org/ResourceLibrary/article_SystematicReview.htm).
  28. Pat Litzelfelner, *Court Appointed Special Advocates (CASAs): A Review of Their Effectiveness*, 22 CHILD. LEGAL RTS. J. 1 (2002), available at [www.perspectivesonyouth.org/Pages-Archive/CurrentEditionsPerspectives-Jan-June2003.htm](http://www.perspectivesonyouth.org/Pages-Archive/CurrentEditionsPerspectives-Jan-June2003.htm).
  29. Published literature is typically indexed in databases like LexisNexis, Medline, and PsycINFO and is easy to acquire. Unpublished literature or documents of limited circulation pose a problem for social scientists who research, present, and publish on the topic, with the result that good investigations remain unnoticed by those who could benefit from the studies' findings.
  30. We began with the three previously published reviews of CASA program effectiveness. We examined the reference lists of those reviews and obtained the studies to which they referred. Study authors were contacted and asked whether the cited version was the most current, whether they knew of other researchers or other studies we should consider, and whether they personally had conducted any other evaluations of similar advocacy programs.
- The evaluation project manager at the National Court Appointed Special Advocates Association office provided a list of evaluation research of which the association was aware. We also contacted each of the state CASA program



offices to inquire about recent research conducted in that state. In addition, we sent open messages to two listservs (one sponsored by the International Society for the Prevention of Child Abuse and Neglect and the other by the journal *Child Maltreatment*), posting a general request for information about additional outcome studies.

We conducted searches of eight electronic databases of published literature, including Medline, PsycINFO, Academic Index, LexisNexis, Dissertation Abstracts Online, the National Criminal Justice Reference Service, Social Work Abstracts (which indexes documents from 1977 to the present) and the Social Science Index (which indexes documents from 1983 to the present). Each database was searched on the following terms: *Court Appointed Special Advocate*, *CASA*, *guardian ad litem*, *GAL*, and (*child abuse AND child advocacy*).

Each outcome study was carefully scrutinized for reference to other possible outcome studies cited in the text or listed in the references. Many referred to studies in progress or unpublished prior reports. We pursued each vigorously.

31. If any two reports appeared to present the same data (for example, an internal report that was later published in a research journal), they were enumerated as a single study. Published reports were preferred when discrepancies were evaluated.

32. Child outcomes are measured at or after case closure and reflect how things turned out for the child. We included researched advocacy programs if they used trained volunteers (not paid attorneys or social workers) who were assigned to follow particular children through direct relationships and were expected, where possible, to stay with a case through its duration. Children must have been involved in child abuse and neglect proceedings; advocacy for juvenile delinquents was not examined in this review. Most such programs are CASA programs, but studies of non-CASA interventions were included if trained community volunteers were assigned to follow specific cases. These criteria included lay guardians ad litem who are not affiliated with CASA organizations but excluded citizen review panels and foster-care review boards.

33. Of 69 potential outcome studies identified, we located 68, of which 5 were redundant and 43 were excluded for methodological reasons (e.g., absence of a comparison group, qualitative research, perceptions as outcomes, satisfaction surveys). This process yielded a total of 20 separate studies that met our inclusion and exclusion criteria.

34. BOB PHILLIPS ET AL., OXFORD CTR. FOR EVIDENCE-BASED MED., LEVELS OF EVIDENCE (May 2001), at [www.cebm.net/downloads/Oxford\\_CEBM\\_Levels\\_5.rtf](http://www.cebm.net/downloads/Oxford_CEBM_Levels_5.rtf).

35. *Id.*

36. We calculated point estimates in order to present a quantitative comparison and communicate the magnitude of CASA's impact for descriptive purposes. To accomplish this, we factored in the sample size of each study and produced weighted averages and weighted proportions for the outcomes. No pooled data analyses were possible because many authors did not include the necessary statistical information.

37. We used statistical significance as an indicator of more definitive or convincing findings. However, several studies, particularly the government reports that are designed to be more descriptive than analytic, do not report statistical significance and did not include enough information for the authors to perform secondary statistical tests. Many of the studies were underpowered with small sample sizes, so statistical significance would not be anticipated even if important differences were present.

38. Many evaluations of the effectiveness of programs remain unpublished because they are commissioned by private organizations, foundations, or other institutions interested in the effects of interventions using granted funds but with no interest in publishing. Relying on the results of easily available studies while ignoring these other reports eliminates a large source of relevant data.

39. The *American Heritage Dictionary* defines *cohort* as "3. A generational group as defined in demographics, statistics, or market research..." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 359 (Houghton Mifflin 4th ed. 2000).

40. Process variables are variables that are measured prior to case closure and reflect the manner in which the case was handled.

41. 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000 & Supp. 2004).

42. Why such a high percentage of case plan services did not have corresponding court-ordered services for both groups is unclear.

43. Adoptions and Safe Families Act of 1997, Pub. L. No. 105-89, §§ 107, 201, 111 Stat. 2115, 2121–22 (codified as amended at 42 U.S.C. §§ 673b, 675 (2000 & Supp. 2004)). According to 2002 AFCARS information, 129,262 children were waiting for adoption in 2002. Children's Bureau, U.S. Dep't of Health & Human Servs.,

- NOTES FY 1998, 1999, FY 2000, FY 2001, and FY 2002 Foster Care: Children Waiting for Adoption, [www.acf.hhs.gov/programs/cb/dis/tables/waiting2002.htm](http://www.acf.hhs.gov/programs/cb/dis/tables/waiting2002.htm).
44. In all studies this reduction brought the rate below the target (8.6 percent) set by the federal government in the Child and Family Service Reviews. ADMIN. FOR CHILDREN & FAMILIES, U.S. DEPT. OF HEALTH & HUMAN SERVS., INFORMATION MEMORANDUM: UPDATED NATIONAL STANDARDS FOR THE CHILD AND FAMILY SERVICE REVIEWS AND GUIDANCE ON PROGRAM IMPROVEMENT PLANS 4 (Aug. 16, 2001).
45. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., FOSTER CARE NATIONAL STATISTICS (Mar. 2003), at <http://nccanch.acf.hhs.gov/pubs/factsheets/foster.cfm>.
46. The limitations of this review are largely a consequence of limitations in the individual studies themselves. There also may be unpublished literature that we did not locate. Furthermore, a formal meta-analysis that would have allowed completely objective interpretation was not possible because of the absence of essential statistical information. In addition, the majority of the studies were observational, introducing the strong possibility that children with CASA volunteers were systematically different from children without CASA volunteers in ways likely to affect the outcome of their cases. Additionally, some of these studies followed dependent children over time and were influenced by changes in court processes and concurrent programs. We also observed geographic variance in how CASA programs operate across the country; therefore we cannot distinguish between the effectiveness of the various approaches.
47. Press Release, Child Advocates, Inc., Making a Difference in the Lives of Children: A Five-Year Study of the Effectiveness of Child Advocates, Inc. (n.d.) (on file with the authors).
48. *Id.*
49. *Id.*
50. JOHN GOTTMAN & JOAN DECLAIRE, RAISING AN EMOTIONALLY INTELLIGENT CHILD (Simon & Schuster 1998); EVAN IMBER-BLACK & JANINE ROBERTS, RITUALS FOR OUR TIMES: CELEBRATING, HEALING, AND CHANGING OUR LIVES AND OUR RELATIONSHIPS (Jason Aronson 1998).
51. LEE DORAN & LUCY BERLINER, WASH. STATE INST. FOR PUB. POLICY, PLACEMENT DECISIONS FOR CHILDREN IN LONG-TERM FOSTER CARE: INNOVATIVE PRACTICES AND LITERATURE REVIEW 8 (2001), available at [www.wsipp.wa.gov/rptfiles/FCPlacement.pdf](http://www.wsipp.wa.gov/rptfiles/FCPlacement.pdf).
52. See generally, THOMAS P. McDONALD ET AL., CHILD WELFARE LEAGUE OF AM., ASSESSING THE LONG-TERM EFFECTS OF FOSTER CARE: A RESEARCH SYNTHESIS (1997).
53. Telephone interview with Gene C. Siegel, Nat'l Ctr. for Juvenile Justice (July 14, 2003).
54. See Robyn Dawes et al., *Clinical Versus Actuarial Judgment*, 243 SCIENCE 1668-74 (Mar. 1989).

# Principles of Child Development and Juvenile Justice

## *Information for Decision-Makers*

Judges, prosecutors, and public defenders in juvenile delinquency court routinely encounter offenders of both sexes who are psychologically very different from their adult counterparts. Thus, an understanding of the principles of child and adolescent development and a consideration of children's mental health are useful to decision-makers at all levels of the juvenile justice system. Indeed, knowledge of the basic principles of developmental psychology is essential to understanding the requirements of normal neurobiological, psychological, social, and moral development.<sup>1</sup> Yet judges and attorneys can and do serve in delinquency court with little or no training in principles of normal—let alone abnormal—childhood development.

Unfortunately, inappropriate juvenile court sanctions based on the decision-makers' ignorance of child development principles can have negative developmental consequences that frustrate the very purpose of the juvenile court.<sup>2</sup> Simply put, there is the very real risk that the justice system can do more harm than good to a child who is still in the process of neurobiological, psychological, social, and moral development. And the negative consequences of careless sanctioning may last longer for a child (and for society) than they might for an adult. Thus, decision-makers at all levels of the juvenile justice system would benefit from considering children's mental health informed by the principles of child and adolescent development.

Other than infancy, no stage in human development results in such rapid or dramatic change as adolescence.<sup>3</sup> Adolescence is an intense period of rapid development culminating in identity formation<sup>4</sup> and social integration. These developmental tasks are keenly sensitive to environmental (peer, educational, familial, and social) influence. The teen years are also characterized by a struggle for autonomy from adults, upon whom adolescents nonetheless depend. Rapid neurobiological concomitants accompany these changes and are reflected in cognitive, emotional, and abstract reasoning, as well as changes in moral development.<sup>5</sup> According to some authorities, adolescence is an "important formative period in which many developmental trajectories become firmly established and increasingly difficult to alter."<sup>6</sup>

Applying the child development considerations discussed in this article to juvenile court decisions should lead to lower detention rates and durations and to less frequent use of interventions whose success is not supported by

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The juvenile justice system exists to protect public safety, prevent youthful offending, and promote positive social development in children and adolescents. This article argues that, to accomplish these goals without harming both children and society, the system's decision-makers must avoid treating the children it faces simply as little adults. Children and adolescents are psychologically very different from adults and even from each other. Decision-makers must understand principles of child development and apply them to tailor developmentally appropriate sanctions. The article explains principles of child development and discusses the various ways children of different developmental stages experience the same sanction. It goes on to describe different sanctions and their effects on children, and then to urge decision-makers to tailor sanctions to

*Continued on page 128*

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each offender's individual developmental, emotional, and social circumstances. The article concludes by suggesting sanctioning strategies for special juvenile offender populations: girls, the mentally ill, and transgenerationally involved youth.

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evidence. These changes will be most pronounced for children with mental disorders or mental retardation and for low- to moderate-level youthful offenders of all genders, races, and ethnicities. The purpose of this article is to help lawyers, judges, and other juvenile justice policymakers and decision-makers prescribe more appropriate, effective, and humane remedies when designing alternative interventions and sanctions for juvenile offenders who are not seriously violent or sociopathic. Because the vast majority of youthful offenders are not dangerous, this group is the focus of this article. And, although they are extremely important, this article does not directly address issues of diminished competence, capacity, and culpability.<sup>7</sup>

The article is organized in three major sections. The first section references principles of child and adolescent development and children's mental health and discusses how they affect social behavior. The second section explains the overarching goals of the juvenile justice system and offers examples demonstrating that certain sanctions are more conducive to a child's positive social development than others. It describes the necessary balance between allowing some latitude for mistakes while providing a clear set of limits and consequences. The section also discusses the inappropriate imposition of particular sanctions and their possible deleterious effects on a child's relationship to society. It notes especially that children of different maturational stages may experience the same sanction differently. The section concludes by proposing more effective sanctioning methods for healthy child development. It argues that decision-makers in the juvenile justice system should focus primarily on the developmental, emotional, and social needs of the *offender*, rather than on the characteristics of the *offense*; in other words, the system should be offender-driven rather than offense-driven. The goal of this approach is to help the decision-maker conceive more clearly the objectives to be attained and to become more knowledgeable and effective in achieving those objectives.

The last section suggests specific sanctioning strategies for various special cases, including those of girls in the juvenile system, incarcerated juveniles with mental health and neurodevelopmental problems (including learning disabilities), disproportionate minority confinement from a child's perspective, and transgenerational offenders and their families.<sup>8</sup>

## GENERAL DEVELOPMENTAL CONSIDERATIONS

Both biology and experience determine a child's developmental trajectory. Modern neurobiological understanding of the interdependence and interpenetration of these two dimensions has superseded the historical question of "nature versus nurture." A child's experience affects his or her brain development, and the level of brain development affects how the child experiences his or her environment and processes information.<sup>9</sup> This mutual causation means that future behaviors in response to a given set of environmental circumstances, cues, or stimuli can be traced to genetic and biological factors

(temperament, biological predilection, vulnerability), as well as other experiences (internal, familial, interpersonal, environmental). Insofar as social behavior is a principal concern of the juvenile justice system, that system should focus on familial and social factors that affect behavior. In this context, social learning theory<sup>10</sup> and developmental neurobiology<sup>11</sup> are both relevant for framing issues that inform effective sanctioning of children and adolescents.<sup>12</sup>

Research in developmental neurobiology using magnetic resonance imaging of the brain has demonstrated differences in the way adolescents and adults think and feel and the way they process information before they act. Adolescents tend to process emotionally charged decisions in the limbic system, the part of the brain charged with instinctive (and often impulsive) reactions. Most adults use more of their frontal cortex, the part of the brain responsible for reasoned and thoughtful responses.<sup>13</sup> This is one reason why adolescents tend to be more intensely emotional, impulsive, and willing to take risks than their adult counterparts. In addition to the large differences between adolescents and adults in the degree to which the frontal cortex is used, there is a large amount of within-group variation among adolescents themselves, such that chronological age is a poor index of neurobiological and emotional maturity.

On the social front, youth who repeatedly appear before the juvenile court typically come from chaotic homes and neighborhoods. These youth have learned that the world can be unpredictable, capricious, threatening, and grossly unfair. Additionally, they have not had the necessary developmental opportunity to internalize consistently benevolent, reliable, and fair adult authority figures. Instead, hostile environments that were not responsive to their need for consistent and reliable caregiving may have determined these young offenders' views of family, neighborhood, and society.<sup>14</sup>

Though this does not diminish offenders' responsibility for learning to control their behaviors, it illustrates why it is important for the delinquency court to avoid reenacting the role of an indifferent,

unreliable, unpredictable, unfair, or incompetent authority figure. Children and adolescents need limits, structure, and boundaries to develop normally.<sup>15</sup> From a developmental perspective, interaction with the juvenile justice system is a key opportunity for society to demonstrate its values<sup>16</sup> and to articulate its expectations of its members. To developing youth just beginning to learn what they can expect from social authority, the juvenile justice system represents the social order. If the authority (law enforcement and delinquency court) seems thoughtless, impersonal, or indifferent, youth will experience precisely the opposite of the timely, consistent, and thoughtful responses they need to developmentally internalize personal responsibility for their actions. What vulnerable youth experience from the juvenile justice system will affect how they view authority in general and their beliefs about social authority in particular.

Although children have a developmental need to test limits, they also have an equally important need to encounter predictable structure and boundaries. A balance between punishment and permissiveness—both measured and timely—is essential for effectively intervening with the low- to moderate-level offender, the responsibility for whom has fallen to the legal system.

From a developmental perspective, the predictability and consistency of adult attention and responsiveness are often what is most important. If children learn that their social environment responds inconsistently, they are much more likely to continue behavior in the hope that they will “get away with it this time.” For example, if a child is caught sniffing glue after breaking into a neighbor's house while truant from school and “nothing really happens,” he is more likely to persist in those behaviors and perhaps even escalate the seriousness of his substance abuse, truancy, and delinquency. The message he has received is: “No one really cares about me that much,” which is construed to mean, “So I might as well do whatever I want.”

One reason for this response is that children require attention for brain development just as they require food or sleep. The notion of an attention

requirement or demand has been relatively unrecognized in Western psychology, although it has been known for some time in the psychologies of central Asia.<sup>17</sup> This attention-seeking behavior has its correlates in brain development inasmuch as the developing child requires interaction with other humans to develop the capacity of recognizing facial cues and the nuances of social situations. Teenagers who are attention-deprived are not very discriminating about how they go about getting the attention they need. Children will seek both positive and negative attention to meet their needs. This is the root of much of attention-seeking behavior in normal adolescents; it accounts for some of their more peculiar vagaries in dress, appearance, and behavior.<sup>18</sup> If no attention is forthcoming, they will escalate their demands. For example, if a child is not noticed when he uses mild profanity, he may “raise the stakes” by using more vulgar language to get the attention he needs (and to test his social boundaries). Another example is verbal taunting. If no one intervenes, taunting by an attention-seeking child often escalates into full-scale bullying and sometimes into physical violence.<sup>19</sup> It does not matter to the child what the valence of the attention is; failing to get positive attention, a child will attract negative attention.

### STRATEGIC SANCTIONING

Muddled thinking and significant differences of opinion exist today regarding the proper role of the delinquency system.<sup>20</sup> The historical polarization of advocates of punishment and those who advocate “rehabilitation” is, for the most part, irrational. As any parent can testify, successfully raising a child requires at least some negative consequences (i.e., punishment) in response to dangerous, antisocial, or otherwise inappropriate behaviors.<sup>21</sup> Complications arise when youth confuse punishment (to discourage misbehavior) with retribution. Further complications develop when punishment is applied thoughtlessly, unfairly, and disproportionately in a manner that does not foster positive development. Worse yet, it may forestall it.<sup>22</sup> Finally, the frequent pres-

ence of biologically based mental illness or mental retardation in a substantial subpopulation of juvenile offenders further confounds effective decision making. Thus, effective sanctioning of juvenile offenders requires clarity of thought and purpose.

The modern decision- and policymaker in the juvenile justice system must first be clear about what sanctioning the offender needs to accomplish.<sup>23</sup> Three important, overlapping goals of the juvenile delinquency system for low- to moderate-level offenders are punishment, prevention of recidivism (to provide for community safety), and deterrence (of other youth from committing the same offense). Another goal, which is often conceptually mixed with these three, is rehabilitation—a term that has effectively lost useful, precise meaning because of its vague definition in popular usage,<sup>24</sup> the political associations it acquired through heavy usage over time,<sup>25</sup> and its use as a euphemism to denote intermediate sanctions designed to effect one or more of the other goals of the juvenile justice system. For example, a two-year incarceration of a 14-year-old in a state “training” school is often called “rehabilitation.” *Black’s Law Dictionary* defines *rehabilitation* in the context of criminal law as “the process of seeking to improve a criminal’s character and outlook so that he or she can function in society without committing other crimes.”<sup>26</sup>

Problems arise when this definition of *rehabilitation* is applied to children and adolescents. The rehabilitative process is open to widely different interpretations depending on the philosophy of the decision-maker. For example, prolonged detention of a moderate-level offender is thought by some decision-makers to be rehabilitative because it may improve the offender’s character. Yet modern psychology and psychiatry specifically dispute that a child or adolescent has a fully formed character. For example, a child cannot be diagnosed with an antisocial personality disorder before 18 years of age.<sup>27</sup> In other words, the character of the child and adolescent is still in the process of forming. Evidence exists that incarceration, boot camps,<sup>28</sup> and the fear of being “scared straight”<sup>29</sup> do nothing to improve

the characters of juvenile delinquents, even though all are commonly cited as rehabilitative elements of the juvenile justice system.

If the term is to be used at all, *rehabilitation*—at least in the context of the low-level juvenile offender—should be defined as “the goal of fostering positive social development (healthy personal, social, and moral maturation) of youth.”<sup>30</sup>

Stated in this way, the goal of rehabilitation is broader than punishing, controlling, or deterring behavior, but it does include the more narrow aim of controlling and delivering consequences that will serve as deterrents to delinquent behaviors, and that will provide for community safety. Given the confusion that currently surrounds the primary purpose of juvenile court law, it is imperative that the reader understand that these goals (positive development versus behavior control/punishment) are *not* in opposition to each other but, rather, are interdependent. This article describes the interdependence between the two goals and explains how an appreciation of the principles of healthy childhood development has a direct bearing on the design of effective sanctions and deterrents for the vast majority of juvenile offenders.

#### DURATION OF SANCTIONING AND FREQUENCY OF REVIEWS

Many variables play roles in determining effective offender-based sanctioning. Generalization is therefore difficult and risks contradiction in an article advocating individualized decision making. Nevertheless, this article will address two primary components of effective sanctioning: duration of sanctioning and frequency of review. Developmentally appropriate offender-based sanctions usually vary along these dimensions.

The reason that a year seems interminably long for a 4-year-old is that a year is, subjectively, one-fourth of his life. For a 60-year-old man, a year is only one-sixtieth of his life. This subjective perspective is why the years seem to go by more quickly as we get older. The reason this principle is important to understand in the context of sanctions is twofold. First, it has a

direct bearing on the effects of delaying the onset of sanctions vis-à-vis the behavior for which they are to serve as punishment or deterrent. The younger the child, the more quickly the consequences must follow the behavior in order to be effective. Second, the perspective has a direct bearing on setting developmentally appropriate durations of sanctions. It is therefore imperative that decision-makers remember that the younger the child, the longer a given duration of sanction will be subjectively experienced. This is especially important when detention is used. If the duration is too long, the child will invariably feel that the punishment could not possibly match the crime. There is the risk of losing this child, who will externalize his responsibility (e.g., blame his or her lawyer) and feel (consciously or not) that societal authority is capricious and unfair. Patricia Chamberlain aptly describes the roots of this feeling:

Another salient characteristic of adolescents with severe conduct problems is that they invariably have a strong sense that they have been treated unfairly. Whether it has been by their parents, the police, or their teachers, each of them feels victimized in some way. Of course, there are good reasons for this. After reading the case histories of these children, one cannot help but feel sympathetic to their plight. Many of them were raised in families in which there have been serious mental health problems for generations and legacies of abuse, crime, and disrupted relationships have been passed down as part of the family tradition. Attempting to change the life course of these adolescents while treating them in a way they see as fair is a formidable challenge.... That is, an individual will act out in destructive ways to the extent that he or she feels treated unfairly.<sup>31</sup>

If efficacy in sanctioning is the goal, the foremost considerations in tailoring the variables of duration of sanction and frequency of monitoring should be the developmental stage and psychological circumstances of the child. As discussed above, younger children will subjectively experience any given duration of sanction as longer because of how they experience time. In practical terms, this means that three months for a 14-year-old is subjectively much longer

than three months for an adult. This is why effective parents ground their children for weeks, not months, at a time. Imposing a sanction longer than a few days or weeks on a younger child does not usually add anything to deterrence. It is also more difficult to enforce and is more likely to be perceived as grossly unreasonable and unfair, further mitigating the effectiveness of the sanction.<sup>32</sup>

Developmentally appropriate *frequency of review*, however, is the other side of this coin. Because younger children experience time as moving more slowly, frequent reviews of their behavior are highly desirable, even necessary. Older children and adolescents do not require such frequent monitoring. Effective parents monitor homework, chores, curfews, and bedtimes daily or weekly until they are assured that the child can monitor these responsibilities on his or her own. Effective therapeutic residential centers or group homes also monitor behaviors on a daily or weekly basis and reward or punish accordingly. Consequences for misbehaviors are sure, consistent, quick, and directly tied to the undesired behavior. On the other hand, the child gets a fresh start with every new day or week.

To be effective in promoting positive development and extinguishing negative behaviors, the juvenile justice system must adopt the same consciousness of developmental appropriateness: as a general rule, the younger the child, the shorter the duration of sanction but the greater the frequency of monitoring. For example, in residential treatment, a youth is not asked to stay in control “forever.” Experience has taught that “one day at a time” works much better. Similarly, frequent reviews give the child support and an excuse to say no to peer pressure. Another example is review of compliance with court orders. It is unreasonable to reprimand a child six months after he or she has stopped complying with an order. The original offense, the rationale for the court order, and the warning and admonitions delivered by the judge have long since faded from the child’s memory. The judge has a record to review; the child does not. If goals (for example, school attendance and performance) have been set, progress toward those

goals should be monitored frequently to make sure the child is on track. To be fair and effective with young people, the juvenile justice system must strive to mark time in accordance with the needs of individual youth at different stages of maturation and not based on a fixed and preset timetable determined by convenience or usual and customary practice. In general, this means that the juvenile justice system must conduct more frequent reviews. In addition, each child would ideally have one judge; in practice, this would mandate a less-frequent rotation of judges.<sup>33</sup>

#### COMMUNITY-BASED SANCTIONS ARE BETTER THAN INSTITUTIONAL ALTERNATIVES

Although acknowledging one’s personal responsibility for an action is often difficult, the youth must accept responsibility for his or her delinquent behaviors. This step corresponds to the developmental goal of encouraging children to control their impulses, to consider the impact of their behaviors on others, and to accept responsibility for their own mistakes without blaming them on others or on circumstance. For a youth who has not yet become desensitized to the threat or imposition of detention, the initial impact of incarceration will be profound. At the same time, the impact of this sanction diminishes dramatically over time as the child becomes desensitized. At a certain point, the child begins to “identify” with some of the more delinquent peers in detention.<sup>34</sup> For most teenagers, losing a Friday and a Saturday night to a curfew is sufficient to get their attention and to serve as an effective sanction.<sup>35</sup> Paradoxically, months of detention are often counterproductive and can have seriously undesirable side effects, such as gang recruitment. Judges report a frequent refrain from parents that “my child never even *thought* of doing *that* until he was locked up with those other children.”

From a developmental point of view, prolonged detention is also problematic because the child is undergoing developmentally important phases of life in an institutional setting with idiosyncratic demands particular to that setting. Consequently, the child is



adapting to incarceration and an institution, not to the community from which she came and to which she will return. It is imperative that the juvenile justice decision-maker understand that virtually *every effective evidence-based intervention for delinquency occurs in the home and community*. One expert states it simply:

It seems unlikely that institutional treatment, retraining or punishment is effective in decreasing delinquency. It is even possible that there is a harmful effect because of the alienation, stigmatization and “contamination” suffered by those who are incarcerated together with other offenders. Even where treatment gains are observed, it appears that they are lost on return to the community.<sup>36</sup>

This finding makes perfect sense. Normal child and adolescent development requires an environment that is more, not less, normalized.<sup>37</sup> This is one reason why boot camps do not work for the great majority of offenders and may, in fact, worsen their behavior.<sup>38</sup>

#### THE PROPORTIONALITY OF SANCTIONS

The developmentally appropriate intensity of sanctions is also very difficult to address with generalizations, for several reasons. First, there are cultural differences in what is considered a reasonable way to treat a child. Not long ago, many Americans believed corporal punishment was a sanction of choice, hence the popular saying “Spare the rod and spoil the child.” Second, individuals experience sanctions differently from one another. For some children, just the thought of detention is terrifying, while for others, a stint in “juvie” is a badge of honor: in fact, home detention or being alone on the weekends is a fate far worse than juvenile hall, where their friends are.<sup>39</sup> Third, depending on the degree to which a child has become inured to the system, a given sanction may appear more or less fair to that child and his family. For example, the family of a girl who is in detention for running away, drinking, and intimately associating with older males in stolen cars might

be relieved or, depending on the context, might feel that she is being discriminated against on the basis of her gender.<sup>40</sup>

Inasmuch as the child’s and family’s experience with the court is *itself* a determinant of future attitudes toward social authority, it is imperative that the court be predictably knowledgeable and reasonable in designing sanctions that are offender-based. This requires an understanding of the individual child, as well as his or her family, culture, and social circumstances.

#### DEVELOPMENTALLY CONSTRUCTIVE SANCTIONS

As many parents and teachers know, designing constructive sanctions is challenging but very worthwhile because it multiplies the developmental, educational, or social yield. Children become more mature, responsible, knowledgeable, or prosocial as a result of their punishment. This is why researching and writing a report on the effects of substance abuse is better than writing “I will not smoke marijuana” a thousand times. Volunteer service at a senior care home is better for a child than picking up highway litter (unless the offense is littering). A youth convicted of driving while intoxicated might be ordered to volunteer in an emergency room. A particularly good example of a constructive sanction for graffiti vandals is ordering them to adopt a piece of property and holding them strictly responsible for maintaining it and keeping it graffiti-free.<sup>41</sup> This type of individualized and nuanced sanction is developmentally constructive because the youth has a chance to experience the sensation of watching out for his assigned property. He learns what it feels like to be at the mercy of vandals and experiences the victimization of having his property vandalized. Furthermore, he learns the inconvenience, cost, time, and labor involved in cleaning up after somebody else who has little regard for the rights of others.

Another example is arranging for a youth to meet his victim. Adolescents, often thoughtless and impulsive, will commit a crime or prank without considering its impact on others. When a human face

is placed on the damage and suffering adolescents have caused, they often feel both regret and remorse. What most of these offenders lack is experience—not the capacity for empathy. Whether they admit it or not, a genuine desire to make things better often arises. The juvenile justice system should take every opportunity to present to youth the human face of victimization.<sup>42</sup> From a developmental point of view, this is one of the most potent tools in the hands of decision-makers. It teaches empathy, accountability, and compassion while allowing the painful impact of guilt and shame to mold future behavior. It personalizes the system and humanizes society for the children whom the system is trying to socialize.<sup>43</sup>

#### DEVELOPMENTALLY COMPETENT PRACTICE PRINCIPLES

The most effective sanctions are those that address the personal, familial, and societal variables that are essential to healthy child development. These sanctions are community-based whenever possible because, as discussed earlier, virtually every effective evidence-based intervention for delinquency occurs in the home and community. These sanctions almost invariably help the low- to moderate-level offender in developing increased personal competence and connectedness to prosocial elements of a larger community. The immediate community perceives them as measured and fair. Effective sanctions provide supervision, encouragement, and support, along with clear, firm, and timely consequences for delinquent behavior. Effective sanctions are also characterized by some of the following features:

1. **They focus on the offender, not the offense.**
  - There is sensitivity to the developmental stage of the offender.
  - Juveniles are dealt with in the context of their connectedness with others (parents, siblings, extended family, peers).
  - Judicial and supervisory contact with the offender is frequent and reliable.
  - Opportunities for the child to externalize responsibility for his or her acts are minimized.
2. **They fortify extant strengths, competence, and self-control.**
  - The individual youth's strengths are identified and mobilized.
  - There is recognition of the child's efforts; the child receives encouragement.
  - Multiple aspects of the child's life are acknowledged (for example, sanctions may effect education, peer relations, vocational preparedness, and prosocial community relatedness).
  - The child's commitment to appropriate education or vocational preparedness is vigorously promoted.
  - The youth is given meaningful opportunities to enhance the development of personal competence.
3. **They are community-based rather than institutional, building on relationships with the child's family and community whenever possible.**
  - Family, schools, peer group, and neighborhood risk and need factors are taken into account.
  - There are meaningful opportunities to enhance the youth's connectedness to prosocial elements, e.g., neighborhood sports teams.
  - Immediate and extended family and community members are used as allies.
  - After-school hours are accounted for.
  - Time with antisocial peers is minimized.
  - The youth is exposed to positive peer environments.
  - The youth has genuine opportunities to contribute to family, school, or a prosocial community.
4. **They are realistic.**
  - Incentives to succeed are within the reach of the offender.
  - Clear expectations are set, and monitoring is set at a developmentally appropriate frequency.
  - There is recognition of the child's efforts; the child receives encouragement.

- There is a developmentally appropriate provision of latitude for mistakes.
5. **They engender respect for the court and its processes.**
- There is an implicit and explicit expectation of respect for the court.
  - There is explicit respect for each youth and his or her family, culture, and community.
  - Humiliation or shaming is not used as a means of motivation (for example, the child is shown respect).
6. **They put a human face on the court process.**
- The judge relates to each child personally.
  - All parties explicitly communicate the message that “the system cares.”
  - The child is encouraged to meet the victims of his or her criminal acts.
  - Empathy for the victims, an apology, and individualized restitution are explicit expectations.

## STRATEGIES FOR SPECIAL POPULATIONS

Within the juvenile population there are enormous differences in emotional development between, for instance, a 12-year-old and a 17-year-old. There are also vast differences among children of the same chronological age—for example, among 13-year-old boys. Understanding principles of child development and children’s mental health can help guide the design and implementation of more effective interventions for youth who have committed minor to moderately severe offenses. For example, there is evidence that earlier-maturing girls and later-maturing boys tend to have more problems than adolescents who experience puberty in the typical age range.<sup>44</sup> The National Research Council’s Forum on Adolescence reports that, compared to girls who physically mature later, early-maturing females are at increased risk for victimization (especially sexual assault), which may contribute to their greater likelihood of problem behaviors.<sup>45</sup> This section describes four such special populations to highlight the types

of developmental issues that professionals commonly encounter.

### GIRLS

Girls make up an increasing proportion of the number of juveniles arrested.<sup>46</sup> The 1997 violent crime arrest rate for females was 85 percent higher than the 1987 rate.<sup>47</sup> No single theory for their increasing arrest rates is entirely satisfactory. As with juvenile crime in general, the causes of the increase are many and include developmental,<sup>48</sup> psychological,<sup>49</sup> post-traumatic,<sup>50</sup> sociological,<sup>51</sup> and processing factors.<sup>52</sup> Compared to boys, girls are (1) more often arrested and tried for status offenses such as running away and curfew violations,<sup>53</sup> (2) more likely to be the victims of trauma,<sup>54</sup> and (3) more affected by apparent increases in the rates of family violence observed in specialized juvenile domestic violence court calendars.<sup>55</sup> A tragic fact is that many girls run away as a response to family trauma—especially sexual victimization.<sup>56</sup> Clinical experience makes it clear that we are unlikely to hear about this victimization in usual court processing.<sup>57</sup> Most often, the trauma will be displayed by out-of-control behavior, substance abuse, running away, extreme promiscuity, and even prostitution.<sup>58</sup> According to the National Research Council’s Forum on Adolescence,

[t]here is some evidence that, on average, girls experience more distress during adolescence than boys. Some researchers have speculated that, for girls, the transition during puberty brings about greater vulnerability to other environmental stressors. In particular, a growing literature suggests that the early onset of puberty can have an adverse effect on girls’ development. It can affect their physical development (they tend to be shorter and heavier), their behavior (they may have higher rates of conduct disorders), and their emotional development (they tend to have lower self-esteem and higher rates of depression, eating disorders, and suicide). The youngest, most mature children are those at greatest risk for delinquency.<sup>59</sup>

Among the juvenile population, girls are also disproportionately affected by affective (mood) disorders

such as major depression.<sup>60</sup> Because irritability and problems with impulse control are cardinal features of mood disorders,<sup>61</sup> these symptoms often show up in female offenders.<sup>62</sup> These circumstances create many difficulties for the decision-maker who may not have many gender-appropriate resources available as alternatives to traditional sanctions.<sup>63</sup> Punishment alone is not a good remedy for girls who are already self-destructive. And, from a child psychiatrist's point of view, self-punishment is one of the most difficult and intractable syndromes encountered in victims. It often occurs as an attempt at psychologically mastering an inflicted psychological wound that occurred when the victim was helpless or passive, as in the case with sexual abuse. In simple terms, a girl who has been seriously harmed is more likely to put herself in harm's way. Punishment by the justice system can, of course, exacerbate these self-destructive behaviors.

Another variable that sometimes compounds these problems is a girl's transgenerational involvement with the dependency or criminal system. For example, a girl's mother may have a history of involvement with the dependency court. If her mother has frequently been absent from her upbringing owing to the mother's involvement with the system, a girl is at higher risk for early pregnancy and subpar mothering of her own children. Thus, the stakes for the decision-maker are high; to be effective, he or she must take into account developmental, gender-specific, and mental health considerations to mitigate the potential risk to the girl and, potentially, to her children.<sup>64</sup>

Although few gender-specific alternatives exist, juvenile justice professionals should look for programs that incorporate the following elements:

- teach girls how to build healthy relationships
- teach girls how to deal with emotional, physical, and sexual trauma
- address future risk of victimization
- provide for affect regulation to address the intense, rapid changes in mood that often characterize abused girls

- teach pregnancy prevention or prepare girls for motherhood
- base their programs in the community whenever possible

#### MENTALLY ILL AND RETARDED JUVENILE OFFENDERS

The juvenile justice system has become a dumping ground for emotionally disturbed juveniles with nowhere else to go.<sup>65</sup> Thus, decision-makers commonly face children with mental illness and mental retardation. In a recent survey, 86 percent of juvenile and family court judges said they believed that "mentally-ill juveniles were being shunted into the delinquency system."<sup>66</sup> Seventy percent of judges believed that at least 15 percent of defendants were "mildly or moderately mentally retarded."<sup>67</sup> Conservative estimates suggest that 20 percent of juvenile detainees have serious biological and genetic mental illnesses.<sup>68</sup> The rates of less-serious but equally debilitating illness (including posttraumatic stress reactions) are considerably higher—especially in girls.<sup>69</sup> Although the prevalence of mild and moderate mental retardation is unknown, the author's observation of one specialized court suggests it is very high.<sup>70</sup> The presence of a serious mental disability has a direct bearing on the imposition of appropriate sanctions (for example, boot camps are contraindicated during serious clinical depression), the use of juvenile beds,<sup>71</sup> and the development of treatment alternatives.<sup>72</sup> Indeed, 77 percent of juvenile and family court judges said that, given better treatment options, detention rates could be reduced.<sup>73</sup> As a practical matter, these better treatment options would be community-based sanctions that strengthen the family, bolster educational performance or vocational preparedness, and address accountability and victim restitution.

Most important, serious mental disability raises serious issues about diminished competence, fairness, and humaneness. Cognitively limited youth often are already taken advantage of by more intelligent yet antisocial youth; it would be even crueler to incarcerate them merely because they are delusional

or hallucinating. The sequelae of criminalizing the child with mental illness are clinically unacceptable. From a medical point of view, they are a violation of a fundamental ethical precept *primum non nocere*—“first do no harm.”

With respect to mental illness, an effective juvenile justice system would have the following characteristics:

- aggressively identifies mental health issues by, for example, screening all youth
- seeks appropriate mental health and mental retardation expertise for diagnosis or assessment<sup>74</sup>
- provides treatment in lieu of institutionalization, boot camps, or incarceration for children with serious mental illness
- separates children with mental retardation from their peers with normal intelligence

#### MINORITY YOUTH

The proportion of minority youth in the juvenile justice system greatly exceeds the proportion of these youth in the general juvenile population.<sup>75</sup> This disproportionate representation extends to virtually all phases of the delinquency process and intensifies as minority youth become more deeply involved in the juvenile justice system.<sup>76</sup> This situation continues to worsen despite increased public awareness and efforts to combat it.<sup>77</sup>

There are myriad causes and conditions from which these circumstances arise. Developmental psychologists, parents (of all ethnicities), and concerned citizens view the situation as unacceptable because the very children to whom our society is trying to teach the value of justice perceive our society as grossly unjust. Although minority children are obviously the most deleteriously affected, their plight is not lost on their nonminority peers. The unfairness of “the system” toward people of color has become a widely accepted fact among young people. Popular music and entertainment abound with “jokes” about racial profiling and the system’s unequal treatment of minorities. From a child-development point of view, this severely undermines our children’s moral

development and their respect for society and social authority. As these children age, their lack of respect turns into cynicism and is accompanied by the belief that injustice, not justice, is the lot of people of color in America. The societal impact of this cynicism on our social fabric is difficult to overestimate.

#### TRANSGENERATIONAL INVOLVEMENT

Another dimension to the problem of disproportionate minority confinement is the transgenerational involvement of children. Transgenerational involvement is a pattern in which multiple generations of a single family are involved in the justice system. Examples include a 13-year-old boy brought before the court while his father is still in prison or a 12-year-old girl who was taken from her mother by child protective services when she was 6 years old and is now charged with battering one of her foster parents. When encountering a young offender from this background, the decision-maker must carefully consider developmental issues because of the complex and interrelated dynamics between the child, parental authority, and social authority. Transgenerational involvement creates psychosocial dynamics that might lead to an escalation in antisocial reactions rather than to their abatement. A young child is likely to idealize his or her imprisoned parent and unambivalently harbor hatred of anyone whom they perceive to have hurt that parent. An older child is also likely to identify with parental figures, siblings, cousins, and others who have been sanctioned by society. Idealization, identification, empathy, and protectiveness are natural human filial attitudes, desirable and common to us all. From the point of view of the child to be sanctioned, however, they can create complex ambivalence. For example, a child who enters the system from a family with extensive transgenerational involvement may view the process as a rite of passage and a point of (unspoken) family pride. Consequently, careless system interventions may have paradoxical and undesired effects on that child, such as providing him with what he silently desires.

To the transgenerationally involved parental figure, sanctioning of his or her child can be perceived many different ways. Some parents may be indifferent. Others may view the intervention as unwelcome and unfair (perhaps racist or sexist) harassment or be very fearful of involvement with social authority based on their previous personal experiences with that authority (for example, child protective and immigration services). Some parents, such as recovering alcoholics or drug addicts, may be relieved or grateful that someone is stepping in, in the hope that societal intervention will help their children turn their lives around and prevent the unnecessary suffering that they themselves have endured as a result of their addiction.

It is essential that the decision-maker understand the whole spectrum of parental attitudes, which may include mixtures of indifference, antipathy, fear, and hope. These attitudes are part of the context in which the child will perceive the sanction and are therefore a major determinant of its effectiveness or lack thereof.

The decision-maker must also examine his or her own attitudes and biases regarding the relationships of transgenerationally involved parents and children: Does the decision-maker believe (consciously or unconsciously) that criminality is genetically determined and that he or she is providing early detection and incapacitation of children destined to become criminals? Does he or she believe his or her job is to protect one part of society from another? Does he or she believe children should be taken away from criminal parents and neighborhoods to reduce the chance that the child will be raised to become a criminal?<sup>78</sup> Does he or she assume that parents will interpret his or her interventions as benevolent? Does he or she believe that setting an example with one child will serve as an effective deterrent to other siblings who are also at risk? Although a full discussion of these attitudes is beyond the scope of this article, the decision-maker must ensure that his or her attitude about the incorrigibility of the children of justice-involved parents does not lead to ineffective and inappropriately punitive law enforcement and sanctioning.

## CONCLUSION

*Primum non nocere*—first do no harm—is not an ideal but the lowest threshold to which adequate performance is compared. Once public safety and victim rights have been accounted for, it is reasonable to apply this minimal standard to the juvenile justice system, which intervenes on behalf of the highest-risk, and oftentimes most highly victimized, youth. To meet this threshold, decision-makers need familiarity with the general principles of child development and a reasonable knowledge of the risks and needs presented by each individual offender. The juvenile justice system cannot do this alone.

For the majority of court jurisdictions, meaningful implementation of the principles outlined in this article requires an amount of time, thought, and expertise that far exceeds their current capacity. Many jurisdictions exhibit severe fragmentation of triage, assessment, and service delivery systems with poor communication, little mutual understanding, and often distrust between community agencies competing for the same public dollar. Nevertheless, the developmental principles outlined in this article can serve as a rationale for intense cross-disciplinary training, cooperation, and integrated treatment planning far beyond what currently exists. New models are needed in which departments of probation, mental health, social service, and education work synergistically, instead of at odds with one another. All participants in the juvenile justice system must appreciate the value of fostering positive child development and realize that some current practices can be harmful. Defense attorneys must understand that effective treatment for a child is not synonymous with punishment. In turn, prosecutors and probation officers must understand that effective intervention enhances public safety. Judges need to appreciate the enormous impact they can have if they encourage cooperative, working relationships among all members of the juvenile court system.

In spite of very significant advances in understanding juvenile delinquency, developmental traumatology, neurobiology, and social learning psychology, there is a palpable dearth of information being transmitted to

key players in the juvenile justice system. This is not an insoluble problem. At the very least, decision-makers can be educated about practices and interventions that have a developmental rationale or an evidence base and therefore have a reasonable chance of being successful. This would naturally lead to the elimination of ineffectual practices, which also frequently present unacceptable risks to normative child development and socialization.

#### NOTES

1. For psychological and neurobiological references and studies linking the origins of consciousness and morality in children to a nurturing environment, see STANLEY I. GREENSPAN & NANCY BRESLAU LEWIS, *BUILDING HEALTHY MINDS: THE SIX EXPERIENCES THAT CREATE INTELLIGENCE AND EMOTIONAL GROWTH IN BABIES AND YOUNG CHILDREN* 85–129 (Perseus 1999); STANLEY I. GREENSPAN & BERYL LIEFF BENDERLY, *THE GROWTH OF THE MIND AND THE ENDANGERED ORIGINS OF INTELLIGENCE* 110–32 (Perseus 1997); ADRIAN RAINE, *THE PSYCHOPATHOLOGY OF CRIME: CRIMINAL BEHAVIOR AS A CLINICAL DISORDER* (Academic Press 1997); David E. Arredondo & Leonard P. Edwards, *Attachment, Bonding, and Reciprocal Connectedness: Limitations of Attachment Theory in the Juvenile and Family Court*, 2 J. CTR. FOR FAM. CHILD. & CTS. 109 (2000); Harry F. Harlow, *Mice, Monkeys, Men, and Motives*, 60 PSYCHOL. REV. 23 (1953); Bruce D. Perry, *Bonding and Attachment in Maltreated Children: Consequences of Emotional Neglect in Childhood*, 4 CHILDTRAUMA ACAD. PARENT & CAREGIVER EDUC. SERIES (2001), [www.childtrauma.org/ctamaterials/AttCar4\\_03\\_v2.pdf](http://www.childtrauma.org/ctamaterials/AttCar4_03_v2.pdf). Neurobiological studies of nonhuman mammals also show the necessity of an attentive and predictably nourishing environment for normal brain development. See David H. Hubel & Torsten N. Wiesel, *Receptive Fields and Functional Architecture in Two Non-striate Visual Areas (18 and 19) of the Cat*, 28 J. NEUROPHYSIOLOGY 229 (1965); Anita M. Turner & William T. Greenough, *Differential Rearing Effects on Rat Visual Cortex Synapses: I. Synaptic and Neuronal Density and Synapses per Neuron*, 329 BRAIN RES. 195 (1985).

2. For example, the perception of gross unfairness or indifference can further alienate children or cause them to lose respect for the social system that the court represents. As any parent can testify, children and adolescents are

preoccupied with the concept of “fairness,” and perceived or real lack of fairness can lead to increased negative behavior.

3. See, e.g., FORUM ON ADOLESCENCE, NAT’L RESEARCH COUNCIL & INST. OF MED., *ADOLESCENT DEVELOPMENT AND THE BIOLOGY OF PUBERTY 1* (Michael D. Kipke ed., Nat’l Acads. Press 1999), <http://books.nap.edu/books/0309065828/html/1.html#pagetop>; Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Jurisdictional Boundary*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT* 379 (Jeffrey Fagan & Franklin E. Zimring eds., Univ. of Chicago Press 2000).

4. According to Erik Erikson, “In their search for a new sense of continuity and sameness, adolescents have to refight many of the battles of earlier years, even though to do so they must artificially appoint perfectly well-meaning people to play the roles of adversaries; and they are ever ready to install lasting idols and ideals as guardians of a final identity.” ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* 261 (W.W. Norton 2d ed. 1963) (1955).

5. According to one panel of child psychologists, “Research conducted with both humans and nonhuman primates suggests that adolescence is a time for carrying out crucial developmental tasks: becoming physically and sexually mature; acquiring skills needed to carry out adult roles; gaining increased autonomy from parents; and realigning social ties with members of both the same and the opposite gender. Studies of such commonalities underscore the critical importance of this part of the life course in establishing social skills. For many social species, such skills are further developed through peer-oriented interactions that are distinct from both earlier child-adult patterns and later adult pairings.” FORUM ON ADOLESCENCE, *supra* note 3, at 1–2.

6. Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 23 (Thomas Grisso & Robert G. Schwartz eds., Univ. of Chicago Press 2000). The authors continue: “[I]t is not an overstatement to say that it is much easier to alter an individual’s life course in adolescence than in adulthood.” *Id.*

7. For excellent collections on these important topics, see *YOUTH ON TRIAL*, *supra* note 6; *THE CHANGING BORDERS OF JUVENILE JUSTICE*, *supra* note 3.

8. “Transgenerationally involved” children are children whose adult family members have been involved in the justice system. The term includes children of parents,

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grandparents, aunts, and uncles who have been arrested, incarcerated, or are currently incarcerated or on parole. It also includes adult relatives' involvement with the dependency court.

9. See, e.g., GREENSPAN & BENDERLY, *supra* note 1, at 264; DANIEL J. SIEGEL, *THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE* 1–22, 276–82 (Guilford Press 1999); Arredondo & Edwards, *supra* note 1, at 111–14; cf. David H. Hubel, *Effects of Distortion of Sensory Input on the Visual System of Kittens*, 10 *PHYSIOLOGIST* 17 (1967) (studying joint impact of environment and physiology on feline neurobiological development); Hubel & Wiesel, *supra* note 1 (same).

10. See, e.g., ALBERT BANDURA & RICHARD H. WALTERS, *SOCIAL LEARNING AND PERSONALITY DEVELOPMENT* (Holt, Rinehart & Winston 1963); JULIAN B. ROTTER, *SOCIAL LEARNING AND CLINICAL PSYCHOLOGY* (Prentice Hall 1954); Albert Bandura & Frederick J. McDonald, *The Influence of Social Reinforcement and the Behavior of Models in Shaping Children's Moral Judgments*, 67 *J. ABNORMAL & SOC. PSYCHOL.* 274 (1963); Robert Sears, *A Theoretical Framework for Personality and Social Behavior*, 6 *AM. PSYCHOLOGIST* 476 (1951).

11. See, e.g., RAINE, *supra* note 1; SIEGEL, *supra* note 9; Perry, *supra* note 1.

12. Virtually all evidence-based approaches to delinquency include intensive family involvement. Good examples of evidence-based practices include the “wraparound” approach used in Santa Clara County, California; the “multisystemic therapy” developed in rural South Carolina and Columbia, Missouri; and Treatment Foster Care and Functional Family Therapy promulgated in Oregon. Statistically and clinically meaningful studies have shown that evidence-based approaches are effective. As such, they can be described as effective in treating antisocial behaviors (juvenile delinquency) with a reasonable degree of certainty. Historically, most juvenile justice interventions derive their support from anecdotal evidence, which does not withstand the test of follow-up evaluation for effectiveness. Examples of these (non-evidence-based) practices include wilderness programs, shock incarceration, scared-straight programs, and boot camps. See PETER FONAGY ET AL., *WHAT WORKS FOR WHOM? A CRITICAL REVIEW OF TREATMENTS FOR CHILDREN AND ADOLESCENTS* 153–65 (Guilford Press 2002); RICHARD A. MENDEL, *LESS HYPE, MORE HELP: REDUCING JUVENILE CRIME, WHAT WORKS—AND WHAT DOESN'T* 10–11 (Am. Youth Policy Forum 2000) (describing Multisystemic Therapy and Functional Family Therapy); EMQ CHILDREN & FAMILY

SERVS., *PROGRAM UPLIFT, WRAPAROUND SERVICE REPORT 3* (2001) (describing the wraparound approach).

13. See PANEL ON JUVENILE CRIME: PREVENTION, TREATMENT & CONTROL, NAT'L RESEARCH COUNCIL & INST. OF MED., *JUVENILE CRIME, JUVENILE JUSTICE* 16 (Joan McCord et al. eds., Nat'l Acad. Press 2001), <http://books.nap.edu/books/0309068428/html/16.html>.

14. See GREENSPAN & BENDERLY, *supra* note 1, at 258–70 (describing effects of violence and deprivation on a young delinquent).

15. See *id.*

16. The irony of relying on the justice system to embody society's values in light of current resource allocation is not lost on the author.

17. It is painful to be deprived of human attention. This is why solitary confinement is used as punishment. There are psychological reasons why attention and reciprocal interaction are required to develop a normal human psyche. See IDRIES SHAH, *LEARNING HOW TO LEARN: PSYCHOLOGY AND SPIRITUALITY IN THE SUFI WAY* 85 (Harper & Row 1983) (“One of the keys to human behavior is the attention factor”); see also Arredondo & Edwards, *supra* note 1, at 111–14 (describing the necessity of reciprocal connectedness, beyond attachment and bonding, for normal brain and social development).

18. Attention-seeking behavior is also noted in infants. Upon casual observation in orphanages where infants are attention-deprived, a visitor will often be greeted with intense demands for attention.

19. This is not a minor problem among American youth. The U.S. Justice Department's Office of Juvenile Justice and Delinquency Prevention estimates that 17 to 23 percent of children from 6th grade and above have been bullied at least weekly. NELS ERICSON, *OJJDP FACT SHEET: ADDRESSING THE PROBLEM OF JUVENILE BULLYING* (June 2001), available at [www.ncjrs.org/pdffiles1/ojjdp/fs200127.pdf](http://www.ncjrs.org/pdffiles1/ojjdp/fs200127.pdf).

20. See STEVEN M. COX & JOHN J. CONRAD, *JUVENILE JUSTICE: A GUIDE TO PRACTICE AND THEORY* 11 (McGraw-Hill 3d ed. 1991) (“The dispute between legalists and therapists remains unresolved after a century or more of debate”); BARRY KRISBERG & JAMES F. AUSTIN, *REINVENTING JUVENILE JUSTICE* 109 (Sage Publ'ns 1993) (arguing that the juvenile justice system should be more attentive to social inequity); Barry Krisberg & James C. Howell, *The Impact of the Juvenile Justice System and Prospects for Graduated Sanctions in a Comprehensive Strategy*, in



SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS 347 (Rolf Loeber & David P. Farrington eds., Sage Publ'ns 1998) (arguing same as applied to serious juvenile offenders).

21. PANEL ON JUVENILE CRIME: PREVENTION, TREATMENT & CONTROL, *supra* note 13, at 78 (“Failure to set clear expectations for children’s behavior, inconsistent discipline, excessively severe or aggressive discipline, and poor monitoring and supervision of children predict later delinquency”).

22. The issue of “potential harm done” is rarely part of a discussion on choosing between sanctioning alternatives. This is especially problematic in the context of child development. Failures during critical windows of this development can have lifelong consequences because of the profound impact of early experience on a child’s worldview. For example, a child who is subjected to a callous environment for a significant duration of time is likely to make generalizations about the rest of the world (i.e., that it is also fundamentally, if not overtly, callous). The principle of *primum non nocere* (first do no harm) is especially important when dealing with children for many reasons, including the enduring impact of childhood experience.

23. A popular and well-grounded conceptualization of the purpose of juvenile probation is termed the “Balanced Approach” or “Balanced and Restorative Justice.” This thoughtful and developmentally sound approach dictates that three goals—community safety, accountability, and competence development—steer decision making. This model does not, however, *explicitly* address the issues of deterrence, societal desire for unadulterated retribution, or the notion of “harm done” by current practices. For a good review of this model approach, see Dennis Maloney et al., *Juvenile Probation: The Balanced Approach*, 39 JUV. & FAM. CT. J. 1–11 (1988).

24. The *American Heritage Dictionary of the English Language* defines *rehabilitate* as “1. To restore to good health or useful life, as through therapy and education. 2. To restore to good condition, operation, or capacity. 3. To reinstate the good name of. 4. To restore the former rank, privileges, or rights of.” AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1471 (Houghton Mifflin 4th ed. 2000).

25. In practice, the use of the term *rehabilitation* is often portrayed as an alternative to punishment or accountability-based sanctioning. This portrayal leads to an unfortunate dichotomization, which further muddles clear thinking on desired outcomes and the purpose of the delinquency court.

26. BLACK’S LAW DICTIONARY 1290 (West Group 7th ed. 1999).

27. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS—TEXT REVISION (DSM-IV-TR) 704 (4th ed. 2000) (“By definition, Antisocial Personality cannot be diagnosed before age 18”).

28. See MENDEL, *supra* note 12, at 59.

29. See Richard E. Behrman, *The Juvenile Court: Statement of Purpose*, 6 FUTURE CHILD. 33 (1996) (noting the need for prosecutors and defenders to understand social services).

30. This definition helps clarify what, in addition to public safety and victim rights, should be the proper objectives of the delinquency court. It also creates a framework for developing meaningful outcome measures that are quantifiable yet not limited to detected recidivism per se.

31. PATRICIA CHAMBERLAIN, FAMILY CONNECTIONS: A TREATMENT FOSTER CARE MODEL FOR ADOLESCENTS WITH DELINQUENCY 30 (Northwest Media 2d ed. 1998).

32. Physiological tolerance to medication may provide a useful analogy. The dose and duration of administration are critical to the effectiveness of medication. Administration of too much medication for too long can lead to a marked reduction in the medication’s effectiveness or to undesirable side effects.

33. Less frequent rotation of judges is highly desirable for many other reasons, not the least of which is the relative lack of experience engendered by a one- to two-year juvenile rotation. Longer rotations or permanent assignments would allow an interested judge to acquire the training and cultivate the experience necessary for wisdom on the bench.

34. Moreover, there is little information regarding evaluation of the efficacy of detention. According to one critique, “No responsible business concern would operate with as little information regarding its success or failure as do nearly all of our delinquency-prevention and control programs. It is almost possible to count on one hand the number of true experiments in which alternative techniques are compared; the number of systematic, though nonexperimental, evaluations is not a great deal larger. We spend millions of dollars a year in preventive and corrective efforts, with little other than guesswork to tell us whether we are getting the desired effects.” William E. Wright & Michael C. Dixon, *Community Prevention and Treatment of Juvenile Delinquency: A Review of Evaluation Studies*, 14 J. RES. CRIME & DELINQ. 35, 55 (1977)

- NOTES (citing Wheeler S. Cottrell et al., *Juvenile Delinquency: Its Prevention and Control*, in DELINQUENCY AND SOCIAL POLICY 428, 440 (Paul Lerman ed., Praeger 1970)).
35. I am indebted to Kurt Kumli, supervising district attorney of the Santa Clara County Delinquency Court, and Judge Leonard Edwards for this observation.
36. FONAGY ET AL., *supra* note 12.
37. See MENDEL, *supra* note 12, at 17–20; Lawrence W. Sherman et al., *Preventing Crime: What Works, What Doesn't, What's Promising*, NAT'L INST. OF JUSTICE, RES. IN BRIEF 1–13 (July 1998) (summarizing findings of 1997 report to Congress with same title); Carol Sheldrick, *Treatment of Delinquents*, in CHILD AND ADOLESCENT PSYCHIATRY 968 (Michael Rutter et al. eds., Blackwell 3d ed. 1994).
38. Wright & Dixon, *supra* note 34, at 53 (“Empey and Lubeck ... and Empey and Erickson ... reported that, after one- and four-year follow-ups, those youths who had been incarcerated committed more serious crimes when they were returned to their communities than did the youths who had been in the community treatment program”).
39. I am indebted to Kurt Kumli for this observation.
40. See *infra* text accompanying notes 46–64.
41. I am indebted to Kurt Kumli for this example.
42. Fostering such an understanding is the cornerstone of the Balanced and Restorative Justice approach. See *supra* note 23 and accompanying text.
43. Of course, many of the children in the delinquency system have also themselves been victims. Indeed, W.H. Auden reminds us:
- I and the public know  
What all schoolchildren learn,  
Those to whom evil is done  
Do evil in return.
- W.H. AUDEN, *September 1, 1939*, in THE ENGLISH AUDEN: POEMS, ESSAYS, AND DRAMATIC WRITINGS, 1927–1939, at 245 (Edward Mendelson ed., Faber & Faber 1977).
44. FORUM ON ADOLESCENCE, *supra* note 3, at 18. “Indicators of pubertal growth have been observed as early as age 7. These findings suggest that as children experience puberty and other developmental changes at earlier ages, there may be the need to consider how to design and deliver age-appropriate interventions during the middle childhood and preteen years to help them avoid harmful or risky behaviors and develop a health-promoting lifestyle.” *Id.*; see also Julia A. Graber et al., *Is Psychopathology Associated With the Timing of Pubertal Development?*, 36 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1768 (1997).
45. Daniel J. Flannery et al., *Impact of Pubertal Status, Timing, and Age on Adolescent Sexual Experience and Delinquency*, 8 J. ADOLESCENT RES. 21 (1993), quoted in FORUM ON ADOLESCENCE, *supra* note 3, at 20.
46. HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT (Sept. 1999), available at [www.ncjrs.org/html/ojjdp/nationalreport99/toc.html](http://www.ncjrs.org/html/ojjdp/nationalreport99/toc.html).
47. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, OJJDP STATISTICAL BRIEFING BOOK (Jan. 2002), at [ojjdp.ncjrs.org/ojstatbb/html/qa253.html](http://ojjdp.ncjrs.org/ojstatbb/html/qa253.html).
48. See, e.g., Cathy Spatz Widom, *Child Abuse, Neglect, and Violent Criminal Behavior*, 27 CRIMINOLOGY 251 (1989).
49. See MEDA CHESNEY-LIND, THE FEMALE OFFENDER: GIRLS, WOMEN, AND CRIME (Sage Publ'ns 1997); see also LESLIE ACOCA & JAMES AUSTIN, THE CRISIS: WOMEN IN PRISON (Nat'l Council on Crime & Delinquency 1996); FAEDRA LAZAR WEISS ET AL., PREVENTION AND PARITY: GIRLS IN JUVENILE JUSTICE (Girls Inc. 1996).
50. Delinquent girls report serious mental health problems, including depression and anxiety, and suicidal thoughts. A 1994 study of delinquent girls revealed that half of those surveyed had considered suicide, and some 64 percent of these girls had thought about it more than once. PANEL ON JUVENILE CRIME: PREVENTION, TREATMENT & CONTROL, *supra* note 13, at 102. See also FRED A ADLER, SISTERS IN CRIME: THE RISE OF THE NEW FEMALE CRIMINAL (McGraw-Hill 1975); Leslie Acoca, *Outside/Inside: The Violation of American Girls at Home, on the Streets, and in the Juvenile Justice System*, 44 CRIME & DELINQ. 561 (1998).
51. See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (Harvard Univ. Press 1982); Peggy C. Giordano et al., *Delinquency, Identity, and Women's Involvement in Relationship Violence*, 37 CRIMINOLOGY 17 (1999).
52. See, e.g., Kimberly Kempf-Leonard & Lisa L. Sample, *Disparity Based on Sex: Is Gender-Specific Treatment Warranted?*, 17 JUST. Q. 89 (2000).
53. PANEL ON JUVENILE CRIME: PREVENTION, TREATMENT & CONTROL, *supra* note 13, at 57–58. Leslie Acoca and Myrna S. Raeder argue that “[t]he process of disproportionately penalizing and detaining girls for status offenses and subsequent violations of valid court orders must

be halted. Instead, effective diversion and intervention options that specifically address girls' needs and engage their families and caretakers should be developed at the community level. Family focused programs that intervene upon family violence, including domestic combat between rebellious girls and their caretakers, should also be implemented at the community level. Further, training that provides accurate and current information on the characteristics and needs of girl offenders and their families and on dispositional alternatives for this population should be immediately delivered to law enforcement, probation officers, juvenile and family court judges, and child welfare professionals." Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, 11 STAN. L. & POL'Y REV. 133, 143 (1999).

54. The vast majority of female detainees have been the victims of sexual or physical abuse. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1998 (1999); see also ACOCA & AUSTIN, *supra* note 49; WEISS ET AL., *supra* note 49; Leslie Acoca, *Investing in Girls: A 21st Century Strategy*, 6 JUV. JUST. 3 (1999); Giordano et al., *supra* note 51.

55. I am indebted to Judge Eugene Hyman of the Superior Court of California, County of Santa Clara, who shared his experience working with a specialized juvenile cohort of domestic and family violence cases.

56. WEISS ET AL., *supra* note 49, at 14–15.

57. Many times victims of sexual abuse (especially chronic abuse) are ambivalent about the perpetrator. Sometimes they are also fearful. It is the common experience of psychotherapists that getting the "whole story" is often difficult because of complex feelings of shame, fear, guilt, and ambivalence.

58. This is an extremely common clinical profile seen by therapists who work with sexually traumatized girls at high risk.

59. FORUM ON ADOLESCENCE, *supra* note 3, at 10 (citations omitted).

60. PANEL ON JUVENILE CRIME: PREVENTION, TREATMENT & CONTROL, *supra* note 13, at 101. In general, women suffer from depression and other mood disorders at rates considerably higher than men, who are more likely to resort to substance abuse to control their moods.

61. AM. PSYCHIATRIC ASS'N, *supra* note 27, at 356; Richard Harrington, *Affective Disorders*, in CHILD AND

ADOLESCENT PSYCHIATRY: MODERN APPROACHES 330–43 (Michael Rutter et al. eds., Blackwell 3d ed. 1994).

62. Females often (and more than males) present internalizing disorders, such as anxiety, depression, and eating disorders. Girls may direct pain, anger, self-loathing, and frustration inward as a reaction to sexual, emotional, and physical abuse. This internalization can lead to self-destructive behavior, such as extreme promiscuity, prostitution, and placing themselves in harm's way. See PANEL ON JUVENILE CRIME: PREVENTION, TREATMENT & CONTROL, *supra* note 13, at 101.

63. See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PROGRAMS, U.S. DEP'T OF JUSTICE, GUIDING PRINCIPLES FOR PROMISING FEMALE PROGRAMMING: AN INVENTORY OF BEST PRACTICES (1998), available at [www.ojjdp.ncjrs.org/pubs/principles/contents.html](http://www.ojjdp.ncjrs.org/pubs/principles/contents.html).

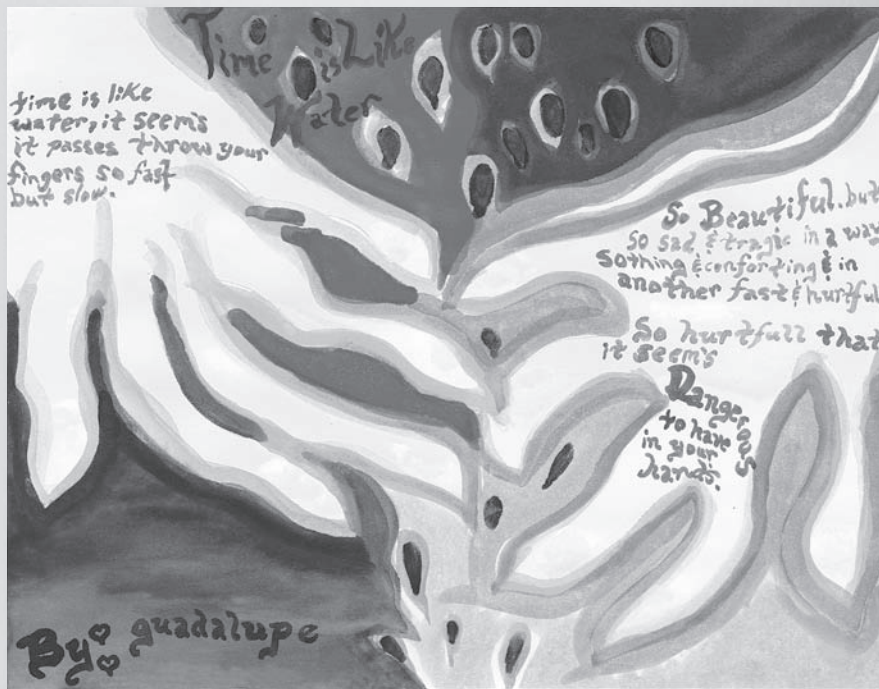
64. For example, different cultures have different attitudes toward sexual precocity and sexual behavior, including early pregnancy and child rearing. Early puberty poses fewer problems for girls in cultures whose adult women tend to support early maturation. For example, there is limited research suggesting that black girls cope better with early maturation than their white peers. FORUM ON ADOLESCENCE, *supra* note 3, at 29.

65. See, e.g., NAT'L CTR. FOR JUVENILE JUSTICE, DESKTOP GUIDE TO GOOD JUVENILE PROBATION PRACTICE 113 (2002), available at <http://ncjj.servehttp.com/NCJJWebsite/pdf/Chapter11.pdf> (noting that "many observers ... feel that, for fiscal and other reasons, the juvenile justice system has become a kind of dumping ground for emotionally disturbed juveniles who have nowhere else to go"); Joseph J. Cocozza & Kathleen Skowrya, *Youth With Mental Health Disorders: Issues and Emerging Responses*, 7 JUV. JUST. J. 3 (2000); Richard E. Redding, Inst. of Law, Psychiatry & Pub. Policy, *Barriers to Meeting the Mental Health Needs of Offenders in the Juvenile Justice System*, JUVENILE JUSTICE FACT SHEET (Univ. of Va. 2000), available at [www.ilppp.virginia.edu/Juvenile\\_Forensic\\_Fact\\_Sheets/BarrMeet.html](http://www.ilppp.virginia.edu/Juvenile_Forensic_Fact_Sheets/BarrMeet.html); Fox Butterfield, *Concern Rising Over Use of Juvenile Prisons to "Warehouse" the Mentally Ill*, N.Y. TIMES, Dec. 5, 2000, at A16.

66. David E. Arredondo, Comm. on Mental Health, Med. & Legal Issues, Nat'l Council of Juvenile & Family Court Judges (2002) (unpublished manuscript, on file with author).

67. *Id.*

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68. David E. Arredondo et al., *Juvenile Mental Health Court: Rationale and Protocols*, 52 JUV. & FAM. CT. J. 1, 3 (Fall 2001).
69. Hans Steiner & Erickson Cauffman, *PTSD Among Female Juvenile Offenders*, 37 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 11 (1998); David E. Arredondo, *Massachusetts Youth Screening Instrument—2* (2002) (unpublished manuscript, on file with author).
70. In the author's experience as a consultant to the Juvenile Mental Health Court in Santa Clara County, California, the prevalence of mild to moderate mental retardation approached 35 percent of youth referred. For a description of this court and its protocols, see Arredondo et al., *supra* note 68, at 8–17. Estimates by the Coalition for Juvenile Justice, a federally financed group appointed by the nation's governors, also suggest that 15 to 20 percent of teenagers suffer from a severe, biologically based mental illness. *Id.* at 4.
71. It is an inappropriate, though very common, practice to use juvenile detention facilities to warehouse mentally ill children. See NAT'L CTR. FOR JUVENILE JUSTICE, *supra* note 65; Butterfield, *supra* note 65.
72. Arredondo, *supra* note 66, at 3–4.
73. *Id.*
74. Screening is a quick check for symptoms that may suggest suicidal tendencies or major emotional disturbance. Diagnosis and assessment are more thorough and formal evaluations for the presence of mental illness.
75. Heidi M. Hsia & Donna Hamparian, *Disproportionate Minority Confinement: 1997 Update*, OJJDP JUV. JUST. BULL. 1 (Sept. 1998), available at [www.ncjrs.org/pdffiles/1170606.pdf](http://www.ncjrs.org/pdffiles/1170606.pdf).
76. Carl E. Pope & William Feyerherm, *Minorities and the Juvenile Justice System*, OJJDP RES. SUMMARY 2–3 (July 1995), available at [www.ncjrs.org/pdffiles/minor.pdf](http://www.ncjrs.org/pdffiles/minor.pdf).
77. In 1985, Caucasian youth between the ages of 10 and the upper age of juvenile court jurisdiction were detained at a rate of 45 per 100,000, while the rates for African-American and Hispanic youth of comparable age were 114 per 100,000 and 73 per 100,000, respectively. By 1995, detention rates for Caucasians had decreased 13 percent to 39 per 100,000. Rates for African Americans had increased 180 percent to 319 per 100,000; rates for Hispanics had increased 145 percent to 179 per 100,000. Madeline Wordes & Sharon M. Jones, *Trends in Juvenile Detention and Steps Toward Reform*, 44 CRIME & DELINQ. 544, 554–55 (1998) (citing U.S. Census Bureau annual one-day counts from 1985 to 1995).
78. RAINE, *supra* note 1, at 243–85.



Time is like  
water, it seems  
it passes through your  
fingers so fast  
but slow.

Time is like  
Water

So Beautiful, but  
so sad & tragic in a way  
something comforting & in  
another fast & beautiful

So hurtful that  
it seems  
Dangerous  
to have  
in your  
hands.

By ♡ guadalupe

*Illustration, page 145:*

**“TIME IS LIKE WATER”**

I have been in foster care throw out my life. In and out. I stayed until the age of 19. I recently got my High School diploma in June of 2003. I've been working and going to school. I hope to further my education and become someone people recognize for my hardworking and dedication to my life in bettering myself. I moved out, emancipated. And just maturing with everyday thing's in life.

**GUADALUPE S.**

*Age 19*

*2003 Children's Art & Poetry Contest*

# Juveniles and the Death Penalty

## *Exploring the Issues in Roper v. Simmons*

On October 13, 2004, the parties in the case of *Roper v. Simmons*<sup>1</sup> argued before the U.S. Supreme Court on the issue of whether the Eighth Amendment to the U.S. Constitution, which bans “cruel and unusual” punishment, bars the execution of juveniles who commit capital crimes.<sup>2</sup> The Court issued its decision in the case on March 1, 2005, holding that the Eighth Amendment, applicable to the states through the Fourteenth Amendment, forbids the imposition of the death penalty on juveniles who were under the age of 18 when their crimes were committed.<sup>3</sup> The Court decision turned on “evolving standards of decency that mark the progress of a maturing society,”<sup>4</sup> which have determined that imposition of the death penalty on juveniles under 18 is “cruel and unusual”:

As in *Atkins*, the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as “categorically less culpable than the average criminal.”<sup>5</sup>

The editors feel that the issues presented by the argument over whether juveniles should be eligible for the death penalty are of such a deep and abiding concern to all of us working in or with the court system as to justify a briefing on the background of the case and a reprinting of the full transcript of the oral argument before the Supreme Court, with the hope of further expanding and refining the national conversation on the issue. The following background on the lower court’s decision, the related Supreme Court decisions, and other issues is meant to give context both to the oral argument and to the Court’s final opinion.

When a Missouri jury convicted Christopher Simmons of first-degree murder for abducting Shirley Crook and throwing her from a bridge to her death when he was 17, it recommended and the judge imposed the death penalty.<sup>6</sup> On appeal the Supreme Court of Missouri affirmed en banc both the conviction and the sentence of death.<sup>7</sup> But six years later the Supreme Court of Missouri, again en banc, granted Simmons relief on his petition for writ of habeas corpus, holding that (1) Simmons did not waive by failing to raise at trial his right to a claim that the Eighth Amendment barred the execution of juveniles, and (2) the Eighth Amendment bars the execution of

*When the U.S. Supreme Court issued its decision on juveniles and the death penalty, it did not settle the debate over the issue but rather sparked a wider national conversation that shows no intention of fading.*

individuals who are under 18 years of age at the time they commit a capital crime.<sup>8</sup>

Missouri petitioned the U.S. Supreme Court for a writ of certiorari, posing two questions for the Court's review:<sup>9</sup>

1. Once this Court holds that a particular punishment is not "cruel and unusual" and thus not barred by the Eighth and Fourteenth Amendments, can a lower court reach a contrary decision based on its own analysis of evolving standards?
2. Is the imposition of the death penalty on a person who commits a murder at age 17 "cruel and unusual" and thus barred by the Eighth and Fourteenth Amendments?

The Court granted certiorari,<sup>10</sup> and the oral argument followed a full briefing of the issues by each party.

In the decision that led to the Supreme Court case, Missouri's high court first reviewed the applicable U.S. Supreme Court case law—these cases are mentioned in the argument and in the Court's opinion. In 1998 the Court held in *Thompson v. Oklahoma* that it was cruel and unusual punishment to execute juveniles who were 15 years or younger at the time they committed a capital offense.<sup>11</sup> But a year later the Court refused to extend that holding in *Stanford v. Kentucky*, stating that there was no "national consensus" against the execution of juveniles who were 16 or 17 years old when they committed their crimes.<sup>12</sup> On that same day, in *Penry v. Lynaugh*, it also held that there was no national consensus barring the execution of the mentally retarded.<sup>13</sup> But 12 years later, in 2002, the Supreme Court held in *Atkins v. Virginia* that a national consensus against executing mentally retarded offenders had emerged.<sup>14</sup>

Missouri's high court then applied the reasoning in *Atkins* to the *Simmons* case and found that a national consensus against executing juvenile offenders had, indeed, also developed, justifying its holding that the Eighth and Fourteenth Amendments prohibited juvenile executions.<sup>15</sup> As evidence of the "national consensus" it cited that 18 states now barred juvenile executions, that 12 others now barred all executions,

and that, although no states have lowered the age of execution below 18, 5 states had raised or established the minimum age for execution at 18—and it noted that the imposition of the death penalty on a juvenile had become "truly unusual" in the preceding decade.<sup>16</sup> This put the Missouri Supreme Court in the position of deciding on its own—though applying the U.S. Supreme Court's reasoning—that the Court's holding in *Stanford v. Kentucky* was no longer controlling authority. Counsel for the State of Missouri in his argument strongly challenged the Missouri court for doing this. There is much discussion among the justices and counsel as to whether or not there is a new national consensus against the execution of juveniles. As we now know, the Supreme Court decided, just as it did in *Atkins*, that there is such a consensus.<sup>17</sup> Justice Scalia, in his dissent, lambastes the majority for failing to admonish the Missouri Supreme Court "for its flagrant disregard of our precedent in *Stanford*."<sup>18</sup>

Another issue in the oral argument is the position of other countries on the juvenile death penalty. One hundred ninety-two countries have ratified the U.N. Convention on the Rights of the Child, an international human rights treaty, and only two have not: the United States and Somalia.<sup>19</sup> Article 37 of the Convention on the Rights of the Child bans capital punishment for offenses committed by persons younger than 18 years of age.<sup>20</sup> The oral argument presents an interesting discussion about whether the position of other countries against executing juveniles should have a bearing on whether continuing to execute juveniles in the United States constitutes "unusual" punishment. Again, we now know that the majority of the Court agreed that the opinion of the international community is relevant but not controlling.<sup>21</sup>

It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime.... The opinion of the world community, while not controlling our outcome, does provide



respected and significant confirmation for our own conclusions.<sup>22</sup>

In a scathing dissent, Justice Scalia argued that the opinion of the international community is entirely irrelevant.<sup>23</sup>

And, finally, the argument refers to new research on the adolescent brain. Neuroscientific research at the National Institutes of Health has demonstrated that, contrary to prior thinking, the brain changes dramatically during the teenage years. We now know that the adolescent brain is much less developed than once believed—particularly the prefrontal cortex, which provides the advanced cognition allowing abstract thinking, impulse control, prioritization, and anticipation of consequences.<sup>24</sup> In fact, the frontal lobe of the brain changes more during adolescence than at any other stage of life and is the last part of the brain to develop—often not until the early twenties.<sup>25</sup> So while adolescents may be mature in many other areas, with immature brain circuitry they do not have the ability to reason as well as adults and therefore cannot be as morally culpable when they commit crimes.<sup>26</sup> By corollary, they are also much more capable of change and rehabilitation, given that their brains have not fully developed.<sup>27</sup>

In terms of informing our decisions about how to treat young people in the juvenile justice system, this is blockbusting information. The colloquy among the justices and counsel suggests that the Court was not sure how this new development should affect the case because it was not introduced at trial—in fact, it did not even exist at the time of trial. And, in its decision, the Court acknowledged the new science but did not rely on it.<sup>28</sup> —Ed.

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IN THE SUPREME COURT  
OF THE UNITED STATES

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DONALD P. ROPER,  
SUPERINTENDENT, POTOSI  
CORRECTIONAL CENTER,  
Petitioner

v.

CHRISTOPHER SIMMONS  
Respondent

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No. 03-633

Washington, D.C.

Wednesday, October 13, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

JAMES R. LAYTON, ESQ., State Solicitor,  
Jefferson City, Missouri; on behalf of the  
Petitioner.

SETH P. WAXMAN, ESQ., Washington,  
D.C.; on behalf of the Respondent.

C O N T E N T S

ORAL ARGUMENT OF

JAMES R. LAYTON, ESQ.  
On behalf of the Petitioner

SETH P. WAXMAN, ESQ.  
On behalf of the Respondent

REBUTTAL ARGUMENT OF

JAMES R. LAYTON, ESQ.  
On behalf of the Petitioner

## P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 03-633, Donald Roper v. Christopher Simmons.

Mr. Layton.

ORAL ARGUMENT OF  
JAMES R. LAYTON ON BEHALF  
OF THE PETITIONER

MR. LAYTON: Mr. Chief Justice, and may it please the Court:

Though bound by *Stanford v. Kentucky*, the Missouri Supreme Court rejected both its holding and its rationale. This Court should stay the course it set in *Stanford*, leaving in the hands of legislators a determination as to the precise minimum age for capital punishment within the realm of *Thompson v. Oklahoma*, and leaving to jurors responsibility for determining the culpability of individual defendants about that minimum age.

The Missouri court justified its departure from *Stanford* on *Atkins v. Virginia*, but the result it reached is quite different from the result in *Stanford*. In that—excuse me—in *Atkins*. In that case, the Court was addressing mental ability, itself a component of culpability. The Court announced a principle based on that characteristic, that is, that the mentally retarded are not to be eligible for capital punishment, but then it left to the States the determination of the standard and the means of implementing that principle.

The Missouri Supreme Court, by contrast, jumped beyond the question of maturity, which is an element of culpability analysis, to the arbitrary distinction of age. It drew a line based purely on age, which is necessarily overinclusive, and then it gave that line constitutional status, thus depriving legislators and juries of the ability to evaluate the maturity of 17-year-old offenders.

JUSTICE SCALIA: Well, we didn't leave it up to the States entirely. I mean, you—you mean the States could adopt any definition of mental retardation they want?

MR. LAYTON: No. The States certainly—

JUSTICE SCALIA: So there's—there's some minimal level of mental retardation. Right?

MR. LAYTON: There is some minimal level.

JUSTICE SCALIA: And isn't that necessarily overinclusive, just as picking any single age is necessarily overinclusive?

MR. LAYTON: No.

JUSTICE SCALIA: Surely there will be some people who—who, although they have that level of mental retardation, with regard to the particular crime in question, are deserving of the death penalty.

MR. LAYTON: I—I don't agree that it would be overinclusive, given the Court's analysis in *Atkins*. The Court said that someone who has that level of mental retardation is simply not sufficiently culpable by definition. That certainly would not be true here. There are 17-year-olds who are equally culpable with those who are 18, 20, 25, or some other age.

JUSTICE GINSBURG: But the age 18 is set even for such things as buying tobacco. The—the dividing line between people who are members of the community, the adult community, is pervasively 18, to vote, to sit on juries, to serve in the military. Why should it be that someone is death-eligible under the age of 18 but not eligible to be an adult member of the community?

MR. LAYTON: I think that legislators would be surprised, when they adopted those statutes, that they were affecting their criminal law. In fact, many of those statutes have individualized determinations, the military being one of them. Seventeen-year-olds can enlist. There is an individualized determination, albeit by parents, not the Government. Seventeen-year-olds may be serving in Iraq today. That—the

other kinds of examples that you cite, for example, tobacco—

JUSTICE GINSBURG: But with parental—they are wards of their parents.

MR. LAYTON: Yes.

JUSTICE GINSBURG: So their parents—the same thing with marriage. A 17-year-old can marry but not without parental consent.

MR. LAYTON: Although in most instances can marry if they go to a court and demonstrate they are sufficiently mature, again contemplating individualized determination, which the Missouri Supreme Court says does not exist as to 17-year-olds with regard to capital punishment.

JUSTICE SCALIA: Why pick—why pick on the death penalty? I mean, if you're going to say that somehow people under 18 are juveniles for all purposes, why—why just pick on the death penalty? Why—why not say they're immune from any criminal penalty?

MR. LAYTON: Well, I—I must assume that if we—if the Court says they are immune from the—from capital punishment that someone will come and say they also must be immune from, for example, life without parole.

JUSTICE SCALIA: I'm sure that—I'm sure that would follow. I—I don't see where there's a logical line.

MR. LAYTON: No. The—the problem with adopting the—the 18-year-old line is that it is essentially arbitrary. It's the kind of line that legislators and not courts adopt.

CHIEF JUSTICE REHNQUIST: But didn't—didn't we adopt a 16-year-old line in our earlier case?

MR. LAYTON: In—in *Thompson*, the Court in a 4-1-4 decision struck a 15-year-old—a 15-year-old execution, and the States have taken, including Missouri through its General Assembly, have taken that to mean that there is a 16-year-old line. And today, in

fact, I think it's true that there is a consensus nationally with regard to the 16-year-old line, not because it has some biological or psychological magic, but because perhaps—

JUSTICE O'CONNOR: Well, but—but there was—it's about the same consensus that existed in the retardation case.

MR. LAYTON: Absolutely, that's true. If you look at the—the—

JUSTICE O'CONNOR: And—and so are we somehow required to at least look at that? I mean, the statistics of how many States have approved 18 years as the line is about the same as those in the retardation case.

MR. LAYTON: The—the Court has kind of three groups of cases with regard to the number of States. On one extreme are *Enmund* and *Coker*, where you have three and eight States. On the other extreme; are *Penry* and *Stanford*, where you have 24 and 34 States. And then there's this middle group, which isn't just *Atkins* and this case. It's also *Tison*, which is also almost exactly the same number.

The Court in *Atkins* had to find a way of distinguishing *Tison*, to the extent the Court relied on that—that counting process, and the—the Court concluded that there was kind of an inexorable trend with regard to the mentally retarded. We don't have that kind of trend here. In—

JUSTICE SOUTER: Well, we—we have a different kind of trend. What do you make—you spoke of a consensus, but what do you make of the fact that over the last, I guess, 10—or 12-year period, the actual imposition of the death penalty for—for those whose crimes were—were under 18 has—has steadily been dropping? I think 10 years ago, there were 13. Last year, I—I think the figures were that there were two. The—the consensus seems to be eroding, and yet as—as the counsel on the other side pointed out, this has been occurring at a time when—when treating juvenile crime seriously has not, in fact,

been eroding at all. What—what are we supposed to make of that?

MR. LAYTON: Well, two things.

Number one is that capital sentences have been dropping for all ages, not just for those under 18. So it—you have to take that into account.

The second is that although the last—

JUSTICE SOUTER: Has—has the—has the rate of attrition been the same?

MR. LAYTON: It is—

JUSTICE SOUTER: Thirteen to two is pretty spectacular.

MR. LAYTON: It is not—

JUSTICE SOUTER: I don't think we've seen that, or maybe we have seen that, for—for death imposition generally. Is that so?

MR. LAYTON: It is certainly greater, but part of the problem is we're dealing with such small numbers for the—the juveniles, those under 18, that the difference of one or two makes a huge difference in how the numbers come out.

But if you look over the last 10 years, in fact, it has gone up and down and currently is in a downtrend, but the downtrend—

JUSTICE SOUTER: Well, it went up once I think, didn't it?

MR. LAYTON: It—it went up once within—since—since *Stanford* and then came back down. Now, whether this—this period in which it comes back down is going to remain that way or whether we'll go back up to where we were 10 years ago I don't know. That's entirely hypothetical to suggest that—that this very recent trend is more dispositive than the trends over the last 10 years.

JUSTICE SOUTER: So—so you're basically—

JUSTICE SCALIA: Of course—

JUSTICE SOUTER: You're—you're basically saying that the—the time is too short, the numbers are too small—

MR. LAYTON: Right.

JUSTICE SOUTER: —to infer anything.

MR. LAYTON: Right, and the time is too short on the legislative side as well. We're only talking about the States that have adopted new legislation having done so, one of them in 1999 and the others simply in 2002 and 2004. If we were to look at the history of—of capital punishment in the United States, there are many times when States have abolished capital punishment and then returned. And Justice—

JUSTICE KENNEDY: You—you were in the midst of telling us why the—there is a consensus now that it's inappropriate to execute anyone under 16, and I—I—you weren't—

MR. LAYTON: No. It—

JUSTICE KENNEDY: You couldn't finish that answer. I want to know it.

MR. LAYTON: Since—since *Stanford*, we have had no executions under 16 even though it is possible to read Justice O'Connor's opinion in that case as allowing a State to adopt a statute that specifically says 15. No one has tried that. Everyone seems to have taken *Thompson* and *Stanford* together to mean there is a 16-year-old line. Two States have adopted 16 by statute.

JUSTICE KENNEDY: And—and so you say there's—there's not so much as a consensus as an understanding of what that decision means.

MR. LAYTON: I—I think that that's right. There are States that have adopted it specifically and others have simply implemented it. If I were a prosecutor today, I—it's hard to imagine that I would—even in a State where I could find a statute saying I could prosecute someone under age 16, that I would try such a thing.

JUSTICE KENNEDY: Let—let me ask you this. I—I don't yet have the—the record showing the full closing argument of—of both sides, but we do have the portion where the prosecutor says, isn't this scary? Can adolescence ever be anything but mitigating?

MR. LAYTON: I—I don't know how it could be anything but mitigating. But we have in that—

JUSTICE KENNEDY: But that's now [sic] how the prosecution presented it to the jury.

MR. LAYTON: In that statement, but—

JUSTICE KENNEDY: He said—he—he almost made it aggravating. Isn't that scary? I don't have the—I don't have the full argument.

MR. LAYTON: No. What—what he's facing is—is 18 pages of transcript that occupied the—the defense counsel's argument. Of those 18 pages, 4 pages are dedicated purely to Mr. Simmons' youth, and throughout the rest of the argument, he uses terms to reinforce that. He refers to him repeatedly as a 17-year-old. He calls him a kid. He does things to reinforce with the jury that he's very young.

So then we come back and in a few pages of rebuttal, we have a couple of words—I shouldn't say that—two sentences in which the prosecutor is trying to respond to that particular lengthy theme and argument.

JUSTICE GINSBURG: It was pretty clear. The—the words in question were: Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary.

MR. LAYTON: And if we were here because Mr. Simmons said that was improper and the Missouri Supreme Court said that was improper, well, we wouldn't be here. We wouldn't have asked for certiorari. The Court wouldn't have granted it.

JUSTICE GINSBURG: But the question is, can—is—is age, youth inevitably mitigating, and here is a prosecutor giving the answer no, it can be aggravating.

MR. LAYTON: The Missouri statute requires that an instruction be given that says that age is a mitigator, and the—the instruction was given here. And the jury heard argument concerning that particular claim.

JUSTICE SCALIA: Well, what's—what's the—

JUSTICE KENNEDY: Well, that's somewhat—

JUSTICE SCALIA: What is the contrary of—of mitigating? I—I would assume—

MR. LAYTON: Aggravating, but aggravating—

JUSTICE SCALIA: Is it? I—I would assume it's not mitigating.

MR. LAYTON: Well, you're right, Your Honor, because—

JUSTICE SCALIA: Maybe the opposite of mitigating is aggravating, but it—it's perfectly good English to say, mitigating? Quite the contrary—

MR. LAYTON: It is—it is not mitigating.

JUSTICE SCALIA: It's not at all mitigating.

MR. LAYTON: Yes. And—and—

JUSTICE SCALIA: So I don't know why you give that one away.

MR. LAYTON: Certainly "aggravating circumstances" are defined in the Missouri statute, and they were defined in the instructions. So this was not to be considered by the jury as an aggravator.

JUSTICE KENNEDY: Let—let's focus on the word unusual. Forget cruel for the moment, although they're both obviously involved.

We've seen very substantial demonstration that world opinion is—is against this, at least as interpreted by the leaders of the European Union. Does that have a bearing on what's unusual? Suppose it were shown that the United States was one of the very, very few countries that executed juveniles, and that's true. Does that have a bearing on whether or not it's unusual?

MR. LAYTON: No more than if we were one of the very few countries that didn't do this. It would bear on the question of unusual. The decision as to Eighth Amendment should not be based on what happens in the rest of the world. It needs to be based on the mores of—of American society.

JUSTICE SCALIA: Have the countries of the European Union abolished the death penalty by popular vote?

MR. LAYTON: I don't know how they've done that, Your Honor.

JUSTICE SCALIA: I thought they did it by reason of a judgment of a court—

MR. LAYTON: Well, in fact—

JUSTICE SCALIA: —which required all of them to abolish it.

MR. LAYTON: I—I believe that—

JUSTICE SCALIA: And I thought that some of the public opinion polls in—in a number of the countries support the death penalty.

MR. LAYTON: I believe that there are countries in Europe who abolished it because of their membership in the European Union—

JUSTICE KENNEDY: I—I acknowledged that in—in my question. I recognize it is the leadership in many of these countries that objects to it.

But let us—let us assume that it's an accepted practice in most countries of the world not to execute a juvenile for moral reasons. That has no bearing on whether or not what we're doing is unusual?

MR. LAYTON: I—I can't concede that it does because it's unimaginable to me that we would be willing to accept the alternative, the flip side of that argument.

It does seem to me, however, that that goes to a particular—back to the aspect where I began—

JUSTICE BREYER: Is there—is there any on—on that? Is there any indication? I mean, I've never

seen any either way, to tell you the truth, but—that Madison or Jefferson or whoever, when they were writing the Constitution, would have thought what happened elsewhere, let's say, in Britain or in the British—they were a British colony. They did think Blackstone was relevant. Did any—that they would have thought it was totally irrelevant what happened elsewhere in the world to the world unusual. Is there any indication in any debate or any of the ratification conventions?

MR. LAYTON: Nothing that I have seen has suggested that—

JUSTICE BREYER: So if Lincoln—

MR. LAYTON: —one way or the other.

JUSTICE BREYER: —Abraham Lincoln used to study Blackstone and I think he thought that the Founding Fathers studied Blackstone, and all that happened in England was relevant, is there some special reason why what happens abroad would not be relevant here? Relevant.

MR. LAYTON: There's a—

JUSTICE BREYER: I'm not saying "controlling."

MR. LAYTON: There's a special reason why Blackstone would be relevant because that was the law from which they were operating when they put this language into the Constitution.

JUSTICE BREYER: Absolutely, and they, I guess, were looking at English practices, and would they have thought it was wrong to look abroad as a relevant feature?

MR. LAYTON: And—and I don't know the answer to that, Your Honor.

JUSTICE KENNEDY: Do we—do we ever take the position that what we do here should influence what people think elsewhere?

MR. LAYTON: I—I have not seen that overtly in any of the Court's opinions, Your Honor.

JUSTICE SCALIA: You—you think—

JUSTICE KENNEDY: You—you thought that Mr. Jefferson thought that what we did here had no bearing on the rest of the world?

MR. LAYTON: Oh, I—I think Mr. Jefferson thought that. I think many of the Founders thought that they were leading the world, and I have no objection to us leading the world, but Mr. Jefferson's lead of the world was through the legislature not through the courts.

JUSTICE GINSBURG: But did he not also say that to—to lead the world, we would have to show a decent respect for the opinions of mankind?

MR. LAYTON: That—that may well be.

JUSTICE SCALIA: What did John Adams think of the French? (Laughter.)

MR. LAYTON: I read a biography of John Adams recently. I recall that he didn't think highly of them. (Laughter.)

MR. LAYTON: The—Missouri, in order to implement the principle that those who are immature should not be subject to capital punishment, has adopted an approach that, first off, excludes anyone age 16 and under from capital punishment; second, requires certification by the juvenile court for anyone who is 16, but otherwise turns the matter over to the jury and defines it as a statutory mitigator.

The kind of evidence that is discussed in Mr. Simmons' brief at some length could have been applied—could have been presented during the penalty phase of Mr. Simmons' trial. It has been reflected in decisions of this Court as far back as *Eddings*, where there was evidence of mental and emotional development. In *Penry*, there was evidence of mental age and social maturity. And here, in the postconviction proceeding, Mr. Simmons presented such evidence regarding his impulsivity, his susceptibility to peer pressure, and his immaturity. But he didn't present that at trial. There is a mechanism in Missouri for him to do that and he chose not to.

JUSTICE BREYER: Before you go off on this, the one statistic that interested me—and I'd like you

to discuss its relevance really—is if we look back 10 years, I have only three States executing a juvenile: Texas, 11; Virginia, 3; and Oklahoma, 2.

MR. LAYTON: Correct.

JUSTICE BREYER: And those three States account for about 11 percent of the population of the country, 11.3 percent.

Now, if we go back a few more years to Stanford, we get three others in there: Louisiana, 1; Georgia, 1; and Missouri, 1.

MR. LAYTON: And if you go to the convictions rather than the executions, then Alabama goes into that mix.

JUSTICE BREYER: We have a very different number.

MR. LAYTON: Right.

JUSTICE BREYER: So the reason that I thought arguably it's more relevant to look at the convictions is there are a lot of States. Say, New Hampshire, I think, for example—when I was in the First Circuit, there were several States that on the books permitted the death penalty, but nobody ever had ever been executed. And—and that's true across the country. There are a number of States like that. So if we look at the States that actually execute people, it's 10 years, say, 11 percent of the population are in such States. You go back 15 years, and you get these three other States, which raises the percentage.

How—how should I understand that? I'm interested in both sides—

MR. LAYTON: Frankly, we don't know what those numbers mean because we don't know to what extent juveniles are committing capital-level murders. We—and there is no way in current social science to make that determination.

It's interesting that among the three States—two of the three States that are on that list that Justice Breyer mentioned are States in which there is a specific instruction to the jury, or indeed, in Texas, a requirement, that the jury evaluate future dangerousness. That is, the argument that was referred to by

opposing—or that counsel made, the State’s counsel made, the prosecutor made, in the—in the trial here, there’s actually an instruction in some of those States. And that may play into the manner in which this—those States—the reason those States have additional convictions and additional executions.

But Missouri doesn’t have that. We don’t require that the jury find future dangerousness, and although that may come up in the course of a mitigation and aggravation argument in the penalty phase, it isn’t highlighted like it is in those States. And that may be more problematic than the system that Missouri has created.

If the kind of evidence, psychosocial evidence, that is cited in Mr. Simmons’ brief had been presented at the penalty phase, of course there would have been an opportunity to rebut it, to question it. Instead, what we have in this case is the marshaling of untested evidence from various cause groups and some dispassionate observers.

CHIEF JUSTICE REHNQUIST: At what point was this inserted into the record, Mr. Layton?

MR. LAYTON: The—the kind of—well, as to Mr. Simmons specifically, it came in in the postconviction proceeding, and then was also present in the habeas record. In this case, the—the lengthy litany of scientific studies appeared for the first time in his brief in this Court. There were references to a few of them before, but nothing—

CHIEF JUSTICE REHNQUIST: It was never—never tested in the trial court.

MR. LAYTON: Oh, no. Oh, no, because he never made the argument in the trial court during his trial—that scientifically he was too immature to be culpable to the degree that would merit capital punishment.

JUSTICE SOUTER: Well, at least to the extent that he’s simply quoting public sources, you had a chance to quote public sources in—in return.

MR. LAYTON: Absolutely.

JUSTICE SOUTER: So I think you’re—you’re even on that—

MR. LAYTON: Absolutely.

JUSTICE SOUTER: —or at least your opportunity is.

MR. LAYTON: I—and I think the reason that we did that and we cited the difficulties in our reply brief with what he cited is to highlight that the precise age is a legislative question based on legislative-type facts. Legislatures can evaluate this series of studies and then pick what is essentially an arbitrary age. There is no study in anything that Mr. Simmons cites that—that justifies that particular day, 18. They talk about adolescence. They talk about young adolescence, old adolescence. They talk about adolescence continuing until the mid-twenties. Nothing justifies the age of 18. That makes it the kind of fact that a legislature ought to be evaluating, not a court.

JUSTICE SCALIA: Does adolescence as a scientific term—does it always occur on the same day for—for all individuals?

MR. LAYTON: No. The—the studies point out that adolescence is—well, they don’t agree on what adolescence means, and they don’t—and they point out that it begins and ends on different times for different people. So we don’t know what adolescence means in the studies, and we don’t know what it would mean were the Court to base a decision on the—this concept of adolescence.

I’d like to reserve the rest of my time, if there are no other questions.

CHIEF JUSTICE REHNQUIST: Very well, Mr. Layton.

Mr. Waxman, we’ll hear from you.

#### ORAL ARGUMENT OF SETH P. WAXMAN ON BEHALF OF THE RESPONDENT

MR. WAXMAN: Mr. Chief Justice, and may it please the Court:



Everyone agrees that there is some age below which juveniles can't be subjected to the death penalty. The question here is where our society's evolving standards of decency now draw that line.

Fifteen years ago, this Court found insufficient evidence to justify a bright line at 18, but since *Stanford*, a consensus has evolved and new scientific evidence has emerged, and these developments change the constitutional calculus for much the same reasons the Court found compelling in *Atkins*. As was noted—

JUSTICE SCALIA: Can the constitutional calculus ever move in the other direction? I mean, once we hold that, you know, 16 is the age, if there's new scientific evidence that shows that some people are quite mature at 18 or at—at 17-and-a-half or if—if there is a—a new feeling among the people that youthful murderers are, indeed, a serious problem and—and deterrence is necessary, can we ever go back?

MR. WAXMAN: Well, there is a—

JUSTICE SCALIA: It's sort of a one-way ratchet. Isn't it?

MR. WAXMAN: There is a one-way ratchet here as there is whenever this Court draws a constitutional line; that is, whenever this Court determines that the Constitution preempts the ability of legislatures to make—

CHIEF JUSTICE REHNQUIST: Well, but what—what if a State legislature decides that, sure, the Supreme Court said in the *Simmons* case that you can't execute anybody under 18, but we think there's kind of a tendency the other way, we're going to pass a statute and see what happens in court?

MR. WAXMAN: Well, you could—you could have, I guess, what I refer to as the *Dickerson v. United States* phenomenon. It could come up. But what's—what's really interesting—I think what's—

CHIEF JUSTICE REHNQUIST: Is it—is that a closed book? I mean, granted, you may lose the argu-

ment, but is it a permissible argument that the standards have evolved the other way?

MR. WAXMAN: It—it certainly would be a permissible—permissible argument.

What's—what's notable here, Justice Scalia and Mr. Chief Justice, is how robust this consensus is. We're talking not only about the whole variety of ways in which our society has concluded that 18 is the bright line between childhood and adulthood and that 18 is the line below which we preserve—presume immaturity. But the line with respect to executions, the trend is very robust and it is very deep.

JUSTICE SCALIA: We don't—we don't use 18 for everything. Aren't there States that—that allow adolescents to drive at the age of 16?

MR. WAXMAN: There are nine States that allow adolescents to drive at the age of 16 without their parents' consent. That—driving, of course, is the classic example, but—

JUSTICE SCALIA: With their parents' consent—

CHIEF JUSTICE REHNQUIST: Right.

JUSTICE SCALIA: With their parents' consent, how many?

MR. WAXMAN: To—to—there are 41 States that require parental consent below 18.

JUSTICE SCALIA: But they can drive.

MR. WAXMAN: But they can drive if their parents agree. My—my—

JUSTICE SCALIA: If it's okay with the parents, it's okay with the State.

MR. WAXMAN: My point here is that with respect to the death penalty, we have a substantial consensus within the United States, as it happens, exactly the same lineup as existed in—as existed in—was true in *Atkins*. We have not just a worldwide consensus that represents the better view in Europe. There are 194 countries—

CHIEF JUSTICE REHNQUIST: Well, how does one—how does one determine what is the better view?

MR. WAXMAN: I was—I was referring to the implication that it has often been said that because the European Union thinks something, we should, therefore, presume that the world views it that way. We're now talking about—

CHIEF JUSTICE REHNQUIST: Are you suggesting that we adopt that principle?

MR. WAXMAN: To the contrary. My point is we are not talking about just what a particular European treaty requires. We—the—the eight States that—that theoretically—that have statutes that theoretically permit execution of offenders under 18 are not only alone in this country, they are alone in the world. Every country in the world, including China and Nigeria and Saudi Arabia and the—and the Democratic Republic of the Congo, every one has agreed formally and legislatively to renounce this punishment, and the only country besides the United States that has not is Somalia, which as this Court was reminded yesterday, has no organized government. It is incapable—

JUSTICE SCALIA: They have a lot of customs that we don't have. They don't allow most—almost all of them do not allow—have trial by jury. Should we—and they think it's not only more efficient, it is fairer because juries are, you know, unpredictable and whatnot. Should we yield to the views of the rest of the world?

MR. WAXMAN: Of course not, but this is a—this is a standard which—a constitutional test that looks to evolving standards of moral decency that go to human dignity. And in that regard, it is—it is notable that we are literally alone in the world even though 110 countries in the world permit capital punishment for one purpose—for one crime or another, and yet every one—every one formally renounces it for juvenile offenders.

And, Justice Kennedy, my submission isn't that that that's set—you know, game, set, and match. It's just relevant, and I think it is relevant in terms of the existence of a consensus.

There was reference made by my opponent to the fact that there are four States that set the age at 17 and four States that set the age at 16. No—in terms of movement, no one has suggested that any of those States or any other State has ever lowered the age. In fact, if you look at those particular—those eight States, a number of them legislated an age that represented raising the number over what had previously been permitted. The movement, as this Court addressed, talked about in *Atkins*, has all been in one direction, and it's not as if that movement, in and of itself, answers the question. But where you have the type of consensus that exists here, as it did in *Atkins*, and where you have a scientific community that in *Stanford* was absent—the American Medical Association, the American Psychological Association, the American Psychiatric Association, the major medical and scientific associations, were not able in 1989, based on the evidence, to come to this Court and say there is scientific, empirical validation for requiring that the line be set at 18.

JUSTICE KENNEDY: Well, in fact, the American Psychological Association is not your brief. You're not accountable for inconsistencies there.

But I—I would like your comment. They came to us in *Hodgson v. Minnesota*, as I think the State quite correctly points out, and said that with reference to the age for determining whether the child could have an abortion without parental consent, that adults—that they—that they were risk—that they could assess risk, that they had rational capacity, and they completely flip-flop in this case.

MR. WAXMAN: Well—

JUSTICE KENNEDY: Is that just because of—is that just because of this modern evidence?

MR. WAXMAN: No, no, no. I don't—I think it's—it may be in small part to that, Justice Kennedy, but I

think the main point is that what their brief looked to—what the argument was was our—are adolescents cognitively different than adults? And the answer is, as we—our brief concedes, is generally no.

And what was at issue in the abortion cases was competency to decide. And just as we allow the mentally retarded the ability to decide whether or not to obtain an abortion but not to be subject to a penalty that is reserved for the tiny fraction of murderers that are so depraved that we call them the worst of the worst, here competency to decide here, as with the mentally retarded, isn't the issue.

Christopher Simmons was found, beyond a reasonable doubt, to have committed this offense with the specific intent necessary to do it, just as the mentally retarded can be. The issue in *Hodgson* was cognitive ability to be able to make a competent decision. And so I don't—I didn't represent the APA then and I don't now, but I don't, with respect, think there's an inconsistency.

In fact, the difference here goes to the factors that *Atkins* identified about why overwhelmingly the mentally retarded—and here adolescents—are less morally capable. They are much, much less likely to be sufficiently mature to be among the worst of the worst. And here, even more than with the mentally retarded, the few 16- and 17-year-olds who might, if we could even determine it, be—we could determine were in fact so depraved that they were among the worst of the worst, there is way reliably to identify them and there's no way reliably to exclude them. And it is in this respect that science I think changes.

At the time of *Stanford*, everybody on this Court, of course, knew what all of us as adults intuitively know, which is that adolescents—and—and here we're talking about—I agree that when adolescence starts and when it ends is undefined. But every scientific and medical journal and study acknowledges that 16- and 17-year-olds are the heartland. No one excludes them. And what we know from the science essentially explains and validates the consensus that society has already developed.

JUSTICE SCALIA: If all of this is so clear, why can't the State legislature take it into account?

MR. WAXMAN: Well, one could have said—

JUSTICE SCALIA: I mean, if it's such an overwhelming case that—that we can prescribe it for the whole country, you would expect that the number of States that—that now permit it would not permit it. All you have to do is bring these facts to the attention of the legislature, and they can investigate the accuracy of the studies that the American Psychological Association does or other associations in a manner that we can't. We just have to read whatever you put in front of us.

MR. WAXMAN: Justice Scalia, the number of States that engage in these executions is very small, and if it were all of the States, none of this Court's Eighth Amendment jurisprudence would ever have to come—would ever have to be developed. But—

JUSTICE SCALIA: But that's precisely because the jury considers youthfulness as one of the mitigating factors. It doesn't surprise me that the death penalty for 16- to 18-year-olds is rarely imposed. I would expect it would be. But it—it's a question of whether you leave it to the jury to evaluate the person's youth and take that into account or whether you adopt a hard rule that nobody who is under 18 is—is—has committed such a heinous crime with such intent that he—that he deserves the death penalty.

MR. WAXMAN: Justice—Justice Scalia, there's no doubt—and the jury was instructed—that age is a mitigating factor although, Justice Kennedy, in response to your question, our brief points out prosecutors, in the context of future dangerousness, which is relevant, argue it all the time and jurors intuitively think it all the time.

But the fact that he could have made an individualized mitigating case or argued that he was only—that he was young, as he did, doesn't address the constitutional problem. The constitutional problem is that overwhelmingly 16- and 17-year-olds, for

reasons of the—the developmental reasons relating to their psychosocial character—

CHIEF JUSTICE REHNQUIST: Well, Mr. Waxman, was that in evidence that you referred to from these various associations? Was that introduced at trial?

MR. WAXMAN: The—about the character—

CHIEF JUSTICE REHNQUIST: Yes.

MR. WAXMAN: No. The trial was—I'm making an observation just as in—as in *Atkins*—

CHIEF JUSTICE REHNQUIST: Well, but I—I would think if you want to rely on evidence like that, it ought to be introduced at trial and subject to cross-examination rather than just put in amicus briefs.

MR. WAXMAN: Oh, no, Mr. Chief Justice. I'm not making an argument about the character or maturity of this defendant, which would have been the only thing that would be—

CHIEF JUSTICE REHNQUIST: No. But you're making an argument that science says people this age are simply different, and it seems to me you—if that's to be an argument, it ought to be introduced at trial.

MR. WAXMAN: I—I—it's an argument about what the Constitution prohibits. It's an argument about where a constitutional line should be drawn.

CHIEF JUSTICE REHNQUIST: Well, but you're—you're talking facts basically and facts ordinarily are adduced at trial for cross-examination.

MR. WAXMAN: Well, I am not aware of any instance in which legislative facts, as you will call them—that is, facts that go to where a line should be drawn, whether it's by this Court because the Constitution ought to be so interpreted or a legislation should change—would be properly introduced to a jury that is supposed to accept the law, that has required to accept the law as is given by a judge—

CHIEF JUSTICE REHNQUIST: Well, how about in the—how about in the habeas proceeding?

MR. WAXMAN: In the habeas proceeding, it's—it's—an argument could have been made and, indeed, was made in this case that the line—that under *Atkins* juvenile offenders are the same and—

CHIEF JUSTICE REHNQUIST: Well, was this evidence adduced at the habeas proceeding?

MR. WAXMAN: The habeas—if you're talking about the—the scientific studies—

CHIEF JUSTICE REHNQUIST: Right.

MR. WAXMAN: —in peer-reviewed journals, it was not.

JUSTICE KENNEDY: Well—well, surely at the trial, you could have had a psychiatrist testify to all the things that are in your—in your brief, and in fact the—it would be another argument, but maybe the—maybe the finding was deficient on that ground as well.

MR. WAXMAN: Well, we certainly could have had a psychiatrist argue that in—generally speaking, adolescents are less mature and on a range of psychosocial factors, they—

JUSTICE KENNEDY: Well, he could have cited all the—all the authorities you cite in your brief.

MR. WAXMAN: Right. But, Justice Kennedy, I—I concede that.

The issue for this Court is whether the Constitution requires that as a matter of law, not as a matter of the application of law to a particular defendant, the line has to be drawn this way, and—

JUSTICE KENNEDY: Suppose—suppose that all of the things set forth in your brief were eloquently set forth by a psychiatrist to the jury. Could the jury then weigh these things that you're telling us?

MR. WAXMAN: The jury could have weighed these things, but there is no way, even for a psychiatrist or a psychologist, much less a juror to—to be confident

because of the inherent, documented transiency of the adolescent personality. No psychiatrist and no juror can say with confidence that the crime that was committed by a 16- or 17-year-old, on the average two years ago—and this is the key point—proceeded from enduring qualities of that person’s character as opposed to the transient aspects of youth, and therefore—

CHIEF JUSTICE REHNQUIST: But now, that—that itself is a purported scientific fact, what you just said, and it seems to me if we’re—if we’re to rely on that, it ought to have been tested in the way most facts are.

MR. WAXMAN: What the jury—perhaps I’m not understanding your point.

CHIEF JUSTICE REHNQUIST: Well, you’re—you’re relying on factual—the statement you just made was—was a factual statement about the enduring character, et cetera. Now, if—if we are to take that as a fact, it ought to have been tested somewhere rather than just given to us in a brief.

MR. WAXMAN: Well, the—the—an argument to the jury that regardless of what a psychiatrist or a psychologist would have said about Christopher Simmons, as a group, 16- and 17-year-olds have such labile personalities that it is impossible to know whether they’re—the crime that they committed reflected an enduring character is an argument that could have been made to spare this particular defendant, but it need not have been credited or given dispositive weight, particularly since at sentencing—and this Court has acknowledged this in cases like *Pate v. Robinson* and *Drope v. Illinois*—the jury is evaluating somebody, determining their moral blameworthiness two years later.

JUSTICE KENNEDY: But—but if you’re reluctant to give it dispositive weight in an individual case, then you come in and ask us to give it dispositive weight as a general rule, that seems to me inconsistent.

MR. WAXMAN: Well, no. What I’m—what I’m asking you to do—what I’m suggesting is that the

weight of scientific and medical evidence of which the Court can take judicial notice and should take judicial notice and did take judicial notice in cases like *Atkins* and *Thompson* and *Stanford* explains and validates the consensus that society has drawn. We’re not arguing that the science or what a particular neurobiologist or developmental psychologist says dictates the line of 18. The question is we have a consensus. It’s even more robust than it was in *Atkins*. Looking at proportionality and reliability with respect to that consensus, is there a good, objective, scientific reason to credit the line that society has drawn? And I’m suggesting two things. Number one, that although one could posit that there are 16- and 17-year-olds whose antisocial traits are characterological rather than transient, we know it is impossible—we know this from common sense and it’s been validated by science, of which the Court can take note, that it is impossible to know whether the crime that was committed by a 16- or 17 year-old is a reflection of his true, enduring character or whether it’s a manifestation of traits that are exhibited during adolescence. And—

JUSTICE KENNEDY: Well, suppose—suppose I—I were not convinced about your scientific evidence was conclusive and I don’t identify a clear consensus. Do you lose the case, or can you then make the same argument you just made appealing to some other more fundamental principle that *Stanford* was just wrong?

MR. WAXMAN: Here—no. Well—no. Here’s what I would appeal to. I—there are three relevant factors that this Court has to look at. There’s the determination of consensus. Is there enough of a one or isn’t there? There’s the determination of proportionality, and then there’s the issue identified in *Lockett* and in *Atkins*, which is how reliable is the individualized sentencing process. How reliably—when we’re talking about picking the tiny few who are the worst of the worst, how reliably can we do that? We think that with respect to each of those, we have demonstrated that the Eighth Amendment requires recognizing 18.

But I will take as a posit your hypothetical question that I haven't convinced you on number one, number two, or perhaps individually on all three. This is truly a case, Justice Kennedy, in which the whole is greater than the sum of the parts. Taken together, the fact that it's impossible for a jury to know whether the crime of an adolescent was really the feature of an enduring character, since we know, as in *Atkins*, that many of the characteristics that manifest themselves in mental retardation also affect the inability of adolescents to communicate with their attorneys, to express remorse, that two years later when this person is on trial, physically, emotionally it's not the same person that the jury is looking at and being asked to evaluate—

JUSTICE BREYER: All right. So that—that's—that last point was what I thought the scientific evidence was getting at, that it simply confirmed what common sense suggests, that when you execute a person 15 or sometimes 20 years later, a problem always is that that person isn't the same person who committed the trial in a meaningful sense. And it's specially true of 16- and 17-year-olds who, observation would suggest, have a lot of changing to do because their personality is not fully formed.

Now, I thought that the—the scientific evidence simply corroborated something that every parent already knows, and if it's more than that, I would like to know what more.

MR. WAXMAN: Well, it's—I think it's—it's more than that in a couple of respects. It—it explains, corroborates, and validates what we sort of intuitively know, not just as parents but in adults that—that—who live in a world filled with adolescents. And—and the very fact that science—and I'm not just talking about social science here, but the important neurobiological science that has now shown that these adolescents are—their character is not hard-wired. It's why, for example—here's a—here's an interesting and relevant scientific fact. Psychiatrists under the *DSM*, the *Diagnostic and Statistical Manual*, which is their Bible, are precluded from making a diagnosis of antisocial personality before the age of 18 pre-

cisely because before the age of 18, personality and character are not fixed even with respect to—

JUSTICE SCALIA: Mr. Waxman, I—I thought we punish people, criminals, for what were, not for what they are. I mean, you know, if you have someone who commits a heinous crime and by the time he's brought to trial and convicted, he's come to Jesus, we don't let him off because he's not now what he was then. It seems to me we punish people for what they were.

MR. WAXMAN: We—

JUSTICE SCALIA: And to say that adolescents change, everybody changes, but that doesn't justify eliminating the—the proper punishments that society has determined.

MR. WAXMAN: I think, with respect, Justice Scalia, I'm not—I think that there is an interesting question about—with respect to death, whether that they are and what they will become is totally irrelevant.

But accepting the premise of your question, my point is that science has confirmed what we intuitively know, which is that when the jury gets around to evaluating what the character was that manifested that horrible crime, they can't tell because of the passage of age and because of a number of confounding factors and because psychologists and psychiatrists can't tell themselves whether the crime that occurred two years ago or two weeks ago was the manifestation of an enduring character or transient psychosocial traits that rage in adolescence.

CHIEF JUSTICE REHNQUIST: Is part of your answer based on the length of time between the killing and the trial?

MR. WAXMAN: Only part, Mr. Chief Justice. Part of it is that the jury, of course, is looking at the defendant, and we have laid before the Court peer-reviewed scientific studies that show that they—that people are—frequently equate maturity and psychosocial development with race and with physical appearance. In addition, because the adolescent personality is transient and the lapse of time for trial

is two years, in a very real sense psychosocially as opposed to—in addition to physically, the person that the jury is judging is not the—is not a manifestation of the person who committed the crime.

CHIEF JUSTICE REHNQUIST: Well, what if—what if a State said I see the problem, so we'll bring this person to trial in six weeks?

MR. WAXMAN: Even if it were in six weeks, Mr. Chief Justice, we believe that the process is—is sufficiently—that would just make the youth the same as the mentally retarded, because the mentally retarded have stable personalities and stable characters, and yet, what this Court said in *Atkins* was we have two things to say. One is that overwhelmingly as a group the mentally retarded are unlikely to be among the very worst of the worst, and the very deficits that they have—that you called deficits in reasoning, judgment, and control of their impulses, makes the jury—the process of the jury evaluating the moral culpability, the moral blameworthiness unreliable. And it's on the basis of those two things that we think that the consensus that's otherwise reflected is validated. And here—

JUSTICE KENNEDY: I have—I have one other question I'd like to ask because it's been troubling me and I want your comment.

A number of juveniles run in gangs and a number of the gang members are over 18. If we ruled in your favor and this decision was given wide publicity, wouldn't that make 16-, 17-year-olds subject to being persuaded to be the hitmen for the gangs?

MR. WAXMAN: Well—

JUSTICE KENNEDY: I'm—I'm very concerned about that.

MR. WAXMAN: I—I am also concerned about it, and I—I have thought about this. First of all, if they are enlisted by people over the age of 18 to do that, the—the precise degree of culpability goes to the people who are over 18, and juries ought to consider

whether people who are over the age of 18 have so enlisted them.

But even—but with respect to—

JUSTICE KENNEDY: I'm talking about the deterrent value of the existing rule insofar as the 16- and 17-year-old. If—if we rule against you, then the deterrent remains.

MR. WAXMAN: Well, I think—I think, as with the mentally retarded, or in fact, even more than with the mentally retarded, adolescents—the—the role of deterrence has even less to say, precisely because they weigh risks differently and they don't see the future and they are impulsive and they're subject to peer pressure.

And in fact, if you look at what happened in this case, it's as good an example as any. The State says, well, okay, you know, he—you know, this guy, according to the State's witness, the person who was over 18 and described as the Fagin of this group of juveniles, testified to the court, well, Christopher Simmons says, let's do it because, quote, we can get away with it.

JUSTICE KENNEDY: Well, there were a number—a number of cases in the Alabama amicus brief, which is chilling reading—and I wish that all the people that sign on to the amicus briefs had at least read that before they sign on to them—indicates that often the 17-year-old is the ringleader.

MR. WAXMAN: Well, the 17-year-old may be the ringleader, and even if you posit that Christopher Simmons was the ringleader here, he—he wasn't under any illusions. He wasn't making a statement about being executed. He said, we could get away with it, which speaks volumes about the—the extent to which—this guy was subject to life without parole, which is, Justice Scalia, fundamentally different than death. This Court has said that only when the penalty is death, do you look at the character of the defendant as opposed to the nature of the crime and the act.

But the data shows—and I think this Court has acknowledged—it acknowledged in *Thompson* in

any event—that the—that adolescents like the—the mentally retarded are much less likely to be deterred by the prospect of an uncertain, even if probable, very substantial penalty. The—no mature adult would have thought, as Chris Simmons reportedly said, I can get away with this because I'm 17 years old, when the mandatory punishment for him would have life in prison.

It's—it is not—eliminating the death penalty as an option, which is—which is imposed so rarely as to be more freakish than the death penalty was in *Furman*—three States in the last 10 years, one—

JUSTICE STEVENS: But, of course, the death penalty was not a deterrent for any of the crimes described in the Alabama brief because those are all—crimes all occurred in States which execute people under 18.

MR. WAXMAN: Yes, and I—and I—the—the examples in the Alabama brief are horrifying. But if you look at those examples, the very first one, this is a kid who went on a killing spree, including his father, because he felt he was unjustly deprived use of the family truck. And there—I can go through the other examples, but these are posited as people who a jury could, with a degree of reliability that the Constitution requires, say acted out of a stable, enduring character rather than transient aspects of youth? I think that's a poster child for us.

JUSTICE SCALIA: Whereas if it had been done by an 18-year-old, a jury could have said that.

MR. WAXMAN: Well—

JUSTICE SCALIA: If an 18-year-old did the same thing, you say, well, he's certainly stable.

MR. WAXMAN: May I answer? Briefly.

The line—the science shows what common sense understands which is that development is a continuum, but the line, 18, is one that has been drawn by society.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Waxman.

MR. WAXMAN: Thank you.

CHIEF JUSTICE REHNQUIST: Mr. Layton, you have 8 minutes remaining.

#### REBUTTAL ARGUMENT OF JAMES R. LAYTON ON BEHALF OF THE PETITIONER

MR. LAYTON: Mr. Simmons, of course, was found by the jury to be the ringleader. And in essence, that creates a contrast with the *Lee Malvo* case, where we had something like what Justice Kennedy referred to, adults influencing a juvenile, and the jury was able to make that distinction in the Virginia *Lee Malvo* case.

JUSTICE STEVENS: May I ask this question, Mr. Layton? This case kind of raises a question about the basic State interests that are involved here, and the State interests that justify the death penalty include deterrence and also retribution.

MR. LAYTON: Yes.

JUSTICE SCALIA: Which, if either, of those do you think is the primary State interest you seek to vindicate today?

MR. LAYTON: I—I think that they are of equal weight in the minds of the legislators in the State of Missouri.

The—Mr. Simmons' counsel comes to the edge of asking this Court to—

JUSTICE STEVENS: May I just ask one further?

MR. LAYTON: Yes.

JUSTICE STEVENS: Is there any evidence that the death penalty for those under 18 or even above has, in fact, had any deterrent value?

MR. LAYTON: From all that I have read, the evidence both directions is inconclusive, Your Honor, and thus, subject to legislators' determination.

Mr. Simmons' counsel comes to the edge of asking the Court to elevate proportionality to be equivalent to—to a consensus. But let me just highlight



two aspects of the non-capital case proportionality jurisprudence of this Court.

Justice Kennedy, in—in *Harmelin*, recently cited by the plurality in *Ewing*, pointed out that two of the considerations in proportionality review in those instances are the primacy of the legislature and the nature of the Federal system. What we should have here is a principle—that is a principle dealing with immaturity, and the States, within the Federal system, should be able to make the determination as to how to implement it.

As pointed out, this Court's jurisprudence in Eighth Amendment areas has proven to be a one-way ratchet, and because of that, the Court has to be very wary of leading rather than reflecting societal norms. Now, there are some States, of course, that have raised the age, the minimum age, for capital punishment, but at least in some instances, such as Missouri, that is a reaction to this Court's jurisprudence—that is, a reaction to *Thompson* and *Stanford*. Other States have left 18 for other purposes, and yet there still is a role by this Court.

Pornography is an example. I am confident that but for this Court's First Amendment jurisprudence, the Missouri General Assembly would adopt a statute that said that pornography should not be allowed at ages much higher than 18 and not because of maturity, but because of their opposition to pornography.

In many of the instances cited by Mr. Simmons, the kind of statutes that he cites, gambling and others, it is a compromise in the legislative arena, not necessarily based on maturity or immaturity, that leads to the selection of the age of 18. Many States have, of course, individualized determinations with regard to those statutes. There was a discussion of driver's licenses. In Missouri, of course, we allow people to drive at age 15. They have to have parental consent, yes, but there also is a test. That is, there is an individualized determination before we do that, and that's what the State requests here.

Mr. Simmons' counsel points out that in *Atkins* the Court took judicial notice of psychosocial evidence, and that's true. The Court did. But remember that what the Court had before it in *Atkins* was not

a proxy for a—a factor that plays into culpability. It was, in fact, the factor itself, that is, mental capacity. And what they want here is not a determination as to the maturity or the capacity of individuals. They want a bright-line test that is based purely on age.

This Court should adopt, as it did in *Atkins*, a principle and leave it to the States to act. That's what the Court did in—

JUSTICE STEVENS: Of course, one—one of the objections in—in *Atkins* was we needed a bright-line test. We'd have difficulty determining which ones are mentally retarded. Here we don't have that problem at all. I guess everybody knows whether or not the defendant is over or under 18.

MR. LAYTON: Well, if that's the bright line. We don't know whether they're mature or immature, and we have to measure that somehow.

JUSTICE STEVENS: But the—but the purpose of a bright-line test is to avoid litigation over the borderline cases, and you just have completely avoided that in this category.

MR. LAYTON: Because the—having a bright-line test means that the individual who murders at age 17, 364 days is treated differently than a more—a less mature individual who is two days older.

JUSTICE STEVENS: But it's an equally arbitrary line if it's 16, 17, or 15.

MR. LAYTON: Yes, it is, and it's an arbitrary line that the legislatures have set because it's a legislative-type determination based on what even Mr. Waxman called legislative facts.

JUSTICE STEVENS: May I ask one—have you read the brief of the former U.S. diplomats in the case?

MR. LAYTON: Yes.

JUSTICE STEVENS: Do you think we should give any credence whatsoever to the arguments they make?

MR. LAYTON: No.

(Laughter.)

JUSTICE STEVENS: The respect of other countries for our country is something we should totally ignore.

MR. LAYTON: That's not for this Court to decide. Congress should consider that. The legislatures should consider that. It's an important consideration, but it is not a consideration under the Eighth Amendment.

JUSTICE STEVENS: We should leave it up to the legislature of the State of Missouri to resolve those questions.

MR. LAYTON: Within the parameters of—of *Thompson* and *Stanford*, yes. Yes. The Missouri Supreme Court—the *Atkins v. Virginia*—in *Atkins v. Virginia*, this Court did not authorize the Missouri Supreme Court to reject *Stanford*.

The Court should refuse to—to sanction such activity by the lower courts and continue the course it set in that decision.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Layton.

The case is submitted.

(Whereupon, at 10:59 a.m., the case in the above-entitled matter was submitted.)

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NOTES

1. *Roper v. Simmons*, 125 S. Ct. 1183 (2005).
2. See [www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/03-633.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-633.pdf).
3. *Roper v. Simmons*, 125 S. Ct. 1183 (2005).
4. *Id.* at 1190.
5. *Id.* at 1194.
6. *State v. Simmons*, 944 S.W.2d 165, 169–70 (Mo. 1997).
7. *Id.* at 191.
8. *Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003).
9. Brief for Petitioner Simmons, No. 03-633, 2004 WL 903158 (U.S. 2004).
10. *Roper v. Simmons*, 540 U.S. 1160 (2004).
11. *Thompson v. Oklahoma*, 487 U.S. 815 (1988).
12. *Stanford v. Kentucky*, 492 U.S. 361 (1989).
13. *Penry v. Lynaugh*, 492 U.S. 302 (1989).
14. *Atkins v. Virginia*, 536 U.S. 304 (2002).
15. *Simmons v. Roper*, 112 S.W.3d 397, 399 (Mo. 1997).
16. *Id.*
17. *Roper v. Simmons*, 125 S. Ct. 1183, 1194 (2005).
18. *Id.* at 1229.
19. See Convention on the Rights of the Child at [www.unicef.org/crc/introduction.htm](http://www.unicef.org/crc/introduction.htm).
20. See Convention on the Rights of the Child at [www.unicef.org/crc/fulltext.htm](http://www.unicef.org/crc/fulltext.htm).
21. *Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005).
22. *Id.* (Citations omitted.)
23. *Id.* at 1225–28.
24. JUVENILE JUSTICE CTR., AM. BAR ASS'N, CRUEL AND UNUSUAL PUNISHMENT: THE JUVENILE DEATH PENALTY: ADOLESCENCE, BRAIN DEVELOPMENT, AND LEGAL CULPABILITY 1 (Jan. 2004), available at [www.abanet.org/crimjust/juvjus/Adolescence.pdf](http://www.abanet.org/crimjust/juvjus/Adolescence.pdf).
25. *Id.* at 2.
26. *Id.* at 2–3.
27. *Id.*
28. *Roper v. Simmons*, 125 S. Ct. 1183, 1195–96 (2005).

PERSPECTIVES



*Illustration, page 167:*

**“I LIKE COURT”**

**ARLENE**

*Age 6*

*2003 Children's Art & Poetry Contest*

# Remarks of Judge Leonard P. Edwards

*at the Presentation of the William H. Rehnquist Award for Judicial Excellence, U.S. Supreme Court, Washington, D.C., November 18, 2004*

On November 18, 2004, Judge Leonard P. Edwards of the Superior Court of Santa Clara County received the William H. Rehnquist Award for Judicial Excellence at a ceremony in the Great Hall of the U.S. Supreme Court in Washington, D.C. The award is presented annually by the National Center for State Courts to a state court judge who exemplifies the highest level of judicial excellence, integrity, fairness, and professional ethics. Judge Edwards is the first juvenile court judge to receive the award.

Through Judge Edwards's efforts, the Santa Clara County juvenile dependency court was designated a national model by the National Council of Juvenile and Family Court Judges. This court is one of the most visited in the country: hundreds of legal professionals travel there to observe and learn the model practices that Judge Edwards has implemented, such as dependency court mediation, family group conferencing, direct calendaring, and court coordination. In 1999, Judge Edwards established one of the country's first dependency drug treatment courts, which has been named a Mentor Court by the National Association of Drug Court Professionals.

Judge Edwards also works closely with the Judicial Council and the Administrative Office of the Courts—he is a past member of the council and currently serves on the Family and Juvenile Law Advisory Committee and on this journal's editorial review board. We are pleased to reprint below Judge Edwards's remarks on receiving the Rehnquist Award.—Ed.

**T**his is a historic occasion for me and for all of my colleagues who sit on the juvenile court bench. It is worthy of comment that someone who every day presides over the cases of children should appear in the Great Hall to receive the nation's most prestigious judicial award. How can it be that someone who has devoted his professional life to the well-being of abused and neglected children, to the correction and rehabilitation of youth, and to the rights of victims of violence emerges from all of the more well known judges in our country? After all, the United States Supreme Court has had very little to say about the work that hundreds of my colleagues around the country and I perform. Since the case of *In re Gault*<sup>1</sup> in 1967, there have been fewer than 10 Supreme Court decisions regarding juvenile delinquency issues. There have

HON. LEONARD P. EDWARDS

*Superior Court of California,  
County of Santa Clara*

**THERE IS NO GREATER JOY  
THAN SEEING A FAMILY  
SUCCESSFULLY REUNITED,  
TO SEE PARENTS TURN  
THEIR LIVES AROUND,  
GAIN SELF-ESTEEM,  
AND PROUDLY WALK  
INTO COURT WITH THE  
CONFIDENCE THAT  
THEY HAVE BECOME  
COMPETENT PARENTS—  
AND TO SEE CHILDREN  
HAPPILY ACCOMPANYING  
THEIR PARENTS.**

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been even fewer decisions regarding the law relating to child abuse and neglect. I cannot ever recall finding references to United States Supreme Court decisions in the legal briefs or arguments presented by attorneys in my court. In a way we juvenile judges have worked in the shadows of the court system.

So it is a unique event that the Supreme Court and the National Center for State Courts are honoring a juvenile court judge. The Rehnquist Award is a clear and powerful statement that a judge working with abused and neglected children and their families is important; that to work with the victims of domestic violence is important; that to convene the community around issues relating to at-risk children and families is important; that to oversee family crises in order to provide good outcomes for children is important. For that is what we in the juvenile court are charged to do. This award will help move the juvenile court out of the shadows of the court system and into the mainstream, where it belongs.

I believe the work of our juvenile and family court judges is critical to the future of our nation. That is a bold claim, but let me explain. Judges in the juvenile court are charged with keeping children safe; restoring families; finding permanency for children; and holding youth, families, and service providers accountable. Every day hundreds of judges make thousands of decisions regarding children in

**I BELIEVE THE WORK OF OUR JUVENILE  
AND FAMILY COURT JUDGES IS CRITICAL  
TO THE FUTURE OF OUR NATION.**

crisis. We decide whether a child should be removed from parental care, whether a child has committed a delinquent act, whether a child should be committed to the state for correction, whether parental rights should be terminated. When parenting fails, when informal community responses are inadequate,

our juvenile and family courts provide the state's official intervention in the most serious cases involving children and families. We are the legal equivalent of an emergency room in the medical profession. We intervene in crises and figure out the best response on a case-by-case, individualized basis. In addition, we have to get off of the bench and work in the community. We have to convene child- and family-serving agencies, schools, and the community around the problems facing our most vulnerable and troubled children. We have to ask these agencies and the community to work together to support our efforts so that the orders we make on the bench can be fulfilled. We have to be the champions of collaboration.

Many of these roles are not traditional for a judge. Yet for juvenile court judges they are essential if the work of the court is to be successful and if court orders will be carried out. The role of the juvenile court judge is unlike any other. In the traditional judicial role, deciding a legal issue may complete the judge's task; however, in deciding the future of a child or family member, the juvenile court judge must, in addition to making a legal decision, be prepared to take on the role of an administrator, a collaborator, a convener, and an advocate.

Perhaps I can give you an idea of these multiple roles in the context of a typical case. When I removed three children from a young drug-abusing mother last month, at the initial hearing I was able to recommend that she receive a substance abuse assessment available in our courthouse and administered by experts from the drug and alcohol service providers in our community. When her attorney nominated her for our dependency drug treatment court, our drug court team, including representatives from a wide range of service providers, accepted her on the condition that she enter a residential drug treatment facility, engage in substance abuse treatment, and participate in counseling. In the months ahead she will receive services from a social worker, a public health nurse, a housing expert, and a mentor from our Mentor Moms program, which assigns graduates from the drug court to counsel current clients; attend a special parenting class that will bring her and her children together with other mothers, their children, and Head Start and Early Start teachers; and receive other services as needed. All of her children will be represented by an experienced attorney. Moreover, one or more of her children will have a trained volunteer, a Court Appointed Special Advocate, assigned to assist them through this difficult time in their lives. All this has become possible because in my role as a juvenile court judge I have been able to reach out to agencies, service providers, and the community with the request that they work with me and the other members of the court system on behalf of children and families who come before the juvenile court. In essence, I asked for help and they responded to my request. I met with leaders of agencies and service providers, and I convened meetings bringing all members of the drug court team together in order to organize the drug court, to provide expert substance abuse assessors available in the courthouse, and to have the substance abuse treatment community work with the court. These are examples of the nontraditional work of the juvenile court judge. These are the kinds of tasks that my colleagues and I undertake every day as juvenile court judges. These tasks also exemplify the complexities that recovery and rehabilitation involve during the family reunification process in juvenile dependency court.

It is very likely that this mother will reunify safely with her children—the majority in our juvenile court do—but even if she does not, the children will have a permanent home. They will likely be adopted by a family member or a foster family, the same family they have been placed in concurrently during the reunification period.

Each day juvenile court judges hear cases, one by one. Although a single case will obviously make an immense difference for a particular family, it may not seem significant to the entire community. Yet these cases in the aggregate will make a great difference to our society. Last year I did some research with the staff at the National Council of Juvenile and Family Court Judges to determine just how many judicial decisions are made on a daily basis in our nation's juvenile courts. We concluded that there are approximately 30,800 hearings held each working day.

That is, at least 30,800 children and their families come before a judicial officer who will decide as to their status. The child may be a baby or a teen. The case may involve abuse or neglect, children in need of supervision, or delinquency. The hearing may be at the beginning, the middle, or the end of the case. Some may be review hearings to determine whether a plan is working out; others may be much more serious—whether a child is to be removed from her parent's home, whether a youth will be committed to the state for correction, whether parental rights will be terminated. This is the law in action: judge after judge trying to determine what intervention is necessary on behalf of a child in crisis.

You all know about problem-solving courts. Every state judiciary has drug courts, and many are developing mental health courts and other types of courts dedicated to solving challenging issues facing our citizens. The juvenile court is the original problem-solving court. The juvenile court was America's first and most significant contribution to world criminology. Originated as a reform, the juvenile court combines social and legal attributes to serve public interests relating to children and families. It was founded in recognition that children are different from adults and that the law should address children's issues from a perspective that acknowledges those differences. The juvenile court was envisioned as the setting where societal intervention on behalf of children would take place if parenting failed to ensure that children were properly raised. The hallmark of the juvenile court is individualized justice. From the beginnings of the juvenile court over 100 years ago, juvenile court judges have worked with social workers, probation officers, and others to devise individual plans for each child who comes before the court.

All 50 states and the District of Columbia have a juvenile court. All state legislatures have recognized the importance of having a legal institution devoted to the well-being of children. I would like to give you an update on the state of juvenile courts today. The juvenile court is one of the unsung success stories in our country. Our juvenile court judges are doing a good job. This may come as a surprise to some of you. After all, some commentators have criticized the juvenile court. Because of the confidentiality that shrouds much of what happens in the juvenile court, many in the public do not know what happens there. Many in this room are working to make the juvenile court process more transparent. Yet as overcrowded as our courtrooms are, as stressful as the work of these courts is, as difficult as the decisions are that judges have to make every day, our juvenile and family courts have never been stronger or more effective than they are today.

Unfortunately, the nation has a distorted picture of what happens in our juvenile courts. We seem to read only about the tragedies, the children who are killed by their parents or who are lost in foster care or who commit terrible crimes. These sensational news accounts are utterly misleading. Yes, tragedies do happen, but the real news, the good news, is that the juvenile court is a strong, vibrant institution.



Perhaps more significantly, our juvenile courts are making improvements to their operations at a pace never before imagined.

**...THE REAL NEWS, THE GOOD NEWS,  
IS THAT THE JUVENILE COURT  
IS A STRONG, VIBRANT INSTITUTION.**

Just as drug courts have demonstrated their effectiveness through research and evaluation, so too have our juvenile courts begun to demonstrate excellent results. Even in those jurisdictions where individual juvenile courts are struggling with a lack of resources, they have started the court improvement process. Court practice has improved in every state, principally because of national court improvement efforts by such organizations as the National Council of Juvenile and Family Court Judges and the National Center for State Courts, and because of the support of the federal government (in particular, the Office of Juvenile Justice and Delinquency Prevention) and charitable foundations such as the David and Lucile Packard Foundation, the Pew Charitable Trusts, the Dave Thomas Foundation for Adoption, and the Robert Wood Johnson Foundation. Working with judges and researchers, these organizations have developed what we refer to as best practices for juvenile courts. Improved technology, technical assistance, and a broad array of training opportunities have resulted in courts' learning quickly about what is happening in other courts. Initiatives such as the federal Court Improvement Program and the Model Courts Project of the National Council of Juvenile and Family Court Judges have given courts the opportunity to learn about best practices that other jurisdictions are using. Judicial leadership has made it possible for these courts to make significant improvements in court operations.

Let me give some examples. Ten years ago the National Council of Juvenile and Family Court Judges published a book called the *Resource Guidelines for Abuse & Neglect Cases*.<sup>2</sup> It carefully outlined the time and judicial resources necessary to operate a successful child protection courtroom. This had never been done before. The *Resource Guidelines* were immediately embraced by the Conference of Chief Justices and the American Bar Association but, more important, became a practice guide for courts across the country. Now, after we have watched court after court aspire to follow the *Resource Guidelines*, we know that best practices result in fewer children coming into foster care and that those who do enter care have fewer placements and reach permanency more quickly.

The better results can be measured. Seven years ago three jurisdictions—New York City, Los Angeles County, and Cook County, Illinois—accounted for approximately 150,000 children in out-of-home care under the supervision of the juvenile court, almost one-third of the national total of children in foster care. All three of these courts are part of the model courts initiative directed by the National Council of Juvenile and Family Court Judges. All three committed to improve practice by reference to the *Resource Guidelines*. All three had strong judicial leadership: Judge Nancy Salyers and Presiding Judge Patricia Martin Bishop in Chicago, Chief Judge Judith

Kaye and Administrative Judge Joseph Lauria in New York City, and Judge Michael Nash in Los Angeles. Today there are fewer than 60,000 children in care in these jurisdictions, a decline of over 60 percent. As a result of the *Resource Guidelines*' best-practices recommendations, fewer children are in out-of-home care and those that do enter care stay there for a shorter period of time.

Another example is Tucson (Pima County), Arizona, also a model court site, under the leadership of Commissioner Stephen Rubin. The National Center for Juvenile Justice recently completed an exhaustive study of juvenile court practice in the Tucson juvenile court after best practices based on the *Resource Guidelines* were implemented. The results were dramatic. Following the guidelines, the Tucson juvenile court reduced the time a child waits for a permanent home, the time a child remains in out-of-home care, and the time it takes to dismiss a child protection case—all by 30 to 60 percent. These results are positive for children, but they also resulted in significant foster-care cost savings to the local, state, and federal governments. The Chief Justice of Arizona and other state leaders were so impressed by the results that they took steps to make every juvenile court in Arizona a model court and to have all of Arizona's juvenile courts implement best practices as described by the *Resource Guidelines*. In Minnesota, under the leadership of Chief Justice Kathleen Blatz, the entire state judiciary has organized a juvenile court project called Through the Eyes of the Child. Chief Justice Blatz has used organizational techniques similar to those of the model courts, has brought together and created teams in each jurisdiction, and set goals for court improvement for each and every county in Minnesota. I have seen the enthusiasm that the Minnesota judges, court administrators, and attorneys have for this project and for their collaboration with children's services administrators and service providers. This is court improvement at its best.

For those of you who have not visited the new Washington, D.C., juvenile court, I urge you to do so. Under the leadership of Chief Judge Rufus King III and Presiding Judge Lee Satterfield, and following the *Resource Guidelines*, our nation's capital (another model court) has adopted best practices that will quickly show positive results for the children who appear in their family court.

At a recent meeting of the model courts here in Washington, D.C., our lead judges and National Council of Juvenile and Family Court Judges staff discussed strategies that would make it possible to expand best practices statewide across the country. We discussed how Arizona, New Jersey, Minnesota, and Georgia are expanding model court practices to the entire state. With our successes over the past few years, we are confident this type of expansion can be accomplished in all states in the next decade. Be prepared for another revolution in juvenile court improvement. Next year the National Council of Juvenile and Family Court Judges will publish resource guidelines for juvenile delinquency cases, addressing best

practices in our nation's juvenile courts. These guidelines should usher in a new national confidence in the juvenile delinquency court and a legislative shift to keep more children in the juvenile court, where they belong, where they will receive individualized justice, where accountability and rehabilitation go hand in hand, and where programs that have been proven successful are utilized by the court and court-serving agencies. The national trend of waiving youth to the criminal court has already started to reverse itself; the delinquency guidelines will accelerate that process. The court improvement efforts that will flow from the guidelines' publication will lead to a fresh look at the juvenile court by judicial leaders, policymakers, and members of the community.

Court improvement successes have led to a new spirit among judges in juvenile and family courts across the nation. More and more judges are choosing the juvenile court as an assignment and as a career. In most court systems the juvenile court is no longer the training ground for other judicial assignments. Many chief justices and presiding judges have taken an interest in the juvenile court and have devoted time and energy to juvenile court improvement. Juvenile and family courts are getting more respect from the judiciary and from the community. We on the juvenile court appreciate this interest and attention because we believe that our work is critical to the well-being of our communities and of our nation. We respectfully ask for more. We ask that juvenile courts be placed in the judicial hierarchy at the highest level of trial court in each of our states. That is what we do in California, where we have one level of trial court, the superior court, and all judicial business including juvenile court matters is conducted at that level. We know that placing the juvenile court on a status equal to that of criminal and civil trial courts has sent a clear message that the judiciary values the work of the juvenile court. Perhaps not surprisingly, more California judges are choosing juvenile court not as a steppingstone to a different assignment but as an important part of their judicial careers. When I first took the juvenile court assignment in 1985, I was the only judge who indicated an interest in remaining there. Now numerous younger colleagues ask me when I am going to retire—they would like my job.

Over the years I've traveled to more than 40 states as a judicial educator. I've seen a new spirit every place I visit. In state after state judicial leaders have shown an increased desire to learn from other states and from organizations with expertise to offer. Judges are asking, How can I do my job better? How can I improve outcomes for the children and families who come before me? This spirit is all it takes to start courts on the path to excellence. A little competitive edge mixed in can accelerate the process. When I tell a court system that the court in a neighboring jurisdiction has made significant improvements in court operations, the quick response is often that "we can do better than they can." For example, when I learned that Administrative Judge Cindy Lederman in Miami, Florida, Sheryl Dicker in New York, and the Zero to Three project in Washington, D.C., had creative

ideas for the care of infants in foster care, I read what they had written, consulted with them, and invited some of them to come to one of our trainings in my home county. My purpose was clear: I wanted to see if they could teach us how to do our jobs better. Based on what we learned, we have made numerous changes in how we deal with infants and their families in our court system.

One message I care deeply about and deliver wherever I go is that children belong in families, preferably their own families, and that congregate care and large detention centers are seldom the best choice for a child. Social science and child development expertise have demonstrated that congregate care is developmentally inappropriate and often harmful to children. This should not be a surprise to anyone who has studied juvenile law because this conclusion reflects the legal principles established in both state and federal law. Over the past 25 years Congress has passed two major pieces of legislation relating to the judicial role in child protection and finding permanent homes for children, the Adoption Assistance

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and Child Welfare Act of 1980<sup>3</sup> and the Adoption and Safe Families Act of 1997.<sup>4</sup> These federal statutes and the state statutes implemented to conform to them govern what we as juvenile court judges do in child abuse and neglect cases. Moreover, it was Congress that passed the Juvenile Justice and Delinquency Prevention Act of 1974,<sup>5</sup> 30 years ago. Acknowledging the harm that can be done to children by older, hardened criminals, this legislation forbade the placement of children in adult jails and prison. Now we realize that even same-age peers can teach one another about crime while in custody. Nevertheless, juvenile courts throughout our country and in many parts of the world continue to place children in institutions— orphanages, group homes, large youth prisons, and other forms of congregate care. My colleagues often respond that they have no choice.

The good news I have to report is that in many cases we do have a choice. Utilizing modern technology we can and do find family members for children. Did you know that most of us in this room have more than 75 living relatives? This statement is based on Kevin Campbell's work at Catholic Community Services of Western Washington. This statement applies to everyone in this room and, more significantly, every child in foster care. Our job as caretakers and overseers is to find that family and let them know that one of their relatives, a child, a member of their family, needs them. We have the technology today to find families, technology that was not available 10 years ago. Web technology and search engines make this possible. This search is worth our effort because we have learned that just because one or both parents are in jail or prison, we should not assume that other family members are either unavailable or unfit. Many of you have seen the movie  *Antwone Fisher* and the remarkable story of a young boy caught in a foster-care system because his father was dead and his mother in prison. What he did not

learn until adulthood was that he had a large and loving extended family that lived very near him while he suffered through a childhood in multiple foster homes. When we in the juvenile court system learn that a child's father has disappeared and his mother is in prison, we must not assume that the child has no relatives or that the relatives are unworthy of consideration. We need to start the search for relatives immediately. I can tell you that Antwone Fisher's story about finding family can be a reality in every community in the country if we start paying more attention to family finding. It is my dream that the expanded use of family finding will literally dry up the foster-care system.

Does family finding work? Will the family respond? In most cases they do. Can families find the solution for the crises facing their children? I believe they can. There is something special about family. I am not a scientist, but child development experts tell me that we have a special relationship with those who carry our DNA. We are more likely to take that extra step and to make sacrifices for the person who is related to us. I have seen the power of family finding both in my own county and in Hawai'i, where they practice Ohana family conferencing. I have been to a family group conference where 25 family members participated, some of whom traveled from other states. They all came for the same reason—the child. They all had something to contribute to the future of that child. They all helped devise a family plan. Large groups of family members ensure good results for a child even when the biological parents are unavailable.

Can we find families? One tactic is to ask about family throughout the entire case. That is what the State of Washington's Legislature mandated two years ago when it passed legislation requiring social workers to ask about extended family at every stage of a child's case. The results have been an almost twofold increase in family placements, from 19 to 37 percent—just from asking. I wouldn't be surprised to see similar legislation introduced in California next year. That is not to say that there are not wonderful foster and adoptive homes for children. It is also not to say that all children must remain with family. But we have been halfhearted in our search for families for children in out-of-home care. We can do much better, and some courts and social service agencies around the country are proving this today. After all, our goal is to find permanent homes for children so we in the public sector can dismiss their cases and let them live normal lives. Family finding, family group conferencing, team decision making, and similar innovations permit us to identify family members, convene them, and permit them to come up with the best plan for each child's future. Then we in the court and social services system can get out of the way. There is nothing more satisfying for a judge than to see a happy ending with a child in a loving home and to dismiss the case. I feel privileged to preside over that type of happy ending almost every day. It is what keeps me coming back to the emotional environment of the juvenile court each morning.

**OF ALL THE WORK I DO, THE  
MOST REWARDING IS THE WORK  
WITH INDIVIDUAL CHILDREN AND  
FAMILIES IN THE COURTROOM.**

Of all the work I do, the most rewarding is the work with individual children and families in the courtroom. When children first come to the attention of the court, they have been beaten, neglected, traumatized, unloved, in need of a stable, loving family. Parents come before the court as drug addicted, victims or perpetrators of violence, with few or no parenting skills, with mental health and maturity challenges, and without support systems. The initial hearings are so sad that people in the room are in tears as they reflect on the tragedy of their lives and the lives of their children. Kleenex boxes line the tables. Juvenile court orders place children in safe, temporary homes, preferably with relatives, and the parents start the difficult

process of reconstructing their lives. They participate in services, many substance-abusing parents (mostly mothers) enter our drug treatment court, some participate in groups focusing on the effects of domestic violence, and many receive mental health services. Most family members participate in substance abuse assessments and treatment plans as well as individual and family counseling. Parenting classes are frequently a part of the plan, including specialized classes, such as Parenting Without Violence. Child advocates will support the child through the process; and an attorney, a guardian ad litem, or both will speak for the child in all court hearings. Specialized services such as wraparound services will enable many children to remain with families rather than go to congregate care.

The court frequently reviews the progress of the parents and children at subsequent hearings, and the structure of our court system ensures that the same judge will preside over all hearings for the same family from beginning to end. Some parents do not participate in services or are unsuccessful in their efforts to safely reunify with their children. These children will usually be adopted by relatives or foster parents. Other families—the majority—will make significant changes in their lives and be reunified with their children.

One reason for the optimism I have about the future of the juvenile court is the development of new services for children and families—services that have demonstrated success and that have resulted in better outcomes for children. When 14-year-old Sally (not her real name) came before me several years ago, she had been abused by her mother, her father was not available, and she was so depressed that she had attempted suicide on several occasions. The social worker recommended that she be placed in a mental hospital. I made that placement believing it was necessary to save her life. A few months later at a review hearing the social worker recommended that Sally be placed with a family member and given wrap-around services. I was shocked. How could this be a safe placement when I had removed Sally from her home only a few months earlier? I was not familiar with wraparound services, but the agency had been using them successfully for over a year. Wraparound services take an ecological approach to the care and safety of

a child. A team of professionals, relatives, and community members work together to create an individualized 24-hour plan of supervision while the child lives with a family in the community.

I returned Sally to the relative and nine months later was able to safely dismiss her case. Since that time, using wraparound services, I have been able to place over a hundred children with their families. It is an example of how the juvenile court can use newly developed, carefully evaluated services to place children safely with families, where before they would be committed to institutions. For me, both professionally and personally, this has been nothing less than a miracle.

There is no greater joy than seeing a family successfully reunited, to see parents turn their lives around, gain self-esteem, and proudly walk into court with the confidence that they have become competent parents—and to see children happily accompanying their parents. I feel privileged to be able to preside over cases that produce such remarkable outcomes for children and families. Even in the cases in which the parents are unsuccessful, juvenile court judges are able to conduct adoption hearings, another joyful occasion where families and the court system celebrate the building of a new family through the adoption process. These are the main reasons I have remained in the juvenile court for most of my judicial career. Without these uplifting moments, the job of a juvenile court judge would be too emotionally draining for me and for most judges.

So when I tell you that in my own court in Santa Clara County we have reduced the number of children in foster care by 40 percent, that we are dramatically reducing the number of children in congregate care by utilizing family finding and wraparound services, that adoptions have increased fourfold, and that trials have been reduced significantly with the use of confidential mediation, that our juvenile dependency drug treatment court has provided a new and effective system of support for substance-abusing mothers, that our juvenile mental health court (the first in the world) has demonstrated to the country that youth with mental illness can be humanely and effectively treated by the juvenile court system, and that with judicial leadership in concert with community commitment a Court Appointed Special Advocate (CASA) program has been created with over 900 volunteers who are advocating on behalf of over a thousand children, you will understand that the good feelings that my colleagues in the juvenile court and I have are based on data and evaluation, not anecdotes.

Much of this work would not be possible were it not for our judicial leaders' support for the work of juvenile and family court judges. When Chief Justice Ronald George and Administrative Director of the Courts William Vickrey make children and families a priority in their administration of the California court system, that means our judges have a better opportunity to operate successful courts. When

the California Judicial Council approved section 24 of the Standards of Judicial Administration over 10 years ago, it gave permission to all of our juvenile court judges to get off the bench and step up their advocacy on behalf of children, knowing that we are supported by our leaders in our efforts to work both in and out of the courtroom to secure better results for children and families. When organizations such as the National Council of Juvenile and Family Court Judges provide technical assistance and guidance to assist us, and when the United States Supreme Court and the National Center for State Courts award the William H. Rehnquist Award for Judicial Excellence to a juvenile court judge, that sends a message across this country that the work of the juvenile court is important and that to serve in the juvenile court is to make a significant contribution to children and families in crisis, to the community, and, ultimately, to the nation.

Mr. Justice Kennedy, thank you for this opportunity to speak to you tonight and for this wonderful award. I accept it personally and on behalf of juvenile court judges in California and across the country. We all are grateful for this recognition.

#### NOTES

1. *In re Gault*, 387 U.S. 1 (1967).
2. NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES (1995).
3. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified in part at 42 U.S.C. §§ 670–679b (Matthew Bender, LEXIS current through P.L. 109-6, approved 3/31/05)).
4. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended at 42 U.S.C. § 1305 (Matthew Bender, LEXIS current through P.L. 109-6, approved 3/31/05)).
5. Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (codified as amended at 42 U.S.C. §§ 5601–5792a (Matthew Bender, LEXIS current through P.L. 109-6, approved 3/31/05)).



# Can You Hear Me?

**W**e are delighted to publish the poems that follow, entries to our first Children's Art and Poetry Contest held in 2003 to

honor the 100th anniversary of California's juvenile court. Open to youth of any age who have had experience with the court system, the contest drew a large response from all over the state.

The poems reproduced here—a sampling of the entries, including a range of ages and subjects—were among those published in a booklet distributed at the Celebrating California's Juvenile Court Centennial Conference in Los Angeles. The poems, as well as the background information accompanying them, have not been edited; they are as they were submitted to us, in the language of those who wrote them.

The contest was funded through volunteer efforts at the Administrative Office of the Courts. We express our deepest appreciation to all the young poets who entered the contest and shared their thoughts and feelings with us. And we are also grateful to the many individuals and court personnel who assisted us in reaching out to young people in the court system and helping them participate in this program.

A COLLECTION OF  
POETRY BY YOUTH  
IN CALIFORNIA'S  
COURT SYSTEM



ESTRELLA

*These Are the Days  
of My Sentence...*

## Court

**JUSHEEM W.**

*Age 16*

*Jusheem is in the  
delinquency system in  
San Mateo County.*

Heart pounding

My legs are weak

I feel like I can't walk

Head Hurts

Feels like somebody is pushing down

on both sides of my head.

Wondering if my family is waiting

Wondering if I will get to go home

Waiting for me to be called in

Waiting to be judged

I will never get to go home

I will never get out of here

Im going to be here forever

## Night Time

Incarcerated by my own thoughts.  
I try to escape this place of hate but can't.  
I feel all hope is lost.  
I'm sending prayers to the one on the cross.  
Can you help me?  
Because I want to do right but at night I turn and toss.  
Trying to sleep off this drunkness of sorrow  
While thinking bout the past  
I'm living in the present trying to plan for tomorrow.  
But as I lay in this silence, only young felons breathing.  
I hear myself inside my heart and mind yelling and screaming.  
I wish I could stay asleep and dreaming.  
But awake to reality.  
My life is a nightmare where I fight for my sanity.  
How long will this go on?  
My hearts been torn.  
Ripped up, stitched up  
Since the day I was born.

DAVID C.

*David is in the  
delinquency system in  
Sacramento County.*

## I Want to Be Adopted

**CHELLA N.**

*Age 13*

*“Chella did not officially enter DCS [Department of Children’s Services] until the age of 5 even though reports had been made earlier on the family. From that time until age 12, she lived a few months with a relative, a group home, and 2 foster homes. About the time she was 10 an adopted home was sought. Chella went to one adoption fair and inquiries were made but, none that Marin County workers felt were right. I became aware of Chella in the fall of 2001. After 2 visits to California and a Christmas visit from Chella, we both knew that we were meant to be a family. I brought Chella home to Tennessee on March 11, 2002. Our adoption was finalized March 11, 2003. Today Chella is a wonderful part of our family. She has many friends, makes honor roll in school, and is active in band and in church. Chella is my precious gift from God.”*

—Chella’s Mom

I want to be adopted  
 Because I wanted a mom  
 I went to Adoption Fairs  
 But I didn’t meet anybody  
 That I would want to live with  
 For the rest of my life  
 I thought about  
 How much I would miss my family  
 I used to think that I would get  
 To live with my mom again  
 But I never got to  
 My sister is already adopted  
 And she likes it just fine  
 Now I just don’t know  
 What I should do

## Not Another Day

My life to this day,  
has been wasted away.  
A life that no one should have to live,  
not even for one day.  
I've listened to you  
now hear what I say  
I will not live that life  
not even for another day  
starting today I am a changed man  
I am gonna live a productive life  
the best that I can  
I'll never come to this place again  
because I'm sick of livin a life of sin.  
My life will never again waste away  
not for a month, a week, not even another day.

**CHRIS W.**

*Age 16*

## Innocent Child

CHANDRA P.

*Age 16*

I was just an innocent child lying in my bed  
Not knowing you were lurking and danger was ahead.  
I can feel your presence, you're right in my room,  
All I can hope and wish for is that mommy wakes up soon.  
You touch me all over my body, my feet, my legs,  
and my thighs. You tell me you'll buy me what ever I want  
But I know there bold face lies  
You touch me all over, caress my body and  
grab a hold of my face,  
You do this without a trace, without a trace of guilt  
for what you're doing to me  
Taking my innocence and my virginity  
You know what you've done to me is not fair,  
As you leave my room I feel naked and bare,  
I wait in my room so frigid and scared, and feeling like a fool.  
When morning comes I run to my school.  
I tell my teacher all about you.  
She calls up a number I hope its not you,  
I'm scared, really scared I don't know what to do.

The police come and they take me away, they say in a group  
home is where I must stay.

They take me to court to place you in jail,

They say people like you belong in hell. I see you looking at  
me as I testify,

I stutter as I talk, I think I'm gonna cry. I look at my mother  
who also looks scared,

I can't handle this place, I can no longer bare.

And when I am done they say that its all over,

My mother hugs me softly as she cries on my shoulder

For she knows that I am not coming home

And I realized that's when I started my journey alone.

Eleven years in the system with a sick pathetic dad,

I miss the home that I once had.

But I know it was for the best, I'm doing well in school not  
really good in math.

I know great things are out there,

I must continue the path.

## A Home

ANDY W.

Age 13

*“This poem has changed my outlook on where I’ve lived in the last few months. I learned from my experiences in writing this poem that if you are happy where you live than that is your home. For a clearer example, in my court experiences I have had 3 homes the foster home I lived in, Yellow Brick Homes in Santa Rosa, and Full Circle in Bolinas. I know these will always be a place of my spirit body and mind.”*

A Home is not a window

A tile nor a wall

A Home is not a dorm

With rooms down a hall

A Home is what we make it

From the inside out

A Home is where we stand

Where we live, make things work out.



## Needles

the sounds ♦ the rush ♦ the pain ♦ the thrill ♦ the high ♦  
nauseatingly wonderful ♦ waking up without even being asleep ♦  
with bruises, dark, painful, and purple, Running down my arm ♦ not  
knowing where the time went ♦ Still not knowing what I did to pass  
the time ♦ It suffocates me ♦ An issue... ♦ It was sweet relief from  
all my nightmares ♦ Yet it all felt like a hazy dream ♦ Seeing things  
through cloudy eyes ♦ Made it impossible to feel the pain on the  
inside ♦ Impossible to see clearly, the girl I was becoming on the  
inside ♦ So dingy ♦ So dirty ♦ So skinny ♦ So...nauseating

**KASEY C.**

*Kasey is in the  
delinquency system in  
Fresno County.*

## Visiting

### AMBER

Age 15

*“My name is Amber and I have been here at Juvenile Hall San Bernardino for almost three weeks now. So far I am doing very well. I have been rehabilitated from my drug addiction, and I have taken the Lord as my savior. I am not yet finished with court and I am really scared. I am here for a crime I did not commit; the sentence for that crime is life. My whole family is behind me 100%, but they are all scared for me also. I am grateful for my time here to give me a full recovery but I hope the truth is found soon so I may go home. My poem relates to my current visiting experiences with my parents. It is always hard for us knowing I may never see home again, but we pray every night and have faith that it will all go well. Until I return home, I will continue to do my best and have these visits every Wednesday evening.”*

When ever I look into their eyes  
I can't seem to stop the loving stare  
I can't bring myself to say the words  
To say how much I really care  
I put my hands over my face  
I always hold my feelings in  
I don't know what I will say when I see them again  
Or when I can say those words again  
To tell them all my love for them  
The last time I even told them  
What they mean to me  
They put their hands over mine  
And told me they stand by my side

I am afraid to speak those words again  
For fear they'll lose their delight  
Today may even be the last time  
I may get to see their faces shine  
Their happy faces bring me delight  
I finally think that I am prepared  
To say the words I want to say  
I just hope the words don't slip away  
I know my mom will probably cry  
My dad and I will both ask why  
My mom will only simply sigh  
It seems we've just begun our "Hi's"  
I see it's time for our good-bye's

## Behind Walls

**RUBEN V.**

*Ruben is in placement  
at a drug and alcohol  
rehabilitation facility in  
San Joaquin County.*

Endless days that count the years,  
No longer can I hold back my tears.  
Serving time behind a wall  
With no one to visit, no one to call.

Like a wild animal locked inside a gate  
Waiting patiently for my parole date.  
No reason to feel any sorrow.  
All I do is pray for tomorrow.

Then one day the gates will open wide,  
That boy that's now a man steps outside.  
As he leaves he looks behind,  
Seeing the same wall holding his own kind.

The broken promises, the empty dreams,  
The sorrow is stitched between the seams.

## Wonder As I Wander

I wonder as i wander out under the sky why do people i care about  
always have to die. Are happy where you are wherever that may be.  
I wonder as I wander do you still think of me.

Is it nice up there in heaven for i know you made it there. Are the  
clouds made out of marshmallows do you know that I still care.

I wonder as I wander out under the sky why do people I care about  
always have to die.

**KRISTIN L.**

*Age 15*

*“The piece that I have written is dedicated to two very beautiful people who have passed on and are no longer hurting. My grandfather whom I was living with when I had nowhere else in the world to go. He had lung cancer from smoking and died in my grandmother’s arms. We no longer have the best relationship and I don’t live with her anymore. I moved around to 36 out of home placements and met a wonderful lady (Mary Taylor) who works at Edmund D. Edelman Children’s Court. Well, her husband died and she’s not able to see me as much anymore but I want her to know she’s took all the bitterness out of me and has me looking to the lord all the time.”*

## To Mom

**CARRIE M.**

*Age 11*

*“Carrie and her brother were wards of the court several years ago due to alcoholism and domestic violence in the home. They were only in foster care for a short time and were returned to the home as the father was in jail and later went to a 90 day rehabilitation program. I cooperated with all the requests of the court and full custody of the children was returned.”*

*—Carrie’s Mom*

Love is patient

Love is kind

Love is something

Some people don’t find

Love will be with you

Everywhere you go

Love is something

Some people don’t know

Love is something

That will stay with you

Love is something

Some people can’t get to

Love is something

That is true

Love is something

For me and you

## This Little Girl

She needs your hand  
She is so confused  
She doesn't know  
Where she is or where she is going  
She doesn't know if this is all just a dream  
She needs your hand she needs it so  
She needs your hand to grasp and lead her  
You can't begin to understand  
What this little girl is going through  
She needs your help to know what love is  
She was told that she didn't love herself  
She is lost in this heart  
This heart that is broken  
She can't see what is going on  
With these feelings inside  
She needs your hand to grasp  
To tell her everything will be all right

KASSIE O.

*Age 16*