

CHAPTER
JUVENILE JUSTICE

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PART I: THE DELINQUENT TODDLER¹

I. INTRODUCTION

In Bremerton, Washington, a nine year old boy brings a gun to school, in his backpack. As he drops it on the ground, the gun discharges, hitting an eight year old classmate in the abdomen. He is booked into the juvenile detention center.²

In Florence, South Carolina, a nine year old girl is accused of stabbing her grandmother in the back over an argument about watching television at 2:00 a.m. The child is placed with relatives, and the case referred to the family court.³

In a suburb of San Francisco, a six year old boy is accused of sexual assault during a game of tag at his elementary school. He confessed to the crime in the principal's office. The charges were ultimately dismissed, after authorities concluded that a six year old was incapable of committing such an offense under California law.⁴

While much has been written in recent years about the culpability of adolescents charged with crimes, and the rediscovery by the American justice system that adolescent offenders are not adults, cases of children like these have received little attention by comparison, except in the press.

Thirty-five states in the U.S. have no minimum age for the prosecution of a child accused of a crime.⁵ In contrast, several states, including Connecticut, Illinois and Mississippi have raised the age of criminal responsibility from 16 or 17 to age 18, concomitantly expanding the jurisdiction of the juvenile court.⁶

Fifteen states have a statutory framework allowing children ranging from age six to 10 to be tried for criminal offenses in the juvenile court.⁷ Hence, the vast majority of American children may be charged with crimes, and therefore subject to detention, confinement and the collateral consequences of a juvenile delinquency offense.

In 2008, the most recent year for available data, 40,748 children under the age of 12 were referred to the nation's juvenile courts for prosecution.⁸ Of those, 7,752 were found delinquent. Local court statistics confirm the national pattern. In 2010, 100 children age eight or nine years old were referred to the Maricopa County juvenile court in Phoenix, Arizona.⁹ In Memphis, Tennessee, 113 children age ten and younger, including eight children five and six years old, were referred to its juvenile court in 2009.¹⁰ A one day census count in 2010 reveals that 693 children age 12 and under were in a residential placement for juvenile offenders.¹¹

While it is not surprising that the majority of these cases are diverted from the formal juvenile court, as the OJJDP data indicate, these youngsters nonetheless are subjected to formal arrest, interrogation, detention and pre-trial processing. Moreover, for those children who do face trial, whether in the juvenile court or potentially, a criminal court, the implications for the

nation's justice system are daunting. This is especially so for lawyers representing these children.

II. WAIVER OF RIGHTS AT THE STATIONHOUSE

In his groundbreaking work, *Juveniles Waiver of Rights: Legal and Psychological Competence*, Thomas Grisso conducted a study of stationhouse interrogations of youth arrested in St. Louis County, Missouri.¹² He found that younger children (age 13 and younger) were somewhat more likely to be interrogated by police than older youths.¹³ Not surprisingly, age and intelligence were closely related to comprehension of police warnings under *Miranda*.¹⁴

He also found that the understanding of *Miranda* warnings was significantly poorer among youth who were 14 years of age or younger, than among 15-16 year olds and adults; as a class, children age 14 and younger demonstrated incompetence to waive their rights to silence and legal counsel.¹⁵

The problem of false confessions in the justice system has also become a focal point for critical analysis, and nowhere is this more implicated than in confessions by children. In their study of false confessions, *The Problem of False Confessions in the Post- DNA World*, Drizin and Leo found that youths age 15 and younger accounted for nearly 20% of all false confessions in the study.¹⁶

A notorious example of this is the apprehension of two boys, seven and eight years old, for the murder of Ryan Harris, in Chicago in 1997. The two boys ultimately confessed to the girl's murder after several hours of police questioning, only to have the charges dismissed when the authorities discovered semen on her underwear, and, with the advice of medical experts, concluded that the boys were incapable of producing it at that age.¹⁷

In his 1981 work, Thomas Grisso concluded:

As a group, juveniles who were 14 years of age and younger consistently fell short of the research definitions of the legal standards for competence to waive rights...[in contrast to a rebuttable presumption of competence at age 14] our results indicate that with regard to competence to waive *Miranda* rights, age 14 should stand as the age below which incompetence should be presumed.¹⁸

His work also recommends that, at a minimum, the IJA/ABA juvenile justice standards recommendation that the right to counsel not be waived by a youth should at least apply to children age 14 and younger at the stationhouse.¹⁹

III. COMPETENCE TO STAND TRIAL

Grisso's work also extends to the ability of youngsters to participate with their counsel in making decisions about criminal or juvenile proceedings involving them, otherwise known as competence to stand trial. His findings in this area are no less instructive.

In *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, Grisso's research concluded that 30% of children ages 11 through 13 were significantly impaired in their ability to understand and reason in proceedings in which they were accused of crimes.²⁰

Even more stark are the findings of a clinics professor and psychologist conducting a study of youths' competency to stand trial in a juvenile court. Cowden and McKee, in *Competency to Stand Trial in Juvenile Delinquency Proceedings – Cognitive Maturity and the Attorney-Client Relationship*, determined that age was correlated significantly with competence to stand trial.²¹ The researchers found that only 18.2% of 11 year olds, and 27.3% of 12 year olds, were considered competent under the conditions of their study. As to the nine and ten year old children facing trial in the juvenile court, 0.00% - none – were considered competent.²²

An additional problem posed by younger children for counsel is the difficulty of communicating with them about legal procedure and legal consequence. Understanding concepts of criminal intent, incarceration and collateral consequence are difficult enough even for adult defendants. Moreover, language deficits compound this problem, especially between learned counsel and very young children. A recent analysis of this problem is found in *Breakdown in the Language Zone: the Prevalence of Language Impairments Among Juvenile and Adult Offenders and Why it Matters*, by Michele LaVigne and Gregory J. VanRybroek.²³ The authors provide a thorough discussion of language impairment and its influence on offenders, especially juvenile offenders.

The MacArthur Foundation has devoted a great deal of attention to the problems of competency and comprehension of youth facing trial in the justice system, in the juvenile and criminal courts. Through its *Models for Change* initiative to reform juvenile justice in the U.S. the Foundation has developed a training curriculum for juvenile justice practitioners to acquaint them with the latest research on adolescent development and its application to juvenile court practice. The series, *Toward Developmentally Appropriate Practice: A Juvenile Court Training Curriculum*, was produced in concert with the National Juvenile Defender Center and its five module training guide can be obtained through the Center.²⁴

Nonetheless, the vast majority of research and analysis in this field is directed at the obstacles encountered by adolescents older than 12 in the nation's courts. More – much more – attention needs to be focused on the problems facing younger children and the lawyers representing them.

IV. CAPACITY TO COMMIT A CRIME

Students of law are familiar with the common law defense of *infancy*, that is a child below the age of seven was irrebuttably presumed to be incapable of a crime, and could not be prosecuted. A child between the ages of seven and under 14 was presumed to lack the capacity for criminal intent, and could not be prosecuted unless the presumption was rebutted. Sir William Blackstone commented that the presumption could be rebutted only by evidence proving that the child possessed the requisite capacity “beyond all doubt and contradiction,” a high bar indeed.²⁵

The advent of the juvenile court in the twentieth century altered the concept of capacity to commit a criminal offense considerably. Because the juvenile court was a therapeutic court, designed not to punish but to intervene, ostensibly with help for a delinquent child, the common law presumption was essentially abolished and the requirement of *scienter* relaxed for young offenders.

Appellate decisions over the years have almost uniformly rejected the assertion of an infancy defense – that a child lacked the requisite *mens rea* to commit the crime charged in the juvenile court.

...Most of the decisions rest on the premise that the rehabilitative ideal and *parens patriae* doctrine upon which the juvenile court was founded are based, first and foremost, on the notion that the child is being helped, not punished.²⁶

That view has largely persisted.²⁷ In recent decades, however, a handful of state courts have resurrected the defense. The California Supreme Court, for example, has held that its delinquency code “should apply only to those who are over 14 and may be presumed to understand the wrongfulness of their acts and to those under the age of 14 who clearly appreciate the wrongfulness of their conduct.”²⁸ In most states, however, every child is subject to prosecution, regardless of age.

Given the political policies of punishment and retribution which have infected the juvenile and criminal justice systems in the recent past, some observers have called for resurrection of the defense of infancy. As one author has argued:

Despite the recent shift back in the juvenile law toward process, punishment and accountability, legislatures and courts have been slow to recognize that the infancy defense is essential in justifying juvenile justice jurisdiction over accused offenders. Without resort to the infancy defense, a juvenile proceeding may produce the unacceptable result of subjecting a child who has not been found to know the wrongfulness of his act to a system which is largely criminal in nature.²⁹

Another has formulated a model statute which, among other things, would prohibit children younger than seven from being charged with any crime in a court, and would create a rebuttable presumption that any child between the ages of seven to 11 lacks the capacity for *mens rea*.³⁰

The IJA/ABA Juvenile Justice Standards address the concept of *mens rea* specifically, in the standards devoted to Juvenile Delinquency and Sanctions. The standards make clear that the lack of *mens rea* is a defense to any offense charged:

Standard 3.1. *Mens rea* – lack of *mens rea* an affirmative defense.

Where an applicable criminal statute or ordinance does not require proof of some culpable mental state, it should be an affirmative defense to delinquency liability that the juvenile:

- A. Was neither negligent nor reckless with respect to any material element of an offense penalizing the unintended consequence of risk-taking conduct; or
- B. Acted without knowledge or intention with respect to any material element of and offense penalizing conduct or the circumstances or consequences of such conduct.

The commentary to the standards on sanctions points out that the standards rely heavily on the Model Penal Code, to avoid the imposition of juvenile delinquency liability without a showing of fault.

The standards would also create a “reasonable juvenile” measurement of conduct to be applied to juvenile criminal behavior:

Standard 3.2: Mens res – reasonableness defense.

Where an applicable criminal statute or ordinance penalizes risk creating conduct, it should be a defense to juvenile delinquency liability that the juvenile's conduct conformed to the standard of care that a reasonable person of the juvenile's age, maturity and mental capacity would observe in the juvenile's situation.

As the commentary to the standard explains, the effect of this standard is to allow an adjudication of delinquency based on the ordinary standard of care required by the offense charged, "... unless the juvenile introduces some evidence that his or her conduct was reasonable when judged against the conduct of a reasonable person of the juvenile's age, maturity and mental capacity."³¹

While the standards likewise abolish the defense of infancy, they do allow for a defense of age or capacity to commit an offense. Importantly, the standards are coupled with another important reform – the establishment of a minimum age for prosecution in a juvenile court.

V. THE NEED FOR A MINIMUM AGE

The IJA/ABA standards recommend a minimum age of ten at the time the offense is committed for prosecution in the juvenile court.³²

Such an age is the upper limit for those 15 states which have adopted a minimum age, with statutes ranging from as young as age six. Nine states have adopted the age of ten, which is the age in Great Britain and Switzerland. The United Nations Convention on the Rights of the Child (famously not ratified by the United States) requires that all member states enact a minimum age, without specifying one. Norway and Finland have set the minimum age for prosecution of a criminal offense at 15, and 14 is not uncommon, as in Germany, Italy and Russia.

Homicides committed by young children – in any country – present a difficult problem for a justice system attempting to reconcile the act of murder committed by a young child.³³ It is noteworthy that the IJA/ABA standards would prohibit transfer of any child younger than 15 to a criminal court for prosecution, including homicide.³⁴

Notwithstanding those hard cases, the need for a minimum age for prosecution is acute among the 35 states which lack one, and the consensus of ten as a minimum age, embodied by the ABA standards and expressed in the statutes of nine states, would be a significant reform.

VI. AGE REMAINS IMPORTANT IN THE SUPREME COURT

Last term, the U.S. Supreme Court decided the case of *J.D.B. v. North Carolina*,³⁵ ruling that a youngster's age is an important consideration in determining whether a child was "in custody" for purposes of a police interrogation.

J.D.B. was a 13 year old special education student, who was also the suspect in a series of burglaries in his neighborhood. A police investigator came to his school to question him. He was led to a room from his class, the door closed, and he was asked questions by the investigator, surrounded by a school resource officer, and assistant principal, and an intern.

He was not given warnings under Miranda, though he was told he did not have to talk. He was assured he was free to leave. He initially denied knowing anything about the crimes, but

after the principal encouraged him to “do the right thing,” he confessed. He was allowed to go home from school, where the investigator later went to meet with him. The boy turned over some of the stolen goods.

He was charged in the juvenile court, where he pled guilty.³⁶ On appeal, the North Carolina Supreme Court concluded that boy was not in custody, and declined to “extend the test for custody to include consideration of ...age.”³⁷

Writing for five of the justices, Justice Sotomayor reversed the decision of the North Carolina court, after reviewing the high court’s jurisprudence regarding custodial interrogation of the young:

It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same Circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child’s age properly informs the Miranda custody analysis.³⁸

Four justices dissented from her commonsense view. Writing for the dissent, Justice Alito argued, in essence, that requiring a youth’s age to be taken into account in police questioning introduced a variable in an otherwise objective analysis of “custody” which police could not easily apply.³⁹

Invoking the notion of common sense in her opinion several times, however, Justice Sotomayor, a former prosecutor, had this to say:

...officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child’s age. They simply need the common sense to know that a 7-year old is not a 13-year old and neither is an adult.⁴⁰

The decision in *North Carolina v. J.D.B.* was a narrow one; it merely held that age was a consideration in determining whether a child in J.D.B.’s setting was effectively in custody, and hence, to be provided warnings under Miranda before being questioned. Because the lower courts in North Carolina had not made such a determination, the decision remanded the matter for determination by the North Carolina courts.

Camreta v. Green,⁴¹ presented the question of whether the removal of a nine year old from her classroom for an interview in a child protective service investigation was a “seizure,” within the meaning of the Fourth Amendment, requiring a warrant. Intriguing – and important – as the question was, the court decided on procedural grounds that the case was not ripe for review.⁴² Nevertheless, the question remains – does a nine year old child, who may be a victim of a crime, have a right to be free of an intrusive interview, however beneficent its purpose.

Age takes center stage again this term, when the court will address the issue of whether imposing a sentence of life without parole upon children as young as age 14 who have committed homicides.

In some ways, the question and its answer would be a logical extension of *Roper v. Simmons*,⁴³ which abolished imposition the death penalty for children under the age of 18 who committed homicide, and *Graham v. Florida*,⁴⁴ which abolished the imposition of life without parole on youth younger than 18 who committed serious crimes short of murder.

It has been said that “death is different,” however, and even though the phrase invoked in discussions of death penalty litigation, the court may have great difficulty deciding whether a homicide committed by a youngster, even at 14, is that different. Originally, the focus of the petitions for certiorari and their briefs was on the age and immaturity of 14-year olds and younger children; lawyers for the petitioners, led by Bryan A. Stevenson of the Equal Justice Center, had gone to great lengths to limit the question to “young teens” and “young adolescents.” That focus as much begs questions of immaturity, reduced culpability and capacity for rehabilitation as it does culpability and retribution for a homicide.

On March 20th, however, at oral argument, Mr. Stevenson argued in favor of the abolition of such sentences for all youth under the age of 18. The reaction of the justices to that suggests the court will not adopt such a sweeping approach. The number of children 14 and younger serving such sentences is a mere 79, in comparison to the roughly 2,300 offenders who were between age 15 and 18 at the time the homicide was committed. Moreover, as many as 39 states provide for such sentences, as Justice Scalia pointed out, arguing that the national consensus militates against a suggestion that such sentences are “cruel or unusual.”

It is clear from the arguments that the court’s center will struggle with the question. In response to the Arkansas state’s attorney advancing the notion such a sentence “...reinforces the sanctity of human life,” Justice Ginsberg questioned the wisdom of “making a 14 year old throwaway person” a symbol of such sanctity.

The court may not create a bright line with a precise age, below which a state may not impose such a sentence, if the exchanges between the justices and counsel are any indication. Instead, the court may render a decision requiring judges and juries to take into account the age and maturity of a youngster accused of murder at trial and sentencing.

A key justice in the decision will be Justice Kennedy, whose reasoning – and vote – were pivotal in *Roper* and *Graham*.⁴⁵ The American Bar Association has filed an amicus brief, co-authored by Criminal Justice Section juvenile justice committee co-chair, Lawrence A. Wojcik.

In its trio of decisions starting with *Roper*, then *Graham*, and now *J.D.B.*, the Supreme Court has done much to reverse the trend towards a more punitive era in the juvenile justice system, which after all was established in the early 20th Century on the premise that children are different from adults. It will be interesting to see whether the court advances the premise one more time.

VII. FEDERAL JUVENILE JUSTICE LEGISLATION

Austerity measures for discretionary federal spending have affected appropriations for spending on juvenile justice programs at least as much as for any other area. In the past decade, appropriations for juvenile justice have been slashed dramatically.

The venerable Juvenile Justice and Delinquency Prevention Act, originally passed in 1974 to reduce the nation’s reliance on jails and institutions to incarcerate youth, saw a 55% reduction in formula grants to states, from \$88.8 million in 2002, to \$62.3 million in 2011. The act, which has achieved its goals with steady success, will reduce formula grants to states to a total of \$40 million for 2012.⁴⁶

The more recently enacted Juvenile Accountability Block Grants to states, which funds 10 program areas aimed mostly at improving the capacity of the formal juvenile justice system, has seen an 88% reduction in funds since the original appropriations of nearly \$250 million. For 2012, the act will be funded to the tune of \$30 million.

Congress has appropriated funds for mentoring program through the U.S. Department of Education and the Department of Health and Human Services. That initiative has fared well by comparison, and will receive \$78 million for 2012.⁴⁷

The National Criminal Justice Commission Act, which would create the first comprehensive review of the nation's justice system in 40 years, was reintroduced by its sponsor, Sen. Jim Webb (D – Va.) in February, 2011. The bill, S. 306, remains stalled in the Senate.

VIII. ABA ACTIVITIES

The ABA Criminal Justice Section juvenile justice task force has completed its work to develop standards for the relationship between the juvenile court and other institutions, particularly child welfare, education and mental health agencies. Its report and recommendations will be forwarded to the Criminal Justice Section council for approval. Any proposed standards must be adopted by the ABA House of Delegates.

The juvenile justice committee also has as one of its priorities an emphasis on the 20 volume series on juvenile justice standards already assembled and approved by the ABA. Those standards contain recommendations for improvement of the juvenile justice system stem to stern, from police handling of youth to adjudication to disposition. The standards and their commentary, originally published in 1980, are available at the ABA Criminal Justice Section website.

The juvenile justice committee has completed its state by state assessment of the collateral consequences of juvenile court adjudications. The results may be found at an easily accessible website, www.beforeyouplea.com.

IX. CONCLUSION

Troublesome as the difficulties are for adolescents in the justice system, those difficulties are compounded for younger children in trouble with the law and subjected to arrest, prosecution and punishment. The ABA has led the way in this field, with its recommended reforms for the justice system reflected in the IJA/ABA Juvenile Justice Standards. With the recognition that children must be treated differently from adults in the justice system now firmly established, it is high time attention shift to the problems of very young children facing coercive intervention by the state.

PART II: WHO'S THE ADULT IN THIS SITUATION? MAKING THE CASE FOR DEVELOPMENTAL COMPETENCE

I. INTRODUCTION

In June 2011, *J.D.B. v. North Carolina* held that by virtue of their age and development, children and youth perceive police custody differently, and as a consequence, police must consider the age of a suspect in deciding whether and when to *Mirandize*. Justice Sotomayor began the decision for the majority by noting that,

A child's age is far 'more than a chronological fact.' It is a fact that 'generates common-sense conclusions about behavior and perception.' Such conclusions

apply broadly to children as a class. And they are self-evident to anyone who was a child once himself including any police officer or judge. [citations omitted]

In *dicta*, Justice Sotomayor appeared to express some impatience with the failure of police to consider age. Writing for the Court, she admonished:

[O]fficers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age. They simply need the common sense to know that a 7 year old is not a 13 year old and neither is an adult.⁴⁸

Why does the U.S. Supreme Court need to state this and so forcefully in 2011—more than one hundred years after the creation of the first juvenile court? Nearly 40 years since enactment and repeated re-authorization of the Juvenile Justice and Delinquency Prevention Act,⁴⁹ which regulates the treatment of juveniles by police and incarceration facilities? And less than 8 years after the recent flurry of U.S. Supreme Court cases invoking the unique characteristics of adolescence as reason to prohibit states from executing juveniles⁵⁰ or sentencing them to life without parole⁵¹ for crimes they committed as juveniles?

Why are key stakeholders in the juvenile justice system so intent on using adult approaches with youth, in spite of the mountains of evidence suggesting that such practices are harmful and counterproductive? Why do so many juvenile justice system stakeholders persist in attributing intent to adolescent behaviors? Where are the structural disincentives for stakeholders' "adultified" responses?

II. NEITHER FISH NOR FOWL: THE ISSUES RAISED BY TEENS

E.Z. Friedenberg, who published the first psychology textbook on the subject of adolescence in 1959, noted that "Adolescent personality evokes in adults conflict, anxiety, and intense hostility."⁵² To be sure, youths' behavior can provoke this response. As Dr. Grisso and Robert Schwartz noted in the context of police/youth interactions, "Juvenile developmental characteristics such as impulsivity, self centeredness, and resistance to authority increase the chances that police-juvenile encounters will involve conflict, disrespect, and confrontational behavior."⁵³ Of course such behaviors also appear in interactions with parents, teachers, administrators, neighbors, storekeepers, and peers.

And while the term adolescence is relatively new, dating back only to 1905 when it was first coined,⁵⁴ the exasperation teen conduct provokes is not a 20th century phenomenon. For instance, 3,000 years ago Socrates allegedly told Plato:

The children now love luxury; they have bad manners, contempt for authority; they allow disrespect for elders and love chatter in place of exercise. Children now are tyrants, not the servants of their households. They no longer rise when elders enter the room. They contradict their parents, chatter before company, gobble up dainties at the table, cross their legs, and tyrannize their teachers.⁵⁵

And Shakespeare expressed the “ancientry’s” chagrin in *A Winter’s Tale*, in a speech that summarized all the ills associated with adolescence—insolence, disrespect, teen pregnancy, youth violence—and a modest proposal for their soporific elimination in one charming sentence:

I would there were no age between sixteen and three-and-twenty, or that youth would sleep out the rest; for there is nothing in the between but getting wenches with child wronging the ancientry, stealing, fighting!⁵⁶

Of course, it took Mark Twain to address the matter plainly:

When a child turns 12, he should be kept in a barrel and fed through the bung hole, until he reaches 16...at which time you plug the bung hole.⁵⁷

There is overwhelming scientific evidence⁵⁸ explaining why the “ancientry” is inclined to want to withhold the keys for these “machines built to test limits.”⁵⁹ It is now well and repeatedly established that youth perceive the world differently than adults⁶⁰ and use a different part of the brain to process what they perceive.⁶¹ Teens process information using the amygdala, the part of the brain that is central to emotions and impulses and that acts like an accelerator pedal,⁶² fueling intense and impulsive responses.

Teen brains make more use of the amygdala than their frontal lobe, which isn’t finished growing until age 25.⁶³ The frontal lobe acts as the brain’s braking mechanism, helping youth sequence actions, anticipate consequences, and self-regulate.⁶⁴ And if that’s not enough, during this phase there’s neural pruning of the brain cells youth have not used⁶⁵ (this may explain why parents must repeat things 87 times before being heard) and the development of connections between brain lobes⁶⁶ (which may explain why youth have intermittent developmental leaps and insights one minute and commit acts of boundary testing and risk taking the next).

Unfortunately, the solid evidence that this behavior is temporary and transitive and results from enormous structural changes occurring in the brain, seems unable to compete with enduring beliefs about the value of punishing youth through arrest, confinement, and stigmatization. Until these culturally ingrained imperatives diminish their influence, what’s a thoughtful youth advocate to do?

III. POLICY & PRACTICE

There is growing awareness that application of adult criminal justice system approaches to youth is antithetical to positive outcomes, a tremendous scourge on entire populations of youth, and in some instances can be fairly characterized as barbaric. Structural incentives should reward developmentally appropriate approaches and equip stakeholders with the necessary training to use these approaches, but they often don’t.

Stakeholders should not be allowed, much less provided incentives, to succumb to the notion that teens are short adults, whose “youthful indiscretions” necessarily portend a lifetime of similar behavior, justifying withdrawal of a second chance and the removal of any benefit of the doubt.

Perhaps the first step towards achieving change is obtaining the various system stakeholders’ support for and training in *developmental competence*. To their credit, key stakeholder groups including juvenile defenders, judges, and district attorneys have issued

national statements or standards requiring their members' practices to be informed by neuroscientific discoveries regarding the workings of the teen brain. Each of these stakeholder institutions has standards which recognize the difference between adults and youth. But few stakeholders have systematically ensured that training and application of this information is cogently implemented.

Police Policy & Training

As gatekeepers of the juvenile justice system, national police standards promote recognition that arrest should be a last resort, but little in the way of training for practices informed by adolescent development and psychology. Without this change in mind set and tactics, the approaches police academies teach recruits to use with youth *do not differ* from those they would use with adults; they are simply downsized for younger clients with a reminder to recruits that different laws apply.

The Juvenile Enforcement and Custody Policy and Concepts and Issues Paper⁶⁷ of the International Association of Chiefs of Police (IACP) recommends that training for “the use of alternative enforcement strategies should be defined more clearly through agency training” but offers no more recommendations for officer training for policing youth.

The IACP reported in its 2011 Juvenile Justice Training Needs Assessment, that over half of the “agencies represented had a decrease in, or abolishment of, training budgets in the last five years.” The report also noted that most states “do not mandate juvenile justice training after basic academy level training.” The IACP is in the process of addressing this gap and is presently working with the MacArthur Foundation to create an academy curriculum that incorporates youth development.⁶⁸

In a nationwide study of police academy curriculum on the subject of juvenile justice, *Strategies for Youth* found that on average, police recruits spend 3 to 4 hours on juvenile justice issues in the academy. (Forthcoming, 2012)

Academy training is limited to juvenile law; only two or three states focus on child and adolescent development and the issues regarding cognition, competence, and *mens rea* they raise. States like California, for example, allocate 3 hours for juvenile justice and do not provide training for best practices for use with children and adolescents, much less those experiencing mental health issues or trauma.

The Commission for Accreditation of Law Enforcement Agencies (CALEA), similarly recommends specialized treatment of youth in Standard 44, Juvenile Operations.⁶⁹ In Standard 33.6, supporting the broad category of Specialized In-Service Training, CALEA recommends that “supervision and management of specialized functions includes responsibility for ensuring persons assigned to the function receive adequate training and support services.”

Prosecutors' Policy & Training

Prosecutors' standards are equally mindful of the need for awareness of juvenile development for both the selection of prosecutors and prosecutors' approach to juvenile prosecution. The National District Attorneys Association recommends that

[s]pecialized training and experience should be required for prosecutors assigned to juvenile delinquency cases. Chief prosecutors should select prosecutors for

juvenile court on the basis of their skill and competence, including knowledge of juvenile law, interest in children and youth, education, and experience. Entry-level attorneys in the juvenile unit should be as qualified as any entry-level attorney, and receive special training regarding juvenile matters.”⁷⁰

The special training should include, but not be limited to, “the philosophy and intent of the family court, the problems of juveniles, the problems and conflicts within the community, and the resources available in the community.”⁷¹

Juvenile Defenders: Policies, Standards, Training & Practice

The most promising example of adoption of specialized training is the juvenile bar. There are juvenile defense standards in 9 states; one court decision creating juvenile defense standards.⁷² All of these state standards require juvenile defenders to obtain special training prior to representing juveniles.

The ABA supports the specialization of juvenile defense: “Lawyers active in practice should be encouraged to qualify themselves for participation in juvenile and family court cases through Juvenile Delinquency Guidelines, National Counsel of Juvenile and Family Court Judges. In order to meet the demands of practicing juvenile defense, specialized training and opportunities for skill development should be required and available.”

The National Juvenile Defender Center, in conjunction with the MacArthur Foundation Juvenile Indigent Defenders Advocacy Network (JIDAN), has drafted standards (to be published in 2012) which depart from the premise that juvenile defense is a specialized practice that requires substantial education in child and adolescent development, mental health, and awareness of youths’ capacity to communicate under stress and when compromised by mental health issues and trauma.⁷³ Juvenile defenders are at the forefront of integrating into juvenile court practice information about differences in juveniles’ ability to understand and be held accountable for their actions.

While juvenile defenders may be leaders in requiring training for the defense of juveniles in juvenile court, no such requirements exists for criminal defense counsel representing juveniles who have been transferred to adult courts.⁷⁴ In fact, the dearth of such training has led the Juvenile Law Center and the National Association of Criminal Defense Lawyers to initiate webinars to close the gap.

Juvenile and Family Court Judges: Standards, Policy & Obligation to Promote Training in Developmental Competence

One of the “Key Principles of a Juvenile Delinquency Court of Excellence” of *The Juvenile Delinquency Guidelines* of the National Council on Family and Juvenile Court Judges holds both judges and system stakeholders responsible for understanding child and adolescent development:

The Juvenile Delinquency Court Judge Is Responsible to Ensure that the Judiciary, Court Staff, and all System Participants Are Both Individually Trained and Trained Across Systems and Roles. --All participants in the juvenile delinquency court system should be trained in child and adolescent development

principles, cultural differences, mental health, substance abuse, and learning issues...all participants in the juvenile delinquency court system should be cross-trained in the basics...⁷⁵

Presently, 29 states have enacted competency statutes or rely on court rules that require the courts to consider the juvenile's level of competence as a function of the juvenile's development and mental health.⁷⁶

The universal trend among stakeholders who adopt developmentally appropriate approaches is better outcomes for youth, public safety and communities. One of the most impressive demonstrations of this is the impact of youth development approaches used in decision making by probation officers sponsored by the Annie E. Casey Foundation.⁷⁷

After training police in best practices for "policing the teen brain," Strategies for Youth saw reduction in arrests from 646 in 1999 to 74 in 2009 by the MBTA Transit Police in Boston and from 83 in 2007 to 40 in 2010 in Everett, Massachusetts.

IV. LET'S TRY THIS WITH A LITTLE DEVELOPMENTAL COMPETENCE:

The time has come for states to require *all* juvenile justice system stakeholders, front line personnel working with the most challenging youth, to have *developmental competence* and for states to invest in training system stakeholders. In consultation with psychologists, psychiatrists, adolescent development experts, juvenile defense attorneys and police officers, SFY has developed the following defining characteristics of developmental competence:

- Understanding that children and adolescents' perceptions and behaviors are influenced by biological and psychological factors related to their developmental stage.
- Cognizance of the fact that specific, sequential stages of neurological and psychological development are **universal**. Children and adolescents' responses differ from adults because of fundamental neurobiological factors and related developmental stages of maturation.
- Recognition that how children and youth perceive, process and respond to situations is a function of their developmental stage, and secondarily of their culture and life experience.
- Alignment of expectations, responses, and interactions—as well as those of institutions and organizations—to the developmental stage of the children and youth they serve.

The case described below, demonstrates the value of promoting this concept. The only remarkable feature of this story is that it is presently in federal court.

A New Mexico federal court judge recently received a complaint in November 2011 describing the story of a 13-year-old boy repeatedly belched in class. While this was amusing to his pals, the teacher found it disruptive.⁷⁸ Unable to get the 13-year-old to stop, the teacher called the school resource officer. The officer refused to arrest the boy for belching, but the teacher insisted and the officer arrested the boy.

The media for all intents and purposes, indicted the officer.⁷⁹ The boy, fearing the loss of his status as a nationally ranked baseball player, fell apart. The mother removed her son from the school and filed suit. This lose-lose scenario is not unusual. At Strategies for Youth, we hear of such cases weekly. For the adults involved, the result is frustration and defensiveness; for the youth involved, the result is trauma and distrust and the dangerous lesson that “might makes right.”

Some incidents are resolved in court; many receive big headlines but little follow-up in the media. There are often calls for investigation, questions about racial bias, and further entrenchment of adversarial attitudes that lead to expensive and usually unhelpful extensions of anguish for most of, if not all, the parties involved. Rarely is there a systemic consideration of how the situation could have been avoided in the first place.

V. CONCLUSION: WE CAN DO BETTER

If adults working with youth were both trained in and required to demonstrate developmental competence, this little bit of knowledge could go a long way toward avoiding the escalation of minor incidents, reducing arrests and school suspensions and alienating youth from authority in a way that harms youths’ prospects. Application of these concepts in that New Mexico classroom might have kept it out of the media and federal court process.

This is how the situation could have been resolved:

The teacher would have realized that the boy was aiming to impress his classmates by disrupting her teaching. She would have known that youth that age are motivated by peer status, and that self-image with peers often trumps the self-interest of avoiding trouble by obeying an authority figure.⁸⁰ She would have offered the boy alternatives to respond to the situation, and advanced probable consequences if he persisted (detention after school, poor grade that prevents extracurricular participation in sports). She could have also used the tried and true method of distraction, where the teacher grabs the attention of all the other students, thereby isolating the troublemaker.

If these tactics were ineffective, the teacher might have relied on other adults, including the police officer, to break the escalating conflict, and to model how the boy needed to think through the situation.

The simple imposition of a consequence for noncompliance ultimately created more problems than it solved in this situation. Just as the power struggle between teacher and student proved ineffective, the partnering of the teacher and police officer similarly yielded poor results. The boy chose to use his limited repertoire of coping skills (resist!) and his developmental tendency to “go down in a blaze of glory” to save face with his peers—rather than obey an adult asking him to stop belching.

A developmentally competent approach helps adults in authority positions, particularly school staff and police, navigate with teens the complicated process of trying on different personalities and testing limits as they converge on adulthood. As adults, recognizing what drives a young person’s behavior, and providing alternatives in a developmentally competent

manner, increases the likelihood of teens choosing more appropriate strategies to plot a course through the complex demands of adolescence—without sacrificing any adults along the way.

It's time to include developmental competence as a core training element and skill set for all juvenile justice system stakeholders. It's what kids need, what science shows works, and what communities deserve.

Endnotes, Chapter

¹ A version of *The Delinquent Toddler: The Minimum Age of Responsibility* by Merrill Sobie originally appeared in *Criminal Justice*, ABA Section of Criminal Justice 36 (Winter 2012). John D. "Jay" Elliott has revised and added to that version in the first part of this chapter. The second part of the chapter addressing developmental competency was written by Lisa Thureau.

² Associated Press, Seattle WA, February 23, 2012.

³ Associated Press, Charlotte, NC, March 8, 2012.

⁴ KCBS News, San Francisco CA, January 27, 2012.

⁵ *The Delinquent Toddler*, supra note 1, at 36.

⁶ *Id.*

⁷ *Id.*

⁸ National Center for Juvenile Justice, at www.ojjdp.gov, Statistical Briefing Book, at "Statistics."

⁹ Rubin, *Increases in the Maximum Age of Juvenile Court Jurisdiction*, 17 *Juv. Just. Update*, 4, 14 (2011).

¹⁰ *Id.*

¹¹ Note 8, *supra*.

¹² GRISSEO, THOMAS, JUVENILES WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE (1981).

¹³ *Id.* at 33.

¹⁴ *Id.* at 80-83.

¹⁵ *Id.* at 192-193.

¹⁶ Drizin and Leo, *The Problem of False Confessions in the Post-DNA World*, 82 *N.C. L. Rev.* 891 (2004).

¹⁷ See Bazelon, Lara A., *Exploding the Superpredator Myth; Why Infancy is the Pre-Adolescent's Best Defense in Juvenile Court*, 75 *N.Y.U. L. Rev.*, 159, 163, n. 17 (2000).

¹⁸ Grisso, *supra* note 12, at 202.

¹⁹ See IJA/ABA Juvenile Justice Standards relating to Pretrial Court Proceedings, 5.1B: "The right to counsel should attach as soon as the juvenile is taken into custody by an agent of the state..." See also 6.1A: "...A juvenile's right to counsel may not be waived."

²⁰ 27 *Law & Hum. Behav.* 333 (2003).

²¹ 33 U. Louisville J. Fam. Law 629 (1995).

²² *Id.* at 652.

²³ 15 U.C.Davis J. Juv. L. & Pol'y 37 (2011)

²⁴ Available at www.modelsforchange.net @ publications: Juvenile Court Training Curriculum, 2d Edition.

²⁵ Blackstone's *Commentaries*.

²⁶ Carter, Andrew M., *Age Matters: The Case for a Constitutionalized Infancy Defense*, 54 Kan. L. Rev. 687, 721 (2006).

²⁷ *See, e.g.*, In re Tyvonne M., 558 A.2d 661 (Conn. 1989); State v. D.H., 340 So.2d 1163 (Fla. 1976); In the Interest of G.T., 409 Pa.Super. 15, 597 A.2d 638 (1991); Matter of Skinner, 272 S.C. 135, 249 S.E.2d 746 (1978).

²⁸ In re Gladys R. 464 P.2d 127 (Cal. 1970).

²⁹ Walkover, Andrew, *The Infancy Defense in the New Juvenile Court*, 31 U.C.L.A. L. Rev. 503, 506 (1983).

³⁰ Bazelon, Lara A., *Exploding the Superpredator Myth: Why Infancy Is the Pre-Adolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. Rev. 159, 190-192 (2000).

³¹ IJA/ABA Juvenile Justice Standards relating to Juvenile Delinquency and Sanctions, (Ballenger Publishing Co., Cambridge 1980) p. 29, available at the ABA Criminal Justice Section website, under juvenile justice committee, "More Resources – IJA/ABA Juvenile Justice Standards"

³² *See* IJA/ABA Juvenile Justice Standards relating to Juvenile Delinquency and Sanctions, Standard 2.1A.

³³ "Discomfort [with very young offenders] is even more acute when cases arise involving pre-adolescent offenders committing serious crimes." Scott and Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 Journal of Criminal Law & Criminology 151, n. 52, citing the case of 11 year old 'Yummy' Sandifer, a suspected gang member implicated in a killing, only to be murdered himself shortly after.

³⁴ IJA/ABA Juvenile Justice Standards relating to Transfer Between Courts, Standard 1.1B.

³⁵ 564 U.S. ___, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011).

³⁶ The question of whether the setting was coercive, and his confession involuntary, was preserved for appellate review by his counsel at his plea.

³⁷ In Re J.D.B., 363 N.C. 664, 672, 686 S.E.2d 135, 140 (2009).

³⁸ J.D.B. v. North Carolina, 564 U.S. ___, 131 S.Ct. 2397, at 2398-2399 (2011).

³⁹ *Id.* at 131 S.Ct. 2408, et seq.

⁴⁰ *Id.* at 131 S.Ct. 2407.

⁴¹ 563 U.S. ___, 131 S.Ct. 2020 (2011).

⁴² The appellant – the protective services caseworker – had been granted qualified immunity from suit under 42 U.S. C. 1983, even though his conduct had been found by the Ninth Circuit to violate the youngster's Fourth

Amendment right to be free of a warrantless seizure. The Supreme Court held that as a prevailing party, the caseworker was not entitled to appellate review, and since the child was nearly 18, the case was moot.

⁴³ 543 U.S. 551 (2005).

⁴⁴ 560 U.S. 1 (2010).

⁴⁵ The cases are *Miller v. Alabama*, No. 10-9646, and *Jackson v. Hobbs*, No. 10-9647. Transcripts of the oral argument are found at the Supreme Court website, www.supremecourt.gov/oral_arguments.

⁴⁶ For information on the history of the federal legislative initiatives, go to www.act4jj.org, a coalition organized to promote the goals of the Juvenile Justice and Delinquency Prevention Act and related legislation.

⁴⁷ For more information on these programs go to www.mentoring.org and link to “funding for mentoring.”

⁴⁸ *J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011).

⁴⁹ Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C.A. §§ 5601-02 (West 2012).

⁵⁰ *Roper v. Simmons*, 534 U.S. 551 (2005).

⁵¹ *Graham v. Florida*, 130 S.Ct. 2011 (2010).

⁵² E. Z. Freidenberg, *The Generation Gap*, 382 THE ANNALS OF THE AM. ACAD. OF POLITICAL & SOC. SCI., Mar. 1969, at 32-42.

⁵³ YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE (Thomas Grisso & Robert Schwartz, eds., Univ. of Chicago Press 2000).

⁵⁴ G. Stanley Hall, *Adolescence: Its Psychology and Its Relation to Physiology, Anthropology, Sociology, Sex, Crime, Religion and Education*, 2 THE UNIVERSITY OF MICHIGAN. D. APPLETON & COMPANY (1905).

⁵⁵ Thomas R. McDaniel, *School Discipline in Perspective*, THE CLEARING HOUSE: A JOURNAL OF EDUC. STRATEGIES, ISSUES & IDEAS, 369-70 (July 29, 2010).

⁵⁶ William Shakespeare, THE WINTER’S TALE (A NEW VARIORUM EDITION OF SHAKESPEARE) (Classic Books Co. 2001).

⁵⁷ Howard Noel, *Just Humor Me: The Hilarious Side of Family Life*, iUniverse, (2003).

⁵⁸ David Dobbs, *Moody. Impulsive. Maddening. Why do teenagers act the way they do?*, NAT’L GEOGRAPHIC, Sept. 2011, available at <http://ngm.nationalgeographic.com/2011/10/teenage-brains/dobbs-text>.

⁵⁹ Jason Graziadei, *Police Hire Youth-Relations Consultant for Officers*, News and Media, Strategies from Youth available at http://www.strategiesforyouth.org/news_police_hire.htm (statement of Police Chief Pittman) (“A teenager is a machine built for rebellion... They’re testing all limits of authority put on them by parents, by society, by schools, by everybody.”).

⁶⁰ Clare Ryan, Econ. & Soc. Research Council, *Children and Adults See the World Differently*, Science Daily (Sept. 13, 2010), available at <http://www.sciencedaily.com/releases/2010/09/100913153630.htm>.

⁶¹ Taken from interview with Dr. Yurgelun Todd. Frontline: Inside the Teenage Brain (PBS Video 2001) (transcript of broadcasted interview available at <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/todd.html>).

⁶² *Id.*; See also Harvard Health Publications, *Understanding the Stress Response*, Harvard Medical School Harvard Health Newsletters (Mar. 1, 2011), available at <http://harvardpartnersinternational.staywellsolutionsonline.com/HealthNewsLetters/69,M0311b>.

⁶³ James Shreeve, *Beyond the Brain*, NAT'L GEOGRAPHIC, available at <http://science.nationalgeographic.com/science/health-and-human-body/human-body/mind-brain/#page=1>.

⁶⁴ ACT for Youth Upstate Center of Excellence, *Adolescent Brain Development*, RESEARCH FACTS AND FINDINGS 2 (May 2002) (A collaboration of Cornell Univ. , Univ. of Rochester, and the NYS Ctr. For School Safety).

⁶⁵ *Id.* at 1.

⁶⁶ *Id.*

⁶⁷ IACP National Law Enforcement Policy Center, *Juvenile Enforcement and Custody*, CONCEPTS AND ISSUES PAPER, May 1994, at 2.

⁶⁸ The standard recommends that special procedures are necessary for taking youth in custody as well as interrogating them, "given the special legal status of juveniles." But there is no statement in service of specialized training for police interactions with youth. CALEA Standard 44, 2006 Edition.

⁶⁹ Standard 33.6, at 33-8, CALEA (2006 ed.).

⁷⁰ National District Attorneys Association, *National Prosecution Standards*, 3rd. ed., § 4-11.3, available at <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>.

⁷¹ Inst. of Judicial Admin., ABA JUVENILE JUSTICE STANDARDS ANNOTATED: A BALANCED APPROACH, § 2.5 (Robert E. Shepherd, Jr., ed., A.B.A. 1996).

⁷² District of Columbia, Florida, Georgia, Massachusetts, Ohio, Oregon, Pennsylvania, Virginia and Washington. The Nevada Supreme Court issued standards for juvenile defenders in 2009. They are available at <http://www.nevadajudiciary.us/index.php/component/remository/func-showdown/369/>.

⁷³ *National Juvenile Defense Standards*, National Juvenile Defender Center (forthcoming, 2012).

⁷⁴ See www.nacdl.org. Defenders in Alaska affirmatively moved to train attorneys representing Alaskan youth in adult court. The Campaign for Youth Justice reports that the use of transfer is declining due to legislative changes to expand juvenile court jurisdiction (Connect, Illinois and Mississippi), and changes in transfer laws (Arizona, Colorado, Connecticut, Delaware, Illinois, Indiana, Nevada, Utah, Virginia and Washington). See, *Legislative Victories from 2005 to 2010 Removing Youth from the Adult Criminal Justice System 7* (2011), Campaign for Youth Justice.

⁷⁵ National Council of Juvenile and Family Judges, *THE JUVENILE DELINQUENCY GUIDELINES § C16* (2005).

⁷⁶ Linda Szymanski, Nat'l Ctr. for Juvenile Justice, *Juvenile Competency to Stand Trial in Juvenile Court*, 3 NCJJ SNAPSHOT, Jan. 1998.

⁷⁷ See Richard A. Mendel, The Annie E. Casey Found. *Two Decades of Juvenile Detention Alternative Initiative: From Demonstration Project to National Standard* (2009); See also THE ANNIE E. CASEY FOUND., *THE JUVENILE DETENTION ALTERNATIVES INITIATIVE*, available at <http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative.aspx>.

⁷⁸ *Montoya v. Espanola Pub. Sch. Dist. Bd. of Educ.*, No. CV 10-651 WPJ/LFG (D.N.M. 2010).

⁷⁹ Jeri Clausing, *Student Arrested for Burping In Class: Shannon Kennedy Sues Albuquerque School*, HUFFINGTON POST (Dec. 1, 2011, 05:45 PM), available at http://www.huffingtonpost.com/2011/12/01/student-arrested-for-burping_n_1124179.html

⁸⁰ Ironically, not all states require teachers to be educated in developmental differences; few states require classroom behavioral management skills for conferring a certification.