



Handbook for Juvenile Court Prosecutors



Disclaimer and OJJDP Priorities

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OJJDP Priorities

- Treat Children as Children
- Serve Children at Home, With Their Families, in Their Communities
- Open Up Opportunities for System-Involved Youth

More information on OJJDP's Priorities can be found at <https://ojjdp.ojp.gov/about/ojjdp-priorities>.

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Thank you to the late **Susan Broderick** for her contributions to this chapter.

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Michele Linley is a retired San Diego County Prosecutor who was a prosecutor for 34 years. She spent almost half of her time as a prosecutor in the Juvenile Division serving as a line deputy, Assistant Chief, and Chief of the Division. She also served as a Division Chief in the Insurance Fraud Division and as Division Chief of the East County Branch of the San Diego County District Attorney's Office. She has presented to many community-based organizations and law enforcement agencies on juvenile justice and been a speaker on juvenile justice at the San Diego Regional Restorative Justice and Restorative Practice Summit. While a prosecutor, she received the Citizen of Courage Award for her and her husband's involvement with a crime victim's family, an award from the San Diego Juvenile Justice Commission for her service to Juvenile Justice and the George A. Alspaugh Jr. award from the Foothills Bar Association. She assisted NDAA as a Senior Advisor, Juvenile Justice in 2022.

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Introduction: Role of the Juvenile Court Prosecutor

Since juvenile court was first established in the late 1800s, the juvenile justice system has had various changes in approaches to addressing delinquent behavior. The early *parens patriae* approach to intervention focused on rehabilitation but had few procedural rights for juveniles. In the 1920s and 1930s, there was a shift to a harsher, detention-oriented system with physical and emotional abuse of children.¹ In the 1950s and 1960s, doubt arose about the effectiveness of the juvenile justice system because of the disparities in treatment that resulted from the absolute discretion of juvenile court judges.² As a result, the United States Supreme Court decided several cases involving the rights of court-involved youth, such as *Kent v. United States*, 383 U.S. 541 (1966), *In re Gault*, 387 U.S. 1 (1967) and *Fare v. Michael C.*, 442 U.S. 707 (1979), to provide for meaningful waiver/transfer hearings, procedural due process rights, and competence to waive *Miranda* rights, respectively. An increase in juvenile crime in the late 1980s and early 1990s led to a more punitive approach with states enacting laws to charge youth as adults.³ Today, advances in science regarding the adolescent brain and the availability of more community-based programs, have led to a more rehabilitative approach in juvenile justice. Juvenile court prosecutors employ a balanced approach regarding community safety, accountability to victims and communities, and the rehabilitative and treatment needs of the youth. They are knowledgeable about services for victims, the adolescent brain, the impact of childhood trauma, and about the array of rehabilitative and treatment programs offered in their jurisdictions.

Serving as a juvenile court prosecutor is one of the most important and rewarding positions an attorney can have. The role of the juvenile court prosecutor has evolved significantly over the last 20 years, and the field of juvenile justice has become more complex. Juvenile court prosecutors play a critical role in assisting victims, preventing crime, making communities safer, and ensuring that youth get the services they need to proceed along a positive path. A juvenile court prosecutor conducts thorough investigations, helps victims and witnesses navigate the court system, collaborates with law enforcement, schools, and other stakeholders, conducts legal research, and prepares and conducts hearings and trials. The increase in alternatives to incarceration and strategies based on research have created greater opportunities for juvenile court prosecutors to serve a more expansive role in their communities. They play an important and influential role in delinquency prevention and early intervention efforts. They serve as leaders by creating innovative programs and policies that make crime prevention a key component of the community safety mission.⁴

¹ National Juvenile Justice Prosecution Center, *Juvenile Prosecution Policy Positions and Guidelines* (2016).

² Center on Juvenile & Criminal Justice, "Juvenile Justice History," accessed April 3, 2023, www.cjcj.org/history-education/juvenile-justice-history.

³ *Id.*

⁴ National District Attorneys Association (NDAA), *National Prosecution Standards*, 4th ed. (2023), Part V, Commentary, accessed August 7, 2023, ndaa.org/wp-content/uploads/National-Prosecution-Standards-Fourth-Edition_January-2023-1.pdf.

Introduction: Role of the Juvenile Court Prosecutor

The work of a juvenile court prosecutor extends far beyond the courtroom and far beyond individual cases. Juvenile court prosecutors are often involved in interagency collaborations to improve the juvenile justice system. Juvenile court prosecutors work with law enforcement to make communities safer and work with school officials to address truancy and reduce the number of youth cases referred for prosecution where appropriate. Juvenile court prosecutors may be involved in collecting and reviewing data to understand and respond to trends, and attending community meetings and events to share information and understand community concerns. Juvenile court prosecutors may also be involved in speaking to youth about safety, legal issues, and careers, and hosting mock trials and other events that have a positive impact on youth.

The purpose of this Handbook is to support and enhance the multifaceted work of juvenile court prosecutors by establishing principles of juvenile prosecution, providing guidance, and promoting informed decision-making. This Handbook addresses many areas of juvenile prosecution, including but not limited to, organizational priorities; case assessment; the adolescent brain; diversion and charging; working with victims; risk assessment; plea bargaining; trial preparation; disposition/sentencing; reducing ethnic and racial disparities; guns; and gangs/crews. Additional chapters will be added in the future and updates will be made to reflect changes as the field of juvenile prosecution continues to evolve.

NDAAs National Prosecution Standards, Fourth Edition (2023), Part V, Juvenile Justice

1. Juvenile Justice

The primary duty of the prosecutor is to seek justice while fully and faithfully representing the interests of the state. While the safety and welfare of the community, including the victim, is their primary concern, prosecutors should consider the special circumstances and rehabilitative potential of the youth to the extent they can do so without unduly compromising their primary concern. Formal charging documents for all cases referred to juvenile or adult court should be prepared or reviewed by a prosecutor. To the extent possible, a prosecutor should appear at all hearings concerning a youth accused of an act that would constitute a crime if they were an adult.

1.1 Personnel and Resources

The prosecutor's office should devote specific personnel and resources to fulfill its responsibilities with respect to juvenile delinquency proceedings, and all prosecutors' offices should have an identified juvenile unit or attorney responsible for representing the state in juvenile matters. For smaller and/or rural jurisdictions, it may be appropriate to combine resources when possible, however, specialized juvenile training should be made available to prosecutors who will appear in juvenile court in addition to their adult court commitments.

1.2 Qualification and Training of Prosecutors in Juvenile Court

Specialized 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 working with children and youth, interest in community engagement, education, and experience. Entry-level attorneys in the juvenile unit should be as qualified as any entry-level attorney, and receive special, ongoing training regarding juvenile matters, including adolescent development.

1.3 Screening Juvenile Cases

The prosecutor or a designee should review all cases, which may be reviewed pursuant to their state statutes, for legal sufficiency and then decide whether a case will be diverted, formally petitioned with the juvenile court, or transferred to criminal court. If the facts of the case are not legally sufficient to warrant action, the matter should be terminated or returned to the referral source pending further investigation or receipt of additional reports.

1.4 Diversion

The prosecutor or a designee should be responsible for recommending which cases should be diverted from formal adjudication. No case should be diverted unless the prosecutor reasonably believes that they could substantiate the criminal or delinquency charge against the youth. Treatment, restitution, or public service programs developed in his or her office may be utilized, or the case can be referred to existing probation or community service agencies. To the extent possible, when determining the conditions of diversion, prosecutors should consider the individual treatment and service needs of the youth in order to tailor services accordingly. As much as possible, prosecutors should support efforts to address not only the needs of the youth, but also those of the youth's family that would help in rehabilitating the youth.

1.5 Charging and Diversion Criteria

The prosecutor or a designee must further review legally sufficient cases to determine whether they should be filed formally with the juvenile court, transferred or diverted for treatment, services, or probation. In determining whether to file formally or, where allowed by law, divert, the prosecutor or designated case reviewer should consider the following factors in deciding what result best serves the interests of the community and the youth:

- a. The seriousness of the alleged offense, including whether the conduct involved violence or bodily injury to others, including the victim;
- b. The role of the youth in that offense;
- c. The nature and number of previous cases presented by law enforcement or others against the youth, and the disposition of those cases;
- d. The youth's age, maturity, and mental status;
- e. The existence of appropriate treatment or services available through the juvenile court, child protective services, or through diversion;
- f. Whether the youth admits guilt or involvement in the offense charged (If allowed by statute), whether they accept responsibility for the conduct and the youth's attitude in regard to the crime;
- g. The dangerousness or threat posed by the youth to the person or property of others;
- h. The decision made with respect to similarly-situated youths; and
- i. Recommendations of the referring agency, victim, law enforcement, and advocates for the youth, in consideration of the youth's rehabilitative potential.

1.6 Transfer to Criminal Court

The transfer of cases to criminal court should be reserved for the most serious, violent, and chronic offending. Prosecutors should make transfer decisions on a case-by-case basis and take into account the individual factors and state requirements of each case including, among other factors, the gravity and violent nature of the current alleged offense, the record of previous delinquent behavior of the youth charged, and the availability of adequate treatment, services and dispositional alternatives in juvenile court.

1.7 Plea Agreements

The decision to enter into a plea agreement should be governed by both the interests of the state and those of the youth, although the primary concern of the prosecutor should be protection of the community as determined in the exercise of traditional prosecutorial discretion. The prosecutor should also consider the youth's potential for rehabilitation.

1.8 Prosecutor's Role in Adjudication (Trial)

At the adjudicatory hearing, the prosecutor should assume the traditional adversarial role of a prosecutor, acting in the best interests of justice and community safety.

1.9 Dispositions

The prosecutor should take an active role in the dispositional hearing and make a recommendation consistent with community safety to the court after reviewing reports prepared by prosecutorial staff, the probation department, and others. In making a recommendation, the prosecutor should seek the input of the victim and consider the rehabilitative needs of the youth, provided that they are consistent with community safety and welfare.

1.10 Victim Impact

Victims of crimes should be informed of all important stages of the proceedings to the extent feasible, upon request or as required by law. The prosecutor should be aware of any obligations imposed by victims' rights legislation in his or her particular jurisdiction. The prosecutor should take care to balance the extent of information provided to the victim with the need to protect the integrity of the case and process.

1.11 Evaluation of Programs

The prosecutor should periodically review diversion and dispositional programs, both within and outside the prosecutor's office, to ensure that they provide appropriate supervision, treatment, restitution requirements, or services for the youth. The prosecutor should maintain a working relationship with all outside agencies providing diversion and dispositional services to ensure that the prosecutor's decisions are consistent and appropriate. If the prosecutor discovers that a youth or class of youths is not receiving the care and treatment envisioned in disposition or diversion decisions, the prosecutor should inform the court of this fact.

1.12 Duty to Report

If the prosecutor becomes aware that the directives and/or sanctions imposed by the court are not being administered by an agency to which the court assigned the youth or that a treatment provider is engaging in unethical or questionable practices, the prosecutor, at minimum, should report the concerns to the court.

Commentary

Over the last twenty years, there has been significant attention paid to the field of juvenile justice. The decline in the number of juvenile delinquency cases since 1997, coupled with the increase in alternatives to incarceration and strategies based on research have created greater opportunities for prosecutors to serve a more expansive role in their respective communities. No longer confined to the courtroom, juvenile court prosecutors play an important and influential role in delinquency prevention and early intervention efforts. They serve as leaders by creating innovative programs and policies that make crime prevention a key component of the community safety mission.

The prosecutor is charged to seek justice just as he does in criminal prosecutions. The prosecutor in the juvenile system, however, is further charged to give special attention to the circumstances and needs of the youth to the extent that it does not conflict with the duty to fully and faithfully represent the interests of the state. This balanced approach reflects the philosophy that the safety and welfare of the community is enhanced when youths, through counseling, restitution, or more extensive rehabilitative efforts and sanctions, are dissuaded from further criminal activity.

To efficiently carry out his or her duties, it is desirable that the prosecutor appear at all stages of the proceedings. In so doing, the prosecutor maintains a focus on the safety and well-being of the community at each decision-making level. Further, because the juvenile system is increasingly adversarial, the prosecutor fulfills an important role in addressing the positions of juvenile and social service advocates. The prosecutor's presence guarantees the opportunity to exercise continuous monitoring at each stage and broad discretion to ensure fair and just results.

These standards further emphasize professionalism in juvenile court work. They provide that attorneys in juvenile court should be experienced, competent, and interested. Because of the adversarial nature of juvenile proceedings, the prosecutor should be responsible for screening to determine whether there is sufficient evidence to believe that a crime was committed and that the youth committed it. A case should only be further processed if it is legally sufficient. "Legally sufficient" means a case in which the prosecutor believes that he can reasonably substantiate the charges against the youth by admissible evidence at trial.

These determinations should be made by the prosecutor.

After a determination of legal sufficiency, the next decision to be made is whether the case should be diverted, referred to juvenile court or transferred to criminal court. This decision has both legal and social implications. It should be made either by an experienced prosecutor who has an interest in youths or by other case screeners under the guidance of a prosecutor. The prosecutor, in exercising this function, should consider the rehabilitative needs of the youth while upholding the safety and welfare of the community. These decisions should be made without unreasonable delay. Prompt determinations generally promote confidence in the system and fairness to the victim, the community, and the youth. Further, prompt decisions are more likely to result in rehabilitation of the youth by providing more immediate attention.

Diversion of cases in juvenile court from the formal charging, adjudication, and disposition procedure has become common for less serious offenses. The impetus for such a procedure is that because youths are in the process of cognitive, moral, and social development, there is a unique opportunity presented at the juvenile court level to dissuade them from criminal activity. Advances in neuroscience confirm that the adolescent brain is undergoing significant development, and the neuroplasticity creates tremendous opportunity to influence youth in a positive way. However, science also confirms the tremendous vulnerability of the adolescent brain to drugs and alcohol. This is a concern for juvenile court prosecutors. Many youths will never enter the justice system again if their cases are handled properly through a robust

diversion program. Treatment, restitution, or service programs often are viable alternatives to court processing. These standards describe the opportunity for prosecutors to be involved either in diversion programs based in their offices or through referral to existing probation or community service agencies.

In many jurisdictions, transfer of youths to criminal court is controlled by statute or practice. This standard simply provides guidance for prosecutors in using discretion to the extent that they participate in this process, and includes consideration of the rehabilitative potential of a youth. Given the general decline in the number of cases being transferred, this option should be reserved for serious, violent, and chronic offending.

These standards reflect the consensus that plea agreements are appropriate for juvenile court. A plea agreement should only be entered into when there is sufficient admissible evidence to demonstrate a prima facie case that the youth has committed the acts alleged in the petition to which he is pleading guilty. The appropriateness and extent to which plea agreements are used are matters of office policy to be determined by the chief prosecutor. The prosecutor should always take steps to ensure that the resulting disposition is in the interest of the community with due regard being given to the rehabilitative needs of the youth. In those matters that are not diverted or disposed of without trial the prosecutor should assume the traditional prosecution role in the adversarial process with respect to determination of guilt or innocence. This standard, therefore, suggests that the rules of evidence apply. Prosecutors should strive in the juvenile court setting to maintain a distinction between a factual determination of innocence or guilt and a determination of disposition. This approach promotes fairness to both the victim and the community and enhances the integrity of juvenile court findings.

Prosecutors should offer dispositional alternatives to the court that reduce risk and increase the protective factors that will make a youth successful in the future. When a youth presents a danger to the safety and welfare of the community, the prosecutor should voice this concern. On the other hand, when appropriate, the prosecutor may offer a dispositional recommendation that is less restrictive than what the juvenile court judge may contemplate imposing.

Given the unique role that prosecutors play across the justice continuum, they have a responsibility to ensure that all decisions are fair and just. They must base decisions on factors such as community safety, accountability, and rehabilitation. Race, ethnicity, and/or gender are never appropriate factors in decision-making. In order to ensure that decisions and policies are fair and equal, it is important to track case processing and outcomes. Data-driven practices are an important component of the fair administration of justice. Prosecutors should examine strategies and alternatives that decrease racial, ethnic, and gender disparities while maintaining community safety.

This standard also suggests that, to the extent possible, the prosecutor should take a leadership role in the community in assuring that a wide range of appropriate dispositional alternatives are available for youth who are adjudicated delinquents. In addition, the prosecutor is encouraged to follow up on cases to ensure that dispositions are upheld, court ordered sanctions are administered, and treatment is provided. Similarly, prosecutors, to the extent possible, should take an active role in prevention and early intervention efforts.

NDAAs Juvenile Prosecution Principles and Guidelines

Purpose

These policy positions were developed to strengthen and support the work of juvenile prosecution. They are designed to be read in conjunction with NDAA's *National Prosecution Standards*, Fourth Edition (2023), Section V, Juvenile Justice. While every state has its own juvenile code/statute, these policy positions can be used to guide decision-making at each stage of a case and to ensure that outcomes for youth and communities are fair, just, and equitable. These policy positions can also be used to inform local policies and guidelines. Recognizing juvenile prosecution as a specialized and critical practice not only helps prosecutors but also elevates the practice of juvenile law.

Goals of Prosecution

- **Principle:** The primary duty of a prosecutor is to seek justice while fully and faithfully representing the interests of the state.¹
- **Principle:** Prosecutors have a duty to give effect to the purpose clause of the juvenile code in their jurisdictions.
- **Principle:** Prosecutors are encouraged to adopt a balanced consideration of community safety, the youth's accountability to victims and communities, and the rehabilitative and treatment needs of the youth.²
- **Principle:** Prosecutors should seek to resolve juvenile prosecutions as quickly as possible, without compromising due process, fairness, and thoroughness.³

Commentary

Support for these policies can be found in the NDAA *National Prosecution Standards*, Fourth Edition (2023), the American Bar Association *Model Rules of Professional Conduct* (2023), and in the National Council of Juvenile and Family Court Judges, *Enhanced Juvenile Justice Guidelines* (2019) cited below. These policies promote fairness, balance, accountability, and efficiency in juvenile cases.

¹ NDAA, *National Prosecution Standards*, Part V, Juvenile Justice (hereinafter "NDAA, *National Prosecution Standards*, JJ 2023"), 69.

² See generally, *Id.*, 5-1.9.

³ See National Council of Juvenile and Family Court Judges, *Enhanced Juvenile Justice Guidelines* (2019), 16-17, www.ncjfcj.org/publications/enhanced-juvenile-justice-guidelines/.

Organizational Priorities

Policy: Elected prosecutors are encouraged to make juvenile court a priority in their offices.

- **Principle:** Juvenile court units should be staffed with prosecutors who desire to work in juvenile court; who desire to intervene effectively in the lives of youth and deter them from future criminal conduct.⁴
- **Principle:** Office assignments should provide for stability of prosecutors assigned to juvenile court and minimize turnover.
- **Principle:** Prosecutors in juvenile court should receive ongoing specialized training and professional development.⁵
- **Principle:** Prosecutors should maintain a presence in communities, and to the extent possible, should take an active role in prevention and early intervention efforts.⁶ Where feasible, resources should be allocated to allow juvenile court prosecutors to have a presence in their communities, including having time to attend relevant community events and attend community-based meetings.

Commentary

Historically, juvenile court was often used as a training ground for newly hired prosecutors. Frequently, less experienced assistants were assigned to juvenile court and juvenile court assignments were made for short term duration. As juvenile court has become more complex and specialized, it has become more important to staff juvenile court units with both new and experienced prosecutors. Juvenile court units in each jurisdiction can be strengthened by staffing them with attorneys who have an interest in juvenile prosecution and an ability to balance the needs of youth, victims, and community safety in a manner that is consistent with that jurisdiction's juvenile code/statute.

Juvenile court prosecutors must be properly trained and must receive ongoing training throughout their tenure in juvenile court. Juvenile court prosecutors must have intricate knowledge of many different concepts, including but not limited to adolescent brain development, adjudicative competency, the effects of exposure to violence on children, risk assessment tools, diversion programs and disposition programs, evidence-based practices and programs, and ethical considerations, and must know how to prepare for complex hearings and trials, including but not limited to competency hearings, transfer hearings, and suppression hearings pertaining to constitutional rights.

To the extent possible, juvenile court prosecutors should maintain a presence in communities and work collaboratively with law enforcement, schools, and other juvenile justice stakeholders to prevent and reduce juvenile crime. Prosecutors can support efforts to prevent and reduce crime in many ways,⁷ including but not limited to:

- Collaborating with schools, including schools that have high rates of offenses, to maximize resources and develop effective strategies to reduce offending.

⁴ See NDAA, *National Prosecution Standards*, JJ 2023, 5-1.2.

⁵ NDAA, *National Prosecution Standards*, JJ 2023, 5-1.2, 5-1.3.

⁶ *Id.*

⁷ *Id.*, 73 (Commentary).

- Conducting presentations in schools and public forums on the juvenile justice system and topics such as substance use prevention, the importance of attending and remaining in school, and making good decisions.⁸
- Bringing stakeholders together to share resource information and ensure that community members are aware of resources available to children and families.
- Sharing statistics about juvenile crime and crime trends (to the extent consistent with confidentiality laws), so that they can work collaboratively with communities and other juvenile justice stakeholders to design strategies that will reduce offending and make communities safer.
- Launching and supporting initiatives to build and improve relationships between law enforcement and youth.⁹

Intake/Charging Decisions/Diversion

- **Principle:** When consistent with the laws and juvenile justice system in a jurisdiction, a prosecutor should make all charging decisions, including diversion decisions.¹⁰
- **Principle:** In many jurisdictions, state law prohibits filing on children below a certain age. For those states, there should be a written office policy regarding charging younger youth.
- **Principle:** Diversion should be considered for appropriate low-level and first-time offenses.
- **Principle:** Charges should only be filed in cases supported by legally sufficient evidence. Cases unsupported by legally sufficient evidence should be sent back to the referral source for further investigation, dismissed or declined to prosecute with no further action. They should not be diverted.¹¹
- **Principle:** Diversion policies should be in writing and set forth general guidelines for a youth's participation in the diversion process.
- **Principle:** Diversion programs should utilize validated screening and assessments to determine the risk and needs of the individual youth, including the assessment of possible commercial sexual exploitation and human trafficking issues.
- **Principle:** Participation in diversion should be voluntary. Youth and their parent/guardian must sign all agreements should they choose to participate.
- **Principle:** To the extent permitted by law, victims must be notified of all charging decisions, including a referral to diversion. Their input should be sought prior to making the decision.
- **Principle:** To the extent consistent with confidentiality laws, a protocol should be in place to identify youth who have been or are currently involved in the child welfare system, to share information, access resources and coordinate services.

⁸ See *e.g.*, Bronx District Attorney's Office CONCEPT Program, www.bronxda.nyc.gov/html/outreach/community-affairs-unit.shtml.

⁹ See *generally*, OJJDP, "Interactions between Youth and Law Enforcement," Literature Review (2018), ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/interactions-youth-law-enforcement.pdf.

¹⁰ NDAA, *National Prosecution Standards*, JJ 2023, 5-1.5 (Commentary), 74.

¹¹ *Id.*

- **Principle:** In determining whether to file formal charges or divert a case, the following factors¹² should be considered in deciding what result best serves the interests of the community, the victim, and the youth:

With respect to the offense:

- Sufficiency of the evidence;
- The seriousness of the alleged offense including whether the conduct involved violence or bodily injury to others, including the victim;
- Whether the offense involved the possession or use of a firearm;
- Whether the offense involved gang/crew activity;
- Parental involvement in the offense;
- A history of non-enforcement of the statute violated;

With respect to the youth:

- The role of the youth in the offense;
- Whether the youth admits guilt or involvement in the offense charged (if allowed by statute), and whether the youth accepts responsibility for the conduct, and the youth's attitude regarding the offense;
- Whether the youth is a commercially sexually exploited youth;
- The nature and number of previous cases presented by law enforcement or others against the youth, and the disposition of those cases;
- Any mitigating circumstance of the youth;
- The youth's potential for rehabilitation;
- The youth's age, maturity, and mental status;
- Mental health, substance use, and other possible treatment needs;
- Physical, developmental, social and psychological needs of the youth;
- The dangerousness, risk, or threat posed by the youth to persons or property of others;
- Parental support of the youth and other protective factors;
- Any undue hardship caused to the youth;

With respect to the victim:

- Victim input;
- Harm to the victim;
- Availability of restitution to the victim;

¹² See generally, NDAA, *National Prosecution Standards*, JJ 2023, 5-1.

With respect to other factors:

- The existence of appropriate treatment services available through juvenile court, child protective services, or through diversion;
- The decision made with respect to similarly situated youth;
- Recommendations of the referring agency, victim, law enforcement agency, and advocates for the youth, in consideration of the youth's rehabilitative potential.

This is not an exhaustive list but provides a starting point for consideration.

Commentary

Charging decisions are a critical part of prosecutorial function. Prosecutors have the statutory authority and responsibility to file charges, and they have knowledge of the elements of offenses and rules of evidence necessary to determine legal sufficiency.

Programs that divert youth from involvement in the juvenile justice system have increased in response to the growing recognition that such involvement is often not necessary and can even adversely affect young people and communities. Diversion programs provide an opportunity to address problematic behavior while at the same time avoiding the stigma of adjudication. Very often, this involvement can connect youth with positive peers, positive adults, and activities that build upon their strengths and promote resiliency.

While it may be tempting to divert cases not supported by legally sufficient evidence in order to obtain services for the youth, this should be avoided. Without legally sufficient evidence to support a charge, there is no legal basis for diversion. Diversion in the absence of legally sufficient evidence may well be a violation of *Model Rules of Professional Conduct*.¹³ In those jurisdictions where police, probation agencies, or court counselors make decisions to divert youth from prosecution, these agencies, to the extent permitted by law should seek input from the prosecuting authority before such decisions are made to ensure that the case is supported by legally sufficient evidence.

If, after an initial screening, it is determined that a diversion is inappropriate or if the youth fails to successfully complete a diversion program, the case should be re-referred to the prosecutor for formal charges. This is important, because if no charges are filed, the youth is not held accountable and does not benefit from an intervention.

Because of the high proliferation of youth who crossover from the child welfare system to the juvenile system, protocols should be put in place that allow for early identification of such youth. These cases require extensive collaboration and efforts should be made to implement coordinated case assignment, joint assessment processes and coordinated case plans and supervision.¹⁴

¹³ American Bar Association, *Model Rules of Professional Conduct* (2023), Rule 3.8, www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/.

¹⁴ Georgetown University Center for Center for Juvenile Justice Reform, *The Crossover Youth Practice Model (CYPM): An Abbreviated Guide* (2015), drive.google.com/file/d/1IUXfhHxnknx5XctxJU3iBMW-eVDLcll/view?pli=1).

Waiver/Transfer

- **Principle:** The transfer of cases to Criminal Court should be reserved for the most serious, violent, and chronic youth.¹⁵
- **Principle:** Prosecutors should make transfer decisions on a case-by-case basis and take into account the individual factors of each case, including, among other factors, the gravity of the current alleged offense, the level of harm to the victim, the record of previous delinquent behavior, the risk level of the youth, the age and maturity level of the youth, and the availability of adequate treatment and dispositional alternatives in juvenile court compared to adult court.¹⁶

Commentary

Transfer decisions should be made on a case-by-case basis, considering the individual factors of each case. Prosecutors should evaluate which system best supports public safety, holds the youth accountable, addresses rehabilitation and treatment needs, and develops the youth's skills in reducing future delinquency or criminal behavior.

Prosecutors are encouraged to review research and juvenile crime data around juvenile reoffending and consider if their existing policies are supported by the research and data. Evidence-based policies are not only more likely to achieve the desired result, but such policies also provide a defensible basis for the exercise of prosecutorial discretion.

Discovery¹⁷

Discovery: A prosecutor should, at all times, carry out his or her discovery obligations in good faith and in a manner that furthers the goals of discovery, namely, to minimize surprise, afford the opportunity for effective cross-examination, expedite trials, and meet the requirements of due process. To further these objectives, the prosecutor should pursue the discovery of material information, and fully and promptly comply with lawful discovery requests from defense counsel.

Duty to Disclose Exculpatory and Impeachment Evidence: Due process requires that the prosecutor provide defendants with any evidence that is favorable to them whenever that evidence is material to either their guilt or punishment, pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. The "Brady Rule" applies to evidence that negates the guilt of the accused or evidence that mitigates the crime committed by the accused. Due process also requires that the Government disclose impeachment evidence for witnesses who will be testifying at trial, pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), and its progeny.

Continuing Duty: If at any point in the pretrial or trial proceedings the prosecutor discovers additional witnesses, information, or other material previously requested or ordered which is subject to disclosure or inspection, the prosecutor should promptly notify defense counsel and provide the required information.

¹⁵ NDAA, *National Prosecution Standards*, JJ 2023, 5-1.7.

¹⁶ *Id.*

¹⁷ *Id.*, 4-9.1.

Plea Negotiations

- **Principle:** Prosecutors should engage in plea negotiations in juvenile court cases.
- **Principle:** Similarly situated youth should be offered substantially similar plea agreement opportunities, taking into consideration community safety, the rehabilitative and treatment needs of the youth, family support, and other appropriate factors relevant to juvenile disposition/sentencing, including victim input.¹⁸
- **Principle:** Alford pleas¹⁹ (pleas that do not involve an admission to the act) should be avoided in juvenile court because they do not require personal acceptance of responsibility for the illegal conduct. (The youth gains access to programs while maintaining that he/she never committed any illegal acts.)
- **Principle:** Prosecutors should be encouraged to consider many forms of plea agreements to find one that might serve the interests of justice in a particular case. The following are general starting places for plea negotiations and how to hold the youth accountable through a plea agreement: agree to forego transfer/waiver into adult court in exchange for plea in juvenile court and juvenile disposition; within juvenile court, agree to allow the youth to plea to a lesser charge; offer pre-adjudication diversion; offer post-adjudication but pre-disposition diversion.

Commentary

Plea agreements in juvenile court are an effective way to help youths accept responsibility for their conduct. The guilty plea is often the beginning of rehabilitation and prosecutors should find suitable ways to settle juvenile court cases.

Proper factors²⁰ to consider while negotiating pleas in juvenile court include, but are not limited to:

With respect to the offense:

- Nature, severity, and classification of the offense;
- Whether the offense was committed in an especially heinous, cruel or depraved manner;
- Plea agreements previously made with similarly situated youths;
- Whether the offense involves the possession or use of a firearm;
- Whether the offense involves gang/crew activity;
- Parental involvement in the offense;
- Sufficiency of the evidence at trial;
- Any mitigating circumstances involving the offense;

¹⁸ NDAA, *National Prosecution Standards*, JJ 2023, 5-1.8.

¹⁹ *North Carolina v. Alford*, U.S., 400 U.S. 25 (1970).

²⁰ *See generally*, NDAA, *National Prosecution Standards*, Part VI, Plea Negotiation and Agreements.

With respect to the youth:

- The role of the youth in the offense;
- Whether the youth admits guilt or involvement in the offense charged, and whether the youth accepts responsibility for the conduct, and the youth's attitude regarding the offense;
- Whether the youth is a commercially sexually exploited youth;
- The nature and number of previous cases presented by law enforcement or others against the youth, and the disposition of those cases;
- Any mitigating circumstances of the youth;
- The youth's age, maturity, and mental status;
- Mental health, substance use, and other possible treatment needs;
- Physical, developmental, social and psychological needs of the youth;
- The youth's potential for rehabilitation;
- The dangerousness, risk, or threat posed by the youth to persons or property of others;
- Any cooperation by the youth;
- The youth's strengths;
- Parental support of the youth and other protective factors;
- The risk to the community posed by the youth;

With respect to victims and/or witnesses:

- The availability and willingness of the victim(s) and witnesses to testify;
- Any physical or mental impairment of the victim(s) or witnesses;
- The witness's relationship to the youth;
- Victim's input;
- Availability of restitution to the victim;
- Any possible improper motive of the victim(s) or witnesses;
- The age of the victim(s) or witnesses and the likelihood of re-traumatization if forced to testify;
- Vulnerability on the part of the victim;
- Any other undue hardship to the victim(s) or witnesses caused by testifying;
- The existence and extent of harm, including economic harm, physical injury and emotional trauma suffered by the victim(s) or witnesses.

This is not an exhaustive list but provides a starting point for consideration.

Adjudication

- **Principle:** Prosecutors should appear and represent the interests of the state at every hearing involving a juvenile respondent/defendant. At the adjudicative hearing (trial), prosecutors should assume the traditional adversarial role of a prosecutor, acting in the best interests of justice and community safety.²¹
- **Principle:** Prosecutors must comply with all discovery obligations and are encouraged to implement open file policies wherever possible.

Commentary

Juvenile court is a formal, adversarial system that requires legal representation for the state and the youth at every stage of the court process. Prosecutors may be the only voice victims and communities have in court. It is incumbent on prosecutors to attend every hearing to protect the community and advance the rights of crime victims, while ensuring that the youth is held accountable and that the youth's rehabilitative and treatment needs are being met. Prosecutors are encouraged to work collaboratively with defense counsel and encourage communication about individual cases and systemic issues where appropriate.

Discovery obligations are generally the same in juvenile court as they are in criminal court. Prosecutors in juvenile court must be well-trained on discovery obligations, including all ethical considerations and must have a full understanding of the consequences of failure in this area of practice.²²

Screening and Assessment

- **Principle:** Prosecutors should utilize validated screening and assessment instruments to assess the risk of re-offense, the needs, strengths and/or behavioral health issues of youth referred to the system, including the risk of commercial sexual exploitation and human trafficking.
- **Principle:** Prosecutors should support and/or adopt policies that encourage the free exchange of information by protecting the youth's right to confidentiality with respect to information obtained from him/her during screening and assessment.

Commentary

During the initial stages of screening and assessment, there may be interviews and communications between youth, family members and juvenile court personnel. To encourage youth to share information openly and truthfully during these processes, it is recommended that prosecutors support and/or adopt policies regarding the confidentiality of statements made during these processes. Provisions that encourage the free exchange of information when addressing potential behavioral issues can lead to better outcomes for youth and for the community as well.²³

²¹ NDAA, *National Prosecution Standards*, JJ 2023, 5-1.9 (Commentary), 73.

²² American Bar Association, *Model Rules of Professional Conduct*, Rule 3.8(d).

²³ Models for Change, *Juvenile Diversion Guidebook* (2011), 53, modelsforchange.net/publications/301/Juvenile_Diversion_Guidebook.pdf.

Dispositions

- **Principle:** Prosecutors should take an active role in dispositional hearings and make recommendations after reviewing the entire case file and all disposition/sentencing reports so that they can recommend a disposition that balances community protection, accountability, and the rehabilitative and treatment needs of the youth.
- **Principle:** The primary factors affecting a youth’s disposition/sentence should be the seriousness of the crime, the protection of the community, accountability to the victim and the community, and the rehabilitative and treatment needs of the youth.²⁴
- **Principle:** At the dispositional hearing, the prosecutor should make the court aware of the impact of the youth’s conduct on the victim and the community.
- **Principle:** Dispositions should be tailored to the individual risk level of the youth. Interventions should be developmentally appropriate and build upon the specific needs and strengths of the youth.
- **Principle:** Accountability must be promoted when there is non-compliance. Incentives can be incorporated to acknowledge positive progress. Barriers to non-compliance should be explored before the imposition of sanctions. If sanctions are appropriate, they should be graduated, swift, and certain.
- **Principle:** Family involvement in the youth’s rehabilitation and/or treatment should be encouraged wherever possible and appropriate.
- **Principle:** Dispositions should include conditions and programs consistent with best practices and evidence-based interventions. When possible and when consistent with the need to protect the community and the youth’s rehabilitative and treatment needs, community-based interventions rather than residential interventions should be utilized.
- **Principle:** The prosecutor’s office should periodically review diversion and dispositional programs to ensure that they provide appropriate supervision, treatment, and services for the youth they serve.²⁵

Commentary

Over the past 30 years, there have been many advances in effective approaches to juvenile rehabilitation. Based on neuroscience and social science studies, policies and practices can be designed to decrease recidivism and improve positive outcomes for young people.

When considering the dispositional alternatives, it is important to analyze the needs and strengths of each young person. Dispositions should be tailored in a way that will encourage pro-social behavior and outcomes. The importance of connecting youth to positive peers, adults and activities cannot be overstated.

²⁴ See NDAA, *National Prosecution Standards*, JJ 2023.

²⁵ NDAA, *National Prosecution Standards*, JJ 2023, 5-1.2.

In addition to those criteria considered during plea negotiations, the following are proper factors to consider when making disposition recommendations:

With respect to the youth:

- Physical, developmental, emotional, social, and psychological needs of the youth;
- Mental health challenges the youth may be experiencing;
- Other treatment, rehabilitative, and skill-building needs of the youth;
- Parental or other support of the youth as well as other protective factors;
- Any pre-disposition reports that may have been completed;
- The youth's risk assessment scores/levels, where applicable;
- The youth's level of success with prior probation or other disposition/sentencing conditions.

Reducing Ethnic and Racial Disparities

- **Principle:** Prosecutors should continue their efforts to participate with other juvenile court stakeholders to reduce ethnic and racial disparities.
- **Principle:** Prosecutors should maintain a well-qualified staff that is reflective of the community and must promote policies that discourage any type of disparate treatment.
- **Principle:** Prosecutors should be pro-active in maintaining and reviewing data from all decisions points in the juvenile justice process to identify areas where disparities may exist.
- **Principle:** Prosecutors should be proactive in developing ways to improve relations between youth and law enforcement.²⁶

Commentary

According to OJJDP, in 2020, Black youth were 2.3 times more likely to be arrested than their white peers. In 2019, black youth were 4.4 times more likely than their white peers to be in residential placement.²⁷ Prosecutors must be proactive in analyzing statistics similar to these and design strategies in collaboration with other stakeholders to reduce racial and ethnic disparities in the juvenile and criminal justice systems. The five points of contact where disproportionate minority contact most often occurs are: arrest; diversion; pre-trial detention; disposition commitments; and adult transfer.²⁸

To be eligible to receive federal funding, states are required to implement plans to reduce disproportionate minority contact, as outlined in the Juvenile Justice and Delinquency Prevention Act, which was reauthorized and amended by the Juvenile Justice Reform Act of 2018.²⁹

²⁶ See generally, OJJDP, "Interactions between Youth and Law Enforcement."

²⁷ Liz Ryan, "Celebrating Youth Achievements and Promise During Black History Month," February 13, 2023, ojjdp.ojp.gov/blog/celebrating-youth-achievements-and-promise-during-black-history-month.

²⁸ OJJDP, "Racial/Ethnic Disparities (R/ED)," accessed June 8, 2023, ojjdp.ojp.gov/programs/racial-and-ethnic-disparities.

²⁹ *Id.*

Victims

- **Principle:** Crime victims should have the same rights in juvenile court that they have in adult criminal court.
- **Principle:** Prosecutors should make the court aware of the impact of the youth's conduct on the victim and the community.
- **Principle:** Prosecutors must be familiar with and comply with all victims' rights laws in their jurisdictions.
- **Principle:** Victims should be kept informed of proceedings and their input should be considered at all decision points in a case, including charging and diversion decisions, plea bargaining, and disposition/sentencing. Where permitted by law, victims should be informed of the final outcome of a case, and should be given information regarding a youth's release from a facility or information on how to access that information.
- **Principle:** Prosecutors should work to ensure confidentiality laws do not hinder victims' rights or prevent victims from accessing essential information.
- **Principle:** Prosecutors should ensure that victims have a safe and comfortable waiting area in the prosecutors' office and courtroom when their presence is needed at those locations.
- **Principle:** Prosecutors should be aware of all services and resources available to victims to ensure that information is shared with them.
- **Principle:** Prosecutors should ensure that interpreters are available for victims for interviews, case updates, and other communications between the victim and prosecutor.

Commentary

Every state and the District of Columbia have some form of victims' rights legislation. It is essential for prosecutors to understand their responsibility to victims and to put it into practice daily. When victim advocates are available, prosecutors should cultivate a good working relationship with them, and take advantage of their expertise in protecting the rights of victims and referring victims to services.

Victims must be provided safe and comfortable waiting areas, informative case updates, and interpreter services when needed. While a victim's right might include procedural notifications, a request for restitution, and the opportunity to make victim impact statements, the most basic right of every victim of crime is being treated with dignity, respect, and sensitivity throughout the criminal justice process.³⁰ Confidentiality laws may adversely impact crime victims and prosecutors should support legislation that allows victims access to relevant information involving their cases.

³⁰ Constitution of Maryland, Article 47, Crime Victims' Rights, msa.maryland.gov/msa/mdmanual/43const/html/00dec.html.

Gangs/Crews

The impact of gang/crew activity by youth requires the juvenile justice system to address the problem.

- **Principle:** Adequate resources should be given to prosecutors to assist in the prosecution of gang-related violence and the protection of victims and witnesses.
- **Principle:** Prosecutors must prioritize the identification and prosecution of gangs/crews and gang/crew behavior.
- **Principle:** Prosecutors must know what gangs/crews exist in their jurisdiction and neighboring jurisdictions.
- **Principle:** Specialized prosecution is necessary to assist in the effective prosecution of crimes committed for the benefit of gangs/crews. Prosecutors in large jurisdictions should be encouraged to share information and provide technical assistance regarding gang prosecution with small jurisdictions.
- **Principle:** Prosecutors should work with other community stakeholders to develop comprehensive plans to combat gang/crew violence and prevent youth from joining gangs.

Prosecutors can raise awareness about gang/crew activity and support prevention efforts by giving community presentations on:

- Risk factors for gang/crew membership³¹;
- Positive activities in which youth can participate;
- Signs of gang/crew membership that parents should look for³²;
- Type of gang/crew activity happening in specific communities;

Factors to consider when making decisions in various stages of a case, including diversion, charging, plea bargaining, sentencing/disposition:

- The youth's role in the gang/crew;
- The youth's length of time in the gang/crew;
- Whether or not gang/crew membership played a role in the current offense;
- The youth's history of gang/crew offenses.

Commentary

A gang can be defined as a group of individuals that band together for a common cause and are involved in criminal activity; many gangs are highly organized and operate across state lines. A crew is a more loosely knit group, often based in a neighborhood. These are usually individuals who grew up in or who have

³¹ National Gang Center, "Review of Risk and Protective Factors for Juvenile Delinquency and Youth Gang Involvement," accessed August 7, 2023, nationalgangcenter.ojp.gov/spt/Risk-Factors.

³² OJJDP, *A Parent's Quick Reference Card: Recognizing and Preventing Gang Involvement* (2015), ojjdp.ojp.gov/library/publications/parents-quick-reference-card-recognizing-and-preventing-gang-involvement.

family roots in that neighborhood. Regardless of Gang or Crew affiliation, both groups are often associated with a variety of crimes, including drug trafficking, gun possession, assaults, and even homicides.³³ They may exist in cities, smaller cities, rural, and suburban environments.

Prosecutors must set a high priority within their offices concerning gang/crew issues. Prosecutors assigned to a gang-related crime unit would be well served to understand the dynamics of gang/crew recruitment and engagement, and the various incentives for joining a particular gang or crew. Depending on the size of the jurisdiction and the gang/crew problems in existence, the availability of community programs that address such issues may vary. Check your state's laws for definitions or elements of gang or crew-related crimes and applicable sentencing provisions. One issue often overlooked is the ability to protect witnesses who testify against gang members from retribution by the gang. Witnesses often will not come forward with information about a crime, and if they do, they express concern that testifying will result in retaliation by the gang members against themselves or their families. Horrific cases of such retaliation have occurred.³⁴ Prosecutors must be aware of all available programs that protect victims and witnesses.

Small and medium size jurisdictions may not have the staff and resources to create such units. To provide the most reasonable alternatives for these offices, it is hoped that larger offices can provide assistance. The experience and information available to the larger office, if shared, could assist smaller offices in protecting their communities from gang-related crime.

Guns and Other Dangerous Weapons

- **Principle:** Prosecutors should prioritize cases involving guns and other dangerous weapons, and to the extent possible, should provide enhanced supervision on these cases to ensure that outcomes promote accountability, protect the community, and address the rehabilitative and treatment needs of the youth.
- **Principle:** Prosecutors should maintain statistics on these cases and collaborate with other stakeholders to suppress gun violence.

Commentary

The availability, distribution, and use of guns by youth in the commission of crimes continues to impact communities. Teens obtain access to guns and other weapons from a wide variety of sources, including their home, friends, family members and their neighborhood. Cities across the country are reporting increases in youth shootings, including where youth are the victims.³⁵

Prosecutors should continue to take a firm stance on youth who possess or use dangerous weapons, while also ensuring that their rehabilitative needs are met. To the extent possible, cases involving dangerous weapons should be reviewed by supervisors throughout their pendency, and statistics should be maintained regarding how many juvenile cases the office handled regarding dangerous weapons, what areas the

³³ Government of the District of Columbia Metropolitan Police Department, *Understanding and Avoiding Gangs* (2011), mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/understanding_avoiding_gangs.pdf.

³⁴ U.S. Attorney's Office, Northern District of Georgia, "Eight gang members sentenced to federal prison for their roles in the execution of a teenage gang member for suspected 'snitching,'" press release, November 30, 2022, www.justice.gov/usao-ndga/pr/eight-gang-members-sentenced-federal-prison-their-roles-execution-teenage-gang-member.

³⁵ Liz Szabo, "Pandemic Stress, Gangs, and Utter Fear Fueled a Rise in Teen Shootings," KFF Health News, March 14, 2023, khn.org/news/article/teen-shootings-gun-violence-pandemic-stress-gangs-trauma-fear/.

incidents occurred in, and whether anyone was injured. Prosecutors should collaborate with law enforcement and other stakeholders including community groups, to address, and suppress gun violence in their jurisdictions by sharing information to the extent permitted by law, by developing prevention and enforcement strategies, and advocating for strict penalties for adults who give youth access to dangerous weapons.

Human Trafficking and Commercial Sexual Exploitation of Youth

Human trafficking and commercial exploitation of youth is a growing problem in America. An estimated 1.2 million children are trafficked each year.³⁶ Prosecutors should work closely with law enforcement, child protection, and other agencies to address sexual exploitation and human trafficking of youth to protect these vulnerable victims of these crimes.

- **Principle:** Prosecutors should consider a multi-systemic approach to addressing sexual exploitation and human trafficking involving youth through partnerships with law enforcement, child protection and family services, medical and mental health providers and other groups and agencies working to keep youth safe from such exploitation.
- **Principle:** Prosecutors should consider youth arrested for prostitution as victims. Such conduct by youth should be addressed in the child protection system or through qualified service providers to the extent possible, and not through the juvenile delinquency system.
- **Principle:** Prosecutors should be trained to identify justice-involved youth who are commercially sexually exploited (CSEC).

Commentary

Child sex trafficking is a form of child abuse that occurs when a child under the age of 18 is advertised as, solicited for, or exploited through a commercial sex act, an act where something of value is given to or received by any person for sexual activity.³⁷

Several states have enacted “Safe Harbor” laws aimed at treating youth involved in prostitution as crime victims and not juvenile delinquents.³⁸ These laws are premised on the fact that youth are not voluntarily engaged in this conduct but are often being forced or coerced into it by sexual predators and human traffickers. Prosecutors should treat sexually exploited youth as victims, and such youth should be referred to the child protection system, to the extent the law allows for it, or to qualified service providers rather than the juvenile delinquency system.

If a youth who has been commercially sexually exploited commits an offense other than a prostitution-related offense, the fact that the youth has been commercially sexually exploited should be a factor when a prosecutor is making a decision regarding diversion, charging, plea bargaining, and disposition/sentencing.

³⁶ Sunriseforchildren.org, “Human Trafficking Statistics and Facts,” accessed August 7, 2023, sunriseforchildren.org/human_trafficking/.

³⁷ National Center for Missing & Exploited Children, “Child Sex Trafficking,” accessed August 7, 2023, www.missingkids.org/theissues/trafficking.

³⁸ Development Services Group, Inc., *Safe Harbor Laws: Changing the Legal Response to Minors Involved in Commercial Sex, Phase 3. The Qualitative Analysis* (2018), www.ojp.gov/pdffiles1/ojdp/grants/253244.pdf.

The Intersection Between Adolescent Brain Science and Juvenile Justice

Chapter 3

Katie Jerstad

Introduction

Society has known for a long time that child and adolescent brains are different than those of adults. This difference was the reason for the creation of the juvenile justice system in Chicago in the late 1890s.¹ Even before advances in brain science explained these behavioral differences between teens and adults, states legislated an 18-year-old threshold for “adulthood”—the right to vote, the right to join the military, the right to marry without parental consent, etc. On the one hand, some laws are designed to protect the young and society from youth’s immaturity, such as setting the legal age for alcohol consumption at 21. On the other hand, many states’ juvenile court jurisdiction has no floor and children ten years of age or younger can be brought before a juvenile court judge. Most states allow for youth as young as fourteen to be prosecuted as adults for the most serious crimes. During this period of brain growth, American adolescents live in a “precarious middle ground” and legal status between innocence and immaturity and responsibility and accountability.²

With the advancements in brain science, society has come to accept that, while most young adults may stop growing vertically by age 17 and 18, their brains continue to develop into their mid-to-late 20s. Advancements in science in the last 20 years, particularly research involving MRIs and then functional MRIs, enhanced our knowledge about the differences not only in the architecture between adolescents’ and adults’ brains but the functional pathways.

Some of these differences, such as lack of maturity, undeveloped sense of responsibility, and higher levels of risk-taking, were the basis for legislative changes as well as expansion of Eighth Amendment protections for juveniles by the United States Supreme Court. Some state legislatures have determined 17-year-olds are adults for criminal proceedings while other states are raising the age to 19 or 20 for adult prosecution to enable emerging adults the benefits of the juvenile justice system for certain types of offenses. Some jurisdictions have already enacted legislation or are considering legislation that would raise the floor of juvenile justice prosecution to 12 or 13 so as to prevent younger children from becoming “system involved.” The U.S. Supreme Court, in a series of cases, considered the appropriate sentences and sentencing procedure for crimes committed by youth in light of brain science advancements (*Roper*, *Graham*, *Montgomery*, and *Jones*, discussed below). Adolescent brain science is influencing these changes to some degree, but prosecutors must be cautious about what assumptions are being made about brain science in Court.

¹ *In re. Gault*, 387 U.S. 1, 15, 87 S. Ct. 1428, 1437 (1967). “The Juvenile Court movement began in this country at the end of the last century. From the juvenile court statute adopted in Illinois in 1899, the system has spread to every State in the Union, the District of Columbia, and Puerto Rico.” However, it was lacking in expertise and legal resources. As the *Gault* Court included in a footnote, see *Harvard Law Review Note*, 809; and McCune, *Profile of the Nation’s Juvenile Court Judges* (monograph, George Washington University, Center for the Behavioral Sciences, 1965).

² ACT4JuvenileJustice, *Adolescent Brain Development & Juvenile Justice Fact Sheet*, JJDPFA Fact Book, accessed August 7, 2023, www.gvsu.edu/cms4/asset/903124DF-BD7F-3286-FE3330AA44F994DE/ad_brain_development_jj_fact_sheet.pdf.

Part One of this chapter aims to cover what prosecutors need to know about adolescent brain science and Part Two will cover how the Courts have incorporated it into their reasoning in various cases. Since the U.S. Supreme Court decided *Miller v. Alabama* in 2012, study of the brain's development throughout late adolescence has appeared in more than one hundred new publications.³ Of over 1,000 legal cases referencing the same or similar neuroscience discussed in *Miller*, roughly half concerned individuals who were 18 years old or older at the time of the offense for which they are charged.⁴ Almost 40% of those serving the longest prison sentences in the U.S. were incarcerated before the age of 25.⁵ The implications of brain science research could alter the U.S. judicial and correctional systems significantly and some vocal proponents are advocating for that.

Within the adolescent brain science field, neuroscientists have learned through their studies that complex interactions between biology and environment influence brain development. Neuroscientists recognize that both positive and negative experiences and environments affect child and adolescent development and life outcomes. Advanced research has helped us better understand the parts of the adolescent brain that control or influence youth decision-making, impulsivity, and risk-taking. The research has led to changes in laws, policies, and juvenile justice systems across the country that embrace a youth's ability to correct criminal behavior as compared to an adult whose brain is no longer growing. This chapter aims to discuss that research and what has been learned as well as how the courts have taken that research into consideration in reaching decisions on specific youth cases.

How this general population research is applied to specific case facts is a matter of significant importance to the Youth Court and Adult Court Prosecutors. Juvenile court prosecutors have the dual task of advocating for community safety while also considering the rehabilitative needs of the juvenile involved, taking into account the emotional and psychological development of the youth. To some degree, adolescent brain science and the Adverse Childhood Experiences (ACEs) study (discussed below) will inform that dual task.

Part One: Brain Science

Areas of the Brain

The central nervous system is made up of the brain and spinal cord, which are interconnected with nearly every other part of your body with the help of **nerves**.⁶ The brain can be divided into three basic units: the forebrain, the midbrain, and the hindbrain.

The **forebrain** is the largest part of the brain and consists primarily of the cerebrum and the structures hidden beneath it (the "inner brain"). The **cerebrum** holds memories, allows you to plan, imagine, think, recognize friends, read books, and play games. The cerebrum is split into two halves by deep fissures. The ability to form words seems to lie primarily in the left hemisphere, while the right hemisphere seems to control many abstract reasoning skills. These hemispheres communicate with each other through a thick

³ Center for Law, Brain & Behavior at Massachusetts General Hospital, *White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers* (January 27, 2022), 7, clbb.mgh.harvard.edu/white-paper-on-the-science-of-late-adolescence/.

⁴ *Id.*

⁵ *Id.*, 8.

⁶ JoAnn Deak and Terrence Deak, *The Owner's Manual for Driving Your Adolescent Brain* (San Francisco: Little Pickle Press, 2013), 13.

tract of nerve fibers called the **corpus callosum**. *During adolescence, the corpus callosum begins to thicken, “making stronger connections between different parts of your brain, so suddenly things like abstract math start to click.”*⁷

The **midbrain** contains the uppermost part of the brain stem, which controls reflex actions and circuitry controlling eye movement and other voluntary movements.⁸

The **hindbrain** includes the upper part of the spinal cord, the brain stem and the cerebellum. The hindbrain controls respiration and heart rate.⁹ The **cerebellum** coordinates movement and motor control.¹⁰ This includes balance, coordination, fine motor learning upon repetition, integration of muscle groups to provide smooth body movements and posture.¹¹ *Recent testing shows this area is also responsible for some cognitive functions relating to emotional processing, language, attention, fear, and pleasure.*¹²

The **cerebral cortex** is a vital layer of tissue, like bark, that surrounds or coats the cerebrum and the cerebellum.¹³ Often referred to as “**gray matter**” in the brain, the nerves in this area have less insulation causing a slightly darker appearance than other whiter parts of the brain.¹⁴

The term “gray matter” is also used to describe the unmyelinated (insulated) neurons in the brain, the density of which appear to increase as a child develops into early adulthood.¹⁵

Each of the two hemispheres of the cerebrum contain lobes each specializing in a distinct function: the occipital, temporal, parietal, and frontal lobes.

The **occipital lobes** are two areas at the back of the brain that are primarily responsible for image and visual processing, linking what we see with images stored in memory.

The **temporal lobes** process sensory input for hearing and assists with language and sound recognition. It is located just above the spinal cord. At the top of the temporal lobes is an area responsible for receiving information from the ears.¹⁶ In the left temporal lobe, a region important for memory and language, gray matter density continues to grow until age 30, according to MRI studies.¹⁷

⁷ *Id.*

⁸ National Institute of Neurological Disorders and Stroke, “Brain Basics: Know Your Brain,” accessed March 17, 2023, www.ninds.nih.gov/health-information/public-education/brain-basics/brain-basics-know-your-brain.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*; Olivia Guy Evans, “Cerebellum: Functions, Structure, and Location,” Simply Psychology, last updated July 3, 2023, www.simplypsychology.org/what-is-the-cerebellum.html#Functions.

¹² Jill Seladi-Schulman, “What Is the Cerebellum and What Does It Do?,” Healthline, last reviewed February 11, 2020, www.healthline.com/health/cerebellum#function.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Efstathios D. Gennatas et al., “Age-Related Effects and Sex Differences in Gray Matter Density, Volume, Mass, and Cortical Thickness from Childhood to Young Adulthood,” *Journal of Neuroscience* 37, no. 20 (May 17, 2017): 5065–5073, doi.org/10.1523/JNEUROSCI.3550-16.2017.

¹⁶ *Id.*

¹⁷ Lindzi Wessel, “The Teen Years,” BrainFacts.org, September 26, 2019, www.brainfacts.org/thinking-sensing-and-behaving/childhood-and-adolescence/2019/the-teen-years-092619.

The temporal lobes contain a **limbic system** which handle emotions, instincts, goal-directed behavior such as thirst, appetite for food, and other things like social interaction.¹⁸ The limbic system activates when one experiences survival instincts and reward/pleasure. The limbic system is a powerful brain region responsible for motivation, fear, fight or flight, anger, and pleasure. *The limbic system can overtake the frontal lobes' executive functions in a teen, especially when stressors are involved. It can cause teens to experience higher "highs" and lower "lows" and makes a teen especially sensitive to emotional cues, information, and rewards.*¹⁹

The **amygdala** is a crucial part of the limbic system connected to the **ventral anterior cingulate cortex** (vACC). It is activated when we experience basic emotions like fear, anger and pleasure.²⁰ It is also involved in binding individual memories with particular emotions.²¹ It "becomes activated when you feel a very strong emotion, especially in response to a fearful situation, and files that intense emotion in your memory bank."²²

The **parietal lobes** are on the top of the brain and integrates information from sensory input like touch, taste, aroma, pain, and temperature. Reading and arithmetic are also functions of each parietal lobe.²³ Rewards circuits to the parietal cortex help with attention.²⁴

The **somatosensory cortex** is the front part of the parietal lobes and receives information about "temperature, taste, touch, and movement from the rest of the body."²⁵

The **frontal lobes** are at the front of your brain behind the forehead. The frontal lobe contains the prefrontal cortex (PFC), thought of as the seat of executive functioning. Functions of the frontal lobe include short-term storage site for ideas, attention, abstract thinking, emotional and behavioral control, long term planning, motivation, goal directed behavior, and understanding and evaluating consequences. *The frontal lobes are the last area of the brain to fully develop. This late maturation of the frontal lobe might explain some of the characteristics of a "typical teenager" such as short attention span, impulsive behavior, and forgetting homework.*²⁶

¹⁸ Deak, *The Owner's Manual*, 15.

¹⁹ Harvard Health Publishing, "The adolescent brain: Beyond raging hormones," March 7, 2011, www.health.harvard.edu/mind-and-mood/the-adolescent-brain-beyond-raging-hormones.

²⁰ PracticalPie, "Anterior Cingulate Cortex," August 9, 2022, practicalpie.com/anterior-cingulate-cortex/.

²¹ *Id.*

²² Deak, *The Owner's Manual*, 43.

²³ National Institute of Neurological Disorders and Stroke, "Brain Basics: Know Your Brain."

²⁴ Emily Underwood, "Teens can have excellent executive function—just not all the time," *Knowable Magazine*, April 20, 2023, knowablemagazine.org/article/mind/2023/executive-function-in-teen-brains.

²⁵ National Institute of Neurological Disorders and Stroke, "Brain Basics: Know Your Brain."

²⁶ Lindzi Wessel, "The Teen Years."

Special areas within the frontal lobe are the **motor cortex** (which helps plan, control and execute voluntary body movement, like moving your arm or kicking a ball), the **prefrontal cortex** (the “conductor”²⁷ for “executive functions” such as thinking, problem-solving, reasoning, impulse-control) and **Broca’s area** (involved in speech production). *The prefrontal cortex also supervises and directs other areas of the brain.*²⁸ *The prefrontal cortex is also the final area of the human brain to mature.*²⁹

Disruption of functions associated with the frontal lobe may lead to impairments of foresight, strategic thinking, and risk management.³⁰ One “hallmark of frontal lobe dysfunction is difficulty in making decisions that are in the long-term best interests of the individual.”³¹ How do disruptions or dysfunction of the frontal lobe occur? As discussed below, disruptions or dysfunction may result from traumatic events (both physical or emotional trauma, chronic toxic stress, discussed in more depth below) or substance use.

Deep in the “**inner brain**” are the parts of the brain that act as gatekeepers between the spinal cord and cerebral hemispheres. Like lobes, these come in pairs, duplicated in the other cerebral hemisphere. These parts are the hypothalamus, thalamus, hippocampus, and basal ganglia.

The **hypothalamus**, part of the limbic system, mediates between the endocrine and central nervous systems³² (wakes you up in the morning, gets adrenaline flowing, important emotional center, controlling molecules that make you feel exhilarated, angry or unhappy). According to a 1972 study by psychologist Donald Hebb, the hypothalamus contains from the time of birth “the anatomical circuitry of instinctual violence.”³³ It contains a section called the **nucleus accumbens** which is part of reward system and is associated with motivation and behavioral reinforcement.³⁴

The **thalamus** is the center of communication between the spinal cord and cerebrum.

The **hippocampus** is part of the limbic system and acts as a memory indexer—sending memories out to appropriate parts of the brain for long term storage and retrieval when necessary. Working with the amygdala, the hippocampus ensures that you remember where and how you were previously hurt or injured and other important environmental cues to predict where danger might be lying in wait and effectively protect you.³⁵

²⁷ Underwood, “Teens can have excellent executive function.”

²⁸ Cleveland Clinic, “Cerebral Cortex,” last reviewed May 23, 2022, my.clevelandclinic.org/health/articles/23073-cerebral-cortex.

²⁹ ACT4JuvenileJustice, *Adolescent Brain Development & Juvenile Justice*, citing Paul Thompson, “Time-Lapse Imaging Tracks Brain Maturation From Ages 5 to 20,” National Institutes of Mental Health and the University of California Los Angeles, May 2004; also author interview with Robin Jenkins, June 2006.

Coalition for Juvenile Justice, *What Are the Implications of Adolescent Brain Development for Juvenile Justice?* (Washington, DC: Coalition for Juvenile Justice, 2006), 3, accessed January 13, 2016, www.juvjustice.org/sites/default/files/resource-files/resource_134.pdf.

³⁰ See M.-Marsel Mesulam, “Behavioral Neuroanatomy,” in *Principles of Behavioral and Cognitive Neurology*, 2nd ed., ed. M.-Marsel Mesulam (Oxford University Press, 2000), 47–48.

³¹ See Antonio R. Damasio and Steven W. Anderson, “The Frontal Lobes,” in *Clinical Neuropsychology*, 4th ed., ed. Kenneth M. Heilman and Edward Valenstein (Oxford University Press, 2003), 404, 434.

³² PracticalPie, “Anterior Cingulate Cortex.”

³³ Chris Murphy, *The Violence Inside Us: A Brief History of an Ongoing American Tragedy* (New York: Random House, 2020), 38.

³⁴ PracticalPie, “Anterior Cingulate Cortex.”

³⁵ Deak, *The Owner’s Manual*, 43.

The **basal ganglia** is a cluster of nerve cells surrounding the thalamus. It is responsible for initiating and integrating movements.³⁶

No parts of the brain would work without many different cell types doing their job, but the primary functional cell in the brain is called the **neuron**.³⁷ Neurons are different from other cells in the body because they are electrically charged and process electrical information.³⁸ “Groups of neurons in one brain structure send their **axons** together to other brain structures, forming a **neural pathway**.”³⁹ “Specialized sensory neurons translate messages from the environment into **electrical impulses**—the language of the brain to form a **sensation**.”⁴⁰

Neurons require the support of glial cells, or **glia**, which provide nourishment by releasing proteins that act like fertilizer to help neurons thrive and remove waste material from neurons.

All sensations, movements, thoughts, memories, and feelings are the results of signals passed through neurons.⁴¹ This activation takes place with the help of **vesicles** that release **neurotransmitters** from the end of its axon (which can be up to a meter long) that carry a signal through the **synapse** (the place where a signal passes from the neuron to another cell) to a receptor on a neighboring cell.⁴²

Different types of neurotransmitters can activate or dampen a cell’s activity level. “There are two types of neurotransmitters: **inhibitory** neurotransmitters send a STOP signal to the next neuron (like hitting the brakes) and **excitatory neurotransmitters** send a signal for the next neuron to GO (like stepping on the gas).”⁴³ Scientists have learned that certain diseases stem from over-production or under-production of certain types of neurotransmitters.⁴⁴

Dopamine, a neurotransmitter (and hormone) that influences memory, concentration, problem-solving and other mental functions, *is not at its most effective level in adolescence*.⁴⁵ “Dopamine is critical to the brain’s reward system—creating a neurochemical loop that links a stimulus with pleasure and satisfaction.”⁴⁶ One theory on the bio-chemistry of violence posits that when dopamine levels are off-kilter, the brain may offer higher reward signals to violence and aggression than in brains where the levels are more stable.⁴⁷

³⁶ National Institute of Neurological Disorders and Stroke, “Brain Basics: Know Your Brain.”

³⁷ Deak, *The Owner’s Manual*, 16.

³⁸ *Id.*, 17.

³⁹ *Id.*, 17.

⁴⁰ *Id.*, 20.

⁴¹ *Id.*, 18.

⁴² *Id.*, 19.

⁴³ *Id.*, 18.

⁴⁴ National Institute of Neurological Disorders and Stroke, “Brain Basics: Know Your Brain.”

⁴⁵ ACT4JuvenileJustice, *Adolescent Brain Development & Juvenile Justice*, citing Linda Patia Spear, “Neurodevelopment During Adolescence,” in *Neurodevelopmental Mechanisms in Psychopathology*, ed. Dante Cicchetti and Elaine F. Walker (Cambridge University Press, 2003); Coalition for Juvenile Justice, *What Are the Implications of Adolescent Brain Development*.

⁴⁶ Murphy, *The Violence Inside Us*, 40.

⁴⁷ *Id.*

Much knowledge of brain development and many of the studies rely on the use of MRIs and functional MRIs (fMRI). A fMRI uses the same equipment as an MRI, however, in a fMRI a task or stimulus is introduced. The fMRI measures blood flow that results from or is indicative of an increase in neuronal connectivity, i.e., brain activity, resulting from the stimuli.⁴⁸ Researchers infer that the part of the brain with increased blood flow resulted from the stimulus or was used in the task. Where an MRI provides a static structural view of the brain, the fMRI can show how those structures react to a stimulus.

Past studies have guided newer neuroimaging studies to look at:

the role of a relatively small number of brain regions in mediating social-affective behavior. Specifically, much attention has been given to the **amygdala, striatum, insula, and anterior cingulate cortex (ACC)**, and a number of regions within the **prefrontal cortex (PFC)**. These regions work together to assign salience, promote learning, monitor conflict, compute relative valence of social stimuli, and integrate this information to generate and guide affective behaviors toward wider goals and within the contexts in which they occur.⁴⁹

Where there was once a focus on the “regional activation” with certain stimuli, more recent studies are looking at the “functional interconnection” between and among these brain regions and areas by looking at neural substrates and networks.⁵⁰

How the Brain Develops and Why that Leads to Risky and Other Behavior

The brain develops through a combination of our genes, environment, experiences, and interpersonal relations. By age three, the brain has grown to almost ninety percent of its adult size.⁵¹ “During adolescence the brain gets larger and heavier overall, ridges (**gyri**) and folds (**sulci**) in the cortex become more pronounced and the brain takes on a more cauliflower-like shape.”⁵² Aside from its physical appearance or growth in size, the brain becomes more complex and efficient during adolescence in part because of the strengthening of neural pathways and increased effectiveness of glia protecting and nourishing of neurons.⁵³

⁴⁸ John C. Gore, “Principles and practice of functional MRI of the human brain,” *The Journal of Clinical Investigation* 112, no. 1 (July 2003): 4–9, doi.org/10.1172/JCI19010.

⁴⁹ Amanda E. Guyer, Jennifer S. Silk, and Eric E Nelson, “The neurobiology of the emotional adolescent: From the inside out,” *Neuroscience & Biobehavioral Reviews* 70 (November 2016): 74–85, doi.org/10.1016/j.neubiorev.2016.07.037.

⁵⁰ *Id.*

⁵¹ Child Welfare Information Gateway, *Child Maltreatment and Brain Development: A Primer for Child Welfare Professionals* (U.S. Department of Health and Human Services, Administration for Children and Families, Children’s Bureau, 2023), www.childwelfare.gov/pubs/issue-briefs/brain-development/.

⁵² Deak, *The Owner’s Manual*, 25.

⁵³ *Id.*

Adolescence is a tricky time because of this variable rate of growth across different regions of the brain. The growth period referred to as “adolescent brain development” *typically begins at puberty and is roughly defined as lasting from age 10 to 25.*⁵⁴ The functions of the brain continue to develop into the mid-20s and for some parts, the early 30s.⁵⁵ Development of each area of the brain is generally completed at different rates and times⁵⁶ rather than linearly like height. “The hindbrain structures are more mature at birth than structures of the forebrain.”⁵⁷ The forebrain structures, like the cerebral cortex, are not fully developed until adulthood.⁵⁸

There are **critical periods** for developing certain abilities. The critical period for learning a language, for example, is from birth to age eight. Once a critical period passes, the brain begins to fossilize. At that point, you could still learn a language, but it will take more time and effort.⁵⁹

This doesn’t mean that the brain stops growing at age eight—the brain will continue to produce new neurons throughout a lifetime in a process called **neurogenesis**.⁶⁰ “This happens mostly in brain structures that help with **plasticity**, or learning.” Regular exercise has been shown to increase neurogenesis. The more a teen stimulates, challenges, and stretches their mind, the more **neurotrophins** the brain will produce. Neurotrophins are proteins produced by glial cells that act like fertilizer for the brain, stimulating neurogenesis and increasing resiliency to stress and capability of handling new experiences.⁶¹

Three processes occur simultaneously in the brain of a teen at a greater rate than at any other time of brain development. These are cell proliferation, pruning and myelination.

Cell proliferation is a growth spurt of neurons and connections, mainly in the frontal lobe, which generally begins at the onset of puberty.

Synaptic pruning of neuronal connections eliminate those connections that are not being used as often. Pruning is a fine tuning of the brain through one’s environment and experiences. By pruning away irrelevant synapses, neural signals can travel and transmit information more efficiently.

Finally, **myelination** is the insulation of axons of the neurons to enable fast and efficient transmission of electrical and chemical impulses.⁶² Myelination takes place from birth through late adolescence, but different brain structures achieve a fully myelinated state at different ages. “As myelination becomes more extensive, the brain becomes more capable of complex skills.”⁶³

⁵⁴ ACT4JuvenileJustice, *Adolescent Brain Development & Juvenile Justice*.

⁵⁵ National Juvenile Justice Prosecution Center in partnership with NDAA, OJJDP, DOJ, Juvenile Prosecutor Training Curriculum, Instructor Manual, Module 2, Child and Adolescent Development, 28, citing Coalition for Juvenile Justice, *What Are the Implications of Adolescent Brain Development*.

⁵⁶ Deak, *The Owner’s Manual*, 25.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*, 27.

⁶⁰ *Id.*

⁶¹ *Id.*, 41.

⁶² Child Welfare Information Gateway, *Child Maltreatment and Brain Development*.

⁶³ Deak, *The Owner’s Manual*, 29.

With the three processes working at their busiest rate, adolescence is a distinct, transient period of tremendous neuroplasticity. “Because many of the brain circuits involved in social information processing continue to develop throughout the teenage years, adolescence may represent a sensitive period for the long-term organization of social behavior.”⁶⁴

One component of social behavior that makes humans unique is **empathy**. Scientists believe that the **right temporal parietal junction** (RTPJ) is particularly important for developing empathy and that a critical period of its development happens during adolescence. The **medial prefrontal cortex** is strongly engaged when you think about yourself and others as well, but is more active in adolescents than in adults.⁶⁵ The **temporoparietal junction** becomes active when you switch your perspective between yourself and others. *Some research on adolescents with a history of delinquent behavior found that the temporoparietal junction showed less variation in activity across different social situations in adolescents with a history of delinquency, compared with others.*⁶⁶ One potential explanation is that they are not as successful in switching from their own perspective to others’, but other explanations are possible.

Researchers have concluded that *face to face human interaction activates this part of the brain and the more activation, the more positive social interactions one will have (suggesting more empathy)*. Researchers are concerned, however, about decreased use of this area of the brain by adolescents today who are communicating mostly electronically and certainly did so during the Covid 19 pandemic. Rodent studies have shown that when contact with other rodents was restricted, the rodents failed to develop normal social interactions. “These effects are particularly pronounced when social interaction is restricted during adolescent, suggesting that this is a critical/sensitive period for social interaction.”⁶⁷

On the other side of the spectrum from empathy is **rage, aggression, hate, violence, or antipathy**. Young children often exhibit violent tendencies—and studies of twin toddlers supported this observation. “The children generally were able to unlearn violence, suggesting that while violence may be part of our nature, nurture plays an increasingly influential role as children gain more exposure to alternative methods of conflict and rage resolution.”⁶⁸ The study suggests that “[v]iolence may be a part of human biology, but it is not destiny.”⁶⁹ “As children grow, they learn to manage their emotions, communicate with others and deal with conflict.”⁷⁰

⁶⁴ Guyer, “The neurobiology of the emotional adolescent,” 2.1.

⁶⁵ Tim Vernimmen, “Inside the adolescent brain,” *Knowable Magazine*, June 30, 2022, knowablemagazine.org/article/mind/2022/inside-adolescent-brain.

⁶⁶ Wouter van den Bos et al., “Neural correlates of social decision-making in severely antisocial adolescents,” *Social Cognitive and Affective Neuroscience* 9, no. 11 (December 2014): 2059–2066, doi.org/10.1093/scan/nsu003.

⁶⁷ Deak, *The Owner’s Manual*, 44–45.

⁶⁸ Murphy, *The Violence Inside Us*, 38, referencing a 2014 University of Montreal study.

⁶⁹ *Id.*

⁷⁰ *Id.*

Kent Kiehl, a neuroscience professor at the University of New Mexico, is developing a database of brains of hardened criminals and found that they have, in adulthood, different brains. There is less gray matter; the amygdala is smaller; and there are defects in limbic and paralimbic cortex.⁷¹ This study is backed up by other studies that show brain scans of those prone to violence look different from those who are not.⁷² Scientists are trying to understand the role that not only genetics but also brain chemicals play in the brain architecture of this one percent of the population (brain chemicals/neurotransmitters such as norepinephrine, dopamine, and serotonin for instance).⁷³

It would be an oversight to not mention **puberty** also taking place during adolescence and causing rapid growth and maturation of body parts. Puberty starts in the brain when a small group of neurons in the hypothalamus begin to produce a protein called **kisspeptin**.⁷⁴ When sufficient kisspeptin is produced, a specific hormone called **gonadotropin-releasing hormone** (GnRH) is released, which stimulates the release of **testosterone** (in males) and **estrogen** (in females) that surge around the body during puberty.⁷⁵ Animal studies have contributed to our knowledge of the influence of puberty and specific hormones on adolescent behavior, brain development and emotionality.⁷⁶

Unlike popular belief, hormones and sex drive are not the only source of **risky behavior** for this age group. Adolescent brains' cognitive processes are mature by mid-teens, but self-regulation and other socio-emotional processes are not complete until early adulthood. The neural circuitry needed to produce an executive response is already there in adolescence, but an adolescent's ability to access these systems in a sustained and reliable way is variable.⁷⁷ Without consistent access to that system, teens use a different area of the brain to assist in making decisions than adults.⁷⁸ This is a time when synaptic pruning in the PFC is occurring.⁷⁹ Studies have shown that adolescents' greater involvement than adults in risk taking does *not* stem from ignorance, irrationality, delusions of invulnerability, or faulty calculations but from use of the emotional center of their brain.⁸⁰ *Because the frontal cortex is the last to develop, teens rely heavily on parts of the brain that house their emotional centers (the limbic system of the temporal lobe) when making decisions.*⁸¹

⁷¹ Murphy, *The Violence Inside Us*, 40.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Deak, *The Owner's Manual*, 33–34.

⁷⁵ *Id.*

⁷⁶ National Juvenile Justice Prosecution Center in partnership with NDAA, OJJDP, DOJ, Juvenile Prosecutor Training Curriculum, Instructor Manual, Module 2, Child and Adolescent Development, 28, citing Coalition for Juvenile Justice, *What Are the Implications of Adolescent Brain Development*.

⁷⁷ Underwood, "Teens can have excellent executive function."

⁷⁸ ACT4JuvenileJustice, *Adolescent Brain Development & Juvenile Justice*; Coalition for Juvenile Justice, *What Are the Implications of Adolescent Brain Development*.

⁷⁹ Underwood, "Teens can have excellent executive function."

⁸⁰ Valerie Reyna and Frank Farley, "Risk and Rationality in Adolescent Decision Making," *Psychological Science in the Public Interest* 7, no. 1 (2006): 1–44, doi.org/10.1111/j.1529-1006.2006.00026.x; Valerie Reyna and Frank Farley, "Is the Teen Brain Too Rational?" *Scientific American Mind* 17, no. 6 (June 2007), www.scientificamerican.com/article/is-the-teen-brain-too-rational/.

⁸¹ Child Welfare Information Gateway, *Child Maltreatment and Brain Development*.

Perhaps this is the reason one author and scientist described adolescence as “like driving a car with a sensitive gas pedal and bad brakes.”⁸² More recent research indicates that adolescence is more like driving a car that is generally smooth and well-functioning, except, in highly emotionally charged situations, the gas pedal becomes more sensitive and the brakes go bad temporarily. Studies have shown that adolescents can make well-reasoned decisions when things are calm but struggle with activating their PFC when emotions are high.⁸³

“Recent research has shown that adolescents often act impulsively or engage in risky behaviors in part because the PFC is not yet fully mature, and not yet capable of effectively reigning in impulsive actions. This may be because adolescents don’t have as much GABA, a key inhibitory neurotransmitter, in their PFC as adults.”⁸⁴ A small percentage of youth engage in extremely risky behavior, which is a problem for juvenile justice systems, but according to researchers, “a side effect of the helpful, adaptive function of risk-taking that propels teens into adulthood.”⁸⁵

When compared to adults’ cognitive control, adolescents’ is not as good unless there is a **short-term reward** involved. Kids with higher levels of dopamine, the neurotransmitter involved in reward, in neurons in the basal ganglia exhibited cognitive control at levels of an adult when a short-term reward was offered for following the rule (“don’t look at the light”).⁸⁶

This is consistent with another study looking at adolescents’ lack of impulse control and their lower level of dopamine than adults. In one study, adolescents with higher dopamine levels could control their impulsive responses better than those with less dopamine when there was a reward involved.⁸⁷

Due to fluctuating dopamine levels in adolescents and the reality that short-term rewards are not always available, cognitive control is inconsistent for this age group. Due to teens’ excitement to pursue short-term rewards, some think that teens are naturally and chemically geared to seek greater risks for social, emotional, and physical reasons.⁸⁸ Some think that, at this point in their brain development, teens are naturally attracted to risky activities.⁸⁹

⁸² Juvenile Prosecutor Training Curriculum, Instructor Manual, Module 2, Child and Adolescent Development, National Juvenile Justice Prosecution Center in partnership with NDAA, OJJDP, DOJ, 28, citing *Age of Opportunity*, Laurence Steinberg.

⁸³ B. J. Casey, “Beyond Simple Models of Self-Control to Circuit-Based Accounts of Adolescent Behavior,” *Annual Review of Psychology* 66, no. 1 (2015): 295–319, doi.org/10.1146/annurev-psych-010814-015156.

⁸⁴ Deak, *The Owner’s Manual*, 50.

⁸⁵ Vernimmen, “Inside the adolescent brain.”

⁸⁶ Underwood, “Teens can have excellent executive function.”

⁸⁷ Daniel Siegel, “Dopamine and Teenage Logic,” *The Atlantic*, January 24, 2014, www.theatlantic.com/health/archive/2014/01/dopamine-and-teenage-logic/282895/. Also discussed in National Juvenile Justice Prosecution Center in partnership with NDAA, OJJDP, DOJ, Juvenile Prosecutor Training Curriculum, Instructor Manual, Module 2, Child and Adolescent Development, 28, citing Coalition for Juvenile Justice, *What Are the Implications of Adolescent Brain Development*.

⁸⁸ National Juvenile Justice Prosecution Center in partnership with NDAA, OJJDP, DOJ, Juvenile Prosecutor Training Curriculum, Instructor Manual, Module 2, Child and Adolescent Development, 28, citing Coalition for Juvenile Justice, *What Are the Implications of Adolescent Brain Development*.

⁸⁹ *Id.*

Some theorize that adolescents experience “reward-deficiency syndrome” that occurs when youth are no longer stimulated by activities that thrilled them when they were younger, and they engage in activities involving greater risk and higher stimulation in order to achieve similar level of excitement.⁹⁰ These theories contemplate the adolescent actor choosing risk or reward over reason as purposeful or volitional behavior when the biological explanation (though perhaps not a justification) makes it more complicated than that.

As an example, in one study it was determined, through imaging, that two networks in the frontal lobe of the brain impact adolescent behavior and choices. In this study exploring contraceptive use and pregnancy prevention, it was found that the emotional network dominates the cognitive network and impacts planning and risk assessment.

Under normal conditions, the cognitive network can regulate the social/emotional network. However, when the social/emotional network is highly activated, they do not work together. The emotional network dominates the cognitive network. The result is that emotion, rather than reason, often influences adolescent decision-making.⁹¹

It is probably not a surprise to anyone that a teenager could be emotionally overwhelmed by sexual activity to the point of losing cognitive control. What might come as a surprise is the extent to which not just paramours but **peers** can cause the emotional network to dominate over the PFC.⁹² Peers act like a form of reward that can overwhelm cognitive control.⁹³ *Peer acceptance is extremely important to an adolescent.*⁹⁴ This makes sense from an evolution standpoint—at a time when humans are getting ready to leave the safety of their family, they want to ensure safety and protection provided by the peer group, find a partner and reproduce.⁹⁵ **Peer rejection, pressure, and influence** greatly impact teens emotions and therefore decision-making but even the mere **presence** of peers can greatly influence an adolescent’s decision-making.⁹⁶ On the other hand, a calm atmosphere helps teens brains focus on frontal lobe functions when making decisions instead of only reacting to limbic system impulses.⁹⁷

⁹⁰ ACT4JuvenileJustice, *Adolescent Brain Development & Juvenile Justice*, citing Linda Patia Spear, “Neurodevelopment During Adolescence,” in *Neurodevelopmental Mechanisms in Psychopathology*, ed. Dante Cicchetti and Elaine F. Walker (Cambridge University Press, 2003); Coalition for Juvenile Justice, *What Are the Implications of Adolescent Brain Development*.

⁹¹ Youth.gov, “Adolescent Decision-Making Research,” August 7, 2023, youth.gov/youth-topics/adolescent-health/adolescent-decision-making.

⁹² See Kerry E. Bolger and Charlotte J. Patterson, “Developmental Pathways from Child Maltreatment to Peer Rejection,” *Child Development* 72, no. 2 (March/April 2001): 549–568, doi.org/10.1111/1467-8624.00296; Laura R. Stroud et al., “Sex differences in biological response to peer rejection and performance challenge across development: A pilot study,” *Physiology & Behavior* 169 (February 2017): 224–233, doi.org/10.1016/j.physbeh.2016.12.005.

⁹³ Underwood, “Teens can have excellent executive function.”

⁹⁴ Berna Guroğlu, “Adolescent brain in a social world: Unravelling the positive power of peers from a neurobehavioral perspective,” *European Journal of Developmental Psychology* 18, no. 4 (2021): 471–493, doi.org/10.1080/17405629.2020.1813101.

⁹⁵ Underwood, “Teens can have excellent executive function.”

⁹⁶ Guyer, “The neurobiology of the emotional adolescent.”

⁹⁷ Ken Ginsburg, “How Teens Make Decisions: The Developing Adolescent Brain,” Center for Parent and Teen Communication, September 4, 2018, parentandteen.com/how-teens-make-decisions/; Jay N. Giedd, “The Amazing Teen Brain,” *Scientific American*, May 1, 2016, www.scientificamerican.com/article/the-amazing-teen-brain/.

There are numerous studies in the area of peer rejection, acceptance, presence, but one take away from some studies is that **anxious and depressed adolescents** may have less access to the parts of the brain that can reduce distress from peer rejection, creating a never-ending cycle of negative feelings.⁹⁸ Many major mental illnesses emerge during adolescence—that is why psychiatrists and neurologists have been using these studies to map typical trajectories in a pediatric growth chart to identify risk and fortify weaknesses in certain brain functions.⁹⁹ **Cognitive behavioral therapy** (CBT) trains the brain to start to observe emotional reactions and activate the PFC executive system with the goal that overtime the cognitive control will get stronger, and neural pathways that reinforced the illness will grow weaker due to infrequent use.¹⁰⁰

In addition to anxiety and depression, other illnesses like **substance use** can threaten brain responses, executive functioning and development during adolescence. A neural pathway activated by natural rewards such as social interaction, tasty food, and sexual activity, becomes even more activated when a teen consumes **alcohol or drugs**, causing the teen to seek out those substances over and over again.¹⁰¹ If this behavior becomes pathological, it can result in **addiction**, which takes over your life's priorities and can lead to devastating consequences. Alcohol use reduces neurogenesis and reduces how much a teen can learn later in life. Adolescents metabolize alcohol faster than adults so they can consume more without showing signs of impairment and are less likely to suffer hangover effects.

While the adolescent brain is developing, it is a time of great emotional, social, and moral development. Often the intensity of a teen's emotions can be overwhelming. Pursuing important passions, like pastimes such as music, sports, or writing, can hold a teen steady when they are feeling overwhelmed. These activities or pursuits are sometimes referred to as **North Star**.¹⁰²

Stress

Stress is the internal response the mind-body system creates when experiencing something that the survival brain **perceives** as pressure, a challenge, or a threat. The perception starts in the brain with eyes and ears sending information to the amygdala, which send a distress signal to the hypothalamus, which sends signals to the adrenal glands, which pumps adrenaline into the bloodstream, which raises heart rate, pulse and blood pressure and releases blood sugar (energy) into the body.¹⁰³

Although normally thought of in negative terms, stress is simply our system mobilizing energy to respond to the challenge or threat. A stress response temporarily disrupts our internal equilibrium so we can successfully respond. When our inner equilibrium is perturbed and comes back to baseline, this is called **allostasis** (the return to homeostasis after acute stress with the help of stress hormones).¹⁰⁴ Our bodies are

⁹⁸ Carrie L. Masten et al., "Neural correlates of social exclusion during adolescence: understanding the distress of peer rejection," *Social Cognitive and Affective Neuroscience* 4, no. 2 (June 2009): 143–157, doi.org/10.1093/scan/nsp007.

⁹⁹ Underwood, "Teens can have excellent executive function."

¹⁰⁰ *Id.*

¹⁰¹ Deak, *The Owner's Manual*, 48.

¹⁰² *Id.*, 37.

¹⁰³ Harvard Health Publishing, "Understanding the stress response," July 6, 2020, www.health.harvard.edu/staying-healthy/understanding-the-stress-response.

¹⁰⁴ Bruce S. McEwen, "Allostasis and Allostatic Load: Implications for Neuropsychopharmacology," *Neuropsychopharmacology* 22 (2000): 108–124, doi.org/10.1016/S0893-133X(99)00129-3.

wired for this response as a means of survival. A certain level of stress is necessary for brain development while certain types of stress or prolonged periods of stress can interrupt it.¹⁰⁵

The effect of stress mainly depends on an individual's tolerance to stress, not the actual event causing the stress. Where a person finds themselves on the stress continuum has everything to do with how their system (conscious and unconscious) perceives the situation. Although stress can influence the brain and brain development, it largely depends on several factors including what type of stress an adolescent is experiencing.

The three types of stress are positive stress, tolerable stress, and toxic stress. How these types of stress affect an adolescent's brain development depend on the child's resilience.¹⁰⁶

Positive stress briefly increases the heart rate and causes mild elevations in stress hormones. Positive stress is a normal and essential part of health and human development.

Tolerable stress causes serious but temporary stress responses. This causes a body's alert systems to be activated and it is usually a result of a more severe and/or longer-lasting difficulty such as loss of a loved one or a natural disaster. When tolerable stress activation is for a limited time and buffered by caring adults the brain and organs can recover.¹⁰⁷

Toxic stress, on the other hand, causes prolonged activation of stress response systems in the absence of protective relationships. *Toxic stress occurs with strong, frequent and/or prolonged adversity such as physical or emotional abuse, chronic neglect, and addiction.* Prolonged activation of the body's natural stress response can rewire parts of the brain, altering activity and influence over emotions and the body.¹⁰⁸ The issue with chronic or prolonged stress is that the brain does not completely recovery and remains in an activated state—it can “disrupt the development of brain architecture and other organ systems, and increase the risk for stress-related disease and cognitive impairment, well into adult years.”¹⁰⁹ The good news is that it is possible to develop and build tolerance to stress.¹¹⁰

A growing body of science and respected research supports the belief that children are both vulnerable and resilient. Even youth and families who face extraordinary stresses, as detailed above, have the capacity for **resilience**. Research shows that supportive, responsive relationships with caring adults as early in life as possible can prevent or reverse the damaging effects of the toxic stress response. Family conflict

¹⁰⁵ Harvard University Center on the Developing Child, “Toxic Stress,” accessed August 7, 2023, developingchild.harvard.edu/science/key-concepts/toxic-stress/.

¹⁰⁶ National Scientific Council on the Developing Child, *Excessive Stress Disrupts the Architecture of the Developing Brain: Working Paper #3*, updated ed. (2005/2014), developingchild.harvard.edu/resources/wp3/.

¹⁰⁷ Harvard University Center on the Developing Child, “Key Concepts,” accessed August 7, 2023, developingchild.harvard.edu/science/key-concepts/.

¹⁰⁸ Brainfacts.org, “Wired for Danger: The Effects of Childhood Trauma on the Brain,” video created by Jasmine Purnomo, October 19, 2020, www.brainfacts.org/thinking-sensing-and-behaving/childhood-and-adolescence/2020/wired-for-danger-the-effects-of-childhood-trauma-on-the-brain-101920; Hillary A. Franke, “Toxic Stress: Effects, Prevention and Treatment,” *Children* 1, no. 3 (November 2014): 390–402, doi.org/10.3390/children1030390.

¹⁰⁹ Harvard University Center on the Developing Child, “Toxic Stress.”

¹¹⁰ Harvard University Center on the Developing Child, “Key Concepts”; Celina M. Joos, Ashley McDonald, and Martha E. Wadsworth, “Extending the toxic stress model into adolescence: Profiles of cortisol reactivity,” *Psychoneuroendocrinology* 107 (September 2019): 46–58, doi.org/10.1016/j.psyneuen.2019.05.002.

and cohesion affected resilience far more than the length or type of abuse people had suffered. The faith community, when assisting in building stronger family dynamics, is trying to build resilience.¹¹¹

ACEs—Adverse Childhood Experiences Study¹¹²

This discussion of brain development and stress naturally leads us to a discussion of the Adverse Childhood Experiences Study (ACEs). ACEs was conducted by Kaiser Permanente where they examined health and social effects of adverse childhood experiences on approximately 17,000 of their members. They asked participants to answer a series of questions about 10 types of adverse childhood experiences falling into three categories (abuse, neglect and household dysfunction). Participants are asked about three forms of abuse: physical, emotional or sexual abuse; two types of neglect: physical or emotional neglect; and five types of “household dysfunction”: witnessing DV, growing up with substance using or mentally ill household members, parental separation or divorce, or having a household member sentenced to prison. What they found was that the higher the ACE score, the more likely the person would suffer negative health and social connections (smoking, chronic lung and kidney disease, shorter lifetime/premature mortality, alcoholism and drug addiction, teenage pregnancy and fertility complications, likelihood to be raped). Health consequences were found to include obesity, diabetes, depression, suicide attempts, STDs, heart disease, cancer, stroke, COPD, and broken bones. Higher ACEs scores led to behaviors like smoking, alcoholism, and drug use. Furthermore, high ACE scores correlated with low graduation rates, low academic achievement, and lost time from work. In summation, ACEs are a pathway to negative neuro-developmental consequences and social problems.

It is important not to conflate terms such as stress and trauma¹¹³ and ACEs, while recognizing the overlap and interconnectedness of these events on brain function. Stress and trauma are not the same thing and don’t affect the brain the same way unless and until the stress becomes toxic and chronic; once that happens, it can affect the region of the brain that helps with safe decision-making, making the person more prone to subsequent health and social problems, similar to a trauma response. Consider this statement from an article in the American Academy of Pediatrics:

[T]oxic stress limits the ability of the hippocampus to promote contextual learning, making it more difficult to discriminate conditions for which there may be danger versus safety, as is common in posttraumatic stress disorder. Hence, altered brain architecture in response to toxic stress in early

¹¹¹ Ann S. Masten, “2019 Keynote: Ordinary Magic: Advances in Developmental Resilience Science,” recorded February 22, 2019 at Miami International Child & Adolescent Mental Health Conference, video, 1:02:20, www.youtube.com/watch?v=YcfWZU2cfp8.

¹¹² National Center for Injury Prevention and Control, Division of Violence Prevention, “Adverse Childhood Experiences (ACEs),” last reviewed June 29, 2023, www.cdc.gov/violenceprevention/aces/; ACE Interface, Master Trainer Education, www.aceinterface.com.

¹¹³ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed. (2013), psycnet.apa.org/record/2013-14907-000. The *Diagnostic and Statistical Manual of Mental Disorders* provides the following threshold definition of trauma as Criteria A of post-traumatic stress disorder: “The person was exposed to: death, threatened death, actual or threatened serious injury, or actual or threatened sexual violence, in the following way(s): direct exposure; witnessing the trauma; learning that a relative or close friend was exposed to trauma; indirect exposure to aversive details of the trauma, usually in the course of professional duties (e.g., first responders such as police or medics).”

childhood could explain, at least in part, the strong association between early adverse experiences and subsequent problems in the development of linguistic, cognitive, and social-emotional skills, all of which are inextricably intertwined in the wiring of the developing brain.¹¹⁴

Why is ACEs important and what can we learn from ACEs?

The first lesson learned is the importance of preventing ACEs from happening. Dr. Robert Anda summed it up best: “what is predictive is preventable.”¹¹⁵ If we prevent some or most adverse childhood experiences, we can prevent numerous adult health conditions and social problems.

Another lesson is that risky decision-making and lack of discrimination between danger and safety is not always a “bad choice” by a youth exercising free will but a neurological predisposition due to adverse childhood experiences, trauma, or chronic toxic stress.

A third lesson learned, and a positive finding in research, is that risk factors can be offset by protective factors. Safe, stable nurturing relationships are an example of a protective factor. The ABCD study conducted during the pandemic showed regular mealtime or family time and open communication with parents were two buffers or protective factors reducing anxiety in adolescents.¹¹⁶ The presence of one dependable and caring adult can make a difference.¹¹⁷ This can include trauma-informed professionals working with youth crime victims or justice-involved youth. Safe, stable, and nurturing relationships and environments can have a positive impact on a broad range of health problems and on development of skills that help children reach their full potential.

Conclusion

If you read this chapter hoping to know when precisely a teenager’s brain was sufficiently mature: I’m sorry. That answer is not available . . . yet. According to researcher Leah Somerville,

“[t]here is little agreement among basic scientists on what properties of a brain should be evaluated when judging whether a brain is mature. This lack of consensus could reflect the fact that most neuroscientists are typically focused on the “journey”—the temporal unfolding of a particular development process—more than when a brain reaches a particular “destination.”

It will not come as a surprise to learn that nurturing and other experiences play a critical role in brain development.¹¹⁸ Since brain development is strongly affected by interplay between the brain and the environment, teens are strongly affected by interactions with parents, peers, teachers, and community

¹¹⁴ Jack P. Shonkoff et al., “The Lifelong Effects of Early Childhood Adversity and Toxic Stress,” *Pediatrics* 129, no. 1 (2012): e232–e246, doi.org/10.1542/peds.2011-2663, citing National Scientific Council on the Developing Child, *Excessive Stress Disrupts the Architecture of the Developing Brain*.

¹¹⁵ Tian Dayton, “ACE’s Adverse Childhood Experiences: A Message from Dr. Robert Anda and Oprah Winfrey,” Thrive Global, March 28, 2018, medium.com/thrive-global/aces-adverse-childhood-experiences-a-message-from-dr-robert-anda-and-oprah-winfrey-26654844ddc9.

¹¹⁶ ABCD Research Consortium, “About the [Adolescent Brain Cognitive Development (ABCD)] Study,” abcdstudy.org/about/.

¹¹⁷ Dayton, “ACE’s Adverse Childhood Experiences.”

¹¹⁸ Thumbs Down. Speak Up., “The Adolescent Brain, Neuroplasticity, and Social Media,” September 15, 2022, tdsu.org/news/the-adolescent-brain-neuroplasticity-and-social-media/.

members. Juvenile Justice partners, including prosecutors, can and must look for ways in which their communities can build and expand opportunities for teens to engage in activities that will positively impact their growing brains, and re-examine each point of contact or interaction with adolescents to ensure that developmentally appropriate responses are in place.¹¹⁹

Part Two: U.S. Supreme Court Cases that Have Considered Brain Development

The U.S. Supreme Court precedence—and how the high court has treated or considered brain development in specific cases—forms the invisible backdrop in a youth or juvenile court proceeding.

When the U.S. Supreme Court considered the history of the juvenile court system in its 1967 decision *In re. Gault*,¹²⁰ it determined that the informal, *parens patriae* style of juvenile proceedings were unconstitutional in their lack of due process and procedural safeguards for the youth but could still retain their rehabilitative focus. As a result of *Gault*, juvenile court systems have the procedural safeguards and due process rights given to adults as well as the rehabilitative focus originally intended. The Court noted,

[o]f course, it is not suggested that juvenile court judges should fail appropriately to take account, in their demeanor and conduct, **of the emotional and psychological attitude of the juveniles with whom they are confronted**. While due process requirements will, in some instances, introduce a degree of order and regularity to juvenile court proceedings to determine delinquency, and in contested cases will introduce some elements of the adversary system, nothing will require that the conception of the kindly juvenile judge be replaced by its opposite.¹²¹

This assumes the juvenile will understand the proceedings.

Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. As Justice Frankfurter stated, “[c]hildren have a very special place in life which law should reflect.”¹²² And indeed the law does reflect this special place. Every state in the country makes some separate provision for minors.¹²³

Viewing adult and juvenile systems together, the cases show that although children are generally protected by the same constitutional guarantees against governmental deprivations as are adults, *the state is entitled to adjust its legal system to account for children’s vulnerability and their needs for “concern, . . . sympathy, and . . . paternal attention.”*¹²⁴

¹¹⁹ ACT4JuvenileJustice, *Adolescent Brain Development & Juvenile Justice*.

¹²⁰ *In re. Application of Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

¹²¹ *Gault* at 26–27, at 1443 (emphasis added).

¹²² *May v. Anderson*, 345 U.S. 528, 536, 73 S. Ct. 840, 844, 97 L.Ed. 1221 (1953) (concurring opinion).

¹²³ *Eddings v. Oklahoma*, 455 U.S. 104, 115–16, 102 S. Ct. 869, 877 (1982), citing *In re Gault*, 387 U.S., 14, 87 S. Ct., 1436 (1967).

¹²⁴ *McKeiver v. Pennsylvania*, 403 U.S. 528, 550, 91 S. Ct. 1976, 1989, 29 L.Ed.2d 647 (1971) (plurality opinion), followed by *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S. Ct. 3035, 3044, 61 L. Ed. 2d 797 (1979).

As the *Eddings v. Oklahoma* case later showed, courts must also take those characteristics into account as mitigating factors at sentencing, even in a case involving the murder of a police officer by a 16-year-old youth who shot the officer at point-blank range.¹²⁵ Historically, courts recognized *youth* as a mitigating factor but also the background of the youth, if that background stunted growth or interfered with the youth's development. *Eddings* was one such case.

Even the normal 16-year-old customarily lacks the maturity of an adult. In this case, Eddings was not a normal 16-year-old; he had been deprived of the care, concern, and paternal attention that children deserve. On the contrary, it is not disputed that he was a juvenile with serious emotional problems, and had been raised in a neglectful, sometimes even violent, family background. In addition, there was testimony that Eddings' mental and emotional development were at a level several years below his chronological age. All of this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that *just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.*¹²⁶

Roper v. Simmons and Preceding Cases

The intersection between law and adolescent mental and emotional development was further brought to the forefront in *Roper v. Simmons*¹²⁷, in which the U.S. Supreme Court ruled that it was unconstitutional to sentence a juvenile (16 or 17 years of age at the time of the crime) to death pursuant to the Eighth and Fourteenth Amendments. Although the opinion does not give a lot of weight to specific scientific studies, there is a nod to some research referenced in an amicus brief filed by the American Psychological Association (APA).

Of all the factual scenarios for the U.S. Supreme Court to consider when weighing the constitutionality of the death penalty, the facts of the *Roper* case shock the conscience and make it a hard case. 17-year-old Christopher Simmons discussed with two friends a plan to burglar and murder a particular victim whom Simmons knew from a recent car accident. One of the two friends ended up assisting him on the night of the murder. They broke into the victim's home when her husband was out of town, covered her eyes and mouth and bound her hands with duct tape, then put her in her minivan and drove to a state park where they reinforced the bindings, covered her head with a towel, and walked her to a railroad trestle spanning a river. They tied her hands and feet with electrical wire, wrapped her whole face in duct tape, and threw her from the bridge, drowning her. Simmons reportedly told his friends before the murder that they would "get away with it" because they were minors. After the murder, he was heard bragging about the murder and why he did it.

¹²⁵ *Eddings* at 115–16, 877.

¹²⁶ *Eddings*, 455 U.S. at 116, 102 S. Ct. at 877 (1982) (emphasis added).

¹²⁷ *Roper v. Simmons*, 543 U. S. 551 (2005).

Simmons was charged as an adult with numerous offenses (burglary, kidnapping, stealing, and murder in the 1st) and tried by a jury as an adult. The jury's verdict was guilty on murder, the jury recommended the death penalty, and the Court followed the jury's recommendation.¹²⁸

After the U.S. Supreme Court issued its opinion in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the Constitution prohibited the execution of a mentally retarded defendant, Simmons filed a petition for state post-conviction relief, arguing that the reasoning of *Atkins* applied to juveniles as well. The Missouri Supreme Court agreed. The State appealed to the U.S. Supreme Court, which affirmed the ruling.¹²⁹

The premeditated nature of Simmons' offense, the depravity of his actions, and his pride in his actions all point towards his unsuitability for society and the appropriateness of the death penalty as punishment under Missouri law and capital case jurisprudence. The possibility for a court to remain free of passion or prejudice against Simmons was slim. For that reason, it is largely accepted as fact that Simmons' age and the recent discoveries in adolescent brain science were influential on the Court's reasoning.

Brain science was not the only rationale, however. Prior cases considered national standards of decency, not according to the medical community, but according to state legislatures. Rather than just brain science or IQ leading to the decision, the Court built its decision off the decision in not only *Atkins*, but also *Thompson v. Oklahoma*, 487 U.S. 815, 108 S. Ct. 2687 (1988). In *Thompson*, the Court determined that the national standards of decency do not permit the execution of any person under the age of 16 at the time of the crime. *Thompson*, at 818–838, 108 S. Ct. at 2687. The Court was guided by relevant legislative enactments and jury determinations and the reasons why a civilized society may accept or reject the death penalty for a person of a certain age at the time of the crime. The *Thompson* Court also considered the lack of juries supporting the death penalty for children under 16 and the low number of those under 16 who had been sentenced to death for murder.

The *Thompson* Court's reasoning included the view or conclusion that continues to be repeated in case after case, that juveniles have **reduced culpability** and imposing the death penalty on this age group with reduced culpability "does not measurably **contribute to the essential purpose of the penalty.**" The Court already recognized juveniles, when compared to adults, as having *less experience, less education, and less intelligence making a teen less able to evaluate consequences of his or her conduct and more apt to act on emotion or peer pressure.*¹³⁰

¹²⁸ Simmons pursued writs of habeas corpus which were denied by the federal courts. Then the U.S. Supreme Court decided the case of *Atkins v. Virginia*, 536 U.S. 304 (2002), holding that the Eighth and Fourteenth amendments prohibit the execution of a mentally retarded person. The *Atkins* ruling was a departure from *Penry v. Lynbaugh*, 492 U.S. 302 (1989), which held that the constitution did not prohibit the execution of a mentally retarded person because there was not sufficient evidence of a national consensus on the issue (with just two states enacting laws specifically prohibiting their execution, and 14 states rejecting capital punishment completely). The *Atkins* Court held that standards of decency had evolved since *Penry* and now demonstrate the execution of the mental retarded as cruel and unusual punishment.

¹²⁹ By affirming the Missouri Supreme Court's decision in *Roper*, the U.S. Supreme Court reversed its ruling in *Stanford v. Kentucky*, 492 U.S. 361 (1989) which held that imposition of capital punishment on an individual for a crime committed at 16 or 17 years of age did not violate the Eighth Amendment, noting, like in *Penry*, that standards of decency have not evolved to that point yet, as evidenced by state laws in part.

¹³⁰ *Bellotti v. Baird*, 443 U.S. 622, 99 S. Ct. 3035, 61 L.Ed.2d 797 (1979) (regarding the constitutionality of requiring parental notification and consent to their unmarried pregnant child's abortion; requiring the Court to make factual findings regarding the "maturity" of the youth and if she's well enough "informed"); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L.Ed.2d 1.

The year after the *Thompson* decision, the Court decided *Stanford v. Kentucky*, a 5–4 decision, which again considered contemporary standards of decency in this country and concluded the 8th and 14th amendments did *not* prohibit the execution of juveniles over 15 but under 18. The Court, in weighing the meaning of cruel and unusual punishment, considered the fact that 22 out of 37 death penalty states permitted 16-year-olds to be sentenced to death and 25 permit it for 17-year-olds. In 1989, these numbers were not sufficient to convince the majority to label the particular punishment “cruel and unusual.”¹³¹

The *Atkins* Court considered many items to be objective indicia of consensus significant in determining the national standard of decency in wading through the vague meaning of “cruel and unusual” punishment. The Court also applied the Court’s independent judgment, though the dissent disagreed with this approach. The Court found that *mental retardation diminishes personal culpability even if the person can distinguish right from wrong*. The Court concluded that the death penalty for a mentally retarded person *does not meet the sentencing purposes of retribution or deterrence* and is therefore an excessive sanction.

The *Roper* Court, in following those cases before it, considered many items to be the objective indicia of consensus in weighing the national standard of decency. It considered the following:

1. The *number of states* that prohibited the death penalty overall, or the death penalty for all juveniles, through legislation or court decision;
2. The increase in the number of states that had prohibited the death penalty for juveniles, both at the time of *Stanford* and at the time of their consideration of *Roper*;
3. The *frequency* that states allowing juvenile death penalty had carried it out;
4. The *rate* at which these legislative enactments took place between the last case, noting that the rate of change was faster to abolish the death penalty for those with mental retardation than for minors, but the *climate or collective change in attitude* towards minors was still significant; and
5. The *lack of states reimposing the death penalty* since the Court’s decision to not prohibit it (*Stanford* and *Penry*).

After considering all those, the *Roper* Court referenced three general differences between youth under 18 and adults:

1. **A lack of maturity and an underdeveloped sense of responsibility**, often resulting in impetuous and ill-considered actions and decisions, citing *Johnson* and *Eddings* as well as an article on adolescent development.¹³² “Adolescents are overrepresented statistically in virtually every category of reckless behavior.”¹³³ The Court notes that states recognize this immaturity and irresponsibility in juveniles as almost every state prohibits those under 18 from voting, serving on juries, or marrying without parental consent.

¹³¹ *Stanford*, 492 U.S. at 370–371, 109 S. Ct. at 2969.

¹³² *Johnson v. Texas*, 509 U.S. 350, 359–362 (1993); *Eddings v. Oklahoma*, 455 U.S. 104, 115–116 (1982).

¹³³ *Roper* at 568, citing Jeffrey Arnett, “Reckless behavior in adolescence: A developmental perspective,” *Developmental Review* 12, no. 4 (December 1992): 339–373, doi.org/10.1016/0273-2297(92)90013-R.

2. Juveniles are more **vulnerable or susceptible to negative influences and outside pressures**, including peer pressure (again citing *Eddings*, 455 U.S. at 115). The Court noted juveniles have less control, and less experience with control, over their own environment.¹³⁴
3. The third difference is that a juvenile's **character is less well-formed than an adult**. Juveniles have more transitory, less fixed personality traits. This matters to the Court who impose sentences and ask themselves, what are the chances that this person could actually change and stop committing offenses? For adolescents whose brains and characters are not done forming, **there is the potential for change**.

This is referred to by Court watchers as the “diminished culpability/enhanced potential theory” later broadened by the *Graham* decision.¹³⁵

In summary, the *Roper* Court says juveniles have

qualities that often result in impetuous and **ill-considered actions and decisions**; juveniles are **more vulnerable or susceptible to negative influences** and outside pressures, including peer pressure; and the **character** of a juvenile is **not as well formed** as that of an adult.¹³⁶

Due to these general traits, the Court concludes that “their irresponsible conduct is **not as morally reprehensible as that of an adult**.”¹³⁷ Because their identities and personalities are still developing, there is some chance of rehabilitation and the youth’s *depraved character causing the offense may be retrievable*. Quoting an adolescent brain science article, “[o]nly a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.”¹³⁸ The Court concludes that juveniles overall are less culpable than adults and expands the holding in *Thompson* to apply to juveniles not just under 16 but also under 18.

The *Roper* Court considered the argument that general characteristics of juveniles still leaves the possibility that a particular youth who has attained psychological maturity commits a crime demonstrative of sufficient depravity to merit a death sentence. The *Roper* Court pointed out that even in those cases, the APA manual does not allow psychiatrists to diagnose a juvenile with antisocial personality disorder (one of the most, if not the most, condemning of diagnoses), and concluded that if the psychiatrists cannot diagnose a juvenile with that diagnosis, states should not be allowed to ask juries and the Courts to issue the most condemning of punishments.

¹³⁴ See L. Steinberg and E. S. Scott, “Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty,” *American Psychologist* 58, no. 12 (2003): 1009, 1014, doi.org/10.1037/0003-066X.58.12.1009. “[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting.”

¹³⁵ Terry A. Maroney, “Adolescent Brain Science after *Graham v. Florida*,” *Notre Dame Law Review* 86, no. 2 (2013): 765, 782, scholarship.law.nd.edu/ndlr/vol86/iss2/6/.

¹³⁶ *Roper*, 569–570.

¹³⁷ *Roper*, 570, citing *Thompson*, 835.

¹³⁸ L. Steinberg and E. S. Scott, “Less Guilty by Reason of Adolescence.”

Graham v. Florida

Five years after *Roper* came *Graham v. Florida*¹³⁹, in which the Court held that the Eighth Amendment prohibits a sentence of life without possibility of parole for a nonhomicide crime committed by a juvenile, the majority opinion goes further than *Roper* by citing to amicus briefs from the APA and American Medical Association (AMA) regarding developments in psychology and brain science, specifically regarding the part of the brain linked to behavior control and how it continues to mature through late adolescence.¹⁴⁰

The Court further explained differences between the juvenile and adult brain and the greater opportunity for reform with juveniles:

[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. See Brief for American Medical Association et al. as *Amici Curiae* 16–24; Brief for APA et al. as *Amici Curiae* 22–27. Juveniles are more capable of change than adults, and their actions are less likely to be evidence of “irretrievably depraved character” than are the actions of adults. *Roper*, 543 U. S., at 570. It remains true that “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”¹⁴¹

The Court’s decision “likened life without parole for juvenile to the death penalty, thereby evoking a second line of cases”¹⁴² requiring sentencing authorities to consider the characteristics of a defendant and the details of his offense before sentencing him to death.¹⁴³

Miller v. Alabama

Then in 2012 came *Miller v. Alabama*, 567 U.S. 460, the confluence of the two lines of cases, in which the Court held that a *mandatory* sentence of life without parole for a juvenile convicted of homicide violated the Eighth amendment. “Such mandatory penalties, by their nature, preclude a sentencer from taking account of ... age and the wealth of characteristics and circumstances attendant to it.”¹⁴⁴

¹³⁹ *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011 (2010).

¹⁴⁰ *Graham*, 68, 2026.

¹⁴¹ *Graham*, 68, 2026.

¹⁴² *Miller v. Alabama*, 567 U.S. 460, 470, 132 S. Ct. 2455, 2463 (2012).

¹⁴³ Maroney, “Adolescent Brain Science after *Graham v. Florida*.” One author was convinced that *Graham* represented the extent to which the Court considered brain science of adolescents in expanding constitutional protections. In the *Notre Dame Law Review* article, *Adolescent Brain Science after Graham*, the author makes this observation of the Court’s treatment of science in the juvenile justice context: Assessment of blameworthiness hinges partially on the degree to which the defendant’s behavior was subject to deliberate control. Similarly, assessment of dangerousness hinges partially on the degree to which capacity for such control is likely to increase and be exercised. The former assessment informs moral judgment as to intent and character, while the latter informs utilitarian determination of the most effective response. More, that juveniles tend for this reason to be both less blameworthy and (eventually) less dangerous affects the likelihood that the same will be true of any given juvenile.

¹⁴⁴ *Miller*, 476, 2467.

The *Miller* case considered two Petitioners' cases, Evan Miller (in Alabama) and Kuntrell Jackson (in Arkansas), each of whom was 14 years old when convicted of murder and sentenced to a mandatory term of life imprisonment without the possibility of parole.

Jackson accompanied two other boys to rob a video store, learned one of the other two boys had a shotgun on the way to the store, and stayed outside the store for most of the robbery. Jackson eventually entered the store and soon after his co-conspirator shot and killed the store clerk. Jackson was charged as an adult with capital felony murder and aggravated robbery, and a jury convicted him of both crimes.

After an evening of drinking and using drugs with an adult neighbor who earlier had sold drugs to Miller's mother, Miller, along with a friend, beat the neighbor and set fire to his trailer, causing the neighbor to die. Initially charged as a juvenile, his case was transferred to adult court where he was charged with murder in the course of arson and a jury found him guilty.

As the *Roper* and *Graham* decisions were being decided, Jackson and Miller's cases made their way to the U.S. Supreme Court. By the time the two cases were heard by the Court, *Roper* and *Graham* laid the groundwork.

The Court stated:

Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account *the family and home environment that surrounds him—and from which he cannot usually extricate himself*—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including *the extent of his participation in the conduct and the way the familial and peer pressures may have affected him* . . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.¹⁴⁵

The reference to familiar and peer pressures was no doubt informed by the studies of adolescent brain science cited in the amicus briefs. These studies show that youth understand and appreciate risks and consequences, but set aside those considerations when, in a particular situation, there is emotionally charged situation, peer pressure or fear of rejection. And while there may be environmental factors that contribute to a youth making or resisting these choices, natural adolescent brain development, not the youth, also explain the choices to some degree because the frontal lobe has not caught up with the limbic system.

Miller discusses these four factors about adolescents (#3 is the only one not mentioned in *Roper* but appears in *Graham*):

1. Immaturity, impetuosity, and risk-taking;
2. Peer involvement/influence;
3. Understanding legal proceedings, including the inability to deal with police officers or prosecutors and incapacity to assist one's own attorney; and
4. Greater potential for rehabilitation, recognized by the *Roper* Court.

The *Miller* Court clearly accepted this brain science as reliable, undeniable and applicable.

¹⁴⁵ *Miller* at 478, 2468 (emphasis added).

The Court was also convinced that juveniles are more prone than adults to *falsely confess to crimes*, a fact attributed to immaturity of judgment that affects youths' participation in the early stage of the criminal process. Additional cases have gone further to discuss how youth's immaturity impacts their *interactions with law enforcement*, their understanding or *consideration of Miranda* particularly when presented with an alternative that appears to be a reward, and *their ability to assist in their own defense*. The referenced studies also called into question the effect of harsher criminal sanctions on juvenile recidivism, for instance. This was referenced by the Court and treated like persuasive research.¹⁴⁶

The U.S. Supreme Court made *Miller* retroactive in cases on collateral review by concluding that the *Miller* holding was a new *substantive* constitutional rule in its decision in *Montgomery v. Louisiana*, 577 U.S. 190 (2016), which involved an inmate, incarcerated for life without parole for crimes committed before he was 18 years old. Once the U.S. Supreme Court made *Miller* retroactive, Montgomery and inmates serving similar sentences were able to go back before the sentencer for application of *Miller*.

Jones v. Mississippi

This discussion would be incomplete without consideration of *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), in which the U.S. Supreme Court affirmed the life without parole sentence of a juvenile convicted of a homicide offense. Jones, who was 15 years old at the time, stabbed his grandfather to death after an argument over Jones' girlfriend sleeping over in Jones' room. Jones did not call 911 after stabbing his grandfather; instead, he tried to destroy and cover up evidence, and he and his girlfriend gave the police fake names when stopped later that day at a gas station. A jury found him guilty of murder, not the lesser included offense of manslaughter.

At the time the crime of murder carried a mandatory life sentence without parole under Mississippi law, so Jones was sentenced accordingly but appealed under *Miller*. The State Supreme Court ordered a new sentencing where the judge could consider Jones' youth and exercise discretion in selecting an appropriate sentence. The Judge, with that discretion, re-sentenced Jones to life without parole and did not make any findings regarding "transient immaturity" of the youth or "permanent incorrigibility." The appeal of the re-sentencing centered around the lack of *Miller*-type findings by the re-sentencer and the U.S. Supreme Court, in a majority opinion written by Justice Kavanaugh, affirmed, with Justice Thomas concurring, and three other justices dissenting.

In light of the U.S. Supreme Court's previous rulings the effect of which was to allow the sentencing court to make certain considerations that may mitigate a youth's sentence but eliminating the mandatory life sentence and only impose a life sentence on a child in the rarest of circumstances, the Court's decision was a departure and a much narrower reading of *Miller* than what the dissenters propose.

Much debate continues as to whether *Jones* represents the end to expansion of Eighth amendment protections for juveniles or whether the tides could change again with the appointment of a different justice to the Supreme Court.¹⁴⁷

¹⁴⁶ The APA and the Missouri Psychological Association filed an amicus brief in the Roper case, pointing to significant research findings from the previous three years about the correlation between adolescence and risk-taking. These briefs cited research much of which is mentioned throughout this chapter because it was also relied upon in *Graham*.

¹⁴⁷ Center for Law, Brain & Behavior at Massachusetts General Hospital, *White Paper on the Science of Late Adolescence*.

A finding of permanent incorrigibility is an unlikely finding for even the most criminal youth, such that if the Court required such a finding in *Miller*, the Court would have prohibited all life without parole sentences for crimes committed by those under 18, not just those imposed under the mandatory laws. The reason it would be an unlikely finding is that, generally speaking, adolescents' brains are still developing. Assigning a label or a diagnosis to an adolescent will be temporary; they need to be re-reviewed/re-assessed, and professionals don't rely on them in perpetuity. Studies showed that assessments of severe antisocial behaviors in adolescents did not remain stable as those individuals grow into adulthood. Henceforth, incorrigibility, like psychopathy, also known as sociopathy, among adolescents, is an inherently problematic diagnosis in an adolescent, prone to error, and creates a risk of cruel and unusual punishment.

At the state court level, however, legislatures, sentencing procedures, and individual case decisions continue to be informed by brain science. The authors of the White Paper (2022) recommend the following criteria be considered with respect to the four *Miller* factors:

1. Immaturity, impetuosity and irresponsibility.^{148, 149}
2. Family and home, peer influence, including exposure to threats and exposure to deprivation.
3. Peer involvement
4. Understanding legal proceedings
5. Greater potential for rehabilitation

On this point, the White Paper is clear: it is currently not possible to reliably predict an individual adolescent's future developmental trajectory based upon current presentation and past history. This is partly because of the high rates of desistance from antisocial conduct as youth mature into young adulthood and partly because behavioral, emotional, and attitudinal changes are expected components of adolescent development. It is also currently scientifically impossible to reliably predict how much or how quickly an individual will change with age based on their presumed brain development, history, or current behavioral profiles.

In U.S. Supreme Court cases, as well as some state supreme court cases, the progression of development of different parts of the brain has become a common concept relied upon for legal arguments at all levels of prosecution of older juveniles and young adults. It will be important for prosecutors to not just understand adolescent brain development and its impact on adolescent behavior in general but how it may apply to the facts of the case, particularly if peers are involved, and to retain the necessary experts if needed to articulate why this scientific theory does or does not apply to a particular set of facts.

¹⁴⁸ White Paper, citing Laurence Steinberg et al., "Around the world, adolescence is a time of heightened sensation seeking and immature self-regulation," *Developmental Science* 21, no. 2 (March 2018): e12532, doi.org/10.1111/desc.12532.

¹⁴⁹ Michelle Achterberg et al., "Frontostriatal White Matter Integrity Predicts Development of Delay of Gratification: A Longitudinal Study," *The Journal of Neuroscience* 36, no. 6 (February 10, 2016): 1954–1961, doi.org/10.1523/JNEUROSCI.3459-15.2016. With regard to delaying gratification, the White Paper considered how longitudinal research testing of individuals ages 8–26 demonstrates that the strengthening of white matter connections between the prefrontal cortex and striatum may also account for why individuals are better able to delay gratification as they age.

In addition, other juvenile justice stakeholders will be discussing brain development during key decision points, and prosecutors must understand what is being discussed, the application of the theory and the limits of the theory, to make cogent arguments and rebuttals to legal positions and policy arguments. Knowledge in this area is also key to understanding expert testimony and deciding whether to present expert witness testimony.

Conclusion

You understand the adolescent brain, stress, and adverse child experiences. How and when do you use that information as a juvenile court prosecutor? The goal is to be familiar with the concepts, acknowledge the existence of the science and research (though always be prepared to question the specific study or generalization raised by defense counsel in court), evaluate each youth individually, assess the needs of the youth and their families and take this opportunity to have an impact on their future and the future of your community. Rehabilitation of youth is prevention of crime in the community.

How will adolescent brain science manifest itself in your daily work? It may be argued to you by juvenile justice partners when you are making decisions on diversion, detention, dispositions, community program evaluation, competency, and transfer. It can be offered in the courtroom through expert witnesses or indirectly through oral advocacy or submission of research.

When evaluating brain development studies and/or theories, a prosecutor should keep in mind legal theories and requirements for their specific case. Legal requirements may differ from brain science theories, but those theories may still be useful when looking at the overall plan for an adolescent involved in the juvenile justice system or what should be present in probation or community programs. Developmental neuroscience supports generalizations about youth as a class but is not a substitute for looking at facts and circumstances of your particular juvenile justice situation. This is referred to in the research world as the “Group to Individual” conundrum.¹⁵⁰ Taking both legal and scientific information into account will lead to a full evaluation of your juvenile justice incident.¹⁵¹

Adolescent brain science tells us generally what is happening to youths’ brains during adolescence. You should use it to give you a deeper understanding of the impact/social environments we create for youth. Put this information to use to create better programs and evaluate existing programs to see if they are addressing resilience and fostering executive functioning. It should not be used as a rigid framework determining what should happen to youth. It should be used to satisfy our goal of assisting those involved in the system become productive members of society through Juvenile Justice programming and legal proceedings.

¹⁵⁰ Center for Law, Brain & Behavior at Massachusetts General Hospital, *White Paper on the Science of Late Adolescence*, 3.

¹⁵¹ Terry A. Maroney, “The False Promise of Adolescent Brain Science in Juvenile Justice,” *Notre Dame Law Review* 85, no. 1 (2013): 89, scholarship.law.nd.edu/ndlr/vol85/iss1/3/.

How to Prepare for Arguments or Expert Testimony about Brain Science

Anytime scientific research comes up in a case, a diligent prosecutor will need to conduct a credibility check on the study. Ask yourself: is it credible and reliable? Then conduct this 4-stage analysis.¹⁵²

1. Start by evaluating the publication.

- What's the title of the publication?
- Is the article published in PubMed, the National Institute of Health's online catalog of biomedical literature (<https://pubmed.ncbi.nlm.nih.gov/>)?
- Is the journal/article peer reviewed?

2. Next, consider the author's qualifications and area of expertise.

- Is the author affiliated with a credible institution?
- Is the article's topic within the author's field or area of study?
- Is there obvious confirmation bias?

3. Then, consider the bibliography.

- Are these sources referenced from credible sources?
- Conduct a literature review.
- Do you recognize referenced works?

4. Finally, look at the funding source of the research:

- Is the funding source an indicator of bias?
- Did industry pay for the project? If so, how much control did they retain over the project?
- Does the funding present a conflict of interest with researchers?

Some of the online research journals will provide the option to "check for updates," similar to Shepardizing legal cases. Take advantage of this resource if available to save time and learn of more recent research building off of others'.

¹⁵² Florida International University Global Forensic and Justice Center, *The FIU Research Forensic Library Card Catalog: Is This Research Credible?*, video, 2:27, www.youtube.com/watch?v=_KUFpyRF9nU. Partly funded by a grant from the National Institute of Justice.

When it comes to preparing for an expert witness to testify about brain science, use all the same tools you would use above for considering the expert's qualifications and area of expertise in addition to the following:

- Research expert's qualifications (NDAA can assist), credentials, institutions affiliated with expert, read articles s/he authored.
- Was the research, articles, well received? Peer reviewed? Cited elsewhere? Contradicted later? Does it cite credible sources?
- Review prior testimony including what field s/he was previously qualified as expert in, what states has s/he testified in, what opinions have been given, etc.
- Does the proposed testimony meet Daubert/Frye standard? Is this a novel discovery or opinion? Is it in the expert's area of expertise?
- Conduct legal research into whether courts in your jurisdiction have made findings or adopted the scientific explanation or opinion similar to the expert's.
- Consider whether you want to hire your own expert, either to consult with (e.g., be present in the court room when the expert is testifying or to help you prepare for cross-examination) or to call as your witness, etc.
- Evaluate whether you can utilize the expert to make points that assist your case.
- Review any reciprocal discovery such as reports prepared by the expert, etc.
- Understand limits on what brain science can/cannot tell us.

That last point will be the hardest to determine as someone not in the brain science research field because it is constantly changing. One study alone does not tell the whole story but often raises a myriad of questions that researchers then want to do more research to answer. The most challenging part will be not getting lost in the overwhelming amount of brain science research and articles out there. This chapter has attempted to distill and navigate that research to provide an overview in the concepts and to broaden the vocabulary of the prosecutors having to make or refute arguments about brain science in court.

Case Assessment

Michele Linley

Introduction

This chapter provides a framework for prosecutors to assess a juvenile case for charging and other decisions. Deciding whether to file/issue charges is one of the most important decisions a prosecutor makes. Such decisions may profoundly impact the life of a youth and others involved in the case. By conducting a comprehensive case assessment, prosecutors can make informed decisions regarding whether to file/issue charges, as well as other decisions such as whether to divert a case, whether to decline to prosecute a case in the interest of justice, and whether to transfer a case to adult court. The main purpose of case assessment in many jurisdictions is to determine if the facts presented are legally sufficient to support the filing/issuance of charges. Each and every element of a charge must be supported by admissible evidence; each element must be able to be proven beyond a reasonable doubt at trial. Only after it is determined if the case is legally sufficient can decisions be made on filing/issuance, transfer, and diversion. If a case is not legally sufficient, the case must be returned to the submitting/referring agency with a request for further information or declined to prosecute.¹

This framework recognizes that jurisdictions differ in terms of when prosecution agencies may have cases submitted/referred to them from different agencies; and that the contents of a case file vary from jurisdiction to jurisdiction. This framework also recognizes that juvenile court prosecutors generally must make decisions in shorter periods of time than their adult counterparts. Juvenile court prosecutors across the country have different local laws, rules of court, procedures, and office guidelines to follow when assessing a case. However, there are many aspects of a comprehensive case assessment that juvenile court prosecutors in every jurisdiction can utilize at the relevant point in their cases. The framework provided in this chapter is designed to be read in conjunction with NDAA's *National Prosecution Standards*, Fourth Edition (2023), Section V, Juvenile Justice² (see Chapter 1 of this handbook) and NDAA's *Juvenile Prosecution Principles and Guidelines* (2023) (see Chapter 2 of this handbook).³

Obtaining the Case File

When a case is first received from the submitting/referring agency, you should take an inventory of what the case file contains. The most important part of this initial review is to make sure you have all the documents and evidence available to make informed decisions pertaining to the case. Obtaining missing documents or evidence is critical; there could be one piece of evidence that changes the nature and/or direction of the case. The witness statement that shows the youth was not involved, the audio recording

¹ NDAA, *National Prosecution Standards*, JJ 2023, 5-1.3.

² NDAA, *National Prosecution Standards*, Part V.

³ National District Attorneys Association, *Juvenile Prosecution Principles and Guidelines* (2023).

where the “clear” admission of guilt is not as clear as expected, the photograph which does not show what you expected it to; these are all realistic possibilities that prosecutors encounter in the normal course of their investigations.

Items Needed for a Thorough Case Assessment

Police Reports. Review all paperwork, including police reports, evidence vouchers, photographs, etc. Law Enforcement officers may prepare numerous forms of paperwork when they respond to a location and/or make an arrest. The paperwork may contain information based upon law enforcement officer observations, interviews, evidence they collected, and information they were given by others.

To ensure that you have all the police paperwork pertaining to the case, the following questions should be asked of the involved law enforcement agency:

- How many officers responded?
- What are their names and shield/badge numbers?
- What paperwork is required to be completed in this situation? (Check to see if your office has a checklist of police paperwork that may exist.)
- Did different units respond?
- Do different units fill out different reports/paperwork?
- Were crime detection programs used (such as those that record and determine the location from which gunshots were fired, license plate readers, cameras . . .)?
- If so, are there reports, analyses, photos, video, and other evidence from these programs?
- Did the officers take pictures and/or video?
- Did the officers take notes beyond what is contained in the standard paperwork?
- Did the officers have body worn cameras?
- Which paperwork contains the statements of the victim(s) and witness(es)? Were those statements recorded?
- Is the case file you have in your possession missing anything? (Show the officers what you have in hard copy and electronically.)

Body Worn Cameras (BWC). To the extent feasible, review all BWC footage. This form of digital evidence is likely of vital importance to your case. BWC footage may show an offense in progress, the aftermath of an offense, and may show the actions of victim(s), witness(es), and law enforcement. BWC footage may also show injuries, property damage, tangible evidence, and may lead you to additional witnesses and additional evidence. BWC footage may also contain evidentiary tools such as excited utterances, present sense impressions, and admissions. The way words were used, emotions displayed, and surrounding circumstances may significantly impact the prosecutor’s assessment of the strength or nature of a case. (Remember that other video footage may exist, beyond BWCs, such as on social media, surveillance videos, etc.)

As part of case assessment, a prosecutor must have a full understanding of:

- How BWCs are shared with the prosecutor's office.
- Whether BWCs are redacted by law enforcement prior to being shared with the prosecutor's office.
- Whether the prosecutor has all the BWC footage from all locations relevant to the case and from all officers involved at each location.

Additional Video Evidence. Review all video evidence including surveillance video footage. It may show the actual incident from a different perspective than the other evidence you have reviewed. Even if video footage does not show the actual incident, it may show the path of escape, the moments preceding the incident or potential witnesses. Ensure that law enforcement has canvassed for all types of video evidence, including but not limited to electronic doorbells, private or business security cameras, video camera footage from vehicle dash cams, red light cameras, license plate readers, or video from cameras set up in high crime areas. Be mindful that business vehicles such as trash trucks or buses may have cameras onboard that may have caught an incident.

911 calls and Radio Transmissions. Listen to 911 calls, police radio transmissions and review any accompanying transcripts. 911 calls generally contain information that is vital to a case, including information about what is occurring during the crime, the demeanor of victims/witnesses (see BWC section), and descriptions of suspects. 911 calls may contain excited utterances and/or present sense impressions that may be admissible at trial. Radio transmissions may contain conversations between law enforcement and victims/witnesses, information that explains the actions of law enforcement, information regarding identification procedures, descriptions of suspects, and a timeline for when a person was taken into custody.

Victim/Witness Evidence. Review all statements made by victims and witnesses to law enforcement and other relevant entities (such as statements made to private security guards at a location) to the extent permissible by law. Audio or video interviews, including those shown on BWCs are especially helpful because you can see the demeanor and hear the exact words used by a witness which will assist you in making credibility decisions. If feasible in your jurisdiction, interview the victim(s) and witness(es) prior to deciding whether to file/issue charges. (See Chapter entitled "Working with Victims at the Early Stages of a Case" for additional information.) Review all photographs and video footage of victims and witnesses, including on BWCs, surveillance videos, social media, etc.

Questions to ask law enforcement about victim/witness evidence:

- Were written statements taken?
- Are written statements contained in the police reports? Did any of the victims/witnesses call 911?
- Were any victim or witness statements recorded?
- If so, do you have all the recordings, or access thereto?
- Was an identification procedure done? If so, by what officers, and with which witnesses?
- Does your police agency have access to prior law enforcement contacts with victims and/or witnesses?
- If so, can they legally share them with the prosecutor under confidentiality laws?

Criminal History. Check the rules of evidence in your state to determine if a victim or witness may be impeached for having a criminal record and if you may legally obtain this information. Some states may allow impeachment for conviction of misdemeanors, some allow only for felony convictions, and some require the crime to be one of moral turpitude and do not consider the degree of the crime. The definition of a crime of moral turpitude will vary from state to state.

Identification Procedures. Review all paperwork, photographs, and audio/video recordings pertaining to identification procedures, and if feasible in your jurisdiction interview all the police officers and victims/witnesses involved.

Questions to ask law enforcement about identification procedures:

- Was a show-up/line-up/photo line-up done? Who transported the victim/witness to the show-up/line-up/photo line-up location? Who apprehended the youth who was the subject of the show-up/line-up/photo line-up?
- Was a photo array conducted? If so, where? By whom? Was it a “blind”⁴ procedure?
- If a line-up was conducted, was it a photo or in-person line-up? (Each jurisdiction does identification procedures differently.) If so, where? By whom? Was it a “blind” procedure?
- Were pictures and audio/video taken during the line-up?
- What was said to the victim/witness prior to the photo array/line-up?
- Where line-up fillers kept separate and out of view of the victim/witness prior to the line-up?
- If a photo array or line-up was conducted were all photos and any notes by the victim submitted?
- What was the result of the photo array/line-up?
- Did the victim/witness express any hesitation in his/her identification?

Hospital/EMS/Medical Records. Review all medical records that you legally have access to or can legally obtain (explore obtaining a HIPAA waiver from the victim(s)). These records can provide information on the extent and nature of victim injuries, statements made for diagnosis and treatment that may be admissible at trial, future treatment needs, and discharge recommendations.

Photographs. Review all photographs, including those of the scene, victim, youth, and physical evidence.

Social Media. Review all social media available to you pertaining to the case, to the victim(s), to the witnesses, and to the youth(s). Evaluate whether you can obtain additional social media evidence, through public searches, consent, or search warrants. Preservation letters should be sent to social media companies so that the evidence does not get removed.

Scientific Records. Review all reports pertaining to fingerprint evidence, serology evidence, DNA evidence, etc. You must have a thorough understanding of the laws in your jurisdiction pertaining to this type of evidence in the juvenile context.

⁴ A blind procedure is an identification procedure where the administrator does not know the identity of the suspect. See National Institute of Justice, “Live Police Lineups: How Do They Work?”, accessed April 26, 2023, nij.ojp.gov/media/image/19686.

Juvenile Admissions. Review all statements made by the youth, including but not limited to statements at the scene, statements during transport, and statements at the police precinct; evaluate the admissibility of each one based on the facts and the laws in your jurisdiction. It is important to have a full understanding of the laws in your jurisdiction pertaining to juvenile admissions. Your jurisdiction may have laws requiring that a parent or attorney be contacted prior to speaking to a youth, that a statement be recorded, that a statement be taken at a specific location or type of location, or that require a youth to speak with a defense attorney before being interviewed by law enforcement. Factual considerations regarding whether a statement was made voluntarily by a youth include but are not limited to: where the statement was made, what the room looked like, how long the youth was in custody, how long the interview lasted, how many members of law enforcement participated in the interview, how the *Miranda* warnings were read, whether the statements were audio or video recorded, whether the youth was given food and drink, whether weapons were visible during the interview, whether promises or threats were made to the youth, and whether any force was used against the youth.

Additional Considerations During Case Assessment

Confidentiality of Records. There may be records, statements or evidence in your case that is protected by confidentiality laws. The types of records that may be protected by law in your jurisdiction include, but are not limited to, medical records, counseling/mental health/therapy records, child welfare records, search warrant affidavits containing confidential informant information, social service records, and records containing juvenile or criminal history. Be mindful of confidentiality laws when speaking to victims and witnesses to ensure that you do not reveal confidential information. The law may require that you not share these records absent a court order, that you redact them, or that you not use them in your decision-making. It is important that you have a full understanding of the confidentiality laws in your state with respect to different types of records. When you come across records that may be confidential, it is a good practice to discuss with your supervisor how to proceed regarding those records.

Law Enforcement Records. Many jurisdictions require prosecutors to turn over to defense counsel disciplinary records of police officers and other impeachment material⁵ such as adverse credibility findings that can be used at a hearing or trial. It is important to review these records, to the extent permissible by law, including any cases in which an officer was found not credible by a court and determine whether these records or findings impact your case. This type of information may help to assess the credibility of your law enforcement witnesses. You must have a full understanding of the laws in your jurisdiction and your office's policies regarding obtaining and disclosing this information.

Conclusion

The evidence described in this chapter is thorough although not an exhaustive list of items that are important when evaluating a case for filing/issuance and other decisions. Due to time constraints in juvenile court and the volume of cases, not everything mentioned in this chapter may be possible to obtain. Furthermore, some items may not be legally permissible in your jurisdiction. As a juvenile court prosecutor, it is your duty to be familiar with the legal, evidentiary and policy rules in your jurisdiction. Making an informed decision at the earliest possible time will enable you to make decisions about whether and how the case should proceed, which will fulfill your ultimate duty to seek justice.

⁵ *Brady v. Maryland*, 373 US 83 (1963); *Giglio v. United States*, 405 US 150 (1972).

Working with Victims During the Early Stages of a Case

Chapter 5

Angela Albertus

Among the most important working relationships for juvenile court prosecutors is the relationship with victims. (Victims may also be referred to as survivors or persons harmed). Establishing a positive relationship from the start of the case will positively impact the prosecutor and victim. Your office may have policies and procedures regarding victim outreach, contact, notifications, and interviews and it is important to follow those policies and procedures.

Outreach to the victim as soon as possible is crucial for several reasons. The prosecutor has a wealth of information about what will happen next in the process and will be able to share that information with the victim who may or may not be familiar with the juvenile justice system. The victim may have questions/concerns related to their immediate safety, and what will happen to the youth who has been accused of the offense(s) (hereinafter “youth”). Additionally, the incident is fresh in the victim’s mind and the victim may have or know of evidence that needs to be preserved and/or obtained by the prosecutor.

If a victim does not respond to the initial outreach, check your office’s policy on acceptable methods to contact victims, including sending letters, text messages, and/or emails, as well as asking for assistance from law enforcement and/or investigators to locate or visit a victim. There are various resources that can be used to locate a victim, and your office may have access to specific resources for this purpose. Resources include search engines, people locators, social media, legal databases, reverse phone searches, property databases, and postal verifications for government agencies.¹ Be mindful of victims’ privacy concerns when trying to locate a victim; a victim may not want others, including family members, school personnel/classmates, and/or coworkers to know about the incident.

Prosecutors should ascertain whether the victim needs an interpreter and if so, make every effort to have one available during conversations with the prosecutor. Wherever possible, use an official interpreter and avoid having a family member or friend serve in this capacity to ensure it is done accurately, to avoid having someone interpret who may have emotional involvement in the case, and to maintain confidentiality. Be mindful of any laws in your jurisdiction that address interpretation and/or translation issues, including laws that address admissibility of statements and/or other evidence.

¹ See libguides.law.rutgers.edu/c.php?g=812592&p=5797768.

The Initial Meeting/Interview

The initial conversation or one soon thereafter should cover where practicable and to the extent allowed by the juvenile confidentiality laws in your jurisdiction:

Introductory Questions/Information

- Whether the current time is a good time for them to speak.
- If the conversation is being recorded, inform the victim of why that is (e.g., law or office policy) and any rights the victim has in conjunction with the recording, such as the right to refuse being recorded, the right to have a copy of the recording, etc.
- Introduce others at the meeting and why they are there (if, for instance, your office requires a victim advocate or third party to be present during meetings with victim).
- How the victim is doing.
- Whether they need anything to make them comfortable during the interview/meeting. (Victims with disabilities may be entitled to an accommodation; be mindful that not all disabilities are visible.)
- The prosecutor's role in the case.
- How the victim can contact the prosecutor, and who they should contact in the future if that person is not the prosecutor making the initial contact.

Information About the Court System

- Whether the youth is being charged as a juvenile or as an adult, and how the transfer process between adult court and juvenile court works if applicable.
- The purpose of your jurisdiction's statute, e.g., including whether it is rehabilitative.
- What options there are at this stage of this case, including what could happen at the next court appearance.
- Whether the youth is at liberty, in custody, and whether s/he is subject to any type of supervision (to the extent the law allows you to share this information).
- How to find out if a detained youth has been released (where permitted by law).
- Confidentiality laws that pertain to the case.

Questions About the Incident

See section below entitled "Areas to Explore Regarding the Incident" for additional information.

Information Regarding the Rights of the Victim and Services Available

- Provide/refer to pamphlets or other written material (including on internet), regarding the rights of victims, how the process works, resources available to them, etc.

- The legal rights of victims in your jurisdiction.
- Whether the victim has any immediate safety concerns, including the need for an order of protection, getting locks changed, relocating, etc.
- Crime victims' reimbursement services and/or availability of restitution.
- Referrals to a victim's service agency or prosecutors' office victim unit and how that agency/unit assists victims. Include where/how to get counseling, crisis intervention, safety planning assistance, and court accompaniment services, to the extent available.
- How to get property back, if applicable.
- How many times they will have to meet with the prosecutor and/or attend court, including for trial and trial preparation.
- Whether they are entitled to witness fees and/or transportation to and from meetings/court.
- Whether a plea will be offered, and why/why not. (Include when that determination will be made).
- Explain that the victim may be contacted by the defense attorney, defense investigator, etc. and your jurisdiction's law on whether they have any obligation to speak to that person(s).
- Explain the extent to which their name, address and other personal information is confidential.

Victim Contact Information

- How the victim would like to be contacted in the future, what their mailing address is, and the name and contact information of a person who will always know how to contact them.
- Complete all information on the Victim Contact Sheet if your jurisdiction uses one.
- Ascertain whether it is okay to contact them at work.

If an in-person interview is set up, the victim should be interviewed in a private setting or private office area. Ensure that employees and others nearby know that you are doing a victim interview and keep interruptions to a minimum. Additionally, if the interview is being recorded, ensure that it is being done in a manner that will not record others who are nearby. Explain in advance if you are expecting to be interrupted by an unavoidable call, visit, etc. In-person interviews are important for rapport building, maintaining confidentiality, and assessing credibility so it is important to minimize interruptions.

If there is a delay during the time the victim is waiting for the prosecutor or for a court proceeding, the victim should be given updates throughout the delay period. Victims should always be kept separate from a youth and the youth's family/friends for safety reasons and to avoid the possibility of tainted identifications.

When asking victims questions about themselves, their history, potential impeachment information, etc. it is important to explain that those questions are asked of all victims of that crime, so that the victim does not feel they are being asked questions in an unfair manner. Using a one-page pedigree document, such as a Victim Contact Sheet for this purpose may be helpful. Be mindful that some or all of it may be discoverable in your jurisdiction. (See Appendix A, page 101.)

To the extent consistent with the laws in your jurisdiction, victim input should be sought at the relevant stages of the case, including what they would like to see happen in the case, whether they want to attend the court proceedings, whether they want to speak at the proceeding and whether they want to prepare a victim impact statement (these should be obtainable from your victim services agency or victim unit and tailored to your jurisdiction's statute). To the extent consistent with confidentiality and other laws, victim input should be sought with regards to all significant decisions and aspects of a case, including but not limited to, charging/diversion decisions (including a decision not to charge or to dismiss charges), plea offers, and sentencing/disposition recommendations. Victims should also be informed about each court date prior to the date in case they want to appear and should be informed about what transpired after each court date. In each conversation you have with the victim, be sure to ask if they have any questions.

Areas to Explore Regarding the Incident

These are general questions and not an exhaustive list; interview questions must always be tailored specifically for each case and each victim.

Questions Regarding the Time and Place of the Incident

- The date, time, and location of the incident(s).
- Victim's familiarity if any regarding location of the incident.
- How long the incident lasted.

Questions Regarding Whether the Victim and Youth Are Known to Each Other

- Whether the youth is known to the victim and if so, how. Explore how well they know each other and how many times the victim has seen the youth previously.

General Questions Pertaining to the Chronology of the Incident

- What the victim was doing before, during and after the incident.
- How the police got involved, including whether the victim knows if 911 was called.
- How many police officers responded, and which ones/how many the victim had conversations with.
- What the youth said before, during and after the incident.

Questions Pertaining to the Victim's Ability to Identify the Youth

- Opportunity to observe the youth, especially if they are not known to each other.
- The length of time the victim observed the youth before, during and after the incident.
- The weather and lighting conditions.
- The distance between the victim and the youth before, during and after the incident.
- Whether the victim's observation of the youth was face to face.
- Whether anything was blocking the victim's view of the youth at any point.

Questions Regarding Identification Procedures Conducted by Law Enforcement

- Whether the victim identified the youth to the police.
- The circumstances of that identification (show-up, line-up, yearbook identification, social media identification, etc.).
- The victim's discussions with the police prior to, during and after the identification procedure, including whether the victim was shown any pictures, video recordings, etc.
- Whether the victim was provided with any information by the police (or others) regarding the youth.
- How sure the victim is about his/her identification of the youth.

Questions Regarding Harm to the Victim or Victim's Property

- The extent of harm to the victim and/or victim's property and whether medical attention was sought.
- Whether the injuries or pain are still present. (If injuries are still present, take pictures each time you meet with the victim so that you have pictures in various stages of healing to help prove injury at trial.)
- If medical attention was sought, where and when (including follow-up appointments).
- Whether they are willing to sign a release for you to obtain the medical records. (See NY State's uniform form as an example at www.nycourts.gov/forms/hipaa_fillable.pdf.)
- If there was damage to the victim's property, whether the victim has estimates or receipts for the repair or replacement.

Questions Regarding the Existence of Any Additional Evidence

- Whether the victim knows of any available evidence such as video footage or other recordings, photos, text messages, social media, etc.
- Whether anyone else witnessed the incident and any information the victim has about that witness(es).

Special Considerations Regarding Benefits to Victims

Be mindful that some jurisdictions require that prosecutors turn over to defense counsel information regarding any benefit given to a victim. While this is not an exhaustive list, here are some things that may constitute a benefit:

- Transportation to and from court or the prosecutor's office, or funds for transportation
- Stuffed animals
- Food/meals/snacks
- Assistance with housing/relocation
- Immigration documentation (e.g., U-VISA assistance)

Special Considerations in School Cases

Although research indicates that rates of violent crime and theft in school and away from school declined substantially between 1992 and 2019, in 2019 more nonfatal victimizations (theft and violent crime) were committed against students ages 12–18 at school than away from school.² When interviewing victims of school crime, it is important to explore, where appropriate:

- Whether the victim is amenable to any school-based interventions including restorative justice programs that are available in your jurisdiction.
- How much contact s/he has with the youth at school, to and from school, and in any afterschool programs, sports, etc. so that you can ask the court for specific terms and conditions of an order of protection. It is also important to share with the victim any official information you have about how the school districts in your jurisdiction enforce orders of protection.
- The existence of any videos or photographs of the incident belonging to the school.³

Conclusion

For additional information on victims, please see NDAA's *National Prosecution Standards*, Fourth Edition (2023), Section V, Juvenile Justice (see Chapter 1 of this handbook), NDAA's *Juvenile Prosecution Principles and Guidelines* (2023) (see Chapter 2 of this handbook), NDAA's material for juvenile court prosecutors on Case Assessment (see Chapter 4 of this handbook), and NDAA's material for juvenile court prosecutors on Trial Preparation (see Chapter 6 of this handbook).

² Charles Puzzanchera, Sarah Hockenberry, and Melissa Sickmund, *Youth and the Juvenile Justice System: 2022 Annual Report* (Pittsburgh, PA: National Center for Juvenile Justice, December 2022), ojjdp.ojp.gov/library/publications/youth-and-juvenile-justice-system-2022-national-report.

³ This evidence may be protected by the Family Educational Rights and Privacy Act (FERPA). The U.S. Department of Education provides guidance on topics such as when a photograph or video constitutes an educational record for FERPA purposes; under what circumstances law enforcement can obtain educational records, and when juvenile justice systems can obtain such records. See U.S. Department of Education's Student Privacy Policy Office, "FERPA," accessed January 5, 2023, studentprivacy.ed.gov/ferpa.

Introduction

Trial preparation starts well in advance of your trial date. Important steps include reviewing your charging document, preparing your witness list, considering the foundations for your physical evidence/exhibits, identifying weaknesses, and anticipating potential defenses and legal issues. When evaluating your case for trial it is imperative to know your jurisdiction's statutes governing the offenses alleged, juvenile and criminal court procedure, etc. You must have a solid working knowledge of the rules of evidence and current caselaw relating to court procedure and the offenses alleged.

Preliminary Preparation

Petition

Check charging document (petition) for accuracy. If you determine that changes have to be made in the petition, make them as soon as possible.

Review the:

- Charges and elements
- Time/timeframe of occurrence
- Location and jurisdiction
- Witnesses listed/endorsed on petition:
 - If your jurisdiction requires you to provide the names of all of the witnesses you intend to call at trial, make sure if there are witnesses you intend to call whose names were not already provided to the defense, that you provide that notice to both the court and the defense.
 - Once the court allows the witnesses to be added, ensure that they receive notice of trial and a subpoena (not all jurisdictions subpoena all witnesses; follow your jurisdiction's law and office policy).
- Disposition/sentence/enhancements:
 - If required in your jurisdiction, make sure the petition includes the disposition or sentence information required as well as any special designations or enhancements.
 - If the petition needs amendment, follow the statutory procedure on amending pleadings which may differ if your amendment is substantive versus non-substantive.

- If the court allows the amendment, ask for a new arraignment under an amended petition (and anticipate that the amendment of the petition could alter/push out the trial date).

Subpoenas

If required in your jurisdiction or by office policy, ensure that the witnesses you intend to call receive subpoenas. Make the witness list for trial (check against the previously disclosed/endorsed witnesses in the petition and endorse accordingly), subpoena all endorsed witnesses needed for trial (save your process server time by identifying which of your witnesses is willing to receive service of subpoena by email versus person service), and check the returns prior to trial to make sure that all witnesses have been properly served.

Jury Instructions

Even if your case is proceeding to a bench trial, the jury instructions for your charges and legal issues can be helpful and instructive. Instructions that may be helpful to review include: circumstantial evidence, eyewitness identification, prior inconsistent statements, and any other issues in your case. Jury instruction committee notes or legislative notes can provide useful insight and relevant caselaw on a variety of trial issues.

Complete Discovery

Be mindful that prosecutors have an ongoing discovery obligation. In most jurisdictions, cases should not be set for trial until all discovery is complete. An important step in determining whether your discovery is complete is to speak to or meet with the main officer/detective on your case and review the entire file (hard copy and electronic). Depending on your case, it may also be necessary to meet with other officers or witnesses to determine if you have all of the discovery materials. Review what you have with the officer(s) or other witness(es), to be certain that there are no reports or other evidentiary items that should be tendered to the defense. If your office policy allows, meet with the defense to have a file review to be certain everything has been tendered. Have a comprehensive understanding of how cases in your jurisdiction are handled by local law enforcement, including what police personnel are assigned to specific types of cases, so you are aware of the typical discovery for your cases.

Know that certain types of cases have specific pieces/kinds of discovery related to charges. For example, weapons charges may have firearms testing reports, and cases where an officer uses force during an arrest may result in additional reports. Further, some records (i.e., child welfare records, mental health/therapy/counseling records, social service records, medical records, records containing juvenile or criminal history, school records, etc.) may require a court to review them *in camera* before they are tendered. Some records may have to be redacted; others may require a protective order. Know which records in your jurisdiction should be reviewed by a court, which records may require a protective order, and which records may need to be redacted.

Whenever possible, if the Court orders an *in camera* review of sensitive or confidential records and then disseminates those records (complete or redacted) to the parties, make sure the Court has bated stamped those records and if they have not, check your office to policy to see if it allows the bating of the records and dissemination of the bated stamped records for easy review and retrieval of specific pages.

Pursuant to *Brady vs. Maryland*, 373 U.S. 83 (1963), prosecutors are required to obtain and tender all potentially exculpatory material on all cases. This includes but is not limited to, police reports (initial reports from on the scene officers as well as supplemental detective reports, evidence technician reports, etc.), evidence logs, forensic evidence testing results, surveillance videos, body worn camera videos, medical records, and any evidence containing witness or respondent statements. *Brady* material exists not only in written reports and records, but in any information that we are aware of, including oral statements. All exculpatory evidence **MUST** be tendered. Be aware that some *Brady* material may pose risks or put an individual in danger. Consider a protective order or similar remedy available in your jurisdiction.

Review Defense Filings

Check your jurisdiction's code/statute to see if the same rules of discovery apply to both the prosecution and the defense. The defense may also have an obligation to disclose witness information and any evidence that they intend to introduce at trial. Where permitted, it is important to review any evidence the defense will be introducing at trial, the defense's witness list, and any information required to be disclosed about defense witnesses. Consider asking for an offer of proof where permissible, if there is any ambiguity as to the nature of the testimony. The defense may have an obligation to give alibi notice and provide a list of alibi witnesses to the prosecution. If your office has investigators, request that they interview all defense witnesses.

Determine whether the defense has given notice of any affirmative defenses and if that notice was given in a timely manner. If notice was given but no additional discovery was offered to support it, consider a motion to compel to allow the court to decide the issue. What is permissible in this situation varies by jurisdiction.

Pretrial Motions, Motions *in Limine* and Relevant Caselaw

Consider the facts of your case carefully. Determine if there are any issues of law that should be considered by the court before trial. Admissibility of certain types of evidence may require that you provide support for your request to admit such evidence with case law and/or statutory citations. Determine if a pre-trial ruling is more appropriate than waiting to commence the trial and face an objection and possible delay during the trial. If there is a novel or complex issue, consider filing a motion *in limine* to get a pre-trial ruling. This will reduce delays at the time of trial. File a motion *in limine* in advance of trial to obtain a pre-trial ruling on any issues that might affect your ability to proceed or the way in which you will proceed.

An important part of preparation is to anticipate defense arguments and to research case law to support your legal positions. Tender the case law to defense and the court prior to arguments. Be prepared to draw distinctions between your case and case law provided by the defense, to the extent possible.

Quick Tips

- Never tender originals. Copies of all originals should be tendered.
- Know which items in your jurisdiction require a signed protective order before they are tendered (i.e., forensic interviews).
- Read/review each piece of discovery before you tender it.

Witness Preparation

Prepare your witness list by identifying which witnesses will be needed to prove the elements of the charges; ensure that you are prepared to lay the proper foundation for exhibits. Once witnesses have been identified, determine all discovery related to each witness, including which exhibits they will be testifying about. For law enforcement witnesses, have all of the officers' reports available. Likewise, for civilian victims and witnesses, have all discovery available that includes statements made by each witness. Be clear about all existing discovery related to your witness. Thorough witness preparation is essential in determining witness strengths and weaknesses and allows for a well thought out trial strategy. Let the witnesses know that the questions asked will take them step by step through the offense.

Law Enforcement Witnesses

Review of Discovery Materials

Prior to speaking with the officers regarding the facts of the case, have the officers review all of the case reports and any video evidence, unless this is prohibited in your jurisdiction. Do not assume that because an officer has appeared pursuant to a court notification that they are familiar with the case facts. Where permissible, allow police personnel to review the reports and tangible evidence prior to beginning your discussion. If applicable, officers should watch all available body worn camera footage as well as any surveillance footage associated with your case prior to case preparation. Determine whether officers reviewed body worn camera footage prior to generating reports. Once the officer(s) have gone through the discovery, begin your discussion with a broad overview of what happened. Interview each officer separately. Allow each officer to tell you in his/her own words what occurred, and clarify any ambiguities or vague responses.

Identification Procedures

It is necessary to flesh out the details of identification procedures during trial preparation, including descriptions of suspects given by victims (determine whether your jurisdiction allows police officers to testify about descriptions of suspects given by victims/witnesses). In some jurisdictions, police officers are not permitted to testify at trial that a victim/witness identified a person in an identification procedure; only the victims or witnesses themselves can testify to that. The officer may be permitted to testify about where each party was located during the identification, which law enforcement officers were standing with each party, who was asking questions about the identification, what the distance was between the suspect and the victim, and what the lighting conditions were. Be mindful that suspects may self-identify in a manner different than how victims, witnesses and police describe them, and adhere to the laws in your jurisdiction pertaining to the use of gender pronouns.

Civilian Witnesses

Logistical Information

If your office has witness coordinators, they can assist in ensuring that your witness knows exactly where to go and when to arrive. Have the witness advised of all the details of the trial day, including the length of their appearance, relevant courthouse regulations, where to check-in, where to wait, who will let them know when it is their turn to testify, where to walk to in the courtroom, being sworn in, where to sit, and what to do when their testimony concludes.

Review of Discovery Materials

Before speaking with your civilian witnesses, you must review all of their statements related to the incident and all video coverage involving them. In addition to the law enforcement and any medical personnel, note any statements made to entities such as child welfare agencies, emergency operators or possibly other on-scene witnesses to the extent permitted by law. Also review any social media or other digital evidence that may be related to the case.

Explaining the Process to Witnesses

Separate your witnesses and speak to them individually. Start with a brief explanation of the trial process. Remember most witnesses have little, if any, experience with the juvenile justice world. Most of what they know is gleaned from television shows and movies, that often depict the juvenile and criminal justice systems inaccurately. Once an overview of the process has been described, begin preparation by inquiring generally about the witnesses' knowledge of what happened. This overview allows for an analysis of the witnesses' level of cooperation, understanding of the facts and intellectual ability. Throughout the interaction with the witness, give the witness opportunities to ask questions.

Preparation for Testimony

Once you describe to the witness what to expect during the direct and cross-examinations and any pertinent rules of evidence or pretrial rulings to navigate, do a run-through of how a direct exam might sound.

Ongoing Obligation to Provide Testimony

Understand that we have an ongoing obligation to tender discovery as we learn of it. If a victim or witness provides new or different information than what has previously been tendered, this information must be tendered to the defense. If it is determined that the new or different evidence will not be elicited by you, still tender this information.

Conclusion of Preparation

Wrap up trial preparation by asking if the witness has any questions, and if there's anything that wasn't discussed but may be important. Often these questions reveal important information.

Direct Examination Tips

- Start witness testimony with basic background questions about the individual including age, employment information, educational history, and county of residence. Civilians should not testify as to their specific employment information, home address, or any information that would put them in danger.
- Highlight important areas of your direct examination including descriptions of suspects and identification procedures. Do this by asking detailed questions in a slow methodical manner. Allow the court to absorb this testimony by not rushing through it. Slow down the narrative when the questions involve the crime itself.
- Ask pointed questions about distance and lighting. Use language that supports your evidence and theory of the case. For example, asking "how *close* were you to the person who hit you?" instead of "how *far* were you from the person who hit you?" can have an effect on the trier of fact. Choose words that allow the trier of fact to picture the incident.

- Have the victim demonstrate specific actions. If the victim was grabbed, have the victim show how they were grabbed. If the victim was shot, have the victim point to where they were shot. If there is a visible scar on the victim's person from the incident, have the victim show that scar to the court or to the jury. Always have victim's rise from their chair (with the court's permission) when addressing the court directly to demonstrate or show something.
- You must make a record of demonstrations. ("Let the record reflect the witness is standing up and [action taken by witness].")
- After the witness has slowly gone through the events of the crime, show them the relevant exhibits. This allows the trier of fact to hear the facts again and connect the testimony with the physical evidence. In the alternative, admission of exhibits can be woven in to the direct as they come up. Determine during trial preparation which style fits each case and witness best.
- Do not write out direct or cross questions in their entirety. Instead, use an outline format with bullet points for main areas of inquiry. Use boxes to check off your elements, in court identification, and any other essential details that must be elicited during trial (i.e., license plate numbers for stolen car cases). This allows for active listening, which is the concept of listening closely to a witness's answer before proceeding to the next question. It is essential to listen to the witness's answer to ensure that a sufficient response has been elicited. This process also aids in avoiding the habit of asking a question that has already been answered.
- Wrap up trial preparation by asking if the witness has any questions, and if there's anything that wasn't discussed but may be important. Often these questions reveal important information.

Witness Cross-Examination

Prepare witnesses for the defense cross-examination and common tactics used by defense attorneys during cross-examination.

Many of the same directives in direct examination apply to cross-examination:

- Tell the truth.
- Listen carefully to each question and answer only what is being asked.
- If the witness doesn't understand the question, ask counsel to rephrase.
- If the witness doesn't know the answer, they can say they don't know.
- If the witness does not remember something, s/he should say s/he does not remember.
- Remind your witness that the judge/jury is making credibility determinations based on their testimony. Highlight the importance of being truthful and respectful.

Common tactics used by the defense attorneys during cross-examination:

- If the tempo of questions increases, the witnesses should carefully consider each question and not be rushed. Defense attorneys may like to get into a rhythm and ask questions rapidly. Instruct witnesses that they are in control of the pace of their answer even if they can't control an attorney's rapid fire questioning. If the tempo of questions increases, the witnesses should carefully consider each question before answering and not be rushed.
- Some defense attorneys might ask a question in an insulting tone or insinuate a mistake was made by the witness - this may be intended to make the witness mad and show anger; discuss the importance of remaining calm and not be goaded into getting hostile or defensive. Direct the witness to listen to the question, not the tone of the attorney's voice.
- Attorneys like to ask "yes" or "no" questions during cross-examination. If "yes" or "no" is not the most truthful answer, then they should say that.
- Some defense attorneys like to ask questions that cover a lot of the same ground covered during direct examination but using "yes" or "no" questions. If the defense attorney does that, and the witness finds himself/herself answering "yes" to a lot of questions in a row, be alert to the "yes train" - the attorney might ask a line of obvious, undisputed "yes" or "no" questions to get the witness into a rhythm, but then follow it with a "yes" or "no" question on an issue in dispute. Prepare witnesses to be aware of this technique and to listen carefully to every question.
- Some defense attorneys like to ask compound questions; listen carefully before answering; there may be a different answer to different parts of the question.

Go through the expected areas of cross-examination that will likely occur.

- If there is a problem area, identify it and discuss the plan of action.
- Do not let the witness hear about the problem for the first time from the defense attorney during cross-examination.

Quick Tips

- Go over foundational questions and what questions you will ask prior to offering an exhibit into evidence.
- Discuss the procedure for objections.
- Explain that trial preparation is normal and expected.
- Prepare all of the witnesses in advance of the trial date; it may be necessary to prepare some witnesses more than once depending on their age, amount of discovery and length of testimony.
- Utilize victim/witness advocates for child victims and for sensitive domestic violence and sex crime cases.

Opening Statements

Opening statements should focus on the theory of the case, the facts expected to be elicited and the applicable law. No evidence or statements should be included unless there is a good faith basis to believe such evidence will be admitted. Remember, opening statements are the trier of facts' first impression of the case. Recognize the need to be clear and concise about the evidence. This is a preview of what will be elicited at trial and should be captivating and persuasive.

- Discuss the main points of your case without going through every detail. Focus on the evidence that will prove your elements. Give an overview of what the witnesses will testify to, instead of a recitation of their entire testimony. Refrain from referring to all of your witnesses by their full name, instead identify them by their role in the occurrence. Avoid a sterile rendering of what each witness will say. Instead, give a narrative of what happened using all of the evidence that the trier of fact will hear.
- Limit the number of people, places and events that are introduced in an opening statement, only using what is necessary for a clear picture of the occurrence.
- Be thoughtful when choosing language for your opening statement. Simply choosing a more descriptive word over a common word can have a real impact.
- All cases have weaknesses on some level. If there is a significant weakness in your case, consider addressing it in your opening statement. Witnesses with criminal convictions, witnesses whose testimony has changed, witnesses who have provided information for reduced charges are some examples of significant case weaknesses. Highlighting these issues in your opening statement allows the trier of fact to hear about the weakness while also learning how additional corroborative evidence reduces the significance of the weakness. Controlling how the weakness is presented can minimize its impact.
- The first and last sentences in your opening statement should be particularly engaging. Grab the attention of the court or jury with descriptive language or a phrase from your case. If you choose to use a verbatim statement attributable to any witness or the respondent, you must make clear the words are theirs.
- You can choose to describe the crime from the victim's perspective by discussing how the unsuspecting victim was going about daily life when the crime occurred. In the alternative, you can use the respondent's perspective and discuss all the steps that were taken to prepare for the execution of the crime.
- Start and end with the same perspective of your theory. Like all of your trial work, plan your opening statement in advance. Create an outline and not a full speech so that there is no temptation to read from it.

Quick Tips

AVOID the following:

- Discussing evidence that will not be admitted in your case in chief
- Reading from a script
- Over promising what the evidence will show
- Giving personal opinions
- Using exhibits without the court's permission

Admitting Evidence

Identify the physical evidence associated with your case and determine what is relevant or necessary to establish an element. Determine which witness will lay the foundation for your evidence. Sometimes multiple witnesses will testify using the same exhibit. Always go through the foundation questions with your witnesses during your preparation.

Foundation

An evidentiary foundation must be established for all exhibits and consists of required facts that demonstrate the evidence is relevant and is what it purports to be. A foundation establishes reliability for the fact finder. It need only be established with the first witness that identifies the evidence once it is admitted. Know the necessary foundation questions for your evidence. The basis is different for photographs/videos than for physical objects. Styles for foundation may differ, but the fundamentals must be there for each piece of evidence.

The witness must:

1. Identify the exhibit by stating the nature of the exhibit; and
2. Verify that it is in *the same or substantially same condition* as it was when witness last saw it (for an object) or that it *accurately depicts that which it purports to show*.

After the witness has laid the foundation for the exhibit, offer the exhibit into evidence and, if admitted, proceed with questions related to the content of the exhibit. Exhibits can be admitted at the time the foundation is laid or before you rest your case in chief. However, exhibits must be admitted before they can be published or described in any detail to the jury.

Example: Object (exact foundational words may vary by jurisdiction)

Approach your witness:

Q: *"Sir, I am showing you what is marked as People's Exhibit A. Do you recognize this?"*

A: *"Yes."*

Q: *"What is People's Exhibit A?"*

A: *"That's the knife that I saw in Bob's hand when he left the house that night."*

Q: *"Is this knife in the same or substantially same condition as it was when you saw it in Bob's hand?"*

A: *"Yes."*

Example: Picture (exact foundational words may vary by jurisdiction)

Approach your witness:

Q: *"Sir, I am showing you what is marked as People's Exhibit B. Do you recognize this?"*

A: *"Yes."*

Q: *"What is People's Exhibit B?"*

A: *"That's a picture of the car that crashed into my house."*

Q: *"Does this picture truly and accurately show how the car looked after it crashed into your house?"*

A: *"Yes."*

Specific Types of Evidence

Photographs

Photographs are among the most commonly used type of evidence in juvenile and criminal cases. The foundation for a photograph can be laid by the photographer or someone who has personal knowledge of what is depicted in the photograph. For example, if the photograph is of a crime scene, any witness who was at the crime scene can lay the foundation for the photograph. The original or a duplicate may be used as evidence. Photographs are relevant to show scenes, injuries, physical evidence and more. Any witness present in the picture or with personal knowledge of what is in the photograph can authenticate the exhibit for foundational purposes. Have copies of the relevant rule(s) of evidence available in case there is a challenge.

Videos

Body worn cameras, home or business surveillance videos, cellular phone footage and police monitored cameras are all excellent sources of evidence. These videos can provide essential evidence including statements by victims, witnesses, and respondents. Videos allow the trier of fact to observe firsthand the important details of the offense including the scene, lighting conditions, the actions of those involved, and any injuries sustained. This type of evidence can be more powerful than witness testimony and can be utilized to value in corroborate testimony or other evidence.

Police officers can lay the foundation for their own body worn cameras or for another officer's camera footage if they were present when it was recorded. In other words, if Officer A has personal knowledge of what is captured in Officer B's body worn video, either can lay the necessary foundation. A witness can lay the foundation for a surveillance video if they were present in the footage or were on scene and can authenticate the footage. If only the respondent is in the footage, the operator of the video recording equipment must authenticate the recording by establishing that the equipment was functioning properly at the time of the recording and that the recording has not been altered. In the alternative, an expert who observed the recording equipment may be able to testify to its authenticity.

Have copies of the relevant rule(s) of evidence and case law available in case there is a challenge.

Social Media

Evidence from social media can be incredibly persuasive at trial for a multitude of reasons. It can capture the planning or commission of the offense, or be used to show individuals in possession of the proceeds. It can also link faces or clothing to individuals in videos. Social media evidence includes videos, screen stills, phone extractions and detailed account information. This evidence can be obtained through preservation letters, subpoenas and search warrants or provided with consent by the accused or victims and witnesses. The foundation for this evidence can be established by direct or circumstantial evidence. An example of direct evidence includes account information linking the social media account where the evidence was recovered to the respondent. An example of circumstantial evidence for text messages from a respondent includes testimony from a witness that regularly communicates with the respondent, and therefore recognizes the account name or number.

Quick Tips

- Clearly identify what is being admitted, particularly if it is a partial clip and not the entire recording.
- Show exhibits to witnesses before trial.
- Consider possible hearsay objections for the evidence.

Defense Case

Anticipating defenses requires a critical analysis of your case facts. Certain defenses, such as alibi, must be disclosed by the defense in advance of trial. Details of the alibi must also be provided by the defense. (These laws may vary by jurisdiction.) Use this information to have investigators attempt to interview the alibi witnesses. It is essential to thoroughly evaluate and investigate alibi defenses. If no alibi or affirmative defense is filed in an answer by the defense, the defense will likely be that “the State has not met their burden” and there are several common theories that will likely be put forward. Prepare for them during your case in chief. Some of the most common defenses include reasonable doubt, lack of physical evidence, mistaken identity, and lying victim. Eliciting detailed information during direct examination in your case in chief can effectively combat these theories. Always keep an open mind throughout the pendency of a case when evaluating defenses.

Reasonable Doubt/Lack of Physical Evidence

This defense attacks the sufficiency of evidence in the prosecution’s case and is perhaps the most popular defense. It often attacks true weaknesses in the case. This defense is defeated by presenting more than enough evidence for a guilty finding in your case in chief. Consider putting negative evidence in your case in chief. Be mindful that the law does not require physical evidence to prove a case beyond a reasonable doubt despite the popular defense argument for it. This defense can be defeated by highlighting the credibility of the witnesses and using additional evidence to corroborate their testimony.

Mistaken Identity

By their very nature, crimes typically happen very quickly. Identities may be disguised and actions may be taken quickly to avoid being caught. These factors alone do not render witness identification untrustworthy, but rather require clear testimony surrounding all identification processes. Be cognizant of the circumstances of identification in your case. Go painstakingly through them with your victim and

witnesses. Be certain to address every aspect of the witnesses' ability to identify the respondent. Distance, lighting, opportunity to observe, clear view, degree of attention, presence of any face covering, and vantage point are important topics to discuss with your witness. Flushing out these details in your direct can be used later to rebut the argument of mistaken identification. Further, it prepares your witness for the inevitable cross-examination questions that seek to discredit your witness's opportunity to make an accurate identification. It is also important to pay close attention to the initial description given by the witness to police. The accuracy of the description, the level of certainty shown during the identification procedure and the length of time between the offense and the identification will all be considered by the trier of fact in weighing the identification. Discuss each of these with your witness when you prepare for trial. Know your case strengths and weaknesses. Have arguments and explanations prepared to explain the weaknesses.

Lying Witness

This defense can arise regardless of whether the respondent and the victim are acquainted. It is easiest to defeat when the parties are strangers. The lack of motivation to lie about a crime can typically defeat this defense. Elicit the steps the victim has taken to report the crime, cooperate with police, meet with police, go through identification procedures, cooperate with prosecutors, and appear for testimony. Without evidence of any benefit to the victim for all of this effort, this is not a strong defense argument. Further, elicit background information, if available, to bolster the credibility of your witness. Information about their education, career, and community involvement may be helpful in this regard. If the parties are acquainted, draw out details of the relationship. Determine if there was a lack of trouble between the two prior to the incident. Talk candidly with your witness about the history of the relationship. Be aware that the defense likely knows from the respondent more information about the relationship than what is listed in reports. Seek this information from your witness. Remember to disclose any newly obtained discoverable statements.

Bolster problematic witness testimony with physical evidence and other corroborating witness testimony. Address any issues with your witnesses on direct examination rather than having them come out for the first time on cross-examination.

Alibi

In most jurisdictions, the defense must produce statements made by alibi witnesses that they intend to call at trial. Even if you receive these statements, the witness should be interviewed by an investigator. If you don't have a detective or investigator to interview the alibi witnesses, check with your supervisor about whether someone else can do the interviews.

It is important to evaluate the credibility of the alibi witnesses. If the alibi witnesses are credible the case must be dismissed. Determine the relationship between the witness and the respondent, what the witness knows about the offense, and the details of the whereabouts of the respondent at the specific time of the crime.

Most often the alibi witness is a friend or family member of the respondent. If an alibi witness is not credible, the goal in cross examining that witness is to expose the incredulous testimony and highlight their motive, bias and interest. The objective is to show that the alibi witness is not credible. It is important to flesh out the improbabilities of their testimony.

Areas to cross-examine an alibi witness include:

- The timeline (know the distance between the offense and address of the alibi; determine if the crime could have been committed by the respondent based on the timeframe).
- The timing of when the alibi arose (learn if the witness advised police or prosecutors of the alibi at the time of arrest; know if the alibi witness was with the respondent at the time of arrest).
- Challenge the witness's ability to recall a specific night in the distant past.

Cross-Examination of the Respondent

During cross-examination, it is important to be mindful of the age of the accused. The tone of your cross-examination should reflect that you are questioning a minor. Style adjustments may be necessary. Understand that the respondent is not going to admit to committing the offense on the stand unless there is a self-defense claim. The objective here is similar to that of the defense witness, to show the unreasonable nature of the testimony and to demonstrate the lack of credibility in their testimony. Leading questions are permitted and preferred. However, there may be an advantage to asking an open-ended question(s) in certain situations. Be thoughtful about your questions and how they are framed.

- Start by corroborating the testimony of the prosecution witnesses if possible.
- Be slow and deliberate about questioning the respondent.
- Confirm all of the details from the direct of the respondent that are similar to your own witnesses' testimony. Does he/she admit to part of the prosecution's theory? Slowly go through the testimony that matches the prosecution's evidence. Later in argument you can highlight the convenience of that for the trier of fact.
- Show that the respondent is minimizing their involvement, possibly because of some evidence that cannot be otherwise explained or argued away. For example, if there is forensic evidence linking the respondent to the scene, they must admit their presence, as a challenge to forensic evidence is unlikely to prevail.

Like statements given by any witness, it is critical to be aware of all statements that the respondent has made prior to your cross-examination. Be prepared for the impeachment process. If the respondent gave a video statement previously, have it transcribed. This will aid in the impeachment process during cross-examination.

Stay in control of the examination. Do not allow the respondent to avoid a question. Do not get defensive or show frustration.

Closing Arguments

Closing argument is your opportunity to weave the facts and the law together to support your theory of the case. Arguments should be based on reasonable inferences and conclusions from the evidence. This is an argument, not a speech. Do not simply recite the facts! Apply the facts to the law and argue persuasively about how you proved your case. Craft your argument using the style that suits you best.

Opening Close/Closing Argument

In this portion of the closing arguments, it is essential to establish how you have met your burden. Limit the opening close to the case in chief, save your arguments related to the defense case for rebuttal if your jurisdiction allows rebuttal. The structure of the argument should include an introduction that grabs the attention of the trier of fact, followed by an application of the facts to the law, followed by a final statement that encapsulates your case theory.

- When applying the facts to the law, address each element and establish how it has been proven. Highlight the strengths of your case.
- Focus on the strongest evidence that you have while also incorporating all the corroborative evidence.
- Argue the credibility of your strongest witnesses.
- Minimize any inconsistencies or impeachment, which are often related to minor points.
- Show how the evidence elicited and admitted has proven the charges.
- Use your exhibits during your argument.
- Remind the court how they prove your case theory.
- Insignificant details that do not add to your theory should be excluded. Do not read your arguments.
- While it may be necessary to read from case law or from some pieces of evidence, generally avoid reading a script. This practice is not persuasive.
- End your opening close with a statement that is riveting and summarizes your theory of the case.

Rebuttal

- Rebuttal arguments should be confined to rebut what the defense presented.
- Plan for rebuttal in advance of the defense closing.
- Assess your case for areas of weakness.
- Anticipate the defense by critically analyzing your case.
- Be prepared to rebut several possible defense arguments based on your knowledge of the evidence.
- Assessing your case closely will allow you to accurately anticipate which might apply to your case.

- Draft notes based on your facts and evidence that show how these defenses do not apply to your case.
- During the defense argument, add to your notes if necessary. If the defense does not argue an anticipated topic, then discard your argument on that point.
- Do not defend arguments that were not presented by the defense.
- At the close of rebuttal, similar to your opening close, summarize your theory and how you have proven your case.

Quick Tips

- Do not comment on the respondent's failure to testify.
- Do not comment on the respondent's exercising their right to remain silent.
- Do not comment on the defense not putting on a case.
- Do not be overly theatrical.
- Do not shift the burden.

Ethical Considerations

Ethical considerations arise at every stage of prosecution from charging decisions through discovery and trial. A prosecutor's role is to seek justice. Yet, the path to justice has many forks and pitfalls. While each agency and its administration handle ethical issues differently, identifying these issues is critical for all. While policies and practices may vary, the issues are largely the same. The following areas represent some common ethical issues related to trial preparation. This is not intended to be an exhaustive list.

Discovery

It is a prosecutor's obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), to obtain and tender all discovery, including exculpatory evidence. If there is a doubt about whether a particular piece of evidence is exculpatory, tender it. Be familiar with witness's previous statements and if you are tendered additional information, include that in a supplemental filing and tender it. If you become aware that additional discovery exists, even if this occurs moments before trial, disclose this information to the defense and request a date to obtain it. The prosecutor's discovery duties are ongoing. Even if the information arises in an untimely fashion, it must be disclosed. Prepping a witness in advance of trial is preferable but not always possible. This opens the door for new information coming to light at the last minute. It must nonetheless be tendered. Err on the side of disclosure when it comes to tendering discovery materials.

Be cautious handling defense subpoenas for mental health or therapy records for a victim or witness. These materials are highly confidential and although they may be relevant, most jurisdictions require a preliminary showing of relevance before disclosure. If the defense fails to articulate a relevancy basis for the disclosure of such records, the court may still allow the subpoena to issue with an *in camera* inspection.

Victims and Witnesses

Know your jurisdiction's Victims Bill of Rights. This legislation affords crime victims certain rights that all prosecutors must know and follow. Most include provisions related to notice of proceedings, as well as the right to be present and to participate. These rights must be honored and safeguarded. Although prosecutors have the ultimate authority in the handling of criminal cases, we work on behalf of our victims. As such, they deserve to have their rights honored and the law requires us to do so. (See Chapter 5, "Working with Victims During the Early Stages of a Case," and Chapter 2, *NDAA's Juvenile Prosecution Principles and Guidelines* (2023), for more information on victims.)

When speaking with an adverse or potentially adverse witness, it is essential to have an additional person (commonly referred to as "prover") present to potentially testify to prove up impeachment should the witness change their testimony during trial. Do not skip this step. You risk making yourself a witness to the litigation and rendering yourself unable litigate the case yourself.

If a witness refuses to appear, determine your agency's policy for enforcing subpoenas. There are various processes for issuing warrants for victims and witnesses. Depending on the nature of the offense and the extent of the evidence, forcing a witness or victim to appear in court for testimony may not be the best practice.

If at anytime your witness expresses concerns about the accuracy of their identification, bring this to a supervisor's attention immediately. This is exculpatory evidence and must be tendered. Depending on the existence of additional evidence this circumstance may result in a dismissal. Likewise, if a victim or witness recants or substantially alters their recollection of the events, seek out the advice of a supervisor. This must be tendered and the witnesses credibility must be re-evaluated. This circumstance too, may result in a dismissal.

Giglio v. United States, 405 U.S. 150 (1972) requires disclosure of any evidence that could call into question the credibility of prosecution witnesses. This includes any adverse credibility finding related to law enforcement witnesses. Your agency may have a database of officers that have been the subject of such findings. Check this database during case assessment and at the time that you notify the officer for a court appearance. Other impeachment material of law enforcement witnesses may also be subject to disclosure in your jurisdiction. You must have a clear understanding of what prosecutors have a duty to acquire and tender to the defense in this area. All materials obtained should be reviewed to assess credibility. This way you can determine how best to proceed if you have a necessary witness with credibility issues. Consider whether the case can proceed without an officer with a negative credibility finding, as their testimony is inherently problematic. Similarly, prosecutors have a duty to disclose criminal backgrounds of civilian witnesses for purposes of impeachment. (This may be limited to certain types of crimes in different jurisdictions.)

Confidentiality

Juvenile court proceedings are generally confidential; confidentiality statutes vary by jurisdiction. The law recognizes the interest in protecting juveniles and young adults from having youthful indiscretions publicized. When speaking with witnesses and victims be mindful of disclosing information related to the accused or about the case. In most jurisdictions release of information for any reason must be by court order only. Some statutes contain enumerated exceptions. It is important to understand the laws of confidentiality in your jurisdiction.

Other records related to the victim or to the accused may also have confidentiality implications. Some common examples of confidential documents include child welfare records, social service records, medical records, search warrant affidavits containing confidential informant information, records containing juvenile or criminal history, and mental health/therapy records. Depending on the content, these records may require redaction, an *in camera* inspection, or a protective order before they can be accessed by one or both parties. It is recommended practice to discuss these issues with a supervisor to ensure that all confidentiality laws are followed.

Conclusion

Thorough preparation for trial is a critical aspect of a prosecutor's responsibility. It will allow you to become fully familiar with all the facts, evidence, and legal issues in your case, and will maximize your ability to prevail on disputed issues in the case, to obtain justice for the victim(s), and to ensure that the respondent is held accountable and receives appropriate services and treatment.

What Juvenile Court Prosecutors Need to Know about Risk Assessment Instruments

Chapter 7

Katie Jerstad

Introduction

Many jurisdictions have adopted risk and needs assessment instruments (RAIs) in their efforts to improve their juvenile justice systems. The use of RAIs at different, various stages of a youth's contact with the system can assist criminal justice professionals make more informed and objective decisions over the life cycle of a case.

From the eligibility for a particular diversion program to the length of time on probation, RAIs can assist in decision-making and be useful tools in the juvenile justice system. Some RAIs are used at early stages of the youth's contact with the criminal justice system, either during the investigation phase by law enforcement partners or at the intake phase with a juvenile court counselor or probation officer. If a youth is detained following an investigation, RAIs can be useful in helping the court, prosecutor or detaining authority determine the propriety of detention or appropriate alternatives to detention for that particular youth. RAIs may be used at or before the time of an arraignment to measure the youth's level of risk for failure to appear at subsequent hearings or level of risk to the community pending adjudication. RAIs utilized at the disposition phase typically measure risk of re-offense and identify the child's specific needs to tailor a plan for rehabilitation. Of those detained or committed, RAIs can also be helpful in treatment, discharge, or transition planning.

An RAI can help answer these questions:

- Will this individual fail to appear? (APPEARANCE)
- Is this person safe to be on the streets? (DANGEROUS)
- Will this person reoffend? (RECIDIVISM)

Not all RAIs are the same. The RAIs discussed in this chapter are distinct from the risk assessments used in the adult system and those used in the child welfare system to measure child and adolescent well-being and trauma. Juvenile RAIs are also distinct from threat assessments used by law enforcement, for instance in a school where a youth has made a threat of violence. Even within the juvenile justice system, RAIs used at different stages of the process are not the same. For instance, an RAI designed for screening for diversion will define or categorize risk differently than an RAI designed for transition planning out of a detention or correctional facility. Although different RAIs may be premised upon the same concepts or methodology, there are significant differences between RAIs that prosecutors will need to understand whether relying on or discrediting one for a particular argument.

Adoption of a juvenile risk assessment tool won't, by itself, be enough to divert youth from delinquency or prevent recidivism. Only when coupled with evidence-based and needs-based diversion programs (both community-based and residential) will the assessment of risk prove useful. Some data-driven juvenile justice programs that use RAIs have produced results, facilitated diversions and assisted in rehabilitation.

In turn, these programs have seen a reduction in the number of juveniles detained, the number of delinquency petitions filed, the number of juveniles committed to juvenile corrections facilities, and the overall juvenile recidivism rate.¹ For a list of evidence-based diversion or community-based or residential programs and how to find them in the future, see the Appendix.

What aspects of the RAIs are critical for the juvenile court prosecutor to understand?

Over the past twenty-five years, there have been significant advances in research about effective screening tools and interventions in juvenile court. As a juvenile court prosecutor, it is important to be familiar with juvenile justice research and to understand the science behind these instruments being used prior to cases getting to court and/or utilized in court. In addition to the information presented in this chapter, a helpful overview can be found online at ojjdp.ojp.gov/model-programs-guide/literature-reviews/risk_needs_assessments_for_youths.pdf (January 2015).

Nine RAIs were compared in a 2013 study summarized at www.ojp.gov/pdffiles1/ojjdp/grants/244477.pdf. This free 2013 article is the result of the U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention (OJJDP), funded research.

The article recommends more attention be given to the following areas:

- The RAI must be reliable, valid, and equitable. Evaluation of the RAI, through reliability testing and validation studies, should be a regular component of the practice.
- The Administrators of RAIs would benefit from national standards.
- Keep it simple: the list of factors considered by a RAI should include only those that have a statistically strong correlation with recidivism rather than weak correlation (including dynamic factors and criminogenic needs).

In order to understand the developments in the research since 2013 and continuing beyond the date of this manual, prosecutors must understand the evolution of the RAI, the scientific principles that gave rise to the RAI, and how they are used in a judicial context, from detention to diversion to disposition/sentencing. This chapter will discuss the principles of effective interventions (specifically, the Risk-Need-Responsivity framework) and the types of risk (static versus dynamic) and protective factors RAIs measure to determine risk level and to match that to a level of service.

Prosecutors and judges should consider the pros and cons of risk assessment tools when making decisions because the results of an assessment can be a helpful component of an argument to the court. However, the results cannot be relied upon exclusively. While a RAI can provide a program or community with benefits, a RAI can also have limitations. A prosecutor should be aware of the limitations of the RAI being used in their jurisdiction. This chapter will discuss both benefits and/or limitations of RAIs.

¹ See OJJDP, “Diversion from Formal Juvenile Court Processing,” Literature Review (2017), 6, ojjdp.ojp.gov/model-programs-guide/literature-reviews/diversion_from_formal_juvenile_court_processing.pdf, re. Adolescent Diversion Program at Michigan State University and other successful diversion programs reducing recidivism; Anne Hobbs and Sommer Fousek, *The Lancaster County Juvenile Reentry Project Follow-up Report* (2015), www.unomaha.edu/college-of-public-affairs-and-community-service/juvenile-justice-institute/_files/documents/reentry-project-followup.pdf; North Carolina Department of Public Safety, *Statewide Contracts Results First: Research Brief* (2022), www.dac.nc.gov/documents/files/divisions/jj/research-brief-state-contracts-results-first/open, comparing rates of recidivism across four evidence-based programs, Value-Based Therapeutic Environment (VBTE), Cognitive Behavioral Therapy (CBT), Functional Family Therapy (FFT) (court-involved and post release supervision).

For practical application, this chapter will also discuss one particular RAI, the Youth Assessment and Screening Instrument (YASI), studies of its efficacy in the field and case law discussing it.

Additionally, this chapter will address the use of RAIs in particularly challenging cases of youth committing sexual offenses.

But beware: just because a risk assessment tool may be used in your jurisdiction doesn't necessarily mean it cannot be challenged in court. Be sure to research the risk assessment tool in your jurisdiction's jurisprudence to see what issues have already been litigated.

Finally, this chapter will conclude with a guide for how a juvenile court prosecutor, if presented with a questionable RAI, can critically assess the tool and effectively cross-examine the professional who administered the assessment if necessary.

The Evolution of Juvenile Risk Assessment Instruments

Modern juvenile risk assessment instruments were first developed in the 1970s² and grew out of the adult risk assessment research taking place in the 1960s, but some early quasi-clinical risk assessments and objective/empirical-based RAIs date back to much earlier (1920s). The questions asked or factors considered in these juvenile RAIs have evolved since the 1960s starting with an early generation of questions that asked primarily dynamic factors (items that could change). The next generation of RAIs considered actuarial or static factors (items that do not change). Generation 3 and 4 generally ask a combination of static and dynamic questions.

Some generation 3 and 4 instruments incorporate risk factors identified in prior research studies and in one or more theories of criminal or deviant behavior. The YLS/CMI [one type of RAI], for example, includes "those items that previous research had indicated were most strongly associated with youthful criminal behavior" and were also based on the "General Personality and Social Psychological Model of Criminal Conduct" (Andrews & Bonta, 2003). Similarly, the COMPAS Youth risk assessment instrument is based on theories of criminal/deviant behavior (Brennan, Dieterich, & Ehret, 2009).³

The fourth and current generation of RAIs are considered a part of an integrated case management plan system. By 2014, researcher Andrew Wachter found more than 20 different RAIs being implemented as part of integrated case management systems statewide across 34 states in the country, although only 25 states have juvenile probation services that are all or mostly state administered.⁴

By 2015, two types of juvenile RAIs were identified. According to the 2015 *Risk/Needs Assessments for Youths* Literature Review, the two types are the actuarial model and the structured professional judgment approach.

The **actuarial model** involved scoring items related to reoffending from the assessment tool, then weighing and summing the items before using a statistical formula to calculate a total risk score. This score is cross-referenced with another table that provides an estimate of risk over a specified period such as 5 to 10 years. *The estimate, often a percentage, is based on the number of individuals who received the same risk score and recidivated during the development of the RAI.*

² Chris Baird et al., *A Comparison of Risk Assessment Instruments in Juvenile Justice* (National Council on Crime and Delinquency, 2013), 2, www.ojp.gov/pdffiles1/ojdp/grants/244477.pdf.

³ *Id.*, 3.

⁴ Andrew Wachter, *Statewide Risk Assessment in Juvenile Probation*, JJGPS StateScan (Pittsburgh, PA: National Center for Juvenile Justice, 2015), www.ncjj.org/Publication/Statewide-Risk-Assessment-in-Juvenile-Probation.aspx.

It is important to understand that the percentage gleaned from the actuarial model does not represent that youth's likelihood to reoffend, but the rate at which other youth with the same score reoffended.

Under the **structured professional judgment approach**, the practitioner determines which risk factors to consider, how they should be measured, and then categorizes risk level (involving far more discretion than the actuarial model and allowing consideration of factors not on the list).⁵

Principles of Effective Intervention— Risk Assessment Principles and Framework.

Adherence to the Principles of Effective Interventions (PEI) is a critical part of juvenile justice integrated case management plan systems. It is important to understand each element and that they must be used together to understand and measure outcomes for youth and reduce a youth's risk for recidivating.

The principles:

- **Risk**—determining the youth's risk of reoffending, considering both risk factors and **Protective Factors**, to determine the youth's needs and level of service required
- **Need**—addressing the youth's presenting issues ("criminogenic needs") associated with offending; can be done through a validated risk assessment instrument
- **Responsivity**—accounting for youth's individual characteristics⁶

The Risk Factor

The first step of an effective intervention is to identify the level of risk presented by a particular youth. RAIs are a valuable tool for this step or to achieve this principle. It can be used by institutions (youth probation, for example) to identify WHO to target with interventions. The risk level designation is meant to help ascertain the probability that a youth will reoffend, based on characteristics that are correlated with delinquency. Risk information is used to classify juveniles for purposes of supervision and to determine the need for control or treatment. Measuring risk, generally, can enable a jurisdiction to:

- Target youth with higher probability of recidivism
- Provide most intensive treatment to higher risk youth⁷

⁵ OJJDP, "Risk/Needs Assessments for Youths," Literature Review (2015), 4, ojjdp.ojp.gov/model-programs-guide/literature-reviews/risk_needs_assessments_for_youths.pdf.

⁶ See D. A. Andrews, James Bonta, and R. D. Hoge, "Classification for Effective Rehabilitation: Rediscovering Psychology," *Criminal Justice and Behavior* 17, no. 1 (March 1990): 20, 35–38, doi.org/10.1177/0093854890017001004.

⁷ Edward J. Latessa, "Why It's Important to Use Risk Data to Drive Decision Making," presented April 2017 at Institutional Corrections Research Network (ICRN) Conference, www.crj.org/assets/2017/09/ICRN-2017-Keynote-Latessa.pdf; Matthew Makarios, Kimberly Gentry Sperber, and Edward J. Latessa, "Treatment Dosage and the Risk Principle: A Refinement and Extension," (July 2014): 334–350, doi.org/10.1080/10509674.2014.922157; Guy Bourgon and Barbara Armstrong, "Transferring the Principles of Effective Treatment into a 'Real World' Prison Setting," *Criminal Justice and Behavior* 32, no. 1 (February, 2005): 3–25, doi.org/10.1177/0093854804270618.

Risk factors may include the following, depending on the RAI used (these can also correlate with Protective Factors, described in more detail below):

- Legal history
- Family supports or lack thereof
- School
- Community/peers
- Alcohol/drugs
- Violence/aggression
- Attitudes
- Skills
- Use of free time/employment

In developing the Risk Assessment Instruments, social scientists have had to take into consideration the historical discrimination and disproportionate minority contact (DMC) that could skew risk factor determination. Youth court practitioners must also consider this history and current reality when assessing a RAI.⁸

Risk assessments generally categorize youth into one of three levels of risk: low risk, moderate risk, or high risk. Low risk means youths are unlikely to reoffend or engage in delinquent behavior in the near future. Generally, they do not need the number of services or the supervision that moderate or high risk youths may require.⁹ It should also be noted that a youth in trouble for the first time could fall into the “low risk” category even when their first offense is an extremely violent offense, like homicide.¹⁰ This is where one must understand the limitations of the risk level determination obtained through a RAI.

⁸ For example, the Georgia Comprehensive Risk and Needs Assessment, the RAI used in Georgia in 2013, analyzed as part of a comparative study in 2013, asked the following questions: how many times has the youth been suspended since first grade; how many of the youth’s friends are gang-affiliated; and how many of youth’s friends have been arrested. In light of the research that black and brown boys experience a disproportionate number of school suspensions (revealing that non-black and brown children are not suspended at the same rate for similar conduct), that black and brown children, due to discriminatory banking and other housing-related practices, are more prone to live in under-resourced areas where gangs/crews dominate, and that black and brown boys are more likely to be arrested than white boys for similar behavior, these questions/factors could skew the results of the risk assessment or perpetuate DMC. Consideration of these factors could result in an RAI that assigns black and brown boys higher risk levels which could result in prolonged and unnecessary the involvement of black and brown youth in the juvenile system. Georgia’s RAI may have been modified since this 2013 study.

⁹ Gina M. Vincent, Laura S. Guy, and Thomas Grisso, *Risk Assessment in Juvenile Justice: A Guidebook for Implementation* (Models for Change, November 2012), www.modelsforchange.net/publications/346/Risk_Assessment_in_Juvenile_Justice_A_Guidebook_for_Implementation.pdf, cited in OJJDP, “Risk/Needs Assessments for Youths,” 4.

¹⁰ Rachel Larsen, “Top Common Mistakes or Misunderstandings in Juvenile Risk Assessment,” *Juvenile Justice Update* 27, no. 4 (2022): 1–2; for the free resource, see Rachel Larsen and Susan Broderick, *Top Common Mistakes or Misunderstandings in Juvenile Risk Assessment*, NDAA–Juvenile Justice Publication (2019), ndaa.org/wp-content/uploads/Common-Mistakes-in-Risk-Assessment-Magazine-FINAL.pdf.

These 3 categories of risk do not provide specific *probabilities* that youth will reoffend; juveniles are considered at a specific risk to recidivate when compared to other juveniles similarly situated.¹¹

Some states, after assessing the youth's needs based on the risk level and other evaluations, will prescribe certain treatment or assign certain activities to meet those needs and the youth has to show completion without regard to a specific number of hours.

To address the DMC problem and to highlight those attributes that reduce a child's risk to re-offend, PEI and RAIs consequently take into consideration Protective Factors.

Protective Factors

Protective Factors are those characteristics of the child, family, and wider environment that reduce the likelihood of adversity leading to negative outcomes and behaviors such as delinquency, including:

- High expectations and positive/resilient temperament
- Social competencies and problem-solving skills
- Healthy/conventional beliefs and commitment to community and school
- Positive family relationships
- Presence and involvement of caring/supportive adults
- Opportunities and rewards for prosocial bonding
- Good relationships with peers/positive peers
- High expectations and above average academic achievement¹²

Among the factors considered by the administrator and the prosecutor, certain "Protective Factors" can be identified as a strength, if already in place, or a goal. Risk/needs assessment tools can take a more strengths-based approach by considering the presence of Protective Factors when estimating a youth's level of risk.¹³ The incorporation of Protective Factors and consideration of responsivity are a part of the fourth generation of RAIs.¹⁴ Generally, the goal of any programming is to decrease risk factors and increase Protective Factors.

With three risk categories, some may assume there would be three distinct levels or combinations of services, three types of supervision or treatment that correlate. But in reality, just because two youths may be determined to be high risk, their Needs will be different so their referrals may not be similar at all. This next section will discuss the Needs part of the RMR framework.

¹¹ Vincent, *Risk Assessment in Juvenile Justice*, 30 (emphasis added).

¹² OJJDP, "Protective Factors Against Delinquency," Literature Review (2015), ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/protective_factors.pdf.

¹³ *Id.*

¹⁴ Baird, *A Comparison of Risk Assessment Instruments*, 2.

The Need Factor

The Need factor or principle identifies WHAT to target with interventions. In essence, this factor serves to answer the following question: What NEEDS changing for this youth to avoid further contact with the juvenile or criminal justice systems?

The Need principle identifies and defines the attributes of future delinquent behavior that can be changed—such as the **dynamic risk factors**.

There can be criminogenic needs factors and noncriminogenic needs factors. Here is a helpful description of the difference:

Criminogenic needs factors are related to dynamic risk factors and refer to characteristics of the youth that, when changed, are associated with changes in risk of reoffending.¹⁵ For example, substance use is a risk factor but can also be a criminogenic needs factor if a youth's substance use is related to the youth's delinquent behavior. If that youth's substance use is targeted and treated properly, the youth's risk to reoffend should be reduced.

Noncriminogenic needs factors are dynamic risk factors that may indicate a need for treatment or programming for the youth; however, they are not related to delinquent behavior. Low self-esteem is a prime example of a noncriminogenic factor. Although a youth's low self-esteem may suggest a need for counseling, it is not a risk factor for delinquency, and changing a youth's self-esteem level will not change the likelihood of reoffending.¹⁶

Examples of criminogenic needs may be static (unchanging factors) or dynamic.

Dynamic risk factors are those that can change, and indeed often do change during the course of adolescence (e.g., attitudes, values, beliefs, substance use, truancy, and peers associations). Dynamic risk factors are often identified as criminogenic needs when they are problematic for the youth. They are potentially malleable and thus may be influenced by intervention.¹⁷ Interventions tailored to identified criminogenic needs factors are associated with changes in risk of reoffending.¹⁸ Thus, it is important to identify these dynamic criminogenic needs factors and tailor the intervention to them to reduce risk of reoffending.

Most of the risk factors listed here associated with criminal conduct can be CHANGED. They are DYNAMIC.

- Antisocial attitudes, values, beliefs and emotional states
- Negative peers/associates
- Antisocial personality patterns conducive to offending

¹⁵ Vincent, *Risk Assessment in Juvenile Justice*, 5, 18–19, 23, 25, 31–33, 36.

¹⁶ OJJDP, "Risk/Needs Assessments for Youths."

¹⁷ Mark Lipsey et al., *Juvenile Justice System Improvement: Implementing an Evidence-Based Decision Making Platform* (Georgetown University Center for Juvenile Justice Reform, 2017), 6, www.ojp.gov/pdffiles1/ojjdp/grants/250443.pdf.

¹⁸ Vincent, *Risk Assessment in Juvenile Justice*, 5, 18–19, 23, 25, 31–33, 36.

- Family factors including criminality and psychological problems; low levels of affection, caring and cohesiveness; poor parental supervision and discipline practices; neglect and abuse
- Low levels of personal educational, vocational, or financial achievement
- Low levels of involvement in pro-social leisure activities
- Substance abuse¹⁹

There may be static risk factors, risk factors that are harder to eliminate, reduce or change, so the focus of the Needs factor is the dynamic risk factors that can be changed, with the right responsivity, the next factor in PEI.

The Responsivity Factor

Responsivity factors are non-criminogenic factors that should not be considered when estimating the risk level but are important to consider when determining appropriate treatment and services. They are factors that may affect a youth's ability to respond to treatment and programming, such as motivation to change, cognitive functioning, and access to transportation.²⁰

Put another way, Responsivity is the consideration of HOW to provide the youth with interventions. Responsivity can include removing barriers to treatment, such as making sure the youth has transportation to services, and if the youth does not have transportation, arranging an alternative method or time for the youth to obtain that service. Another example of Responsivity is matching the style and mode of service delivery to key youth characteristics, such as temperament, learning style, motivation, gender and culture.²¹ The Responsivity factor encourages the use of cognitive-behavioral interventions.²²

Specific Responsivity factors may include the following:

- Low intelligence
- Physical handicap
- Mental health issues
- Transportation
- Reading and writing limitations
- No desire to change (motivation)
- Childcare
- Language

¹⁹ Edward J. Latessa, "What Works and What Doesn't in Reducing Recidivism ... Understanding the Principles of Effective Intervention" (Presentation, 2014), 11–12, nicic.gov/resources/nic-library/all-library-items/what-works-and-what-doesnt-reducing-recidivism-youthful.

²⁰ Vincent, *Risk Assessment in Juvenile Justice*, cited in OJJDP, "Risk/Needs Assessments for Youths," 4.

²¹ Andrews, "Classification for Effective Rehabilitation," 20, 35–38.

²² *Id.*, 37–43.

- Ethnicity
- Cultural barriers
- History of abuse/neglect
- Interpersonal anxiety

The Responsivity factor is where juvenile justice professionals can apply the unique information about a youth, gathered not just from an assessment tool but through other sources, to the interventions available. Responsivity is an essential part of effective intervention.

Benefits and Limitations of the RAIs

The advantages of using risk and needs assessments to guide levels of supervision and treatment planning include:

- Helps track changes in the youth;
- Promotes greater objectivity in decision-making, reducing bias, including working against the racial and ethnic disparities in treatment/adjudications and dispositions;²³
- Helps provide consistency across the state, if adopted state-wide;²⁴
- Aids in legal challenges;
- Helps standardize data collection and provides common measure of effectiveness in interventions used;
- Provides a common language across counties and stakeholder groups;
- Helps formulate treatment and supervision plans;
- Identifies factors that, if changed, can reduce recidivism and lead to enhanced public safety;
- Avoids use of expensive programs for youth who do not need them;²⁵
- Helps better utilize resources and assists with case load management.

Research shows that youth who scored “low risk” by a validated assessment and were diverted from the juvenile court system recidivated at lower rates than comparable youth whose cases were formally processed through the court system.²⁶ Therefore, there is a push to keep low level youths from having to go to court. Alternative methods of holding low risk level youth accountable are emerging across the country, such as diversion and restorative justice programs.

²³ See generally, Vincent, *Risk Assessment in Juvenile Justice*, 6.

²⁴ Wisconsin Child Welfare Professional Development System, University of Wisconsin–Madison, “Youth Assessment and Screening Instrument (YASI),” accessed August 8, 2023, wcwpds.wisc.edu/yasi/#why-use-a-risk-assessment-tool.

²⁵ *Id.*

²⁶ Holly A. Wilson and Robert D. Hoge, “The Effect of Youth Diversion Programs on Recidivism: A Meta-Analytic Review,” *Criminal Justice and Behavior* 40, no. 5 (May 2013): 509–511, doi.org/10.1177/0093854812451089.

Limitations of risks and needs assessments include:

- General risk assessments are not appropriate for identifying risk for violent or sexual offending;²⁷
- General risk assessments are not mental health assessments and do not diagnosis mental health issues;²⁸
- Risk assessment “tools were not designed to specify the action a court should take . . . they provide additional information, grounded in research, to enhance the decision-making process of the court”;²⁹
- According to some researchers, risk and need assessments may contribute to racial disparities in the juvenile justice system;³⁰
 - A 2013 report from the National Research Council explains: These instruments thus provide estimates of the likelihood of detection, apprehension, and prosecution for illegal acts, not involvement in illegal activity. Given the well-documented patterns of selective law enforcement, gender differences in processing, and disproportionate minority contact (DMC), this means that risk/needs instruments might be conflating risk with ongoing biases in the juvenile justice system and enforcing the status quo in juvenile justice processing.³¹
- Risk assessments can help practitioners understand likelihood of re-offense but cannot predict a person’s behavior with certainty;³²
- While some RAIs are in the public domain, other RAIs are propriety, trademarked products that can be costly to purchase, update, and train/certify those who administer the tool;
- The validity of a particular RAI can be difficult to study for a number of reasons (for example, if an initial pre-screening diverts low risk youth, then a study of the validity of the RAI’s full screening when applied to referred youth will have a disproportionately high number of moderate and high-risk level cases);³³
- One source of variability in RAIs is inter-rater unreliability;
 - Anyone contemplating the adoption of a RAI in their jurisdiction or the reliance on a RAI result needs to consider the degree to which the RAI, when administered by different caseworkers faced with the same case information, will reach different scoring and recommendations for key decision thresholds. One must look for a RAI with good inter-rater RELIABILITY (when the case workers reach the same result with the same information).

²⁷ Vincent, *Risk Assessment in Juvenile Justice*, 25; Larsen, *Top Common Mistakes*, 2.

²⁸ Vincent, *Risk Assessment in Juvenile Justice*, 26.

²⁹ *Id.*

³⁰ OJJDP, “Risk/Needs Assessments for Youths.”

³¹ National Research Council, *Reforming Juvenile Justice: A Developmental Approach* (Washington, DC: The National Academies Press, 2013), 148, doi.org/10.17226/14685.

³² Bureau of Justice Assistance, “What Is Risk Assessment,” accessed August 8, 2023, bja.ojp.gov/program/psrac/basics/what-is-risk-assessment.

³³ Baird, *A Comparison of Risk Assessment Instruments*, 34, discussing Solano County’s use of JSC and Girls Link RAIs.

- Across RAIs and studies of RAIs, measures of recidivism differ;
 - Some define recidivism as another referral received prior to disposition on the first referral or prior to completion of a diversion program. Others define recidivism as a law violation 1 year or 5 years out from the time the first risk level was determined, requiring a look into the adult criminal reports/ records. Look for and understand the differences between RAIs when recidivism, as used in the RAI, is defined in different ways.
- To determine if a RAI performs well in a study, make sure there is a statistically significant difference in recidivism across the three risk levels, and make sure there aren't issues of equity.

RAI in Practice: The YASI

The Youth Assessment and Screening Instrument or YASI is the evidence-based screening tool developed by Orbis, Inc., and adopted for use by juvenile court professionals in many states. The YASI evolved from the Washington State Juvenile Court Assessment (WSJCA) instrument designed in the 1990s.³⁴ The YASI was implemented in several states including New York, Illinois and Mississippi in the 2000s and Virginia in 2008.³⁵

The YASI focuses on assessing RISK by considering static characteristics, dynamic characteristics and protective factors. It is a tool generally used to determine risk of recidivism (overall risk to reoffend). The YASI consists of a “pre-screen” assessment that is completed prior to filing a petition into juvenile court and a “full assessment” that is completed prior to the youth entering onto probation. The YASI not only assists in identifying risk levels, assessing needs and devising the appropriate interventions, but it has also assisted in the management of probation officer caseloads.

The YASI has a “Pre-Screen” (32 items) and a “Full Assessment” (87 items, including pre-screen items). The “Pre-Screen” may be used most frequently prior to entering the juvenile court system whereas the “Full Assessment” may be completed by case managers or probation officers (certified in the use of the tool) after adjudication for purposes of advising the Court at the time of disposition, or it may be used by case managers following admission to a juvenile correctional facility for case planning to increase protective factors and reduce risk of recidivism.

The YASI's 87 items each fall into one of ten domains:³⁶

- Legal History
- Family
- School
- Community/Peers
- Alcohol/Drugs
- Mental Health

³⁴ Baird, *A Comparison of Risk Assessment Instruments*, 45.

³⁵ *Id.*

³⁶ *Id.*

- Aggression
- Attitudes (pro-social and antisocial)
- Skills (social and cognitive)
- Employment and Free Time

The 32 pre-screen questions or items are designed to assess youth's risk level while obtaining a brief social and legal history.³⁷ A key component of administering the YASI is motivational interviewing and collecting of collateral information.³⁸ In practice, the styles or techniques or skill of motivational interviewing will differ across practitioners, which is where inter-rater reliability may weaken. The YASI generates a rating of static and dynamic risks and protective factors for each of the ten domains. Using a six-point rating system, scores range from low to high.³⁹

The final component of the YASI is the development of a case supervision plan by juvenile justice personnel that builds on the problem areas identified in the assessment.⁴⁰ Case planning is where the intervention comes in, often in the form of a "Treatment Package," or a combination of multiple strategies to be successful. Developing a common goal, communicating well and often, and regularly meeting with the youth can be helpful to reinforce the youth's learning taking place under the plan. These strategies also need to be assessed for their validity, and the youth need to be assessed to see if they are learning through their treatment referral services.

The YASI has been studied and argued about in courts; some of this research and debate has resulted in revision of the instrument. "[A] 2007 study of YASI in the state of New York found only a 3.8% difference in outcomes between moderate- and high-risk cases (Orbis Partners, 2007)."⁴¹ The study results indicated an area under the curve (AUC) value of 0.62 for 12-month and 24-month outcome measures.

The 2013 comparison study looked at the Virginia YASI pre-screen and determined that it produced substantial separation of re-adjudication rates by risk-level. It concluded that the YASI appeared to work better for boys than girls because the moderate-risk girls had higher risks of recidivism than high-risk girls, although this may be attributed to a limited sample size. It further concluded that "[d]evelopment of a 10-item risk instrument significantly improved the level of discrimination attained and produced a balanced distribution of cases across low, moderate and high levels of risk."⁴²

In a 2016 study, the pre-screen YASI was applied to 464 juveniles on community supervision in Alberta, Canada. Researchers found that the YASI "pre-screen" achieved a high level of accuracy in predicting both general and violent offenses over an 18-month follow-up period, noting that protective factors, or

³⁷ *Id.*

³⁸ Wisconsin Department of Children and Families, *Wisconsin's Plan for Assessment & Case Planning in Youth Justice Statewide* (September 2020), dcf.wisconsin.gov/files/cwportal/yj/pdf/yasi-plan.pdf; Wisconsin Child Welfare Professional Development System, "Youth Assessment and Screening Instrument (YASI)."

³⁹ Baird, *A Comparison of Risk Assessment Instruments*, 45.

⁴⁰ *Id.*

⁴¹ *Id.*, 4.

⁴² *Id.*, 50.

strengths, had a buffering effect in high-risk youth but a relatively lower level of accuracy was achieved in predicting general reoffending amongst females.⁴³

A 2019 study examined the predictive validity of risk and strength factors of the YASI and the Youth Level of Service/Case Management Inventory (YLS/CMI) in a sample of 254 justice-involved youth from Ontario, Canada, to specifically look at whether there was a gender difference in predictive validity. The study concluded that both RAIs are viable risk assessment measures for justice-involved males and females.⁴⁴

Another 2019 study conducted by researchers at the University of North Dakota examined the evaluability, or predictive accuracy, of the YASI, adopted by the North Dakota Juvenile Court in 2002, and found that questions still remain regarding the applicability of the YASI to female and Native American youth populations.⁴⁵ An article about this research, first published online in 2020, tells us that the study found a moderate effect for the instrument's predictive accuracy in relation to general reoffending from a random sample of juvenile probationers, but results were notably weaker for females compared to males. The article recommends further research on the RAI's accuracy among African American and Native American youth.⁴⁶

In addition to research, there are appellate cases in which the YASI has been discussed. In a 2019 case, the Supreme Court of Vermont considered Vermont's Department of Children and Families' recommendation that a 20 year-old youth facing aggravated assault allegations be given youthful status by the court based on the YASI's designation of the 20 year-old as moderate-risk and Vermont's statutory framework allowing for those between 12 and 22 years of age to apply for such a designation if given a low or moderate risk level. The district court, in deciding if the youth should be given youthful status, pointed to the following reasons why the YASI was not persuasive, by itself:

the YASI failed to take into account that there was probable cause for a new violent offense [committed after the aggravated assault incident]; [the answers plugged into the YASI] were based on the youth's own self-report [and that of his (not disinterested) grandmother]; [the YASI] did not consider whether the youth was still using alcohol or heroin; [the YASI] did not take into account the seriousness of the victim's injury in the aggravated assault; and the DCF worker testified that the YASI tool was "flawed."⁴⁷

The Supreme Court of Vermont upheld the district court's departure from the recommendations of the YASI and the consideration of factors not considered by the YASI, such as public safety.

⁴³ N. J. Jones et al., "Validity of the youth assessment and screening instrument: A juvenile justice tool incorporating risks, needs, and strengths," *Law and Human Behavior* 40, no. 2 (2016): 182–194, doi.org/10.1037/lhb0000170.

⁴⁴ Terri Scott, Shelley I. Brown, and Tracey A. Skilling, "Predictive and Convergent Validity of the Youth Assessment and Screening Instrument in a Sample of Male and Female Justice-Involved Youth," *Criminal Justice and Behavior* 46, no. 6 (2019): 811–831, doi.org/10.1177/0093854819842585.

⁴⁵ Adam K. Matz and Adrian R. Martinez, *Juvenile Risk Assessment: Assessing the Evaluability and Predictive Validity of the Youth Assessment and Screening Instrument for use among the North Dakota Juvenile Probation Population* (University of North Dakota Department of Criminal Justice, 2019), 20, commons.und.edu/cj-fac/2.

⁴⁶ Adam K. Matz, Adrian R. Martinez, and Elizabeth Kujava, "Assessing Risk in North Dakota Juvenile Probation: A Preliminary Examination of the Predictive Validity of the Youth Assessment and Screening Instrument," *Crime and Delinquency* 67, no. 4 (2021): 551–573, doi.org/10.1177/001128720950023.

⁴⁷ *In re B.B.*, 2019 VT 86, P3, 211 Vt. 272, 224 A.3d 1149 (2019).

As far back as 1996, Florida's use of the risk assessment has been statutorily required to aid the detention decision. The First District Court of Appeal in *S.W. v. Woolsey*, 673 So.2d 152, 154 (Fla. 1st DCA 1996), provides an insightful history of the risk assessment instrument and outlines its appropriate application by juvenile courts in determining the propriety of detention.

If you are an administrator weighing the pros and cons of a particular RAI for use in your jurisdiction, or if you are a prosecutor compiling information about the results of a RAI to include in a sentencing argument to the Court, you will be well-served by researching the history of the specific RAI just as this chapter has covered information about the YASI. Be able to answer the following: how it came into existence, what other jurisdictions use it, is there evidence of its predictive validity from more than one jurisdiction, how many studies have looked at its validity for your jurisdiction, whether it has been revised and further studied, and what appellate decisions have considered the RAI and its specific results and recommendations. Also, along with the RIA itself, consider adopting written policies and procedures on its implementation. Make sure that the adoption of a RAI is not the end all and be all—make sure it is part of a larger risk assessment system, that the results and data are used, and make sure the staff understand that the level of risk doesn't dictate a particular action or decision.⁴⁸

Risk Assessments of Juveniles Who Sexually Offend

Even if one particular assessment instrument is shown to have predictive validity, inter-rater reliability and equity, that does not mean it is the appropriate RAI for all cases. Youth accused of sexual offenses should be evaluated with a psychological evaluation or specialized risk assessment. "Many youth who engage in a sexual offense will score low on general risk assessment tools because the characteristics associated with general reoffending are not the same characteristics associated with continual sex offending (for example, deviant sexual arousal)."⁴⁹

There are six well-known risk assessment instruments for youth accused of sexual offenses: J-SOAP-II, J-SORRAT-II, Estimate of Risk of Adolescent Sexual Offence Recidivism (ERASOR), Juvenile Risk Assessment Scale (JRAS), Structured Assessment of Violent Risk in Youth (SAVRY), and Hare Psychopathy Checklist: Youth Version (PCL:YV). In 2015, the two most commonly used instruments were the J-SOAP-II and the ERASOR, both of which are structured and empirically informed instruments.

These can be broken up into two categories, not unlike the two types of RAIs discussed above: actuarial models (based on statistical comparison of static risk factors) and clinical models (based on observation and professional judgment on defined risk factors—static, dynamic and protective).⁵⁰ As for their predictive accuracy, "[i]t has been strongly asserted in both juvenile and adult risk assessment contexts that actuarial assessment has the capacity to predict risk more accurately than clinical assessment."⁵¹

⁴⁸ Gina M. Vincent, *Screening and Assessment in Juvenile Justice Systems: Identifying Mental Health Needs and Risk of Reoffending* (Washington, DC: Technical Assistance Partnership for Child and Family Mental Health, January 2012), 7–8 modelsforchange.net/publications/328/.

⁴⁹ Vincent, *Risk Assessment in Juvenile Justice*, 25.

⁵⁰ Phil Rich, *The Assessment of Risk for Sexual Reoffense in Juveniles Who Commit Sexual Offenses*, U.S. Department of Justice, Office of Justice Programs, SOMAPI Research Brief (July 2015), 2, smart.ojp.gov/SOMAPI-brief-juvenile-risk-assessment.

⁵¹ *Id.*

These tests or tools are often administered as part of a psychosexual evaluation (PSE) court ordered to inform in the dispositional phase. The purpose of PSE is to assist the Court is determining the level of risk to reoffend and the amenability to treatment (and whether that treatment should be obtained in a facility or the community). Multiple tests or assessment tools may be administered by the psychosexual evaluator for one report. Not unlike juvenile RAIs, RAIs for sex offending have undergone a similar evolution as far as practitioners understanding of which tools are best: Starting with a preference for unstructured clinical judgment, evolving into a preference for static actuarial RAIs, evolving further into a preference for a combination of RAIs (actuarial and clinical) and even further evolving to where more dynamic risk factors are taken into consideration.

However, there is not agreement on the predictive or empirical validation of all factors identified as “risk factors” in some studies. For instance, one study pointed to a lack of empirical support, or contradiction by other empirical evidence, of the following traits: history of sexual victimization, history of nonsexual offending, sexual offenses involving penetration, denial of sexual offending, and low victim empathy.⁵²

Perhaps more so than other types of risk assessments, the risk assessment tools pertaining to sex offenses are imperfect, but particularly so for juveniles who’ve committed sexual offenses. Individuals of all ages who commit sex offenses do not exhibit a consistent group of character traits.⁵³ “[They] are a heterogeneous group with few shared characteristics apart from a predilection for deviant sexual behavior. Furthermore, there is no psychological test or device that reliably detects persons who have or will sexually abuse children.”⁵⁴

Regarding reliably predicting the re-offense of a juvenile:

The process of risk assessment for juveniles who sexually offend is complicated by the relatively low base rates of sexual recidivism found among juveniles. Juvenile risk assessment is complicated even further by the ongoing development and maturation of youth. Accordingly, risk assessment models and tools need to account for these developmental factors in order to accurately estimate risk.⁵⁵

The tools or tests administered to assess adult males must not be confused with those designed to assess juveniles, as has happened in the courts. *See In re J.P.*, 339 N.J. Super. 443, 772 A.2d 54 (App. Div. 2001). Juvenile risk assessment tools take into account the growing development of the child and therefore have a short shelf life (an expiration date) for a juvenile’s assessed risk level or score, either requiring reassessment every six months (J-SOAP-II) or noting that the results cover risk of sexual recidivism up to age 18 (JSORRAT-II).⁵⁶

In the New Jersey case, *In re J.P.*, the appellant was a juvenile at the time of conviction for three sexual offenses, was prosecuted and sentenced at 16, but was an adult at the time of subsequent hearing on the State’s petition for civil commitment under the state’s Sexual and Violent Predator’s Act. At the hearing on the commitment petition, the Court took into consideration the results of the actuarial tools, the Minnesota RAI (MnSOST-R) and the Static 99, which are tools validated for *adults* who commit sex offenses. The tools were administered earlier in the case when the appellant was still a youth. When the admissibility was

⁵² *Id.*

⁵³ John E. B. Myers et al., “Expert Testimony in Child Sexual Abuse Litigation,” *Nebraska Law Review* 68, no. 1 (1989): 66, digitalcommons.unl.edu/nlr/vol68/iss1/2.

⁵⁴ *Id.*

⁵⁵ Rich, *The Assessment of Risk for Sexual Reoffense in Juveniles*, 1.

⁵⁶ *Id.*, 2.

challenged by the respondent's attorney, the court referenced an earlier opinion of another judge who found the actuarial instruments admissible as clinical tools in SVPA commitment hearings, without regard for the instruments' validity when applied to juveniles. This resulted in the remand of the matter for a re-hearing without consideration of those tests' results.

Although imperfect and there being a need for more research, tests and methods used in a psychosexual evaluation can be enormously helpful information gathering techniques. They must be understood by prosecutors in order to conduct direct or cross-examinations of PSE writers to inform the court of the risks to public safety posed by a defendant and how to mitigate that risk at the sentencing phase. Additionally, tier level designation by the court is guided by the results of these tools, and that tier level designation in turn may mandate a particular disposition or particular conditions of supervision, so prosecutors must be familiar with the sentencing statutes for sex offenses.

In addition, youth court practitioners handling sex-related offenses, and those handling cases against juveniles that have been transferred to adult court, must educate themselves about the juvenile RAIs being used for sexual offending youth, and, depending on whether the courts in that jurisdiction follow the Frye or Daubert test for the admissibility of expert testimony, whether the court would consider the RAI to be based on a "new" or "novel" scientific principle, method, or technique for which an evidentiary hearing would be required (under Frye).⁵⁷

Scrutinizing the RAI and Preparing a Cross-Examination

Checklist for Risk Assessment Cross-Examination

Preparation

- Research the origins of the RAI: is it public information or propriety?
- Review tool's guidebook to check what factors or questions are asked and if questions are being asked/interpreted appropriately by the administrator of the tool.
- Also, carefully look at the source of information that goes into the RAI. Are there just one source or multiple sources? Is the youth a source? The youth's parents? Teachers? Public records? Was collateral information obtained to administer the RAI?
- Conduct legal research to determine if there is case law in your jurisdiction and/or other jurisdictions that use the tool (*see e.g., Matter of Geraldine*, 2010 N.Y. Slip Op. 53033 (N.Y. Fam. Ct. 2010), finding that the risk assessment tool used at that time impermissibly discriminated against males by awarding a preference to delinquent females in the form of asset points based solely on gender).
- Conduct social science research to determine if there are journal articles about strengths or weaknesses of the tool.
- What credentials are required for the person administering the test? Does the person who administered the test in your case have those credentials?

⁵⁷ See *In re Det. of Erbe*, 344 Ill. App. 3d 350, 800 N.E.2d 137 (2003) followed by *In re Commitment of Stevens*, 345 Ill. App. 3d 1050, 803 N.E.2d 1036 (2004) (affirming that the actuarial methods used in an RAI are admissible without a Frye hearing in Illinois).

Areas to explore with the administrator of the tool⁵⁸ (whether to ask open ended questions should be determined on a case-by-case and question-by-question basis)

- Are you trained to administer the test? How frequent is the training for those administering assessments; has there been training recently? Booster trainings?
- Are you certified to administer the tool? How often does the tool require recertification?
- Do you have the credentials/qualifications to administer the RAI?
- Was this RAI/tool validated in this state/normed to specific population in [your jurisdiction]? Is it valid? Does the instrument measure what it is supposed to measure? Accuracy? Predictive validity?
- Is the tool reliable? Consistent across the board? Dependable? Inter-rater reliable?
- Can the tool predict whether the youth is at risk for committing a violent crime or non-violent crime?
- Has the tool been validated recently in your jurisdiction?
- What is the difference between a low, moderate and high risk level result?
- What is the recidivism rate for each of those levels?
- Are the factors considered by the tool biased against a certain ethnicity, certain race, certain gender, certain neighborhood?
- How can you be sure that another PO or LCSW who administers this test won't come up with different results?

Conclusion

The adoption of RAIs and principles of effective intervention in juvenile justice systems is widespread across the country but not yet present in all fifty states. Of those states where this framework is adopted, no two states' systems are identical. Even within a state, how and when the RAI is put to use can differ from district to district, county to county. But within a state that has adopted a state-wide model, the benefits can outweigh the limitations, as long as it has been assessed as valid in that jurisdiction and the tool can be revised to reflect advancements in the research. Prosecutors in the juvenile space would be wise to ask questions about if and how the RAI is used in their jurisdiction, how it came into effect, and whether it has been assessed. Additionally, because this chapter covered mostly generalities, prosecutors should carve out time to learn about any cases and studies involving the RAI's validity, reliability, equity and legal history in their particular jurisdiction.

⁵⁸ See also National District Attorneys Association, *Cross-Examination of Juvenile Risk Assessment Administrators*, NDAA–Juvenile Justice Publication (2019), nda.org/wp-content/uploads/Cross-Exam-Risk-Assessment-for-All-States.pdf.

Victim Contact Sheet

Name _____ DOB _____ / _____ / _____
(First) (Middle) (Last) (Month) (Day) (Year xxxx)

Address _____ / _____ / _____ / _____
(Street) (City) (State) (Zip code)

Email address _____ Home phone _____

Cell phone _____ Work phone _____

Employer/school _____

Job title _____

Work address: _____ / _____ / _____ / _____
(Street) (City) (State) (Zip code)

Driver's license or non-driver ID #: _____

Person who will always know how to reach you _____

Address _____ / _____ / _____ / _____
(Street) (City) (State) (Zip code)

Do you have any pending cases in any courts? Yes No

If yes, in what court? _____

Type of case _____

Docket # _____

Have you ever been convicted of a crime? Yes No

If yes, what crime in what court? _____

Additional Resources: Youth and Substance Use

Prevalence of Drug Use and Substance Use Disorders Among Youth

- OJJDP publishes a national report on system-involved youth. Their most recent report is from 2022 and contains data from 2019 and includes statistics regarding the proportion of high school seniors reporting use of vaping nicotine 40.8%, and vaping marijuana 23.7%.¹
- According to the National Institute on Drug Abuse, part of the National Institutes of Health, the percentage of adolescents reporting substance use in 2022 held steady after declining between 2020 and 2021. 31% of 12th graders used cannabis in the last 12 months of 2022, same as 2021. 27% vaped nicotine, as in 2021. 52% of 12th graders drank alcohol, up from 47% in 2021.²
- This recent steady rate has occurred after a significant climb in reports of drug use by youth between 2016 and 2020. For instance, among 8th graders there was a 61% increase in drug use from 2016 to 2020.³
- 50% of teenagers have misused a drug at least once.⁴
- 62% of teenagers in 12th grade have abused alcohol.⁵
- According to the 2020 National Survey on Drug Use and Health, with regard to excessive drinking, the percentages of youth using alcohol ranges from 1% among 12–13 year-olds to about 17% at ages 16–17 and almost 32% among 18–20-year-olds.⁶

¹ Puzzanchera, *Youth and the Juvenile Justice System*, 70. Discussion of youth and substance use.

² National Institute on Drug Abuse, “Most reported substance use among adolescents held steady in 2022,” news release, December 2022, nida.nih.gov/news-events/news-releases/2022/12/most-reported-substance-use-among-adolescents-held-steady-in-2022; Richard A. Miech et al., *Monitoring the Future: National Survey Results on Drug Use, 1975–2022: Secondary School Students* (Ann Arbor, MI: The University of Michigan Institute for Social Research, 2023), monitoringthefuture.org/wp-content/uploads/2022/12/mtf2022.pdf.

³ National Center for Drug Abuse Statistics, “Drug Use Among Youth: Facts & Statistics,” accessed August 8, 2023, drugabusestatistics.org/teen-drug-use/.

⁴ *Id.*

⁵ *Id.*

⁶ Responsibility.org, “The Fight Against Underage Drinking | Stats on Teen Alcohol Use,” accessed March 9, 2023, [www.responsibility.org/alcohol-statistics/underage-drinking-statistics#:~:text=The%20rate%20of%20current%20alcohol,teens%20are%20consuming%20alcohol%20underage](https://www.responsibility.org/alcohol-statistics/underage-drinking-statistics#:~:text=The%20rate%20of%20current%20alcohol,teens%20are%20consuming%20alcohol%20underage.).

- 15% of high schoolers have been reported to use certain illicit or injectable drugs. 14% of high schoolers use prescribed drugs, primarily opioids, irresponsibly.⁷
- The CDC reports that between July–December 2019 and July–December 2021, the number of overdose deaths among children and young adults aged 10 to 19 jumped by 109%. These deaths involved illegally produced fentanyl.⁸
- Other research shows a recent dramatic rise in overdose deaths among young people ages 14–18 and attributes the increase to illicit fentanyl contaminating the supply of counterfeit pills.⁹
- Impact of Covid: In 2021, CDC’s Adolescent Behaviors and Experiences Survey (ABES) found that one third of students participating in ABES who had ever drunk alcohol or used drugs used those substances more during the pandemic.¹⁰

Substances Commonly Used by Adolescents

- The 2022 survey “Monitoring the Future” found three substances adolescents most commonly reported using: alcohol, nicotine vaping, and cannabis.¹¹
- Use of narcotics other than heroin (including Vicodin, OxyContin, Percocet, etc.) increased slightly among 12th graders between 2021 and 2022.¹²
- For more information about this survey, visit nida.nih.gov/news-events/news-releases/2022/12/most-reported-substance-use-among-adolescents-held-steady-in-2022.

Risk Factors for Youth and Substance Use Initiation, Misuse and Disorders

1. First, it is important to know the meaning of “substance abuse” versus “substance use or misuse” and “substance use disorders” and which term is preferred.
 - According to Webster’s Dictionary, *substance abuse* is the overindulgence in or dependence on an addictive substance, especially alcohol or drugs.

⁷ Centers for Disease Control and Prevention, “High-Risk Substance Use Among Youth,” last reviewed September 29, 2022, www.cdc.gov/healthyouth/substance-use/index.htm.

⁸ Lauren J. Tanz et al., “Drug Overdose Deaths Among Persons Aged 10–19 Years—United States, July 2019–December 2021,” *MMWR Morbidity and Mortality Weekly Report* 71, no. 50 (December 16, 2022): 1576–1582, [dx.doi.org/10.15585/mmwr.mm7150a2](https://doi.org/10.15585/mmwr.mm7150a2).

⁹ Joseph Friedman et al., “Trends in Drug Overdose Deaths Among US Adolescents, January 2010 to June 2021,” *JAMA* 327, no. 14 (April 2022): 1398–1400, doi.org/10.1001/jama.2022.2847.

¹⁰ Brooke E. Hoots et al., “Alcohol and Other Substance Use Before and During the COVID-19 Pandemic Among High School Students—Youth Risk Behavior Survey, United States, 2021,” *MMWR Supplements* 72, Suppl-1 (April 28, 2023): 84–92, [dx.doi.org/10.15585/mmwr.su7201a10](https://doi.org/10.15585/mmwr.su7201a10).

¹¹ Miech, *Monitoring the Future: National Survey Results on Drug Use*.

¹² *Id.*

- The term “substance abuse” is considered stigmatizing. Stigma can make individuals with substance use disorders less likely to seek treatment. Public health experts recommend against using stigmatizing language in favor of more particularly describing the usage issue and to achieve higher rates of intervention earlier.
- Because it may not be clear if someone has a diagnosed disorder, unless you know there is a diagnosis of a substance use disorder (SUD), the better term to use is a “person who misuses substances” or “substance misuse.” See NIDA’s online guide.¹³ This guidance appears to be the same whether you are referring to an adult or a youth.
- According to the National Institute on Drug Abuse, *substance use disorders* (SUDs) are defined in part by continued use of substances despite negative consequences. Substance use disorders are chronic, treatable conditions from which people can recover. In 2020, over 40 million people in the United States had at least one substance use disorder. They are also relapsing conditions, in which periods of abstinence (not using substances) can be followed by a return to use.

2. What puts a child at risk of substance misuse? What helps buffer them against it?

- Risk factors that lead to substance misuse among children and youth and protective factors that buffer against initiation are described in the OJJDP Model Programs Guide Literature Review: Substance Use Prevention Programs, published February 2022.¹⁴
- Personal traits such as: genetics, early moral development, personality traits (neuroticism, lower agreeableness, and lower conscientiousness than siblings of similar ages), temperament, and negative life events.¹⁵
 - Mental health disorders, such as ADHD, conduct disorders, and mood disorders, are associated with substance use disorders, but it is difficult for researchers to determine which preceded the other. The disorders can be multidirectional.¹⁶
 - Research demonstrates that an association with peers who engage in deviant behavior and use substances is one of the strongest risk factors for youth substance use and initiation, but this too is multi-directional. Youth choose their friends based on shared interests and behaviors, but those are also shaped by peers.¹⁷

¹³ National Institute on Drug Abuse, “Words Matter: Preferred Language for Talking About Addiction,” June 23, 2021, nida.nih.gov/research-topics/addiction-science/words-matter-preferred-language-talking-about-addiction.

¹⁴ OJJDP, “Substance Use Prevention Programs,” Literature Review (2022), ojjdp.ojp.gov/model-programs-guide/literature-reviews/substance-use-prevention-programs.

¹⁵ OJJDP, “Substance Use Treatment Programs,” Literature Review (2023), ojjdp.ojp.gov/model-programs-guide/literature-reviews/substance-use-treatment-programs#2.

¹⁶ *Id.*

¹⁷ *Id.*

- Conditions in family, school, and community:
 - Poor performance, such as low grades and low academic motivation, truancy and suspension, in school is linked to initiation of use, but the direction of the association is unclear. Did academic performance lead to substance use or did substance use lead to academic performance? This has not yet been determined clearly.¹⁸
 - Family, parental behavior and family structure: Neglect and abuse by a parent can make a strong impact on substance use and disorder in youth.¹⁹ As of 2019, there was a recognition that little research had been done into the influence of a parent’s substance use on a child’s disordered substance use, although it was determined that family risk factors may differ by gender, with family conflict factoring more into girls’ substance use disorders than for boys.²⁰
 - Community: Studies have shown a correlation between perceived levels of safety and crime and substance use and disorders, with higher levels of neighborhood disorganization correlating with higher levels of substance use dependence.²¹
- The Centers for Disease Control and Prevention (CDC) provides information about high-risk substance use among youth for purposes of addressing HIV and STD prevention. The CDC defines *high-risk substance use* as “any use by adolescents of substances with a high risk of adverse outcomes (i.e., injury, criminal justice involvement, school dropout, loss of life). This includes misuse of prescription drugs, use of illicit drugs, and use of injection drugs.
 - The risk factors for high-risk substance use are:²²
 - Family history of substance use
 - Favorable parental attitudes towards the behavior
 - Poor parental monitoring
 - Parental substance use
 - Family rejection of sexual orientation or gender identity
 - Association with delinquent or substance using peers
 - Lack of school connectedness
 - Low academic achievement

¹⁸ OJJDP, “Substance Use Treatment Programs.”

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Centers for Disease Control and Prevention, “High-Risk Substance Use Among Youth,” last reviewed September 29, 2022), www.cdc.gov/healthyyouth/substance-use/index.htm.

- Childhood sexual abuse
- Mental health issues
- Protective factors that buffer against from a variety of risky behaviors are:
 - Parent or family engagement
 - Family support
 - Parental disapproval of substance use
 - Parental monitoring
 - School connectedness
- Among other research, the CDC is conducting a pilot project in high-risk rural communities called Teens Linked to Care (TLC).²³

3. What are characteristics of young people who are more likely to use drugs?

The CDC conducts research into youth behavior that can lead to poor health in students grades 9 through 12. This research is called the Youth Risk Behavior Surveillance System (YRBSS) and is made up of a set of surveys that track behavior. The following risk factors were identified by 2021 YRBSS data:

- Those who feel unconnected at school²⁴
- Those who witness community violence consistently²⁵
- Those who experienced unstable housing²⁶
- Those with low parental monitoring²⁷

²³ Centers for Disease Control and Prevention, Division of Adolescent and School Health, “Teens Linked to Care (TLC); Strategies to Prevent Substance Misuse,” last reviewed July 6, 2023, www.cdc.gov/healthyouth/substance-use/teens_linked_to_care.htm.

²⁴ Natalie J. Wilkins et al., “School Connectedness and Risk Behaviors and Experiences Among High School Students—Youth Risk Behavior Survey, United States, 2021,” *MMWR Supplements* 72, Suppl-1 (April 28, 2023): 13–21, [dx.doi.org/10.15585/mmwr.su7201a2](https://doi.org/10.15585/mmwr.su7201a2).

²⁵ This was associated with increased odds of gun carrying, substance use, and suicide risk for both males and females across Black, White and Hispanic students. Christopher R. Harper et al., “Witnessing Community Violence, Gun Carrying, and Associations with Substance Use and Suicide Risk Among High School Students—Youth Risk Behavior Survey, United States, 2021,” *MMWR Supplements* 72, Suppl-1 (April 28, 2023): 22–28, [dx.doi.org/10.15585/mmwr.su7201a3](https://doi.org/10.15585/mmwr.su7201a3).

²⁶ Izraelle I. McKinnon et al., “Experiences of Unstable Housing Among High School Students—Youth Risk Behavior Survey, United States, 2021,” *MMWR Supplements* 72, Suppl-1 (April 28, 2023): 29–26, [dx.doi.org/10.15585/mmwr.su7201a4](https://doi.org/10.15585/mmwr.su7201a4).

²⁷ Patricia J. Dittus et al., “Parental Monitoring and Risk Behaviors and Experiences Among High School Students—Youth Risk Behavior Survey, United States, 2021,” *MMWR Supplements* 72, Suppl-1 (April 28, 2023): 37–44, [dx.doi.org/10.15585/mmwr.su7201a5](https://doi.org/10.15585/mmwr.su7201a5).

MedlinePlus is a service of the National Library of Medicine (NLM), the world’s largest medical library, which is part of the National Institutes of Health (NIH). It is an online health information resource for patients and their families and friends. With regard to drugs and young people, they have the following information about substance use risk factors in young people:²⁸

- Those with trauma from early life experiences, such as child abuse and child sexual abuse
 - Those with certain genetic predisposition
 - Those with prenatal exposure to alcohol or other drugs
 - Those with exposure to substances in the home
 - Those with a lack of parental supervision or monitoring
 - Those with peers/friends who also use drugs/alcohol
4. Why do youth turn to drug or alcohol use? There are numerous reasons why young people use drugs, but some examples include:²⁹
- To try to fit in—where they want to show off for their peers who also do drugs.
 - To feel good—drugs can produce feelings of pleasure.
 - To feel better—children may think that by using drugs, it will provide some temporary relief from depression, anxiety, stress-related disorders, and physical pain; any trauma or stress-related disorder they are currently experiencing, not realizing that it is not a healthy coping mechanism.
 - To improve performance in academic or sports—Some adolescents may use study stimulants or steroids to improve their academic or athletic performance.
 - To experiment- Adolescents are at a stage in their lives when trying new things can lead them to believe that doing drugs is exciting.
5. Once a youth starts misusing substances, how can you tell? What are the signs that a young person has a drug problem?³⁰
- Changing friends a lot
 - Spending a lot of time alone
 - Losing interest in favorite things
 - Not taking care of themselves—for example, not taking showers, changing clothes, or brushing their teeth

²⁸ MedlinePlus, National Library of Medicine, “Drugs and Young People,” last updated November 20, 2019, medlineplus.gov/drugsandyoungpeople.html.

²⁹ *Id.*

³⁰ *Id.*

- Being really tired and sad
 - Eating more or eating less than usual
 - Being very energetic, talking fast, or saying things that don't make sense
 - Being in a bad mood
 - Quickly changing between feeling bad and feeling good
 - Missing important appointments
 - Having problems at school—missing class, getting bad grades
 - Having problems in personal or family relationships
 - Lying and stealing
 - Memory lapses, poor concentration, lack of coordination, slurred speech, etc.
6. Once a youth starts misusing substances, what does that put them at risk of?³¹
- Adolescents with substance use problems have a high likelihood of serious illnesses, poorer general health, and a higher risk of developing addiction.
 - Injection of drugs will put the user at a higher risk of spreading infections like HIV or hepatitis.
 - Those who use opioids or other prescribed medications are more likely to encounter physical or sexual abuse than those who don't.
 - Drug use severity in adolescence affects substance use disorder risk in adulthood.³²

Adolescent Brain and Substance Use

- Adolescents' brains are normally still developing between the ages of 12 and 25.³³ During this time, adolescents are noted to take more risks, especially when in the presence of peers or in highly emotionally charged situations.³⁴ At times and in some youth short-term rewards incentivize behavior more than long-term rewards. Researchers attribute this to a number of things, one of which is less effective dopamine levels (a neurotransmitter) in the brain during adolescence.³⁵ They also attribute this

³¹ *Id.*

³² National Institute on Drug Abuse, "Drug use severity in adolescence affects substance use disorder risk in adulthood," news release, April 1, 2022, nida.nih.gov/news-events/news-releases/2022/04/drug-use-severity-in-adolescence-affects-substance-use-disorder-risk-in-adulthood.

³³ ACT4JuvenileJustice, *Adolescent Brain Development & Juvenile Justice*.

³⁴ Underwood, "Teens can have excellent executive function."

³⁵ Siegel, "Dopamine and Teenage Logic"; Anu Balogun, "Adolescent Impulse Control Could be Fueled by Dopamine," UPMC, Inside Life Changing Medicine, May 10, 2022, inside.upmc.com/adolescent-impulse-control-could-be-fueled-by-dopamine/; also discussed in National Juvenile Justice Prosecution Center in partnership with NDAA, OJJDP, DOJ, Juvenile Prosecutor Training Curriculum, Instructor Manual, Module 2, Child and Adolescent Development, 28, citing Coalition for Juvenile Justice, *What Are the Implications of Adolescent Brain Development*.

to the late development of the frontal cortex (the center of executive function) and teens heavy reliance on the emotional centers of the brain (such as the limbic system) when making decisions.³⁶

- Researchers have been studying drug exposure’s impact on brain development and cognitive skills.³⁷ According to the 2009 paper, substance use throughout adolescence is associated with anomalies in brain activity, such as decreased cognitive function, differences in brain volume, and irregular neuronal lifestyle habits.
- When you start using drugs at a young age, there is a greater chance that you will continue using as an adult and that it will interfere with brain development, which will most likely affect decision-making in adolescence.³⁸
- Studies show that adolescent brains can become addicted more easily and quickly than adult brains.³⁹
- Alcohol is one example of a substance that can cause more brain damage in an adolescent than in an adult.⁴⁰
- A neural pathway activated by natural rewards, such as social interaction, tasty food, and sexual activity, becomes even more activated when a teen consumes **alcohol or drugs**, causing the teen to seek out those substances over and over again.⁴¹
- If this behavior becomes pathological, it can result in **addiction**, which takes over your life’s priorities and can lead to devastating consequences if left untreated, like cancer.
- The brain’s growth throughout the adolescent years, when hazardous substances, particularly alcohol, are present, may pave the way for cognitive problems in adulthood that have long-term effects.⁴²
- Alcohol use reduces neurogenesis and reduces how much a teen can learn later in life.⁴³
- Adolescents metabolize alcohol faster than adults so they can consume more without showing signs of impairment and are less likely to suffer hangover effects.⁴⁴
- The earlier the use, the greater likelihood of continuing to use drugs and becoming more addicted later in life, which leads to adult health problems.⁴⁵

³⁶ Harvard Health Publishing, “The adolescent brain.”

³⁷ L. M. Squeglia, J. Jacobus, and S. F. Tapert, “The Influence of Substance Use on Adolescent Brain Development,” *Clinical EEG and Neuroscience* 40, no. 1 (January 2009): 31–38, doi.org/10.1177/155005940904000110.

³⁸ Frances Jensen, “The Teenage Brain and Addiction,” recorded February 17, 2011 by Boston Children’s Hospital, video, 4:22, www.youtube.com/watch?v=ZTy1_aQV9pA; MedlinePlus, “Drugs and Young People.”

³⁹ Jensen, “The Teenage Brain and Addiction.”

⁴⁰ *Id.*

⁴¹ Deak, *The Owner’s Manual*, 48.

⁴² Lindsay M. Squeglia et al., “Age-Related Effects of Alcohol from Adolescent, Adult, and Aged Populations Using Human and Animal Models,” *Alcohol: Clinical and Experimental Research* 38, no. 10 (October 2014): 2509–2516, doi.org/10.1111/acer.12531.

⁴³ Deak, *The Owner’s Manual*, 48.

⁴⁴ *Id.*

⁴⁵ Jensen, “The Teenage Brain and Addiction.”

- For more information, check out developments in the Adolescent Brain Cognitive Development (ABCD) study.⁴⁶
- For a quick video on the brain science of addiction, visit www.addictionpolicy.org/addiction-a-z.

ACEs (Adverse Child Experiences) Study and Substance Misuse

- ACEs (Adverse Child Experiences) refers to situations in a person’s childhood that were unpleasant or traumatic. This includes experiencing domestic abuse firsthand or even growing up with relatives that have an addiction problem. The impact of these experiences on long term health conditions was the subject of an extensive study, called ACEs. Studies conducted in 1995 and 1997 revealed that participants’ cumulative ACEs scores correlated with a wide range of behavioral, social, and health issues as adults.⁴⁷
- According to the study, the number of ACEs correlates with the onset of many different health issues over the course of a person’s lifetime, including health issues related to substance misuse.
- Researchers found a strong correlation between ACEs score and substance use-related behaviors for adolescents like:
 - Early onset of alcohol consumption (underage drinking)
 - Higher likelihood of mental and drug use disorders as an older adult (50+ years)
 - Continued tobacco-use during adulthood
 - Usage of prescription drugs
 - Use of illegal drugs throughout one’s life, substance dependence, and self-reported addiction

Effective Treatment Methods, Modalities, Programs for Adolescents/Youth

- Substance use disorder treatment: A service or set of services that may include medication, counseling, and other supportive services designed to enable an individual to reduce or eliminate alcohol and/or drug use, address associated physical and mental health problems, and restore the patient to maximum functional ability.⁴⁸

⁴⁶ National Institute on Drug Abuse, “Landmark study of adolescent brain development renews for additional seven years,” news release, April 15, 2020, www.nih.gov/news-events/news-releases/landmark-study-adolescent-brain-development-renews-additional-seven-years.

⁴⁷ Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Division of Violence Prevention, “Fast Facts: Preventing Adverse Childhood Experiences,” last reviewed April 6, 2022, www.cdc.gov/violenceprevention/aces/fastfact.html; SAMHSA’s Center for the Application of Prevention Technologies, *The Role of Adverse Childhood Experiences in Substance Misuse and Related Behavioral Health Problems*, updated June 2018, mnprc.org/wp-content/uploads/2019/01/aces-behavioral-health-problems.pdf.

⁴⁸ U.S. Department of Health and Human Services (HHS), Office of the Surgeon General, *Facing Addiction in America: The Surgeon General’s Spotlight on Opioids* (Washington, DC: HHS, September 2018), 53, addiction.surgeongeneral.gov/sites/default/files/Spotlight-on-Opioids_09192018.pdf.

- There are several different types of treatment modalities that can be used in substance use treatment for adolescents, such as cognitive behavioral therapy (CBT), motivational enhancement therapy, and assertive continuing care programs.⁴⁹ The following is a brief description of each modality described in the Crime Solutions rating from January 19, 2023:
 - Assertive continuing care programs provide integrated and coordinated case management services for youth after discharge from outpatient or inpatient treatment, including home visits, client advocacy for support services, and integrated social support services.
 - Behavioral or contingency management programs are based on operant behavioral principles that use incentives (e.g., gift certificates) to reward abstinence and/or treatment compliance.
 - CBT programs are based on theories of classical conditioning and focus on teaching adolescents coping skills, problem-solving skills, and cognitive restructuring techniques for dealing with stimuli that trigger substance use or cravings.
 - Family therapy programs are based on ecological approaches that actively involve family members in treatment and address issues of family functioning, parenting skills, and family communication skills.
 - Motivational enhancement therapy (MET) programs use supportive and nonconfrontational therapeutic techniques to encourage motivation to change based on clients' readiness to change and self-efficacy for behavior change.
 - MET/CBT programs use a combination of motivational enhancement and cognitive-behavioral therapy techniques.
 - Multiservice package programs use a combination of behavioral, CBT, family therapy, MET, pharmacological, psychoeducational therapy (PET), and/or group and mixed counseling in a comprehensive package.⁵⁰
- Treatment planning includes assessment and diagnosis. Clinical interview is a part of this assessment but not the only thing. Assessment instruments are available to clinicians.⁵¹ The diagnosis of a substance use disorder is made by a trained professional based on symptoms defined in the latest edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM). The treatment plan and goals should be person-centered and include a strength-based approach. Co-occurring mental health conditions should be considered and addressed. Reassessment should be done periodically. Keeping the patient engaged is key to retention in treatment.⁵²

⁴⁹ National Institute of Justice CrimeSolutions, "Practice Profile: Adolescent Substance Use Treatment," January 19, 2023, crimesolutions.ojp.gov/ratedpractices/129#pdf.

⁵⁰ Emily E. Tanner-Smith, Mark W. Lipsey, and David B. Wilson, "Juvenile drug court effects on recidivism and drug use: a systematic review and meta-analysis," *Journal of Experimental Criminology* 12 (2016): 477–513, doi.org/10.1007/s11292-016-9274-y.

⁵¹ For a recent article on the assessment of screening tools, see Sharon Levy et al., "Assessment of Screening Tools to Identify Substance Use Disorders Among Adolescents," *JAMA Network Open* 6, no. 5 (May 1, 2023): e2314422, jamanetwork.com/journals/jamanetworkopen/fullarticle/2805055.

⁵² U.S. Department of Health and Human Services (HHS), Office of the Surgeon General, *Facing Addiction in America: The Surgeon General's Report on Alcohol, Drugs, and Health* (Washington, DC: HHS, November 2016), 53–55, addiction.surgeongeneral.gov/sites/default/files/surgeon-generals-report.pdf.

- Regardless of the substance for which the individual seeks treatment or the setting or level of care, all substance use disorder treatment programs are expected to offer an individualized set of evidence-based clinical components. These components are clinical practices that research has shown to be effective in reducing substance use and improving health and functioning. These include behavioral therapies (CBT, Contingency Management, Community Reinforcement Approach, Motivational Enhancement Therapy, the Matrix Model, Twelve-Step Facilitation or TSF Therapy, Family Therapies, Tobacco-Cessation Efforts), medications, and RSS (Recovery Support Services). Treatment programs that offer more of these evidence-based components have the greatest likelihood of producing better outcomes.⁵³
- The **continuum of care** refers to all of the following: prevention, screening, assessment, intervention, a menu of treatment options, case management/specialized rehabilitation and continued care.⁵⁴
- The National Institute on Drug Abuse has identified the following five principles of effective treatment for adolescents⁵⁵, in addition to those identified for adult treatment:
 1. Adolescent substance use needs to be identified and addressed as soon as possible.
 2. Routine annual medical visits are an opportunity to ask adolescents about drug use.
 3. Legal interventions and sanctions or family pressure may play an important role in getting adolescents to enter, stay in, and complete treatment.
 4. Families and the community are important aspects of treatment.
 5. Sensitive issues such as violence and child abuse or risk of suicide should be identified and addressed.
- Other sources say that adolescent treatment programs differ from adult treatment programs in that:
 - Linkage of multiple service environments with the family or guardians is critical to effective youth treatment.
 - Youth programs need to conduct parent training classes, set up supervised free time, provide pro-social activities, manage interagency teams, ensure educational services, and involve juvenile justice/ drug courts and other child-serving systems.⁵⁶
 - Early intervention and treatment is key.

⁵³ *Id.*, 46–83.

⁵⁴ Youth.gov, “Substance Use Treatment,” accessed May 26, 2023, youth.gov/youth-topics/substance-abuse/critical-elements-substance-abuse-prevention-efforts#_ftn.

⁵⁵ National Institute on Drug Abuse, *Principles of Adolescent Substance Use Disorder Treatment: A Research-Based Guide*, revised January 2014, 12–14, nida.nih.gov/sites/default/files/podat-guide-adolescents-508.pdf.

⁵⁶ Youth.gov, “Substance Use Treatment.”

- For a more recent update on effective interventions for youth, see the 2019 article “Adolescent Substance Use Disorder Treatment: An Update on Evidence-Based Strategies,”⁵⁷ PMC (nih.gov), in which the authors conclude that well-established psychosocial interventions remain the primary modality of treatment but promising new adjunctive treatment and improvements to established treatments may yield significant advances. Below is the table of treatments considered evidence-based and categorized according to efficacy and whether administered as a stand-alone treatment or in combination with other treatments:

Adolescent Substance Use Disorder Treatment Recommendations

Well-Established Standalone Interventions	Family Based Therapy, Cognitive Behavioral Therapy, Multicomponent Psychosocial Therapy
Probably Efficacious Standalone Interventions	Motivational Interviewing/Motivational Enhancement Therapy, Third-Wave Cognitive Behavioral Therapies
Possibly Efficacious Standalone Interventions	12-Step Programs
Possible Adjunctive Interventions	Pharmacotherapy, Exercise, Yoga, Mindfulness, Recovery-Specific Educational Settings, Goal Setting, Progress Monitoring
Modifications to Improve Existing Approaches	Digital Strategies, Culturally-Based Programs

- Research continues to identify new effective components of care. SAMHSA (Substance Abuse and Mental Health Services Administration) provides grants to fund services for drug misuse and mental illness. SAMHSA manages the National Registry of Evidence-based Programs and Practices (NREPP) that was developed to inform the public and to guide individual choices about treatment.
 - The research of electronic or cyber treatment (web-based or telephone-based interventions) is a growing field and one to keep an eye on as courts look for cost-effective components of a treatment plan.
 - Also, they are studying more experimental treatments that may improve the efficiency of current therapies by rewiring the brains of those suffering from addiction using techniques like magnetic stimulation and mindfulness training.⁵⁸
 - Check your state’s or neighboring state’s Department of Health resources because it might have a best practices guide on how to treat adolescent substance use disorder, like this one from California: *Adolescent Substance Use Disorder Best Practices Guide* (October 2020).⁵⁹

⁵⁷ Matthew C. Fergus et al., “Adolescent Substance Use Disorder Treatment: An Update on Evidence-Based Strategies,” *Current Psychiatry Reports* 21, no. 10 (October 2019), doi.org/10.1007%2Fs11920-019-1086-0.

⁵⁸ National Institutes of Health, “Biology of Addiction: Drugs and Alcohol Can Hijack Your Brain,” *NIH News In Health* (October 2015), newsinhealth.nih.gov/2015/10/biology-addiction.

⁵⁹ California Department of Health Care Services, *Adolescent Substance Use Disorder Best Practices Guide* (October 2020), www.dhcs.ca.gov/Documents/CSD_CMHCS/Adol%20Best%20Practices%20Guide/AdolBestPracGuideOCTOBER2020.pdf.

What to Look for in a Treatment Program for Youth

- If you are worried about a loved one and want to help them avoid substance use and help them make healthy choices, the Mayo Clinic published this article to their website in February 2023: Teen drug abuse: Help your teen avoid drugs.⁶⁰
- The American Academy of Child & Adolescent Psychiatry published this resource (dated June 2018): Substance Abuse Treatment For Children And Adolescents: Questions To Ask.⁶¹

Components of Care⁶²

Personalized diagnosis, assessment, and treatment planning—one size does not fit all, and treatments should be tailored to you and your family.

COMPREHENSIVE SERVICES—Evidence-based practices for youth include protocols that are motivational, cognitive-behavioral and behavioral, family-oriented, and centered around 12-step strategies.

PROGRESSIVE ASSESSMENT—understand the stages of substance misuse, areas of life affected by misuse, whether misuse had become a problem, and use screening tools to assess and re-assess an individual's involvement (what stage they may be in).

ORIENTATION—A good orientation to a treatment program is essential to engaging families. A programs' orientation process should be inviting and easy to understand. Materials describing the program should include information on the process (i.e., consent for treatment, confidentiality, available options) and be available to family members.

Long-term disease management—addiction is a chronic disease of the brain with the potential for both recovery and recurrence. Long-term outpatient care is the key to recovery.

ADOLESCENT-FOCUSED TREATMENT—must be engaging (dynamic, active, focused on individual), clinically and developmentally appropriate, and strength-based.

Evidence-based treatment supports:

- Gender competence and cultural competence, particularly around LGBTQ+ and other youth struggling with aspects of their identity
- Recovery environments and continued care

⁶⁰ Mayo Clinic, "Teen drug abuse: Help your teen avoid drugs," last reviewed February 22, 2023, www.mayoclinic.org/healthy-lifestyle/tween-and-teen-health/in-depth/teen-drug-abuse/art-20045921.

⁶¹ American Academy of Child & Adolescent Psychiatry, "Substance Abuse Treatment for Children and Adolescents: Questions to Ask," last reviewed June 2018, www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Substance-Abuse-Treatment-For-Children-And-Adolescents-Questions-To-Ask-041.aspx.

⁶² HHS, *Facing Addiction in America: The Surgeon General's Spotlight on Opioids*.

Evidence-based treatment includes:

- Targeted sessions for victimization/trauma,
- Anger management,
- Depression
- Gender and cultural issues
- Psychiatric services
- Medication management (and access to FDA-approved medications [for adult treatment])
- Family involvement
- Education services
- Wrap-around services
- Health care services
- Exposure to non-using activities

Evidence-based treatment emphasizes:

- Acquisition of new abilities and skills

Effective behavioral interventions delivered by trained professionals.

Coordinated care for other/co-occurring diseases and disorders.

Recovery support services—such as mutual aid groups, peer support specialists, and community services that can provide continuing emotional and practical support for recovery.

For examples of Treatment for Substance Misuse in Youth, visit www.samhsa.gov/find-help.

Drug Treatment Court for Adolescents/Youth

- Juvenile Drug Treatment Courts for youth work to improve family engagement, address issues that may lead to substance use and addiction and empower youths to live a better life without the use of drugs.
- Juvenile Drug Treatment Courts are more effective than family court programs at reducing teen crime and substance addiction rates, according to studies based on a year-long randomized experiment involving about 161 young adults.⁶³

⁶³ Matthew L. Hiller et al., “The impact of Juvenile Drug Treatment Courts (JDTC) implementing Federal Evidence-Based Guidelines on recidivism and substance use: multisite Randomized Controlled Trial (RCT) and Regression Discontinuity (RDD) Designs,” *Health & Justice* 9, article 38 (2021), doi.org/10.1186/s40352-021-00158-2.

- A total of \$26.1 million was provided by the OJJDP to drug treatment court programs nationwide. It enabled the courts to offer services to children and adults who struggle with substance misuse, particularly those who struggle with ongoing mental health problems or opiate dependence.⁶⁴
- OJJDP has a Juvenile Drug Court Manual from 2016 available online: ojjdp.ojp.gov/programs/juvenile-drug-treatment-court-guidelines.
- The Robert Wood Johnson Foundation collaborates with juvenile drug courts with the goal of detecting and assessing substance use in youth and providing them with complementary services and support.
 - This essentially includes cooperating with the courts, communities, and volunteers to motivate the program to assist adolescents in ending the cycle of substance use and crime.
 - The Robert Wood Johnson Foundation follows a six-step model: preliminary screening, preliminary assessment, service coordination, initiation, engagement, and completion.
 - In essence, the foundation is centered on encouraging young people to seek treatment, make healthy decisions, and refrain from using again.⁶⁵
 - In order to successfully complete any suggested treatment, Drug Court participants must maintain their sobriety, agree to random drug testing, show up as scheduled for supervision by the Drug Court team, and effectively participate in all mandatory drug education classes.
 - According to ndcrc.org/maps/interactive-maps/, as of 2021, 296 Jurisdictions had OJJDP-funded Juvenile Drug Treatment Courts.
 - Another way to locate a court is the National Juvenile Treatment Court Dashboard: jdtdc.ndcrcserver.org.
 - In 2020, with funding from OJJDP, National Association of Drug Court Professionals (NADCP) launched an Adolescent Recovery Oriented Systems of Care Project (AROSC). Six JDTC programs were selected through a competitive application process and participants will undergo a multi-year endeavor to apply principles of recovery capital to improve operations and enhance youth development. It is one of the National Drug Court Institute's programs through the Juvenile Treatment Court Project, which provides training and support for Juvenile Treatment Court Teams. For more information, see [AROSC-Project-Overview_final.pdf](#) (ndci.org) or Juvenile Drug Treatment Court Project, National Drug Court Institute, www.ndci.org/jdtdc/.
 - Information on the evolving role of the prosecutor in juvenile drug treatment courts can be found at www.ojp.gov/library/publications/evolving-role-prosecutor-juvenile-drug-treatment-courts-advice-field.

⁶⁴ Juvenile Drug Treatment Courts, Office of Juvenile Justice and Delinquency Prevention, accessed August 8, 2023, ojp.gov.

⁶⁵ The Annie E. Casey Foundation, "Positive Youth Development," accessed August 8, 2023, www.aecf.org/topics/positive-youth-development.

Additional References

All Rise Treatment Court Institute [formerly known as National Association of Drug Court Professionals (NADCP)]

- [Allrise.org/resources/](https://allrise.org/resources/)

Centers for Disease Control and Prevention (CDC)

- “Get Informed,” last reviewed December 5, 2022, www.cdc.gov/rxawareness/information/index.html.

National Drug Court Resource Center (NDCRC)

- National Juvenile Treatment Court Dashboard, jdtc.ndcrcserver.org.
- Treatment Court Maps, ndcrc.org/maps/interactive-maps/.

National Institute on Drug Abuse (NIDA)

- “Adolescent Brain,” February 17, 2023, nida.nih.gov/research-topics/adolescent-brain.
- “Fentanyl DrugFacts,” June 2021, nida.nih.gov/publications/drugfacts/fentanyl.

National Library of Medicine (NLM)

- Lindsay M. Squeglia, Joanna Jacobus, and Susan F. Tapert, “The effect of alcohol use on human adolescent brain structures and systems,” *Handbook of Clinical Neurology*, 125 (2014): 501–510.

Office of Juvenile Justice and Delinquency Prevention (OJJDP)

- “Drug Courts,” last revised May 28, 2021, ojjdp.ojp.gov/programs/drug-courts.
- “Juvenile Drug Treatment Court Guidelines,” accessed March 6, 2023, ojjdp.ojp.gov/programs/juvenile-drug-treatment-court-guidelines.
- *Juvenile Drug Treatment Court Guidelines* (December 2016), ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/250368.pdf.

Office of the Surgeon General (OSG)

- “U.S. Surgeon General’s Advisory: Marijuana Use and the Developing Brain,” last reviewed August 29, 2019, www.hhs.gov/surgeongeneral/reports-and-publications/addiction-and-substance-misuse/advisory-on-marijuana-use-and-developing-brain/index.html.

Substance Abuse and Mental Health Services Administration (SAMHSA)

- “Find Help,” www.samhsa.gov/find-help.
- “Juvenile Drug Courts Help Youth Dealing With Trauma,” May 4, 2020, www.samhsa.gov/homelessness-programs-resources/hpr-resources/juvenile-drug-courts-help-youth.
- Q. Is it true that heroin isn’t risky if you snort or smoke it instead of injecting it? *Tips for Teens: Heroin* (February 2018), store.samhsa.gov/sites/default/files/d7/priv/pep18-02.pdf.
- “Substance Abuse and Mental Health Block Grants,” last updated June 28, 2023, www.samhsa.gov/grants/block-grants#:~:text=Mandated%20by%20Congress%2C%20SAMHSA's%20block,abuse%20and%20mental%20health%20services.

Key Federal Resources

Centers for Disease Control and Prevention (CDC)

- Adverse Childhood Experiences
www.cdc.gov/violenceprevention/aces/index.html
- CDC Guideline for Prescribing Opioids for Chronic Pain
www.cdc.gov/mmwr/volumes/65/rr/rr6501e1.htm
- Drug Overdose
www.cdc.gov/drugoverdose/index.html
- *Morbidity and Mortality Weekly Report (MMWR)* Opioid Reports
www.cdc.gov/mmwr/opioid_reports.html
- People Who Inject Drugs (PWID)
www.cdc.gov/pwid/index.html
- Rx Awareness Campaign
www.cdc.gov/rxawareness/index.html

National Institute on Drug Abuse (NIDA)

- Opioid Risk Tool
www.drugabuse.gov/sites/default/files/files/OpioidRiskTool.pdf
- Quick Screen
www.drugabuse.gov/publications/resource-guide-screening-drug-use-in-general-medical-settings/nida-quick-screen

Office of the Surgeon General (OSG)

- Addiction
addiction.surgeongeneral.gov
- *Facing Addiction in America: The Surgeon General's Report on Alcohol, Drugs, and Health*, Appendix A. Review Process for Prevention Programs
addiction.surgeongeneral.gov/sites/default/files/appendices.pdf
- "U.S. Surgeon General's Advisory on Naloxone and Opioid Overdose"
www.surgeongeneral.gov/priorities/opioid-overdose-prevention/naloxone-advisory.html

Substance Abuse and Mental Health Services Administration (SAMHSA)

- *Clinical Guidance for Treating Pregnant and Parenting Women With Opioid Use Disorder and Their Infants*
store.samhsa.gov/product/Clinical-Guidance-for-Treating-Pregnant-and-Parenting-Women-With-Opioid-Use-Disorder-and-Their-Infants/SMA18-5054
- *Opioid Overdose Prevention Toolkit*
store.samhsa.gov/product/Opioid-Overdose-Prevention-Toolkit/SMA18-4742
- *Preventing the Consequences of Opioid Overdose: Understanding the Naloxone Access Laws*
solutions.edc.org/sites/default/files/Preventing-Consequences-Opioid-Overdose-understanding-Naloxone-Access-Laws_0-1.pdf

