

# Child Development, Children's Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making

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Unfortunately, judges and attorneys can serve in delinquency court with essentially no training in principles of normal—let alone abnormal—childhood development. These principles are essential if one is to understand the requirements of normal neurobiological, psychological, social and moral development.<sup>1</sup> An understanding of the principles of child and adolescent development and a consideration of children's mental health is useful to decision-makers at all levels of the juvenile justice system. Judges, prosecutors, and public defenders are routinely faced with offenders of both sexes who are psychologically very different than their adult counterparts. Thus, there are several reasons why actors in our juvenile justice system should understand child development principles.

Indeed, there may be paradoxical or untoward negative developmental consequences of incompetent or developmentally inappropriate sanctions by a juvenile court.<sup>2</sup> Simply put, there is the very real risk that the system can do more harm than good to a child who is still in the process of neurobiological, psychological, social, and moral development. Because of this, the negative consequences of careless sanctioning may be more enduring for a child (and for society) than they might be for an adult.

Childhood is an intense period of rapid development culminating in the tasks of identity formation<sup>3</sup> and social integration. Other than infancy, no stage in human development results in such rapid or

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<sup>1</sup> For psychological and neurobiological references and studies linking the origins of consciousness and morality in children to a nurturing environment, see STANLEY I. GREENSPAN, M.D. & NANCY BRESLAU LEWIS, *BUILDING HEALTHY MINDS: THE SIX EXPERIENCES THAT CREATE INTELLIGENCE AND EMOTIONAL GROWTH IN BABIES AND YOUNG CHILDREN* 85-129 (1999); STANLEY I. GREENSPAN, M.D. & BERYL LIFF BENDERLY, *THE GROWTH OF THE MIND AND THE ENDANGERED ORIGINS OF INTELLIGENCE* 110-32 (1997); ADRIAN RAINE, *THE PSYCHOPATHOLOGY OF CRIME: CRIMINAL BEHAVIOR AS A CLINICAL DISORDER* (1997); David E. Arredondo, M.D. & Honorable Leonard P. Edwards, *Attachment, Bonding, and Reciprocal Connectedness: Limitations of Attachment Theory in the Juvenile and Family Court*, 2 J. CENTER FOR FAM., CHILD. & CTS. (2000); Harry F. Harlow, *Mice, Monkeys, Men, and Motives*, 60 PSYCHOL. REV. 23 (1953); Bruce D. Perry, M.D., *Bonding and Attachment in Maltreated Children: Consequences of Emotional Neglect in Childhood*, 4 CHILD TRAUMA ACAD. PARENT & CAREGIVER EDUC. SERIES 1-10 (1999). Neurobiological studies of non-human mammals also evidence the necessity of a sufficiently attentive and predictably nourishing environment for normal brain development. See David H. Hubel & Torsten N. Wiesel, *Receptive Fields and Functional Architecture in Two Nonstriate Visual Areas (18 and 19) of the Cat*, 28 J. NEUROPHYSIOLOGY 229 (1965); Anita M. Turner & William T. Greenough, *Differential Rearing Effects on Rat Visual Cortex Synapses: I. Synaptic and Neuronal Density and Synapses Per Neuron*, 329 BRAIN RES. 195 (1985).

<sup>2</sup> For example, the perception of gross unfairness or indifference can further alienate children or cause them to lose respect for the social system that the court represents. As any parent can testify, children and adolescents are greatly preoccupied with the concept of "fairness," and perceived or real lack of fairness can lead to increased negative behavior.

<sup>3</sup> According to Erik Erikson:

dramatic change as adolescence.<sup>4</sup> These developmental tasks are exquisitely sensitive to environmental (peer, educational, familial, and social) influence. To complicate matters further, the teen years are also characterized by a struggle for autonomy from adults upon whom these youth must still depend. These changes are accompanied by rapid neurobiological concomitants, which are reflected in cognitive, emotional, and abstract reasoning, as well as moral changes in development.<sup>5</sup> According to some authorities, adolescence is an “important formative period in which many developmental trajectories become firmly established and increasingly difficult to alter . . . it is not an overstatement to say that it is much easier to alter an individual’s life course in adolescence than in adulthood.”<sup>6</sup>

The application of the child development considerations described in this paper should lead to decreased rates and durations of detention and decreased use of interventions with no positive evidence base for all detained youth. This will apply especially to children with mental disorders or mental retardation and for low- to moderate-level youthful offenders of all genders, races, and ethnicities. The purpose of this Article is to help lawyers, judges, and other juvenile justice policy-makers and decision-makers in prescribing more effective, developmentally appropriate, and humane remedies when designing alternative interventions and sanctions for juvenile offenders who are not seriously violent or sociopathic. The vast majority of youthful offenders are not dangerous, and this group will be the focus of this Article. Although extremely important, issues of diminished culpability and capacity will not be directly addressed.<sup>7</sup>

Part I of this Article will reference principles of child and adolescent development and children’s mental health. The concept that children of different maturational stages experience the same sanction differently will be explained. In Part II, examples will be offered to demonstrate how some sanctions are more conducive to a child’s positive social development than others. The necessary balance between allowing some latitude for mistakes while providing a clear set of limits and consequences will be described. Inappropriate imposition of some sanctions and their possible deleterious effects on a child’s relationship to society will be discussed. Part II will conclude that decision-makers in the juvenile justice system, including the juvenile delinquency court, should be driven primarily by the developmental, emotional, and social needs of the individual *offender*, rather than the characteristics of the individual *offense* (the system should be *offender* driven instead of *offense* driven). The goal is to help the decision-maker obtain more clarity in the objectives to be obtained and to become more knowledgeable and effective in achieving those objectives. Finally, in Part III, this paper will suggest specific sanctioning strategies in various “special” cases, including those of girls in the juvenile system, the incarceration of

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In their search for a new sense of continuity and sameness, adolescents have to refight many of the battles of earlier years, even though to do so they must artificially appoint perfectly well-meaning people to play the roles of adversaries; and they are ever ready to install lasting idols and ideals as guardians of a final identity.

ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* 261 (2d ed. W.W. Norton & Co. 1963) (1955).

<sup>4</sup> See, e.g., *BD. ON CHILD., YOUTH, & FAMS., NAT’L RES. COUNCIL & INST. OF MED., ADOLESCENT DEVELOPMENT AND THE BIOLOGY OF PUBERTY* 18 (Michael D. Kipke ed., 1999), available at [http://books.nap.edu/html/ado\\_dev\\_bio\\_pub/](http://books.nap.edu/html/ado_dev_bio_pub/) [hereinafter *ADOLESCENT DEVELOPMENT AND THE BIOLOGY OF PUBERTY*]; Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Jurisdictional Boundary*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT* 379 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

<sup>5</sup> According to one child psychiatrist:

Research conducted with both humans and nonhuman primates suggest that adolescence is a time for carrying out crucial developmental tasks: becoming physically and sexually mature; acquiring skills needed to carry out adult roles; gaining increased autonomy from parents; and realigning social ties with members of both the same and the opposite gender. Studies of such commonalities underscore the critical importance of this part of the life course in establishing social skills. For many social species, such skills are further developed through peer-oriented interactions that are distinct from both earlier child-adult patterns and later adult pairings.

*ADOLESCENT DEVELOPMENT AND THE BIOLOGY OF PUBERTY*, *supra* note 4, at 12.

<sup>6</sup> Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 23 (Thomas Grisso & Robert G. Schwartz eds., 2000).

<sup>7</sup> Excellent collections on these critically important topics include *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE*, *supra* note 6; and *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT*, *supra* note 4.

juveniles with mental health and neurodevelopmental problems (including learning disabilities), disproportionate minority confinement from a child's perspective, and trans-generational offenders and their families.<sup>8</sup>

## I. GENERAL DEVELOPMENTAL CONSIDERATIONS

Biology and experience determine the developmental trajectory of a child. Modern neurobiological understanding of the interdependence and developmental interpenetration of these two dimensions has superseded the historical question of "nature vs. nurture." Indeed, according to modern neurobiologists, that dichotomization is misleading: experience affects brain development *and* the developing brain affects how the environment is experienced and processed.<sup>9</sup> Therefore, future behaviors in response to a given set of environmental circumstances, cues, or stimuli can be traced to genetic/biological factors (temperament, biological predilection, or vulnerability) and experience (internal, familial, interpersonal, and environmental). Insofar as a principal concern of the juvenile justice system is social behavior, its proper focus is on familial and social factors that impact behavior. In this context, social-learning theory<sup>10</sup> and developmental neurobiology<sup>11</sup> are relevant for framing developmental issues that inform effective sanctioning of children and adolescents who are still developing.<sup>12</sup>

Research using magnetic resonance imaging of the brain demonstrates differences in the way adolescents and adults think and feel and the way they process information before they act. Adolescents tend to process emotionally charged decisions in the limbic system, the part of the brain charged with instinctive (and often impulsive) reactions. Most adults use more of their frontal cortex, the part of the brain responsible for reasoned and thoughtful responses.<sup>13</sup> This may be one reason why adolescents tend to be more intensely emotional, impulsive, and willing to take risks than their adult counterparts. These are marked differences in rates of brain development in adolescents. Thus, chronological age is a poor index of neurobiological and emotional mentality.

A typical youth who repeatedly appears before the juvenile court comes from a chaotic home and neighborhood environment. Oftentimes, he has learned that the world can be unpredictable, capricious, threatening, and grossly unfair. Additionally, he has not had the necessary developmental opportunity of

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<sup>8</sup> Trans-generationally involved children are children whose adult family members have been involved in the justice system. This includes children of parents, grandparents, aunts and uncles who have been arrested, incarcerated, or are currently incarcerated or on parole. It also includes involvement with the dependency court.

<sup>9</sup> See, e.g., GREENSPAN, *supra* note 1; DANIEL J. SIEGEL, *THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE* 1-22 & 276-82 (1999); Arredondo & Edwards, *supra* note 1; cf. David H. Hubel, *Effects of Distortion on Sensory Input on the Visual System of Kittens*, 10 *PHYSIOLOGIST* 17 (1967) (studying joint impact of environment and physiology on feline neurobiological development); Hubel & Wiesel, *supra* note 1 (same).

<sup>10</sup> See, e.g., ALBERT BANDURA & RICHARD H. WALTERS, *SOCIAL LEARNING AND PERSONALITY DEVELOPMENT* (1963); JULIAN B. ROTTER, *SOCIAL LEARNING AND CLINICAL PSYCHOLOGY* (1954); Albert Bandura & Frederick J. McDonald, *The Influence of Social Reinforcement and the Behavior of Models in Shaping Children's Moral Judgments*, 67 *J. ABNORMAL & SOCIAL PSYCHOL.* 274 (1963); Robert Sears, *A Theoretical Framework for Personality and Social Behavior*, 6 *AM. PSYCHOLOGIST* 476 (1951).

<sup>11</sup> See, e.g., RAINE, *supra* note 1; SIEGEL, *supra* note 9; Perry, *supra* note 1.

<sup>12</sup> Virtually all evidence-based approaches to delinquency include intensive family involvement. Good examples of evidence-based practices include the "Wraparound" approach used in Santa Clara County, California, the "Multisystemic Therapy" developed in rural South Carolina and Columbia, Missouri, Treatment Foster Care and Functional Family Therapy promulgated in Oregon. Evidence-based approaches are practices that have been shown to be effective in statistically and clinically meaningful studies. As such they can be described as effective in treating anti-social behaviors (juvenile delinquency) with a reasonable degree of certainty. Historically, most juvenile justice interventions derive their support from anecdotal (and biased) evidence, which does not withstand the test of follow-up evaluation for effectiveness. Examples of these (non-evidence-based) practices include wilderness programs, shock incarceration, scared-straight programs, and boot camps. See PETER FONAGY ET AL., *WHAT WORKS FOR WHOM? A CRITICAL REVIEW OF TREATMENTS FOR CHILDREN AND ADOLESCENTS* 153-65 (2002); RICHARD A. MENDEL, *LESS HYPE, MORE HELP: REDUCING JUVENILE CRIME, WHAT WORKS—WHAT DOESN'T* 10-11 (2000) (describing Multisystemic Therapy and Functional Family Therapy); EMQ CHILD. & FAM. SERVICES PROGRAM UPLIFT, *WRAPAROUND SERVICE REPORT* 3 (2001) (describing Wraparound).

<sup>13</sup> See NAT'L RES. COUNCIL & INST. OF MED., *JUVENILE CRIME, JUVENILE JUSTICE* 16 (Joan McCord et al. eds., 2001) [hereinafter *JUVENILE CRIME, JUVENILE JUSTICE*].

internalizing consistently benevolent, reliable, and fair adult authority figures. Instead, a hostile environment that was *not* responsive to a child's need for consistent and reliable care giving may have determined his view of family, neighborhood, and society.<sup>14</sup> While this does not diminish the delinquent's responsibility for learning to control his behaviors, it illustrates why it is important for the delinquency court to avoid re-enacting the role of an indifferent, unreliable, unpredictable, unfair, or incompetent authority figure. Children and adolescents need limits, structure, and boundaries in order to develop normally.<sup>15</sup> From a developmental perspective, the child's interaction with the juvenile justice system is a key opportunity for a society to unequivocally illustrate its true values<sup>16</sup> and to clearly articulate its expectations of its citizens. To the developing youth who is just beginning to learn what he can expect from social authority, the juvenile justice system represents the social order. If a child's experience with a societal authority (e.g., law enforcement and the delinquency court) seems thoughtless, impersonal, or indifferent, he will experience precisely the opposite of what he needs to developmentally internalize personal responsibility for their actions in relation to the society that the court represents. This is why timely, consistent, and thoughtful responses to each juvenile offender are so important. What the vulnerable youth experiences from the juvenile justice system will affect how he views authority in general and his beliefs about social authority in particular.

Just as children have a developmental need to test limits, they have an equally important need to encounter predictable structure and boundaries. A balance between punishment and permissiveness—both measured and timely—is essential for effectively intervening with the low- to moderate-level offender for whom responsibility has fallen to the legal system.

From a child development perspective, the predictability and consistency of adult attention and responsiveness is often what is most important. If a child learns that his social environment will respond inconsistently, he is much more likely to continue a behavior in the hopes that he will “get away with it this time.” For example, if a child is caught sniffing glue after breaking into a neighbor's house while truant from school and “nothing really happens,” he is more likely to persist in those behaviors and perhaps escalate the seriousness of his substance abuse, truancy, and delinquency. The message he has received is: “No one really cares about me that much,” which is construed to mean, “So I might as well do whatever I want.”

One reason for this is that children require attention the way they require food and sleep. Attention is necessary for brain development. The notion of an attention requirement or demand is relatively unrecognized in Western psychology, although it has been known for some time in the psychologies of central Asia.<sup>17</sup> Such behavior has its correlates in brain development inasmuch as the developing child requires interaction of other humans to develop the capacity of recognizing facial cues and the nuances of social situations. As teenagers become more attention-deprived they will become less and less discriminate toward how they go about getting the attention that they need. This is the root in much of attention-seeking behavior in normal adolescents, and accounts for some of their more peculiar vagaries in dress, appearance, and behavior.<sup>18</sup> Children will seek both positive and negative attention to meet their needs. If no attention is forthcoming, they will escalate their demands. For example, if a child is not noticed when he uses mild profanity, he may escalate the “stakes” by using more vulgar language in order to get the needed attention (and to test his social boundaries). Another example is verbal taunting. If no

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<sup>14</sup> See GREENSPAN & BENDERLY, *supra* note 1, at 258-70 (describing effects of violence and deprivation on a young delinquent).

<sup>15</sup> *See id.*

<sup>16</sup> The irony of this in relation to current resource allocation does not escape the author.

<sup>17</sup> It is painful to be deprived of human attention. This is why solitary confinement is used as punishment. There are psychological reasons why attention and reciprocal interaction are required to develop a normal psyche. See IDRIES SHAH, *LEARNING HOW TO LEARN: PSYCHOLOGY AND SPIRITUALITY IN THE SUFI WAY* 85 (1983) (“One of the keys to human behavior is the attention factor.”); *see also* Arredondo & Edwards, *supra* note 1, at 111-14 (describing the necessity of reciprocal connectedness, beyond attachment and bonding for normal brain and social development).

<sup>18</sup> Attention-seeking behavior is also noted in infants. Upon casual observation in orphanages where infants are attention deprived, a visitor will often be greeted with intense demands for attention.

one intervenes, taunting by an attention-seeking child often escalates into full-scale bullying and sometimes physical violence.<sup>19</sup> It is important to note that it does not matter to the child what the valence of the attention is. Failing to get positive attention, a child will attract negative attention.

## II. STRATEGIC SANCTIONING

There is a lack of clarity and significant differences of opinion about the proper role of the delinquency system.<sup>20</sup> The historical polarization of advocates of punishment and those who advocate "rehabilitation" is, for the most part, irrational. As any parent can testify, successfully raising a child requires at least some consequences (punishment) in response to dangerous, antisocial, or otherwise inappropriate behaviors.<sup>21</sup> Complications arise when punishment (to discourage misbehavior) is confused with retribution. Further complications develop when punishment is applied thoughtlessly, unfairly, and disproportionately to youth in a manner that does not foster positive development and may, in fact, forestall it.<sup>22</sup> Finally, the frequent presence of biologically-based mental illness or mental retardation in a substantial sub-population of juvenile offenders further confounds effective decision-making. Thus, effective sanctioning of juvenile offenders requires clarity of thought and purpose. The modern decision- and policy-maker in the juvenile justice system must first be clear about what needs to be accomplished.<sup>23</sup> Three common, important, and overlapping goals of the juvenile delinquency system for low- to moderate-level offenders are *punishment*, the *prevention of recidivism* (i.e., to provide for community safety), and *deterrence* (of other youth from committing the same offense). Another goal, which is often conceptually mixed with these three, is "*rehabilitation*"—a phrase that has effectively lost useful, precise meaning because of its vague definition in popular usage,<sup>24</sup> the political associations it has acquired through heavy usage over time,<sup>25</sup> and its use as a euphemism to denote intermediate sanctions designed to effect one or more of the other goals of the juvenile justice system. For example, a two-year incarceration of a fourteen-year-old in a state "training" school is often called "rehabilitation." *Black's Law Dictionary*

<sup>19</sup> This is not a minor problem among American youth. The Justice Department's Office of Juvenile Justice and Delinquency Prevention estimates that 17 to 23% of children from sixth grade and above have been bullied at least weekly. Nels Ericson, *Addressing the Problem of Juvenile Bullying*, OJJDP FACT SHEET (Office of Juvenile Justice & Delinquency Prevention, Washington, D.C.), June 2001, available at <http://ojjdp.ncjrs.org/pubs/fact.html#fs200127>.

<sup>20</sup> See STEVEN M. COX & JOHN J. CONRAD, *JUVENILE JUSTICE: A GUIDE TO THEORY AND PRACTICE* 11 (3d ed. 1991) ("The dispute between legalists and therapists remains unresolved after a century or more of debate."); BARRY KRISBERG & JAMES F. AUSTIN, *REINVENTING JUVENILE JUSTICE* 109 (1993) (arguing that the juvenile justice system should be more attentive to social inequity); Barry Krisberg & James C. Howell, *The Impact of the Juvenile Justice System and Prospects for Graded Sanctions in a Comprehensive Strategy*, in *SERIOUS & VIOLENT JUVENILE OFFENDERS* 347 (Rolf Loeber & David P. Farrington eds., 1998) (arguing same as applied to serious juvenile offenders).

<sup>21</sup> "Failure to set clear expectations for children's behavior, inconsistent discipline, excessively severe or aggressive discipline, and poor monitoring and supervision of children predict later delinquency." *JUVENILE CRIME, JUVENILE JUSTICE*, *supra* note 13.

<sup>22</sup> The issue of "potential harm done" is rarely part of a discussion on choosing between sanctioning alternatives. This is especially problematic in the context of child development. Failures during critical windows of this development can have life-long consequences because of the profound impact on worldview of early experience. For example, a child who is subjected to a callous environment for a significant duration of time is likely to make generalizations about the rest of the world (i.e., that it is also fundamentally, if not overtly callous). The principle of *primum non nocere* (first, do no harm) is especially important when dealing with children for many reasons, including the enduring impact of childhood experience.

<sup>23</sup> A popular and well-grounded conceptualization of the purpose of juvenile probation is termed "The Balanced Approach" or "Balanced and Restorative Justice." This thoughtful and developmentally sound approach dictates that three goals: community safety, accountability, and competence development, steer decision-making. This model does not, however, *explicitly* address the issues of deterrence, societal desire for unadulterated retribution, or the notion of "harm done" by current practices. A good review of this model approach can be found in Dennis Maloney, et al., *Juvenile Probation: The Balanced Approach*, 39 *JUV. & FAM. CT. J.* 1-11 (1988).

<sup>24</sup> The *American Heritage Dictionary of the English Language* defines rehabilitation tautologically as "1. To restore to good health or useful life, as through therapy and education. 2. To restore to good condition, operation, or capacity. 3. To reinstate the good name of. 4. To restore the former rank, privileges, or rights of." *AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 1471 (4th ed. 2000).

<sup>25</sup> In practice, the use of the term "rehabilitation" is often portrayed as an *alternative to* punishment or accountability-based sanctioning. This portrayal leads to an unfortunate dichotomization, which further muddles clear thinking on desired outcomes and the purpose of the delinquency court.

defines rehabilitation in the context of criminal law as “the process of seeking to improve a criminal’s character and outlook so that he or she can function in society without committing other crimes.”<sup>26</sup>

There are problems when this definition of “rehabilitation” is applied to children and adolescents. First, the “process” is open to widely different interpretations depending on the philosophy of the decision-maker. For example, prolonged detention of a moderate-level offender is thought by some decision-makers to be a rehabilitative process that might improve character. Second, modern psychology and psychiatry specifically dispute that a child or adolescent *has* a fully formed character. For example, a child cannot be diagnosed with an anti-social personality disorder before eighteen years of age.<sup>27</sup> In other words, the character of the child and adolescent is still in the process of forming. Third, evidence exists that incarceration, boot camps,<sup>28</sup> and the fear of being “scared straight”<sup>29</sup> does nothing to improve juvenile delinquents’ character, even though all are commonly cited as “rehabilitative” elements of the juvenile justice system.

If the term is going to be used at all, “rehabilitation”—at least in the context of the low-level juvenile offender—should be defined as “the goal of fostering positive social development (healthy personal, social, and moral maturation) of youth.”<sup>30</sup> The goal of rehabilitation is broader than punishing, controlling, or deterring behavior, but it does include the more narrow aim of controlling and delivering consequences that will serve as deterrents to delinquent behaviors and that will provide for community safety. Given that confusion currently surrounds the primary purpose of juvenile court law, it is imperative that the reader understands these goals are *not* in opposition to each other (positive development versus behavior control/punishment). Instead, this paper describes the interdependence of the two and explains how an appreciation of the principles of healthy childhood development has a direct bearing on the design of effective sanctions and deterrence for the vast majority of juvenile offenders.

#### A. DURATION OF SANCTIONING AND FREQUENCY OF REVIEWS

There are many variables in determining effective offender-based sanctioning that make generalizations difficult. It would be illogical to attempt to generalize too much while advocating individualized nuance in decision-making. Nevertheless, two variables will be taken up here to provide an example: duration of sanctioning and frequency of review.

The reason that a year seems interminably long for a four-year-old is that a year is subjectively one-fourth of his life. For a sixty-year-old man, a year is only one-sixtieth of his life. This subjective perspective is why the years seem to go by more quickly as we get older. The reason this principle is important to understand in this context is twofold. First, it has a direct bearing on the effects of delaying the onset of sanctions *vis à vis* the behavior for which it is to serve as a punishment or deterrent. The younger the child, the more quickly the consequence should follow the behavior. Second, it has a direct bearing on setting developmentally appropriate durations of sanctions. It is therefore imperative that decision-makers remember that the younger the child, the longer a given duration of sanction will be subjectively experienced. This is especially important when detention is used. If the duration is too long, the child will invariably feel that the punishment could not possibly match the crime. There is the risk of losing this child, who will externalize his responsibility (e.g., blame his lawyer) and feel (consciously or not) that societal authority is capricious and unfair. Patricia Chamberlain aptly describes this idea:

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<sup>26</sup> BLACK’S LAW DICTIONARY 1290 (7th ed. 1999).

<sup>27</sup> AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 704 (4th ed. 2002) (“By definition, Antisocial Personality cannot be diagnosed before age 18.”).

<sup>28</sup> See MENDEL, *supra* note 12, at 59.

<sup>29</sup> See Richard E. Behrman, *The Juvenile Court: Statement of Purpose*, 6 FUTURE OF CHILD. 33 (1996) (noting the need for prosecutors and defenders to understand social services).

<sup>30</sup> This definition helps clarify what, in addition to public safety and victim rights, should be the proper objectives of the delinquency court. It also creates a framework for developing meaningful outcome measures that are quantifiable yet not limited to detected recidivism *per se*.

Another salient characteristic of adolescents with severe conduct problems is that they invariably have a strong sense that they have been treated unfairly. Whether it has been by their parents, the police, or their teachers, each of them feels victimized in some way. Of course, there are good reasons for this. After reading the case histories of these children, one cannot help but feel sympathetic to their plight. Many of them were raised in families in which there have been serious mental health problems for generations and legacies of abuse, crime, and disrupted relationships have been passed down as part of the family tradition. Attempting to change the life course of these adolescents while treating them in a way they see as fair is a formidable challenge . . . . That is, an individual will act out in destructive ways to the extent that he or she feels treated unfairly.<sup>31</sup>

If efficacy is the goal, the foremost considerations in tailoring the variables of duration of sanction and frequency of monitoring should be the developmental stage and psychological circumstances of the child. Because of differences in the experience of time, any given duration of sanction will be experienced subjectively as longer by younger children. In practical terms, this means that three months for a fourteen-year-old is much longer (in psychological time) than three months for an adult. This is why effective parents ground their teenage children for weeks not months. Duration beyond a few days or weeks does not usually add anything to deterrence, is much more difficult to enforce, and is much more likely to be perceived as grossly unreasonable and unfair, further mitigating the effectiveness of the sanction.

Physiological tolerance to some medications may provide a useful analogy. Physicians know that the dose and the duration of administration are all critical variables in effectiveness. Too much medication for too long will result in a marked diminution in a medication's effectiveness or highly undesirable side effects. The same can be said for many juvenile justice interventions.

The issue of developmentally appropriate *frequency*, however, is the other side of this coin. Because younger children experience time as moving more slowly, frequent reviews of behavior are highly desirable and more necessary than with older adolescents. Effective parents monitor homework, chores, curfews, and bedtimes daily or weekly until they are assured that the child can monitor these responsibilities on his own. Effective therapeutic residential centers also monitor daily and weekly behaviors and reward or punish accordingly. Consequences for misbehaviors are sure, consistent, quick, and directly tied to the undesired behavior. On the other hand, the child gets a fresh start with every new day or week.

To be effective in promoting positive development and extinguishing negative behaviors, the juvenile justice system must adopt the same consciousness of developmental appropriateness. As a general rule, the younger the child, the shorter the duration but the greater the frequency of monitoring. For example, in residential treatment, a youth is not asked to stay in control "forever." Experience has taught that "one day at a time" works much better. Similarly, however, frequent reviews give the child support and an excuse to say "no" to peer pressure. Another example is reviews of compliance with court orders. It is unreasonable to come down on a child six months after she has stopped complying with an order. The original offense, the rationale for the court orders, and the warning and admonitions delivered by the judge, have long since faded from the child's memory (the judge has a record to review—the child does not). If goals have been set (e.g., school attendance and performance), progress towards those goals should be monitored frequently to make sure the child is on track. To be fair and effective with young people, the juvenile justice system must strive to mark time in accordance with the needs of individual youth at different stages of maturation and not based on a fixed and preset timetable determined by convenience or usual and customary practice. In general, this means that the juvenile justice system is

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<sup>31</sup> PATRICIA CHAMBERLAIN, FAMILY CONNECTIONS: A TREATMENT FOSTER CARE MODEL FOR ADOLESCENTS WITH DELINQUENCY 30 (1998).

susceptible to more frequent reviews. Ideally, each child would have one judge; in practice, this would mandate a less frequent rotation of judges.<sup>32</sup>

## B. WHY COMMUNITY BASED SANCTIONS ARE BETTER THAN INSTITUTIONAL ALTERNATIVES

Although often difficult to obtain, the youth must accept personal responsibility for his delinquent behaviors. This corresponds to the developmental goal of encouraging children to control their impulses, to consider the impact of their behaviors on others, and to accept responsibility for their own mistakes while not blaming them on others or on circumstance. For a youth who has not yet become desensitized to the threat or imposition of detention, the initial impact of incarceration will be profound. At the same time, the impact of this sanction diminishes dramatically over time as the child becomes desensitized. At a certain point, the child “gives up” as his identity changes to that of a chronic delinquent. Sooner or later, most children give in to what others expect of them. The child may begin to “identify” with some of the more delinquent peers in detention.<sup>33</sup> For most teenagers, losing a Friday and a Saturday night is sufficient to get their attention and to serve as an effective sanction.<sup>34</sup> Paradoxically, months of detention are often counterproductive and can have seriously undesirable side effects, such as gang recruitment. Judges report a frequent refrain from parents that “my child never even *thought* of doing *that* until he was locked up with those other children.”

From a developmental point of view, prolonged detention is also problematic because the child is undergoing developmentally important phases of life in institutional settings with idiosyncratic demands particular to that setting. Consequently, the child is adapting to incarceration and an institution, not to the community from which she came and to which she will return. It is imperative that the juvenile justice decision-maker understands that virtually *every effective evidence-based intervention for delinquency occurs in the home and community*. One expert states it simply:

It seems unlikely that institutional treatment, retraining or punishment is effective in decreasing delinquency. It is even possible that there is a harmful effect because of the alienation, stigmatization and “contamination” suffered by those who are incarcerated together with other offenders. Even where treatment gains are observed, it appears that they are lost on return to the community.<sup>35</sup>

This finding makes perfect sense. Normal child and adolescent development requires an environment that is more, not less, normalized.<sup>36</sup> This is one reason that boot camps do not work for the great majority of offenders and make a sizable proportion of children worse.<sup>37</sup>

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<sup>32</sup> Less frequent rotation of judges is highly desirable for many other reasons, not the least of which is the relative lack of experience engendered by a 1–2 year juvenile rotation. Longer rotations or permanent assignments would allow an interested judge to acquire the training and cultivate the experience necessary for wisdom on the bench.

<sup>33</sup> Moreover, little information exists evaluating the efficacy of detention. According to one critique, [n]o responsible business concern would operate with as little information regarding its success or failure as do nearly all of our delinquency-prevention and control programs. It is almost possible to count on one hand the number of true experiments in which alternative techniques are compared; the number of systematic, though non-experimental, evaluations is not a great deal larger. We spend millions of dollars a year in preventive and corrective efforts, with little other than guess-work to tell us whether we are getting the desired effects.

WILLIAM E. WRIGHT & MICHAEL C. DIXON, COMMUNITY PREVENTION AND TREATMENT OF JUVENILE DELINQUENCY: A REVIEW OF EVALUATION STUDIES, 14 J. RES. CRIME & DELINQ. 35, 55 (1977) (citing Wheeler S. Cottrell et al., *Juvenile Delinquency: Its Prevention and Control*, in DELINQUENCY AND SOCIAL POLICY 428, 440 (Paul Lerman ed., 1970)).

<sup>34</sup> I am indebted to Kurt Kumli, supervising district attorney of the Santa Clara County Delinquency Court, and the Honorable Leonard Edwards for this observation.

<sup>35</sup> FONAGY ET AL., *supra* note 12, at 153–65.

<sup>36</sup> See MENDEL, *supra* note 12, at 17–20; LAWRENCE W. SHERMAN ET AL., PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING 1–19 (1998); Carol Sheldrick, *Treatment of Delinquents*, 975 NAT'L INST. & JUST. 968 (July 1998).

<sup>37</sup> “Empey and Lubeck (1971) and Empey and Erickson (1972) reported that, after one- and four-year follow-ups, those youths who had been incarcerated committed more serious crimes when they were returned to their communities than did the youths who had been in the community treatment program.” WRIGHT & DIXON, *supra* note 33, at 53.

### C. THE PROPORTIONALITY OF SANCTIONS

The issue of developmentally appropriate intensity of sanctions is also very difficult to address with generalizations for many reasons. First, there are cultural differences in what is considered a reasonable way to treat a child. It was not long ago that many Americans believed corporal punishment was a sanction of choice. Hence the popular saying: "spare the rod and spoil the child." Second, there are differences in how individuals will experience any given sanction. For some children, just the thought of detention is terrifying, while, for others, a stint in "juvie" is a badge of honor. For some, home detention or being alone on the weekends is a fate far worse than juvenile hall (where their friends are).<sup>38</sup> Third, depending on the degree to which a child has become "criminalized," a given sanction may appear more (or less) fair (or reasonable) to that child and his family. For example, the family of a girl who is in detention for running away, drinking, and intimately associating with older males in stolen cars might be relieved or, alternatively, feel discriminated against because of her sex.<sup>39</sup> Inasmuch as the child's and family's experience with the court is *itself* a determinant of future attitudes towards social authority, it is imperative that the court be predictably knowledgeable and reasonable in designing sanctions that are offender-based. This requires an understanding of the individual child, his family, culture, and social circumstances.

### D. DEVELOPMENTALLY CONSTRUCTIVE SANCTIONS

As many parents and teachers know, designing constructive sanctions is challenging but very worthwhile because the developmental, educational, or social yield is multiplied. Children become more mature, responsible, knowledgeable, or pro-social as a result of their "punishment."

This is why researching and writing a report on the effects of substance abuse is better than writing "I will not smoke marijuana" a thousand times. "Volunteer" service at a senior care home is better for a child than picking up highway litter (unless the offense is littering). A youth convicted of driving while intoxicated might be ordered to "volunteer" in an emergency room. A particularly good example of a constructive sanction for graffiti vandals ("taggers") is ordering them to "adopt" a piece of property and holding them strictly liable for its maintenance and graffiti-free state.<sup>40</sup> This type of individualized and "nuanced" sanction is developmentally constructive because the youth has a chance to experience the sensation of "watching out" for his assigned "property." He learns what it feels like to be at the mercy of vandals and experiences the victimization of having his "property" vandalized. Furthermore, he learns the inconvenience, cost, time, and labor involved in cleaning up after somebody else who has little regard for (or experience regarding) the rights of others.

Another developmentally constructive sanctioning example is arranging for a youth to meet his victim. Adolescents, often thoughtless and impulsive, will perpetrate a crime or prank without considering its impact on others. When a human face is put on the damage and suffering they have caused, they often feel both regret and remorse. What most of these offenders lack is experience, not the capacity for empathy. Whether they admit it or not, there often arises a genuine desire to make things better. The juvenile justice system should take every possible opportunity to present to youth the human face of victimization.<sup>41</sup> From a developmental point of view, this is one of the most potent tools in the hands of decision-makers. It teaches empathy, accountability, and compassion while allowing the full impact of the pain of guilt and shame to mold future behavior. It personalizes the system and humanizes society for the children whom the system is trying to socialize.<sup>42</sup>

<sup>38</sup> I am indebted to Kurt Kumli for this observation.

<sup>39</sup> See discussion *infra* Part III.B.

<sup>40</sup> I am indebted to Kurt Kumli for this example.

<sup>41</sup> This is a cornerstone of the strength of the Balanced and Restorative Justice approach.

<sup>42</sup> However responsible we must hold high-risk children for their behavior, few would argue that many of them have also been victims. As W. H. Auden reminds us:

I and the public know

#### D. DEVELOPMENTALLY COMPETENT PRACTICE PRINCIPLES

The most effective sanctions are those that address the personal, familial, and societal variables that are essential to healthy child development. These sanctions are community-based whenever possible. Again, *virtually all effective evidence-based practices occur in the community and the home*. These ideal sanctions almost invariably help the low- to moderate-level offender in developing increased personal competence and connectedness to pro-social elements of a larger community. The immediate community perceives these sanctions as measured and fair. Effective sanctions provide supervision, encouragement, and support, along with clear, firm, and timely consequences for delinquent behavior. Effective sanctions are also characterized by some of the following features:

1. Sanctions are based on the offender and not the offense:
  - There is sensitivity to the developmental stage of the offender
  - Juveniles are dealt with in the context of their connectedness with others (parents, siblings, extended family, peers) rather than as disconnected individuals
  - Contact with the offender is frequent and reliable
  - Opportunities for the child to externalize responsibility for his acts are minimized
2. Sanctions fortify extant strengths, competence, and self-control:
  - The individual youth's strengths are identified and mobilized
  - There is recognition of the child's efforts (the child receives encouragement)
  - Multiple aspects of a juvenile's life are acknowledged (e.g., sanctions may have effects on education, peer relations, vocational preparedness, and pro-social community relatedness)
  - Commitment to appropriate education or vocational preparedness is vigorously promoted
  - Youth are provided meaningful opportunities to enhance competence development
3. Whenever possible, *sanctions are community based rather than institutional*:
  - They build on relationships with the child's family and community
  - Family, schools, peer group, and neighborhood risk and need factors are taken into account
  - Youth are provided meaningful opportunities to enhance pro-social connectedness
  - Immediate and extended family and community members are used as allies whenever possible
  - After-school hours are accounted for
  - Time with anti-social peers is minimized
  - Exposure to positive peer environments is provided whenever possible
  - Genuine opportunities to contribute to family, school, or a pro-social community are provided whenever possible
4. Sanctions are realistic:
  - Incentives to succeed are within reach of the offender
  - Clear expectations are set and monitoring is set at a developmentally appropriate frequency
  - There is recognition of the child's efforts (the child receives encouragement)
  - There is a developmentally appropriate provision of latitude for mistakes

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What all schoolchildren learn,  
Those to whom evil is done  
Do evil in return.

W.H. AUDEN, *September 1, 1939*, in *THE ENGLISH AUDEN: POEMS, ESSAYS AND DRAMATIC WRITINGS 1927-1939*, at 245 (Edward Mendelson ed., 1977).

5. Sanctions engender respect for the court and its processes:
  - There is an implicit and explicit expectation of respect for the court
  - There is explicit respect for each youth and her family, culture, and community
  - Humiliation or shaming is not used as a means of motivation (e.g., respect for the child is shown)
6. Whenever possible, a sanction puts a human face on the court process:
  - The judge relates to each child personally
  - The message that "the system cares" is explicit from all parties
  - The child should be encouraged to meet the victim(s) of his criminal acts whenever practical and appropriate
  - Empathy for the victim(s), an apology, and individualized restitution should be explicit expectations

### III. STRATEGIES FOR SPECIAL POPULATIONS

#### A. INTRODUCTION

Within the juvenile population there are enormous differences between, for example, a twelve-year-old and a seventeen-year-old. Furthermore, there are vast differences in the emotional development of children of the same chronological age (e.g., among thirteen-year old boys). There is also evidence that earlier-maturing girls and later-maturing boys tend to have more problems than adolescents with average ages of onset of puberty.<sup>43</sup> For example, the Institute of Medicine reports that early-maturing females appear to be at increased risk for victimization, especially sexual assault, which may contribute to their greater likelihood of problem behaviors compared to girls who mature (physically) later.<sup>44</sup> Principles of child development and children's mental health can help guide decision-making in the design and implementation of more effective interventions for youth who have committed minor to moderately severe offenses. Again, this Article does *not* address the seriously violent, older juvenile delinquent and important issues of diminished culpability and capacity will not be addressed here.

#### B. GIRLS

Girls make up an increasing proportion of the number of juveniles arrested.<sup>45</sup> The 1997 violent crime arrest rate for females remained 85% above the 1987 rate.<sup>46</sup> No single theory for their increasing arrest rates is entirely satisfactory. Like juvenile crime in general, the causes are multi-factorial and include developmental,<sup>47</sup> psychological,<sup>48</sup> post-traumatic,<sup>49</sup> sociological,<sup>50</sup> and processing factors.<sup>51</sup> Three

<sup>43</sup> It has been noted that:

[i]ndicators of pubertal growth have been observed as early as age 7. These findings suggest that as children experience puberty and other developmental changes at earlier ages, there may be the need to consider how to design and deliver age-appropriate interventions during the middle childhood and preteen years to help them avoid harmful or risky behaviors and develop a health-promoting lifestyle.

ADOLESCENT DEVELOPMENT AND THE BIOLOGY OF PUBERTY, *supra* note 4, at 18; *see also* J.A. Graber et al., *Is Psychopathology Associated with the Timing of Pubertal Development?*, 36 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1768 (1997).

<sup>44</sup> D.J. Flannery et al., *Impact of Pubertal Status, Timing and Age: Adolescent Sexual Experience and Delinquency*, 9 J. ADOLESCENT RES. 21 (1993), *quoted in* ADOLESCENT DEVELOPMENT AND THE BIOLOGY OF PUBERTY, *supra* note 4, at 20.

<sup>45</sup> HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT (Sept. 1999), *available at* <http://www.ncjrs.org/html/ojjdp/nationalreport99/toc.html>.

<sup>46</sup> Office of Juvenile Justice and Delinquency Prevention, *Juvenile Arrest Rates for Violent Crime Index Offenses, 1980-2000* (Jan. 2002), *available at* <http://ojjdp.ncjrs.org/ojstatbb/html/qa253.html>.

<sup>47</sup> *See, e.g.*, Cathy Spatz Widom, *Child Abuse, Neglect and Violent Criminal Behavior*, 27 CRIMINOLOGY 251 (1989).

<sup>48</sup> *See* MEDA CHESNEY-LIND, *THE FEMALE OFFENDER: GIRLS, WOMEN, AND CRIME* (1997); *see also* LESLIE ACOCA & JAMES AUSTIN, *THE CRISIS: WOMEN IN PRISON* (1996); GIRLS INC. & OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *PREVENTION AND PARITY: GIRLS IN THE JUVENILE SYSTEM* (1996) [hereinafter PREVENTION AND PARITY].

<sup>49</sup> Delinquent girls report experiencing serious mental health problems, including depression and anxiety, and suicidal thoughts. In a 1994 study of delinquent girls conducted by Bergsmann, half surveyed said that they had considered suicide, and some 64%

elements are especially salient: (1) Girls are more often arrested and tried for status offenses such as running away and curfew violations,<sup>52</sup> (2) Girls are much more likely to be the victims of trauma,<sup>53</sup> and (3) Girls are affected by apparent increases in the rates of family violence observed in specialized juvenile domestic violence court calendars.<sup>54</sup> A tragic fact is that many girls run away as a response to family trauma—especially sexual victimization.<sup>55</sup> Clinical experience makes it clear that we are unlikely to hear about this victimization in usual court processing.<sup>56</sup> Most often, the trauma will be displayed by out-of-control behaviors, substance abuse, running away, extreme promiscuity and sometimes prostitution.<sup>57</sup> According to the Institute of Medicine, “There is some evidence that, on average, girls experience more distress during adolescence than boys. Some researchers have speculated that, for girls, the transition during puberty brings about greater vulnerability to other environmental stressors.”<sup>58</sup> In particular, a growing literature suggests that the early onset of puberty can have an adverse effect on girls’ development.<sup>59</sup> It can affect their physical development (they tend to be shorter and heavier), their behavior (they have higher rates of conduct disorders), and their emotional development (they tend to have lower self-esteem and higher rates of depression, eating disorders, and suicide). As has been observed, “[t]he youngest, most mature children are those at greatest risk for delinquency.”<sup>60</sup>

Among the juvenile population, girls are also disproportionately affected by affective (mood) disorders such as major depression.<sup>61</sup> Because irritability and problems with impulse control are cardinal features of mood disorders,<sup>62</sup> these symptoms often show up in female offenders.<sup>63</sup> These circumstances

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of these had thought about it more than once. JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 13, at 102. See also FRED A ADLER, SISTERS IN CRIME: THE RISE OF THE NEW FEMALE (1975); Leslie Acoca, *Outside/Inside: The Violation of American Girls at Home, on the Streets, and in the Juvenile Justice System*, 44 CRIME & DELINQ. 561 (1998).

<sup>50</sup> See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982); Peggy C. Giordano et al., *Delinquency, Identity, and Women’s Involvement in Relationship Violence*, 37 CRIMINOLOGY 17 (1999).

<sup>51</sup> See, e.g., Kimberly Kempf-Leonard & Lisa L. Sample, *Disparity Based On Sex: Is Gender Specific Treatment Warranted?*, 17 JUST. Q. 89 (2000).

<sup>52</sup> JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 13, at 57; Leslie Acoca and Myrna S. Raeder argue that [t]he process of disproportionately penalizing and detaining girls for status offenses and subsequent violations of valid court orders must be halted. Instead, effective diversion and intervention options that specifically address girls’ needs and engage their families and caretakers should be developed at the community level. Family focused programs that intervene upon family violence, including domestic combat between rebellious girls and their caretakers, should also be implemented at the community level. Further, training that provides accurate and current information on the characteristics and needs of girl offenders and their families and on dispositional alternatives for this population should be immediately delivered to law enforcement, probation officers, juvenile and family court judges, and child welfare professionals.

Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, 11 STAN. L. & POL’Y REV. 143 (1999).

<sup>53</sup> The vast majority of female detainees have been the victims of sexual or physical abuse. FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES (1999); see also ACOCO & AUSTIN, *supra* note 48; PREVENTION AND PARITY, *supra* note 48; Leslie Acoca, *Investing in Girls: A 21st Century Strategy*, 6 JUV. JUST. 3 (1999); Giordano et al., *supra* note 50.

<sup>54</sup> I am indebted to Judge Eugene Hyman of Santa Clara County who shared his experience working with a specialized juvenile cohort of domestic and partner violence cases.

<sup>55</sup> PREVENTION AND PARITY, *supra* note 48, at 14-15.

<sup>56</sup> Many times victims of sexual abuse (especially chronic abuse) are ambivalent about the perpetrator. Sometimes, they are also fearful. It is the common experience of psychotherapists that it is often difficult to get the “whole story” because of complex feelings of shame, fear, guilt, and ambivalence.

<sup>57</sup> This is an extremely common clinical profile seen by therapists who work with girls at high risk that have been sexually traumatized.

<sup>58</sup> ADOLESCENT DEVELOPMENT AND THE BIOLOGY OF PUBERTY, *supra* note 4, at 19 (citing Xiaojia Ge, et al., *Coming of Age Too Early: Pubertal Influences on Girls’ Vulnerability to Psychological Distress*, 67 CHILD DEV. 3386 (1995)).

<sup>59</sup> See, e.g., *id.*; Avshalom Caspi et al., *Unraveling Girls’ Delinquency: Biological, Dispositional, and Contextual Contributions to Adolescent Misbehavior*, 29 DEV. PSYCHOL. 19 (1993).

<sup>60</sup> ADOLESCENT DEVELOPMENT AND THE BIOLOGY OF PUBERTY, *supra* note 4, at 19.

<sup>61</sup> Women suffer from depression and other disorders of mood at rates considerably higher than men, who are more likely to abuse substances to control their mood states.

<sup>62</sup> AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV-TR) 356 (4th ed. 2000); Richard Harrington, *Affective Disorders*, in CHILD & ADOLESCENT PSYCHIATRY MODERN APPROACHES 330-343 (Michael Rutter et al. eds., 3d ed. 1994).

create many difficulties for the decision-maker who may not have many gender appropriate resources available as alternatives.<sup>64</sup> What is very clear is that punishment alone is not a good remedy for girls who are already self-destructive. From a child psychiatrist's point of view, self-punishment is one of the most difficult and intractable syndromes in victims and often occurs as an attempt at psychologically mastering an inflicted psychological wound that occurred when the victim was helpless or passive (e.g., sexual abuse). In simple terms, a girl who has been seriously harmed is more likely to put herself in harm's way.

Another variable, which sometimes compounds the aforementioned problems, is a girl's trans-generational involvement with the dependency or criminal system (e.g., her mother may have a history of involvement with the dependency court). A girl whose mother has been frequently absent from her upbringing because of involvement with the system is at risk of early pregnancy and suboptimal mothering of her own children. Thus, the stakes for the effective decision-maker are high, and developmental, gender-specific, and mental health considerations must be taken into account to mitigate risk to the girl and potentially to her children.<sup>65</sup>

Although few gender-specific alternatives exist, juvenile justice professionals should look for programs that do the following things:

- Teach girls how to build healthy relationships
- Teach girls how to deal with trauma (emotional, physical, sexual)
- Address future risk of victimhood
- Provide for affect regulation to address the intense, rapid changes in mood that often characterize abused girls
- Prepare girls for motherhood or teach pregnancy prevention
- Base their programs in the community whenever possible

### C. THE MENTALLY ILL AND MENTALLY RETARDED JUVENILE OFFENDER

Decision-makers commonly face children with mental illness, substance dependence,<sup>66</sup> and mental retardation issues. According to many, the juvenile justice system has become a "dumping ground" for emotionally disturbed juveniles with nowhere else to go.<sup>67</sup> A recent survey of juvenile and family court judges indicated that 86% of them believed that "mentally-ill juveniles were being shunted into the delinquency system."<sup>68</sup> Seventy percent of judges believed that 15% or more of defendants were "mildly

<sup>63</sup> Females (more often than males) often present internalizing disorders, such as anxiety, depression, and eating disorders. Girls direct pain, anger, self-loathing, and frustration inward as a reaction to sexual, emotional, and physical abuse. This can lead to self-destructive behavior disorders or behavior such as extreme promiscuity, prostitution, and placing themselves in harms way. JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 13, at 101.

<sup>64</sup> See GREENE, PETERS, & ASSOCS. & NORTHWEST REG'L EDUC. LAB., U.S. DEP'T OF JUST., GUIDING PRINCIPLES FOR PROMISING FEMALE PROGRAMMING: AN INVENTORY OF BEST PRACTICES (1998), available at <http://ojjdp.ncjs.org/pubs/principles/contents.html>.

<sup>65</sup> For example, different cultures have different attitudes toward sexual precocity and sexual behavior, including early pregnancy and childrearing. Early puberty poses fewer problems for girls in cultures whose adult women tend to support early maturation. For example, there is limited research suggesting that black girls cope better with early maturation than their white peers. ADOLESCENT DEVELOPMENT AND THE BIOLOGY OF PUBERTY, *supra* note 4, at 29.

<sup>66</sup> The American Psychiatric Association states, "[t]he essential feature of substance dependence is a cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues use of the substance despite significant substance-related problems." AM. PSYCHIATRIC ASS'N, *supra* note 62, at 192.

<sup>67</sup> E.g., NAT'L CTR. FOR JUV. JUST., DESKTOP GUIDE TO GOOD JUV. PROB. PRACTICE 113 (2002) (noting that "many observers also feel that, for fiscal and other reasons, the juvenile justice system has become a kind of dumping ground for emotionally disturbed juveniles who have nowhere else to go."); Joseph J. Coccozza & Kathleen Skowrya, *Youths with Mental Health Disorders: Issues and Emerging Responses*, 7 JUV. JUST. J. 1 (2000); Richard E. Redding, *Barriers to Meeting the Mental Health Needs of Offenders in the Juvenile Justice System*, 2000 INST. OF L., PSYCHIATRY, & PUB. POL'Y, available at [http://www.ilppp.virginia.edu/Publications\\_and\\_Reports/BarrMeet.html](http://www.ilppp.virginia.edu/Publications_and_Reports/BarrMeet.html); Fox Butterfield, *Concern Rising Over Use of Juvenile Prisons to 'Warehouse' the Mentally Ill*, N.Y. TIMES, Dec. 5, 2000, at A16.

<sup>68</sup> David E. Arredondo, Committee on Mental Health, Medical and Legal Issues National Council of Juvenile and Family Court Judges (2002) (unpublished manuscript, on file with Stanford Law & Policy Review).

or moderately mentally retarded.”<sup>69</sup> Conservative estimates put prevalence rates for serious biologically-based and genetically-transmitted mental illness at 20% of the population of juvenile detainees.<sup>70</sup> The rates of less serious but sometimes equally debilitating illness (including post traumatic stress reactions) is considerably higher, especially in girls.<sup>71</sup> The prevalence of mild and moderate mental retardation is unknown, but in the experience of specialized courts, is very high.<sup>72</sup> The presence of a serious mental disability has a direct bearing on appropriate sanctions (e.g., boot camps are contraindicated during serious clinical depression), the appropriate use of juvenile beds,<sup>73</sup> and the development of treatment alternatives.<sup>74</sup> Indeed, in a recent study, 77% of juvenile and family court judges surveyed believed they could reduce detention rates for offenders with better treatment options.<sup>75</sup> As a practical matter, these better treatment options would be community-based sanctions that strengthen the family, bolster educational performance or vocational preparedness, and address accountability and victim restitution.

Most importantly, serious mental disability raises very serious issues about diminished competence, fairness, and humanness. Often, cognitively limited youth are taken advantage of by more intelligent but more antisocial youth. Incarcerating juveniles who are already terrified because they are delusional or hallucinating is especially cruel. The sheer terror engendered by losing one’s mind to psychosis is impossible to overstate. The sequelae of criminalization of the child with mental illness is clinically and legally unacceptable. From a medical point of view, it is a violation of a fundamental ethical precept: *primum non nocere*—first do no harm.

With regard to mental illness, an effective juvenile justice system would be characterized by the following:

- Mental health issues that are aggressively identified (e.g., screening for all youth is in place)
- Appropriate seeking of mental health and mental retardation expertise (for diagnosis or assessment)<sup>76</sup>
- Treatment that is provided in lieu of institutionalization, boot camps, or incarceration for children with serious mental illness
- Children with mental retardation who are separated from their peers with normal intelligence

#### D. THE EFFECTS OF DISPROPORTIONATE MINORITY CONFINEMENT

The proportion of minority youth involved in the juvenile justice system greatly exceeds the proportion of these youth in the general juvenile population.<sup>77</sup> Disproportionality extends to virtually all phases of the delinquency process and intensifies as minority youth become more deeply involved in the juvenile justice system.<sup>78</sup> This situation continues to grow worse despite increased public awareness.<sup>79</sup>

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<sup>69</sup> *Id.*

<sup>70</sup> David E. Arredondo et al., *Juvenile Mental Health Court: Rationale and Protocols*, 52 JUV. & FAM. CT. J. 1, 3 (2001).

<sup>71</sup> Hans Steiner & Erickson Cauffman, *PTSD Among Female Juvenile Offenders*, 37 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 11 (1998); David E. Arredondo, *Massachusetts Youth Screening Instrument-2* (2002) (unpublished manuscript, on file with Stanford Law & Policy Review).

<sup>72</sup> In the author’s experience as a consultant to the Juvenile Mental Health Court in Santa Clara County, California, the prevalence of mild to moderate mental retardation approached 35% of youth referred. For a description of this court and its protocols, see Arredondo, *supra* note 68, at 8-17. Estimates by the Coalition for Juvenile Justice, a federally financed group appointed by the nation’s governors, also suggest that 15 to 20% of teenagers suffer from a severe biologically-based mental illness. *Id.* at 4.

<sup>73</sup> Although very common, it is inappropriate to use juvenile detention facilities to warehouse mentally ill children.

<sup>74</sup> Arredondo, *supra* note 68, at 3-4.

<sup>75</sup> *Id.*

<sup>76</sup> Screening is a quick check for symptoms that might suggest suicidality or major emotional disturbance. Diagnosis and assessment are more thorough and formal evaluations for the presence of mental illness.

<sup>77</sup> Heidi Hsia & Donna Hamparian, *Disproportionate Minority Confinement: 1997 Update*, JUV. JUST. BULL. (Office of Juvenile Justice & Delinquency Prevention, U.S. Dep’t of Justice), Sept. 1998, at 1.

<sup>78</sup> Carl E. Pope & William Feyerherm, *Minorities and the Juvenile Justice System*, JUV. JUST. BULL. (Office of Juvenile Justice & Delinquency Prevention, U.S. Dep’t. of Justice), July 1995, at 3.

There are myriad causes and conditions from which these circumstances arise. From the point of view of developmental psychologists, concerned citizens, and parents of all ethnicities, the situation is not acceptable because our society is correctly perceived as unjust by the children to whom we are trying to impart the societal value of justice. Although children of color are obviously the most deleteriously impacted, their plight is not lost on their non-minority peers. The unfairness of "the system" towards people of color has become a widely accepted fact among young people. Popular music and entertainment abound with "jokes" about racial profiling and the system's unequal treatment of minorities. From a child developmental point of view, this severely undermines our children's moral development and their respect for society and social authority. As these children age, their lack of regret turns into cynicism and with it the belief that injustice, not justice, is the lot of people of color in America. The societal impact of this cynicism on our social fabric is difficult to overestimate. Another dimension to the problem of disproportionate minority confinement is the trans-generational involvement of children.

#### **E. TRANS-GENERATIONAL INVOLVEMENT**

Trans-generational involvement is a pattern in which multiple generations of a single family are involved in the justice system. This occurs when, for example, a thirteen-year-old boy is brought before the court while his father is still in prison or when a twelve-year-old girl, who was taken from her mother by child protective services when she was six-years-old, is charged with a battery on one of her foster parents. Trans-generational involvement creates psychosocial dynamics, which might lead to an escalation in antisocial reactions rather than to their abatement. The decision-maker must be extremely careful because of the complex and interrelated dynamics between the child, parental authority, and social authority.

For the child offender, developmental considerations are critical. A young child is likely to idealize their parents and unambivalently harbor hatred of anyone who has been perceived to hurt their idealized family member. With the older child, there is also likely to be some identification with parental figures, siblings, cousins, and others who have been sanctioned by society. Idealization, identification, empathy, and protectiveness are natural human filial attitudes, which are desirable and common to us all. From the point of view of the child to be sanctioned, however, they can create complex ambivalence. For example, a child who enters the system from a family with extensive trans-generational involvement may view the process as a rite of passage and a point of (unspoken) family pride. Consequently, careless system interventions might have paradoxical and undesired effects on that child, such as providing him with what he silently wishes.

To the trans-generationally involved parental figure, sanctioning can be perceived many different ways. Some parents might be indifferent. Others may view the intervention as unwelcome and unfair (perhaps racist or sexist) harassment or be very fearful of involvement with social authority based on their previous personal experiences with that authority (including Child Protective and Immigration Services). Some parents might be relieved or grateful that someone is stepping in to help (e.g., recovering alcoholics or drug addicts) and hopeful that societal intervention might help their child turn their life around so as to prevent the unnecessary suffering that they have endured because of their addiction.

It is essential that the decision-maker understand the spectrum of parental attitudes, which may include mixtures of indifference, antipathy, fear, and hope. These attitudes are part of the context in which the sanction will be perceived by the child and therefore are a major determinant of its effectiveness or lack thereof.

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<sup>79</sup> In 1985, Caucasian youth between the ages of 10 and the upper age of juvenile court jurisdiction were detained at a rate of 45 per 100,000, while the comparable rates for African-American and Hispanic youth were 114 per 100,000 and 73 per 100,000, respectively. By 1995, rates for Caucasians had decreased by 13% while rates for African Americans had increased 180% and for Hispanics, 145%. Madeline Wordes & Sharon M. Jones, *Trends in Juvenile Detention and Steps Toward Reform*, 44 *CRIME & DELINQ.* 544, 554 (1998) (citing U.S. Census data for years 1985 to 1995).

The decision-maker must also examine his own attitudes. Does the decision-maker believe (consciously or unconsciously) that criminality is genetically determined and that he is providing early detection and incapacitation of children who are destined to become life-long criminals? Does he believe his job is to protect one part of society from another? Does he believe children should be taken away from criminal parents and neighborhoods so as to lessen the possibility that the child will be raised to become criminal?<sup>80</sup> Does he assume parents will interpret his interventions as benevolent? Does he believe that setting an example with one child will serve as an effective deterrent to younger siblings who are also at risk? Although a discussion of these attitudes is beyond the scope of this paper, the point is that the effective decision-maker must be cognizant of his own attitudes as well as those of the trans-generationally involved child and family.

#### IV. CONCLUSION

*Primum non nocere*—first do no harm—is not an idealistic maxim. It serves as the lowest threshold to which adequate performance is compared. Once public safety and victim rights have been accounted for, it is reasonable to apply this minimal standard to the juvenile justice system which intervenes on behalf of the highest risk, and oftentimes most highly victimized, youth. To meet this minimum threshold, decision-makers need familiarity with the general principles of child development and a reasonable knowledge of the risks and needs presented by each individual offender. The juvenile justice system cannot do this alone.

For the majority of court jurisdictions, the amount of time, thought, and expertise required to implement the principles outlined in this paper far exceeds current capacity if change were to be implemented to a meaningful degree. Many jurisdictions exhibit severe fragmentation of triage, assessment, and service delivery systems with poor communication, little mutual understanding, and often distrust between community agencies competing for the same public dollar. Nevertheless, the developmental principles outlined in this Article can serve as a rationale for intense cross-disciplinary training, cooperation, and integrated treatment planning far beyond what currently exists. New models are needed in which departments of probation, mental health, social service, and education work synergistically instead of at odds with one another. All participants in the juvenile justice system must appreciate the value of working towards fostering positive child development and realize that some current practices can be harmful. Defense attorneys need to understand that effective treatment for a child is not synonymous with punishment. Prosecutors and probation officers need to understand that effective intervention enhances public safety. Judges need to appreciate the enormous impact they can have if they encourage cooperative, working relationships among all members of the juvenile court system.

In spite of very significant advances in understanding juvenile delinquency, developmental traumatology, neurobiology, and social learning psychology, there is a palpable dearth of information being transmitted to key players in the juvenile justice system. This is not an insoluble problem. At the very least, decision-makers can be educated about practices and interventions which have a developmental rationale or an evidence base and therefore have a reasonable chance of being successful (as described above). This would naturally lead to the elimination of ineffectual practices, which also frequently represent unacceptable risks to normative child development and socialization.

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<sup>80</sup> RAINE, *supra* note 1, at 243-85.