

## ARTICLES

# Juvenile Justice: Lessons For A New Era

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This is a time of both great concern and great opportunity in the juvenile justice field. State and local leaders, faced with severe budget shortfalls in a slowed economy, have begun cutting juvenile justice programs and sending more youthful offenders to juvenile prisons in order to close budget gaps.<sup>2</sup> Meanwhile, the Obama administration is developing federal policy to meet the needs of troubled and at-risk youth, and reviewing the mission and leadership of the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP), which had its own share of troubles during the last administration.<sup>3</sup> The Juvenile Justice and Delinquency Prevention Act (JJDP), the primary federal juvenile justice statute, which is overdue for reauthorization, will come before Congress again this year.<sup>4</sup>

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1. The Center for Children's Law and Policy would like to send special thanks to Jason Szanyi, colleague and Skadden fellow.

2. Jim Davenport, "Cash-Strapped States Cut Juvenile Justice Programs," N.Y. TIMES, December 26, 2008.

3. Ann Parks, "Town Hall" meeting highlights juvenile justice priorities for new presidential administration," GEORGETOWN LAW, November 10, 2008, available at <http://www.law.georgetown.edu/news/webstory/11.10.08.html>. See, e.g., Obama's position on crime issues, On the Issues, available at: [http://www.ontheissues.org/2008/Barack\\_Obama\\_Crime.htm](http://www.ontheissues.org/2008/Barack_Obama_Crime.htm). Patrick Boyle, *At Justice, 84<sup>th</sup> Place Wins*, YOUTH TODAY, June 1, 2008, available at [http://www.youthtoday.org/publication/article.cfm?article\\_id=1881](http://www.youthtoday.org/publication/article.cfm?article_id=1881).

4. 42 U.S.C. § 5601 et seq.; On July 31, 2008, the Senate Judiciary Committee approved S. 3155, the Juvenile Justice and Delinquency Prevention Reauthorization Act of 2008. However, the bill was not brought to the full Senate before the end of the 110<sup>th</sup> Congress in December, and no reauthorization bill was introduced in the House of Representatives. On March 24, 2009, Senators

As policy makers evaluate options for addressing the needs of this population, it is worthwhile to consider significant insights from juvenile justice research and experience developed since the last time Congress engaged in a substantive overhaul of the JJDPA in 1992.<sup>5</sup> Although Congress has reauthorized the Act since then, it has done so without major programmatic changes.<sup>6</sup> Perhaps most striking is the difference between what was widely accepted *then* and what we know *now*. In a number of critical areas of juvenile justice policy and practice, there has been a dramatic turnaround in information about what works, what does not, and why.

This article first sets forth the background of public perception and thought in the juvenile justice field in the early and mid-1990s. It then discusses the new research and experience in these key areas: evaluation of juvenile rehabilitation and treatment programs, differences between adolescents and adults, prosecution of youth in adult criminal court, needs of girls, use of incarceration and improvement of conditions of juvenile confinement, and racial and ethnic disparities in the juvenile justice system. Finally, the article lists recommendations for key changes to juvenile justice policy and practice that should follow from this new body of knowledge. Our thesis is that in many important areas of juvenile justice, the research and experience over the past fifteen years provide a solid basis for effective policy and practice reforms. Policy makers at the federal, state, and local levels should incorporate this research and experience in addressing today's juvenile justice challenges.

### I. CONTEXT OF THE TIMES

In 1974, Robert Martinson published an article in the journal *The Public Interest*, entitled "What Works?—Questions and Answers About Prison Reform."<sup>7</sup> This became the most influential criminological study of the second half of the twentieth century.<sup>8</sup> Based on a survey he co-authored of 231 studies of offender rehabilitation, Martinson concluded that rehabilitation programs had no effect on recidivism.<sup>9</sup> His findings were widely reported in the media, and fit well with "law and order" policies of the Nixon and Reagan administrations. He toured the country and advised policymakers, and his conclusions were soon accepted as accurate.<sup>10</sup> His work shattered the prevailing notion that rehabili-

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Patrick Leahy, Herb Kohl, Richard Durbin, and Arlen Specter introduced in the 111<sup>th</sup> Congress a bill very similar to S.3155. The new bill is S. 678.

5. Juvenile Justice and Delinquency Prevention Appropriations Authorization, Pub. L. No. 102-586, 106 Stat. 4982.

6. Compare 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1869 (2002) with S. 678, *supra* note 4.

7. Robert Martinson, *What Works? - Questions and Answers About Prison Reform*, 35 THE PUBLIC INTEREST 22 (1974).

8. Jerome G. Miller, *The Debate on Rehabilitating Criminals: Is It True that Nothing Works?* WASH. POST (March 1989).

9. Martinson, *supra* note 7, at 25.

10. Rick Sarre, *Beyond 'What Works' - A 25 Year Jubilee Retrospective of Robert Martinson*, Paper presented at the History of Crime, Policing and Punishment Conference convened by the Australian Institute of Criminology in conjunction with Charles Stuart University and held in Canberra,

tation was a solid foundation for prison reform efforts, and his study became known as “Nothing Works.”<sup>11</sup>

There was a powerful corollary to Martinson’s key finding. If “nothing works” to rehabilitate offenders, then society must be kept safe by locking them up.<sup>12</sup> During the 1980s and into the 1990s, incarceration was the primary response to delinquent as well as adult criminal behavior.<sup>13</sup> The attack on rehabilitation was so effective that in 1989, the U.S. Supreme Court dealt what seemed to be a death blow to prisoner rehabilitation efforts. In *Mistretta v. United States*, the Court upheld the federal determinate sentencing guidelines that had been established by the U.S. Sentencing Commission.<sup>14</sup> In rejecting the broad discretion that was the core of indeterminate sentencing and parole, the Court noted that indeterminate sentencing and parole were grounded in the concept of rehabilitation—the idea that it was possible to rehabilitate the offender and make it less likely that he would commit future crimes.<sup>15</sup>

However, the Court said, “[r]ehabilitation as a sound penological theory came to be questioned and, in any event, was regarded by some as an unattainable goal for most cases.”<sup>16</sup> Then the Court referred to the Senate Report on the Sentencing Reform Act of 1984, which was “[h]elpful in our consideration and analysis...”<sup>17</sup> The Sentencing Reform Act established the U.S. Sentencing Commission.<sup>18</sup> The Court cited the Senate Report’s description of the “outmoded rehabilitation model” for federal sentencing, and noted that investigators “recognized that the efforts of the criminal justice system to achieve rehabilitation of offenders had failed.”<sup>19</sup>

Although a small group of critics challenged Martinson’s conclusions, the belief that “nothing works” for offenders was widespread among policymakers in the juvenile justice arena as well.<sup>20</sup> For example, Alfred Regnery, Director

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December 9-10, 1999, available at [http://blog.lib.umn.edu/jbs/soc3101/PrisonRehabilitationWhatWorksMartinsonJubilee\\_1988.pdf](http://blog.lib.umn.edu/jbs/soc3101/PrisonRehabilitationWhatWorksMartinsonJubilee_1988.pdf).

11. Miller, *supra* note 8.

12. *Id.*

13. For example, between 1985 and 1995, the number of juveniles incarcerated in detention facilities on an average day rose by 74 percent. ROCHELLE STANFIELD, THE JDAI STORY: BUILDING A BETTER JUVENILE DETENTION SYSTEM 6 (Annie E. Casey Foundation undated), available at <http://www.jdaihelpdesk.org/Docs/Documents/Publications%20and%20Media%20Coverage%20Related%20to%20Detention%20Reform/Pathways%20to%20Juvenile%20Detention%20Reform/1%20JDAI%20Pathway%20Overview%20-%20The%20JDAI%20Story,%20Building%20a%20Better%20Juvenile%20Detention%20System.pdf>.

14. 488 U.S. 361 (1989).

15. *Id.* at 363.

16. *Id.* at 365.

17. *Id.* at 366.

18. Pub. L. 98-473, 98 Stat. 2019 (1987) (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

19. 488 U.S. at 366. The Court also noted that the House Report on the legislation indicated that the House shared the Senate’s rationale underlying sentencing reform. *Id.* at 366 n. 3.

20. *E.g.*, Paul Gendreau and Robert Ross, *Effective correctional treatment: Bibliotherapy for cynics*, 25 CRIME & DELINQUENCY 463 (1979); ROBERT ROSS & PAUL GENDREAU (Eds.), EFFECTIVE CORRECTIONAL TREATMENT (1980).

of the Office of Juvenile Justice and Delinquency Prevention in the Reagan administration, wrote about “the folly of rehabilitation.”<sup>21</sup> The simple phrase “nothing works” had immense staying power.<sup>22</sup>

In the early and mid-1990s, another stream of writing about crime—this time with an explicit focus on fear and an implicit call on racial fears—captured national attention, with equally devastating impact. In 1994 the arrest rate of juveniles for homicides with guns hit an all-time high.<sup>23</sup> Soon after, a number of researchers began using population forecasts to predict disaster on the horizon. James Q. Wilson of Harvard noted that by the year 2000 there would be a million more teenagers between the age of 14 and 17, half of them male. Of the males, he said, “[s]ix percent of them will become high rate, repeat offenders—30,000 more young muggers, killers, and thieves than we have now. Get ready.”<sup>24</sup> John DiIulio of Princeton coined the term “super-predator.”<sup>25</sup> He looked down the road ten more years, predicting that “[b]y the year 2010, there will be approximately 270,000 more juvenile super-predators on the streets than there were in 1990.”<sup>26</sup> James Allan Fox of Northeastern University, in a briefing paper for Attorney General Janet Reno in 1996, predicted that by 2005 there would be “many more than 5,000 teen killers per year.”<sup>27</sup> Fox noted that the population growth for whites would be “modest,” while the population growth for blacks would be 26% by 2005 “and will continue to expand well into the next century...”<sup>28</sup> All three received nationwide publicity and were echoed by Congressional leaders and other policy makers.<sup>29</sup>

Wilson, DiIulio and Fox, like Martinson, were wrong. Martinson used flawed methodology and over-stated his findings. He admitted his errors in an article written a year before his death.<sup>30</sup> Wilson, DiIulio and Fox made headlines but were far off the mark. The number of juvenile arrests in 2004 was 22%

21. Alfred S. Regnery, *Getting Away with Murder: Why the justice system needs an overhaul*, 34 POLICY REVIEW I (1985).

22. See National Center for Mental Health and Juvenile Justice, Cornerstone #4: Treatment, available at [http://www.ncmhjj.com/Blueprint/cornerstones/Treatment\\_background.shtml](http://www.ncmhjj.com/Blueprint/cornerstones/Treatment_background.shtml) (“Up until about 10 years ago, there was a general sense that ‘nothing works’ for youth with mental health needs in the juvenile justice system.”).

23. Howard N. Snyder, *Juvenile Arrests 1999*, JUVENILE JUSTICE BULLETIN (Dec. 2000).

24. James Q. Wilson, *Crime and Public Policy*, in CRIME (James Q. Wilson and Joan Petersilia, eds.) (1995), 507, quoted in FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 49 (1998).

25. John DiIulio, *The Coming Wave of Super-Predators*, WEEKLY STANDARD, Nov. 27, 1995, at 23.

26. JOHN DI IULIO, HOW TO STOP THE COMING CRIME WAVE (1996), cited in ZIMRING, *supra* note 24, at 49.

27. JAMES ALLAN FOX, TRENDS IN JUVENILE VIOLENCE: A REPORT TO THE UNITED STATES ATTORNEY GENERAL ON CURRENT AND FUTURE RATES OF JUVENILE OFFENDING (1996).

28. *Id.* at 3.

29. See, e.g., U.S. Rep. Bill McCollum, Chair of the House Subcommittee on Crime: “Put these demographic facts together and brace yourself for the coming generation of ‘super-predators.’” Testimony Before the House Subcommittee on Early Childhood, Youth, and Families (104th Cong., 2d Sess.) Apr. 30, 1996, at 1-3.

30. Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243 (1979).

lower than the number of juvenile arrests in 1995.<sup>31</sup> In 2004 the arrest rate for juvenile crimes of violence was at the lowest level since 1980.<sup>32</sup> Franklin Zimring of U.C. Berkeley reviewed the rhetoric and the data and concluded that the prediction technique used by Wilson and DiIulio was “empty of logical or empirical content.”<sup>33</sup> The racial component of the “disaster by demographics” rhetoric was particularly disturbing. “Super-predator” became widely recognized as “...a code word for young Black males.”<sup>34</sup>

The combination of the “nothing works” and “super-predator” rhetoric provided fertile ground for “tough on crime” policies in the early and mid-1990s. In 1994 Congress passed the Violent Crime Control and Law Enforcement Act, the largest criminal justice bill in U.S. history.<sup>35</sup> In 1996, Congress passed the Prison Litigation Reform Act (PLRA), the stated purpose of which was to deter “frivolous” prisoner litigation. The PLRA’s primary effect, however, was to make it more difficult and in some cases impossible for prisoners—juveniles as well as adults—to challenge dangerous conditions and practices in juvenile facilities, jails, and prisons.<sup>36</sup> During the 1990s, states across the country established juvenile “boot camps,” although evaluation studies found that participants suffered recidivism rates even worse than the dismaying recidivism rates for youth incarcerated in more traditional correctional facilities.<sup>37</sup> The public believed that these measures would reduce juvenile crime and make the community safer.

In the early 1990s a number of key principles were widely *perceived* to be true by public officials and other policy makers, the public, and the press:

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31. Howard N. Snyder, *Juvenile Arrests 2004*, JUVENILE JUSTICE BULLETIN 3 (Dec. 2006).

32. *Id.* at 1.

33. ZIMRING, *supra* note 24, at 63.

34. Kenneth B. Nunn, *The End of Adolescence: The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, 712 (2002) (“Consequently, it is not surprising that some would believe African-American youth constituted a class of ‘superpredators,’ the control of which necessitated a radical transformation of the juvenile justice system. Indeed, in the minds of many, ‘superpredators’ is simply a code word for young Black males”). See, also, Loic Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOCIETY 95, 117 (2001) (“Along with the return of Lombroso-style mythologies about criminal atavism and the wide diffusion of bestial metaphors in the journalistic and political field (where mentions of ‘superpredators’ or ‘wolf packs,’ and ‘animals’ and the like are commonplace), the massive over-incarceration of blacks has supplied a powerful common-sense warrant for ‘using color as a proxy for dangerousness’). James Alan Fox continues to make population-based predictions, explicitly emphasizing racial differences in population growth. See James Allan Fox & Marc L. Swatt, *The Recent Surge in Homicides Involving Young Black Males and Guns: Time to Reinvest in Prevention and Crime Control* (Dec. 2008), available at <http://www.jfox.neu.edu/Documents/Fox%20Swatt%20Homicide%20Report%20Dec%202009%202008.pdf>.

35. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796. See U.S. Department of Justice, Fact Sheet, Violent Crime Control and Law Enforcement Act of 1994, available at <http://www.ncjrs.gov/txtfiles/bills.txt>.

36. Public L. No. 104-134 (codified at various places in 42 U.S.C. and 28 U.S.C.) See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003) (discussing the impact of the Prison Litigation Reform Act).

37. Michael Peters et al., *Boot Camps for Juvenile Offenders* (Sept. 1997) 21-23, available at <http://www.ncjrs.gov/pdffiles/164258.pdf>.

1. *No consistent evidence proves that treatment programs for youth in trouble with the law are effective.*<sup>38</sup>
2. *Adolescents who commit serious crimes are just as culpable as adults.*<sup>39</sup>
3. *Prosecution of youth in adult criminal court “teaches youth a lesson” and therefore reduces recidivism and promotes deterrence.*<sup>40</sup>
4. *A system designed for boys is fine for girls, too.*<sup>41</sup>
5. *Young people are safe in government-operated juvenile facilities.*<sup>42</sup>
6. *Incarceration is the appropriate response to youth who commit most crimes.*<sup>43</sup>
7. *Racial disparities may exist in the system, but there isn’t much that can be done about them.*<sup>44</sup>

The research and experience of the past fifteen years, however, demonstrate that all of these statements are incorrect. Rigorous evaluation demonstrates which violence prevention and treatment programs are effective.<sup>45</sup> Research has shed new light on the brain development of adolescents and the differences between youth and adults, and new research on competence and culpability of young people has changed the way we think about adolescent judgment and decision making.<sup>46</sup> A number of large research studies show that prosecution of youth in adult criminal court significantly *increases* the likelihood that the youth will commit violent or other crimes in the future.<sup>47</sup> Girls are a growing part of the juvenile justice system, and research, policy and practice should be adjusted to meet girls’ needs.<sup>48</sup> Conditions in many juvenile facilities in the United States are dangerous and abusive, but evolving standards of care paint a clearer path for maintaining safer, more humane facilities.<sup>49</sup> More than a decade of experience demonstrates that public safety can be protected without the heavy reliance on incarceration that grew in the 1990s.<sup>50</sup> National, state, and local data demonstrate that racial and ethnic disparities exist at all stages of the juvenile justice system, but focused, data-driven efforts have reduced racial disparities in a variety of locations.<sup>51</sup>

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38. See *supra* text accompanying notes 7-29.

39. See *infra* text accompanying notes 76-78.

40. See Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?* JUV. JUST. BULL. 2 (Office of Juvenile Justice and Delinquency Prevention Aug. 2008).

41. See Francine Sherman, ANNIE E. CASEY FOUNDATION, DETENTION REFORM AND GIRLS: CHALLENGES AND SOLUTIONS 12 (2005).

42. When Congress debated the Prison Litigation Reform Act, *supra* note 36, supporters of the legislation derided the idea that prisoners had legitimate claims of abuse in penal institutions. The most famous case they cited was an alleged lawsuit by an inmate over crunchy peanut butter. Cindy Chen, *Prison Litigation Reform Act of 1995: Doing Away with More Than Just Crunchy Peanut Butter*, 78 ST. JOHN’S L. REV. 203, 206, 210-11 (Winter 2004).

43. See *infra* text accompanying notes 321-325.

44. MARC MAUER, RACE TO INCARCERATE (1999).

45. See *infra* Part II.

46. See *infra* Part III.

47. See *infra* Part IV.

48. See *infra* Part V.

49. See *infra* Part VI.

50. See *infra* Part VII.

51. See *infra* Part VIII.

The following sections discuss the research and experience in each area over the past fifteen years and the implications for juvenile justice policies.

## II. RIGOROUS EVALUATION DEMONSTRATES WHICH VIOLENCE PREVENTION AND TREATMENT PROGRAMS ARE EFFECTIVE

By the early 1990s, researchers had identified a number of programs that had a positive impact on risk factors for violence and other aspects of delinquency, but few programs had been carefully evaluated. An Office of Juvenile Justice and Delinquency Prevention report in 1995 entitled “Delinquency Prevention Works” listed a small number of “effective” programs and a much larger number of “promising” programs, but evaluation methods varied and there were no consistent selection criteria for effectiveness.<sup>52</sup>

However, in 1996 the Center for the Study and Prevention of Violence (CSPV) at the University of Colorado at Boulder launched a national initiative, Blueprints for Violence Prevention, to find and replicate effective violence prevention programs, using the most rigorous scientific standards.<sup>53</sup> With initial funding from the Colorado Division of Criminal Justice, the Centers for Disease Control and Prevention, and the Pennsylvania Commission on Crime and Delinquency, and with continuing funding from the Office of Juvenile Justice and Delinquency Prevention, CSPV has reviewed a wide variety of programs that have claimed to be effective.<sup>54</sup>

The key to the Blueprints program is the use of rigorous selection criteria.<sup>55</sup> CSPV uses three primary criteria:

- *Evidence of deterrent effect with a strong experimental design.* CSPV looks at evidence of deterrent effects on violence, delinquency, and drug use. It requires the highest scientific standard of experimental design – random assignment of youth to experimental and control groups. If random assignment is impossible, CSPV considers research designs with closely matched experimental and control groups.<sup>56</sup>
- *Sustained effects.* CSPV requires that programs demonstrate “a sustained effect at least one year beyond treatment” or intervention period.<sup>57</sup>
- *Multiple site replications.* CSPV requires replication in at least one additional site with demonstrated program effects.<sup>58</sup>

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52. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *DELINQUENCY PREVENTION WORKS* (1995); Peter Greenwood, *Prevention and Intervention Programs for Juvenile Offenders*, in 18 *THE FUTURE OF CHILDREN: JUVENILE JUSTICE* 185, 186 (Fall 2008).

53. Center for the Study and Prevention of Violence, Background, available at <http://www.colorado.edu/cspv/blueprints/background.html>.

54. *Id.*

55. Center for the Study and Prevention of Violence, Selection Criteria, available at <http://www.colorado.edu/cspv/blueprints/criteria.html>.

56. *Id.*

57. *Id.*

58. *Id.*

For a program to be considered a “model” Blueprints program, it must meet all three criteria.<sup>59</sup> To be considered “promising,” a program must meet the first criterion of demonstrated deterrent effect with a strong experimental design.<sup>60</sup>

CSPV has reviewed more than 800 programs and has found 11 that meet the criteria for “model” programs and 19 that meet the criteria for “promising.”<sup>61</sup> Each of the “model” programs has a target population, and as a whole, the eleven Blueprints models cover age groups from birth (the Nurse-Family Partnership targets at-risk pregnant women bearing their first child) to older adolescents (Big Brothers Big Sisters).<sup>62</sup> Similarly, the “promising” programs target age ranges from toddlers (Perry Preschool Project) to college students (BASICS–Brief Alcohol Screening and Intervention of College Students).<sup>63</sup>

Three of the Blueprints model programs are widely used with youth in the juvenile justice system:

- *Multisystemic Therapy* (MST) is an intensive treatment program for serious youth offenders focused on improving the family’s capacity to overcome the known causes of delinquency. A masters-level therapist with a very small caseload comes to the youth’s home and other places where the youth is involved in the community, and is available to the family 24 hours per day, 7 days per week. MST interventions typically aim to improve families’ discipline practices and abilities to communicate, decrease youth association with deviant peers, increase youth association with positive peers and recreational activities, improve youth school or vocational performance, and develop a support network of extended family, neighbors, and friends to help youth and their families achieve and maintain such changes.<sup>64</sup> MST has been shown to decrease recidivism up to 70% as well as achieve other positive outcomes.<sup>65</sup>
- *Functional Family Therapy* (FFT) is a structured family-based prevention and intervention program for at-risk youth that works to change behaviors by engaging and motivating families and youth. A short-term intervention of up to 30 hours offered mainly in clinical settings but sometimes in-home, this therapy focuses on family communication, parenting skills, and conflict management skills.<sup>66</sup> FFT has been shown

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59. *Id.*

60. *Id.*

61. Center for the Study and Prevention of Violence, Overview, available at <http://www.colorado.edu/cspv/blueprints/index.html>.

62. See Center for the Study and Prevention of Violence, Model Programs, available at <http://www.colorado.edu/cspv/blueprints/modelprograms.html>.

63. See Center for the Study and Prevention of Violence, Promising Programs, available at <http://www.colorado.edu/cspv/blueprints/promisingprograms.html>.

64. See Center for the Study and Prevention of Violence, Multisystemic Therapy (MST), available at <http://www.colorado.edu/cspv/blueprints/modelprograms/MST.html>; and MST Services, Executive Summary, available at [http://www.mstservices.com/executive\\_summary.php](http://www.mstservices.com/executive_summary.php).

65. See MST Services, Multisystemic Therapy: Research on Effectiveness, available at <http://mstservices.com/text/research.html>.

66. See Strengthening America’s Families Project, Functional Family Therapy, available at

to reduce recidivism between 25% and 60%.<sup>67</sup>

- *Multidimensional Treatment Foster Care* (MTFC) places adolescents who need out-of-home placement due to serious delinquency in specially-trained and supported foster homes, rather than incarceration or group home settings. The foster care placements, which last for six to nine months, focus on academic and positive living skills; daily structure and supervision based on clear expectations, limits and consequences; and support for youth in developing positive peer relationships. At the same time, the youth's family receives therapy and parenting skills training to promote successful return after the program.<sup>68</sup> Research has established that MTFC is effective in curbing the development of delinquency, youth violence, and other problem behaviors; it is also more cost effective than congregate care placements aimed at preventing youth reoffending.<sup>69</sup>

Perhaps equally important, Blueprints has determined which programs are *not effective* at violence prevention. These include widely-used programs such as boot camps and Scared Straight.<sup>70</sup>

The Blueprints programs are also cost-effective. In the leading research study on costs and benefits of prevention and early intervention programs for youth, conducted by the Washington State Institute for Public Policy, Multi-systemic Therapy had a cost-benefit ratio of \$2.64 for each dollar spent, Functional Family Therapy returned \$7.69 for each dollar, and Multidimensional Treatment Foster Care had a benefit ratio of \$10.88 per dollar spent.<sup>71</sup>

In comparison, the popular D.A.R.E. (Drug Abuse Resistance Education) substance abuse prevention program had \$0.00 benefits per dollar spent, and Scared Straight had a cost-benefit ratio of *minus* \$203.51 per dollar spent on the program.<sup>72</sup> The development of Blueprints for Violence Prevention has been a signal accomplishment in the juvenile justice field. Blueprints provides

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[http://www.strengtheningfamilies.org/html/programs\\_1999/01\\_FFT.html](http://www.strengtheningfamilies.org/html/programs_1999/01_FFT.html).

67. See Center for the Study and Prevention of Violence, Functional Family Therapy (FFT), available at <http://www.colorado.edu/cspv/blueprints/modelprograms/FFT.html>.

68. See TFC Consultants, Multidimensional Treatment Foster Care for Adolescents, available at <http://www.mtfc.com/mtfca.html>.

69. *Id.*

70. See Center for the Study and Prevention of Violence, Blueprints for Violence Prevention—Overview, available at <http://www.colorado.edu/cspv/blueprints>. In addition to reviewing programs, Blueprints provides a variety of valuable services. They include an online Information Clearinghouse with bibliographic search services; technical assistance to policy makers and community members involved in violence prevention programming; basic research on violence prevention; detailed information on each of the “model” and “promising” programs, including cost-effectiveness data and program contacts; and publications, including facts sheets on the programs and newsletters.

71. STEVE AOS ET AL., BENEFITS AND COSTS OF PREVENTION AND EARLY INTERVENTION PROGRAMS FOR YOUTH 7 (Washington State Institute for Public Policy 2004). See also, STEPHEN A. SMALL ET AL., WHAT WORKS, WISCONSIN: WHAT SCIENCE TELLS US ABOUT COST-EFFECTIVE PROGRAM FOR JUVENILE DELINQUENCY PREVENTION (University of Wisconsin-Madison, June 2005).

72. AOS ET AL., *supra* note 71, at 7.

a strong scientific base for identifying effective programs and relevant information on those programs, which has contributed to their growing use in the field.<sup>73</sup> As a result of the Blueprints effort, it is not only *not* credible to say that “nothing works,” but also possible to say what works, how much, and why.

This research means that policy makers have an opportunity to make better choices about the use of programming dollars in their juvenile justice systems. However, we should not lose sight of the need for additional research and rigorous testing to find other interventions that reach the standard of “promising” or “model.” Further, there should be more evaluation of the impact of intervention programs on racial and ethnic subgroups, and on girls, to determine whether the programs have consistent impact across the youth population.

### III. RESEARCH HAS SHED NEW LIGHT ON THE BRAIN DEVELOPMENT OF ADOLESCENTS AND THE DIFFERENCES BETWEEN YOUTH AND ADULTS

Anyone who has ever parented, taught, or spent much time around adolescents knows that they are impulsive, influenced by their peers and have trouble foreseeing the long-term consequences of their actions. Many American laws have long acknowledged these differences by restricting voting and service on juries to those over the age of 18 and requiring parents to make medical and other important decisions for teenagers. However, the public fear of “superpredator” teenagers and “tough on crime” attitudes fuelled a movement during the 1990s to prosecute young people, especially 16- and 17-year-olds, as adult offenders, despite the common understanding that teenagers do not have the same motivations or the same self control mechanisms as adults.

This reluctance to treat adolescents differently from adults was clearly illustrated in the court decisions surrounding the death penalty for teenagers. In 1988, in *Thompson v. Oklahoma*,<sup>74</sup> the Supreme Court held that the death penalty was unconstitutional as applied to individuals who were under the age of 16 at the time of the offense. One of the reasons the Court so held was that adolescents are less mature, more impulsive, and less self-disciplined than adults. The next year, in *Stanford v. Kentucky*,<sup>75</sup> the Court rejected the claim that the death penalty was similarly unconstitutional as applied to 16- and 17-year-olds. A plurality of the justices held that there was no consensus in the United States that those youth should be protected from the death penalty.<sup>76</sup> On the issue of lack of maturity and lesser culpability of adolescents, Justice Scalia writing for the plurality flatly rejected the scientific research, declaring, “The battle must be fought...on the field of the Eighth Amendment and, in that

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73. See, e.g. John D. and Catherine T. MacArthur Foundation, Models for Change: Systems Reform in Juvenile Justice—Evidence-Based Practices, <http://modelsforchange.net/about/Issues-for-change/Evidence-Based-Practices.html?tab=issues> (last visited Oct. 27, 2009).

74. 487 U.S. 815 (1988).

75. 492 U.S. 361 (1989).

76. *Id.* at 377.

struggle socioscientific, ethicoscientific, or even purely scientific evidence is not an available weapon.”<sup>77</sup>

Over the past ten years, research in adolescent brain development has informed the dialogue about policies regarding youth charged with crimes in new and profound ways. Since 1999, scientists have been using new technologies to study the human brain, and have discovered that adolescent brains are further from full adult development than previously believed. Magnetic resonance imaging reveals that the frontal lobe undergoes great change between early adolescence and young adulthood.<sup>78</sup> A part of the frontal lobe, the prefrontal cortex, governs “executive functions” such as reasoning, planning, personality expression and regulating behavior.<sup>79</sup> The prefrontal cortex is the last area of the human brain to mature.<sup>80</sup> Research reveals that this maturation continues at a rapid pace until a person’s early 20s.<sup>81</sup>

Research largely supported by the John D. and Catherine T. MacArthur Foundation has probed how this new information impacts youth involved in the juvenile justice system. For example, one study determined that both risk taking and risky decision-making decline between adolescence and adulthood.<sup>82</sup> Peer presence increases risky behavior and decisions, and this effect is much more pronounced in adolescents than adults. Thus, while most 16- and 17-year-olds are close to adults in their ability to reason and process information (what one might describe as “cognitive abilities”), they are less capable than adults in using these abilities to make good decisions.<sup>83</sup> Their lack of experience and susceptibility to other social and emotional influences can affect their decisions whether to be involved in crime in ways that differ from adults.<sup>84</sup> In other words, youth may be able to distinguish a behavior as inappropriate or dangerous, but other reasons such as peer pressure or a less developed capacity to foresee consequences may cause youth to engage in the behavior anyway.<sup>85</sup>

77. *Id.* at 378.

78. See Elizabeth R. Sowell et al, *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859 (1999).

79. Paul Thompson, UCLA Laboratory of Neuroimaging, Press Release, *Imaging Study Shows Brain Maturing*, <http://www.nimh.nih.gov/science-news/2004/imaging-study-shows-brain-maturing.shtml> (last visited December 17, 2009); Brain Explorer - Prefrontal Cortex, [http://www.brainexplorer.org/glossary/prefrontal\\_cortex.shtml](http://www.brainexplorer.org/glossary/prefrontal_cortex.shtml) (last visited Dec. 17, 2009).

80. Thompson, *supra* note 79.

81. Jay N. Geidd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 ANN. N.Y. ACAD. SCI. 77 (2004).

82. Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference and Risky Decision-Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625, 632 (2005).

83. Elizabeth Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILDREN 15, 20 (2008).

84. *Id.*

85. MacArthur Foundation Research Network on Adolescent Development & Juvenile Justice, “Research: Adolescent Decision-Making and Youthful Culpability,” available at [http://www.adj-j.org/content/page.php?cat\\_id=2&content\\_id=11](http://www.adj-j.org/content/page.php?cat_id=2&content_id=11) (accessed March 5, 2009).

The MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice has illustrated how the differences between adolescents' and adults' psychosocial development could alter the ways we think about teenagers' culpability for crime.<sup>86</sup> For example, adolescents are short-sighted in their decision-making, while adults are more future-oriented, able to project their visions over a much longer time horizon.<sup>87</sup> As people age, they outgrow much of the impulsiveness and thrill-seeking that can be seen in adolescents.<sup>88</sup> Juveniles may be impulsive when presented with the opportunity to be involved in crime in part because of their tendency to think less about the short and long term costs of involvement than about the possible gains.<sup>89</sup>

For example, a teenager with adequate cognitive abilities may know that it is dangerous to get in a car with friends when the driver has been drinking, but may still make an unwise choice because his brain is not fully developed. He may focus on the short-term positive gains and be influenced by peer pressure ("I get to go out and have fun with my friends, and they'll call me 'boring' and 'lame' if I don't go.") and not be able to envision the long-term hazards ("We could get into an accident and be seriously injured."). In this example, the youth may know cognitively that risky behavior is wrong or dangerous, but those considerations are overridden by stronger (though immature) impulses—wanting to be part of the group, looking for the immediate thrill.<sup>90</sup> Consequently, adolescents are arguably less culpable (or "blameworthy") because, even though they understand cognitively that a course of action is wrong, they are unable to act in accordance with that understanding because their executive functions are not fully developed.<sup>91</sup> These findings, the researchers suggest, point to the need to consider the developmental stage of adolescence as a mitigating factor when juveniles face prosecution.<sup>92</sup> The same factors, they argue, that have caused us to keep youths from voting or serving on juries should keep youth from being transferred to adult court, except in much more limited circumstances than exist today in most states.<sup>93</sup>

The most profound legal impact of these research developments came with the 2005 United States Supreme Court decision in *Roper v. Simmons*,<sup>94</sup> in which the Court found that imposition of the death penalty for offenders who were under the age of 18 when they committed their crimes violates the Eighth and

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86. See, generally, Scott and Steinberg, *supra* note 83.

87. MACARTHUR FOUNDATION RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT & JUVENILE JUSTICE, ISSUE BRIEF 3: LESS GUILTY BY REASON OF ADOLESCENCE 2, available at [http://www.adjj.org/downloads/6093issue\\_brief\\_3.pdf](http://www.adjj.org/downloads/6093issue_brief_3.pdf).

88. *Id.* at 2.

89. *Id.* at 3.

90. See generally MACARTHUR FOUNDATION RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT & JUVENILE JUSTICE, ISSUE BRIEF 3: LESS GUILTY BY REASON OF ADOLESCENCE, *supra* note 87.

91. Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1015-16 (December 2003).

92. *Id.*

93. Scott & Steinberg, *supra* note 83, at 23-28.

94. 543 U.S. 551 (2005).

Fourteenth Amendments. The Court found that imposing the death penalty on juveniles is cruel and unusual punishment disproportionate to the offense, given a youth's lower level of culpability.<sup>95</sup> In concluding that even older adolescents are less culpable than adults, the Court relied on the adolescent brain development research and compared its findings to its decision in *Atkins v. Virginia*<sup>96</sup>, which held that the imposition of the death penalty for adults with diminished capacity is unconstitutional. In *Atkins*, the Court found that defendants whose decision-making abilities are impaired by such factors as developmental disabilities are less blameworthy.<sup>97</sup> In *Roper*, the Court drew parallels with its findings in *Atkins* that mental retardation "diminishes personal culpability even if the offender can distinguish right from wrong," and that such impairments "make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect."<sup>98</sup>

In acknowledging the brain development research, the *Roper* Court cited three primary differences between adolescents and adults. First, youths' "lack of maturity and an underdeveloped sense of responsibility" often result in "ill-considered" behavior,<sup>99</sup> which is why most states do not permit youth under 18 to vote, serve on juries, or marry without their parents' permission.<sup>100</sup> Second, youth "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," and are less able to remove themselves from settings that might lead to crime.<sup>101</sup> Third, juveniles' personalities are still forming.<sup>102</sup> The Court noted that psychiatrists are prohibited from diagnosing a patient under age 18 as having antisocial personality disorder (also known as psychopathy or sociopathy) because "it is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."<sup>103</sup> In addition, the Court cited the "overwhelming weight" of international disapproval of imposing the death penalty for crimes committed by juveniles.<sup>104</sup>

Legislatures are recognizing the importance of the adolescent brain development research as well. In 2007, Connecticut raised the age of juvenile court jurisdiction from 16 to 18 for all but the most serious and violent offenders.<sup>105</sup> Earlier this year, the governor of Illinois signed legislation that will raise the

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95. *Id.* at 564-75.

96. 536 U.S. 304 (2002).

97. 536 U.S. at 317-18.

98. *Roper*, 543 U.S. at 563 (citing *Atkins*, 536 U.S. at 319-20).

99. *Roper* at 568 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

100. *Id.* at 568.

101. *Id.* at 569.

102. *Id.* at 570.

103. *Id.* at 573.

104. *Id.* at 575-578.

105. 2007 Conn. Acts Act 90-93 (Spec. Sess.) (amending CONN. GEN. STAT. § 46b-120).

age of juvenile court jurisdiction to 17 for misdemeanor offenses.<sup>106</sup> The legislation also creates a task force to examine issues surrounding raising adult jurisdiction for felonies from age 17 to age 18.<sup>107</sup> With these legislative changes, 39 states now consider 18 to be the age of adult court supervision for all or a portion of juvenile offenses.<sup>108</sup> The brain development research played a major role in changing the laws. For example, Paula Wolff, Senior Executive at Chicago Metropolis 2020, stated that “[b]y bringing 17-year-olds back to juvenile court, Illinois recognizes the adolescent brain is not fully developed and that, unlike an adult, a teenager is less likely to make sound judgments.”<sup>109</sup>

The next frontier of influence of *Roper v. Simmons* is in challenging life without parole (LWOP) sentences for young people who committed crimes as minors. Advocates point to the brain research and the Supreme Court’s findings in their arguments for abolishing sentences of life without parole for individuals who committed their crimes before they were 18.<sup>110</sup> In its 2009-2010 term, the Supreme Court will decide whether the Eighth Amendment’s ban on cruel and unusual punishments makes the sentence of life without parole inappropriate for youth convicted of crimes less severe than murder.<sup>111</sup> The United States is the only country in which young offenders can receive sentences of life without parole, with 2,484 inmates serving such sentences around the country.<sup>112</sup>

Some states do treat juveniles differently from adults in sentencing, even for violent crimes. Although they are in the minority, six states plus the District of Columbia specifically prohibit LWOP for offenders under age eighteen.<sup>113</sup>

106. Ill. Pub. Act 95-1031(2009) (enacting Illinois Senate Bill 2275).

107. Press release, Juvenile Justice Initiative, New Illinois Law Offers 17 Year-Olds Charged With Misdemeanor Chance in Juvenile Court Juvenile Court Reform Brings Illinois in Line with Most States (Feb. 10, 2009), available at <http://www.jjustice.org/pdf/sb2275%20Press%20Release%20Feb%2010%2009.pdf>.

108. CHRISTOPHER HARTNEY, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, FACT SHEET: YOUTH UNDER AGE 18 IN THE ADULT CRIMINAL JUSTICE SYSTEM 2 (June, 2006), [http://www.nccd-crc.org/nccd/pubs/2006may\\_factsheet\\_youthadult.pdf](http://www.nccd-crc.org/nccd/pubs/2006may_factsheet_youthadult.pdf).

109. *Id.*

110. Brief of Juvenile Law Center, National Juvenile Defender Center, Children and Family Justice Center, et al. as *Amici Curiae* in Support of Petitioners 5, *Graham v. Florida*, No. 08-7412, 08-7621, cert. granted sub nom 77 U.S.L.W. 3609 (U.S. May 4, 2009); The Campaign for the Fair Sentencing of Youth, *Statement of Principles*, <http://www.endjlwop.org/the-issue/statement-of-principles/> (last visited Dec.16, 2009).

111. *Graham v. State*, 982 So. 2d 43 (Fla. App. 2008), cert. granted sub nom *Graham v. Florida*, 77 U.S.L.W. 3609 (U.S. May 4, 2009) (No. 08-7412); *Sullivan v. State*, cert. granted sub nom *Sullivan v. Florida*, 77 U.S.L.W. 3609 (U.S. May 4, 2009) (No. 08-7621). The Supreme Court heard oral argument in the consolidated cases on Nov. 9, 2009.

112. Editorial, *Give Lifers Sentenced As Kids Second Chance*, DES MOINES REGISTER, Feb. 25, 2009, available at <http://avoiceforjuvenileprisonreform.kingscrossingfoundation.com/2009/03/03/give-juvenile-lifers-a-second-chance/>.

113. HUMAN RIGHTS WATCH, EXECUTIVE SUMMARY, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR YOUNG OFFENDERS IN THE UNITED STATES IN 2008 3 (May 2008), available at <http://www.hrw.org/sites/default/files/reports/us1005execsum.pdf> (noting that Alaska, Colorado, Kansas, New Mexico, Oregon, and Washington, DC, prohibit sentencing a juvenile to life without parole); see also Michelle Leighton & Connie de la Vega, *Sentencing Our Children to Die in Prison: Global*

More should reconsider whether sentencing a teenager to die in prison is an appropriate punishment for a person who committed crimes at a point in life when their brains' natural development makes them less able to control impulses and consider long-term consequences.

Advocates are working in a number of states to change LWOP laws.<sup>114</sup> Some argue that a life sentence without parole for a young person is tantamount to the death penalty.<sup>115</sup> The new information about adolescent brain development presents opportunities for federal and state governments to re-examine the standards by which courts determine whether a youth is competent to stand trial, culpable for crimes, amenable to rehabilitation, and eventually released.

#### IV. PROSECUTION OF YOUTH IN ADULT CRIMINAL COURT SIGNIFICANTLY INCREASES THE LIKELIHOOD THAT THE YOUTH WILL COMMIT VIOLENT OR OTHER CRIMES IN THE FUTURE

Judicial waiver laws have existed since the earliest juvenile codes and have historically been the primary vehicle for transfer to criminal court, but they are not the only method of transferring youth to adult court. There are actually three types of statutes that authorize prosecution of youth in adult criminal court. *Judicial waiver* laws authorize judges to waive juvenile court jurisdiction, following a court hearing, and send the case to adult criminal court. This process is also called "transfer," "certification," "remand," or "bind over."<sup>116</sup> *Concurrent jurisdiction* statutes provide that original jurisdiction for the offense lies in both juvenile and criminal court, and the prosecutor can choose the court in which to file the case. This is also known as "prosecutorial waiver," "prosecutor discretion," or "direct file."<sup>117</sup> *Statutory exclusion* laws provide that cases involving certain offenses by juveniles may only be filed in criminal court. This is also called "legislative exclusion."<sup>118</sup>

By 1969, about two-thirds of the states had judicial waiver laws, while only three had statutory exclusions and two had concurrent jurisdiction statutes. In the 1970s and 1980s, there was a significant expansion of all forms of transfer.<sup>119</sup> By 1983, virtually every state had a judicial waiver statute, 20 states had exclusion laws, and nine states had concurrent jurisdiction statutes.<sup>120</sup> During the 1990s, nearly every state enacted legislation to make it easier to prosecute youth in criminal court, either by lowering the age or level of offense that

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*Law and Practice*, 42 U.S.F. L. REV. 983 (2008).

114. Paul Hammel, *A Second Chance for Young Killers?*, OMAHA WORLD-HERALD, Mar. 2, 2009.

115. *Id.*

116. HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 110 (2006).

117. *Id.*

118. *Id.*

119. NATIONAL CENTER FOR JUVENILE JUSTICE, DIFFERENT FROM ADULTS: AN UPDATED ANALYSIS OF JUVENILE TRANSFER AND BLENDED SENTENCING LAWS, WITH RECOMMENDATIONS FOR REFORMS 5 (2008).

120. Barry Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471 (1987).

qualified for transfer, enacting or expanding prosecutorial waiver, or creating or expanding statutory exclusions.<sup>121</sup>

Since the mid-1990s, however, an abundance of research has demonstrated that transfer to adult court is ineffective and actually counter-productive. Six major studies have been reported on the effects of transfer. Two compared 15- and 16-year-old youth charged in New Jersey's juvenile courts with robbery or burglary with youth charged with similar offenses in New York's adult criminal courts (under the state's statutory exclusion law, in which 16 is the age of criminal responsibility). The youth were matched for age, race, gender, age at first offense, prior offenses, offense severity, case length, sentence length, and court.<sup>122</sup> The only significant difference between their profiles was the Hudson River and the court in which they were charged.<sup>123</sup>

Three studies compared youth prosecuted in criminal court in Florida (which relies almost exclusively on prosecutorial discretion) with closely-matched youth prosecuted in juvenile court.<sup>124</sup> One of the Florida studies went further, comparing 315 best-matched pairs on 12 additional case characteristics: prior juvenile referrals, multiple charges at arrest, multiple incidents involved in the case, charge consolidation, legal problems during case processing, gang involvement, codefendants or accomplices, property loss of damage, victim injury, use of weapons, felony charges, and the presence of mitigating and aggravating factors.<sup>125</sup>

The sixth study looked at recidivism over 18 months for 494 youth in Pennsylvania charged with robbery or aggravated assault. The study looked at a large number of variables and used a statistical model to control for the potential factor that transferred youth might be more serious offenders (and thus more likely to recidivate) and less amenable to treatment in the juvenile system.<sup>126</sup>

The results across the studies were remarkably consistent.<sup>127</sup> They were summarized in a report published by the Office of Juvenile Justice and Delinquency Prevention, which concluded that transfer to adult criminal court "does not

121. NATIONAL CENTER FOR JUVENILE JUSTICE, *supra* note 119.

122. Jeffrey Fagan, *The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders*, 18 L. & POLICY 77 (1996); Jeffrey Fagan et al., *Be Careful What You Wish For: The Comparative Impacts of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders* (2003) (Public Law Research Paper No. 03-61, Columbia University Law School). The latter study also looked at youth charged with assault, used a larger sample, and drew from more counties in northern New Jersey and closely-matched counties in New York.

123. *Id.*

124. Donna Bishop et al., *The Transfer of Juveniles to Adult Criminal Court: Does It Make a Difference?* 42 CRIME & DELINQUENCY 171 (1996); Lawrence Winner et al., *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism over the Long Term*, 43 CRIME & DELINQUENCY 548 (1997); Lonni Lanza-Kaduce et al., *Juvenile Offenders and Adult Felony Recidivism: The Impact of Transfer*, 28 J. CRIME & JUSTICE 59 (2005).

125. Lanza-Kaduce et al., *supra* note 124.

126. Redding, *supra* note 40, at 4.

127. Jeffrey Fagan, *Juvenile Crime and Criminal Justice: Resolving Border Disputes*, 18 THE FUTURE OF CHILDREN 81, 101 (2008).

engender community protection by reducing recidivism,” but, on the contrary, “substantially increases recidivism.”<sup>128</sup>

The results are especially compelling because the studies used large sample sizes (between 494 and 5,476 participants), different methodologies (comparisons across two jurisdictions, comparisons within the same jurisdictions, statistical controls), exceptionally close matching, several measures of recidivism, and were conducted in jurisdictions that use different mechanisms for transfer (judicial waiver, prosecutorial discretion, and statutory exclusion).<sup>129</sup> In addition, the results held true for youth who received sentences of probation, meaning that incarceration in an adult jail or prison was not a determining factor in the recidivism.<sup>130</sup>

The Task Force on Community Prevention Services of the Centers for Disease Control and Prevention also reviewed the existing research on transfer to adult criminal court. It independently reached the same conclusion as the OJJDP report with respect to recidivism, and further found that transfer policies put youth directly in danger because they are often victimized by adult inmates and are 36 times as likely to commit suicide in an adult jail as in a juvenile detention facility.<sup>131</sup> The Task Force recommended “against laws or policies facilitating the transfer of juveniles from the juvenile to the adult judicial system.”<sup>132</sup>

This research demonstrates that policy makers seeking to protect public safety through increasing transfer provisions have actually made their communities less safe. Young people are less likely to commit future crimes if they stay in the juvenile justice system. A few states are beginning to re-examine these laws, but these research findings give reason for every state to reconsider trying youth as adults.

#### V. A JUVENILE JUSTICE SYSTEM DEVELOPED MAINLY FOR BOYS IS NOT SUFFICIENT TO MEET GIRLS’ NEEDS

Throughout the history of the juvenile justice system in America, boys have represented the vast majority of the children in contact with the system.<sup>133</sup> As a result, approaches to incarceration and rehabilitation of youthful offenders long focused on the male population.<sup>134</sup> Federal law did not recognize the distinct needs of girls involved in the juvenile justice system until the Juvenile Justice and Delinquency Prevention Act amendments in 1992 mandated

128. Redding, *supra* note 40, at 6.

129. *Id.*

130. *Id.*

131. Centers for Disease Control and Prevention, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, 56 MORBIDITY & MORTALITY WEEKLY REPORTS 1 (Nov. 27, 2007).

132. *Id.*

133. Elizabeth Cauffman, *Understanding the Female Offender*, 18 THE FUTURE OF CHILDREN 119, 120 (2008).

134. *Id.*

that states review their “gender-specific services” to female offenders and plan the delivery of gender-specific treatment and prevention services.<sup>135</sup> Today, although much more research illuminates the different pathways girls take to delinquency and the different needs they bring, gender-specific programs have yet to be rigorously evaluated so that service providers for girls know what gender-specific services actually work to prevent recidivism.<sup>136</sup> In addition, now that research has documented the disproportionate rate at which girls charged with status offenses are brought into the system and incarcerated, policymakers need to find effective ways of working with status offenders without unnecessary reliance on incarceration. For girls who are incarcerated, the growing documentation of sexual misconduct by staff in facilities across the country points to important responsibilities of facility administrators: they must take steps so that the girls (and boys) in their care do not emerge from the juvenile justice system more harmed than helped.<sup>137</sup>

Although still in the minority, girls represent a growing segment of the juvenile justice population today. Even as juvenile crime has declined in recent years, girls make up an increasing percentage of youth arrested in the United States.<sup>138</sup> Boys today are about twice as likely as girls to be arrested, a significant change from 1980, when boys were four times as likely as girls to be arrested.<sup>139</sup> Over the past 15 years, an increasing body of research and experience from the field has challenged old assumptions that the juvenile justice system could process, house and treat girls the same as boys. As this section sets forth, research has shown that girls come to the juvenile justice system with different

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135. Francine Sherman, ANNIE E. CASEY FOUNDATION, DETENTION REFORM AND GIRLS: CHALLENGES AND SOLUTIONS 12-13 (2005); Juvenile Justice and Delinquency Prevention Act, § 223(a)(7)(B)(i-ii).

136. Angela M. Wolf et al., *The Provision and Completion of Gender-Specific Services for Girls on Probation: Variation by Race and Ethnicity*, 55 CRIME & DELINQUENCY 294, 297 (2009). A very recent review of evaluation data for gender-specific and non-gender-specific programs found mixed results. Few programs for girls have been rigorously evaluated, and few evaluations use control groups. Gender-specific programs for girls appear to have positive effects on some key factors, such as educational success and improvements in relationships, but the effects on recidivism are mixed. Studies that have the most rigorous design do not show long-term success. Moreover, some programs that work effectively for boys – notably comprehensive programs targeting multiple risk factors – also work well for girls. This does not mean that gender-specific programs are ineffective or unnecessary, but rather that more research needs to be done – and new evaluation methods may need to be developed – to determine what works with girls and why. See Margaret A. Zahn et al., *Determining What Works for Girls in the Juvenile Justice System: A Summary of Evaluation Evidence*, 55 CRIME & DELINQUENCY 266, 284, 288 (2009). For results of a two-year follow up for girls receive multidimensional treatment foster care, see Patricia Chamberlain et al., *Multidimensional Treatment Foster Care for Girls in the Juvenile Justice System: 2-Year Follow-Up of a Randomized Clinical Trial*, 75 J. CONSULTING & CLINICAL PSYCHOL. 187 (2007).

137. Status offenses are violations of the law that would not be crimes if committed by adults. Examples include truancy, running away, alcohol possession, out-of-control behavior and curfew violations.

138. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 2005, TABLE 33, TEN-YEAR ARREST TRENDS BY SEX, 1996-2005 (2006). Between 1996 and 2005, girls' arrest rates dropped by 14.3% while boys' arrest rates dropped by 28.7%.

139. See Cauffman, *supra* note 133.

mental health, substance abuse, health and programming needs from their male counterparts.

The overwhelming history of physical and sexual victimization for girls involved in the juvenile justice system sets them apart from boys. While the high rate of victimization history for girls has been documented for some time,<sup>140</sup> the depth of the problem and its implications for programming and practice have more recently come to light. Of girls interviewed in the juvenile halls (detention facilities) of four California counties in 1998, 82% had experienced physical abuse, and 56% reported one or more incidents of sexual abuse.<sup>141</sup> This trauma is much more concentrated among girls in the system than boys. For instance, research from the Oregon Social Learning Center shows that while 3 percent of boys in the study had documented histories of physical abuse, 77.8% of the girls had histories of abuse.<sup>142</sup>

Not surprisingly, this history of victimization translates into a 50% higher rate of post-traumatic stress disorder among incarcerated girls than among incarcerated boys,<sup>143</sup> and a significantly higher rate of clinical depression among girls.<sup>144</sup> Girls' units often have more verbal conflict and higher emotions than boys' units, especially in facilities without sufficient mental health staffing to meet the needs of the population.<sup>145</sup>

The difference in girls' and boys' use and abuse of drugs and alcohol is a telling indicator of the need for different strategies and approaches in working with juvenile justice-involved youth. Research in the past decade reveals that high school girls are more likely than boys to consider and attempt suicide.<sup>146</sup> And girls who smoke, drink or use marijuana are about twice as likely to have considered or attempted suicide as those who have not.<sup>147</sup> High school girls are much more likely than their male counterparts to diet and engage in unhealthy weight-related practices, and, ironically, girls who engage in unhealthy

140. AMERICAN CORRECTIONAL ASSOCIATION, *THE FEMALE OFFENDER: WHAT DOES THE FUTURE HOLD?* 38 (1990).

141. LESLIE ACOCA & KELLY DEDEL, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *NO PLACE TO HIDE: UNDERSTANDING AND MEETING THE NEEDS OF GIRLS IN THE CALIFORNIA JUVENILE JUSTICE SYSTEM* 9 (1998).

142. Patricia Chamberlain, *The Multidimensional Treatment Foster Care Model: Research and Community-Based Services*, Presentation at the Annie E. Casey Foundation Second National Training Conference on Juvenile Detention Reform (Portland, OR 2002), cited in Sherman, *supra* note 41, at 21.

143. PHYSICIANS FOR HUMAN RIGHTS, *UNIQUE NEEDS OF GIRLS IN THE JUVENILE JUSTICE SYSTEM*, available at <http://physiciansforhumanrights.org/juvenile-justice/factsheets/girls.pdf>.

144. Linda Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 *ARCHIVES GEN. PSYCHIATRY* 1133-43 (2002).

145. The authors have visited a combined total of more than 100 jails, prisons and juvenile justice facilities in the course of their careers. This statement is based on their personal observations.

146. NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIVERSITY, *THE FORMATIVE YEARS: PATHWAYS TO SUBSTANCE ABUSE AMONG GIRLS AND YOUNG WOMEN AGES 8-22* p.iii (Feb. 2003). 23.6% of high school girls in the study had considered suicide, as compared with 14.2% of the boys; 11.2% of the girls had attempted suicide, as compared with 6.2% of the boys.

147. *Id.*

dieting behaviors drink significantly more alcohol than nondieters.<sup>148</sup> Among teens who move frequently from one home or neighborhood to another (more than 6 times in 5 years), girls are at greater risk than boys of smoking, drinking and using drugs.<sup>149</sup> And girls transition from substance use to substance abuse more quickly than boys, even when using the same amount or less of a particular substance. Sadly, girls and women are more likely to experience adverse health consequences from smoking, drinking or using drugs, including smoking-related lung damage, alcohol or Ecstasy-induced brain damage, cardiac problems and liver disease.<sup>150</sup> These differences point to the need in juvenile justice systems to tailor rehabilitative treatment to the varied experiences of the youth in their care.

While the JJDPDA's 1992 requirement to examine and plan for gender-specific services led to an increase in available gender-specific services for girls, the needs of many court-involved girls remain unmet.<sup>151</sup> Despite increasing gender-specific programming for girls, the attention to evidence-based crime prevention and programming for juveniles has tended to focus on programs that deal exclusively or primarily with boys.<sup>152</sup> As a result, there is less knowledge in the field about effective prevention and intervention for girls' delinquency than boys'.<sup>153</sup> A recent analysis of program evaluations found that some gender-specific programs increased protective factors such as positive self-esteem and increased educational performance but did not show evidence of reduced recidivism.<sup>154</sup> In addition, few programs evaluate which girls the programs help the most.<sup>155</sup> Because outcomes may vary by race and ethnicity, information about different effects of these interventions for girls of different races and ethnicities is essential for practitioners.<sup>156</sup> In order to capitalize on the information practitioners now have about the different pathways and needs of boys and girls in the juvenile justice system, national leaders and researchers should fund and conduct rigorous evaluations of gender-specific services to find programs that work consistently—and should explore the effectiveness of programs and services for youth of different races, ethnicities, sexual orientations and immigration status—and disseminate this information to the field.

Minor offenses, including status offenses, often lead to girls' incarceration and pull them deeper into the juvenile justice system. Girls are disproportion-

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148. *Id.* at iv.

149. *Id.*

150. *Id.*

151. Barry C. Feld, *Violent Girls or Relabeled Status Offenders?: An Alternative Interpretation of the Data*, 55 *CRIME & DELINQUENCY* 241, 261 (2009).

152. Dana Jones Hubbard & Betsy Matthews, *Reconciling the Differences Between the "Gender-Responsive" and the "What Works" Literatures to Improve Services to Girls*, 54 *CRIME & DELINQUENCY* 225 (2008).

153. In a survey of California program providers and juvenile justice administrators, 72.3% of respondents indicated a need for more information about effective girls' programming. Barbara Bloom et al., *Improving Juvenile Justice for Females: A Statewide Assessment in California*, 48 *CRIME & DELINQUENCY* 526 (2002).

154. Zahn et al., *supra* note 136, at 289.

155. *Id.*

156. *Id.*; see also Wolf et al., *supra* note 136, at 298-99.

tionately arrested for running away, in part as a result of their turbulent and violent home situations.<sup>157</sup> Though girls represented 29% of juvenile arrests in 2005, they accounted for 59% of runaway arrests and 74% of prostitution and commercialized vice arrests.<sup>158</sup> Females comprise almost half of other major status offense categories.<sup>159</sup> And girls are incarcerated more frequently for status offenses. While females represented 15% of offenders in custody in 2003, they represented 40% of the status offenders in custody.<sup>160</sup> Recent statistics also show that female status offenders are held in custody twice as long as male offenders. Furthermore, female status offenders are more likely than females accused of *delinquent* behaviors to be held in custody.<sup>161</sup>

National experts believe that a combination of paternalism, need to obtain services for girls when those services are not available in the community, fear of teen pregnancy and sexuality, and desire to protect girls has led juvenile justice decision makers to incarcerate girls in response to behaviors that would not lead to incarceration for boys or that could be handled by the child welfare system.<sup>162</sup> The Juvenile Justice and Delinquency Prevention Act prohibits incarceration of status offenders, but leaves a large loophole permitting incarceration when status offenders violate a Valid Court Order (VCO).<sup>163</sup> This loophole has permitted thousands of male and female status offenders to be incarcerated. A 2001 study found that approximately one-third of youth held in juvenile detention centers were held for technical probation violations or status offenses, conduct such as missing probation meetings or curfew, truancy and other behaviors that generally do not threaten public safety.<sup>164</sup> The latest Census of Juveniles in Residential Placement shows that on a single day in 2006 4,717 status offenders were in custody in a juvenile justice facility, accounting for 5% of juveniles in residential placement on that day. However, including juvenile offenders in residential placement due to technical probation violations (typically a violation of a valid court order), the number increases to 15,316 (or 16% of youth in custody) on one day.<sup>165</sup> The VCO exception to

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157. Meda Chesney-Lind, *What About the Girls? Delinquency Programming as if Gender Mattered*, 63 CORRECTIONS TODAY 38 (2001) (reporting that more than 70 percent of girls on the streets have run away to flee violence in their homes).

158. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 2005, TABLES 39-40, ARRESTS, MALES, BY AGE, 2005 AND FEMALES BY AGE, 2005 (2006).

159. SNYDER & SICKMUND, *supra* note 116, at 206.

160. *Id.*

161. *Id.* at 206-17.

162. Sherman, *supra* note 41, at 17-19.

163. 42 U.S.C. § 4601, § 223(a)(11). For example, if a girl is out past curfew, the judge may not lock her up for the first offense. But typically the judge places the girl on probation, and a condition of probation is to obey curfew. If the girl breaks curfew again, then she is charged with violating the probation order (the Valid Court Order), i.e., contempt of court, and the judge can order her to be incarcerated.

164. James Austin, Kelly D. Johnson & Ronald Weitzer, *Alternatives to the Secure Detention and Confinement of Juvenile Offenders*, JUVENILE JUSTICE BULLETIN (U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, Washington, DC), Sept. 2005, at 1.

165. MELISSA SICKMUND, T.J. SLADKY & WEI KANG, OFFICE OF JUVENILE JUSTICE AND DELIN-

the JJDPa's prohibition of the incarceration of status offenders has become an enormous loophole allowing youth who do not present a danger to the public to be incarcerated. They are often incarcerated with more sophisticated offenders, exposing them to negative influences. Many juvenile justice practitioners, advocates and juvenile justice advisory bodies now advocate an end to the VCO exception.<sup>166</sup>

Some data suggest that girls have recently become involved in more violent offending behavior. However, the cause of this increase in the data is hotly debated. Recent research comparing arrest rates to victim reports and self-reports indicates that girls may not actually be engaged in increased incidence of violence; rather, increases in arrests may be attributable in part to relabeling behavior as delinquent in order to incarcerate "out-of-control" girls who cannot be incarcerated as status offenders.<sup>167</sup> Juvenile justice decision makers see a dearth of options for protecting "out-of-control" girls, which fuels the trend toward incarceration. The Runaway and Homeless Youth Act,<sup>168</sup> recently reauthorized in 2008 with higher levels of appropriations, will help provide new resources to serve runaway youth outside of incarceration settings and improve the programs available to youth.<sup>169</sup> Juvenile justice decision makers should make use of these opportunities for serving status offenders without incarceration and expand them to the extent needed.<sup>170</sup>

Even with efforts to reduce unnecessary incarceration, some girls will still be incarcerated for their delinquent behavior. A continuing struggle for juvenile facility administrators is to meet the special needs of this population which typically makes up only a small portion of facility populations.

Pregnant girls and sexual victimization, along with the different treatment needs outlined above, are among the most pressing issues. No national data are available about the rate of pregnancy among youth in the juvenile justice

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QUENCY PREVENTION, CENSUS OF JUVENILES IN RESIDENTIAL PLACEMENT DATABOOK (2008), available at <http://www.ojjdp.ncjrs.org/ojstatbb/cjrp>.

166. See ACT 4 JUVENILE JUSTICE, A CAMPAIGN OF THE JUVENILE JUSTICE & DELINQUENCY PREVENTION COALITION, RECOMMENDATIONS FOR JJDPa REAUTHORIZATION 1, available at [http://www.act4jj.org/media/documents//document\\_46.pdf](http://www.act4jj.org/media/documents//document_46.pdf) (recommendations endorsed by more than 80 local, state, and national organizations).

167. MARGARET ZAHN ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, GIRLS STUDY GROUP: UNDERSTANDING AND RESPONDING TO GIRLS' DELINQUENCY 15 (May 2008). One recent article posits that the juvenile justice system's commitment to controlling and protecting girls, and its inability to respond to their real needs, has led to more charges of girls with simple and aggravated assault as law enforcement attempts to get around the non-incarceration of status offenders requirement by elevating girls' charges to delinquency offenses. See, Feld, *supra* note 151 at 260-61.

168. 42 U.S.C. § 5701.

169. See National Alliance to End Homelessness, Runaway and Homeless Youth Act, <http://www.endhomelessness.org/section/policy/legislature/rhya> (last visited Oct. 27, 2009).

170. The American Bar Association has adopted a policy promoting pre-court diversion and encouraging states to incorporate more gender-specific services to help status offenders avoid the spiral into increased court involvement. AMERICAN BAR ASSOCIATION, RECOMMENDATION 104C (adopted Aug. 13-14, 2007).

system, but pregnant girls bring unique health needs to incarceration facilities. This article's authors have observed facilities which failed to provide adequate supplemental nutrition and proper clothing for pregnant girls, as well as insufficient access to toilets and insufficient health education. In addition, facilities sometimes place pregnant girls in shackles, which challenges their balance, puts undue pressure on their bellies, or imposes an unnecessary level of physical restraint on girls already physically compromised by pregnancy.<sup>171</sup> Juvenile justice professionals need to develop and implement policies that account for these unique needs.

Girls are also more likely to be sexually victimized in juvenile facilities than are boys; they represented 11% of the youth in state custody in 2004, but were 34% of the victims of substantiated incidence of sexual violence in state facilities.<sup>172</sup> In the mid-1990s, the corrections world was just beginning to identify and recognize the problem of sexual misconduct in United States jails and prisons. Litigation regarding the Georgia<sup>173</sup>, Michigan<sup>174</sup>, District of Columbia<sup>175</sup> and Arizona<sup>176</sup> women's prisons, among others, along with reports by the United States General Accounting Office,<sup>177</sup> United Nations Rapporteur on Violence Against Women,<sup>178</sup> Human Rights Watch<sup>179</sup> and Amnesty International<sup>180</sup> brought national attention to a problem that had largely remained a

171. The American College of Gynecologists (ACOG) has adopted a policy opposing the shackling of incarcerated pregnant women in labor. Citing emotional distress, inability to allay the pains of labor, bruising caused by chain belts across the abdomen, and the existence of other adequate means to protect workers and prevent flight, the ACOG asserts that these practices have also interfered with physicians ability to practice medicine and have put the health of incarcerated women and their unborn children at risk. Letter from Ralph Hale, M.D., Executive Vice President, ACOG, to Malika Saada Saar, Executive Director, The Rebecca Project (June 12, 2007), available at <http://www.rebeccaproject.org/images/stories/ACOG%20Shackling%20Letter.pdf>.

172. SNYDER & SICKMUND, *supra* note 116, at 230-31.

173. For a procedural history of this case, see *Cason v. Seckinger*, 231 F.3d 777, 778-780 (11th Cir. 2000).

174. *Nunn v. Michigan Department of Corrections, et al.*, No. 96-CV-71416 (E.D. Mich. 1997), 1997 WL 33559323 (E.D. Mich.); *United States v. Michigan*, No. 97-40053 (E.D. Mich. filed Mar. 10, 1997), renumbered No. 97-CV-71514-DT (settled May 25, 1999).

175. *Women Prisoners of the District of Columbia Department of Corrections v. District of Columbia*, 877 F. Supp. 634 (D.D.C. 1994).

176. *United States v. Arizona*, No. 97-476-PHX-ROS (D. Ariz., settled Mar. 11, 1999). A Memorandum in Opposition to the Defendants' Motion for Summary Judgment from this litigation is available at <http://www.usdoj.gov/crt/split/documents/arizbrf.php>. See generally Brenda V. Smith, *Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery*, 33 FORDHAM URB. L.J. 571 (2006).

177. UNITED STATES GENERAL ACCOUNTING OFFICE, WOMEN IN PRISON: SEXUAL MISCONDUCT BY CORRECTIONAL STAFF (June 1999).

178. RADHIKA COOMARASWAMY, UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL COMMISSION ON HUMAN RIGHTS, REPORT OF THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES, ADDENDUM: MISSION TO THE UNITED STATES OF AMERICA ON THE ISSUE OF VIOLENCE AGAINST WOMEN IN STATE AND FEDERAL PRISONS (Jan. 4, 1999).

179. HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (Dec. 1996).

180. AMNESTY INTERNATIONAL, "NOT PART OF MY SENTENCE": VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY (Mar. 1999).

secret horror of adult and juvenile prisoners. In 2003, the Prison Rape Elimination Act<sup>181</sup> created a National Prison Rape Elimination Commission, which completed a report and recommended standards for prevention, detection, reduction and elimination of sexual misconduct in juvenile facilities in June 2009. The United States Attorney General now has one year to consider the Commission's recommendations and promulgate national standards.<sup>182</sup> Despite growing documentation of sexual victimization of youth in custody across the country,<sup>183</sup> many juvenile facility administrators are far from taking the steps necessary to prevent, detect and respond to such conduct. Timely consideration and adoption of these standards and wider dissemination to the juvenile justice community is a pressing responsibility of the new federal leadership.

VI. CONDITIONS IN MANY JUVENILE FACILITIES IN THE UNITED STATES ARE DANGEROUS AND ABUSIVE, BUT EVOLVING STANDARDS OF CARE PAINT A CLEARER PATH TO MAINTAINING SAFER, MORE HUMANE FACILITIES

The most recent Census of Juveniles in Residential Placement found that 92,854 youth were confined in residential facilities across the country on one day in 2006,<sup>184</sup> a decrease from the count in 1997 of 105,055.<sup>185</sup> Despite this decrease, many juvenile facilities struggle to maintain safety and promote rehabilitation; reports of abuses and even deaths of youth in juvenile facilities in recent years have received significant news coverage. Even CNN carried a feature story about the extent of dangerous conditions in juvenile facilities.<sup>186</sup>

For example, both in California's Department of Juvenile Justice facilities and in the Los Angeles County juvenile halls, authorities failed to provide adequate medical and mental health treatment, and facility staff regularly used pepper spray on youth.<sup>187</sup> In Indiana, staff sexually assaulted youth in one fa-

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181. 45 U.S.C. § 15601.

182. 42 U.S.C. § 15607(a)(1).

183. See, e.g., AMERICAN CIVIL LIBERTIES UNION & HUMAN RIGHTS WATCH, CUSTODY AND CONTROL: CONDITIONS OF CONFINEMENT IN NEW YORK'S JUVENILE PRISONS FOR GIRLS 5 (Sept. 2006) (documenting reports of sexual misconduct in juvenile prisons for girls in New York). For incidents in Texas juvenile facilities, see Doug Swanson, *Officials Indicted in Abuse at TYC*, DALLAS MORNING NEWS, Apr. 10, 2007; Emily Ramshaw, *Complaints Pour in to TYC Abuse Inquiry*, DALLAS MORNING NEWS, Mar. 13, 2007, [http://www.dallasnews.com/sharedcontent/dws/news/texasouthwest/stories/DN-tyc\\_13tex.ART.State.Edition1.44911b8.html](http://www.dallasnews.com/sharedcontent/dws/news/texasouthwest/stories/DN-tyc_13tex.ART.State.Edition1.44911b8.html); Holly Becka et al., *Young Inmates Endured "Deplorable Conditions"*, DALLAS MORNING NEWS, Oct. 3, 2007, <http://www.dallasnews.com/shared-content/dws/dn/latestnews/stories/100307dntextyc.35bdf47.html>. See also Investigative findings letter from Wan Kim, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Marion County, Indiana Executive Committee Members and City Council President Monroe Gray (Aug. 6, 2007), available at [http://www.usdoj.gov/crt/split/documents/marion\\_juve\\_ind\\_findlet\\_8-6-07.pdf](http://www.usdoj.gov/crt/split/documents/marion_juve_ind_findlet_8-6-07.pdf).

184. SICKMUND ET AL., *supra* note 165.

185. *Id.*

186. Ashley Fantz, *Sex Abuse, Violence Alleged at Teen Jails Across U.S.*, CNN.COM Apr. 4, 2008, <http://www.cnn.com/2008/CRIME/04/04/juvenile.jails/index.html>.

187. Michael Rothfeld, *Juvenile Prison System Needs Reform Lawyers Say*, L.A. TIMES, Feb. 18, 2008, <http://www.latimes.com/news/local/la-me-youth18feb18,0,5845357.story>; Investigative findings

cility, and failed to protect youth from violence in several juvenile facilities.<sup>188</sup> In Mississippi, staff in the Columbia and Oakley Training Schools hog-tied youth, put them in shackles, and stripped youth and put them in dark rooms for twelve hours a day.<sup>189</sup> In Ohio, male staff sexually assaulted girls in a state facility.<sup>190</sup> In Texas, youth filed hundreds of complaints over physical and sexual abuse and repeated use of pepper spray by staff in facilities run by the Texas Youth Commission, leading to investigations, legislative reforms and an ongoing overhaul of the Texas juvenile system.<sup>191</sup> In Maryland and Tennessee, staff restrained youth on the ground using dangerous restraint techniques. Three youth died at two facilities in such restraints.<sup>192</sup>

In addition to these more flagrant physical abuses and lack of necessary medical and mental health care, facility administrators and staff across the country struggle to provide an adequate education and comply with federal and state education requirements. Despite their status as a “captive audience,” incarcerated youth do not always receive the education they need or to which they have a right. Problems that frequently arise in facilities include a failure to identify youth who need special education services, failure to establish plans

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letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Yvonne B. Burke, Chair, Los Angeles County Board of Supervisors (Apr. 9, 2003), available at [http://www.justice.gov/crt/split/documents/la\\_county\\_juvenile\\_findlet.pdf](http://www.justice.gov/crt/split/documents/la_county_juvenile_findlet.pdf).

188. Investigative findings letter from Wan Kim, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Marion County, Indiana Executive Committee Members and City Council President Monroe Gray (Aug. 6, 2007), available at [http://www.usdoj.gov/crt/split/documents/marion\\_juve\\_ind\\_findlet\\_8-6-07.pdf](http://www.usdoj.gov/crt/split/documents/marion_juve_ind_findlet_8-6-07.pdf); *Justice Department Reaches Settlement Regarding Conditions at Two Indiana Juvenile Justice Facilities*, U.S. FED. NEWS SERVICE, Feb. 8, 2006, [http://www.usdoj.gov/opa/pr/2006/February/06\\_crt\\_066.html](http://www.usdoj.gov/opa/pr/2006/February/06_crt_066.html); Investigative findings letter from Bradley J. Schlozman, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Indiana Governor Mitch Daniels (Sept. 9, 2005).

189. Adam Nossiter, *Lawsuit Filed Over Treatment of Girls at State Reform School in Mississippi*, N.Y. TIMES, July 12, 2007, <http://www.nytimes.com/2007/07/12/us/12prison.html>; Associated Press, *Mississippi Center Accused of Abuse*, USA TODAY, July 12, 2007, [http://www.usatoday.com/news/nation/2007-07-12-mississippi\\_N.htm](http://www.usatoday.com/news/nation/2007-07-12-mississippi_N.htm); Investigative findings letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Mississippi Governor Ronnie Musgrove (June 19, 2003), available at [http://www.usdoj.gov/crt/split/documents/oak\\_colu\\_miss\\_findlet.pdf](http://www.usdoj.gov/crt/split/documents/oak_colu_miss_findlet.pdf). Mississippi closed Columbia Training School on June 30, 2008 and transferred the girls to Oakley. See Mississippi Department of Human Services, *The Beacon*, July 2008 at 4. <http://www.mdhs.state.ms.us/pdfs/JulyNews2008.pdf>. Unfortunately, a court monitor report reveals that conditions at Oakley have only improved in a fraction of areas in the nearly four years since this matter was settled; the facility has achieved “substantial compliance” with 16% of the provisions of a settlement agreement with the Justice Department, while conditions remain stagnant in 69% of the provisions. See Press Release, Southern Poverty Law Center, SPLC Calls for Closing of Mississippi Youth Prison (Nov. 17, 2008), available at [http://www.splcenter.org/legal/news/article.jsp?aid=347&site\\_area=1](http://www.splcenter.org/legal/news/article.jsp?aid=347&site_area=1).

190. Fantz, *supra* note 186; Investigative findings letter from Wan Kim, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Ohio Governor Ted Strickland (May 9, 2007), available at [http://www.usdoj.gov/crt/split/documents/scioto\\_findlet\\_5-9-07.pdf](http://www.usdoj.gov/crt/split/documents/scioto_findlet_5-9-07.pdf).

191. See Swanson, *supra* note 183; Ramshaw, *supra* note 183; Becka et al., *supra* note 183.

192. Greg Garland & Annie Linskey, *Restraint Called Common at School, Youths Describe Practices at Facility Where Boy Died*, BALTIMORE SUN, Feb. 2, 2007; Nancy Amons, *Youth Center on DCS’s Radar before Deaths*, WMSV NEWS, June 27, 2007, <http://www.wsmv.com/news/13583136/detail.html>.

and provide services consistent with a free and appropriate public education (FAPE) to youth entitled to special education services, failure to provide the length of school day required by state law, lack of coordination with schools both to acquire records in a timely manner when youth arrive and to transfer credits once youth are released, and insufficient differentiation of instruction for the varied levels of youth who are often combined in classrooms.<sup>193</sup>

Incarcerated youth have a number of constitutional rights. For example, the Supreme Court has held that incarcerated individuals who have not been convicted of a crime may not be subjected to conditions that amount to punishment.<sup>194</sup> This right stems from the Fourteenth Amendment, “[f]or under the Due Process Clause a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”<sup>195</sup> Because youth in the juvenile justice system have not been convicted of crimes (the proceedings are civil, not criminal in nature), youth may not be held under conditions that constitute punishment.<sup>196</sup>

In addition, incarcerated children have constitutional rights to safety and to adequate medical and mental health care in custody, as well as to due process protections, access to their families and the courts, and to education and other programming.<sup>197</sup> Most courts ruling on conditions in juvenile institutions find those rights in the Fourteenth Amendment’s Due Process Clause<sup>198</sup> as well as in a variety of other state and federal laws including the Individuals with Disabilities Education Act (IDEA)<sup>199</sup> and the Americans with Disabilities Act.<sup>200</sup>

In *Youngberg v. Romeo*, the Supreme Court considered the substantive rights of Nicholas Romeo, a person with developmental disabilities who had been involuntarily committed to the Pennhurst State School and Hospital in Pennsylvania.<sup>201</sup> After Romeo was injured by his own actions and by other residents and was held in restraints, his mother sued on his behalf seeking damages for violations of his rights to safe conditions of confinement, freedom from unreasonable bodily restraint, and training or “habilitation.”<sup>202</sup> The Court found that the right to personal safety constitutes “a historic liberty interest”

193. Sue Burrell & Loren Warboys, *Special Education in the Juvenile Justice System*, JUVENILE JUSTICE BULLETIN (U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, Washington, DC), July. 2000. See generally, National Center on Education, Disability and Juvenile Justice, Publications, <http://www.edjj.org/Publications/> (last visited Oct. 27, 2009).

194. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

195. *Id.*

196. *Santana v. Collazo*, 714 F.2d 1172, 1179-80 (1<sup>st</sup> Cir. 1983).

197. See MICHAEL J. DALE ET AL., REPRESENTING THE CHILD CLIENT 2-10-70; 2-106-11 (2008).

198. *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982); *Bell*, 441 U.S. at 535; *Alexander S. v. Boyd*, 876 F. Supp. 773, 796-99 (D.S.C. 1995), *aff'd in part and rev'd in part on other grounds*, 113 F.3d 1373 (4th Cir. 1997). But see *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974) (applying Eighth Amendment to staff’s beatings of juveniles confined in secure facility).

199. 20 U.S.C. § 1400 et seq.

200. 42 U.S.C. § 12132, et seq; 28 C.F.R. § 35.130(d).

201. *Youngberg*, 457 U.S. at 314-15.

202. *Id.* at 309-14.

protected by the Due Process Clause, which “is not extinguished by lawful confinement, even for penal purposes.”<sup>203</sup> The Court also held that since a liberty interest in freedom from unreasonable bodily restraint survives criminal conviction and incarceration, it must also survive involuntary commitment.<sup>204</sup> Without deciding whether an individual who has been involuntarily committed possesses a “right to treatment,” the Court determined that Romeo had a right to “minimally adequate or reasonable training to ensure [his] safety and freedom from undue restraint.”<sup>205</sup> In deciding whether facility administrators and other professionals may be held liable for policies and practices that result in injury, the Court held that “liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.”<sup>206</sup> Federal courts have held that *Youngberg* generally applies to the conditions of juvenile confinement and policies and practices that affect incarcerated youth.<sup>207</sup>

Thus, professional judgment and conformance with accepted professional standards form a basis for youths’ rights in a number of aspects of conditions of confinement.<sup>208</sup> Over the past 15 years, accepted professional standards governing conditions of confinement have evolved, and today administrators can look to several sources for more detailed guidance about the outcomes expected of their facilities, and the rights of youth that must be protected.

In a landmark report commissioned by OJJDP and published in 1994, researchers surveyed all 984 public and private juvenile detention centers, reception centers, training schools, farms, camps and ranches then in existence, and visited 95 of those facilities across the country to study conditions of confinement.<sup>209</sup> They found a variety of deficiencies distributed widely across facilities. Prominent problems at facilities included high rates of injuries to youth, suicidal behavior and inadequate health services.<sup>210</sup> The study found that the

203. *Id.* at 315.

204. *Id.* at 316.

205. *Id.* at 319.

206. *Id.* at 323. For a compelling argument that the “professional judgment” standard cedes too much authority from the courts to government-employed professionals constrained by budgetary realities, see Susan Stefan, *Leaving Civil Rights to the “Experts”: From Deference to Abdication Under the Professional Judgment Standard*, 102 YALE L.J. 640 (1992).

207. *Gary H. v. Hegstrom*, 831 F.2d 1430, 1431 (9th Cir. 1987); *Santana v. Collazo*, 793 F.2d 41, 44 (1st Cir. 1986); *H.C. by Hewett v. Jarrard*, 786 F.2d 1080, 1084-85 (11th Cir. 1986); *Milonas v. Williams*, 691 F.2d 931, 942 & n.10 (10th Cir. 1982); *Alexander S.*, 876 F. Supp. at 796-99. Only the Seventh Circuit has held otherwise, and the Supreme Court has not ruled on the proper standard for examining conditions in juvenile incarceration facilities. See *Nelson*, 491 F.2d at 355.

208. Because the litigation over conditions in adult facilities is much more developed, many Eighth Amendment adult facility cases elucidate incarcerated youths’ rights as well, since the Eighth Amendment has been held to be the “floor,” or minimum level, for determining Fourteenth Amendment rights in conditions cases. *Gary H. v. Hegstrom*, 831 F.2d at 1432.

209. Dale G. Parent et al., *Conditions of Confinement: Juvenile Detention and Corrections Facilities: Research Report—Executive Summary* 1-2 (Aug. 1994), available at <http://www.ncjrs.org/pdffiles1/ojjdp/1FrontMat.pdf>.

210. *Id.* at 5,7.

average rate of youth-on-youth assaults in a facility was 3.1 per 100 youth in a 30-day period.<sup>211</sup> Extrapolated to one year figures, this meant an estimated 24,200 youth-on-youth assaults in facilities around the country.<sup>212</sup> Researchers also found that an average of 2.4 suicide attempt incidents occurred per 100 youth per month.<sup>213</sup> This amounted to an estimated 17,600 suicide attempts per year in secure juvenile facilities.<sup>214</sup> The study found that facilities that conformed to the nationally-recognized standards that existed at that time did not necessarily have better conditions of confinement than other facilities.<sup>215</sup> A substantial portion of the standards in existence in 1994, the researchers observed, focused mainly on policy and procedure development or attaining staffing ratios, rather than on specific desirable outcomes.<sup>216</sup> Researchers proposed development of performance-based standards to serve as goals for facilities to attain and benchmarks against which their progress could be measured.<sup>217</sup>

Since 1994, three major resources have been developed which provide detailed guidance to practitioners about their responsibilities to youth in their care.<sup>218</sup> First, as a direct result of the 1994 conditions of confinement study, OJJDP contracted with the Council of Juvenile Correctional Administrators to develop and implement Performance-based Standards (PbS), a system of data collection and reporting now in use in over 200 facilities in 27 states.<sup>219</sup> The program establishes national standards for facility operations, including safety (e.g., injuries and suicidal behavior), order (behavior management, use of restraints and isolation), security (escapes), programming (education, vocational training), health and mental health services, reintegration planning, and justice and legal rights.<sup>220</sup> Participating facilities collect data, conduct “climate” surveys and enter information into the PbS database. The program provides facilities with analysis tools to determine where they are doing well and where they need work, and the data are compared to previous years and to the aggregate data for other PbS facilities.<sup>221</sup>

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211. *Id.* at 7.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 13.

216. *Id.*

217. *Id.*

218. During the early 1990s, the American Correctional Association, in cooperation with the Commission on Accreditation for Corrections, developed standards for juvenile training schools, juvenile detention facilities, small juvenile detention facilities, juvenile day treatment programs, juvenile community residential facilities, and juvenile correctional boot camp programs. See [www.aca.org](http://www.aca.org). The ACA most recently updated its standards in 2008. AMERICAN CORRECTIONAL ASSOCIATION, 2008 STANDARDS SUPPLEMENT (2008).

219. PERFORMANCE-BASED STANDARDS, COUNCIL OF JUVENILE CORRECTIONAL ADMINISTRATORS, available at [http://pbstandards.org/DocLib/PbS\\_InfoPacket.pdf](http://pbstandards.org/DocLib/PbS_InfoPacket.pdf).

220. *Id.*

221. *Id.* For a national report on safety findings from PbS sites, see NEW AMSTERDAM CONSULTING, INC., PERFORMANCE-BASED STANDARDS FOR YOUTH CORRECTION AND DETENTION FACILITIES (2007).

Also as an outgrowth of the 1994 conditions study, OJJDP contracted with Lindsay Hayes, program director of the Jail Suicide Prevention and Liability Reduction program at the National Center on Institutions and Alternatives, a nationally-recognized expert in suicide prevention in corrections settings, to study and report on the incidence of suicide in juvenile facilities nationwide.<sup>222</sup> Hayes determined that between 1995 and 1999 there were 110 juvenile suicides in confinement.<sup>223</sup> Sadly, this major public health problem has not received much attention.<sup>224</sup> Hayes' comprehensive assessment of those suicides, completed in 2004, was not released by OJJDP until early 2009.<sup>225</sup> National leadership to help state and local facilities prevent such tragedies in the future is essential in the years ahead.

Another recent development has been a product of the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative (JDAI). While much of JDAI focuses on helping jurisdictions reduce their reliance on unnecessary incarceration of youth while maintaining public safety, jurisdictions participating in JDAI also work to ensure safe and humane conditions of confinement in their detention facilities. In order to support this work, JDAI developed a set of standards to guide local teams of juvenile justice stakeholders in assessing conditions in their detention facilities. The standards are based on applicable federal caselaw, settlements from conditions litigation around the country, findings of the United States Justice Department, other national standards, and the input of 15 nationally recognized experts in management, care, and services in juvenile facilities. These standards, contained in "Detention Facility Self-Assessment: A Practice Guide to Juvenile Detention Reform," commonly referred to as the "JDAI Standards," provide 565 outcome-based standards divided into 8 topic areas for teams to assess.<sup>226</sup> Facility assessment teams' findings form the bases for facility corrective action plans in those sites. JDAI currently has more than 100 jurisdictions participating in its juvenile justice reform initiative.<sup>227</sup>

Finally, over the past 15 years the United States Justice Department has become increasingly involved in the investigation of conditions in juvenile facilities and remedying those conditions, through litigation when necessary. Congress granted the Attorney General the authority to investigate institu-

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222. See LINDSAY M. HAYES, NATIONAL CENTER ON INSTITUTIONS AND ALTERNATIVES, JUVENILE SUICIDE IN CONFINEMENT: A NATIONAL SURVEY (2004).

223. *Id.* at ix.

224. *Id.*

225. John Kelly, Author Says OJJDP Buried Suicide Report, Youth Today (Feb. 9, 2009), available at [http://www.youthtoday.org/publication/article.cfm?article\\_id=2656](http://www.youthtoday.org/publication/article.cfm?article_id=2656) (last visited Dec. 17, 2009).

226. The Practice Guide is available through the Casey Foundation or online at <http://www.jdaihelpdesk.org/Docs/Documents/Conditions%20of%20Confinement%20In%20Detention%20Facilities/JDAI%20Conditions%20of%20Confinement%20Self-Assessment%20Tools%20and%20Guidelines/JDAIDetentionFacilitySelfAssessment.pdf>.

227. Annie E. Casey Foundation, JDAI Help Desk homepage, <http://www.jdaihelpdesk.org/Pages/Default.aspx> (last visited Oct. 27, 2009).

tional conditions and file suit against state and local governments to protect the rights of institutionalized person through three statutes: the Civil Rights of Institutionalized Person Act (CRIPA)<sup>228</sup>, the Violent Crime Control and Law Enforcement Act of 1994<sup>229</sup>, and the Religious Land Use and Institutionalized Persons Act (RLUIPA).<sup>230</sup> Since 1994, the Department, through the Special Litigation Section of the Civil Rights Division, has issued 25 publicly available investigative findings letters after visiting 56 juvenile facilities.<sup>231</sup> In total, the Section has investigated conditions of confinement in more than 100 juvenile facilities in sixteen states and the Commonwealths of Puerto Rico and the Northern Mariana Islands.<sup>232</sup> Special Litigation Section staff currently monitor conditions in more than 65 facilities that have entered into settlement agreements with the Department.<sup>233</sup> The Department's investigative findings and settlement agreements provide extensive detail about both the problems in facilities across the country and necessary remedies. These are available to the public on the agency's website. These documents, along with agreements, reports and pleadings from other litigation regarding conditions in juvenile facilities, provide a cautionary tale to any jurisdiction that has not taken a hard look at the conditions in its facilities.

In addition to these three developments, another detailed guidance document will become available to practitioners in the coming year. As described above, the National Prison Rape Elimination Commission (NPREC, or the Commission) was formed pursuant to the Prison Rape Elimination Act of 2003 (PREA).<sup>234</sup> The Commission issued a report<sup>235</sup> and recommended standards<sup>236</sup> for the detection, prevention, reduction and punishment of sexual misconduct in incarceration facilities including juvenile facilities in June 2009. Those recommendations are now under consideration by the Attorney General, who has one year to publish a final rule adopting national standards.<sup>237</sup>

The wealth of guidance available from these documents is too extensive to be summarized in this article, but a few examples of common values among PbS, JDAI and Justice Department findings and settlements provide some insight into standards of care that the authors suggest should be considered "accepted professional judgment, practice or standards" today.<sup>238</sup> Below are brief descriptions of standards covering screening, assessment and follow-up

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228. 42 U.S.C. § 1997.

229. 42 U.S.C. § 14141.

230. 42 U.S.C. § 2000cc.

231. Information compiled from the U.S. Department of Justice, Civil Rights Division, Special Litigation Section website: <http://www.usdoj.gov/crt/split/findsettle.php#CRIPAletters>.

232. Daniel Weiss, Deputy Chief, Special Litigation Section, Presentation at Texas Youth Probation Commission Conference: Behind Closed Doors (Dec. 10, 2008).

233. *Id.*

234. 45 U.S.C. § 15601.

235. NATIONAL PRISON RAPE ELIMINATION COMMISSION, REPORT (June 2009).

236. NATIONAL PRISON RAPE ELIMINATION COMMISSION, STANDARDS FOR THE PREVENTION, DETECTION, RESPONSE, AND MONITORING OF SEXUAL ABUSE IN JUVENILE FACILITIES (June 2009).

237. 42 U.S.C. § 15607(a)(i).

238. *Youngberg v. Romeo*, 457 U.S. at 323.

care for youth with mental health and substance abuse needs; strict limitation on use of pepper spray in facilities that house youth; and reduction of restraint and isolation of youth.

#### *A. Mental Health and Substance Abuse Needs*

Researchers have documented the high rate of mental health and substance abuse disorders among youth in the juvenile justice system. In a recent study of youth in community-based programs, detention centers, and secure residential facilities in Louisiana, Texas and Washington, 70.4% of youth in the juvenile justice system met the criteria for at least one mental health disorder.<sup>239</sup> Even when the researchers removed “conduct disorder” and “substance use disorders” from their analysis, almost half (45.5%) of the youth were still identified as having a mental health disorder.<sup>240</sup> Further, over a quarter of the overall sample (27%) suffered from a mental disorder that was considered severe enough to require significant and immediate treatment.<sup>241</sup> In a study conducted at the Cook County, Illinois youth detention center, researchers reported that 60% of males and more than two-thirds of females both met diagnostic criteria and had a diagnosis-specific impairment for one or more psychiatric disorders, after excluding conduct disorders.<sup>242</sup> Only sixteen percent of youth in that study who needed mental health services received them.<sup>243</sup> If conditions in Cook County are representative of conditions throughout the country, as many as 13,000 detained youth with major mental disorders do not receive treatment on any given day.<sup>244</sup>

Moreover, these data do not convey the full extent of the need for remedial and supportive services. Youth who end up in the juvenile justice system, particularly in urban areas, have lives marked by very high levels of stress and multiple traumas.<sup>245</sup> These traumas may include physical or sexual abuse, violence in youths’ communities, domestic violence, and natural disasters among others.<sup>246</sup> There is a broader need for community-based services to meet youths’

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239. Jennie L. Shufelt & Joseph J. Cocozza, *Youth with Mental Health Disorders in the Juvenile Justice System: Results from a Multi-State Prevalence Study* (Nat’l Ctr. for Mental Health & Juvenile Justice, Delmar, N.Y.), June 2006, at 2.

240. *Id.* at 3. “Conduct disorder,” like “oppositional defiant disorder,” is a vague term that covers a wide variety of adolescent behaviors. Similarly, “substance abuse disorders” includes a range of activities.

241. *Id.* at 4.

242. Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES GEN. PSYCHIATRY 1137 (2002).

243. Linda A. Teplin et al., *Detecting Mental Disorder in Juvenile Detainees: Who Receives Services*, 95 AM. J. PUB. HEALTH 1777 (2005).

244. *Id.*

245. JAMES GARBARINO & CLAIR BEDARD, FAMILY LIFE DEVELOPMENT CENTER, CORNELL UNIVERSITY, IS IT SELF-DEFENSE? A FORENSIC EVALUATION OF JUVENILE VIOLENCE (May 1998); Daniel Goleman, *Conversations/James Garbarino; Attending to the Children of All the World’s War Zones*, N.Y. TIMES (Week in Review) Dec. 6, 1992.

246. JULIAN FORD, ET AL., TRAUMA AMONG YOUTH IN THE JUVENILE JUSTICE SYSTEM: CRITICAL ISSUES AND NEW DIRECTIONS, NATIONAL CENTER FOR MENTAL HEALTH AND JUVENILE JUSTICE

needs outside incarceration settings.<sup>247</sup> However, when youth are in the care of the juvenile justice system, the system must at least provide adequate screening and treatment in the least restrictive setting necessary in order to meet youths' needs.

Among the national standards and Justice Department findings, a generally-accepted practice has emerged to ensure that youth with substance abuse and mental health needs are identified and their needs are met. Facility administrators should provide screening upon intake, conduct timely assessment by a qualified mental health professional for all youth who screen positive for substance abuse risk, symptoms of depression, suicidality, or other risks, and provide services in keeping with the recommendations of the mental health professional who conducted the assessment. In addition, facility administrators and staff should provide a method for youth who develop mental health or substance abuse needs after their admission to the facility to seek care and be referred by staff who identify the need for services.<sup>248</sup>

### B. *Pepper Spray*

Youth incarcerated in state institutions have a legal right to protection from unnecessary and wanton infliction of pain, the unwarranted or excessive use of restraints, and excessive uses of force.<sup>249</sup> More than 35 years ago, in *Morales v. Turman*, the court found that chemical agents may not be used in juvenile facilities unless there is an imminent threat to human life or an imminent and substantial threat to property.<sup>250</sup> Use of chemical agents beyond those limitations violates the Constitution.<sup>251</sup> The United States District Court in South Carolina found the use of chemical spray acceptable only for protection of staff or others when less intrusive methods of restraint are not reasonably available,

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RESEARCH AND PROGRAM BRIEF 1 (June 2007), available at [http://www.ncmhjj.com/pdfs/Trauma\\_and\\_Youth.pdf](http://www.ncmhjj.com/pdfs/Trauma_and_Youth.pdf).

247. Thomas Grisso, *Adolescent Offenders with Mental Disorders*, 18 THE FUTURE OF CHILDREN 143 (2008).

248. COALITION OF JUVENILE CORRECTIONAL ADMINISTRATORS, PERFORMANCE-BASED STANDARDS: GOALS, STANDARDS, OUTCOME MEASURES, EXPECTED PRACTICES AND PROCESSES, 13-17 (Oct. 2009) (outlining standards HEP1-23) [hereinafter PERFORMANCE-BASED STANDARDS]; ANNIE E. CASEY FOUNDATION, JDAI STANDARDS at 31-38; Memorandum of Agreement between the United States and the County of Los Angeles Regarding the Los Angeles Probation Camps (Oct. 31, 2008), available at [http://www.usdoj.gov/crt/split/documents/lacamps\\_moa.pdf](http://www.usdoj.gov/crt/split/documents/lacamps_moa.pdf); Consent Decree, *United States v. Oklahoma*, 4:06-cv-00673-GKF-FHM (N.D. Okla. Sept. 9, 2008), at 12-19. See also AMERICAN CORRECTIONAL ASSOCIATION STANDARDS FOR JUVENILE DETENTION FACILITIES 91, 3-JDF-4C-39 (May 1991); AMERICAN CORRECTIONAL ASSOCIATION STANDARDS FOR JUVENILE TRAINING SCHOOLS 88-89, 3-JTS-4C-22 and 24 (January 1991); AMERICAN CORRECTIONAL ASSOCIATION 2008 STANDARDS SUPPLEMENT 174, 209-10, 3-JDF 4C-21-2; 3-JTS 4C-24-2, 37 and 43 (Jan. 2008).

249. See *Hope v. Pelzer*, 536 U.S. 730, 737 (2002); *Hudson v. McMillian* 503 U.S. 1, 4 (1992); *Hewett*, 786 F.2d at 1089; *Morales v. Turman*, 364 F. Supp. 166, 173-74 (E.D. Tex. 1973).

250. *Morales*, 364 F. Supp. at 173-74; 383 F. Supp. 53, 77 (E.D. Tex. 1974), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977); *remanded for rehearing*, 562 F.2d 993 (5th Cir. 1977).

251. *Id.*

and did not permit use for protection of property or to “enforce orders.”<sup>252</sup> That court found that “the use of CS gas upon juveniles is counterproductive. It causes more anger in the juveniles toward the adults who are supposed to be caring for them.”<sup>253</sup>

Researchers C. Gregory Smith and Woodhall Stopford have documented the dangers of pepper spray.<sup>254</sup> Among their findings, OC spray causes intense pain, swelling, and blistering on contact.<sup>255</sup> Capsaicin, the active ingredient in OC spray, can cause allergic responses, sweating, wheezing, and an inability to breathe or speak.<sup>256</sup> Inhalation of OC can cause acute hypertension, which in turn can cause headache and increased risk of stroke or heart attack.<sup>257</sup>

The JDAI standards prohibit the use of chemical agents in juvenile detention facilities.<sup>258</sup> JDAI’s prohibition on the use of pepper spray arises from its potential dangers to youth and the extreme pain that youth suffer when it is applied.<sup>259</sup> No studies have been conducted on either the immediate potential dangers or safety, or the long-term effects, of OC spray use on adolescents. Most research on use of OC spray focuses on use by police officers on suspects in open air settings. Research has not been conducted in the context of a locked institution, where the close confines make the air circulation and effects on others in close proximity different from public law enforcement contexts. In addition, there are few studies on the effects of pepper spray on emotionally disturbed individuals who make up a significant portion of youth in juvenile facilities. Researchers caution that individuals who are mentally ill may have altered perception of or response to pain, and consequently OC spray may actually exacerbate the difficulty of controlling them.<sup>260</sup> The experience of being sprayed may worsen their mental health conditions.<sup>261</sup> There is also particular concern about the effects on people who have asthma.<sup>262</sup>

Los Angeles County made OC spray available to all staff in its three juvenile detention facilities beginning in 1994-95. This widespread use of OC spray came about as a result of concerns about injuries to staff in facilities. However, by 2000, the United States Department of Justice Civil Rights Division’s

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252. *Alexander S. v. Boyd*, 876 F. Supp. 773, 786 (D.S.C. 1995), *aff’d in part and rev’d in part on other grounds*, 113 F.3d 1373 (4th Cir. 1997).

253. *Id.*

254. C. Gregory Smith & Woodhall Stopford, *Health Hazards of Pepper Spray*, 60 N.C. MED. J. 268-74 (1999).

255. *Id.* at 269.

256. *Id.*

257. *Id.*

258. JDAI STANDARDS, *supra* note 248, at § VI(A)(2)-(4).

259. Smith & Stopford, *supra* note 254.

260. HON. CHARLES M. GREINSKY ET AL., REPORT OF THE PEPPER SPRAY COMMITTEE, NEW YORK CIVILIAN COMPLAINT REVIEW BOARD 9-10 (October 2000).

261. Michael Cohen, *The Health Effects of Pepper Spray: A Review of the Literature and Commentary*, 4 J. CORRECTIONAL HEALTH CARE 73 (1997).

262. Marita Broadstock, *What Is the Safety of “Pepper Spray” Use by Law Enforcement or Mental Health Service Staff?* NEW ZEALAND HEALTH TECHNOLOGY ASSESSMENT TECH BRIEF SERIES 15 (2002), available at [http://nzhta.chmeds.ac.nz/publications/pepper\\_spray.pdf](http://nzhta.chmeds.ac.nz/publications/pepper_spray.pdf).

Special Litigation Section (DOJ) was investigating conditions in the juvenile halls including use of OC spray.<sup>263</sup> Despite the Los Angeles County Probation Department's efforts to train staff in the proper use of OC spray, DOJ found that staff sprayed youth without sufficient warnings that might have prevented the need for its use;<sup>264</sup> when it was not necessary because staff were already in control of youth;<sup>265</sup> for talking back, making noise or "disrespecting" staff;<sup>266</sup> because staff lacked the skills to de-escalate minor problems that instead became major confrontations;<sup>267</sup> at times when youth engaged in self-harming behaviors;<sup>268</sup> and sometimes despite orders from physicians that youth not be sprayed due to health conditions.<sup>269</sup> Los Angeles County and the Los Angeles County Office of Education entered a Memorandum of Agreement with the Department of Justice in 2004, and the Agreement was extended in 2007 while the County worked to come into compliance with its terms.<sup>270</sup> While the Justice Department did not require elimination of pepper spray, it did require tighter controls.<sup>271</sup> In the course of its reform efforts, Los Angeles County has been able to reduce its uses of force while minimizing its use of OC spray at the same time. Between 2004 and 2006, annual uses of force for the three facilities, which house approximately 1600 youth, dropped from 1741 to 1356.<sup>272</sup> While in 2001 staff used OC spray in approximately 1500 incidents, in 2006 staff in the juvenile halls used OC spray only 214 times.<sup>273</sup>

Los Angeles County achieved its reduction in uses of force through a combination of reforms required by the Justice Department, including revision of its use of force policies, intensive training in a new crisis intervention system, reduction of the number of staff permitted to use OC spray, increased review of all uses of force, reforms of mental health services and overall staffing levels, consistent application of an incentive-based behavior management system,

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263. Investigative findings letter from Ralph F. Boyd, Assistant Attorney General, to Yvonne Burke, Chair, Los Angeles County Board of Supervisors, Apr. 9, 2003, at 20-23, available at [http://www.usdoj.gov/crt/split/documents/la\\_county\\_juvenile\\_findlet.pdf](http://www.usdoj.gov/crt/split/documents/la_county_juvenile_findlet.pdf).

264. *Id.* at 21, 22.

265. *Id.* at 21.

266. *Id.*

267. *Id.*

268. *Id.* at 21-22.

269. *Id.* at 22.

270. Memorandum of Agreement between the United States, Los Angeles County and the Los Angeles County Office of Education (Aug. 24, 2004), available at [http://www.usdoj.gov/crt/split/documents/split\\_setagrec\\_lajuvhall\\_8-12-04.pdf](http://www.usdoj.gov/crt/split/documents/split_setagrec_lajuvhall_8-12-04.pdf); First Amendment to Memorandum of Agreement between the United States, Los Angeles County and the Los Angeles County Office of Education (Aug. 1, 2007), available at [http://www.usdoj.gov/crt/split/documents/la\\_juv\\_8-01-07.pdf](http://www.usdoj.gov/crt/split/documents/la_juv_8-01-07.pdf).

271. Memorandum of Agreement between the United States, Los Angeles County and the Los Angeles County Office of Education (Aug. 24, 2004) at 10.

272. MICHAEL GRAHAM ET AL., FIFTH SEMI-ANNUAL MONITORING REPORT FOR THE MEMORANDUM OF AGREEMENT BETWEEN THE UNITED STATES, LOS ANGELES COUNTY AND THE LOS ANGELES COUNTY OFFICE OF EDUCATION ¶¶ 28-29 (May 25, 2007).

273. Telephone interview with Ron Barrett, Detention Services Bureau, Los Angeles County Probation Department (Sept. 12, 2007).

and increase in engaging programming.<sup>274</sup> The combination of research on the painful effects of OC spray, combined with the experience of systems that have tried and failed to use it safely and effectively, point to a much safer approach of tight controls or elimination of pepper spray in juvenile facilities. The most effective reforms involve a comprehensive approach of adequate staffing, effective programming and behavior management, improved staff training and clear policy restricting or eliminating use of dangerous practices such as pepper spray.<sup>275</sup>

### C. Restraint and Isolation/Seclusion

The dangers of restraint and seclusion practices in residential facilities gained national attention in 1998 when the *Hartford Courant* published a lengthy series detailing 142 deaths from restraint and seclusion, including physical restraints such as staff holding a person on the floor and mechanical restraint such as hog-tying, use of restraint beds and restraint chairs.<sup>276</sup> The articles chronicled deaths to youth and adults in mental health, mental retardation and group homes nationwide, and led to extensive federal policy review and overhaul with regard to restraint and seclusion in psychiatric hospitals and other treatment facilities receiving Medicare and Medicaid funding.

In October 2000, President Clinton signed the Children's Health Act of 2000<sup>277</sup>, under which the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), issued new regulations governing use of restraint or seclusion in psychiatric treatment facilities and "non-medical community-based facilities for children and youth" receiving federal funds.<sup>278</sup> The regulations restrict orders for restraint or seclusion to the length of the emergency safety situation, require that the least restrictive effective emergency safety intervention must be used, and require that only a physician or other trained and approved licensed practitioner may order restraint or seclusion.<sup>279</sup> The regulations set an absolute maximum length of 4 hours for residents ages 18 to 21, 2 hours for residents ages 9 to 17, and 1 hour for residents under age 9.<sup>280</sup> They require that a physician or other trained and approved licensed practitioner conduct a face-to-face assessment of the physical and psychological well being of the resident within one hour of the initiation

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274. See *supra* notes 258-261.

275. Performance-based Standards similarly ask facilities to restrict use of chemical restraint to "only as a last resort," (OEP12), expect facilities to engage youth in "meaningful, healthy and age-appropriate activities" under adequate staff supervision. (OEP19), and expect staff to demonstrate competence in de-escalation and other non-physical interventions (OEP9). See PERFORMANCE-BASED STANDARDS, *supra* note 219.

276. Eric M. Weiss et al, *Deadly Restraint: A Hartford Courant Investigative Report*, HARTFORD COURANT, Oct. 11-15, 1998. For a recent accounting of similarly horrific uses of restraint and seclusion in school settings, see NATIONAL DISABILITY RIGHTS NETWORK, SCHOOL IS NOT SUPPOSED TO HURT: INVESTIGATIVE REPORT ON ABUSIVE RESTRAINT AND SECLUSION IN SCHOOLS (2009).

277. P.L. 106-310.

278. 42 C.F.R. § 483.352-483.376.

279. 42 C.F.R. § 483.358(a),(c),(e).

280. 42 C.F.R. § 483.358(e).

of the restraint or seclusion.<sup>281</sup> These careful revisions to federal requirements reflect extensive input from the medical and mental health care communities and many others about minimum protections for youth in facilities that care for them. Unfortunately, they do not extend to juvenile detention and correctional facilities, despite the fact that substantial numbers of mentally ill youth are housed in these facilities. Federal policy leadership to extend similar protections to incarcerated youth is sorely needed.

Restraint and seclusion are dangerous practices.<sup>282</sup> The Joint Commission on Accreditation of Healthcare Organizations has stated that the “use of restraint or seclusion poses an inherent risk to the physical safety and psychological well being of the individual and staff.”<sup>283</sup> The Commission has also said, “Restraint has the potential to produce serious consequences, such as physical or psychological harm, loss of dignity, violation of a patient’s rights and even death.”<sup>284</sup> The National Association of State Mental Health Program Directors has taken a position on the importance of restricting use of seclusion and restraint, noting that “The use of seclusion and restraint creates significant risks for people with psychiatric disabilities. These risks include serious injury or death, retraumatization of people who have a history of trauma, and loss of dignity and other psychological harm. In light of these potential serious consequences, seclusion and restraint should be used only when there exists an imminent risk of danger to the individual or others and no other safe and effective intervention is possible.”<sup>285</sup>

Sources of national standards for juvenile justice facilities support restrictions on isolation and restraint, but would benefit from the specificity and force of governmental oversight that the CMS standards represent. Justice Department findings have stated that excessive use of isolation violates generally accepted standards, and that isolation, if used at all, should be “proportional to the offense” and used in “conjunction with a continuum” of interventions, beginning with techniques such as “verbal re-direction and loss of certain privileges.”<sup>286</sup> In Marion County, Indiana, the Department found, for example, that use of isolation as punishment for rule violations when youth re-

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281. 42 C.F.R. § 483.358(f).

282. SHARON SHALEV, MANNHEIM CENTRE FOR CRIMINOLOGY, A SOURCEBOOK ON SOLITARY CONFINEMENT 9-24 (2008), *available at* <http://www.solitaryconfinement.org/sourcebook>.

283. JOINT COMMISSION ON ACCREDITATION OF HEALTHCARE ORGANIZATIONS, SETTING THE STANDARD 8 (undated), *available at* [http://www.jointcommission.org/NR/rdonlyres/6C33FEDB-BB50-4CEE-950B-A6246DA4911E/o/setting\\_the\\_standard.pdf](http://www.jointcommission.org/NR/rdonlyres/6C33FEDB-BB50-4CEE-950B-A6246DA4911E/o/setting_the_standard.pdf).

284. *Id.*

285. NATIONAL ASSOCIATION OF STATE MENTAL HEALTH PROGRAM DIRECTORS, POSITION STATEMENT ON SECLUSION AND RESTRAINT (1999), *available at* [http://www.nasmhpd.org/general\\_files/position\\_statement/S&R%20position%20statement.Forensic%20Div.%20prop.%20approved%20by%20NASMHPD.07.07.final.pdf](http://www.nasmhpd.org/general_files/position_statement/S&R%20position%20statement.Forensic%20Div.%20prop.%20approved%20by%20NASMHPD.07.07.final.pdf). The Position Statement was last approved and reaffirmed by NASMHPD membership July 15, 2007.

286. Investigative findings letter from Wan Kim, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Marion County, Indiana Executive Committee Members and City Council President Monroe Gray 10-11 (Aug. 6, 2007), *available at* [http://www.usdoj.gov/crt/split/documents/marion\\_juve\\_ind\\_findlet\\_8-6-07.pdf](http://www.usdoj.gov/crt/split/documents/marion_juve_ind_findlet_8-6-07.pdf).

fused to take a shower, did not comply with instructions, or stole food violated youths' federal rights.<sup>287</sup> Lack of staff training, adequate staffing and programming accompanied these problems,<sup>288</sup> as is often observable in facilities that have problems with dangerous practices. JDAI standards clearly distinguish between "isolation," which may be used when a youth is out of control, but only for as long as necessary until a youth's behavior threatening imminent harm to self or others or serious destruction of property has ceased, and disciplinary "room confinement," which may be imposed as a sanction for violation of facility rules, but only after due process procedures.<sup>289</sup> Likewise, PbS standards distinguish between "isolation," which may be used to neutralize out of control behavior and should not be used as punishment, and "room confinement," circumstances in which a youth is confined in his or her own room for cause or punishment.<sup>290</sup> The PbS standards promote minimizing the use of restrictive and coercive means for responding to disorder.<sup>291</sup>

Like isolation, physical restraint poses serious safety risks. These sources acknowledge the important role that staffing levels and training play in keeping the need for restraint low. Unnecessary and excessive physical restraints by staff can be found in many Justice Department findings of unconstitutional conditions. For example, an investigation of Maryland's Hickey and Cheltenham facilities found that their prone restraint practices presented "grave risk of harm" to youth, evidenced by the hospitalization of youth for transient asphyxia, seizures, and neck and shoulder injuries.<sup>292</sup> One 300-pound staff member sat on a youth and then mocked him when he protested that he could not breathe.<sup>293</sup> In Evins Regional Juvenile Center in Edinburgh, Texas, staff slammed a youth to the floor, causing a seizure, and another pushed the resident's eyes "into his face" during a physical restraint.<sup>294</sup> In noting the "disturbing consistency" of youths' accounts of unnecessary restraints, the Justice Department pointed to the officers' universal concern about maintaining facility control in an insufficiently staffed facility with inadequate staff training.<sup>295</sup> Recent findings in an investigation of Los Angeles County's Probation Camps found similar incidents of dangerous restraints on the ground that resulted in injuries to knees, shoulders and mouths.<sup>296</sup> A comparable lack of staffing

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287. *Id.*

288. *Id.* at 6-9.

289. JDAI STANDARDS, *supra* note 248, at 91-92, 94.

290. PERFORMANCE-BASED STANDARDS, *supra* note 219 (OP13 and Glossary page 18).

291. *Id.* (Order Standard 2).

292. Investigative findings letter from R. Alexander Acosta, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Robert J. Ehrlich, Governor of Maryland 7 (Apr. 9, 2004), *available at* [http://www.usdoj.gov/crt/split/documents/cheltenham\\_md.pdf](http://www.usdoj.gov/crt/split/documents/cheltenham_md.pdf).

293. *Id.*

294. Investigative findings letter from Wan Kim, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Rick Perry, Governor of Texas 10 (Mar. 15, 2007), *available at* [http://www.usdoj.gov/crt/split/documents/evins\\_findlet\\_3-15-07.pdf](http://www.usdoj.gov/crt/split/documents/evins_findlet_3-15-07.pdf).

295. *Id.* at 10-11.

296. Investigative findings letter from Wan Kim, Civil Rights Division, U.S. Department of Justice, to Yvonne B. Burke, Chairperson, Los Angeles County Board of Supervisors 8-10 (Oct.

and training appeared there.<sup>297</sup> PbS and JDAI standards stress the availability and use of a range of interventions, conflict management and de-escalation options<sup>298</sup> and insist on adequate staff training and staffing to promote use of only the degree of force necessary, only for as long as necessary.<sup>299</sup>

Restraint to fixed objects can be exceedingly dangerous, as the Supreme Court case *Hope v. Pelzer* acknowledges. In that case, an inmate brought suit against prison guards in Alabama, alleging that his Eighth Amendment rights were violated when he was handcuffed to a hitching post outdoors in the hot sun beyond the time of an immediate danger or threat to safety on two occasions, one of which lasted for seven hours without regular water or bathroom breaks.<sup>300</sup> The Court found that “Hope was treated in a way antithetical to human dignity – he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous.”<sup>301</sup> Notably, an earlier Department of Justice investigation of the use of the hitching post in the Alabama system had found the practice to be without penological justification.<sup>302</sup> Communication about these findings, the Court held, provided sufficient notice to officials that the use of the hitching post under these circumstances violated the Eighth Amendment’s prohibition against cruel and unusual punishment.<sup>303</sup> The Supreme Court’s acknowledgement of Justice Department findings as notice of legal violation lends weight to the argument that the recent findings outlined in this section provide a degree of guidance as to what constitutes generally accepted—and acceptable—practice today.

Based on the experience and observations of a team of national experts, JDAI standards explicitly prohibit a number of the most dangerous practices.<sup>304</sup> JDAI standards expressly forbid restraint to fixed objects and limit mechanical restraint use to handcuffs during transportation or emergencies and soft restraints in situations presenting imminent risk of harm, guided by certified staff or medical or mental health personnel.<sup>305</sup> PbS standards expressly

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31, 2008), available at [http://www.usdoj.gov/crt/split/documents/lacamps\\_findings\\_10-31-08.pdf](http://www.usdoj.gov/crt/split/documents/lacamps_findings_10-31-08.pdf).

297. *Id.* at 19-27.

298. PERFORMANCE-BASED STANDARDS, *supra* note 219 (OEP 8-9); JDAI STANDARDS, *supra* note 248, at 89.

299. JDAI STANDARDS, *supra* note 248, at 89; PERFORMANCE-BASED STANDARDS, *supra* note 219 (OP5-8; OEP 15-16).

300. *Hope v. Pelzer*, 530 U.S. 730, 733-35 (2002).

301. *Id.* at 745.

302. *Id.* at 744-45.

303. *Id.* at 745.

304. Prohibited practices are: use of chemical agents, including pepper spray, tear gas and mace; use of pain compliance techniques; hitting youth with a closed fist, kicking or striking; chokeholds; blows to the head; four- or five-point restraints; straightjackets; restraint chairs; hog-tying; restraint to fixed objects; prone restraint with pressure on the back; use of physical force or mechanical restraints for punishment, discipline or treatment; and use of belly belts or chains on pregnant girls. JDAI STANDARDS, *supra* note 248, at 90.

305. For a descriptive and well-researched explanation of the rationale behind the JDAI standards on fixed restraint, see SUE BURRELL, MOVING AWAY FROM HARDWARE: THE JDAI STAN-

forbid cuffing to walls, beds, fixtures or fences and expect close documentation and careful administrative review of isolation incidents.<sup>306</sup> While the DOJ, PbS and JDAI frameworks provide guidance to restrict isolation and restraint practices, the federal government could protect incarcerated youth more broadly by borrowing from the CMS regulations to apply to juvenile facilities. The clarity and strict limitations embodied in the CMS protections, applied in the juvenile justice setting, could prevent innumerable injuries and deaths.

#### VII. PUBLIC SAFETY CAN BE PROTECTED WITHOUT THE HEAVY RELIANCE ON INCARCERATION THAT GREW IN THE 1990S

In the early 1990s, as in the 1970s and 1980s, policymakers and the public believed that incarceration of delinquent youth was an effective strategy to “teach them a lesson” and to prevent crime and promote public safety.<sup>307</sup> As a result, populations in detention centers and correctional facilities swelled. In the decade before the Annie E. Casey Foundation launched its Juvenile Detention Alternatives Initiative (JDAI) in 1992, the number of youth held in secure detention increased by more than 70 percent,<sup>308</sup> even though there was no corresponding general increase in juvenile crime.<sup>309</sup> In the early 1990s, two-thirds of youth in detention and correctional facilities were held in places that were overcrowded.<sup>310</sup> The majority of these youth were locked up for technical probation violations, such as missing a meeting with a probation officer; fewer than one-third alleged to have committed a violent offense.<sup>311</sup> And the incarcerated youth were disproportionately youth of color: in 1995, about two-thirds of detained youth were youth of color, which was twice their percentage in the general population.<sup>312</sup> In a one-day count taken February 15, 1995, 108,746 youth were held in detention correctional, or shelter facilities.<sup>313</sup>

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DARDS ON FIXED RESTRAINT (2009), *available at* <http://www.jdaihelpdesk.org/Docs/Documents/MovingAwayFromHardware.pdf>.

306. PERFORMANCE-BASED STANDARDS, *supra* note 219 (OEP 10, 14-17).

307. See BARRY HOLMAN & JASON ZIEDENBERG, *THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES II* (2007).

308. Annie E. Casey Foundation, Juvenile Detention Alternatives Initiative, Results, <http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative/AboutJDAI.aspx> (last visited Oct. 27, 2009).

309. As noted *supra* in Part I, there was an increase in juvenile homicides with guns during the period. The number of youth involved in those killings was very small in comparison with the number of youth arrested for other offenses.

310. Dale G. Parent et al., *supra* note 209.

311. Annie E. Casey Foundation, About the Juvenile Detention Alternatives Initiative, <http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative/AboutJDAI.aspx> (last visited Oct. 27, 2009).

312. *Id.*

313. Office of Juvenile Justice and Delinquency Prevention, Statistical Briefing Book: Juveniles in Corrections—Custody Data (1995 & Before), <http://ojjdp.ncjrs.org/ojstatbb/corrections/qao8101.asp?qaDate=19990930> (last visited Oct. 27, 2009).

This trend occurred despite a fundamental discord between practice and research. Juvenile correctional facilities were created with the ideal of rehabilitating youth, but in most cases merely warehouse youth and prevent them from committing new crimes in the community. According to one leading juvenile justice scholar, “Evaluation research indicates that incarcerating young offenders in large, congregate-care juvenile institutions does not effectively rehabilitate and may actually harm them.”<sup>314</sup> In fact, “a century of experience with training schools and youth prisons demonstrates that they constitute the one extensively evaluated and clearly ineffective method to treat delinquents.”<sup>315</sup> A sampling of recidivism rates published in 2003 found that between 41 and 63 percent of youth released from juvenile correctional facilities committed new crimes or rule violations, returning them to the juvenile justice or criminal justice systems.<sup>316</sup> Recidivism studies show consistently that 50 to 70 percent of youth released from juvenile correctional facilities are rearrested within 2 to 3 years.<sup>317</sup> Researchers indicate that overly punitive juvenile justice interventions fail to provide youth with opportunities for psychosocial maturation necessary for a successful transition to adulthood; Zimring and his colleagues assert that “the context of juvenile justice intervention is one that is more likely to arrest individuals’ development than promote it.”<sup>318</sup>

In the past 15 years, successful models have emerged for reducing reliance on both local detention and large state correctional facilities without jeopardizing public safety.<sup>319</sup> At the same time, the multiple harms that detention can cause youth have been documented more fully.<sup>320</sup> This convergence of factors, together with lower rates of crime, have produced a decrease in incarceration levels since the 1990s, though they remain quite high considering the low-level offenses with which most youth are charged. According to data from the Census for Juveniles in Residential Placement, there were 92,854 youth in residential placement in 2006, representing an almost 15% decrease since 1999.<sup>321</sup> The combination of research and experience point to more successful directions that federal, state and local policy makers can support to improve outcomes for youth, as well as cut costs.<sup>322</sup>

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314. Annie E. Casey Foundation, *Confinement or Community? Striking a Better Balance*, 5 ADVOCASEY 9, 10 (Spring 2003) (quoting Barry Feld, Professor of Law, University of Minnesota).

315. *Id.*

316. *Id.*

317. JUSTICE POLICY INSTITUTE: WHY GOOD JUVENILE JUSTICE POLICIES MAKE GOOD FISCAL SENSE 16 (2009).

318. He Len Chung et al., *The Transition to Adulthood for Adolescents in the Juvenile Justice System: A Developmental Perspective*, in ON YOUR OWN WITHOUT A NET: THE TRANSITION TO ADULTHOOD FOR VULNERABLE POPULATIONS, 86 (D. Wayne Osgood et al. eds., 2005).

319. See, e.g., RICHARD A. MENDEL, *TWO DECADES OF JDAI: FROM DEMONSTRATION PROJECT TO NATIONAL STANDARD* (2009); HOLMAN & ZIEDENBERG, *supra* note 307, at 14-16.

320. See, e.g., HOLMAN & ZIEDENBERG, *supra* note 307, at 1-10.

321. ANTOINETTE DAVIS ET AL., *THE DECLINING NUMBER OF YOUTH IN CUSTODY IN THE JUVENILE JUSTICE SYSTEM 2* (2008).

322. Aos et al., *supra* note 71. See also, Paul DeMuro, *Consider the Alternatives: Planning and Implementing Detention Alternatives*, 4 PATHWAYS TO JUVENILE DETENTION REFORM 24 (Annie E. Casey

Since the rise of juvenile incarceration in the 1990s, researchers have been chronicling its ill effects. Not surprisingly, congregating delinquent youth helps them learn new inappropriate behavior and increases their likelihood of reoffending. Researchers at the Oregon Social Learning Center describe this process as “peer deviancy training.”<sup>323</sup> In their research they describe higher levels of substance abuse, school difficulty, delinquency, violence and adjustment problems for youth who are treated in peer group settings than for youth not grouped together for treatment.<sup>324</sup> Studies of incarcerated youth in Arkansas found that whether a youth was incarcerated is the most significant factor in increasing the likelihood of recidivism, more than membership in a gang, carrying a weapon or having a poor relationship with one’s parents.<sup>325</sup>

Young people’s mental health often worsens during periods of incarceration. In the most recent data available, researchers found that 36% of facilities nationwide were operating at or above their standard bed capacity or relied on some makeshift beds.<sup>326</sup> This environment can often be violent and chaotic, contributing to exacerbation of symptoms of mental illness. In a study of youth aged 11 to 17 incarcerated at the Harris County Juvenile Detention Center in Houston, Texas, researchers found that 73% of the youth met the diagnostic criteria for depression, 18% of whom had severe depression.<sup>327</sup> That same study reported that of the youth who met the criteria for depression, just 19% entered the detention facility with a prior diagnosis of either depression or bipolar disorder.<sup>328</sup> While these data may in part reflect a lack of mental health services prior to incarceration, at least one study found that the onset of depression occurred during incarceration in one third of incarcerated youth diagnosed with depression.<sup>329</sup> More than half (52%) of the detained youth in one study reported current suicidal ideation.<sup>330</sup>

For those youth enrolled in school, incarceration represents a break in their education continuity. Although “[t]here is little information about the quality of education provided in juvenile justice facilities,” information from litigation against juvenile justice agencies and reports from non-profit organiza-

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Foundation undated), available at <http://www.aecf.org/upload/publicationfiles/consider%20the%20alternatives.pdf>.

323. Thomas J. Dishion et al., *When Interventions Harm: Peer Groups and Problem Behavior*, 54 AM. PSYCHOLOGIST 755 (1999).

324. *Id.*

325. Brent B. Benda & Connie L. Tollett, *A Study of Recidivism of Serious and Persistent Offenders Among Adolescents*, 27 J. CRIM. JUST. III (1999).

326. SNYDER & SICKMUND, *supra* note 116, at 223-24.

327. Heidi Splete, *Mental Disorders Among Incarcerated Youth Often Overlooked*, CLINICAL PSYCHIATRY NEWS, June 2001, [http://findarticles.com/p/articles/mi\\_hb4345/is\\_6\\_29/ai\\_n28851110/](http://findarticles.com/p/articles/mi_hb4345/is_6_29/ai_n28851110/).

328. *Id.*

329. *Id.*; J.H. Kashani et al., *Depression Among Incarcerated Delinquents*, 3 PSYCHIATRY RESOURCES 185 (1980).

330. Christianne L. Esposito & George A. Clum, *Social Support and Problem-Solving as Moderators of the Relationship between Childhood Abuse and Suicidality: Applications to a Delinquent Population*, 15 J. TRAUMATIC STRESS 137 (2002), cited in Lindsay M. Hayes, *Characteristics of Juvenile Suicide in Confinement*, JUV. JUST. BULL. 7 (Office of Juvenile Justice and Delinquency Prevention Feb. 2009).

tions document the poor quality of education in many institutions.<sup>331</sup> Facilities may make it hard for youth to receive credit for their work while incarcerated, failing to transfer records to youths' home school systems or forcing them to complete remedial work rather than progress in their coursework toward a high school diploma.<sup>332</sup>

The Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative (JDAI) has created a model for effective reduction of reliance on detention without reducing public safety. JDAI began with five pilot sites in 1992 and now has 110 sites in 27 states and the District of Columbia.<sup>333</sup> JDAI sites employ eight core strategies: stakeholder collaboration, data-driven decision making, objective tools to aid in detention admission decisions, development of community-based alternatives to detention, case processing reforms, strategies for reducing detention because of writs, warrants, or probation violations, reduction of racial and ethnic disparities, and compliance with standards to ensure safe and humane conditions in juvenile facilities.<sup>334</sup> These reforms have achieved success in dramatically reducing detention without compromising public safety.

For example, the average daily population in Bernalillo County, New Mexico fell by 58% between 1999 and 2004.<sup>335</sup> Meanwhile, the county experienced an 18% drop in bookings of youth on felony charges.<sup>336</sup> Between 1993 and 2000 in Cook County, Illinois, arrests for violent crime fell by 54% at a time when the county was also reducing its detention population. In 1995, the Cook County Juvenile Detention Center had a population of 682; by 2005, its average population was 411.<sup>337</sup> As states such as New Mexico and Illinois begin to show that JDAI methods are applicable and successful on a statewide basis,<sup>338</sup> federal and state policy makers should consider the impact that broad

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331. See generally MARSHA WEISSMAN ET AL., *THE RIGHT TO EDUCATION IN THE JUVENILE AND CRIMINAL JUSTICE SYSTEMS IN THE UNITED STATES* 8-12 (2008).

332. *Id.*

333. MENDEL, *supra* note 319, at 8, 10-11.

334. Annie E. Casey Foundation, Juvenile Detention Alternatives Initiative: Core Strategies, <http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative/CoreStrategies.aspx> (last visited Oct. 27, 2009). The Juvenile Detention Alternatives Initiative also provides technical assistance to the sites and to other public officials, maintains an interactive website with information on JDAI and detention reform at [www.jdaihelpdesk.org](http://www.jdaihelpdesk.org), publishes a regular newsletter and reports called *Pathways to Juvenile Detention Reform* that cover all aspects of detention reform, and hosts an annual meeting of site representatives.

335. Annie E. Casey Foundation, Juvenile Detention Alternatives Initiative: Results from the Juvenile Detention Alternatives Initiative, <http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative/JDAIResults.aspx> (last visited Oct. 27, 2009).

336. *Id.*

337. *Id.*; HONORABLE TIMOTHY C. EVANS ET AL., *STATE OF ILLINOIS, CIRCUIT COURT OF COOK COUNTY, SUMMARY OF JUVENILE PROBATION AND COURT SERVICES PROGRAMS AND INITIATIVES* 12 (2009).

338. Annie E. Casey Foundation, Juvenile Detention Alternatives Initiative: Results from the Juvenile Detention Alternatives Initiative, <http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative/JDAIResults.aspx> (last visited Oct. 27, 2009).

implementation of these successful strategies could have on today's incarceration rates nationwide.

For youth adjudicated and committed to the custody of the juvenile justice system for rehabilitation, effective alternatives to large correctional facilities have emerged in the last 15 years as well. Missouri, under the leadership of Mark Steward, has evolved a system of small, child-centered residential facilities generally within 75 miles of a youth's home,<sup>339</sup> in stark contrast to many state systems' facilities containing hundreds of youth. The climate of the Missouri facilities contrasts markedly with other systems as well. Youth wear their own clothes, facilities look more like schools than prisons, dormitories are decorated with students' art work and home-like furniture, and there is no barbed wire, even at the facility for the state's most troubled youth.<sup>340</sup> Programming focuses on individualized attention, and staff and young people are encouraged to interact.<sup>341</sup> The state also became the first in the country to place a group home for teenage girls on a state college campus.<sup>342</sup> Missouri's approach relies heavily on "continuous case management": all committed youth are linked with case managers, who serve as advocates and resources both during and after involvement with the juvenile justice system.<sup>343</sup> A significant percentage of staff in Missouri have college degrees in counseling or psychology, a major departure from other systems that require only a high school diploma or two years of college for their youth care workers.<sup>344</sup>

In contrast with the 50 to 70 percent recidivism rates seen elsewhere, of youth released from Missouri's Division of Youth Services programs in 2005, only 8 percent of young offenders were incarcerated three years later and 18 percent were sentenced to adult probation.<sup>345</sup> Those numbers take on greater significance when compared with recidivism rates in other jurisdictions. Direct comparisons between jurisdictions are difficult because each state chooses how to structure its system and how to gather data. However, Louisiana reported that between 1999 and mid-2002, 43 percent of the juveniles who had been released from its secure facilities had reentered the system and were in juvenile custody, in an adult correctional facility, or on probation.<sup>346</sup>

Another jurisdiction seeking to reduce the overuse of incarceration and implement research-based and promising approaches is the District of Columbia, where the District's cabinet-level juvenile justice agency, the Department of Youth Rehabilitation Services ("DYRS"), has been engaged in a major reform

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339. Ayelish McGarvey, *A Culture of Caring*, AM. PROSPECT, Sept. 2005, at A12-14.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

345. Email from Tim Decker, Director, Missouri Division of Youth Services, to Marc Schindler (on file with author).

346. *Id.*

effort since 2005.<sup>347</sup> Under the leadership of its Director, Vincent Schiraldi,<sup>348</sup> DYRS is implementing a systems reform initiative based on the tenets of Positive Youth Development (“PYD”).<sup>349</sup> While most juvenile justice practice seeks (often unsuccessfully) only to extinguish negative behaviors, DYRS believes that the key to preventing and reducing delinquent behavior is through a combination of identifying and building on youths’ strengths as well as meeting their needs.<sup>350</sup>

PYD, as DYRS defines it, means purposefully seeking to meet the needs of young people and building their competencies to enable them to become successful adults.<sup>351</sup> Rather than seeing young people as problems, this developmental approach views youth and their families as resources and builds on their strengths and capabilities. Thus, “[a] Positive Youth Development... approach views the youth as an active participant in the change process, instead of as a client or target of change.”<sup>352</sup> While traditional juvenile justice work with young people has often favored control of their behavior as a central goal, for PYD, connecting the youth with community resources is the focus.<sup>353</sup> For example, services under a traditional juvenile justice approach might include job counseling and mandatory community service; under a PYD framework, the strategy would involve exploring the youth’s interest in careers and capitalizing on that interest with relevant work experience in the community—experience that would provide a learning experience and preparation for future employment.<sup>354</sup> Most importantly, “in the traditional [juvenile justice] approach, the aim is to diminish a youth’s problems or deficits; in PYD, it is to build on a youth’s strengths and assets.”<sup>355</sup> DYRS’s leadership came to the decision to implement this approach based on a review of the research literature<sup>356</sup> and its belief that this approach is the best way to improve public safety in communities.

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347. Nikita Stewart, *Juvenile Justice Chief in D.C. Is Leaving Post, Schiraldi Will Lead New York City’s Probation Department*, WASH. POST, Dec. 1, 2009, at B4.

348. Schiraldi will be leaving DYRS at the end of January to head New York City’s probation department. *See id.*

349. *See* Vincent N. Schiraldi, Director, Department of Youth Rehabilitation Services, Testimony Before the Committee on Human Services (Apr. 6, 2009), at 1, 2, *available at* [http://newsroom.dc.gov/show.aspx?agency=dys&section=2&release=16635&year=2009&file=file.aspx%2frelease%2f16635%2fFY2010%2520Proposed%2520Budget%2520Testimony\\_04\\_06\\_2009.pdf](http://newsroom.dc.gov/show.aspx?agency=dys&section=2&release=16635&year=2009&file=file.aspx%2frelease%2f16635%2fFY2010%2520Proposed%2520Budget%2520Testimony_04_06_2009.pdf).

350. *Id.*

351. *See* Vincent N. Schiraldi, Director, Department of Youth Rehabilitation Services, Testimony Before the Committee on Human Services (Feb. 16, 2006), at 10-12 *available at* [http://dysr.dc.gov/dysr/lib/dysr/pdfs/2006/tm\\_0216.pdf](http://dysr.dc.gov/dysr/lib/dysr/pdfs/2006/tm_0216.pdf).

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.* at 11.

356. *See* Robert G. Schwartz, *Juvenile Justice and Positive Youth Development*, in *YOUTH DEVELOPMENT: ISSUES, CHALLENGES AND DIRECTIONS* (2000); Jeffrey Butts, Susan Mayer & Gretchen Ruth, *Focusing Juvenile Justice on Positive Youth Development*, *ISSUE BRIEF* (Chapin Hall Center for Children, University of Chicago, Chicago, I.L.), 2005; Jeffrey Butts, *A Sensible Model for Juvenile Justice*, *ISSUE BRIEF* (Chapin Hall Center for Children, University of Chicago, Chicago, I.L.), 2008.

DYRS' innovation is particularly noteworthy given that the agency has been deeply troubled for decades. DYRS is in its twenty-third year under a court consent decree for deplorable conditions in its facilities and inadequate community-based services.<sup>357</sup> Plaintiffs in the lawsuit moved to place the Department into receivership as recently as 2004, then withdrew the motion in December 2007 as the reforms took hold.<sup>358</sup> Reducing unnecessary use of incarceration has been a hallmark of the reform effort. For youth in locked custody, DYRS has reduced the population in its one secure facility for committed youth from 130 committed youth in 2005 to 60 by 2009.<sup>359</sup> As a participating jurisdiction in JDAI, District of Columbia city agencies and the courts have developed an array of detention alternatives, including evening reporting centers, balanced and restorative justice centers, third-party monitoring and others.<sup>360</sup> Between January 2006 and November 2009, 91% of youth released from a DYRS alternative to detention appeared in court without rearrest while awaiting their hearings, with only 7% rearrested and 2% failing to appear for a court hearing.<sup>361</sup> These programmatic additions, along with improvements to the speed of case processing and other reforms, led to a drop from approximately 125 pre-trial detained youth in 2005 to an average of 94 youth in 2008.<sup>362</sup>

At the same time, DYRS has revised its approach to direct care within its facilities to create a positive peer culture and therapeutic milieu modeled after the Missouri Division of Youth Services. Consistent with the PYD approach, DYRS has engaged youth in positive activities such as performing Shakespeare in their communities, rebuilding homes destroyed by Hurricane Katrina, winning the citywide football championship, and engaging in a wilderness/cultural exchange on the Navajo Nation in the Southwest. Such activities simply were not permitted or encouraged during the agency's prior corrections orientation. For youth under DYRS' care who are in the community, DYRS is creating a continuum of youth- and family-focused, asset-based services, supports and opportunities for youth either in lieu of secure confinement or as aftercare following secure confinement.

As DYRS adopted a PYD focus in 2005, it achieved a substantial movement of less seriously-delinquent youth from deep-end, secure custody to community-based care, thereby reserving the most expensive (*i.e.*, locked) programming for the youth with the most serious offenses. DYRS concurrently improved secure care for youth involved in serious and violent offenses, assuring that

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357. See *Jerry M. v. District of Columbia*, Civil Action, No. 1519-85 (amended complaint filed April 15, 1986; consent decree entered July 10, 1986).

358. Press Release, District of Columbia Office of the Mayor, Plaintiffs in Jerry M. Lawsuit Withdraw Motion to Place DYRS in Receivership (Dec. 11, 2007), available at <http://app.dc.gov/mayor/news/release.asp?id=1199&mon=200712>.

359. DYRS Research and Quality Assurance Division (Nov. 2009) (data on file with author).

360. Criminal Justice Coordinating Council, 2007 Annual Report 16-17 (2007), available at <http://www.cjcc.dc.gov/cjcc/frames.asp?doc=/cjcc/lib/cjcc/Annual-Report-2007-CJCC.pdf>.

361. See DYRS RESEARCH AND QUALITY ASSURANCE DIVISION, DYRS DETENTION ALTERNATIVE PROGRAM OUTCOMES, JANUARY 2006 THROUGH NOVEMBER 2009 (Nov. 2009).

362. DYRS Research and Quality Assurance Division (Nov. 2009) (data on file with author).

they remain confined longer in order to receive appropriate treatment services.<sup>363</sup> This reform has substantially reduced the number of youth in secure care while improving conditions for those who remain confined, all through a strength-based approach. Importantly, these changes have occurred while there has also been a reduction in recidivism amongst DYRS youth compared to 2004, and a continued decline in serious juvenile crime in Washington, D.C.<sup>364</sup>

DYRS has also created evidence-based and promising programs based on research from OJJDP and others and consistent with the tenets of PYD. For example, some youth in DYRS are involved in the Civic Justice Corps (“CJC”), a workforce development program modeled on the Depression-era Civilian Conservation Corps program.<sup>365</sup> DYRS has also funded Multi-Systemic Therapy, Multidimensional Treatment Foster Care, and Functional Family Therapy as part of its community-based continuum of care.<sup>366</sup> These have all been utilized to build on young people’s assets in non-institutional settings. In addition, DYRS has created a Youth Family Team Meeting (“YFTM”) case planning process, combined with a basic screening system to develop case plans for all DYRS-committed youth.<sup>367</sup> In its YFTMs, youth and their parents have a substantial voice in developing the youths’ case plan (now called an “Individual Development Plan”), and each case plan builds

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363. *Id.* In 2005, fully 42% of youth in DYRS’ most secure setting, the Oak Hill Youth Center, were Tier 3 (low offense severity) youth, compared to only 30% who were Tier 1, high severity youth. In December, 2007, the numbers were dramatically different - 59% of Oak Hill youth were Tier 1 youth, while only 10% were Tier 3 youth. In 2005, 19% of the youth committed to DYRS were confined in Oak Hill; 22% were in distant Residential Treatment Centers (“RTCs”); and only 28% were in their own homes. By 2007, 12% of DYRS committed youth were confined in Oak Hill; 11% were in RTCs; and 45% were in their own homes.

364. See Vincent N. Schiraldi, Director, Department of Youth Rehabilitation Services, Testimony Before the Wisconsin Legislative Council, Special Committee on High Risk Offenders (Oct. 21, 2008), at 10-12 available at [http://www.legis.state.wi.us/lc/committees/study/2008/JUVE/files/schiraldi\\_presentation.pdf](http://www.legis.state.wi.us/lc/committees/study/2008/JUVE/files/schiraldi_presentation.pdf). (“Recidivism within 12 months of returning to the community for youth newly committed to DYRS declined by 19% from 2004 to 2007 [from 31% to 25%].... Although great caution needs to be exercised in cross-jurisdictional comparisons of recidivism, DYRS’ overall rate of recidivism is lower when compared to the most recently published data from nearby states such as Virginia and Maryland... Finally, during the time period we have been initiating our reforms, juvenile arrest rates have been declining steadily in the District of Columbia. Since 2004, the juvenile arrests for serious crime have declined by 24%, more than three times the decline in the rate of adult arrests for serious crime.”).

365. Press Release, Department of Youth Rehabilitation Services, Mayor Recognizes DYRS Youth and Staff’s Hurricane Katrina Relief Efforts (Feb. 6, 2007), available at [http://dyrs.dc.gov/dyrs/lib/dyrs/pdfs/2007/nr\\_02\\_07\\_07.pdf](http://dyrs.dc.gov/dyrs/lib/dyrs/pdfs/2007/nr_02_07_07.pdf).

366. Department of Youth Rehabilitation Services, FY08 Performance Plan 1 (undated), available at [http://oca.dc.gov/oca/lib/oca/performance\\_indicators/dyrs\\_plan\\_fyo8.pdf](http://oca.dc.gov/oca/lib/oca/performance_indicators/dyrs_plan_fyo8.pdf).

367. See Vincent N. Schiraldi, Director, Department of Youth Rehabilitation Services, Testimony of Department of Youth Rehabilitation Services Director, Vincent Schiraldi at an Investigative Hearing on DYRS Placements and Programs and Their Impact on Youth Violence and Public Safety (Oct. 8, 2008), at 6-8, available at [http://dyrs.dc.gov/dyrs/frames.asp?doc=/dyrs/lib/dyrs/testimonies/investigative\\_hearing-impact\\_on\\_youth\\_violence\\_and\\_public\\_safety-\\_vs\\_\\_october\\_8\\_2008.pdf](http://dyrs.dc.gov/dyrs/frames.asp?doc=/dyrs/lib/dyrs/testimonies/investigative_hearing-impact_on_youth_violence_and_public_safety-_vs__october_8_2008.pdf).

upon the youths' strengths while attempting to meet their needs.<sup>368</sup> This in turn helps steer youth into appropriate placements in either community settings or secure confinement.<sup>369</sup>

While DYRS has undergone significant reform, many challenges remain. Many correctional-minded staff members have been resistant to the strength-based approach. Personnel policies and civil service protections reduce the ability of management to make the kinds of sweeping staff changes required to dramatically effect the required change in agency culture. Similarly, community providers in the District of Columbia were accustomed to a correctional-oriented approach to working with delinquent youth. Although community vendors are generally more familiar with youth development practices and therefore less resistant to these reforms than DYRS secure custody staff, DYRS expects that new PYD-oriented requests for proposals for community-based programming and a system-wide PYD training requirement for all DYRS vendors will improve practice even further and make the DYRS continuum even more asset-based.

Public recognition of DYRS' successes is growing. DYRS went from being on the brink of court receivership in 2004 to being recognized in 2008 by Harvard's Kennedy School of Government, in its "Innovations in Government Awards Program," as one of the "Top 50" government programs in the country.<sup>370</sup> DYRS's Director, Vincent Schiraldi, received the 2009 A. L. Carlisle Child Advocacy Award from the Coalition for Juvenile Justice, a national organization of governor-appointed advisory groups from all of the states, U.S. territories, and the District of Columbia.<sup>371</sup>

Finding new options for lower-level offenders and retooling commitment facilities so that they can effectively promote rehabilitation are effective strategies states should actively consider, and the federal government should actively promote. The research and the models paint a clear path to help and protect troubled youth, and it is time to move more systems in that direction.

#### VIII. NATIONAL, STATE, AND LOCAL DATA DEMONSTRATE THAT RACIAL AND ETHNIC DISPARITIES EXIST AT ALL STAGES OF THE JUVENILE JUSTICE SYSTEM, BUT FOCUSED, DATA-DRIVEN EFFORTS HAVE REDUCED RACIAL DISPARITIES IN A VARIETY OF LOCATIONS

Inequities for youth of color in trouble with the law have existed since long before the advent of the juvenile justice system. As the W. Haywood Burns Institute has pointed out, in 1834 the New York House of Refuge, the first juvenile detention facility in the country, established a "colored" section.<sup>372</sup> The

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368. *Id.*

369. *Id.*

370. Press Release, Harvard Kennedy School, Ash Institute for Democratic Governance and Innovation, Harvard Kennedy School's Ash Institute Announces Top 50 Innovations in Government 4 (Apr. 15, 2008), available at [http://virginiadot.org/business/resources/Top50\\_FINAL.pdf](http://virginiadot.org/business/resources/Top50_FINAL.pdf).

371. Coalition for Juvenile Justice, The A. L. Carlisle Child Advocacy Award, available at [http://juvjustice.org/award\\_2.html](http://juvjustice.org/award_2.html).

372. JAMES BELL AND LAURA JOHN RIDOLFI, HAYWOOD BURNS INSTITUTE, ADORATION OF THE

justification was that providing rehabilitation services to youth of color would be “a waste of resources.”<sup>373</sup> By the 1980s and 1990s, the over-representation of youth of color in the system had been recognized for decades.<sup>374</sup> Yet there were no model programs or demonstration sites that had shown effectiveness in actually reducing disparities. Discussions of the issue often began and ended with expressions of concern and no concrete plan to address the problem.

*A. Over-representation and Disparities at All Stages of the Juvenile Justice System*

Inequitable treatment of youth of color occurs in several ways in the juvenile justice system. First, there is an *over-representation of youth of color* throughout the system.<sup>375</sup> Second, at some points in the system, there is *disparate and harsher treatment of youth of color* compared to White youth who are charged with similar offenses.<sup>376</sup> Third, youth of color *disproportionately and unnecessarily enter and penetrate* the juvenile justice system.<sup>377</sup>

The most recent comprehensive review of these issues was published by the National Council on Crime and Delinquency in 2007. The report, entitled *And Justice for Some*,<sup>378</sup> is an update to a report of the same name by NCCD staff published in 2000 in conjunction with Building Blocks for Youth, a national campaign to reduce over-representation and racial disparities affecting youth of color in the justice system.<sup>379</sup>

*Over-representation of youth of color* appears at successive phases of the juvenile justice system. For example, in 2003 African-American youth were:

- 16% of the adolescent population in the United States;
- 28% of juvenile arrests;
- 30% of referrals to juvenile court;
- 37% of youth in secure detention;
- 34% of youth formally processed by the juvenile court;
- 30% of youth adjudicated by juvenile court;
- 35% of youth transferred to adult court by judicial waiver;
- 38% of youth in residential placement; and

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QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL & ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM 3 (2008).

373. *Id.*

374. NATIONAL COALITION OF STATE JUVENILE JUSTICE ADVISORY GROUPS, A DELICATE BALANCE (1989).

375. *See infra* text accompanying notes 383-389.

376. *See infra* text accompanying notes 390-394.

377. *See infra* text accompanying note 395.

378. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM I (2007).

379. EILEEN POE-YAMAGATA AND MICHAEL A. JONES, BUILDING BLOCKS FOR YOUTH, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF MINORITY YOUTH IN THE JUSTICE SYSTEM 28-29 (2000).

58% of youth admitted to state adult prisons.<sup>380</sup>

This overrepresentation may be the result of many factors,<sup>381</sup> some understandable and others inappropriate.<sup>382</sup> For example, a juvenile justice policy may be neutral on its face, but in practice it may disparately impact youth of color. For example, a policy that allows release of arrested youth only to biological parents is neutral on its face, but since many more youth of color live with extended families than White youth, the policy has a differential impact.<sup>383</sup> Police may engage in law enforcement patterns that concentrate on low-income, high-crime neighborhoods, which are frequently communities of color, and those patterns may result in disproportionate arrests of youth of color.<sup>384</sup> In addition, the locations where African-American youth commit crimes—e.g., selling drugs on the street vs. in their homes—may make them more likely to be arrested.<sup>385</sup> In some categories of offenses, youth of color may actually commit more crimes than White youth, although the differences do not explain the much more significant differences in arrest rates of African-American and White youth.<sup>386</sup> In addition, victims may respond differently to offenses committed by White youth and youth of color.<sup>387</sup> For example, many people show a racial bias in their ability to remember the race of the perpetrator of crime.<sup>388</sup> Finally, key decision makers in the juvenile justice system may have unconscious stereotypes about youth of color, and in some cases may have conscious racial bias.<sup>389</sup> Regardless of the cause or causes, the harsher impact on youth of color is clear.

Inequitable treatment also appears as *disparate and harsher treatment of youth of color*, even when they are charged with the same categories of offenses as White youth. For example, a review of admissions to state public facilities and length of incarceration indicates that African-American youth charged with offenses against persons, and having no prior admissions, were nine times as likely to be incarcerated as White youth charged with the same category of offense and

380. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *supra* note 378, at 37.

381. *Id.* at 1. *See also*, CHAPIN HALL CENTER FOR CHILDREN, UNDERSTANDING RACIAL AND ETHNIC DISPARITY IN CHILD WELFARE AND JUVENILE JUSTICE (2008); CHRISTOPHER HARTNEY AND LINH VUONG, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE US CRIMINAL JUSTICE SYSTEM (National Council on Crime and Delinquency 2009).

382. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *supra* note 378, at 1.

383. *Id.*

384. *Id.*

385. *Id.*

386. ELEANOR HINTON HOYTT ET AL., REDUCING RACIAL DISPARITIES IN JUVENILE DETENTION 18-21 (Annie E. Casey Foundation, Pathways to Juvenile Detention Reform 2002). However, these differences do not explain the much more significant differences in arrest rates of African-American and White youth.

387. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *supra* note 378, at 1.

388. Franklin D. Gilliam, Jr., & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560 (2000).

389. FRANCISCO A. VILLARRUEL ET AL., ¿DONDE ESTA LA JUSTICIA? A CALL TO ACTION ON BEHALF OF LATINO AND LATINA YOUTH IN THE U.S. JUSTICE SYSTEM 5 (Building Blocks for Youth 2002), available at <http://cclp.org/media/documents/Donde.pdf>.

similarly having no prior admissions. For those charged with property offenses and having no prior admissions, African-American youth were four times as likely as White youth to be incarcerated. For drug offenses, African-American youth were forty-eight times as likely to be incarcerated. For public order offenses, African-American youth were seven times as likely to be incarcerated. Comparable disparities were found for youth having one or two prior admissions.<sup>390</sup>

Researchers found the same pattern for mean lengths of stay in state facilities. For youth adjudicated for violent crimes, African-American youth spent 30 percent more time incarcerated (an average of 85 days) than white youth charged with the same category of offense. For property crimes, African-American youth spent 13 percent more time incarcerated (average 23 days). For drug crimes, African-American youth spent 63 percent more time incarcerated (average 91 days). For public order offenses, the difference was 23 percent, an average of 34 days.<sup>391</sup>

In addition, youth of color *disproportionately and unnecessarily enter and penetrate* the juvenile justice system. They are more likely than White youth to be arrested, even for the same offense, and more likely to go deeper into the system than White youth. Through successive stages of disproportionate treatment, they suffer a “cumulative disadvantage” in the system when compared with White counterparts.<sup>392</sup>

Moreover, in many jurisdictions there are no accurate data on the number of Latino youth in the juvenile justice system. “Latino” is an ethnicity, not a race—a combination of language, culture, history, and shared values. Many data systems do not disaggregate race from ethnicity and instead ask a single question at arrest or intake – “What race are you—White, Black, Latino, Asian, or Native American?” As a result, Latino youth are often counted as “White” or (to a lesser extent) “Black,” resulting in significant undercounting of Latino youth.<sup>393</sup> Although data on Latino youth exist in some jurisdictions, they may not represent the full extent of disparate treatment of such youth in the system where data remain aggregated.<sup>394</sup>

The data that do exist indicate that Latino youth, like African-American youth, are over-represented in the juvenile justice system. Latino youth are 16% more likely than White youth to be adjudicated delinquent,<sup>395</sup> 28% more likely than White youth to be locked up after arrest,<sup>396</sup> 41% more likely than White youth to be put in a placement outside of their homes,<sup>397</sup> 43% more like-

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390. *Id.* at 29.

391. *Id.* at 30.

392. *Id.*, POE-YAMAGATA AND JONES, *supra* note 379 at 4.

393. *Id.* at 1.

394. FRANCISCO A. VILLARRUEL ET AL., *supra* note 389, at 42-44.

395. NEELUM ARYA, ET AL., AMERICA'S INVISIBLE CHILDREN: LATINO YOUTH AND THE FAILURE OF JUSTICE 6 (2009).

396. *Id.*

397. *Id.*

ly than White youth to be transferred to the adult criminal justice system,<sup>398</sup> and 40% more likely to be sent to adult prison.<sup>399</sup>

Latino youth also suffer from harsher penalties than White youth, even when charged with the same category of offense. Latino youth are more likely to be locked up than White youth for the same category of offense, and are incarcerated for substantially longer periods of time than similarly-charged White youth.<sup>400</sup>

Although there are even fewer data for Native American and Alaska Native youth in the juvenile justice system, the available data indicate that these youth are also over-represented in the juvenile justice system.<sup>401</sup>

### B. National Focus on Disproportionate Minority Contact (“DMC”)

Attention to over-representation and disparate treatment has grown slowly. In 1988, the Coalition for Juvenile Justice brought this problem to the attention of the President, Congress, and the Administrator of the federal Office of Juvenile Justice and Delinquency Prevention in a report entitled *A Delicate Balance*.<sup>402</sup> Later that year, Congress amended the Juvenile Justice and Delinquency Prevention Act (JJDP A) to include a requirement that states address “Disproportionate Minority Confinement” (DMC) (*i.e.*, incarceration) in their juvenile justice systems.<sup>403</sup> In 1992, Congress made the DMC provision a “core requirement” of the Act, thereby making receipt of 25% of its formula grant funds contingent on state compliance.<sup>404</sup> In 2000, the original version of *And Justice for Some* was published, receiving unprecedented news coverage, including the front page of the New York Times,<sup>405</sup> newspapers in major cities throughout the country, major television networks, National Public Radio, and local radio and television stations throughout the country.<sup>406</sup> In 2002, Congress expanded the DMC requirement by broadening its application to “Disproportionate Minority Contact” (thereby including arrest and other

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398. *Id.*

399. *Id.*

400. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *supra* note 378, at 29.

401. NEELUM ARYA & ADDIE C. ROLNICK, A TANGLED WEB OF JUSTICE: AMERICAN INDIAN AND ALASKA NATIVE YOUTH IN FEDERAL, STATE, AND TRIBAL JUSTICE SYSTEMS 7 (CAMPAIGN FOR YOUTH JUSTICE, UNDATED) (citing National Council on Crime and Delinquency, Native American Youth and the Juvenile Justice System (2008)).

402. NATIONAL COALITION OF STATE JUVENILE JUSTICE ADVISORY GROUPS, A DELICATE BALANCE (1989).

403. Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 100-690, 102 Stat 4181 (1988).

404. Juvenile Justice and Delinquency Prevention Act, Pub L. No. 102-586, 106 Stat 4982 (1992).

405. Fox Butterfield, *Racial Disparities Seen as Pervasive in Juvenile Justice*, N.Y. TIMES, Apr. 26, 2000, at 1.

406. Building Blocks for Youth, Newsroom, <http://buildingblocksforyouth.org/newsroom.html#jfs> (last visited Dec. 16, 2009).

points of contact with the system).<sup>407</sup> But the statute remained vague, requiring only that states “address” the problem.<sup>408</sup>

### *C. Effective Strategies to Reduce Over-representation and Disparities*

Over the last 15 years, a number of jurisdictions have made significant reforms to reduce over-representation of youth of color, disparate treatment, and unnecessary entry and penetration into their juvenile justice systems.<sup>409</sup> As described above, the Annie E. Casey Foundation’s Juvenile Detention Alternatives Initiative began in December 1992, and reduction of over-representation and racial and ethnic disparities affecting youth of color quickly became one of its “core strategies.”<sup>410</sup> JDAI has stressed the collection and analysis of data at key points in the juvenile justice system, including disaggregation of data by race and ethnicity.<sup>411</sup> JDAI has other “core strategies” that have also been effective in reducing disparities affecting youth of color, including the use of objective screening instruments for secure detention, improvements in case processing, and development of graduated responses to probation violations.<sup>412</sup>

Many JDAI sites have achieved significant reductions in racial and ethnic inequities. Multnomah County, Oregon, one of the first JDAI sites, was a leader in reducing disparities in its juvenile justice system. In the mid-1990s, when Multnomah started in JDAI, young people of color were significantly more likely to be held in detention than White youth (42 percent vs. 32 percent).<sup>413</sup> By 2000, the county had achieved reduction of detention to 22 percent for *all* youth.<sup>414</sup>

Santa Cruz, California also made substantial progress. When Santa Cruz began as a JDAI site, length of stay in detention was considerably longer for Latino youth than for White youth. Local officials analyzed case processing data and concluded that the reason for the delays was a shortage of culturally appropriate programs for Latino youth. Probation officials then developed partnerships with Latino organizations to provide the needed programming.<sup>415</sup> As a result, the differences in detention time diminished, and the average num-

407. Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 107-273, 116 Stat 1758.

408. Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5633(a)(22).

409. There is still a need for more research in the field, particularly with respect to police contacts. ALEX PIQUERO, *Disproportionate Minority Contact*, in 18 THE FUTURE OF CHILDREN: JUVENILE JUSTICE 59 (Fall 2008).

410. Juvenile Detention Alternatives Initiative, Core Strategies, <http://www.accf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative/CoreStrategies.aspx>.

411. *Id.*

412. *Id.* Douglas W. Nelson, *A Road Map for Juvenile Justice Reform*, in KIDS COUNT 2008 30 (Annie E. Casey Foundation 2008).

413. Nelson, *supra* note 412, at 24.

414. *Id.* The Multnomah County effort is described in detail in HOYTT ET AL., *supra* note 360, at 8 (Annie E. Casey Foundation, Pathways to Juvenile Detention Reform 2002), and BUILDING BLOCKS FOR YOUTH, NO TURNING BACK: PROMISING APPROACHES TO REDUCING RACIAL AND ETHNIC DISPARITIES AFFECTING YOUTH OF COLOR IN THE JUVENILE JUSTICE SYSTEM (2005), available at [http://cclp.org/media/documents/ntb\\_fullreport.pdf](http://cclp.org/media/documents/ntb_fullreport.pdf).

415. Nelson, *supra* note 412, at 24.

ber of Latino youth in secure detention was cut in half, from 34 in 1998 to 17 in 2007.<sup>416</sup>

Another moving force for reform has been the W. Haywood Burns Institute for Juvenile Justice Fairness and Equity, which is based in San Francisco.<sup>417</sup> Created by juvenile justice advocate James Bell, the Burns Institute has worked in 30 sites across the country, sometimes in conjunction with JDAI efforts.<sup>418</sup> Its approach comes out of the JDAI experience, stressing careful analysis of data at key decisions points in the system, identification of underlying causes of disparities, and selection of concrete interventions to reduce inequities.<sup>419</sup> The Burns Institute emphasizes the importance of including racial justice champions, community representatives, parents and youth in reviewing site data and determining policy and practice reforms.<sup>420</sup>

The Burns Institute has achieved measurable results in reducing racial and ethnic disparities across the nation. For example, in Baltimore County, Maryland, the Burns Institute worked with system stakeholders to develop a policy that would decrease the number of youth detained for failing to appear in court. The policy stemmed from analysis of admissions data, which revealed that 45 percent of admissions were the result of court-ordered writs issued for youths' failure to appear in court, and youth of color were significantly over-represented within this population. The stakeholder collaborative developed a policy to call youth and families to remind them of their scheduled court dates. The newly implemented strategy has reduced the use of secure detention for African American youth failing to appear in court by nearly 50 percent, and the overall detention population decreased by 28 percent.

In addition to facilitating and guiding stakeholder groups in local efforts to reduce disparities, the Burns Institute has conducted strategic and intensive trainings with several juvenile justice agencies and departments. The Burns Institute surveys staff in juvenile justice departments and agencies regarding their perceptions of disparities and their perceived role in reducing disparities. Using the results of these surveys along with local data, the Burns Institute develops racial and ethnic disparities training curricula catered to the specific needs of that jurisdiction and to engage the department or agency in local DMC reduction effort. The result has been strong engagement in DMC reduction efforts from all levels of staff.

The John D. and Catherine T. MacArthur Foundation's "Models for Change" initiative has also focused on reduction of racial and ethnic disparities.<sup>421</sup> MacArthur launched the initiative in 2004, with DMC reduction as one of the targeted areas for reform in the four Models for Change "core" states—Pennsylvania, Illinois, Louisiana, and Washington. In December 2007, the

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416. *Id.*

417. The W. Haywood Burns Institute, <http://www.burnsinstitute.org>.

418. Nelson, *supra* note 412, at 24.

419. *Id.*

420. *Id.*

421. Models for Change, <http://www.modelsforchange.net>.

Foundation established the DMC Action Network, coordinated by the Center for Children's Law and Policy, to expand its DMC reduction work into four new states – Kansas, Maryland, North Carolina, and Wisconsin. Several of the Models for Change sites have been successful in reducing DMC. For example, in Berks County, Pennsylvania, a focused, well-led, data-driven effort reduced the number of youth in secure detention, most of whom are youth of color, by 67 percent.<sup>422</sup> The county accomplished this through a combination of detention screening and development of an Evening Reporting Center as an alternative to detention. Rock County, Wisconsin, reduced the percentage of youth of color in secure detention from 71 percent upon joining the DMC Action Network to 30 percent by the end of its second year of participation, primarily through development of non-secure graduated sanctions and incentives for youth who violate probation.<sup>423</sup> Union County, North Carolina, has reduced representation of youth of color in secure detention by 32 percent since joining the DMC Action Network, also through developing graduated sanctions for youth who violate probation.<sup>424</sup>

Models for Change has been particularly interested in reforms to collect accurate information on the number of Latino youth in juvenile justice systems. In Pennsylvania, initiative grantees developed guidelines for capturing ethnicity separately from race, and, with leadership from the Juvenile Court Judges' Commission, those guidelines have been adopted throughout the state.<sup>425</sup> Illinois followed suit with its own manual for collecting disaggregated data, based on the Pennsylvania model.<sup>426</sup> The “two-question format” distinguishing race from ethnicity has also been adopted in other Models for Change sites.<sup>427</sup>

Some jurisdictions have achieved success without the support of a national reform initiative. For example, Travis County, Texas, reduced its disproportionate incarceration of youth of color who violated probation by establishing

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422. *U.S. Compliance with International Human Rights Treaties: Hearing Before the Subcomm. On Human Rights and the Law of the S. Comm. on the Judiciary*, 111th Cong. 7 (Dec. 16, 2009) (Statement of Mark Soler, Executive Director, Center for Children's Law and Policy, Washington, DC).

423. *Id.*

424. *Id.*

425. PATRICIA TORBET, HUNTER HURST, JR., & MARK SOLER, GUIDELINES FOR COLLECTING AND RECORDING RACE AND ETHNICITY OF JUVENILES IN CONJUNCTION WITH JUVENILE DELINQUENCY DISPOSITION REPORTING TO THE JUVENILE COURT JUDGES' COMMISSION (National Center for Juvenile Justice 2006), available at <http://www.modelsforchange.net/publications/138>.

426. ILLINOIS JUVENILE JUSTICE COMMISSION, GUIDELINES FOR COLLECTING AND RECORDING THE RACE AND ETHNICITY OF YOUTH IN ILLINOIS' JUVENILE JUSTICE SYSTEM (2008), available at <http://www.modelsforchange.net/publications/185>.

427. Models for Change works on a variety of juvenile justice reform issues in the four “core” states and in states involved with its Action Networks, including aftercare, community-based alternatives to incarceration, evidence-based practices, juvenile indigent defense, mental health, DMC, and right-sizing age of juvenile court jurisdiction. In addition to the DMC Action Network, there is a Mental Health/Juvenile Justice Action Network and a Juvenile Indigent Defense Action Network. Models for Change has a National Resource Bank of leading organizations that provide expert advice, training, and technical assistance to the core states and Action Networks. Models for Change has an interactive website, <http://www.modelsforchange.net>, and hosts annual meetings for site representatives, NRB members, public officials, and advocates.

a Sanction Supervision Program. The program provides more intensive case management and probation services to youth who have violated probation and their families.

All of these jurisdictions used a core set of strategies to reduce racial and ethnic inequities:

(1) establishment of committees or coordinating bodies to oversee efforts to reduce disparities, with representation of system stakeholders (judges, prosecutors, defenders, probation, law enforcement) as well as the community (leaders of community organizations, parents, youth);

(2) identification of key decision points in the system (e.g., arrest, referral, detention, adjudication, disposition, transfer to adult court, commitment to residential placement) and the criteria by which decisions are made at those points;

(3) creation of systems to collect and analyze local data at every point of contact youth have with the juvenile justice system (disaggregated by race, ethnicity, gender, age, offense, and geographical location) to identify where disparities exist and the causes of those disparities;

(4) development and implementation of plans to address disparities that include measurable objectives for change;

(5) public reporting of findings; and

(6) regular evaluation of progress toward reducing disparities.

These strategies should be a part of all reform efforts addressing over-representation of youth of color in the juvenile justice system, disparate treatment, and unnecessary entry and penetration into the system.

#### VIII. CONCLUSION

The economic crisis in the United States has produced budget shortfalls, often severe, throughout the country. Consequently, juvenile justice policy makers must make choices for policies and programs that are effective. There is less money to be spent on troubled and at-risk youth, so the money that is available must be used for programs that work.

In all of the areas discussed in this article—effective violence prevention and treatment programs, developmentally appropriate programs and services for adolescents, transfer of youth to adult criminal court, needs of girls in the juvenile justice system, excessive and inappropriate use of incarceration, dangerous and abusive practices in juvenile facilities, and racial and ethnic inequities in the system—policy makers now have abundant evidence of effective approaches. It is time for public officials to use that information to make smart choices for America's youth.

## IX. RECOMMENDATIONS FOR REFORM

## A. Effective violence prevention and treatment programs

At the federal level:

- Support strengthening of the Juvenile Justice and Delinquency Prevention Act to promote use of proven effective and evidence-based practices through incentive grants, technical assistance and training;
- Continue to support Blueprints for Violence Prevention and other research to evaluate the evidence base for other promising programs;
- Disseminate information on effective programs and services to the field; and
- Do not support programs that are ineffective such as boot camps and Scared Straight.

At the state and local levels:

- Direct funds toward use of evidence-based programs;
- Rigorously evaluate evidence-based programs in your jurisdiction; and
- Share your experiences with effective programs with the juvenile justice field.

## B. Developmentally appropriate juvenile and criminal justice systems

At the federal level:

- Oppose any new legislation at the federal level that would allow more youth to be prosecuted in or transferred to adult criminal court;
- Support efforts to roll back the use of transfer so that only youth who are the most serious, chronic, and violent offenders are considered for transfer;
- Support efforts to require that all transfer decisions be made on an individual basis by a judge, with full due process protections for the youth;
- Identify successful efforts to reduce the use of transfer and disseminate information on best practices in this area;
- Regularly collect and analyze data on youth prosecuted in adult criminal court and make the information readily available to the public;
- Support strengthening of the Juvenile Justice and Delinquency Prevention Act by extending the *jail removal*<sup>428</sup> and *sight and sound separation*<sup>429</sup> core protections to all youth under the age of 18 held pretrial, whether charged in juvenile or adult court;
- Change the definition of “adult inmate” to allow states to continue to

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428. 42 U.S.C. § 5633(a)(14). Under this provision, states may not incarcerate in an adult jail or lockup any youth prosecuted in juvenile court.

429. 42 U.S.C. § 5633(a)(13). Under this provision, states may not incarcerate youth prosecuted in juvenile court in any facility in which they have contact with adult inmates. Youth may be incarcerated for in adult facilities for brief periods of time, e.g., for processing or holding for transfer to juvenile facilities, but they must be separated by sight and sound from adult inmates.

place youth convicted in adult court in juvenile facilities rather than adult prisons without jeopardizing federal funds; and

- Abolish life without parole sentences for crimes committed before the offender was 18 years of age.

At the state and local levels:

- Oppose any new legislation at the state level that would allow more youth to be prosecuted in or transferred to adult criminal court;
- Support efforts to roll-back the use of transfer so that only youth who are the most serious, chronic, and violent offenders are considered for transfer; and
- Support efforts to require that all transfer decisions be made on an individual basis by a judge, with full due process protections for the youth.

### C. Needs of girls in the juvenile justice system

At the federal level:

- Strengthen the Deinstitutionalization of Status Offenders requirement in the JJDPA, which prohibits secure confinement of status offenders, by closing the loophole that allows status offenders to be incarcerated when they violate valid court orders;
- Approve standards recommended by the National Prison Rape Elimination Commission addressing the prevention, detection and response to sexual misconduct in facilities that incarcerate adults and youth; and
- Collect better data about pregnant girls in the juvenile justice system, and support provisions in the reauthorization of the JJDPA to improve data collection regarding this population.

At the state and local levels:

- Provide better mental health service access prior to juvenile justice system involvement;
- Expand the continuum of care for runaways, truants and other status offenders to avoid use of detention;
- Prohibit use of the valid court order exception as a matter of state law;
- Work together with child welfare system to maximize options to care for youth, especially status offenders;
- Provide gender-specific programming that is trauma-informed, provides opportunities to develop relationships of trust and interdependence with other women, includes female development, health and contraception, and taps girls' cultural strengths; and
- Examine conditions in juvenile facilities through a gender lens to ensure that they provide equal opportunities for education and other programming, meet girls' health and mental health needs, and keep girls safe.

### D. Eliminate dangerous and abusive practices in juvenile facilities

At the federal level:

Support provisions in the reauthorization of the JJDP A to:

- Require states to stop dangerous practices such as hog-tying and pepper spray that create an unreasonable risk of physical injury, pain, or psychological harm;
- Require states to assure that JJDP A funds are not used for dangerous practices;
- Establish incentive grants for States to reduce or eliminate state-supported use of dangerous practices, unnecessary use of isolation and room time, and unreasonable use of restraints;
- Establish incentive grants for States to provide evidence-based mental health, substance abuse and rehabilitative services to youth in custody;
- Provide financial support for States to conduct necessary training for facility staff and to adopt best practices in programming, behavior management, and security;
- Establish systems for independent monitoring of juvenile detention and correctional facilities and, where appropriate, seek to improve conditions in those facilities;
- Require the Office of Juvenile Justice and Delinquency Prevention (OJJDP) to collect data from the states and report to the public on uses of dangerous practices, isolation and room time in the nation's juvenile detention, correctional and residential treatment facilities; and
- Make best practices available nationwide through research, training and technical assistance to improve dangerous conditions of confinement and reduce unnecessary use of isolation and room time.

Amend the Prison Litigation Reform Act to:

- Repeal the provision extending the PLRA to incarcerated juveniles (amend 18 U.S.C. § 3626(g), 42 U.S.C. § 1997e(h), 28 U.S.C. § 1915(h), 28 U.S.C. § 1915A(c));
- Repeal the provision that prohibits prisoners from bringing lawsuits for mental or emotional injury without demonstrating a "physical injury" (repeal 42 U.S.C. § 1997e(e));
- Amend the requirement for exhaustion of administrative remedies to require prisoners to present their claims to responsible prison officials before filing suit, and, if they fail to do so, require the court to stay the case for up to 90 days and return it to prison officials to provide them the opportunity to resolve the complaint administratively (amend 42 U.S.C. § 1997e(a)); and
- Adopt federal standards governing restraint and seclusion in juvenile facilities.

At the state and local level:

- Develop methods to assess conditions in juvenile facilities through in-

dependent monitors or local advisory boards;

- Assess whether staffing and services are adequate in juvenile facilities, and provide additional staff, training, and other resources as necessary;
- Develop mental health–juvenile justice partnerships to ensure that youth are adequately screened and assessed to identify any needs for referral and treatment, and that youth receive needed treatment;
- Develop adequate mental health and substance abuse services that reach at-risk youth to prevent unnecessary involvement in the juvenile and criminal justice systems;
- Ensure that facilities are adequately staffed and that staff are trained to provide engaging rehabilitative programming and prevent harm to youth; and
- Eliminate use of dangerous practices, including unnecessary restraint and isolation, use of pepper spray and other harmful practices.

#### E. Inappropriate use of incarceration

- Find or develop alternatives to incarceration for youth who could be served more effectively (and less expensively) in the community; and
- Create incentives in state funding for local jurisdictions to serve youth in smaller facilities closer to home (Pennsylvania’s Needs-Based Budgeting, Reclaim Ohio, and Redeploy Illinois are models).

#### F. Racial and ethnic inequities in the juvenile justice system

At the federal level:

- Reauthorize the JJDPa with more specific guidance for states regarding reduction of racial and ethnic disparities; and
- Provide leadership, training and technical assistance to states and localities to support their efforts to engage in data-driven reductions of racial and ethnic disparities.

At the state and local level:

- Establish committees or coordinating bodies to oversee efforts to reduce disparities, with representation of system stakeholders (judges, prosecutors, defenders, probation, law enforcement) as well as the community (leaders of community organizations, parents, youth);
- Identify key decision points in the system and the criteria by which decisions are made at those points; create systems to collect and analyze local data at every point of contact youth have with the juvenile justice system (disaggregated by race, ethnicity, gender, age, offense, and geographical location) to identify where disparities exist and the causes of those disparities;
- Develop and implement plans to address disparities that include measurable objectives for change; publicly report findings and implementation plans; and regularly evaluate progress toward reducing disparities.