Trauma *and* Resilience

A new look at legal advocacy for youth in the juvenile justice and child welfare systems

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advancing the rights and well-being of children in jeopardy

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Editorial note: Descriptions of racial/ethnic groups vary among authors. Each represents a historical or political viewpoint. In reporting findings from independent research or publications, RWJF retains terminologies used by the original authors.

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EXECUTIVE SUMMARY

While rates of trauma are high for all youth, they are particularly high for youth in the juvenile justice and child welfare systems. This publication sets forth key risks of and opportunities for using research on trauma in youth advocacy. The publication focuses on legal strategies advocates can use in court, and the state and local policies needed to support these strategies.

Advocacy Cautions

This publication concludes that while information about trauma can be vital for advocates for youth in the juvenile justice and child welfare systems, there are important cautions to consider:

(1) Judges may interpret a youth's trauma history or symptoms to mean that the youth is too damaged to be safe in the community, or that a parent is too damaged to take care of his or her child.

(2) Discussions about trauma can exacerbate racial biases. In both the juvenile justice and child welfare systems, children of color are overrepresented because of persistent differential treatment along lines of race. Addressing trauma without discussing racial biases risks incorrectly implying that youth of color are system-involved because of family problems rather than system biases.

(3) A focus on trauma can draw attention away from important jurisprudence on adolescent development. Unlike adolescent development, in which legal theory applies categorically, research on trauma relies on distinctions based on a youth's previous experiences, and his or her reactions to those experiences.

(4) Trauma information may bring youth into the child welfare or juvenile justice systems who would not otherwise be system-involved, when those youth would do better with voluntary services from other systems.

(5) The process of identifying trauma—by service providers, agencies, or attorneys—may cause self-incrimination problems.

Advocacy Opportunities

Despite these cautions, research on trauma can play a vital role in advocacy on behalf of youth for a number of reasons:

(1) The juvenile justice and child welfare systems themselves can cause harm, traumatization, and retraumatization in youth. Research on trauma can support legal arguments to address harmful practices within public systems.

(2) Information about the trauma histories and symptoms of youth are already regularly introduced in courts—attorneys need the information to make conscious decisions about whether to highlight or underplay the information, and how best to characterize it through the lens of resilience.

(3) Trauma symptoms are often misdiagnosed as other, hard-to-treat mental health problems. This can lead to inappropriate mental health treatment, including psychotropic medication; to youth or family failure to comply with treatment; and to harsher legal consequences.

Case Law Analysis: Our Findings

This publication provides a detailed analysis of published case law addressing trauma in juvenile justice and child welfare cases. We conclude that advocates must be attentive to the legal context in which trauma is raised.

In the juvenile and criminal justice context, published decisions suggest that information about a youth's trauma history has particular potential to be helpful in: some diversion cases; life without parole cases and possibly some other adult sentencing cases. In these cases, trauma information tends to operate as a mitigating factor, connecting youth with treatment, or helping a youth to avoid potentially harmful justice system involvement.

In contrast, information about youth trauma has particular risks when a judge must decide whether a youth should be in the community or in a secure facility. In those cases—including some juvenile disposition cases, some sentencing cases, and adult court transfer cases—judges may interpret information about a youth's trauma history or symptoms to suggest that the youth is too damaged to be safe in the community.

In other cases—juvenile confessions and competency determinations—the law is unclear about how trauma is viewed or applied, and to what extent it will be useful.

In the child welfare context, published cases suggest that while information about trauma can and should be used to connect youth with needed services, there is a real risk that courts will interpret the trauma experienced by a child or parent as justification for terminating parental rights. This is true despite strong evidence suggesting that for most youth, remaining with family—sometimes with added supports—will best assist the youth in overcoming childhood adversity.

Policy Recommendations

Our case law analysis makes clear the need for strong policies to ensure that trauma information is used to help youth and families. State laws should:

- Ensure the availability of high-quality, trauma-informed interventions and supports in the community and in less secure settings—for both youth and families.
- Place the burden on courts and state and local agencies to ensure that juvenile justice and child welfare systems help—and don't harm—youth who have been traumatized.
- Require that information about a child's trauma history or symptoms be used a) as a defense; b) as mitigation in sentencing or disposition; c) to divert youth from the juvenile justice or child welfare system; and d) to connect youth and families with high-quality, voluntary services.
- Ensure that "reasonable efforts" and "best interests" standards in the child welfare system take into account the unique needs of youth and families who have suffered trauma.

"Trauma" is currently a buzzword in both the juvenile justice and child welfare systems, for good reason. Information about a youth or family's trauma history and ongoing symptoms can help courts and systems understand a youth's action, and can better match services to youth or family needs. That said, this publication urges caution. Not only must we use clarity in our definition of what constitutes "trauma," and "resilience," we must also recognize potential pitfalls of raising trauma in court in the absence of sound policies. A careful attention to legal context will inform court-room strategies and policy advocacy, and will lead to better outcomes for youth and families.

I. INTRODUCTION AND OVERVIEW

Emerging bodies of research show that childhood and adolescent exposure, and especially repeated exposure to serious harm, such as witnessing or being a victim of violence or physical and sexual abuse can cause changes to both brain and body, and can dramatically affect adolescent behavior.[1] With support, however—particularly support from parents and other adult family members—youths can be remarkably resilient.[2] In recent years, attorneys have begun to consider the role trauma research can or should play in their representation of youth in the juvenile justice and child welfare systems. This publication continues that dialogue, grappling with the questions of when information and research about trauma is helpful to a youth's case, and when it is harmful. We focus specifically on adolescents, with attention to childhood trauma as it relates to teenage behavior.

Childhood and adolescent exposure to serious harm can cause changes to both brain and body, and can dramatically affect adolescent behavior. With support, however—particularly support from parents and other adult family members—youth can be remarkably resilient.

While this publication grew out of a set of questions regarding the role of attorneys for youth, our research has made clear that changes in courtroom advocacy alone will not suffice. Without policy change, information about trauma can too often be used to the detriment of a youth's legal case—separating youth and families and imposing incarceration rather than providing treatment. For that reason, this publication provides not only an analysis of the research and case law relevant to attorneys for youth, but also a set of related policy recommendations.

This publication identifies opportunities for lawyers advocating for adolescents to use trauma research to protect youth from harm imposed by child-serving systems, and to connect youth with needed—and ideally voluntary—services. The publication focuses on courtroom strategies, and the policy changes needed to support such strategies.

Background on Trauma and Youth Advocacy

Severe stressors that cause changes to an individual's brain and behavior may be described as "trauma," "complex trauma," or "polyvictimization." Each is defined and described more fully below. The resulting stress on the body may be described as "traumatic stress" or "toxic stress." These early experiences affect the production of stress hormones and often, the development of neural pathways in the brain.[3] In the more severe cases, they can result in damage to various areas of the brain, and significant changes in behavior.[4] Consequences vary, but can include hyperarousal (essentially an experience of being stuck in "fight or flight" mode), dissociation, and difficulty concentrating or learning.[5] Children and youth who have been exposed to significant trauma, particularly those who have suffered ongoing trauma at the hands of their caregivers, may have trouble assessing and interpreting another individual's emotions. They may, for example, misread cues and incorrectly believe that another person is angry or threatening. This, in turn, leads to behavior problems as they attempt to protect themselves from perceived threats.[6]

When left unmitigated, the cognitive deficits caused by trauma and toxic stress can last into adulthood. Supportive family and community structures and appropriate interventions, however, can foster resilience and promote healthy development, even for those who face severe adversity and stress during childhood and/or adolescence.[7]

National studies reveal that youth suffer high rates of exposure to potentially traumatic incidents. For example, a 2011 study of a nationally representative sample of youth found that roughly one half of those surveyed had experienced two or more of the following types of harm in the previous year: "conventional crime; child maltreatment; victimization by peers and siblings, sexual victimization, witnessing and indirect victimization (including exposure to community violence and family violence); school violence and threats; and internet victimization."[8] The study also found that 8 percent of youth had experienced seven or more types of victimization in the past year.

Youth in the juvenile justice and child welfare systems have significantly more frequent exposure to traumatic experiences than their non-system-involved peers.

Studies of youth in the juvenile justice and child welfare systems suggest that they have significantly more frequent exposure to traumatic experiences than their peers. Experts have found that at least 75 percent of youth in the juvenile justice system have experienced "traumatic victimization" and 50 percent have post-traumatic stress disorder (PTSD).[9] Another study found that 93 percent of youth in an urban juvenile detention center had experienced at least one traumatic event in the previous year, with 10 percent meeting criteria for PTSD in the previous year.[10] Studies have also shown that "[y]outh in secure juvenile justice settings are at particularly high risk for histories of complex trauma, including polyvictimization, abuse and family violence, and losses that compromise core attachments with caregivers."[11] Similar statistics characterize the child welfare system, where each involved child has generally experienced at least one major traumatic event, while many have much longer histories of complex trauma.[12] Moreover, once a youth enters the child welfare or juvenile justice system, he or she is exposed to a host of conditions that can cause harm and exacerbate any related mental health problems rather than support the youth and foster needed resilience.[13]

In recent years there has been a significant effort to better educate judges and attorneys about the effects of childhood trauma. National organizations have developed initiatives that reflect an awareness of how trauma affects youth, and are working to integrate that understanding into existing systems and policy. For example, the National Council of Juvenile and Family Court Judges published *Ten Things Every Juvenile Court Judge Should Know About Trauma and Delinquency* to empower judges to "best assist traumatized youth who enter the juvenile justice system."[14] The National Child Traumatic Stress Network has created several projects and publications that explore how judges understand and approach children with trauma histories.[15] The American Bar Association Center on Children and the Law has launched a project on Polyvictimization and Trauma-Informed Advocacy, and has published a trauma assessment tool for lawyers. The Defending Childhood Initiative launched by the Attorney General of the United States and the Justice Department has devoted significant resources to better understanding and addressing the impact of exposure to childhood trauma.[16]

This work has raised important questions regarding how legal practice might change to better respond to the needs of youth who have experienced trauma and toxic stress.[17] This publication seeks to answer one of those questions: To what extent can or should courtroom strategies be shaped by research on trauma?

Additional research and training is needed to identify concrete strategies for lawyers and judges to (1) minimize the chance that their interactions with youth and families will cause harm or even retraumatization;[18] (2) connect youth with treatment modalities best suited for youth who have experienced trauma; and (3) incorporate emerging research regarding adolescence and resilience into legal advocacy on behalf of youth.[19]

Cautions and Limitations in Developing Trauma-Informed Advocacy

There are some significant risks to formulating advocacy strategies around trauma research. First, while attorneys may assume that information about trauma will be seen as mitigating evidence or to connect youth and families with services, this is not always the case. In fact, in a variety of legal contexts, judges may interpret a child's trauma history or symptoms to mean that the child will be a risk to public safety. Judges may also assume that a parent who has experienced serious trauma will not be able to care adequately for his or her child.

Discussions of trauma in the juvenile justice and child welfare systems also risk exacerbating racial biases. Racial disparities in both systems emerge not because youth and families of color need the services more, but because of persistent differential treatment along lines of race.

Discussions of trauma in the juvenile justice and child welfare systems also risk exacerbating racial biases. Racial disparities in both systems emerge not because youth and families of color need the services more, but because of persistent differential treatment along lines of race. A youth of color is much more likely than a White youth to enter the juvenile justice system, even though White youth are more likely to engage in unlawful behavior.[20] A family of color is more likely to be brought into the child welfare system than a White family with similar patterns of behavior.[21] Thus, high rates of system involvement should not be read to mean that communities of color experience higher rates of trauma. Indeed, much research suggests that rates of trauma in White communities are just as high as those in communities of color.[22]

Other research underscores trends in the type of trauma and harm experienced by different communities, with, for example, African American youth more likely to be victims of homicide, and White youth at higher risk for suicide.[23] The type of care traumatized children receive is also frequently influenced by race and class. White children and families are more likely to receive private mental health care; children and families of color—particularly those with lower incomes—are more likely to be brought under the supervision of public systems.[34] Moreover, often, the public system involvement itself causes or exacerbates harm to youth. Advocacy efforts to better address trauma issues should explicitly confront these racial biases, and should be wary of assuming that system involvement is necessary or even helpful.

In the juvenile justice system in particular, research on trauma also risks undermining—or at least drawing attention away from—important jurisprudence on adolescent development. In the past decade, the Supreme Court has repeatedly underscored that adolescents, as a class, are not simply miniature adults. This research has informed the Supreme Court's decisions to hold the death penalty and certain life without parole sentences unconstitutional for youth.[25] It has also played into the Supreme Court's conclusion that age is a factor in determining whether to issue *Miranda* warnings.[26] This approach provides a powerful advocacy framework: implicit in the narrative of adolescence is the understanding that young people will grow and mature. Moreover, the research applies to all youth, regardless of race, class, or gender.

In contrast, there is no categorical claim to be made for adolescents and trauma: there are many different kinds of trauma; trauma affects children and youth differently at different ages; not all youth are exposed to potentially traumatic experiences; and youth vary greatly in their degree of resilience to traumatic events. Thus, trauma research relies on distinctions between individuals and, despite strong research about resilience and treatment, does not contain an implicit guarantee of change over time.

The Importance of Trauma Research in Youth Advocacy

Notwithstanding the risks, for a variety of reasons, we cannot simply ignore trauma.

First, the juvenile justice and child welfare systems themselves can cause harm, trauma, and retraumatization in youth. Separating youth from their families can be traumatic. Moreover, the more out-of-home placements a child experiences, the greater the risk.[27] In the juvenile justice system, youth may also face strip searches, shackling, solitary confinement, physical restraints, and other harmful practices.[28] In both systems, children are at risk for being placed in congregate care settings that can be chaotic or even dangerous, and of suffering physical and sexual abuse at the hands of staff members or other youth.[29] A central role of lawyers for youth is to protect them from such harms by preventing harmful placements, and continuing zealous advocacy for youth after disposition.[30] Research on trauma can be an effective advocacy tool in this effort.

Additionally, information about trauma is already regularly introduced in court through psychological evaluations, pre-sentencing reports, and by prosecution or defense attorneys. In one study of cases in which judges were deciding whether youth charged in adult court should have their cases returned to juvenile court, researchers found information about possible traumatic experiences in 71 percent of the psychological evaluations.[31] As a result, attorneys representing youth will need to make a conscious decision about whether to highlight or underplay any evidence of trauma, and what role relevant research should play.

Moreover, in many cases, troubling behaviors are introduced and misdiagnosed as other, harder to address, mental health problems.[32] Without an accurate understanding of trauma, youth often receive inappropriate mental health treatment, including psychotropic medication,[33] and may face harsher consequences in court. Moreover, when youth or families are provided services ill-matched to their needs, they frequently fail to engage in treatment, and drop out of the services.[34] This, in turn, can lead to legal consequences when youth are perceived to be willfully disobeying court-ordered treatment or terms of probation.

Additionally, while trauma cannot and should not be applied categorically, evidence of trauma may at times be vital to defending an individual client. In some jurisdictions, information about the child's PTSD symptoms and history of abuse may support a defense or a more compelling mitigation argument at sentencing.[35] For these reasons, while advocates should be cautious about their use of trauma research, and should highlight the intersection between trauma and adolescent development (noting that even youth with trauma histories are resilient and will grow and mature), ignoring trauma research cannot be the answer.

Outline and Recommendations

This publication responds to previous work on trauma and the courts, identifies both risks and benefits of applying trauma research in legal advocacy in the juvenile justice and child welfare systems, and sets forth concrete practice and policy recommendations.[36] In *Section II*, we discuss background issues, including the definitions of childhood harm and trauma most relevant to legal practice. In *Section III*, we consider the implications of trauma-informed advocacy in public systems with persistent racial inequalities. In *Section IV*, we discuss special issues related to gender and sexual identity. In *Section V*, we highlight a few key points in assessing trauma, including concerns about self-incrimination and net-widening (bringing youth into the juvenile or child welfare system who could be served better without court involvement). In *Section VI*, we explore case law and make policy recommendations for the use of trauma by legal advocates in both juvenile justice and child welfare systems—with a focus on both risks and opportunities.

Trauma can have a severe impact on youth and families—it can undermine a person's capacity for daily functioning, and distort his or her perception of risk. What is even more remarkable, however, is the impressive resilience of individuals — and youth in particular — to overcome adversity. This publication is an effort to identify the legal and policy strategies that can support resilience rather than punish youth for their reactions to past harm.

Overarching Recommendations

(1) Use evidence related to trauma in the courtroom to connect youth and families with needed mental health services that are voluntary or that divert youth and families from more coercive interventions;

(2) Avoid raising trauma in courtroom contexts in which it may justify imposing harsh consequences on youth or separating youth from their families;

(3) Use research on trauma to prevent harm imposed by public systems; and

(4) Require public systems to provide high-quality services to address trauma symptoms in youth and families.

II. BACKGROUND INFORMATION: DEFINITIONS, DIAGNOSES, AND TREATMENT

While we often use the term "trauma" to describe harm with lasting effects that may be legally relevant, that term, without further clarification, is both too narrow and too vague to fully capture our meaning. In fact, bodies of research around psychological trauma, complex trauma, polyvictimization, and toxic stress can inform legal work on behalf of youth in the juvenile justice and child welfare systems. All describe childhood experiences with a possible impact on brain development and behavior. We use the term "trauma" throughout this publication to refer to an individual experiencing symptoms as a result of exposure. While exposure alone may constitute "harm," it is not, for our purposes, "trauma."

Bodies of research around psychological trauma, complex trauma, polyvictimization, and toxic stress can inform legal work on behalf of youth in the juvenile justice and child welfare systems.

If trauma symptoms persist at the time of juvenile justice or child welfare involvement, the trauma—regardless of the cause—is relevant to our analysis.

It is worth noting that not all harmful childhood experiences create behavior changes, or lasting behavior changes in children. An occurrence that may cause traumatic stress in one individual will not necessarily evoke the same response in another. Moreover, research on resilience suggests that the majority of children who experience harm—even those who experience severe harm such as being born in war-torn countries or raised by abusive parents—develop social competence and live productive lives as adults.[37] Key supports, such as an ongoing relationship with a nurturing adult or peer, can help children to develop resilience even when they face serious harm.[38] Similarly, if an event does traumatize a child, focused interventions can help the child address the symptoms and develop key coping skills.[39] Moreover, and as we discuss later in this publication, key characteristics, such as race and gender, can affect the types of harmful events an individual is likely to be exposed to; the treatment received; and, at least in the case of gender, the ongoing symptoms and manifestations expressed. That said, it is also of note that the more adverse experiences a child confronts, the higher the chance of lifelong health and mental health consequences.[40] Below we define some of the terms on trauma most relevant to our analysis of legal advocacy on behalf of youth.

Trauma

Trauma can be a one-time occurrence, or it can be chronic; it results from events such as incarceration, domestic abuse, sexual or physical assault, or a family member's unexpected death. Psychological trauma can be defined as the exposure to or the imminent threat of unexpected death or bodily violation, directly or as a witness.[41] Psychological trauma also involves the "sudden, uncontrollable disruption of affiliative bonds"[42] that occurs when both "internal and external resources are inadequate to cope with external threat."[43]

The most widely known mental health consequence of trauma is post-traumatic stress disorder (PTSD). PTSD is characterized by symptoms of three types: re-experiencing (such as intrusive memories), avoidance and numbing, and increased anxiety or emotional

arousal (hyperarousal).[44] As a practical matter, this may mean that youth with PTSD: react emotionally to incidents that do not seem threatening to a nontraumatized individual; have trouble concentrating; and have an increased chance of self-medicating through drugs and alcohol.[45] Adolescents with PTSD are more likely to have a history of running away from home, self-harming behavior, anxiety, and depression.[46] However, PTSD can be difficult to diagnose in children, and children often have stress disorders and stress reactions that constitute significant mental health impairments even if they do not have enough symptoms for a diagnosis of PTSD—often, this leads to a diagnosis of "partial PTSD."[47]

Complex Trauma

"Complex trauma" refers to the exposure to multiple traumatic events of commission or omission by persons such as caregivers or ostensibly responsible adults.[48] Complex trauma is generally caused by abuse or neglect, but can also result from a child witnessing events such as domestic violence, ethnic cleansing, or war. It is defined as:

> the experience of multiple and/or chronic and prolonged, developmentally adverse traumatic events, most often of an interpersonal nature (e.g., sexual or physical abuse, war, community violence) and early-life onset. These exposures often occur within the child's caregiving system and include physical, emotional, and educational neglect and maltreatment, beginning in early childhood.[49]

Complex trauma can have devastating effects on childhood and adolescent development. For obvious reasons, it is more likely to have severe and lasting consequences than is simple trauma. Complex trauma often "interferes with the formation of a secure attachment between a child and [his or] her caregiver," resulting in a loss of "core capacities for self-regulation and interpersonal relatedness."[50]

When children who experience complex trauma do not have the support to develop needed coping strategies, they may experience or engage in "depression; suicide attempts; alcoholism, drug abuse, sexual promiscuity; domestic violence, cigarette smoking; obesity; physical inactivity; and sexually transmitted diseases" in adulthood.[51] Complex childhood trauma is also associated with aggressive and undercontrolled or compulsive and overcontrolled behavior patterns.[52] Children with exposure to complex trauma "often meet diagnostic criteria for depression; attention-deficit/hyperactivity disorder (ADHD); oppositional defiant disorder (ODD); conduct disorder; anxiety disorders; eating disorders; sleep disorders; communication disorders; separation anxiety disorder; and/or reactive attachment disorder."[53] Children may exhibit some or all of these behaviors as automatic reactions to trauma reminders, or in their own attempts to gain control over their lives.[54]

Polyvictimization

Polyvictimization, or exposure to different kinds of victimization, such as sexual or physical abuse, bullying, and family violence, can lead to particularly severe ongoing symptoms.

Individuals exposed to multiple types of victimization tend to experience greater health and emotional problems, and greater revictimization than others—even than those with repeated exposure to one type of trauma.[55] While all victims have an increased risk of suffering from anxiety; panic disorders; major depression; substance abuse; and eating disorders, those who experience polyvictimization tend to suffer from these particular problems at a greater rate than others.[56] The more types of adversities an individual experiences during childhood, the higher their likelihood of suffering from adult adversities, such as "illnesses, accidents, family unemployment, parental substance abuse, and mental illness."[57]

Toxic Stress

Toxic stress is defined as "the excessive or prolonged activation of the physiologic stress response systems in the absence of the buffering protection afforded by stable, responsive relationships."[58] A toxic stress response may arise when a child experiences "strong, frequent, or prolonged adversity" such as chronic neglect,

physical or emotional abuse, or exposure to violence without appropriate support from caregivers.[59] Both polyvictimization and complex trauma, therefore, can increase the risk of toxic stress. Toxic stress, in turn, causes disruptions in brain circuitry and other regulatory systems.[60] The youth's stress response becomes chronically activated, which, in turn, leads to mood and memory problems.[61] Children who experience toxic stress may have trouble concentrating, learning, and discriminating between safe or dangerous situations.[62] They may overreact to perceived threats.[63] They often suffer ongoing health problems.[64]

Interventions

While it is beyond the scope of this publication to describe in any detail the interventions that work best for children and families who have experienced trauma, it is worth noting a few core principles about trauma treatment and trauma-responsive systems. First, removing a child from his or her family can impose trauma on the child and other family members.[65] Therefore, whenever possible, children, including teenagers, should remain with their families, and parents should receive needed services to cope with their own needs, including dealing with their own possible trauma histories.[66] An effective treatment intervention for youth, including older adolescents, will address both the child's and the entire family's full trauma history, and promote resilience among all involved individuals.[67] Moreover, even if the parent cannot or will not be involved, it is critical that youth have caring adults to assist them in coping with trauma. Supportive adults can promote resilience and protective factors, which can help youth and families move beyond the trauma.[68] Family-finding strategies can help identify a family member or other adult support for a youth who has experienced trauma.[69]

It is vital that traumatized youth and families be given access to treatment targeted to their needs. Indeed, when individuals are provided mental health services that fail to address underlying trauma issues, many disengage, fail to comply with programs, or drop out of treatment entirely.[70] Providing treatment relevant to the trauma needs maximizes the likelihood that treatment will be effective, and minimizes the risk of retraumatization. Additionally, targeted interventions will minimize the risk of misdiagnoses. When trauma issues are ignored, youth in the juvenile justice and child welfare system may be incorrectly labeled as suffering from ADHD, depression, ODD, or bipolar disorder,[71] and as lacking empathy or remorse for their behavior.

Finally, those who have experienced trauma often feel powerless, so it is important that youth play an active decision-making role in their lives.[72] A trauma-informed system will engage youth and their family members as partners, by giving them choices whenever possible, and opportunities to express their needs and wishes.[73]

Whenever possible, children, including teenagers, should remain with their families, and parents should receive needed services to cope with their own needs, including dealing with their own possible trauma histories.

III. RACE, CLASS, CONTEXT, AND TRAUMA-INFORMED ADVOCACY

Any conversation about trauma in the juvenile justice and child welfare systems must directly address issues of race and class. Too often, high rates of trauma within public systems are misunderstood to mean high rates of family dysfunction in poor communities of color. This interpretation ignores the research showing that **youth and families of color are more likely to be brought into the juvenile justice and child welfare systems than White families even for the same behavior, and even controlling for a variety of background characteristics**.[74] It also fails to recognize that wealthier families have significantly greater access to voluntary mental health services to address similar issues. While race, class, and geography may influence the nature of the stressors a youth experiences, the discussion about trauma and toxic stress must explicitly recognize and avoid inaccurate representations about the causes of system involvement.

Race and the Juvenile Justice System

Research demonstrates that youth of color are placed in the juvenile justice system, and move deeper into the juvenile justice system, as well as into the adult criminal justice system, at much higher rates than White youth.[75] This disproportionality holds true even when controlling for factors such as category of offense, and is particularly true in cases of drug and weapons possession offenses, despite higher rates of drug use and possession among White youth than youth of color.[76] Moreover, at least one study has shown that White youth are more likely to receive community-based mental health services, while youth of color are more likely to receive detention, even when their circumstances are comparable.[77] African American adolescents are more likely than White adolescents to be diagnosed with disorders considered to be less treatable, leading to a psychiatric hospitalization rate that is two or three times that of White adolescents.[78]

The same types of disparities hold true for individuals prosecuted in the adult system. For example, while "studies show that people of all colors use and sell drugs at remarkably similar rates,"[79] in some states "African American men have been admitted to prison on drug charges at rates nearly 20 to 50 times greater than those of White men."[80] In major cities, "as many as 80 percent of young African American men now have criminal records."[81] Researchers have suggested that decision-makers may be particularly likely to attribute youth's behavior to internal factors (a lack of capacity to do better) for African American youth, and external factors (family or environmental stresses) for White youth.[82] In light of these stark disparities, any policy or advocacy strategy to better identify youth and family trauma histories must recognize the risk that a trauma history may be used against a youth of color, even if the same history might help a White youth.

Race and the Child Welfare System

Research has demonstrated similarly deep inequalities along racial lines in the child welfare system. Although African American children account for only 15 percent of the children in this country, they constitute 30 percent of the children in the child welfare system.[83] As Dorothy Roberts explains:

> This state intrusion is typically viewed as necessary to protect maltreated children from parental harm. But the need for this intervention is usually linked to poverty, racial injustice, and the state's approach to caregiving, which addresses family economic deprivation with child removal rather than services and financial resources.[84]

Coercive interventions in poor communities of color emerged simultaneously to the dismantling of the social safety net, and occur in "the very neighborhoods most devastated by the evisceration of public resources."[85] Historical trends further underscore the problem: when the state child welfare system was launched, it served mostly White women, and used mostly in-home services. As the system shifted to serving families of color, it also relied increasingly on child removal.[86] Even now, while rates of out-of-home placement are dropping across the country, children struggling with discrimination disproportionately face coercive state involvement.[87] To talk about trauma without recognizing these disparities risks pathologizing youth and families rather than properly accounting for the role of—or problems in—state child welfare systems.

Trauma and Context

While children of all races and all income levels may experience trauma and toxic stress, different communities feel the effects of poverty, race, and trauma in different ways. Eighty percent of all African American children live in communities "characterized by both high levels of poverty and crime."[88] One study found that African American children and youth are nearly three times as likely, and Latino children and youth are just over two times as likely to witness a shooting, bombing or riot than White children and youth.[89] Another study found that while White youth reported a higher risk of suicide and of alcohol abuse than did either African American or Latino youth, "Latino youth were approximately twice as likely as White or African American youth to report a history of traumatic loss, neglect, or community violence."[90]

These distinctions do not occur in a vacuum. Crime rates tend to be significantly higher in neighborhoods of extreme poverty than in other neighborhoods.[91] Moreover, the segregation of individuals of color into such high poverty neighborhoods is not coincidental. Instead, researchers theorize that these distinctions occur as part of a "structural dislocation" influenced by racial segregation, suburbanization, job losses from de-industrialization, school funding disparities, and a lack of access to power in public institutions.[92]

Moreover, racism itself can create mental health stresses for children. As Dr. John Rich explained, "**Racism isn't only unjust, but it is toxic.**"[93] Like other harmful experiences during childhood, racism can contribute to high levels of stress that, in turn, affect a child's development.[94]

The characterization of children of color as predisposed to delinquency or parents as incapable of caring for their children can be particularly damaging.[95] In addition to the psychological harm it imposes, it creates material, and troubling, consequences, including the separation of children from their families and the placement of youth in facilities where they may experience harsh conditions, such as physical restraints, physical and sexual violence, strip searches, and solitary confinement.[96]

Recommendations

- Minimize the intervention of coercive state services, reducing unnecessary reliance on state systems whenever possible and promoting the use of voluntary community-based services;
- Ensure that youth remain with family whenever possible, and that all out-of-home placements engage and involve families;
- Use language that recognizes strengths and resilience rather than implying weakness, pathology, or deviancy;
- Ensure that narratives about clients and trauma do not inadvertently stigmatize youth and lead to harsher consequences in court;
- Work to ensure that systems do not engage in practices that themselves inflict harm or retraumatization;
- Ensure that any assessment tools designed to identify a youth's trauma history are validated across racial groups;
- Ensure that systemwide strategies to address trauma include data collection requirements that can identify any racial disparities and respond to addressed problems; and
- Explicitly address unfounded assumptions about race and behavior.

IV. GENDER, SEXUAL IDENTITY, AND TRAUMA-INFORMED ADVOCACY

While trauma can affect anyone, gender and sexual identity often inform the type of trauma that youth experience and the resulting symptoms. As a result, for advocates to address trauma appropriately, they need to understand the nuances of trauma research through the lens of gender and sexual identity.

Girls enter the juvenile justice system having experienced higher rates of neglect and physical, sexual, and emotional abuse than their male counterparts.

Gender and the Juvenile Justice System

Studies show that girls enter the juvenile justice system having experienced higher rates of neglect and physical, sexual, and emotional abuse than their male counterparts.[97] Indeed, a disproportionate number of girls in the juvenile justice system have experienced child sexual and nonsexual abuse, incest, rape and battering by male partners.[98] Disproportionately, girls in the juvenile justice system have had previous involvement in the child welfare system. Overall, while girls make up 20 percent to 35 percent of the overall juvenile delinquency population, they account for 33 percent to 50 percent of the "crossover" population, or group of youth who have had contact with both the juvenile justice and child welfare systems.[99]

Girls' experiences of family violence frequently influence their pathways into the juvenile justice system. Girls tend to be imprisoned for less serious offenses than boys, including technical probation violations and status offenses,[100] often as a result of self-protective behavior such as running away from violence in the home.[101] Similarly, to the extent that girls are arrested for violent crime, their offenses disproportionately involve family members or others with whom they have relationships.[102] These offenses, too, often result from girls' experiences as victims of domestic violence.[103] For this reason, a girl's violent offense may be not be predictive of future violent behavior.[104] In light of the underlying family violence issues, diversion programs or other supports may be particularly appropriate.[105]

While this research highlights issues common to girls, to the extent that it suggests unique responses in cases of sexual abuse in the home, it can be useful in advocacy on behalf of both boys and girls. **While sexual abuse is more prevalent among girls in the juvenile justice system, it is a persistent and real problem for a significant minority of boys as well.**[106]

Research also suggests that girls tend to exhibit different trauma symptoms than boys. They are more likely than their male peers to respond to trauma with internalizing symptoms such as self-mutilation and substance abuse,[107] and to develop PTSD.[108] More specifically, one study showed that among youth who were sexually abused, abuse with force "was associated with anxiety and affective disorders among females and attention-deficit hyperactivity or disruptive behavior disorders and substance use disorders among males."[109] Consequently, as a group, girls entering the juvenile

justice system are more likely than boys to be suffering from affective disorders, such as major depressive episodes; anxiety disorders; panic disorders; eating disorders; and a number of other mental health issues,[110] including self-mutilation.[111]

Girls may also face distinct issues once they enter juvenile justice facilities. They are at higher risk for sexual abuse at the hands of staff than are their male peers.[112] Moreover, programs operating in juvenile justice facilities may not have been tested on or validated for use with girls,[113] or may not be available to girls because of the smaller population size.[114] Many studies have noted a lack of programming specifically geared toward girls: of 443 delinquency prevention programs across the United States, for example, only 2 percent serve exclusively girls.[115] Even medical providers in juvenile facilities often are ill-equipped to address girls' health issues.[116] A lack of program options also may mean that girls are likely to be sent farther away because no appropriate options exist in their communities.[117]

Gender and the Child Welfare System

Many child welfare systems lack the resources to focus on the different developmental needs of boys and girls; they struggle to keep "children safe, fed, housed, and in school and have not yet considered looking at the system through a gender lens."[118] As with the juvenile justice system, girls enter the child welfare system having experienced higher rates of maltreatment and criminal victimization than boys.[119] This disproportionality is particularly pronounced when looking solely at sexual abuse: the rate of sexual abuse for girls entering the child welfare system is 2.3 times that of boys.[120] System-involved girls are also more likely than boys to have witnessed or experienced violence against their family members (principally siblings and mother), emotional abuse and sexual abuse.[121] Although rates of abuse of children overall have been declining, the rate for girls is declining at a much slower pace than the rate for boys.[122] Like all girls, those in the child welfare system also may show different diagnoses and manifest different symptoms in reaction to trauma than their male peers.

Sexual Orientation and the Juvenile Justice and Child Welfare Systems

As with gender, sexual orientation and gender identity often inform a youth's pathway into the juvenile justice and child welfare systems, his or her treatment needs, and the risk of victimization within the system. Youth who are gender-nonconforming may be at a greater risk for exposure to trauma, both before entering, and within both the child welfare and juvenile justice systems.

LGBTQ (lesbian, gay, bisexual, transgender and questioning) youth are more likely than their straight peers to experience rejection or abuse by their families (both biological and foster), victimization at school, and homelessness.[123] While LGBTQ youth enter the juvenile justice and child welfare systems for a variety of reasons, a large percentage become involved for reasons relating to their gender identities or sexual orientation, such as chronic truancy because of harassment at school,[124] running away because of harassment or abuse at home,[125] and "survival crimes" once they have run away, including prostitution.[126] One study, for example, found that almost half (42%) of youth in an out-of-home placement were kicked out or removed from their homes "because of conflict related to their LGBT identity."[127] Another third were sent to foster care or juvenile justice placements based on drug use, behavioral disorders or family violence, and the remainder entered care due to abuse or neglect at home.[128]

Despite the increased presence of LGBTQ youth in both the child welfare and juvenile justice systems, most programs that provide services to youth fail to consider sexual orientation or gender identity in the development of their policies and professional standards.[129] LGBTQ youth thus are more likely to continue experiencing rejection, harassment and other victimization once they

are in placement, in both the juvenile justice and child welfare systems, and at the hands of both other youth and staff.[130] In one study, for example, 78 percent of youth ran away or were removed from their placements because of assault or other hostility on the basis of their gender identity or sexual orientation.[131] For gender non-conforming youth, few placements or jurisdictions have developed policies to house them according to gender identity instead of physical characteristics.[132] This can lead to further harassment[133] and—in the juvenile justice system—to gender non-conforming youth being placed in solitary confinement for extended periods of time.[134]

Recommendations

- Recognize gender and sexual identity as risk factors for sexual abuse and domestic violence;
- Recognize differing responses to trauma along gender lines to inform attorney-client interactions and potential advocacy strategies;
- Advocate for diversion and alternative services for youth engaging in juvenile offenses as a result of family violence or a lack of safety in a child welfare placement;
- Decriminalize status offenses; and
- Ensure that disposition and services are trauma-informed and validated for the appropriate population, with attention to the unique needs of youth based on gender or sexual identity.

V. IDENTIFYING TRAUMA: APPROACHES AND LEGAL CONSEQUENCES

As a preliminary matter, any advocacy informed by trauma requires attorneys and systems to recognize when a client has been traumatized. While it is beyond the scope of this publication to explore assessment approaches in great detail, we underscore here that care should be taken to ensure that increased trauma identification does not lead to net-widening in either the juvenile justice or child welfare systems, and that youth and families are protected from self-incrimination.

To the extent that lawyers gather information related to trauma, they must be attentive to a client's self-incrimination risks.

A number of advocacy groups have developed tools to help attorneys identify their clients' trauma histories and needs. The American Bar Association (ABA) and Safe Start Center, for example, have developed and published a screening tool and guide for attorneys who work with children and youth.[135] The guide, entitled *Identifying Polyvictimization and Trauma Among Court-Involved Children and Youth: A Checklist and Resource Guide for Attorneys and Other Court-Appointed Advocates*, provides a checklist of different types of traumatic experiences and symptoms, and suggests that attorneys use it to help interpret the information they have already gathered from their clients in the course of their discussions.[136] Because the tool is designed to help advocates interpret information they already possess about their clients, it does not require any distinct training regarding interviewing and discussing trauma-related issues.[137] Using this checklist can enable attorneys to discern trauma experienced by their clients, and to identify potential interventions and legal strategies to discuss with their clients.

To the extent that lawyers gather information related to trauma, they must be attentive to self-incrimination risks. Particularly in the juvenile justice system, it is critical that advocates not disclose any information that could be used against their clients—whether in the courtroom or in any other setting. To the extent that attorneys reach out to other system players, they must be aware of the implications for their clients' cases of any information divulged. Additionally, attorneys should explain to their clients how and why they plan to use any information about trauma, and be mindful of how deeply they are probing into situations that may not be prudent to disclose to other system players. Attorneys should also develop knowledge about discussing trauma in ways that support their clients, and work with other professionals, such as social workers and counselors to assist them in this work.

The concern about information-sharing is particularly acute when the system (either juvenile justice or child welfare), rather than the attorney, is screening or assessing for trauma. Systems gathering information for the purpose of better serving youth should ensure that there are safeguards in place to protect youth from self-incrimination. States can do so through legislation,[138] for example, by requiring that any information obtained to facilitate such treatment is inadmissible in future proceedings.[139] States may also protect information used in forensic evaluations, and ensure that clinicians clearly

disclose the parameters of confidentiality.[140] With such state policies in place, attorneys and systems will be better able to respond to youth trauma without risking negative legal consequences.

One additional concern about trauma assessments is that they will lead to net-widening in the juvenile justice or child welfare systems. For this reason, clear policies should be established to ensure that trauma information gathered through screening provides youth and families with opportunities to receive voluntary services, but does not create a justification for bringing more individuals under the supervision of the child welfare or juvenile justice systems.

Recommendations

- Attorneys should pay careful attention to self-incrimination risks when gathering information about trauma;
- Attorneys should learn to communicate about clients' trauma histories and symptoms in ways that support clients, and should work with trained mental health providers when possible to assist them in this work;
- Policies should protect information about trauma from disclosure or use that works against the client's interest; and
- Information gathered on trauma should not be used as a net-widener, bringing new youth and families into the system.

VI. CASE LAW, COURTROOM ADVOCACY, AND POLICY OPPORTUNITIES

Information about a youth's trauma history or related diagnosis can, in some cases, support arguments on behalf of children in the juvenile justice and child welfare systems.

Attorneys for youth can and should look for opportunities to raise and address the trauma caused by systems. Information about a child's trauma history also can be used to prevent harmful system involvement, or to advocate for better services throughout the delinquency or dependency processes. Attorneys for youth and families must recognize, however, that raising such information in court can pose significant risks. In both the juvenile justice and child welfare systems, information about a youth's trauma history may sometimes work against the client's legal interests. In the juvenile justice system, judges may characterize a youth with a severe trauma history as "too damaged to help," and place the youth in more secure placements than his or her peers. In the child welfare system, information about trauma may be used to separate youth from their families, including teen parents from their children, despite significant bodies of research suggesting that such family separations are often harmful to children.[141]

In both the juvenile justice and child welfare systems, information about a youth's trauma history may sometimes work against the client's legal interests.

This section reviews case law with an eye to the question of how courts treat evidence of trauma in a variety of legal contexts. This review is not comprehensive—it does not look to all published opinions. More importantly, most juvenile court decisions are unpublished. What the case law can provide is some suggestions about where evidence of trauma may be most useful, and where it may pose particular risks.

This section also includes suggestions for state laws and policies that can address problems or fill in gaps suggested by the case law analysis, and set the stage for effective and appropriate use of trauma-related information.

Trauma and the Juvenile or Criminal Justice System: Laws and Policies

As the Fifth Circuit has explained, evidence about childhood harms can be 'double-edged' in court.[142] "Although the evidence of [a defendant's] inadequate supervision as a child might permit an inference that he or she is not as morally culpable for his behavior, it also might suggest [that the defendant], as a product of his environment, is likely to continue to be dangerous in the future."[143] This section reviews the treatment of trauma-related information in case law from various stages in the delinquency and criminal justice system. While case law is not determinative—and indeed there are not many published cases on point—our review suggests that introducing a youth's trauma history or symptoms may bear particular risks when the decision before the court implicates public safety (decisions to incarcerate youth or allow them to remain in the community, or decisions to charge a youth as an adult or keep him or her in the juvenile system). Exceptions to this caution exist in specific "battered child" cases, in jurisdictions that recognize this defense.

On the flipside, information about trauma may be particularly useful in court when advocates are addressing harms imposed by the justice system itself (decisions on juvenile conditions, on juvenile processes,

or on diverting youth from the system entirely), or are matching youth with needed services. Although the juvenile justice system is theoretically designed to provide rehabilitative services, too often the system imposes harm—or provides services ill-matched to the youth's needs. While it is beyond the scope of this publication, additional research is needed to help identify the key questions defenders should pose when determining which programs can best serve traumatized youth.[144]

This section also provides policy proposals and examples of innovative policies addressing youth trauma in the juvenile and criminal justice systems, with a focus on those that can shape or contribute to courtroom practice.

DIVERSION

Key Points

- Legal and policy advocacy should work to divert youth from the juvenile justice system when offenses arise out of trauma symptoms or when youth are particularly vulnerable to trauma in the justice system; and
- State policy should require the provision of high-quality diversion services appropriate to youth with trauma histories and symptoms.

Research on trauma can play a role in diverting youth from the juvenile justice system in three ways: (1) youth whose offenses arise out of trauma symptoms can be diverted from the juvenile justice system; (2) youth who may be particularly vulnerable to trauma from juvenile justice processes may be diverted from the system; and (3) diversion services can be designed to address youth trauma issues, which, in turn, make it easier for youth to comply with any terms placed on their diversion. Existing case law provides some support for accomplishing the first two of these approaches through courtroom advocacy. All three can be fully enacted through policy change.

Case Law Analysis

Case law dismissing cases or diverting youth from the juvenile justice system entirely provides a promising framework for incorporating trauma research into advocacy. Many diversion cases explicitly acknowledge that the juvenile justice system itself can impose trauma, and articulate the importance of keeping some youth, particularly those most vulnerable to harm or retraumatization, out of the juvenile justice system entirely.

In *In re Kemmo N.,* a Maryland appellate court upheld an intake officer's decision to proceed through informal adjustment instead of formal prosecution for a youth under age 16 who had originally been charged with "strong arm robbery," theft of less than $300, possession of PCP and possession of PCP with the intent to distribute.[145] The Court recognized that "[t]he informal adjustment … enables the juvenile to avoid the trauma of full involvement in the court system."[146]

Many of the other cases applying this reasoning involve even younger children. In *Matter of Tristan C.,* for example, the Family Court in New York considered the case of a 10-year-old who accidentally shot his best friend. The child was charged with criminally negligent homicide and criminal possession of a weapon in the fourth degree. The court noted that respondent suffered from extreme guilt, suicidal thoughts, flashbacks and nightmares, and had been diagnosed with PTSD and depressive disorder. The court granted a motion to dismiss the case in the interest of justice, noting that "the present juvenile delinquency proceeding by itself has aggravated [Respondent's] psychological trauma and could well impede his recovery."[147] An Ohio court made a similar determination in dismissing charges against a 5-year-old, noting that "the trauma which the impending trial is causing and could cause the family is far more serious than the alleged acts, which … the family] truly believe[s] [were] just kids playing doctor."[148] Another court later concluded that cases may be dismissed in the interest of justice when youth demonstrate symptoms of "any mental illness, incapacity, or other sensitivity which might render him particularly susceptible to undue trauma."[149]

Policy Recommendations

Jurisdictions could further protect vulnerable youth from the trauma of juvenile justice involvement by requiring by statute that youth be diverted from the juvenile justice system and provided with needed treatment for offenses stemming from trauma-related disorders, or when youth might be uniquely vulnerable to trauma in the system. Ideally, treatment provided in lieu of justice system involvement should be administered on a voluntary basis whenever possible, and policy-makers should design the policy to ensure that any diversionary program created does not bring youth into the juvenile justice system who otherwise would not have had such system involvement. Wyoming statute lays the groundwork for such an approach. The law requires judges to recognize and distinguish "the behavior of children who have been victimized or have disabilities, such as serious mental illness that requires treatment or children with a cognitive impairment that requires services from other youth in the juvenile justice system."[150]

Jurisdictions with existing diversion programs should ensure that such programs are trauma-informed. In many jurisdictions, youth may have their cases dismissed if they comply with certain requirements, such as attending school and going to counseling. If the school is not aware of the youth's trauma triggers and needs, or if the counseling program offered is not appropriate for a child with a trauma history, the youth may fail to comply with the program, and end up in the juvenile justice system. A few jurisdictions have promising models for the provision of effective trauma-informed services. Connecticut law, for example, mandates that the judicial branch "develop constructive programs for the prevention and reduction of delinquency and crime among juvenile offenders."[151] The law explicitly requires the services to be tailored to the unique needs of the youth, "culturally appropriate, trauma informed, and provided in the least restrictive environment."[152] It also requires that services be provided to families.[153] Colorado also focuses on effective and appropriate treatment with an emphasis on family. Colorado statute requires the establishment of "family advocacy mental health juvenile justice programs" to:

(5) Focus on youth with mental illness or co-occurring disorders who are involved in or at risk of involvement with the juvenile justice system and be based upon the families' and youths' strengths; and

(6) Provide navigation, crisis response, integrated planning, transition services, and diversion from the juvenile justice system for youth with mental illness or co-occurring disorders.[154]

The statute requires data to be reported with respect to "[y]outh and family outcomes" including an assessment of "family and youth satisfaction."[155] Providing a strength-based family intervention to youth with trauma histories—and requiring assessments that respond to youth and family input—are particularly promising components of diversion policy. Additional pilot programs and research in this area could help clarify the types of services and interventions that work in diverting youth with trauma histories and symptoms from the juvenile justice system.

TRANSFERS TO AND FROM ADULT COURT

Key Points

- Lawyers should use caution raising a youth's trauma history or symptoms in court, as the information may be relied upon to justify adult court jurisdiction;
- State policies should require high-quality services in the juvenile justice system to address the needs of violent youth with trauma histories and symptoms; and
- State policies should require judges to consider a youth's trauma symptoms or vulnerability to trauma as evidence that the case should be addressed in juvenile court.

Case law regarding juvenile transfer suggests that youth may sometimes be tried in the adult system because the court interprets that the trauma symptoms, history, or risk make the youth too damaged to be safe in the community. For this reason, significant policy advocacy

is needed before trauma information can reliably support positive outcomes for youth. Policy advocacy can:

(1) Require high-quality services in the juvenile justice system to address the needs of traumatized youth, particularly those with violent offenses.

(2) Require judges to consider a child's past trauma, or vulnerability to trauma, as an indication that a case is appropriate for juvenile court.

Case Law Analysis

Cases regarding the transfer to and from adult court set forth some of the clearest cautions about the use of trauma information in court. In these cases, courts may consider information about a trauma history or traumatic environments as evidence of the youth's risk of becoming dangerous, and to justify keeping youth in adult court.

In *State in Interest of CAH,* for example, the Supreme Court of New Jersey held that two children should be transferred to adult court, in part because of the challenges of rehabilitation for youth with PTSD.[156] In assessing the amenability of the charged youth to rehabilitation, the juvenile court considered expert testimony; one psychiatrist opined that one of the juvenile defendants had been "suffering from a post-traumatic stress reaction" and another opined that the other defendant "had an adjustment disorder that consisted of inappropriate reactions to stress and feelings of insecurity."[157] The juvenile court credited these experts in concluding that the youths could be successfully rehabilitated by mental health services in a juvenile detention facility.[158] The New Jersey Supreme Court, however, disagreed. It held that the juvenile court had overestimated the potential for rehabilitation of the youth suffering from PTSD and that the juvenile court's decision had failed to adequately account for "the safety and welfare of the public and the nature of the offense."[159] Despite "extensive expert medical testimony"[160] suggesting that both juveniles had experienced psychiatric disorders that increased their impulsivity at the time of their crimes, New Jersey's high Court characterized the juvenile's conduct as "purposeful,"[161] "calculated,"[162] "premeditated,"[163] and deserving of more stringent punishment reserved for "volitional, deliberate and nonimpulsive behavior."[164]

Similarly, in *United States v. Sealed Appellant,* the United States Court of Appeals for the Fifth Circuit upheld a trial court's decision to transfer a juvenile with PTSD to adult criminal court.[165] The appellate court explained that the 15-year-old had a high risk of future violence, as evidenced by his history of anger management problems, his residence in a violent community with exposure to gangs, the high availability of drugs and firearms in his community, and his family instability and lack of support.[166] Thus, the trial court's justification for transferring the youth to adult court rested, in part, on the youth's continued exposure to potentially traumatic experiences.[167]

These two cases are not representative of the response in all jurisdictions. However, they do highlight the risk that childhood trauma will influence judges to see youth as dangerous and incapable of rehabilitation in the juvenile system—and the need for policy advocacy to create a framework in which a child's trauma is cause for treatment rather than punishment.

Policy Recommendations

As a baseline policy matter, courts will not feel confident deciding that youth should be in the juvenile justice system unless the system itself has strong mental health programming with demonstrated success for youth with complex trauma. Evidence-based programs that can show positive outcomes for youth who have committed violent offenses will likely increase the odds that judges will rely on the juvenile system for such youth.

To the extent that states impose adult court jurisdiction on juveniles, policies can help to ensure that trauma information is not misused in transfer decisions. For example, statutes could require judges to consider a child's trauma history, symptoms, or risks as evidence supporting juvenile court jurisdiction. In the context of a juvenile detention statute, for example, Colorado law requires the court to consider "the risk to the juvenile caused by his or her placement in an adult jail, which risk may be evidenced by mental health or psychological assessments or screenings made available to the district attorney and to defense counsel" when making the initial determination about whether to detain a child. The statute also requires consideration of "[t]he relative

ability of the available adult and juvenile detention facilities to meet the needs of the juvenile, including the juvenile's need for mental health and educational services,"[169] and "any emotional and psychological trauma" the child has experienced as one factor in the detention decision.[170] A similar statute could govern transfer decisions, to ensure that the transfer decision responds to the child's trauma experience and treatment needs. The language on the child's history, however, would be more effective if the law made clear that trauma could only be considered as a mitigating factor.

TRAUMA AS A DEFENSE

Key Points

- Legal and policy advocacy efforts should work to establish a "battered child syndrome" defense;
- The defense should be applied to youth with various stress-related disorders; and
- The defense should be applied even when the victim was not the abuser.

Youth may sometimes react violently because they experience trauma triggers. Case law in some jurisdictions recognizes this as a defense, but only when the victim was the abuser. As a policy matter, jurisdictions can shore up such arguments by (1) establishing a trauma-related defense; (2) applying the defense not only to youth with diagnosed post-traumatic stress disorder, but also to those with other stress-related disorders; and (3) applying it beyond the situation of the child's abuser.

Case Law Analysis

Some jurisdictions have recognized battered child syndrome as a defense in manslaughter or murder cases. These cases recognize the clear impact traumatic stress symptoms can have on a young person's actions. Courts apply this reasoning when the abused child harms or kills an abuser, and generally do not apply it when PTSD symptoms are at play in violence against a stranger or an individual who was not implicated in prior abuse. In *State v. Hines*, for example, the Superior Court of New Jersey held that testimony regarding the defendant's PTSD was admissible as "directly relevant to the issues of the honesty and reasonableness of defendant's purported belief that she had to resort to deadly force in order to repel the victim's [her abusive father's] assault."[171] The court observed that certain PTSD symptoms, like "hypervigilance and re-experiencing of prior trauma, are particularly relevant to claims of self-defense by a person afflicted with PTSD because these symptoms can affect a person's state of mind when confronted with a situation similar to the initial traumatic event."[172]

Similarly, an Arizona appellate court found that expert testimony regarding battered child syndrome was admissible in defense of a child who had shot her mother; it helped to explain that victims "live in a state of constant fear of unpredictable violence and abuse."[173] The court concluded that "examples of the terrible and degrading physical and emotional abuse suffered by the juvenile [defendant] and her younger sister" were admissible to show how "such a mental state would cause someone to do an act otherwise violative of her own moral standards."[174]

In *State v. Janes*, the Washington Supreme Court admitted into evidence expert testimony regarding battered child syndrome in support of the defendant's self-defense argument.[175] After describing the 17-year-old defendant's history of severe abuse and abandonment, the Court explained that this type of "chronic abuse," which results in PTSD, is " 'an extreme stressor that exceeds a child's capacity to cope with it or integrate it into their personality, their awareness, their consciousness.' "[176] Victims of a battering relationship live in a hopeless vacuum of "cumulative terror," and hyper-reactivity and learned helplessness are common symptoms. The court explained that "[a]lthough PTSD is classified as a mental disorder, "it is one of the few kinds of psychiatric disorders that is considered a *normal response* to an *abnormal situation.*"[177]

While the case law provides strong language about the effect of PTSD on a child's mental state, the cases occur in a narrow legal context: children harming or killing abusive adults. For obvious reasons, courts are more likely to use a "battered child syndrome" defense when a child lashes out at his or her abuser than at a third party. Courts underscore that the child's belief in

imminent danger must be "reasonable at the time" of the offense.[178] We found no case law to suggest that courts would be responsive to such an argument as applied to a victim who was not in some way a wrongdoer.

Policy Recommendations

The requirement of a "battered child defense" can also be written into state law. In doing so, policy-makers can work to broadly construe the relevant diagnosis to include childhood stress disorders other than PTSD, and to broadly construe the factual circumstances in which such a defense may apply.

TRAUMA IN SENTENCING AND DISPOSITION

Key Points

- Lawyers should recognize that trauma evidence at sentencing or disposition may be interpreted to justify longer or harsher sentences;
- State policies should ensure that high-quality mental health interventions are available in the juvenile justice system and in the community to respond to youth who have been traumatized, particularly those who have committed violent offenses;
- State policies should require judges in adult court to consider youth trauma as a mitigating factor in sentencing; and
- State policies should require judges in juvenile court to consider community-based treatment for youth with trauma symptoms.

Case law is mixed on whether trauma information acts as mitigating or aggravating evidence in sentencing and disposition determinations. When a judge is choosing between two long sentences, trauma may be more likely to be understood as mitigating evidence. In contrast, when the lesser sentence will be short, or when the youth will be placed in the community, a child's past history of trauma may instead be seen as an indication that the child is a risk to public safety. State policy can support a thoughtful use of trauma information at sentencing by: (1) ensuring that high-quality mental health interventions are available both in the juvenile justice system and in the community for traumatized youth, particularly those who have committed violent offenses; (2) requiring that trauma be understood at sentencing or disposition as a mitigating, rather than aggravating, factor in the adult system; and (3) requiring that judges in the juvenile justice system consider whether a youth who acted out because of a trauma history or trauma symptoms could be served through a mental health diversion program or a community-based intervention rather than secure placement.

Juvenile Life Without Parole

Evidence about a youth's trauma history and symptoms is particularly valuable in sentencing hearings that contemplate life without parole. Perhaps because the consequences will include long terms of imprisonment regardless of the outcome of the case, opinions on juvenile life without parole tend to recognize defendants' trauma histories as mitigating evidence. As the Supreme Court explained in *Miller v. Alabama*, an individualized determination of the defendant's circumstances, including the child's exposure to trauma, is vital before a life without parole sentence can be imposed. According to the Court, proceeding without an individualized assessment unconstitutionally precludes the sentencer from considering the "family and home environment that surrounds [the youth]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional."[179] This language not only recognizes the importance of a defendant's trauma history, but also that such experiences are particularly relevant to assessing culpability for youthful offenders, who have little or no control over their environments.

Even prior to the *Miller* decision, other courts recognized the importance of childhood trauma to juvenile life without parole sentences. In *U.S. v. Juvenile*, for example, the Ninth Circuit Court of Appeals overturned a sentence imposed by the district court for several reasons—among them that the lower court had "utterly failed to consider [the juvenile defendant's] own history of victimization."[180] The Ninth Circuit went on to describe the progress that the child had made since the time of his involvement with the justice system, and to conclude that "[g]iven [his] serious needs, the implicit expectation that he would respond instantly to

treatment is patently unreasonable and shows a startling lack of understanding or appreciation for either trauma or adolescent psychology."[181] Similarly, in 2009, striking a life without parole sentence in a nonhomicide case, California's Court of Appeal for the Fourth District gave deference to expert testimony that PTSD can cause "a heightened awareness of potential threats, coupled with a powerful impulse to protect oneself from real or perceived threats, particularly life-threatening ones."[182] The court ultimately held that the defendant's sentence was unconstitutionally harsh based, in part, on the fact that the defendant's mental illness, including PTSD, meant that his "mental functioning and behavior was diminished *beyond* that typical of a 14-year-old."[183]

In the context of life without parole, courts must, and do, consider trauma as a mitigating factor. The open question is whether this reasoning can be extended to other sentencing contexts.

Determinations Under Sentencing Guidelines

Even prior to *Miller*, at least a few courts recognized that childhood experiences may be relevant to sentences under the federal sentencing guidelines. Both the Ninth Circuit and the D.C. Circuit have recognized that "youthful lack of guidance" may justify a downward departure in a sentence (or reduced sentence) when "a past condition ... may have led a convicted defendant to criminality."[184] The Ninth Circuit explained that a "[l]ack of guidance and education, abandonment by parents and imprisonment at age 17 constitute the elements of this mitigating circumstance."[185] In recognizing the departure, but refusing to apply it to an adult defendant, the D.C. Circuit Court emphasized that the defendant could have "left and gone away from this as he became an adult, and therefore I don't see any basis for any departure."[186] In contrast, as the Supreme Court recognized in *Miller,* children do not have the option of leaving dysfunctional environments. For that reason, there is a strong argument that family and neighborhood life and exposure to trauma are particularly relevant in sentencing decisions for youth.[187]

Juvenile Disposition

How trauma information plays out in juvenile dispositions will obviously depend on the jurisdiction, the judge, and the available services. However, in at least some cases, the need for services for past trauma will not outweigh a judge's determination that a child should be placed in a secure facility. In *Matter of Johnny S.*,[188] a New York family court judge considered testimony about a 16-year-old defendant's traumatic early childhood experiences and the role his diagnosed PTSD might have played in his delinquent conduct.[189] The court acknowledged that Johnny was placed into foster care at age four, after being abandoned by his father and his mother, who had a history of substance abuse and incarceration.[190] The court further observed that Johnny "reported being physically and sexually abused and locked in a dark closet for extended periods in a foster home, which was subsequently delicensed."[191] When Johnny returned to his mother's care at age six, he routinely saw her subjected to domestic abuse in the shelters in which they lived. From this experience, he developed PTSD.[192] The court explained that Johnny "perceives his environment as threatening[,…] has difficulty regulating his anger and emotions[, and] acts out through intimidation and violence."[193] As a former gang member, Johnny also experienced trauma from the violent and unexpected death of loved ones. In fact, one of Johnny's friends was murdered the same week that Johnny committed both of the acts for which he was ultimately found delinquent; on another occasion, "John was stabbed five times in the upper body."[194]

Despite this history, the family court placed Johnny in a secure juvenile detention facility rather than a mental health center where he could receive more appropriate treatment.[195] In so doing, the court expressly acknowledged a letter written by the United States Department of Justice to the Governor of New York, which found that the state's detention "facilities provide inadequate treatment planning and services for children with diagnosed mental illnesses, including PTSD."[196] Ultimately, the Court decided to place Johnny in a secure setting.[197] Unlike adult sentencing cases, which generally

impose serious prison time regardless of downward departures, juvenile disposition determinations require judges to make difficult decisions about whether a youth will be safe in a less secure setting. For that reason, in the absence of strong policies protecting youth, there is a risk that information about trauma history and symptoms will be interpreted to support a more secure placement rather than a community-based treatment approach.

Policy Recommendations

As with our policy recommendations around juvenile court jurisdiction, policy change to support better sentencing outcomes should first and foremost ensure that effective community-based disposition options exist to address the needs of youth, and particularly violent youth, with trauma histories. The existence of such programs may increase the likelihood that judges will place youth in community settings, assured that they are receiving treatment likely to reduce symptoms and decrease the risk of recidivism.

Additionally, adult sentencing laws can explicitly require that trauma be considered as a mitigating, and not an aggravating, factor. A Kansas criminal statute provides an example of how such a law might be constructed. The law recognizes that, if "[a]t the time of the crime, the defendant was suffering from post-traumatic stress syndrome caused by violence or abuse by the victim[,]"[198] it is a mitigating circumstance in sentencing. Jurisdictions could broaden this law even further by focusing on the trauma-related behavior without requiring it to be caused by the victim. Similarly, jurisdictions could expand from relying on the narrower diagnosis of PTSD to applying a similar rule to children suffering from other stress-related disorders.

In the juvenile justice system, a similar statute could be created to require judges to consider whether youth who act out because of stress-related symptoms can be served by a mental health diversion program rather than in the juvenile justice system, or a community-based setting rather than a secure placement.

TRAUMA IN COMPETENCY DETERMINATIONS

Key Points

- Legal and policy advocacy should work to ensure that a child's trauma history and symptoms are considered in competency determinations; and
- State policy should ensure that competency assessment tools adequately account for the potential influence of trauma.

Case law is not clear on the extent to which evidence regarding trauma symptoms factors into competency determinations. To address this issue squarely, jurisdictions could require by statute that trauma be considered in competency determinations. Additional research by forensic psychologists on how and when trauma affects competency would provide needed support for such requirements.

Case Law Analysis

Evidence of childhood trauma may play into competency decisions, but current case law on the issue is sparse. Moreover, existing case law suggests that evidence of PTSD may not be dispositive in competency determinations. In one case, for example, the Michigan Court of Appeals heard evidence regarding a defendant's PTSD, Attention Deficit Hyperactivity Disorder, impulse control disorder, and developmental delay, but ultimately concluded that

> respondent's circumstances, standing alone, did not indicate that his mental condition was such that he was unable to understand the nature and object of the proceedings against him and his statements to the court showed a sufficient level of comprehension. Consequently, respondent has failed to establish a plain error in this regard.[199]

To the extent that advocates consider introducing evidence of trauma at the competency stage, they should keep in mind potential risks at subsequent stages in the proceedings, such as the possibility that the information will later influence a judge to place the individual in a secure placement.

Policy Recommendations

States can clarify this area of the law by requiring in statute that trauma be considered in competency determinations. Relatively recent amendments to the Vermont statute governing juvenile court proceedings have created such a requirement.[200] The comments to the amendments specify that the factors considered in a competency determination "should, in an appropriate case, include, but not be limited to, an analysis of past trauma resulting from abuse and violence, the effects of such trauma, and any continuing presence of trauma."[201] Further research by forensic psychologists could better lay the groundwork for advocates to understand the impact of trauma on competency.

TRAUMA IN CONFESSIONS

Key Point

Legal and policy advocacy should work to ensure that trauma be considered as part of the "totality of the circumstances" test in determining the voluntariness of a confession.

While case law is clear that teenagers are less capable than adults of withstanding coercion in an interrogation, the law is not clear about the effect of trauma symptoms on a youth's susceptibility to coercion. To clarify the law in this area, state policy should specifically require that trauma be considered in the "totality of the circumstances" test for a voluntary confession.

Case Law Analysis

In determining the admissibility of a confession, courts must look at whether the confession was voluntary in light of the "totality of the circumstances." Courts have long recognized that adolescents are more susceptible to coercion than adults, and that this difference is legally relevant in determining whether a confession was voluntary. Thus, as early as 1948, in the case of *Haley v. Ohio,* the Supreme Court held a 15-year-old's confession involuntary, concluding that "we cannot believe that a lad of tender years is a match for the police in such a contest."[202] Decades later, the Court applied similar reasoning in *Gallegos v. Colorado*, concluding that a juvenile "cannot be compared with an adult in full possession of his sense and knowledgeable of the consequences of his admissions."[203]

Few published cases address the role of trauma in the voluntariness determination. In one case, however, a California appellate court did factor in a youth's PTSD as part of the "totality of the circumstances" analysis. The expert had opined that "an adolescent who had suffered trauma would operate at a lower level than an adolescent with a normal developing brain."[204] The court agreed that the youth's trauma history and symptoms were relevant, but ultimately concluded that the confession was voluntary.[205] It is not clear how this argument would be treated in other jurisdictions, or what type of expert testimony would be needed to make this case successfully. Additionally, in a bench trial, raising PTSD on a motion regarding the voluntariness of a confession puts the information before the court, with possible consequences at the adjudication or disposition. As a result, advocates should carefully consider potential pitfalls of raising trauma information at this stage.

Policy Recommendations:

As a policy matter, advocates can push for statutes that require trauma to be considered in a "totality of the circumstances" test. Such statutes could clarify that trauma can be relevant even when a youth's symptoms do not meet the requirements for a diagnosis of post-traumatic stress disorder, and can suggest the ways in which trauma may make it difficult for youth to withstand the pressures of an interrogation.[206]

TRAUMA AND JUVENILE CONDITIONS

Key Points

- Legal and policy advocacy efforts should strive to place the burden on judges and probation to ensure that juvenile placements and services do not impose further harm or trauma on youth;
- Legal and policy advocacy efforts should strive to place the burden on judges and probation to ensure that services meet the trauma-related needs of youth in all juvenile justice settings; and
- State policies should require youth and family input as part of required assessments of juvenile placements and services.

Information on trauma should be used to ensure that: (1) juvenile conditions do not impose further trauma on youth; and (2) juvenile justice placements and services respond appropriately to youth with trauma histories and symptoms. While case law provides a solid foundation to support these goals, policy advocacy can codify these approaches, and support them further by requiring strong monitoring, evaluation, and corrective action systems for juvenile justice facilities and services.

Case Law Analysis

Too often, the juvenile justice system itself causes harm to the youth it is intended to serve. Simply being separated from one's family can be highly stressful. In addition, youth are often traumatized or re-traumatized by harsh conditions such as shackling, strip-searches, and solitary confinement.[207] Too often, youth in secure settings also face physical or sexual abuse by other youth or by staff members, and harassment along lines of gender and sexuality.[208]

It is clear that evidence about trauma can be helpful in constitutional litigation regarding conditions. In assessing the constitutionality of strip searches, for example, courts have recognized that being forced to strip in front of a stranger can be "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission"[209] and that "children are especially susceptible to possible traumas from strip searches."[210]

Similarly, courts have recognized the severe harm that can be caused by placing youth in solitary confinement. In one case, for example, a federal court in New York placed great weight on the testimony of numerous experts that solitary confinement would cause serious psychological damage. The court quoted the many expert psychologists and psychiatrists who testified as to the mental health consequences of isolation. As one expert explained, "'[w]hat is true in this case for adults is of even greater concern with children and adolescents. Youngsters are in general more vulnerable to emotional pressures than mature adults; isolation is a condition of extraordinarily severe psychic stress; the resultant impact on the mental health of the individual exposed to such stress will always be serious, and can occasionally be disastrous."[211] Courts have applied similar reasoning regarding the use of restraints,[212] and the problem of sexual and physical abuse and harassment.[213]

That courts recognize that harsh conditions can traumatize youth does not mean that they always prohibit such conditions or hold them unconstitutional. Indeed, in a number of strip search cases, courts justified imposing the strip search despite the trauma it would impose, in the name of protecting incarcerated youth.[214] Nonetheless, evidence, including expert testimony, on the trauma imposed by harsh conditions is sufficiently influential that it can and should play a significant role in conditions litigation.

Case law can also support the argument that youth should receive thoughtful, trauma-informed services, even when in a secure placement. In *In re Johnny S.*,[215] for example, a New York family court judge explained that "there is a substantive due process right to treatment" for those detained by the juvenile court, and that the type and extent of treatment provided must be related to the reason the person is detained.[216] The court further explained that "the conditions of placement may not be punitive nor exclusively designed to incapacitate, but must include treatment and rehabilitation consistent with the needs and best interests of the juvenile."[217] This framework can support the argument that a child who has experienced trauma and is demonstrating related symptoms must be given access to appropriate, targeted treatment.

Policy Recommendations

State policies should protect youth from trauma in placement by prohibiting and severely reducing the use of any interventions that can cause trauma to youth. In the first instance, youth should remain in their own homes or in the most homelike setting possible. To the extent that youth are placed in secure settings, state policies should completely ban the use of isolation,[218] allow strip searches only when there is reasonable suspicion that a youth has contraband that cannot be found or retrieved absent a strip search, and minimize reliance on physical restraints and shackling.

State policies also should require positive youth development programs that encourage problem solving, and evidence-based practices to respond to youth who have experienced trauma. These interventions may also minimize the need for more coercive and traumatic interventions.[219]

The burden should be on the Court system and the state to ensure that conditions are rehabilitative and do not cause harm. States can do so by creating strict licensing requirements for facilities, and by ensuring that independent monitors and ombudsmen systems, as well as regular evaluations, capture information about abuse and harm within facilities, and about the quality of care provided.[220] Once any information about abuse, harm, or ineffective services arises, policies should require immediate corrective action.[221]

Juvenile Justice Recommendations

Courtroom Advocacy Recommendations

Advocates should consider the risk of introducing evidence of trauma when any of the following exist:

- The case raises public safety concerns and the judge may understand a child's trauma history as an indication of future dangerousness.
- The information will be available to the judge in placement-related decisions, particularly when the placement options will range from secure to community-based.
- No policies ensure that the evidence of trauma history or symptoms is used as a mitigator and not as an aggravator.
- There are insufficient resources to treat the child in the community.

Advocates should accentuate:

- The child's capacity to grow and change, as supported by adolescent development research.
- The child's resiliency factors and strengths, to underscore the likelihood of rehabilitation despite past trauma.
- The availability of treatment in the community that successfully addresses trauma issues.
- The trauma that the juvenile justice system, including courts and facilities, can impose, and the potential negative consequences for youth.

Policy Advocacy Recommendations

- Ensure that there are effective treatments available in the juvenile justice system for youth, particularly violent youth, with significant trauma histories.
- Ensure that such juvenile trauma treatment programs exist in community-based settings.
- Review court proceedings to reduce potential trauma triggers in proceedings themselves, and provide trainings to judges and attorneys to improve interactions with youth and families who have experienced trauma.
- Explicitly require that trauma information be used at various stages of the juvenile or criminal justice system, including: to support diversion programs; to support self-defense claims; and to act as mitigating evidence in transfer, disposition, and sentencing proceedings.
- Ensure that trauma is appropriately accounted for in competency determinations and in assessments about the voluntariness of juvenile confessions.
- Ensure that juvenile dispositions provide treatment and do not inflict further harm on youth.

Case Law on Trauma and the Child Welfare System

Decisions referring to trauma and PTSD pervade child welfare case law. As a result, this section is far from comprehensive, but instead focuses on cases that suggest key opportunities and cautions for using trauma research in child welfare advocacy.

This section focuses largely on the adequacy of services provided to youth and families. When traumatized youth and families receive treatment that is not trauma-informed, it can lead them to fail to engage in or drop out of treatment.[222] Moreover, it is not uncommon for courts to blame individuals for their failure to comply, despite the shortcomings in the services provided.[223]

When the issue is the child's failure to succeed with services, courts may be—but are not always—more forgiving. When the issue is the parent's failure, courts frequently see the lack of success as evidence that the parent is unfit. We also examine here the possibility that discharge from the system, especially for older youth who have not found permanency, can be traumatic and can trigger retraumatization.

This section highlights cases that set forth an advocacy framework to help make the case for more appropriate services, identifies some of the possible challenges in making these arguments, and makes policy recommendations that may fill in some of the gaps.

USING INFORMATION ABOUT TRAUMA TO INFORM THE BEST INTEREST DETERMINATIONS AT PERMANENCY REVIEW HEARINGS AND AT DISCHARGE FROM THE CHILD WELFARE SYSTEM

Key Points

- Legal and policy advocacy should ensure that youth receive appropriate services to meet their trauma needs, regardless of cost or easy availability;
- State policies should establish clear standards for high-quality trauma-informed services;
- Legal and policy advocacy should strive to place the burden on the Court and the child welfare system to ensure that high-quality services are provided; and
- State policy should require staff training on trauma services and trauma-informed care.

To support a youth's "best interest," the system must respond appropriately to his or her trauma symptoms and needs.[224] Systems can do this by: (1) ensuring that the decisions are made based on the child's best interest regardless of the easy availability of such treatment or the reimbursement structure; (2) developing clear standards for the type of trauma-informed services expected; and (3) providing staff with the training needed to respond appropriately to youth who have experienced trauma. The first of these three goals can be accomplished through courtroom advocacy. All three can, and should, be accomplished through state policy.

Case Law Analysis

The "best interest" of the child standard provides a strong framework to advocate for youth to receive appropriate trauma-informed services, regardless of the cost or difficulty of finding such services. In framing arguments for such services, advocates should keep in mind the trauma that removing children from their homes causes,[225] and should identify services in their jurisdictions designed to address the needs of youth and families with trauma histories.

The best interest standard can, for example, support a young adult's attempts to keep his or her case open past his 18th birthday and assure that a youth is adequately prepared for discharge before the case is closed. In *In re T.R.J.*,[226] the D.C. Court of Appeals explicitly recognized that the child welfare system could not close out an older youth's case simply because the young man had not succeeded in previous placements. The case provides a legal framework to support an argument for appropriate services even when the services provided to a youth have repeatedly failed. According to the Court of Appeals, T.R.J.'s adolescent depression and suicidal tendencies led him to be unsuccessful at many placements, which in turn led to his exclusion from others. T.R.J., however, clearly articulated his own need for support:

> I want a life. I need somebody to help [m]e with my life. I ain't had nobody to care for me since I was a kid, you know, no guidance, no discipline. So how can I just start doing what I've been doing to survive and try to do everything somebody else tells me? It is going to be hard, but I want a life though. I don't want to be afraid or get killed. I don't think I can do it by myself.[227]

All parties agreed that T.R.J. had unaddressed mental health issues. Nonetheless, the child welfare agency closed T.R.J.'s case. T.R.J. filed a motion alleging both that the termination was not in his best interest and that the system had failed to create and execute independent

living services for him before he aged out of foster care, as required by law.[228] The trial court disagreed, concluding that the case should be closed because:

> The record in this case reveals that nothing that has been done for [appellant] over the years, including foster placements, group homes, and a costly residential placement, has proved effective. DHS is not required to continue to devise ingenious solutions to a troubled respondent's behavioral problems until it finds one that he decides he likes and will accept. There is a limit to what DHS can be expected to provide and spend on any one respondent at the expense of countless other children with problems equally compelling. In the court's judgment, the limit was reached in this case.[229]

The appellate court reversed and remanded to the trial court, holding that "the best interest of the child must be considered when the court acts to terminate the commitment of a child."[230] The appellate court sent the case back to the trial court for the "limited purpose" of applying the best interest standard to T.R.J.'s situation. The appellate court's conclusion suggests that even when youth struggle with court-ordered services, the child welfare system maintains an ongoing responsibility to meet the youth's best interest. In many states, this responsibility extends past the youth's 18th birthday. This may provide advocates with an opportunity to argue for appropriate trauma-informed services, especially for older youth whose trauma issues are often overlooked and who are often blamed for the dearth of developmentally and age-appropriate services.

That the Court raised this question when T.R.J. was old enough to transition to adulthood raises an important point. Trauma issues can affect a child at any point, but are often triggered when youth age out of care. Facing the possibility of being alone, dealing with the challenges of finding housing and health care and managing a budget can all trigger serious concerns about abandonment, and can act as a trauma trigger for older youth.[231] It is therefore vital that advocates continue to address trauma issues for older youth, prevent youth from being discharged from care without needed supports, and work to ensure that their clients have resources to help them address fear and anxiety during the transition planning process.

The notion that the child welfare system must serve the child's best interest by providing services is further confirmed by case law establishing that funding should not be an obstacle to implementing an appropriate disposition. For advocates arguing that a child needs a specific type of treatment at disposition—for example, strength-based trauma-informed services in the home—this case law can provide a useful model.

In *In re Tameka M.*,[232] the Pennsylvania Supreme Court considered whether the child welfare system has an obligation to provide resources that are not reimbursable by the state, but are in the best interest of the child—in this case, Montessori school. The court concluded that "in order to vindicate the fundamental statutory right of a dependent child to her own 'protection and physical, mental and moral welfare,'" it could order that "a county agency, and ultimately the county itself, [would] have to pay for [the needed services] through the raising and/or expenditure of tax revenues."[233] In other words, if a reimbursable option is adequate to meet the child's needs, it must be chosen over a nonreimbursable one, but if the only option that adequately serves the individual child is not reimbursable, the state still has an obligation to provide proper treatment. To do anything less would "deprive [the child] of due process and of her fundamental rights under the laws" of the state.[234] The decision further supports ensuring that a youth is provided with appropriate services to address his or her trauma needs, regardless of the funding implications.

Policy Recommendations

While the case law sets forth a useful advocacy framework, it can only be successful if the treatment available effectively meets the needs of youth. State and federal policies can create the standards and requirements to ensure such treatment. Currently, under the Federal Child and Family Services Improvement and Innovation Act of 2011 (P.L. 112-34), the state must develop and implement

> a plan for meeting the health and mental health needs of infants, children, and youth in foster care that includes ensuring that the provision of health and mental health care is child-specific, comprehensive, appropriate, and consistent (through means such as ensuring the infant, child, or youth has a medical home, regular wellness medical visits, *and addressing the issue of trauma*, when appropriate).[235]

The state plan must ensure that the "emotional trauma associated with a child's maltreatment and removal from home" is addressed.[236] This policy provides a good starting place, but more is needed to ensure that effective services are used.

Nebraska statute provides further definition as to what such services should look like.[237] Under Nebraska law, a foster care reimbursement rate committee is tasked with creating "a statewide standardized level of care assessment and shall tie performance with payments to achieve permanency outcomes for children and families," with the goal of "maximiz[ing] the utilization of federal funds to support foster care."[238] The statute mandates that a "statewide standardized level of care assessment" that is "research-based, supported by evidence-based practices, and reflect[s] the commitment to systems of care and a trauma-informed, child-centered, family-involved, coordinated process."[239] By providing more clarity about expectations, Nebraska's law goes further toward setting in place necessary trauma-informed processes and services. However, more detailed requirements for data gathered on services provided, including consumer input from children and families served, and analysis by experts in the provision of trauma-informed mental health care, would even more securely ensure that youth and families are receiving appropriate, effective services.

States can also minimize the risk of trauma by ensuring that youth are not discharged from care without sufficient planning and supports. In a number of states, court rules prevent a discharge from care unless the youth has a detailed transition plan in place addressing housing, education, employment, and health care. These rules can significantly reduce the chance of trauma at discharge from care.[240] Moreover, states should consider directly addressing the risk of trauma at discharge in transition planning statutes and rules.

Staff training can further support the goal of connecting youth with appropriate trauma-informed services. State policies can require such trainings. Texas, for example, requires training on "trauma-informed programs and services" to be included in all trainings for "foster parents, adoptive parents, kinship caregivers, department caseworkers, and department supervisors."[241] The department also requires caseworkers and supervisors to take an annual refresher training course on trauma-informed programs and services.[242] The program undergoes an annual evaluation of its effectiveness "to ensure progress toward a trauma-informed system of care."[243] This model can be replicated in other states, with additional protections: to ensure that such training is effective, systems should rely on independent mental health professionals to develop trainings and assess them regularly to confirm that they are meeting key goals in educating stakeholders not only about trauma, but also about resilience and effective treatment opportunities.

CHILD WELFARE PLACEMENTS

Key Points

- Legal and policy advocacy should seek to place the burden on the courts and the child welfare agency to ensure that no youth placement inflicts harm or trauma on youth;
- Legal and policy advocacy should seek to place the burden on the courts and the child welfare agency to ensure that the placement provides needed nurturing and support, including trauma-informed services; and
- State policy should mandate youth and family input as part of required assessments of child welfare placements.

When a child is placed outside of his or her home, she should be provided with a placement that: (1) does not inflict further harm or trauma; and (2) provides needed nurturing and support. While case law can lay the groundwork for these goals to be reached, strong policies are also needed to ensure that they occur. Policies that provide clear standards for child welfare—and particularly that establish accountability and licensing

requirements for child welfare placements—can help to ensure that such placements provide the care children deserve. Policies also should ensure that all players, including facility staff, are well-trained in trauma-informed care. The burden should fall on the courts and the child welfare agency to assess programs and ensure that they are meeting the needs, including the trauma-specific needs, of youth in their care.

In most cases, the best response for a child who has experienced trauma is to provide services in the child's own home, to the child and to his or her family.[244] However, when children are placed out of their own homes, there are strong substantive due process claims that placements should not impose trauma; and services should address a child's trauma-related needs. In *Doe by Johanns v. New York City Dept. of Social Services*,[245] for example, the Court determined that New York City's practice of keeping children without placements at the city offices during the day, and occasionally overnight, violated both the mandate of the child welfare system as well as the Due Process Clause of the United States Constitution.

The Court described the conditions facing the children, noting that "[t]he children involved in this lawsuit [were]repeatedly kept in city offices during the day, d[idn]'t know where they [would] sleep at night and carr[ied] their possessions from place to place in plastic garbage bags."[246] In considering the constitutionality of "such a system of overnight foster care 'placement' which results in the city's continued ability to remove children from their homes without having other homes for them[,]" the Court focused on the stories of individual children, "for whom entering foster care has virtually meant joining the ranks of New York's homeless."[247] The Court found that the city was depriving the children of what they were owed: "decent, habitable living conditions, as well as rational decisions about where and how they would live."[248] Importantly, the Court focused on child development and the disastrous impact that trauma can have on it:

> Children are by their nature in a developmental phase of their lives. If they do not move forward, they move backward. Positive efforts are necessary to prevent stagnation, which, for children, is synonymous with deterioration. The evidence indicates an even more egregious situation. The problems of children who participate in repeated overnights are exacerbated by the experience. Children adjudicated PINS [Persons In Need of Supervision] for truancy have, in the past, not been sent to school. Children who are found to be in need of supervision are unsupervised and go AWOL. The instability which characterizes the night-to-night program is completely contrary to the foster care system's general goal of permanency.[249]

Quoting at length from various expert opinions, the Court emphasized that the consensus view of doctors was that "the multiple overnight experience of these children has a short- and long-term negative effect on their abilities to trust and form stable relationships either in later foster care placement with family members or with other members of society,"[250] and further that:

> Multiple placements have disastrous effects on the abilities to learn, trust, and relate to others. Such children already made vulnerable by the circumstances are placed at further risk by the vagaries of foster care. Serious retardation in reading, antisocial behavior, apathetic states and defects in socialization have all been compellingly described as a sequel to this experience.[251]

In rendering its decision, the Court observed that "[i]t seems self-evident that the Department of Social Services would not be acting in accordance with its statutory purpose if it caused to be abused or neglected the very children it removed from home because they were victimized by their parents."[252] The Court makes clear that the system itself is liable when it causes harm or trauma to children.

The Court also emphasized that the treatment children receive in care must bear a reasonable relationship to the goal of "furthering the best interest of children by helping to create nurturing family environments without infringing on parental rights."[253] This language about nurturing family environments provides further support for the argument that the agency has a responsibility to provide appropriate, targeted, care. For youth who have experienced trauma,

this will be best effectuated by providing trauma-informed child welfare placements and treatment.

Policy Recommendations

To ensure that placements are providing nurturing, trauma-informed care—and not inflicting further harm on youth—state policy-makers should establish systems to require high standards of trauma-informed care, and to regularly assess the quality of care in child welfare placements. The policies referred to above that support best interest advocacy also support nurturing placements. Additional policies can specifically set forth requirements for placement facilities. Maryland statute, for example, mandates that all policies or practices used in, as well as the physical environments of, all state facilities are consistent with trauma-informed principles; the physical spaces are evaluated and modified if necessary at least once a year to ensure compliance.[254] To further ensure that children receive quality trauma-informed care, and are not harmed by their child welfare placements, states also should require assessment of such facilities to ensure that they are meeting their goals. These assessments should rely on the input of independent mental health professionals with expertise in trauma, and should include feedback from children and families served by the systems. Policies should make clear that a facility that fails to provide appropriate care, and fails to correct problems, will not continue to be licensed.

FAMILY REUNIFICATION AND THE TERMINATION OF PARENTAL RIGHTS

Key Points

- Legal and policy advocacy should define "reasonable efforts to reunify" to require trauma-informed and trauma-appropriate services for both parents and children; and
- State policies should require high-quality services for parents and children affected by trauma to prevent out-of-home placement and support efforts to reunify.

To support families while addressing trauma, systems should: (1) define "reasonable efforts to reunify" to require trauma-informed and trauma-appropriate services for both parents and children; and (2) develop high quality services for parents and children affected by trauma to support them in efforts to reunify. Because current case law frequently justifies removing a youth from his or her parent because of the trauma experienced by the parent, the child, or both, strong state policies will be needed to ensure that these goals are met.

Case Law Analysis

In numerous published cases, evidence of family trauma is used to justify terminating parental rights. Although these cases more often focus on younger children, they are also relevant to adolescents both because many teenagers in the dependency system become parents, and because many still seek to reunify with their own parents.

Ideally, research around trauma symptoms and trauma interventions should help shape the arguments about the child welfare system's duty to make "reasonable efforts to reunify" a family before terminating parental rights. In at least some cases, however, courts focus on the parent's failure to comply with services offered, rather than the adequacy of services provided. For example, in *In re A.R.*,[255] A.R.'s mother argued that the child welfare system failed to make reasonable efforts to assist her, the parent, in coping with her PTSD—more specifically, that the counseling she received did not address her past sexual abuse. In upholding the termination of parental rights, the Court explained that

> in cases involving a parent with known mental health deficiencies, "we have repeatedly found that the Department's failure to provide needed psychological or psychiatric treatment constitutes a failure to exercise reasonable efforts." [Citations omitted.] However, we must determine what constitutes "reasonable" efforts based on the circumstances of the case before us. [Citation omitted.]

> We find it interesting that Mother now claims she should have been provided additional counseling, when Mother did not complete the counseling that was provided. Although the trial court found that Mother did substantially comply with the permanency plan as a whole, it specifically found she had not completed the required counseling … .[256]

Research suggests that this behavior is common—parents frequently fail to comply with treatment when it does not account for their trauma histories.[257] Nonetheless, this court's approach suggests that without further policy changes to shore up the implications of the research, advocates may face significant challenges in making the argument in court.

The focus on needed services can be further complicated when both parent and child have significant trauma-related needs. In *In re Aiden S. et al.*,[258] for example, the Connecticut Superior Court considered a mother's willingness and ability to participate in her son, Aiden's, therapy, in assessing whether to terminate her parental rights. Aiden had been exposed to sexual behaviors at home, had been physically (and likely sexually) abused by his mother's boyfriend, and had witnesses domestic violence against his mother. The court focused on the child's need for trauma treatment, as well as the mother's trauma history.

The court noted that during Aiden's "six placements in his first 11 months of foster care, … his "behaviors were marked by extreme aggression, out-of-control conduct and highly sexualized, bizarre behaviors which had put even his sister, Diana, at risk" and had led to a recommendation that he not be placed with his sister, or any other children.[259] Eventually Aiden was placed in a foster home where he continued to exhibit extremely violent and inappropriate sexual behaviors, both at home and in school, toward his teachers, foster parents, social workers and other providers.[260] During the time he spent at this foster home, Aiden began receiving intensive mental health services.[261] While initial therapeutic attempts were unsuccessful, Aiden thrived after receiving In-home Psychiatric Services for Children and Adolescents (IICAPS), which enabled him to consistently control his anger and defiant behaviors, "using breathing techniques, journaling and other strategies which he learned from the IICAPS clinicians."[262] He also thrived with individualized Trauma-Focused Cognitive Behavioral Therapy (TFCBT), which brought his diagnosis of Adjustment Disorder down to Post Traumatic Stress Disorder.[263]

In terminating Aiden's mother's rights, the Court emphasized that "[i]n order for the TFCBT model to be effective, particularly for a younger child, the caregiver needs to be involved throughout the course of treatment and the child's home environment needs to be stable."[264] The Court concluded that "[w]hile the evidence before the Court amply demonstrates that Aiden's current foster home has been extraordinarily committed to supporting Aiden's mental health treatment, the same cannot be said for" his birth mother.[265] Ultimately, the Court found it "inconceivable" that "Aiden could continue his progress in therapy if returned to mother's care."[266] The Court focused on the fact that the mother, Erin S., also was "'an extremely traumatized person'" who herself suffered from PTSD and had:

> a tragic personal history. Her own mother was drug-addicted through most of Erin S.'s childhood, during which Erin S. was physically and sexually abused by her mother's drug-addicted friends. Subsequently, Erin S. lived with her maternal grandmother and her husband, who were alcoholics. Their household was also turbulent although not actively abusive. Eventually, Erin S. became involved with the fathers of her children, all of whom were physically abusive to her.[267]

The Court detailed all of the ways in which Aiden's mother was noncompliant in the treatment the Court had ordered for her, including participation in services and therapy. The Court also emphasized the degree to which she continued to allow her boyfriend to be involved in her life (including living with him upon his release from incarceration), despite the fact that Aiden had a protective order against him. Ultimately, the Court based the termination decision on the fact that, despite the system's reasonable efforts, she would not be able or willing to participate as significantly as would be necessary in Aiden's therapy. This decision was against the wishes of Aiden, who "expressed his affection for his mother and his desire to return to her care."[268] While the case shows a system working hard to meet the needs of

children, it leaves open whether a more family-focused intervention might have succeeded in helping both Aiden and his mother with their mutual goal of re-unification.

Policy Analysis

While there may be situations that require a child to be removed from his or her home, these should be rare. In most cases, efforts should focus on policies that support families—both to prevent child removal in the first instance, and to support reunification once a child has been removed. Connecticut, for example, has established a requirement of "family support centers" to serve as resources for system-involved families and address various needs, including the impacts of exposure to trauma. Each center is a community-based resource "for children and families against whom a complaint has been filed with the Superior Court … that provides multiple services, or access to such services, for the purpose of preventing such children and families from having further involvement with the Court as families with service needs."[269] By statute, each center

> shall provide, or ensure access to, appropriate services that shall include, but not be limited to, screening and assessment, crisis intervention, family mediation, educational evaluations and advocacy, mental health treatment and services, including gender specific trauma treatment and services, resilience skills building, access to positive social activities, short-term respite care and access to services available to children in the juvenile justice system.[270]

The legislation is particularly strong, as it emphasizes prevention of child removal, and also sets in place an assessment requirement, establishing that the "Court Support Services Division shall conduct an independent evaluation of each family support center to measure the quality of the services delivered and the outcomes for the children and families served by such center."[271] In addition to requiring effective, data informed approaches to prevention services, states should explicitly define "reasonable efforts" as requiring appropriately matched services for an individual child or family's needs, including their trauma-related mental health needs.[272]

Child Welfare Recommendations

- Craft arguments around the "best interest" of the child that rely on research regarding effective trauma-informed interventions, and that hold the state to high standards in providing such services, including trauma-informed services to older youth aging out of foster care;
- Craft arguments around "reasonable efforts" to reunify or to achieve permanency, and that hold the state to high standards in providing trauma-informed services to both youth and their families;
- When raising information about an individual's trauma—particularly a parent's trauma—focus on effective interventions and the parent's capacity for resilience;
- Require strong prevention programs and services for youth and families that are based on research regarding what works for people with trauma histories;
- Clarify that out-of-home placement should be used only when necessary;
- Ensure that any out-of-home placement provides a nurturing environment and is effective for youth with trauma histories;
- Assess placements and services regularly, relying on the expertise of medical and mental health professionals, as well as consumer input from children and families;
- Withdraw support and licensing from any facility that fails to meet the high standards set forth for trauma-informed services for youth and families; and
- Establish that the child welfare system's efforts are not reasonable if the care provided to youth and families is not appropriate for their trauma-related needs.

VII. CONCLUSION

This publication sets forth basic background, case law analysis, and policy recommendations for the juvenile and criminal justice systems, and for the child welfare system.

In the juvenile and criminal justice systems, we recommend that advocates recognize the risks and benefits of raising trauma issues at various stages in the delinquency and criminal justice processes. We set forth policy recommendations that will ensure that children with trauma histories are provided with needed mental health services, and are served on a voluntary basis in their communities whenever possible.

In the child welfare system, we suggest strategies for lawyers for children to incorporate research on trauma into arguments around the "best interest of the child" or the requirement of "reasonable efforts" to reunify a family or to provide a youth with permanency. We also provide policy recommendations that center on ensuring that treatment is effective, that families receive supportive services appropriate to their trauma needs—on a voluntary basis whenever possible—and that youth and families are not blamed for failing to comply with treatment that is not appropriately matched to their needs.

In both systems, we underscore how courtroom advocacy and policy change should be used to protect youth and families from system-imposed harm and trauma.

Our recommendations, however, are only first steps in a larger project to examine how trauma issues play out in court, and how the legal field should respond. Further research should include a survey of attorneys to gather more information about how legal arguments based on trauma information and research play out in court in their jurisdictions—since most of this information is not recorded in published opinions. Additional research should also gather input directly from youth and families served by both systems to identify their understanding of the strengths and weaknesses of the systems in addressing trauma-related issues. Further research in collaboration with the medical and research communities should also be undertaken to build on our understanding of how children and families are resilient, and if and how state systems can further support such resilience. Additionally, research in the field of psychology may give the field a deeper understanding of the role of trauma in a child's competency to stand trial or capacity to withstand pressure in an interrogation.

More importantly, policy development, pilot programs, and courtroom advocacy efforts can take the ideas emerging from this publication, implement them, assess them, and begin to determine what can work to improve outcomes for youth and families.

Too frequently, we ask youth and families to make drastic changes without stepping back to examine whether our systems themselves need to change to better meet the needs of the community. Research on trauma gives us a new lens through which to examine our legal advocacy and our public systems, and to identify new strategies to improve outcomes for youth and families.

ENDNOTES

Throughout this publication, including all citations, we have retained the original racial/ethnic language used in the works of the authors cited.

[1] *See* Sandra L. Bloom, M.D., Laying the Groundwork: The Impact of Trauma on Brain Development, Presentation to the Juvenile Law Center Trauma and Resilience Convening (Jan. 28, 2013) [hereinafter Laying the Groundwork]; *see also* Danya Glaser, *Child Abuse and Neglect and the Brain—A Review*, 41 J Child Psychol. & Psychiatry 97 (2000) (examining impairments of the developing brain attributable to, or caused by, abuse and neglect). These early experiences can also have lifelong health consequences. *See* Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 Am. J. Preventative Med. 245 (1998).

[2] Glaser, *supra* note 1, at 111.

[3] Glaser, *supra* note 1, at 106–109.

[4] *Id.* at 98–99.

[5] *Id.* at 103.

[6] *Id.* at 111.

[7] *Id.*

[8] *See* Lisa Pilnik et al., Safe Start Ctr., Victimization and Trauma Experienced by Children and Youth: Implications for Legal Advocates 2 n.3 (Sept. 2012), *www.safestartcenter.org/pdf/issue-brief_7_courts.pdf* (last visited Oct. 14, 2013) (citing David Finkelhor et al., Off. of Juv. Just. & Delinq. Programs (OJJDP), Poly-victimization: Children's Exposure to Multiple Types of Violence, Crime, and Abuse (Oct. 2011), *available at* www.unh.edu/ccrc/pdf/jvq/Polyvictimization% 20OJJDP%20 bulletin.pdf).

[9] Cally Sprague, Nat'l Child Traumatic Stress Network (NCTSN), Judges and Child Trauma: Findings from the National Child Traumatic Stress Network/National Council of Juvenile and Family Court Judges Focus Groups (Aug. 2008), *available at* www.nctsn.org/sites/ default/files/assets/pdfs/judicialbrief.pdf [hereinafter Judges and Child Trauma]; *see also* Kim T. Mueser et al., *Trauma and PTSD Among Adolescents With Severe Emotional Disorders Involved in Multiple Service Systems*, 59 Psychiatric Servs. 627 (2008), *cited in* Robert Kinscherff, Nat'l Ctr. for Mental Health & Juv. Just., A Primer for Mental Health Practitioners Working With Youth Involved in the Juvenile Justice System (Jan. 2012), *available at* www.tapartnership.org/docs/jjResource_ mentalHealthPrimer.pdf.

[10] Linda A Teplin et al., OJJDP, The Northwestern Juvenile Project: Overview (Feb. 2013), *www.ojjdp.gov/pubs/234522.pdf*. The NJP studied 1,829 young people (ages 10–18) who were arrested and detained in at the Cook County Juvenile Temporary Detention Center (CCJTDC), between 1995 and 1998, to assess the mental health needs and long-term outcomes for detained youth. The study found that of those youth with PTSD, more than half reported "witnessing violence as the precipitating trauma." *Id.* at 10. Of those same youth, "93 percent also met diagnostic criteria for at least one comorbid psychiatric disorder." *Id.* The study also found that 83 percent of youth surveyed reported experiencing physical abuse from their parents or caregivers. *Id.* at 12.

[11] Julian D Ford et al., *Complex Trauma and Aggression in Secure Juvenile Justice Settings,* 39 Crim. Just. & Behav. 694 (2012).

[12] Judges and Child Trauma, *supra* note 9 at 1; *see also* Reg'l Research Inst. Human Servs., Portland State Univ., *Complex Trauma in Children and Adolescents*, 21 Focal Point 4, 4 (2007), *available at* http://pathwaysrtc.pdx.edu/pdf/fpW0702.pdf [hereinafter *Complex Trauma*].

[13] *See, e.g.*, NCCD Ctr. Girls & Young Women, Understanding Trauma Through A Gender Lens, *available at* www.nccdglobal.org/sites/default/files/publication_pdf/understandingtrauma.pdf (last visited Oct. 14, 2013).

[14] Kristine Buffington et al., Nat'l Council of Juv. & Fam. Ct. Judges, Ten Things Every Juvenile Court Judge Should Know about Trauma and Delinquency (July 1, 2010), *available at* www.ncjfcj.org/ sites/default/files/trauma%20bulletin_0.pdf.

[15] *See, e.g.*, Judges and Child Trauma (reporting the results of focus groups conducted to understand how knowledgeable juvenile and family court judges are about child trauma and to identify ways to work to promote education on the issue).

[16] Taskforce on Children Exposed to Violence, Dep't of Justice, *available at* www.justice.gov/defendingchildhood/task-force.html (last visited Oct. 14, 2013).

[17] Simultaneously, a significant body of work is asking how juvenile justice and child welfare systems themselves can better respond to trauma, or can become "trauma-informed systems." *See, e.g.*, Cheryl Smithgall et al., Families' Futures: Using Family Assessments to Inform Perspectives on Reasonable Efforts (2012), *available at* www.chapinhall.org/research/report/parents'-pasts-and-families'-futures-using-family-assessments-inform-perspectives; Jenifer Goldman Fraser et al., Child Exposure to Trauma: Comparative Effectiveness of Interventions Addressing Maltreatment, Comparative Effectiveness Review Number 89 (April 2013) *available at* www.ncbi.nlm.nih.gov/books/NBK137808/; Karen Mahoney et al., NCTSN, Trauma-Focused Interventions in the Juvenile Justice System, (2004), *available at* www.nctsn.org/sites/default/files/assets/pdfs/trauma_focused_interventions_youth_jjsys.pdf. Because we focus here on legal practices, these studies—while important—are largely beyond the scope of this publication.

[18] *See, e.g.*, Eliza Patten &Talia Kraemer, Practice Recommendations for Trauma-Informed Legal Services: A Focus on Relationship (unpublished manuscript) (outline on file with the Juvenile Law Center) (emphasizing the importance of building a relationship with one's client and, drawing on the public health approach of "universal precautions," advocating for preventively adopting a trauma-informed stance in *all* attorney-client relationships and, at minimum seeking to "do no harm").

[19] Promising research in this area includes, for example, Angela Duckworth et al., *From Fantasy to Action: Mental Contrasting with Implementation Intentions (MCII) Improves Academic Performance in Children*, 4 Soc. Psychol. & Personality Sci. 745 (February 11, 2013), *available at* http://spp.sagepub.com/content/earl y/2013/02/08/1948550613476307.

[20] Eileen Poe Yamagata & Michael A. Jones, Nat'l Council on Crime & Delinquency (NCCD) And Justice for Some: Differential Treatment of Minority Youth in the Justice System (2000), *available at* www.cclp.org/documents/BBY/jfs.pdf.

[21] *See, e.g.*, Alice M. Hines et al., *Factors Related to the Disproportionate Involvement of Children of Color in the Child Welfare System: A Review and Emerging Themes*, 26 Child. & Youth Servs. Rev. 507 (2008) (describing race and class biases in initial reporting and subsequent processing of children in the child welfare system).

[22] E. Jane Costello et al., *The Prevalence of Potentially Traumatic Events in Childhood and Adolescence*, 15 J. Traumatic Stress 99, 101 (2002).

[23] *Number of Suicide and Homicide Victims by Age and Race/Ethnicity, 1990–2010*, OJJDP (Aug. 5, 2013), *available at* www.ojjdp.gov/ojstatbb/victims/qa02703.asp?qaDate=2010.

[24] Hines et al., *supra* note 21; Shannon Stagman & Janice L. Cooper, Nat'l Ctr. Child. in Poverty, Children's Mental Health: What Every Policymaker Should Know, (Apr. 2010), *available at* www.nccp.org/ publications/pub_929.html.

[25] *See* Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 132 S. Ct. 2455 (2012).

[26] JDB v. North Carolina, 131 S. Ct. 2394, 2403 (2011).

[27] Julian Ford et al., *Complex Trauma Among Psychiatrically Impaired Children: a Cross-Sectional, Chart-Review Study*, 70 J. Clinical Psychiatry 1155 (2009); Julian Ford et al., *Identifying and Determining the Symptom Severity Associated with Polyvictimization Among Psychiatrically Impaired Children in the Outpatient Setting.* 16 Child Maltreatment 216 (2011).

[28] *See, e.g.*, Sue Burrell, Nat'l Center for Child Traumatic Stress, Trauma and the Environment of Care in Juvenile Institutions (Aug. 2013), *available at* www.njjn.org/uploads/digital-library/NCTSN_trauma-and-environment-of-juvenile-care-institutioan_Sue-Burrell_September-2013.pdf.

[29] *See, e.g.*, *id.*

[30] Sandra Simkins, *Out of Sight, Out of Mind: How the Lack of Postdipositional Advocacy in Juvenile Court increases the Risk of Recidivism and Institutional Abuse,* 60 Rutgers L. Rev. 207 (2007).

[31] Christina L. Riggs Romaine, Juvenile Decertification in Philadelphia County: a Model for Jurisdiction-Specific Research (May 2010) (unpublished dissertation, Drexel University).

[32] *See, e.g.*, Robert Kinscherff, Technical Assistance Partnership for Child & Fam. Mental Health, A Primer for Mental Health Practitioners Working With Youth Involved in the Juvenile Justice System (Jan. 2012), *available at* www.tapartnership.org/docs/jjResource_mentalHealthPrimer.pdf.

[33] *See, e.g.*, Marty Beyer, *Too Little, Too Late; Where Do We Go From Here to Achieve Reasonable Efforts?*, Strengths/Needs-Based Support for Children, Youth & Families, *available at* www.martybeyer.com/page/43/99/ (last visited Oct. 24, 2013).

[34] *See, e.g.*, The Chadwick Trauma-Informed Systems Project, Creating Trauma-Informed Child Welfare Systems: A Guide for Administrators, Chadwick Center for Children and Families 7, 10 (2013) [hereinafter Creating Trauma-Informed Child Welfare Systems]; *see also The Risk-Need-Responsivity Model for Assessment and Rehabilitation*, Urban Inst., *available at* www.urban.org/projects/tjc/toolkit/module5/section2_1.html (last visited Apr. 10, 2014) (explaining that "the risk and needs of the incarcerated individual should determine the strategies appropriate for addressing the individual's criminogenic factors before and after release").

[35] *See, e.g.*, State v. Hines, 696 A.2d 780, 786–88 (N.J. Super. 1997); Matter of Appeal in Maricopa County, 893 P.2d 60, 63 (Ariz. Ct. App. 1994); State v. Janes, 850 P.2d 495, 496–503 (Wash. 1993); State v. Nemeth, 694 N.E.2d 1332 (Ohio 1998); *infra* notes 165–172 and accompanying text.

[36] The focus of this publication is on legal and policy approaches that will affect courtroom advocacy strategies. While important, it is beyond our scope here to explore how a client's trauma history shapes the lawyer-client dynamic, or affects a youth's perception of courtroom experiences.

[37] Bonnie Benard, *The Foundations of the Resiliency Framework*, Resiliency in Action, *available at* www.resiliency.com/ free-articles-resources/ the-foundations -of-the-resiliency-framework/ (last visited Oct. 14, 2013) (For children "born into seriously high-risk conditions such as families where parents were mentally ill, alcoholic, abusive, or criminal, or in communities that were poverty-stricken or war-torn" studies suggest that at least 50%—and often closer to 70%—of youth develop social competence and lead successful lives despite exposure to severe stress).

[38] *See, e.g.*, Robert Harris et al., Children Whose Parents Have Experienced Childhood Trauma: Challenges, Obligations, and Reasonable Efforts for Reunification, Presentation at Chapin Hall at the University of Chicago: Child and Family Policy Forum (May 14, 2013) (noting that "[a] return to positive functioning is always possible"); *see also Complex Trauma*, *supra* note 12 at 5 ("It is important to note that supportive and sustaining relationships with adults— or, for adolescents, with peers—can protect children and adolescents from many of the consequences of traumatic stress. When interpersonal support is available, and when stressors are predictable, escapable, or controllable, children and adolescents can become highly resilient in the face of stress.").

[39] Julian D. Ford et al., *Treatment of Complex Posttraumatic Self-Dysregulation*, 18 J. Traumatic Stress 437, 442 (2005), *available at* http://delphicentre.com.au/uploads/Courtois-C-et-al-2005-Treatment-of-Complex-Posttraumatic-Self-Dysregulation.pdf.

[40] Felitti et al., *supra* note 1.

[41] American Psychiatric Association, Diagnostic and Statistical Manual 271 (5th ed. 2013).

[42] Tian Dayton, Heartwounds: The Impact of Unresolved Trauma and Grief on Relationships 41 (1997) [citing Erich Lindemann, *Symptomatology and Management of Acute Grief*, 101 Am. J. Psychiatry 141 (1944)].

[43] Substance Abuse & Mental Health Servs. Admin. (SAMHSA), Trauma Definition (Dec. 10, 2013), *available at* www.samhsa.gov/traumajustice/traumadefinition/%20definition.aspx; *see also* Wendy D'Andrea et al., *Understanding Interpersonal Trauma in Children: Why We Need a Developmentally Appropriate Trauma Diagnosis*, 82 Am. J. Orthopsychiatry 187 (2012).

[44] *Polyvictimization*, Safe Start Ctr., *available at* www.safestartcenter.org/pdf/ Tipsheet_Polyvictimization.pdf (last visited Oct. 14, 2013).

[45] *Id.*

[46] Mueser et al., *supra* note 8 at 632.

[47] Judith A. Cohen & Michael S. Scheeringa, *Post-traumatic Stress Disorder Diagnosis in Children: Challenges and Promises*, 11 Dialogues in Clinical Neuroscience 91 (2009), *available at* www.ncbi.nlm. nih.gov/pmc/articles/PMC3181905.

[48] Complex Trauma, *supra* note 11 at 4. *See also* Christine A. Courtois & Julian Ford, *Treating Complex Trauma: A Sequenced Relationship-Based Approach*. New York: Guilford (2013); Julian Ford, JD, & Christine Courtois, (Eds.). *Treating Complex Traumatic Stress Disorders in Children and Adolescents*. New York: Guilford Press (2013).

[49] Bessel A. van der Kolk, *Developmental Trauma Disorder: Towards a Rational Diagnosis for Children with Complex Trauma Histories*, 35 Psychiatric Annals 401 (2005), *available at* www.traumacenter.org/products/ pdf_files/preprint_ dev_ trauma_disorder.pdf (last visited Oct. 14, 2013) [Hereinafter "Developmental Trauma Disorder"].

[50] *Complex Trauma*, *supra* note 12, at 4.

[51] *See* van der Kolk, *supra* note 49 at 3.

[52] *Complex Trauma*, *supra* note 12 at 5–6. It is important to note that youth with complex trauma will not necessarily meet all of these conditions—often, they will exhibit only some but not necessarily all of these problems.

[53] *Id.* at 4.

[54] *Id.* at 6.

[55] David Finkelhor et al., *Revictimization Patterns in a National Longitudinal Sample of Children and Youth*, 31 Child Abuse & Neglect 479 (2007); David Finkelhor et al., OJJDP, Poly-victimization: Children's Exposure to Multiple Types of Violence, Crime, and Abuse (Oct. 2011), *available at* www.unh.edu/ccrc/pdf/jvq/Polyvictimization%20OJJDP%20bulletin.pdf.

[56] *Poly-victimization*, *supra* note 44 at 5; Felitti et al., *supra* note 1 at 245 (finding that children with four or more adverse childhood experiences were four to twelve times more likely to struggle with depression, suicide attempts, alcoholism, and drug abuse as adults).

[57] *Poly-victimization*, *supra* note 44 at 5 (stating that Polyvictims, with an average of 4.7 adversities, are also more likely than nonpolyvictims, with an average of 2.1 adversities, to experience other adulthood adversities).

[58] Andrew S. Garner et al., *Early Childhood Adversity, Toxic Stress, and the Role of the Pediatrician: Translating Developmental Science into Lifelong Health*, 129 Pediatrics e224, e225 (2012), *available at* http://pediatrics.aappublications.org/content/129/1/e224. full.pdf+html.

[59] *Toxic Stress: The Facts*, Center on the Developing Child, *available at* http://developingchild.harvard.edu/topics/science_of_ early_childhood/toxic_stress_response/ (last visited Oct. 14, 2013).

[60] Garner et al., *supra* note 58 at 225; *see also* Benjamin S. Siegel et al., *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, 129 Pediatrics e232, e236 (2012), *available at* http://pediatrics. aappublications.org/content/129/1/e232.full.pdf+html.

[61] *Id.* at e237.

[62] *Id.* at e237.

[63] *Id.* at e237 ("Children [who faced toxic stress] appear[ed] to be both more reactive to even mildly adverse experiences and less capable of effectively coping with future stress.").

[64] *Id.* at e236.

[65] *See, e.g.*, Creating Trauma-Informed Child Welfare Systems, *supra* note 34.

[66] *Id.* at 14 (observing that "[m]ost birth families with whom child welfare interacts have also experienced trauma; including past childhood trauma, community violence, and domestic violence that may still be ongoing. Providing trauma-informed education and services, including evidence -based or evidence-informed mental health interventions as needed, to birth parents enhances their protective capacities, thereby increasing the resilience, safety, permanency, and well-being of the child. In addition, both birth and resource parents should also be offered training and support to help them manage secondary trauma related to caring for a child who has experienced trauma and his/her siblings.").

[67] *Id.* at 15.

[68] *Id.* at 42.

[69] *Id.*

[70] One tool suggests that a trauma-informed system will: 1) Maximize physical and psychological safety for children and families; 2) Identify trauma-related needs of children and families; 3) Enhance child well-being and resilience; 4) Enhance family well-being and resilience; 5) Enhance the well-being and resilience of those working in the system; 6) Partner with youth and families; 7) Partner with agencies and systems that interact with children and families. Chadwick Center for Children and Families, Trauma System Readiness Tool (TSRT) (June 2013). This both minimizes the risk of re-traumatizing a youth, and also increases the likelihood that the treatment will be effective.

[71] Robert Kinscherff, A Primer for Mental Health Practitioners Working With Youth Involved in the Juvenile Justice System (Jan. 2012), *available at* www.tapartnership.org/docs/jjResource_mentalHealthPrimer.pdf.

[72] Creating Trauma-Informed Child Welfare Systems, *supra* note 33 at 14 (explaining that feeling powerless can reinforce the feelings of powerless that occur during trauma).

[73] *Id.*

[74] Hines et al., *supra* note 21.

[75] *See, e.g.*, James Bell & Laura John Ridolfi, W. Haywood Burns Inst., Adoration of the Question; Reflections on the Failure to Reduce Racial & Ethnic Disparities in the Juvenile Justice System 2 (Dec. 2008) , *available at* www.burnsinstitute.org/downloads/BI%20Adoration%20of%20the%20Question.pdf (explaining that in virtually every state across the country, African American youth are five times more likely to be in juvenile justice custody than are white youth, and that for Latino youth, the chance of being detained by the juvenile justice system is twice that of white youth); *see also* The Sentencing Project, Disproportionate Minority Contact 1, *available at* www.sentencingproject.org/doc/publications/jj_DMCfactsheet.pdf (last visited Oct. 14, 2013) ("While black youth account for 17 percent of the youth population, they represent 28 percent of juvenile arrests, 37 percent of the detained population, 38 percent of those in secure placement, and 58 percent of youth committed to state adult prison."). Other studies have found that youth of color make up 71 percent of those detained in the U.S., which represents a dramatic increase from 28 percent in 1985 and 63 percent in 1997. *See* Clinton Lacey, NCTSN, Racial Disparities and the Juvenile Justice System: A Legacy of Trauma 3 (Aug. 2013), *available at* www.nctsn.org/sites/default/files/assets/pdfs/jj_trauma_brief_racialdisparities_final.pdf (citing Bureau of Just. Stat., Children in Custody, 1975-85: Census of Public and Private Juvenile Detention, Correctional, and Shelter Facilities, 1975, 1977, 1979, 1983, and 1985 (May 1, 1989), *available at* www.bjs.gov/index.cfm?ty=pbdetail&iid=3729; OJJDP, Census of Juveniles in Residential Placement, 1997 & 2010, *available at* www.ojjdp.gov/ojstatbb/ezacjrp/asp/Age_Sex.asp (choose relevant year from dropdown menu) (last visited October 14, 2013)).

[76] *See, e.g.*, Anne E. Casey Found., Unequal Opportunities for Juvenile Justice 3, *available at* www.aecf.org/upload/publicationfiles/ fact_sheet12.pdf (last visited Oct. 14, 2013) (explaining that "[w]hen compared to White youth committing comparable offenses, African American Latino/a, and Native American youth experience more punitive treatment in terms of arrests, referral to juvenile court, detention, formal processing, waiver to adult court, incarceration in juvenile facilities, and incarceration in adult facilities. Further, while White youth engage in unlawful behaviors more than their African American and Latino/a counterparts, such as fighting, weapons possession crimes, and using and selling drugs, data show that White youth are more than twice as likely not to be arrested"). More specifically, "[e]ven when White, African American, and Latino/a youth with no prior admissions are charged with the same offense, African American youth are six times more likely and Latino/a youth three times more likely than White youth to be incarcerated. In 26 states, Native American youth are disproportionately placed in secure confinement. In every offense category, the average length of confinement was longer for Latino/a youth than for any other group"). *Id.*

[77] Linda A. Teplin et al., OJJDP, The Northwestern Juvenile Project: Overview, (Feb. 2013), *available at* www.ojjdp.gov/pubs/234522.pdf (last visited Oct. 14, 2013). The study found that "[t] he likelihood that disorders would be detected or treated was … lower among racial/ethnic minorities, males, older detainees, and detainees transferred to adult court for legal processing." OJJDP, The Northwestern Juvenile Project: Overview, Juvenile Justice Bulletin 13 (Feb. 2013), *available at* www.njjn.org/uploads/ digital-library/The-Northwestern-Juvenile-Project-Overview_ OJJDP_Feb2013.pdf.

[78] Nat'l Mental Health Assoc., Mental Health Treatment for Youth in the Juvenile Justice System; A Compendium of Promising Practices (November 15, 2012), *available at* www.nttac.org/views/docs/jabg/mhcurriculum/mh_mht.pdf

[79] Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 7 (2012).

[80] *Id.*

[81] *Id.*

[82] Sara Steen et al., *Explaining Assessments of Future Risk: Race and Attributions of Juvenile Offenders in Presentencing Reports*, *in* Our Children, Their Children 248 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005).

[83] , *A Child's Day: 2009*, U.S. Census Bureau (last revised Aug. 11, 2011), *available at* www.census.gov/hhes/socdemo/children/data/sipp/ well2009/tables.html; Admin. for Children & Families, The Adoption and Foster Care Analysis and Reporting System ("AFCARS") Report, (July 2010), *available at* www.acf.hhs.gov/sites/default/files/cb/afcarsreport17.pdf.

[84] Dorothy Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. Rev. 1474, 1484 (2012).

[85] Jessica Dixon, *The African American Child Welfare Act: A Legal Redress for African American Disproportionality in Child Protection Cases*, 10 Berkeley J. Afr.-Am. L. & Pol'y 109, 109–10 (2008), *available at* http://scholarship.law.berkeley.edu/ cgi/viewcontent.cgi?article=1076&context=bjalp (describing Dorothy Roberts, Shattered Bonds: The Color of Child Welfare (2002) and explaining that "[s]he addresses the politics of the racial disparities in the system, how they came to be, and how current legal and social structures—ranging from criminal laws, education, welfare reform, to the economy and employment trends--work together to make the problem worse. Ultimately, she argues that the high removal rate of Black children from their homes is a group-based, racial harm").

[86] Roberts, *supra* note 84.

[87] *See, e.g.*, Robert B. Hill , Casey-CSSP Alliance for Racial Equity in the Child Welfare Sys., Synthesis of Research on Disproportionality in Child Welfare: An Update, 11–12 (Oct. 2006), , *available at* www.cssp.org/reform/ child-welfare/other-resources/synthesis-of-research-on-disproportionality-robert-hill.pdf.

[88] Marie-Claude Jipguep & Kathy Sanders-Phillips, *The Context of Violence for Children of Color: Violence in the Community and in the Media*, 72 J. Negro Ed. 380 (2003), *available at* www.jstor.org/stable/3211190 ("African American youth are the ethnic group most exposed to violence, followed by Hispanic Americans, and Whites."); *see also* Tara L. Kuther & Scyatta A. Wallace, *Community Violence and Sociomoral Development: An African American Cultural Perspective*, 73 Am. J. Orthopsychiatry 177 (2003); B.H. Shakoor & D. Chalmers, *Co-victimization of African American Children Who Witness Violence and the Theoretical Implications of Its Effects on Their Cognitive, Emotional, and Behavioral Development*, 83 JAMA 233 (1991); Jennifer Truman et al., Bureau of Justice Statistics, Criminal Victimization, 2012 7 . (Oct. 2013) *available at* www.bjs.gov/content/pub/pdf/cv12.pdf.

[89] James Bell, Trauma and Resilience: A New Look at legal Advocacy, Presentation to Juvenile Law Center: Trauma and Resilience Convening (January 28, 2013) (citing John Rich et al., Drexel Sch. of Pub. Health, and Drexel Univ. Coll. of Med., Healing the Hurt: Trauma-Informed Approaches to the Health of Boys and Young Men of Color , (Oct. 2009), *available at* www.calendow.org/uploadedFiles/Publications/BMOC/Drexel%20 -%20Healing%20the%20Hurt%20-%20Full%20Report.pdf).

[90] Report of the Attorney General's Taskforce onChildren Exposed to Violence, OJJDP 280 (Dec. 12, 2012), www.justice.gov/ defendingchildhood/cev-rpt-full.pdf.

[91] Paul A. Jargowsky et al., *Understanding Race Differences in Offending and the Administration of Justice, in* Our Children, Their Children 167-201 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005).

[92] *Id.*

[93] *See* John A. Rich, M.D., M.P.H., Digital Storytelling, Presentation to Juvenile Law Center: Trauma and Resilience Convening (January 28, 2013) (on file with the Juvenile Law Center).

[94] Martha Davis, *Institute for Safe Families Releases the Results of the Philadelphia Urban ACE Survey at National Summit on ACEs*, ISF Blog (May 28, 2013), *available at* www.instituteforsafefamilies.org/ blog/institute-safe-families-releases-results-philadelphia-urban-ace-survey-national-summit-aces.

[95] *See generally* Lacey, *supra* note 75, at 2-3 (stating that racial/ ethnic disparities in the juvenile justice system are often wrongly blamed on "unfit parents," and that "one reason for the enduring existence and practice of racial disparities is the way youth of color are seen, perceived, and characterized," and explaining that the "well-orchestrated promotion of the myth of the 'super-predator' was one of the most damaging influences on the image and perception of youth of color since the Jim Crow era"). Lacey adds that "[w]hen viewed within a historical context, it becomes clear that current racial/ ethnic disparities in the juvenile justice system are at least partly a legacy of years of racial segregation, discrimination, and mistreatment. These disparities are also based on the belief that youth of color are somehow culturally predisposed to delinquency in a way that their white counterparts are not." *Id.* at 3. Furthermore, "[y] outh of color and their communities are often pathologized in a way that creates a narrative about their past, current status, and likelihood of success. In short, with a broad brush stroke, that narrative paints a picture of "deprived" children from "broken" homes with strong "risk factors" for further delinquency and poor life outcomes." *Id.* at 4.

[96] *See* Burrell, *supra* note 28.

[97] *See, e.g.*, Liz Watson & Peter Edelman, Georgetown Ctr. on Poverty, Inequality & Pub. Policy Improving the Juvenile Justice System for Girls: Lessons from the States 1 (Oct. 2012), *available at www.law.georgetown.edu/academics/centers-institutes/ poverty-inequality/upload/JDS_V1R4_ Web_Singles.pdf* [hereinafter Improving the Juvenile Justice System for Girls] (finding that over three-quarters of females and two-thirds of males entering the Cook County juvenile detention facility had a history of moderate or severe physical abuse, that over forty percent of females and ten percent of males had a history of sexual abuse; *see also* Juvenile Justice Brief Series, Gender Responsiveness and Equity in California's Juvenile Justice System 7-8, *available at* www.law.berkeley.edu/img/ Gender_Responsiveness_and_Equity.pdf [hereinafter Gender Responsiveness and Equity in California's Juvenile Justice System]; Vanessa Patino, Lawanda Ravoira, & Angela Wolf, Nat'l Council on Crime & Delinquency, A Rallying Cry for Change: Charting a New Direction in the State of Florida's Response to Girls in the Juvenile Justice System 41 (July 2006) [hereinafter A Rallying Cry for Change]. Of 319 girls ages 12 to 19 across a variety of types of placements in the juvenile justice system, 64 percent reported having suffered abuse, including 37 percent by a parent. 55 percent reported abuse by someone other than a parent. *Id.* Older girls were more likely to report non-parental abuse, and fewer African American girls reported this type of abuse.

[98] Gender Responsiveness and Equity in California's Juvenile Justice System, *supra* note 97 at 7 (noting the link between girls' experiencing sexual, emotional and physical abuse and acting out criminally); *see also* Joanne Belknap & Kristi Holsinger, An Overview of Delinquent Girls: How Theory and Practice Have Failed and the Need for Innovative Changes 4 (2008); Improving the Juvenile Justice System for Girls, *supra* note 97 at 2 (citing a survey of 319 girls in Florida's juvenile justice system, of which 64 percent had reported suffering abuse, including 37 percent reporting abuse by a parent; 55 percent of whom suffered abuse by someone other than a parent, and 27 percent reporting abuse by both a parent and another person.); Leslie Acoca, Nat'l Girls Health & Justice Inst. (NGHJI), Highlights: Health Care Needs of Girls in the Juvenile Justice System (2009), *available at http://stoneleighfoundation.org/sites/default/files/2009%20Sept% 20GHS%20Highlights.pdf* [hereinafter Health Care Needs of Girls in the Juvenile Justice System] (citing that in a national study of girls entering detention, 22 percent had experienced forced sexual contact, with several reporting assaults that occurred within the previous week); Leslie Acoca, Introduction to The National Girls Health Screen Project; The Findings from the Medical Case File Review of Girls Being Held in Detention and the Preliminary Analysis of Health/ Mental Health Studies of Girls in the Juvenile Justice System (Sept. 2005), *available at www.njjn.org/uploads/digital-library/resource_247.pdf* [hereinafter Introduction to the National Girls Health Screen Project].

[99] *See also* Karen Baynes-Dunning & Karen Worthington, *Responding to the Needs of Adolescent Girls in Foster Care*, 20 Geo. J. on Poverty L. & Pol'y 321, 326 (2013) [hereinafter *Responding to the Needs of Adolescent Girls in Foster Care*] (citing Denise Herz et al., Addressing the Needs of Multi-System Youth: Strengthening the Connection Between Child Welfare and Juvenile Justice (2012), *available at http://cjjr.georgetown.edu/pdfs/msy/ AddressingtheNeedsofMultiSystemYouth.pdf*).

[100] Leslie Acoca, The Stonleigh Found. The National Girls Health Screen Project 5 n.2 (Mar. 2013), *available at http://stoneleighfoundation.org/sites/default/files/Leslie%20Acoca%20%20The%20National %20Girls%20Health%20Screen%20 Project.pdf*; *see also* Improving the Juvenile Justice System for Girls, *supra* note 97 at 1 (noting that in 2006, this type of offense accounted for 25 percent of the boys who were detained, versus 41 percent of young females who were detained.); *id.* at 9 (observing almost half of the girls in Connecticut's juvenile justice system initially were referred for status offenses, and that 88 percent of girls adjudicated delinquent and sent to a secure facility were status offenders).

[101] Gender Responsiveness and Equity in California's Juvenile Justice System, *supra* note 97 at 7.

[102] *Id.* at 3 (noting that 61 percent of the girls studied in the juvenile justice system in Florida had a family member has the victim of their offense).

[103] Gender Responsiveness and Equity in California's Juvenile Justice System, *supra* note 97 at 7.

[104] *Id.*

[105] Improving the Juvenile Justice System for Girls, *supra* note 97 at 8.

106 Devon C. King, et al., *Childhood Maltreatment and Psychiatric Disorders among Detained Youths*, 62 Psychiatric Services 1430 (2011), *available at* http://ps.psychiatryonline.org/article.aspx?articleid=180920 [hereinafter *Childhood Maltreatment and Psychiatric Disorders among Detained Youths*]; *see also* Linda A. Teplin et al., OJJDP, The Northwestern Juvenile Project: Overview, (Feb. 2013), *available at* http://www.ojjdp.gov/ pubs/234522.pdf (in a study of the relationship between childhood maltreatment and psychiatric disorders among incarcerated youth at the Cook County Juvenile Temporary Detention Center, researchers found that 40 percent of the females sampled and 10 percent of the males had a history of sexual abuse).

107 *Childhood Maltreatment and Psychiatric Disorders among Detained Youths*, *supra* note 106; *see also Responding to the Needs of Adolescent Girls in Foster Care*, *supra* note 99 at 321.

108 *Id.* at 331.

109 *Childhood Maltreatment and Psychiatric Disorders among Detained Youths*, *supra* note 106.

110 Improving the Juvenile Justice System for Girls, *supra* note 97 at 2–3. For example, of 1000 girls studied in California's detention system, 88 percent were found to have had "a serious mental or physical health problem." *See also* Dorothy Otnow Lewis et al., *A Follow-up of Female Delinquents: Maternal Contributions to the Perpetuation of Deviance*, 30 J. Am. Acad. Child Adolescent Psychiatry 197 (1991), *available at* www.ncbi.nlm.nih.gov/pubmed/2016222. Girls with PTSD are "diagnosed with objective disease states such as circulatory problems, as well as subjective disease states such as chronic fatigue, fibromyalgia, and chronic fatigue" more than their male counterparts. Gail Hornor, *Posttraumatic Stress Disorder*, 27 J. Pediatric Health Care e29, e33 (2013), *available at* www.medscape.com/viewarticle/803151.

111 *See* A Rallying Cry for Change, *supra* note 97 at 47; *see also id.* at 37. The study determined that "further analysis is needed to determine whether cutting and other self-defeating behavior is learned institutionalized behavior or if it is central to girls' intervention needs." *Id.* Similarly, a 2006 study of youth detained in Ohio revealed that "girls were more likely to report hurting or harming themselves, thinking about committing suicide, and having tried to commit suicide" than were their male counterparts. Gender Responsiveness and Equity in California's Juvenile Justice System, *supra* note 97 at 8.

112 Jamie Edwards , *A Lesson in Unintended Consequences: How Juvenile Justice and Domestic Violence Reforms Harm Girls in Violent Family Situations (and how to Help Them)*, 13 U. Pa. J.L. & Soc. Change 219, 234 (2009), *available at* www.law.upenn.edu/journals/ jlasc/articles/volume13/issue2/Edwards 13U.Pa.J.L.&Soc.Change219(2009).pdf.

113 *See, e.g.*, Health Care Needs of Girls in the Juvenile Justice System, *supra* note 98 (noting that there are "no standardized gender specific medical screens are available for use with girls in the juvenile justice system nationally"); *see also* Introduction to the National Girls Health Screen Project *supra* note 98 at 1 (observing that "[t]here is little data on the specific health care needs of girls in the juvenile justice system").

114 *Id.*

115 Francine Sherman & Marsha L. Levick, *When Individual Differences Demand Equal Treatment: An Equal Rights Approach to the Special Needs of Girls in the Juvenile Justice System*, 18 Wis. Women's L. J. 9 (2003), *available at* http://lawdigitalcommons.bc.edu/cgi/viewcontent. cgi?article=1572& context=lsfp.

116 *Id.; see also* Health Care Needs of Girls in the Juvenile Justice System, *supra* note 98.

117 *Id.* at 9.

118 *Responding to the Needs of Adolescent Girls in Foster Care*, *supra* note 99 at 322-323.

119 *Id.* A 2010 study found that girls' risk of experiencing abuse was 1.3 times that of males'. *Id.*

120 *Id.* at 324.

121 *Id.*

122 *Id.*

123 *See, e.g.*, Shannan Wilber, Caitlin Ryan, & Jody Marksamer, Child Welfare League of America, Serving LGBT Youth in Out-of-Home Care; CWLA Best Practice Guidelines 4–5 (2006), *available at* www.f2f.ca.gov/res/2798_BP_LGBTQ.pdf.

124 *Id.* at 4 ("Population-based studies show that lesbian, gay, and bisexual students are more likely to be in a physical fight, to be threatened or injured with a weapon at school, and to skip school because they felt unsafe, compared with their heterosexual peers.").

125 *Id.* (explaining that "[b]ecause harassment and victimization are so widespread, many LGBT youth prefer to live on the streets rather than in places in which the adults responsible for their care ignore or tolerate their victimization. A study of lesbian and gay youth in New York City's child welfare system found that more than half (56%) of the youth interviewed said they stayed on the streets at times because they felt safer there than living in group or foster homes. Among LGBT homeless youth in San Diego, 39% said they were ejected from their home or placements because of their sexual orientation") (internal citations omitted).

126 *Id.* at 3–5. Once on the street, homeless youth are more likely to engage in criminal activity such as selling drugs, theft, and prostitution. *Id.* at 5. They are also more likely to be crime victims. *Id.* Additionally, "survival sex" exposes homeless LGBTQ youth to a risk of "incarceration, HIV infection, and violence. Among high-risk homeless youth, LGBT homeless youth report the highest rates of victimization, risk, and health concerns." *Id.* In fact, "[s]ome LGBT youth enter state care after they are arrested and charged with a sex offense for engaging in consensual conduct or relationships with same-sex partners that would not result in arrest or prosecution if the youth involved were of the opposite sex." *Id.*

127 *Id.* at 4.

128 *Id.*

129 *See, e.g.*, *id.* at 1.

130 *Id.* at 6.

131 *Id.*

132 *Id.* at ix.

133 *Id.* at 6.

134 Katayoon Majd, Jody Marksamer, & Carolyn Reves, Hidden Inustice: Lesbian, Gay, Bisexual and Transgender Youth in Juvenile Courts 101–106 (Jill Marts Lodwig eds., 2009), *available at* www.equityproject.org/pdfs/hidden_injustice.pdf.

135 *See generally* Lisa Pilnik & Jessica R. Kendall, OJJDP, Identifying Polyvictimization and Trauma Among Court-Involved Children and Youth: A Checklist and Resource Guide for Attorneys and Other Court-Appointed Advocates (2012) [hereinafter Pilnik & Kendall, Identifying Polyvictimization and Trauma], *available at* www.safestartcenter.org/pdf/ Resource-Guide_Polyvictim.pdf.

136 *See id.* at 3–5 (providing list of potential traumas and trauma symptoms).The checklist is intended to be used with the longer resource guide, found here: www.safestartcenter.org/resources/toolkit-court-involved-youth-exposure-violence.php.

137 Indeed, the ABA cautions that their instrument itself has not been tested or evaluated, should only be used after expert consultation with local child trauma experts, and that concerns about the privacy of the sensitive data, and attorneys should be alert to potential misuse of this sensitive client information.

138 *See, e.g.*, Lourdes M. Rosado & Riya S. Shah, Protecting Youth from Self-Incrimination when Undergoing Screening, Assessment and Treatment within the Juvenile Justice System 27–28 (Jan. 2007) , *available at* http://jlc.org/current-initiatives/improving-outcomes-court-involved-youth/information-sharing (noting that, in response to concerns about self-incrimination, advocates like Thomas Grisso have proposed that the implementation of screening and assessment instruments should be accompanied by "the enactment of statewide legislation or court rules that prohibit any information obtained from mental health screening in detention from being introduced as evidence against the youth in any adjudicatory or disposition hearing").

139 *See, e.g.*, *id.*

140 The American Academy of Psychiatry and the Law encourages clinicians who conduct forensic evaluations to inform the youth about "the limitations on confidentiality, including telling them specifically for whom the psychiatrist is conducting the evaluation and who will receive the information collected." The Committee on Ethical Guidelines for Forensic Psychologists similarly advises that " '[f]orensic psychologists have an obligation to ensure that prospective clients are informed of their legal rights with respect to the anticipated forensic service, of the purposes of any evaluation … of the intended uses of any product of their services…' " *Id.* (citing Committee on Ethical Guidelines for Forensic Psychologist 659 (1991)).

141 *See, e.g.*, Roberts, *supra* note 84 at 1490.

142 *See* Ladd v. Cockrell, 311 F.3d 349, 360 (5th Cir. 2002).

143 *Id.*

144 Some work on these issues is underway at Rutgers Camden, where attorneys Sandra Simkins and Meredith Schalick note that advocates should ensure a host of factors, including, at a minimum, the use of trauma assessments and evidence-based practices for trauma treatment. Simkins also notes that attorneys should visit any facility where their youth may be placed, including disciplinary units. If there is harm, or a risk of harm, attorneys should prevent placement in the first instance, or if the child is placed, should engage in zealous post-dispositional advocacy to protect youth from further harm. Email from Sandra Simkins, Clinical Professor and Chair for Clinical Programs, Rutgers School of Law, to Jessica Feierman (Oct. 24, 2014, 15:14 EST) (on file with author).

145 In re Kemmo N., 540 A.2d 1202 (Md. App. 1988).

146 *Id.* at 278–279.

147 *In re* Tristan C., 595 N.Y.S.2d 635, 636 (Fam.Ct. 1993).

148 *In re* M.D., 527 N.E.2d 286 (Ohio 1988) (internal citations omitted).

149 Matter of Angel R., 875 N.Y.S.2d 818 (Fam. Ct. 2008). These cases are further supported by the numerous cases in which judges recognize the harm or trauma of the juvenile justice court proceedings. The D.C. Court of Appeals, for example, noted that "[a] delinquency hearing, while hopefully characterized by a degree of informality and flexibility, still may be a traumatic experience for a juvenile." District of Columbia v. I. P., 335 A.2d 224, (D.C. 1975) (applying double jeopardy rule in juvenile court).

150 Wyo. Stat. Ann. § 14-6-201(c)(ii)(a) (West) (emphasis added).

151 Conn. Gen. Stat. § 46b–121k (2012).

152 *Id.*

153 *Id.*

154 C.R.S. § 27-69–104.

155 C.R.S. § 27-69–105.

156 State in Interest of C.A.H, 89 N.J. 326, 328–30 (1982).

157 *Id.* at 340.

158 Id. at 330.

159 *Id.* at 330, 337–347.

160 *Id.* at 340.

161 *Id.* at 338.

162 *Id.*

163 *Id.* at 341.

164 *Id.* at 335.

165 United States v. Sealed Appellant 1, 591 F.3d 812, 821 (5th Cir. 2009).

166 *Id.* at 822.

167 *Id.* at 821–22. Note that the court would only have been permitted to overturn the decision if the trial court had "abused its discretion." As a result, the case should not be read to require trial courts to transfer such cases to adult court.

168 Colo. Rev. Stat. Ann. § 19-2-508 at (C).

169 *Id.* at (3)(VII)(C)(c)(III) (F).

170 *Id.*

171 696 A.2d 780, 786–88 (N.J. Super. 1997).

172 *Id.* at 786.

173 *In re* Appeal Juvenile Action No. JV-506561, 893 P.2d 60, 63 (Ariz. Ct. App. 1994).

174 *Id.*

175 850 P.2d 495, 496–503 (Wash. 1993).

176 *Id.* at 233.

177 *Id.* (emphasis in original) (quoting Paul A. Nones, When a Child Kills: Abused Children Who Kill Their Parents 63 (1991)); *see also* State v. Nemeth, 694 N.E.2d 1332, 1335 (Ohio 1998) (describing that the juvenile defendant's

178 *Id.*

179 Miller v. Alabama, 132 S. Ct. 2455, 2468 (2012).

180 United States v. Juvenile, 347 F.3d 778, 788-89 (9th Cir. 2003).

181 *Id.* at 789.

182 *In re* Nunez, 173 Cal. App. 4th 709, 722 (2009).

183 *Id.* (emphasis added).

184 United States v. Floyd, 945 F.2d 1096, 1101 (9th Cir. 1991) (overruled on other grounds); *see also* United States *v. Clark*, 8 F.3d 839, 845 (D.C. Cir. 1993) (leaving the district court to consider the nexus between lack of guidance as a youth and later criminality).

185 *Floyd*, 945 F.2d at 1099.

186 United States v. Thomas, 114 F.3d 228, 269 (D.C. Cir. 1997). That judge acknowledged that he was

187 *Miller,* 132 S.Ct. at 2468.

188 Matter of Johnny S., 896 NYS 2d 842 (N.Y. Fam. Ct. 2010).

189 *Id.* at 843–46.

190 *Id.* at 843.

191 *Id.*

192 Id.

193 Id.

194 *Id.* at 844.

195 *Id.* at 848–49.

196 *Id.* at 845.

197 *Id.* at 847. The court did, however, issue specific directives to the agency to provide periodic reports on the status of the psychological and psychiatric services provided to, as well as any disciplinary actions taken against John (with specific mention of the use of restraints).

198 Kan. Stat. Ann. § 21–662.

199 Michigan v. Landfair, 2010 WL 1629072, *1 (Mich. Ct. App. 2010).

200 Vt. Family Proceedings Rule 1: Procedure for Juvenile Delinquency Proceedings—Reporter's Notes, 2006 Amendment.

201 Id.

202 Haley v. Ohio, 332 U.S. 596, 599–600 (1948).

203 370 U.S. 49 (1962),

204 People v. Prachter, 2009 WL 2332183, at *10 (Cal. Ct. App. 2009).

205 Id.

206 Deficits in cognitive processing and difficulty interpreting emotions appropriately, for example, may make youth particularly susceptible to coercion in an interrogation.

207 For more information on this, *see, supra* note 28 and accompanying text.

208 Id.

209 Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir. 1983); *see also* Justice v. City of Peachtree City, 961 F.2d 188, 192 (C.A.11 (Ga.) 1992).

[210] Flores v. Meese, 681 F. Supp. 665, 667 (C.D. Cal. 1988); *see also* Thomas ex. rel. Thomas v. Roberts, 261 F.3d 1160, 1167 (11th Cir. 2001) (strip searches represented a serious intrusion on the rights of the children); Jenkins v. Talladega City Bd. of Educ., 95 F.3d 1036, 1044 (11th Cir. 1996) ("The perceived invasiveness and physical intimidation intrinsic to strip searches may be exacerbated for children."); Cornfield v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1323 (7th Cir. 1993) (finding that a strip search was particularly intrusive on 16-year-old, because that is the "age at which children are extremely self-conscious about their bodies"); Doe v. Renfrow, 631 F.2d 91, 93 (7th Cir. 1980) (holding that a strip search of 13 year old was a "violation of any known principle of human decency").

[211] Lollis v. New York State Dept. of Social Services, 322 F.Supp. 473, 481 (S.D.N.Y. 1970).

[212] *See, e.g, In re* Jonathon C.B., 958 N.E.2d 227, 258 (Ill. 2011) (discussing the harm of shackling adolescents in the context of court hearings).

[213] *See, e.g,* R.G. v. Koller, 415 F. Supp. 2d 1129 (D. Hawai'i 2006).

[214] N.G. v. Connecticut, 382 F.3d 225 (2d Cir. 2003); Smook v. Minnehaha County, 457 F.3d 806 (8th Cir. 2005).

[215] *In re* Johnny S., 896 NYS 2d 842, 846 (N.Y. Fam. Ct. 2010).

[216] *Id.* (quoting Pena v. New York State Division for Youth, 419 F.Supp. 203, 207 (S.D.N.Y. 1976).

[217] *Id.*

[218] *See, e.g.*, C.G.S.A. § 46b-133(e) ("No child shall at any time be held in solitary confinement."); 34-A M.R.S.A. § 3032-5B.

[219] *See, e.g.*, Jeanne C. Rivard et al., *Preliminary Results of a Study Examining the Implementation and Effects of a Trauma Recovery Framework for Youths in Residential Treatment*, 26 Therapeutic Community: Int'l J. Therapeutic & Supportive Orgs. 83 (2005).

[220] *See, e.g.,* Md. Code Ann., State Gov't § 6-402 (requiring regular investigation of abuse in juvenile justice facilities; Tex. Hum. Res. Code Ann. § 261.002 (establishing an office of the ombudsman); S.D. Codified Laws § 26-11A-25 (establishing an independent monitor); Conn. Gen. Stat. Ann. § 46a-13m(d) (ensuring financial independence of the monitor).

[221] *See. e.g.,* Cal. Welf. & Inst. Code § 209 (requiring corrective action plans or a determination that a placement is unsuitable); Fla. Stat. Ann. § 985.688 (granting the department of juvenile justice the authority to close a facility if it fails to implement appropriate corrective action).

[222] *See, e.g.*, Creating Trauma-Informed Child Welfare Systems, *supra* note 34.

[223] For a thoughtful study examining the childhood adversity histories of parents of children, *see* Cheryl Smithgall et al., Chapin Hall at the University of Chicago, Parents' Pasts and Families' Futures: Using Family Assessments to Inform Perspectives on Reasonable Efforts (2012), *available at* www.chapinhall.org/research/report/parents'-pasts-and-families'-futures-using-family-assessments-inform-perspectives.

[224] In most states, case law establishes that the disposition provided to a child in the child welfare system must serve their best interests. The disposition is ordered by the court and reviewed at least at annually at permanency review hearings and status reviews. *See* 42 U.S.C.A. § 675 ("case review"). Dispositions include a transition plan reviewed and approved by the court before a youth may be discharged from the child welfare system.

[225] *See, e.g.*, Joseph J. Doyle, Jr., *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 J. Pol. Econ. 746 (2008), *available at* www.nber.org/papers/w13291.

[226] 661 A.2d 1086 (D.C. Ct. App. 1995).

[227] *Id.*

[228] *Id.* at 1091.

[229] *Id.* at 1090.

[230] *Id.* at 1092.

[231] *See generally* Chadwick Trauma-Informed Systems Project (CTISP), Guidelines to Applying a Trauma Lens to a Child Welfare Practice Model (2013), *available at* http://muskie.usm.maine.edu/helpkids//PMNetworkDocs/Trauma-Informed%20PM%20 2013%20CTISP.pdf.

[232] 580 A.2d 750 (Pa. 1990).

[233] *Id.* at 357.

[234] *Id.* at 358.

[235] *Id.* (emphasis added).

[236] *Id.*

[237] Neb. Rev. St. § 43-4212.

[238] *Id.*

[239] *Id.* (emphasis added).

[240] *See, e.g,* Pennsylvania Rules of Juvenile Court Procedure 1613(E), 1608(D)(1)(J).

[241] V.T.C.A., Family Code § 264.015.

[242] *Id.* at (b).

[243] *Id.* at (a).

[244] *See* Doyle, *supra* note 225.

245 670 F.Supp. 1145 (S.D.N.Y. 1987).

246 *Id.* at 1146.

247 *Id.* at 1146-47, 1154.

248 *Id.* at 1172.

249 *Id.* at 1175.

250 Id. Specifically, one doctor explained that "the professional literature indicates that 'there is a pretty near consensus that children who suffer multiple temporary placements, many changes, are exposed to increased risk in later life.' By 'increased risk,' [the doctor] meant increased likelihood of 'extremely maladapted behavior.' " The doctor further explained that it was probable that these conditions "decreased the likelihood that [the children] could tolerate a stable placement." Id. at 1176.

251 *Id.* at 1176.

252 *Id.*

253 *Id.* at 1174.

254 *Id.* at (d)(2)–(3).

255 2008 WL 4613576 (Tenn. Ct. App. 2008).

256 *Id.* at *18.

257 *See, e.g.*, Creating Trauma-Informed Child Welfare Systems, *supra* note 34.

258 2011 WL 1367031 (Conn. Super, 2011).

259 *Id.* at *6.

260 *Id.*