

Considering Childhood Trauma in the Juvenile Justice System: Guidance for Attorneys and Judges

by *Renée VandenWallBake*

The juvenile justice and family court system has the overarching goal of obtaining treatment and rehabilitative services for the children and families that enter the courthouse doors.¹ Often the cases in these two systems overlap and parents that are the subject of a neglect or abuse case also have a child with a status offense or public offense case.²

Recognizing that childhood trauma may be at the heart of the status offense or public offense is essential to ensuring that the child receives proper treatment and to prevent recidivism.

Legal experts, mental health professionals, and child welfare specialists have called for the court system to engage in a trauma-focused approach. In a trauma-focused court, all players are educated on the effects of trauma and view the child's behavior and the case itself through this lens.³

The Prevalence of Trauma in the Juvenile Justice System

Many youth who encounter the juvenile justice system have experienced or witnessed domestic violence, abuse, or neglect. A nationwide study found that 70 percent of children placed in a residential facility because of a status offense or public offense have experienced trauma.⁴ Another study found that the rates of Post-traumatic Stress Disorder (PTSD) in children who are involved in the juvenile-justice system are about the same as for soldiers returning from deployment in Iraq.⁵

Girls are much more likely to have experienced trauma and are more likely to be placed in residential care for a status or public offense than boys.⁶ Children who have undergone trauma are profoundly affected and their experience has serious implications for their case in the juvenile justice system. For some youth, the juvenile justice experience may itself be

retraumatizing, eliciting feelings of loss of control, and triggering memories and reactions of prior trauma.⁷ Thus, there is a need for the court to be sensitive and responsive to a youth's history of trauma.⁸

Considerations for the Child's Attorney

The natural place to begin a trauma-focused approach is with the child's attorney, who has the most information about the child and is in a position of trust and influence with the child throughout their case. Juvenile defense attorneys⁹ have an ethical responsibility to assess their client's mental health needs¹⁰ but also to represent the express interests of their client,¹¹ which can be an empowering and cathartic experience for the child.¹²

Diversion from the Court System

There is a myth that a child and family can only receive mental health services and treatment if they are involved in the court system. Not only is that not true, but involvement in the court system can cause a child and family more problems as they must miss work and school for court hearings and face possible loss of custody and institutionalization.

Research and experience have taught us that children with mental health needs belong in the community receiving evidence-based treatment, not the court system.¹³ Attorneys who

identify that their client has a mental health need or have a history of trauma should vigorously advocate for the case to be diverted,¹⁴ informally adjusted,¹⁵ or otherwise resolved in a way that does not expose the child to the potential for future incarceration and penalties. Attorneys should use the Court Designated Workers in their court as well as programs such as Reclaiming Futures¹⁶ or the Restorative Justice Program.¹⁷ Any diversion plan should be crafted with the input of the child, their family, and service providers and use positive incentives for compliance. A plan will not be successful if the child and family is not invested in it.¹⁸

Competence and Capacity

If the attorney is unsuccessful in getting a delinquency or status offense case diverted or informally adjusted, the client's competence and capacity to continue through the justice system should be seriously examined. Children who have experienced domestic violence are affected on a physical and psychological level. Chronic abuse can affect the brain's synapses and neuronal pathways.

Abuse during the crucial period of the child's brain development has been linked to difficulties in school, peer relationships, impulse control, and anger management.¹⁹ Children who have experienced physical abuse are also at risk for Traumatic Brain Injury.²⁰ A child that may appear to be unruly or even violent may actually be incapable of conforming his/her conduct, and²¹ therefore, may not have had the capacity to commit the offense.²²

The court, as well as the child's attorney,²³ has the obligation to determine if a child is competent to stand trial.²⁴ While one might think that all

children are incompetent to some degree, and when compared to adults, this may be so; however, for a child to benefit from the court experience and any treatment that may result, they must understand what is happening and why. In fact, for a child who has experienced loss and instability, not understanding the court process may cause the child to feel helpless and out of control, causing further trauma.

Competency involves the ability for the child to understand the legal proceedings, the role of their attorney, judge, and prosecutor, and the consequences they face in the justice system.²⁵ For example, a child who has a long history of social workers and service providers in their life may think that their attorney is one of these and is required to tell their parents or the judge what they have told them; when in reality the opposite is true.

A child with a history of trauma at the hands of an authority figure may not be able to “open up” or trust their attorney, which is crucial for their ability to aide in their defense.²⁶ If a child cannot withstand the stress of court proceedings, pretrial detention, or behave appropriately in court, they may be incompetent.²⁷ If the child is incompetent, their case should be dismissed until such time that the child becomes competent. The court may also amend the petition to a dependency action if the child is in need of services during that time.²⁸

Criminal Responsibility

Research demonstrates that children who have experienced trauma mature at a slower rate than their counterparts.²⁹ This means that children who have experienced trauma may be more impulsive, more susceptible to peer pressure, and less able to appreciate the consequences of their actions than children of like age. U.S. Supreme Court precedent states that children are categorically less culpable because of these characteristics.³⁰ Since these characteristics may be more pronounced in children who have experienced trauma, the child’s attorney

should determine whether to litigate issues of a waiver of *Miranda* rights,³¹ consent to search, and defenses—particularly self-defense—through a trauma-focused lens.³² Even if the child desires to plead guilty to an offense, the attorney must be careful to ensure that he or she is not unduly susceptible from pressure from parents, the court, or even the attorney. The child must truly understand what a guilty plea means and what consequences it entails.³³

A trauma-focused court does not restrict contact with a parent or remove the child from the parent unless it is imperative for the health and safety of the child.

Considerations for the Court

Our juvenile justice system allows for the court to treat each case and each child according to their unique circumstances and needs. The court is tasked with striking a delicate balance between the child’s best interest and protecting the community.

These interests converge when a child is given tailored treatment to address the heart of the child’s behavior and stem the risk of reoffending. A trauma-focused court creates a sensitive environment through the language that the court uses, how the court addresses a parent, and its pre-and post-adjudication orders so that there is no further trauma to the child and to ensure that the child receives appropriate treatment.

Treatment of the Family

A child in the juvenile justice system may have a parent that has a history of violence towards the child or other family members in the household. The parent might also be a survivor of violence themselves and may have untreated mental health needs. While the instinct may be to cut off the parent from the child, research shows that engaging the parent and family is vital to the child’s success.³⁴ A trauma-focused court does not restrict contact with a parent or remove the child from the parent unless it is imperative

for the health and safety of the child. There are many resources available to the court if it is concerned about the safety of the home. The court can order home monitoring and can order the parent to participate in treatment, such as family therapy, parenting classes, and support groups.³⁵

A court that fosters the participation of parents and other family members in the case and treatment ensures that the child has role models and support in their lives and fosters an

environment of support and respect.

Use of Secure Detention

Federal law strongly opposes the incarceration of children for a status offense.³⁶ Kentucky law has many procedures and mechanisms that limit the incarceration of status offenders, but courts have great latitude to punish a child for violating a court order by placing them in secure detention.³⁷ In addition, the court can place a child in secure detention for 45-90 days at disposition for a public offense.³⁸ For a child with a history of trauma and abuse, being placed in a locked secure placement can be retraumatizing.

Children who suffer from Post-traumatic Stress Disorder have difficulty responding appropriately to authority figures and strict rules, as is required in secure placements. This can lead to incidences of restraint and isolation, which can cause more psychological harm and a downward spiral.³⁹ Even short periods of incarceration interrupt vital therapeutic and educational services. Thus, while courts should be hesitant to incarcerate any status offender, a trauma-focused court would place even more emphasis on the use of alternatives such as community service, home detention, and graduated sanctions.

Disposition Considerations and Alternatives

At disposition, the Kentucky Unified Juvenile Code requires the court consider appropriate treatment options given the specific needs of the child.⁴⁰ It is statutorily preferred that the treatment can be given in the community rather than in a residential facility. Removal of the child from his/her family should only be considered after all other alternatives have been exhausted.⁴¹ All of the players in a trauma-focused juvenile justice system—defense attorney, probation officer, judge—focus on dispositional options that are tailored for children with a history of trauma. This includes evidence-based practices and trauma-focused therapy, family counseling, mentoring, and special education services.⁴²

A behavior modification approach will be unsuccessful if trauma-focused treatment is not also part of the solution. For example, dispositional orders that simply require a child to go to school attempt to modify the child's behavior through reward and punishment. Such an approach may be unsuccessful because there is no inquiry or remedy for *why* the child is not going to school.

Perhaps the child does not want to go to school because it is near an abuser's home. They may be bullied at school. They may be afraid to leave the side of their parent, who was the victim of abuse. A court order forcing them to attend may cause more trauma for the child and ignore the underlying issue. It may be difficult to root out the cause of the child's behavior, but with help from professionals and some patience, a tailored resolution can be reached.

The juvenile code requires the court to make specific findings about treatment. Thus, the juvenile or family court judge is in the best position to ensure that the disposition fits the child's needs by enforcing the dispositional plan through court orders. Just as incarceration can retraumatize a child, so too can placement in a residential facility.

The court can ensure that the child is receiving appropriate treatment, such as trauma-focused care, by ordering treatment, rather than commitment. Even if commitment is ordered, the court has the authority to terminate commitment if the child is not receiving appropriate therapeutic services.⁴³

Conclusion

Children are exceedingly resilient and capable of reform. Their chances of success are greatly increased with positive adult influences and when they are invested in the plans for their future and the future of their family.⁴⁴ By incorporating a trauma-informed approach, the juvenile justice system ensures that children who have experienced trauma are empowered to heal, avoid retraumatization and the over-criminalization of this population, while also serving the needs and interests of the community.

Renée VandenWallBake is a staff attorney with the Juvenile Post Disposition Branch of the Kentucky Department of Public Advocacy. She has advocated on behalf of children in the child welfare and juvenile justice system for almost 10 years, including work with the Juvenile Division of the Legal Aid Society of New York City and the Center for Children's Advocacy in Connecticut. She is an honors graduate of the University of Connecticut School of Law, where she was an executive editor of *Connecticut Law Review*.

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Endnotes

1. KRS 600.010 (2)(a).
2. A status offense is a charge that would not be a crime if the child was an adult. This includes missing school, running away from home, and being unruly at home. KRS 600.020(59)(a).
3. National Council of Juv. & Fam. Court Judges. *Ten Things Every Juvenile Court Judge Should Know About Trauma and Delinquency* [*Ten Things*], 2010, 12. For more guidance on

creating a trauma-focused court, see National Child Traumatic Stress Network. *Criteria for Building a Trauma-Informed Mental Health Service System* (December 2007); *Blueprint for Change: A Comprehensive Model for the Identification and Treatment of Youth with Mental Health Needs in Contact with the Juvenile Justice System* [*Blueprint for Change*], 2007.

4. Sedlak, Andrea J. & Karla S. McPherson. *Youth's Needs and Services: Findings from the Survey of Youth in Residential Placement*, U.S. Office of Juvenile Justice and Delinquency Prevention, 2, tbl.1, April 2010, available at www.ncjrs.gov/pdffiles1/ojjdp/227728.pdf.

5. *Ten Things*, 4.

6. *Id.* at 6, fig.4.

7. *Blueprint for Change*, 43.

8. *Id.*

9. A guardian ad litem has a different responsibility than a defense attorney, but should consider a child and family's trauma history when considering their best interest. This consideration is best made with the assistance of an expert.

10. Nat'l Juvenile Defense Standards, 1.7 (2012); 2.1 Commentary.

11. *Id.* at 1.2.

12. The therapeutic effect of giving a child a voice in court and the impression that they have been treated fairly and justly was recognized by U.S. Supreme Court in 1967 in the landmark case *In re Gault*, 387 U.S. 1, 26, 87 S. Ct. 1428, 1443, 18 L. Ed.2d 527 (1967).

13. *Blueprint for Change*, 5.

14. KRS 610.030(2); 630.050; 635.010(1)(e).

15. KRS 610.100(3).

16. For more information about Reclaiming Futures, see www.reclaimingfutures.org.

17. For more information about Restorative Justice, see <http://kcrj.org>.

18. For further guidance in creating a diversion plan, see *Models for Change, Juvenile Diversion Guidebook*, 2011, and Nat'l Center for Juvenile Justice and Mental Health. *Juvenile Diversion: Programs for Justice-Involved Youth with Mental Health Disorders*, 2006.

19. U.S. Dept. Health & Human Services, Child Welfare Information Gateway, Issue Brief, *Maltreatment on Brain Development*, November 2009, available at www.childwelfare.gov.

20. For more information about Traumatic Brain Injury in children, see the Brain Injury Alliance of Kentucky, www.biak.us/traumatic-braininjury.

21. *Ten Things*, 7.

22. Competency is the ability to understand the proceedings and aid in one's defense. Capacity

is the mental ability to form the requisite intent. The law does not hold one responsible for actions if at the time of the offense they lacked the substantial capacity to appreciate the criminality of his/her conduct or conform his/her conduct to the requirements of the law. KRS 504.020. For more information on how trauma affects capacity and competency, see Marty Beyer, "What's Behind Behavior Matters: The Effects of Disabilities, Trauma and Immaturity on Juvenile Intent and Ability to Assist Counsel," *Guild Prac.* 58, 2001, 112.

23. For an excellent article exploring the ethical obligations for attorneys representing juveniles who they suspect are incompetent, see David R. Katner, "The Ethical Struggle of Usurping Juvenile Client Autonomy by Raising Competency in Juvenile Court." *Southern California Interdisciplinary Law Journal*, 16, 2007, 293, 304.

24. See KRS 504.100(1); *Padgett v. Commonwealth*, 312 S.W.3d 336, 345 (Ky. 2010) (requiring the court to order a competency evaluation if there are sufficient facts raising concerns about competency, even if defense counsel has not raised the issue).

25. One is legally incompetent if "as a result of mental condition, [one has a] lack of capacity to appreciate the nature and consequences of the proceedings against one or to participate rationally in one's own defense." KRS 504.060;

see also RCr 8.06. The test for competency is generally referred to as the *Dusky* standard after the U.S. Supreme Court case *Dusky v. United States*, 362 U.S. 402 (1960).

26. See Larson, et al. "Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: Guide for Lawmakers." *Models for Change*, 2011, 14.

27. See Richard E. Redding & Lynda E. Frost. "Adjudicative Competence in the Modern Juvenile Court," *Virginia J. of Social Policy & the Law* 9, 2002, 353, 358.

28. See 610.015 (13) (permitting the court to "amend the petition to reflect jurisdiction pursuant to the proper chapter of the Kentucky Unified Juvenile Code.").

29. Beyer, *What's Behind Behavior Matters*.

30. *Graham v. Florida*, 130 S. Ct. 2011, (2010); *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, (2005).

31. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). For a discussion of *Miranda*, confessions, and other legal issues in juvenile cases, see Steven A. Drizin & Greg Luloff. "Are Juvenile Courts a Breeding Ground for Wrongful Convictions?" *Northern Kentucky Law Review* 34, 2007, 257, 266.

32. Since children with PTSD are often in a state of hypervigilance, they may see people or situations as threats and react aggressively

without realizing it. See *Ten Things*, 7.

33. See *Boykin v. Alabama*, 395 U.S.238, 89 S. Ct. 1709 (1969); *J.D. v. Commonwealth*, 211 S.W.3d 60 (Ky. App. 2006).

34. *Ten Things*, 10.

35. KRS 610.160.

36. See Juvenile Justice and Delinquency Prevention Act, 42 USC §5701 et seq.

37. KRS 630.070.

38. KRS 635.060(4)-(5).

39. Nat'l Child Trauma Stress Network. *Trauma among Girls in the Juvenile Justice System*, 2004, 7; see also Julian D. Ford, et al., Nat'l Center for Mental Health & Juv. Justice. *Trauma among Youth in the Juvenile System: Critical Issues and New Directions*, 2007, 3.

40. KRS 610.100; 610.110.

41. KRS 600.010(2)(c)- (e).

42. *Ten Things*, 9. For a database of treatment strategies to help children with trauma, see the National Child Trauma Stress Network, *Promising Practices*, www.nctsn.org.

43. KRS 610.120 allows the court to terminate a dispositional commitment if the child is no longer benefitting from treatment.

44. *Ten Things*, 11.

LEGISLATION & POLICY

Changing the Course for Infants and Toddlers: A Survey of State Child Welfare Policies and Initiatives

A new report from Zero to Three and Child Trends analyzed policies across 46 states related to infants and toddlers in the child welfare system. According to the report, though the first three years of a child's life are known to be critical and fast-paced developmentally, few states have policies that differentiate the timeline of services and interventions for these kids. The report suggests targeting the needs of infants and toddlers and leveraging the potential of early intervention services.

Access the report: www.childtrends.org/wp-content/uploads/2013/09/changing-the-course-for-infants-and-toddlers-FINAL.pdf

Three short fact sheets accompany the report:

- **Understanding and Meeting the Needs of Birth Parents: A National Snapshot and Action Steps:** www.childtrends.org/wp-content/uploads/2013/09/understanding-and-meeting-the-needs-of-birth-parents-FINAL_.pdf
- **Achieving Prompt Permanency for All Maltreated Infants and Toddlers:** www.childtrends.org/wp-content/uploads/2013/10/achieving-prompt-permanency.pdf
- **Ensuring Assessments and Services for All Maltreated Infants and Toddlers:** www.childtrends.org/wp-content/uploads/2013/10/ensuring-assessments-and-services-for-all-maltreated-infants-and-toddlers.pdf

State Trends Legislative Victories from 2011-2013: Removing Youth from the Adult Criminal Justice System

Each year, an estimated 250,000 children are in the adult criminal justice system and nearly 100,000 youth are placed in adult jails and prisons, according to a new report. The report details legislative trends and state efforts to keep youth out of the criminal justice system. Trends include: passing laws limiting the authority to keep youth in adult jails and prisons, changing transfer laws to keep youth in the juvenile justice system, expanding juvenile court jurisdiction to prevent older youth from being automatically prosecuted in adult criminal court, and changing mandatory minimum sentencing laws.

Access the report: www.campaignforyouthjustice.org/component/content/article/1-real-life/88-statetrends2013.html

Calculating the Risk: Child Sexual Assault

Affluent girls living in two-parent homes are much less likely to be sexually assaulted than other female youth, according to a new study from the University of Iowa. The research revealed that when family income reaches 400 percent of the poverty threshold or around \$92,000 for a four-person household, the risk of sexual assault declines by more than half.

The study conducted by UI School of Social Work professor Amy Butler examined sexual assault in more than 1,000 girls aged 17 and younger, across all income levels. It relied on data obtained from the ongoing Panel Study of Income Dynamics—a national survey of families begun in 1968 and directed by University of Michigan faculty.

Unlike other analyses that examine data gathered after a sexual assault has occurred, Butler's study looked at risk factors related to behavior, family history, and parental income that were measured before an assault, giving the work potentially predictive value.

Published in the *International Journal of Child Abuse & Neglect*, the study showed that the risk of sexual assault for girls between the ages of four and 17 declined from 12.3 to 5.6 percent once income reached 400 percent or more of the poverty threshold.

Her analysis also confirmed previous research that showed girls whose mothers had at least a high-school education and whose biological parents were both present from birth to age one had a lower risk of sexual assault.

Nationwide, one in 10 girls is sexually assaulted, according to Butler's study. This compares to one in five girls who are victims of sexual abuse—a term often encompassing a broader range of inappropriate behavior that can include voyeurism or verbal pressure for sex—as reported by the advocacy organization, the National Center for Victims of Crime.

While reasons behind a decreased risk of sexual assault for young females in economically comfortable, two-parent households are not yet known, Butler notes there may be several possible explanations.

For example, factors that might enable some parents to achieve higher socioeconomic status—e.g. having children later in life—could be tied to personal characteristics like enhanced maturity levels that are then passed down to their children. Education appears to play a role as well.

"It is possible that educated, two-parent families can better afford to raise their children in safe neighborhoods, send them to safe schools, and ensure that their activities are well supervised, thereby decreasing their risk for sexual assault," Butler writes.

"Alternatively, the personal characteristics that may enable some parents to achieve higher socioeconomic status may be transmitted to the daughter through heredity and parental modeling, thereby reducing her risk."

Butler's research helps establish that many risk factors identified in retrospective studies (those conducted

after the fact) are accurate predictors of whether a girl will experience childhood sexual assault.

Her analysis found girls with extremely low math and reading scores, and those referred to special education programs were more likely than their peers to experience an assault. It also confirmed that girls who were shy, withdrawn, had impulsive tendencies or expressed feelings of worthlessness were more prone to sexual assault.

The study further outlined that many mental health disorders found in victims and survivors of assault appear to be a result of their experience with rape. Butler is conducting further analysis to research this link and others. She hopes her study will open doors for more young women to discuss sexual assault, and encourage them to find support and assistance.

Although the research focuses on risk factors in girls, Butler notes that victims are never to blame. "Perpetrators hone their skills to entrap girls. No one enters a situation expecting to be sexually assaulted," says Butler.

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The Invisible Achievement Gap: Education Outcomes of Students in Foster Care in California's Public Schools

A new analysis of foster youth in California public schools shows a drastic gap in education achievement between the foster youth and other students, including those from other at-risk backgrounds. According to the research, students in foster care have the highest yearly dropout rates and are less likely to graduate from high school. In the 2009-2010 school year, 58% of students in foster care graduated from high school, compared to 79% of low socioeconomic status students and 84% of all students. The analysis includes detailed tracking of educational outcomes, demographic background, enrollment by school district, and total number of students in foster care.

Access the report: http://cftl.org/documents/2013/IAG/Invisible_Achievement_Gap_Full_Report.pdf

Using Narratives and Narrative Event Practices in Interviews with Children

Developed by Julie Kenniston, M.S.W., L.S.W.

It is not new to use narrative-inviting questions in interviews with children. Research shows children give more information and more accurate information when asked free recall questions. The focus has shifted from merely asking lots of narrative questions to planning for and using a narrative event practice.

The National Institute for Child Health and Human Development (NICHD) interviewing protocol suggests adding a narrative event practice (training episodic memory) in the early stages of the interview on a neutral topic.

Here is a sample narrative event practice between an interviewer (I) and child (C).

I: "Tell me all about your morning from the time you woke up until you left your house."

C: "My alarm went off but I rolled over. My mom yelled, 'get up now!'

and I got up and went to the bathroom. Then I got dressed and ate breakfast. Got my stuff for school and left for the bus."

I: "I heard you say that you got dressed. Tell me all about getting dressed."

C: "I had to put on my school uniform. So I grabbed my shirt off the floor and put on my pants. They are the khaki ones. My blue ones were too dirty. I didn't have any socks so I went into my dad's drawer and took a pair of his. I put on my shoes by the front door."

I: "Tell me all about your shoes."

C: "We can wear any kind of shoes we want as long as they are black. I have black sneakers. I think my mom is gonna have to buy me new ones because my feet are getting big."

This is an example of asking an event narrative question (the morning routine) with narrative follow-up questions. Inviting narratives in this way early in the interview has many purposes:

- The interviewer engages the child.
- The interviewer shows that she is a listener and is paying attention.
- The interviewer gets a baseline of the child's ability and willingness to communicate.
- The interviewer explains and practices with the child the way that information will be shared.
- The interviewer shows interest and doesn't interrupt.

© May 2013, American Bar Association. For a complete text of Appendix G and references, see *Handbook on Questioning Children: A Linguistic Perspective*, Anne Graffam Walker, Ph.D., 3rd Edition, May 2013. ABA www.ShopABA.org, \$30, PC 34900008, ISBN: 978-1-62722-203-7



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