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Due Process v. Helping Kids in Trouble: Implementing the Right to Appeal from Adjudications of Delinquency in Pennsylvania

By Donald J. Harris*

I. Introduction

One year after the United States Supreme Court delivered its famous decision, *In re Gault,*[1] spelling out the minimum standards of due process for the adjudicatory phase of state juvenile delinquency proceedings, the following observation was made:

> Few commentators have considered the question of the attorney's role or duty in relation to the appeal of the juvenile case. One possible reason for the lack of academic consideration of this stage in the handling of a juvenile case is that very few juvenile cases have gone to the appellate level in proportion to the number adjudicated. Another reason might be the fact that, until recently, most juveniles were not represented by counsel at any stage of the juvenile proceeding. While it may not be necessary to have counsel in order to appeal a case, it would be a rare juvenile defendant who would even know of his right to appeal, much less one who would know the means of perfecting an appeal or of preserving error for review. The advent of the attorney in juvenile courts should increase substantially the number of appeals taken in juvenile cases.[2]

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*Director of Research, Administrative Office of Pennsylvania Courts; Ph.D. Temple University, 1978. I want to thank William F. Cercone, Joy A. Chapper, David Donaldson, Howard Holmes, Hunter Hurst, Thomas B. Marvell, H. Ted Rubin, David Rudovsky, Ira M. Schwartz, Robert G. Schwartz and Charles Thrall for their many valuable comments on an earlier draft of this paper. Points of view expressed herein are my own and do not necessarily represent the official position or policies of the Administrative Office of Pennsylvania Courts or any component of the unified judicial system of Pennsylvania.

1. 387 U.S. 1 (1967). In *Gault*, the Supreme Court ruled that when a child faces potential confinement, delinquency proceedings must measure up to the essentials of due process and fair treatment, including notice of the specific charges, right to counsel, right to confront and cross-examine witnesses called by the state, and protection from compulsory self-incrimination. Subsequent decisions broadened the child's constitutional safeguards to include proof beyond a reasonable doubt, In re Winship, 397 U.S. 358 (1970), and protection against double jeopardy, Breed v. Jones, 421 U.S. 519 (1975).

2. Comment, *Appellate Review of Juvenile Court Proceedings and the Role of the Attorney*, 13 ST. LOUIS U. L.J. 90 (1968). The President's Commission on Law Enforcement and Administration of Justice reached a similar conclusion: "By and large the juvenile court system has operated without appellate surveillance . . . Two factors contribute substantially to the lack of review. The absence of counsel in the great majority of cases is the first . . . The other important

A quarter of a century later, private and public defenders are commonplace in the juvenile courts of America. In Pennsylvania, the locus of the present study, administrative records indicate that representation by counsel, unless expressly waived by the defendant,[3] is universal in cases that result in a finding of delinquency and the child's placement out of the home. Whether representation leads to more appeals is still an open question; it seems that juvenile appeals have not been the subject of quantitative research in any U.S. jurisdiction. One aim of this study is to provide baseline information on juvenile appeal rates in the Commonwealth of Pennsylvania.

The Pennsylvania Constitution provides an absolute right of appeal from juvenile delinquency proceedings.[4] Appeals as of right from the judgment of the juvenile court are taken to the Superior Court of Pennsylvania, the intermediate appellate court with jurisdiction over juvenile and adult criminal matters.[5] In the state judicial hierarchy, the setting of jurisprudential policy is principally the task of the Pennsylvania Supreme Court.[6] Although the supreme court may grant a petition for

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factor is the general absence of transcripts of juvenile proceedings." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT, JUVENILE DELINQUENCY AND YOUTH CRIME, at 115 (Washington, D.C.: U.S. Government Printing Office, 1967).

3. The waiver rate in 1991 was 1.03 percent. JUVENILE COURT JUDGES' COMMISSION, PENNSYLVANIA JUVENILE COURT DISPOSITIONS 1991, Series J-2 No. 21, at 14.

4. The juvenile's right to appeal is conferred by Article V, Section 9 of the Pennsylvania Constitution, which provides, "There shall be a right of appeal in all cases to a court of record from a court not of record; there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be provided by law; and there shall be such other rights of appeal as shall be provided by law." Because the juvenile courts of Pennsylvania are courts of record, the right of appeal attaches. In the Interest of A.P., 617 A.2d 764 (Pa. Super. Ct. 1992).

Note that the United States Supreme Court has never held that states must afford citizens the right of appellate review as an element of due process. However, it has held that if a state grants such a right, it must provide a meaningful review. Evitts v. Lucey, 469 U.S. 387 (1985); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

5. 42 PA. CONS. STAT. ANN. § 742 (1981).

6. The supreme court is the highest court of the Commonwealth and in it is reposed the supreme judicial power of the Commonwealth. PA. CONST. art. V, § 2. For a synopsis of the Pennsylvania Supreme Court's policy-setting role, see In Re Stout, 559 A.2d 489 (Pa. 1989). The complementary roles of the superior and supreme courts closely follow the national pattern:

> The intermediate court normally serves two purposes: (1) it decides the mass of appeals and (2) thereby leaves the top court free to determine questions of law, particularly those that may develop the law as a whole. The highest court formulates doctrine while the intermediate court decides cases in accordance with preexisting law. The intermediate court is in a good position, however, to stimulate revision of the law by calling attention to the need for change, either legislative or judicial, when it cannot itself make change.

ROBERT A. LEFLAR, AMERICAN BAR FOUNDATION, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS (1976), at 64.

an appeal from a decision of the superior court, in the large majority of cases such petitions are denied.[7] The superior court is thus the final arbiter of legal disputes in Pennsylvania in nearly all cases within its jurisdiction, including allegations of delinquency and crime.

The purpose of this study is to encourage and organize a policy discussion on how best to implement juveniles' state constitutional right of appellate review in light of widespread concern that appeals may undermine the rehabilitation of the delinquent child. The focus is on minors whom the court has adjudged delinquent and removed from the home. To motivate the discussion, four propositions are advanced. The first is sociological and asserts the existence of a subculture, a generally shared set of values among the practitioners of juvenile court, in which the goals of rehabilitation are paramount and are usually found to outweigh the child's right to decide whether or not to challenge the adjudication or commitment. The second proposition is statistical and asserts that the available data on appeals are consistent with the concept of a treatment-oriented subculture in the tradition of *parens patriae*, the state as parent and decision-maker. The third is legal-theoretical and asserts that appellate review provides an essential counterweight to the closed, informal proceedings of juvenile court. The fourth is methodological and normative and asserts that while evidence that appeals adversely affect the rehabilitation of juveniles is lacking, every effort should be made to ensure that treatment plans are not compromised by the pendency of an appeal. The study is limited to first-level appeals, that is, appeals to the Superior Court of Pennsylvania.

II. Superior Court Review

To provide a context for the analysis, a brief sketch of the institutional functions of the superior court might be helpful. Appeals are the vehicle by which the Superior Court of Pennsylvania supervises the trial process, correcting errors by reversing or modifying trial court decisions.[8] Because reversals are a more decisive rejection of a lower

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7. Of the 2,128 allocatur (allowance of appeal) petitions filed in 1991 with the Pennsylvania Supreme Court, 1,865 or about 88 percent were denied. ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS, 1991 CASELOAD STATISTICS OF THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA, at 3.

8. In Pennsylvania, the trial courts, which include the juvenile and criminal courts, are the courts of common pleas, having original jurisdiction over all cases not exclusively assigned to another court. PA. CONST. art. V, § 5; 42 PA. CONS. STAT. ANN. § 931 (1981). Each of the sixty judicial districts in the Commonwealth houses one common pleas court. Judicial district boundaries generally follow county lines, although seven of the districts encompass two counties. 42 PA. CONS. STAT. ANN. § 901 (1981).

court's reasoning or conduct than a statement of disapproval in an affirming opinion upholding the result below, superior court opinions accompanying reversals usually contain more systematic guidance for judges "in the trenches." Appellate affirmation of both the trial court's reasoning and result also serves a constructive purpose. For the litigants, it validates the propriety of the trial court's decision; for the trial judge and counsel, it reinforces their understanding of the law. Thus, superior court review is advantageous for at least four reasons:

1. it corrects errors committed by the common pleas courts;
2. it contributes to uniformity of decision throughout the jurisdiction;[9]
3. it helps to maintain the legitimacy of the judicial process for litigants and the public; and
4. it educates the trial bench and bar in the latest developments in the law.

With respect to the error-correction function, it should be mentioned that judges, in the midst of trial, are required to make immediate rulings, without the benefit of extended reflection or research, and it is reasonable to expect some level of reversible error. The data show that the superior court grants relief, in full or in part, in about 14 percent of the criminal appeals decided by written opinion.[10] While not

9. "The desire for uniformity of juvenile court decisions need not militate against the goal of individualization of the child and his situation, because individualization is of paramount importance only in the dispositional phase of the juvenile court hearing. Uniformity is a valid objective in the jurisdictional and adjudicative (as opposed to dispositional) processes of the court, and it is not likely to be achieved without appellate review." Addision M. Bowman, *Appeals from Juvenile Courts*, 11 CRIME & DELINQ. 63, 64 (1965) (footnote omitted).

10. 1990 superior court dispositions were as follows:

Affirmed	1,973
Affirmed in part, remanded in part	6
Affirmed in part, reversed in part	7
Affirmed in part, vacated in part	37
Affirmed/reversed/remanded in part	1
Appeal quashed/dismissed	68
Reversed & appellant discharged	4
Reversed and remanded	94
Remanded	8
Reversed	37
Vacated	21
Vacated in part/remanded in part	10
Vacated and remanded	123
Petition for allowance of appeal denied	45
Other	34
Total	**2,468**

Source: automated docketing system of the Superior Court of Pennsylvania.

overwhelming, an intervention rate of one in seven is certainly high enough to suggest that an uninformed waiver of the right to appeal would expose a litigant to a definite risk.

III. Comparison of Juvenile and Adult Appeals

To identify the unique features of juvenile appeals, this section examines the various points of difference and similarity between the appeals of juveniles who were adjudicated delinquent and the appeals of the closest available comparison group, namely, adults who were convicted of crimes. The analysis considers statutory jurisdiction, constitutional rights at the trial stage, and types of issues raised on appeal. It also provides a frame of reference for interpreting the statistical data.

Pennsylvania's Juvenile Act[11] defines a delinquent as a child between ten and 21 years of age whom the court has found to have committed a delinquent act before reaching the age of 18 years and is in need of treatment, supervision or rehabilitation. The term "delinquent act" means an act that would be designated a crime if committed by an adult. Status and summary offenses, such as truancy or minor traffic violations, are excluded from the delinquency category. Thus, the same range of conduct underlies juvenile and adult adjudications,[12] even though the legal consequences of adjudication may differ. A felony adjudication does not disqualify a juvenile from later holding public office, serving on a jury or voting—typical disqualifications for felony convictions.[13] This is not to say that a delinquency adjudication won't later present problems for the juvenile, however. Pennsylvania law provides for the meting out of harsher sentences to adult defendants with significant juvenile records.[14]

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11. Act of July 9, 1976, P.L. 586, 42 PA. CONS. STAT. ANN. § 6301 (1981). The Juvenile Act's section on definitions is located at 42 PA. CONS. STAT. ANN. § 6302 (1981).

12. The exception is the crime of murder, where jurisdiction originally lies in the criminal court. 42 PA. CONS. STAT. ANN. § 6302(2)(i) (1981).

13. "An order of disposition or other adjudication in a proceeding under this chapter is not a conviction of crime and does not impose any civil disability ordinarily resulting from a conviction or operate to disqualify the child in any civil service application or appointment." 42 PA. CONS. STAT. ANN. § 6354(a) (1981).

14. *See* In the Matter of Brandon Smith, 573 A.2d 1077, 1080 (Pa. Super. Ct. 1990) (*en banc*) (plurality opinion) (juvenile record may substantially affect one's later treatment in criminal justice system); Commonwealth v. Felix, 539 A.2d 371 (Pa. Super. Ct. 1988) (lengthy juvenile record must be considered in sentencing adult); Commonwealth v. Billett, 535 A.2d 1182 (Pa. Super. Ct. 1988) (in sentencing adult, court could consider defendant's prior adjudication of delinquency). Pennsylvania's Sentencing Guidelines direct a sentencing court to count in the prior record score, *inter alia*, all prior juvenile adjudications of delinquency where there was an express finding that the adjudication was based on the commission of a felony or certain weapons misdemeanors where the

Because the legislative response to delinquency is intended to be rehabilitative and nonpunitive,[15] a juvenile court disposition is formally considered civil, comparable to an involuntary mental health commitment proceeding. However, the federal constitutional safeguards afforded to children at the adjudicatory hearing are in core respects the same as the protections afforded to adults accused of crimes.[16] That is to say, the *Gault-Winship-Breed* revolution established procedural regularity, shifting the orientation of the juvenile court from maximum judicial discretion to ascertain the child's "real needs" to proof of the violation of criminal laws. Children acquired the right to be notified of the charges, to remain silent,[17] to suppress evidence obtained from an unreasonable search, to have the effective assistance of counsel, to confront and cross-examine witnesses, to compel process of favorable witnesses, to demand proof beyond a reasonable doubt[18] and to be free of double jeopardy.[19] By defining procedural justice for juveniles in these terms, the Court sought

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adjudication occurred on or after the defendant's 14th birthday. 204 PA. CODE § 303.7(b)(1)(ii) (1993).

15. On the history and mission of the juvenile court, see STEVEN L. SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF "PROGRESSIVE" JUVENILE JUSTICE 1825-1920 (1981); Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205 (1971); Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970). *Cf.* ANTHONY M. PLATT, THE CHILD SAVERS (1977); John R. Sutton, *The Juvenile Court and Social Welfare: Dynamics of Progressive Reform*, 19.1 LAW & SOC'Y 107 (1985). For a turn of the century perspective, see Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

16. "[C]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile court." In re Winship, 397 U.S. at 365. Of the numerous works that discuss the post-*Gault* equivalence between crime and delinquency guilt-determination, cautious assessments are found in Francis Barry McCarthy, *Pre-Adjudicatory Rights in Juvenile Courts: An Historical and Constitutional Analysis*, 42 U. PITT. L. REV. 457 (1981); Irene Merker Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27 UCLA L. REV. 656 (1980).

17. Some scholars contend that it was the child's right to remain silent that finally secured the criminalization of juvenile proceedings. "By recognizing the applicability of the privilege against self-incrimination, juvenile adjudications could no longer be characterized as either 'non-criminal' or 'non-adversarial,' since the fifth amendment privilege is both the guarantor of an adversarial process and the primary mechanism for maintaining a balance between the state and the individual." Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821, 826, n.21 (1988).

18. The *Winship* Court found that "[t]he same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well as to the innocent child." 387 U.S. at 365.

19. In Breed v. Jones, 421 U.S. 519 (1975), the Court held that the protections of the double jeopardy clause of the Fifth Amendment prohibited adult criminal prosecution of a youth previously adjudicated delinquent on the same charges. When the potential consequences include both social stigma and deprivation of liberty, the Court could "find no persuasive distinction" between an adult criminal trial and a delinquency proceeding; both impose "heavy personal strain" upon the accused. *Id.* at 531.

to realize the traditional goals of criminal due process: to provide accuracy in fact-finding and to prevent governmental oppression. It stopped short, however, of granting juveniles a right to a jury trial,[20] which remains the key difference between the federal constitutional rights of children and adults at the trial stage.

Three other departures from full procedural parity should be noted. The Sixth Amendment guarantee of public trial does not apply to state juvenile proceedings.[21] The question of whether minors are entitled to a speedy trial, also guaranteed to criminal defendants by the Sixth Amendment and applied to the states by the Fourteenth, has not been addressed by the U.S. Supreme Court or the Pennsylvania appellate courts.[22] Finally, the federal constitution does not acknowledge a right to bail for adults or for children;[23] however, a right to bail is recognized for adult defendants in Pennsylvania in all cases except capital murder.[24] Table 1 provides a summary of the federal and state

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20. In McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (plurality opinion), the U.S. Supreme Court held that the due process clause of the Fourteenth Amendment did not assure the right to jury trial in state delinquency proceedings. Rather, the applicable standard was fundamental fairness since the absence of a jury trial does not necessarily prevent accurate fact-finding. Furthermore, the added protection of a trial by jury, with all its delays, formality and clamor, was considered unwieldy such that it might discourage state innovations in dealing with the problems of the young. The Court also remarked that it had been forced in earlier rulings to abolish most of the differences between juvenile and criminal trials owing to serious shortcomings in state juvenile court procedures, but that it was not ready to end the juvenile court experiment altogether: "If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it." *Id.* at 551.

21. "Except in hearings to declare a person in contempt of court, the general public shall be excluded from hearings under this chapter." 42 PA. CONS. STAT. ANN. § 6336(d) (1981).

22. Pennsylvania's criminal procedural rules, which define "prompt trial" and regulate its computations, PA. R. CRIM. P. 1100, do not extend to juvenile delinquency cases, PA. R. CRIM. P. 1. Interestingly, Rudovsky and Sosnov's treatise on Pennsylvania criminal procedure states that "the only time limitation on the holding of the [adjudicatory] hearing is the constitutional right to a speedy trial, applicable to juveniles through the Due Process Clause." DAVID RUDOVSKY & LEONARD SOSNOV, CRIMINAL PROCEDURE: FORMS AND COMMENTARY, 2 WEST'S PENNSYLVANIA PRACTICE § 18, at 392 & n.7 (Douglas Frenkel, ed., West 1991).

23. The U.S. Supreme Court has ruled that the Eighth Amendment prohibition against excessive bail does not imply an affirmative right to bail. Rather, it is for Congress to define the classes of cases in which bail shall be permitted. This paves the way for a legislative denial of bail in those cases where the arrestee is likely to commit crimes while on release. Bail under this theory may properly serve two purposes: compelling appearance in court and the preventive custody of dangerous defendants. United States v. Salerno, 481 U.S. 739 (1987). For a contrary reading of the historical record, see Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959 (1965). Several years before *Salerno*, the Court in Schall v. Martin, 467 U.S. 253 (1984), authorized the use of preventive detention for accused juvenile delinquents.

24. PA. CONST. art. I, § 14. The prohibition against excessive bail is found in PA. CONST. art. I, § 13.

constitutional rights of juvenile and adult defendants at the trial stage. The table shows that juvenile cases at the adjudicatory stage are not qualitatively different from adult criminal cases. Except for trial by jury, juveniles are guaranteed nearly the full spectrum of constitutional rights afforded to adult defendants whose liberty may stand forfeit. Juveniles may not lose their freedom except by competent, relevant, legally posited evidence proved beyond a reasonable doubt. States may not diminish these rights, although they may add to them. Direct appeal from the final orders of juvenile and criminal dispositions is a prime example of expanded rights in Pennsylvania.[25]

With the close similarity in rights, and with the same range of offenses being subject to prosecution, it is reasonable to expect that many of the same issues would be raised on appeal from adult criminal convictions and juvenile delinquency adjudications. Recent cross-court research[26] discloses that the most frequent issues raised in criminal appeals are evidentiary, such as a challenge to a ruling on the introduction of evidence or testimony (character testimony, hearsay, testimony of expert witnesses) or a challenge to the sufficiency or weight of the evidence.[27] Equally applicable to juvenile prosecutions are rulings on motions to suppress tangible evidence[28] (drugs or weapons) and motions to exclude a defendant's statements (claims of a coerced confession) or identification of the accused (improper lineup). On

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25. The final order of a juvenile court is the dispositional order. Commonwealth v. Clay, 546 A.2d 101 (Pa. Super. Ct. 1988). In a criminal court, it is the sentencing order. Commonwealth v. Oates, 392 A.2d 1324 (Pa. Super. Ct. 1978). The right to appeal also extends to certain interlocutory orders. *See* 42 PA. CONS. STAT. ANN. §§ 702, 5105(c) (1981); PA. R. APP. P. 311.

26. JOY A. CHAPPER AND ROGER A. HANSON, NATIONAL CENTER FOR STATE COURTS, UNDERSTANDING REVERSIBLE ERROR IN CRIMINAL APPEALS: FINAL REPORT (1989) [hereinafter UNDERSTANDING REVERSIBLE ERROR]. To date, this is the largest and most comprehensive study of issues raised in first-level criminal appeals. The sample included appeals brought by the defense and decided on the merits in five sites: the California Court of Appeal, Third District, in Sacramento; the Colorado Court of Appeals; the Appellate Court of Illinois, Fourth District, in Springfield; the Maryland Court of Special Appeals; and the Rhode Island Supreme Court. The total data set consisted of approximately 3,800 issues raised in 1,750 appeals. *See infra* note 32 for a frequency distribution of issues raised on appeal following jury trial conviction.

See also Thomas W. Davies, *Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeals*, 82 AM. B. FOUND. RES. J. 543 (1982) (a detailed case study of the intermediate appellate court in the San Francisco Bay area). Valuable supplementary research on criminal appeals can be found in Ronald Labbe, *Appellate Review of Sentences: Penology on the Judicial Doorstep*, 68 J. CRIM. L. & CRIMINOLOGY 122 (1977); David Neubauer, *Published Opinions versus Summary Affirmations: Criminal Appeals in Louisiana*, 10 JUST. SYS. J. 173 (1985); and John T. Wold, *Going Through the Motions: The Monotony of Appellate Court Decisionmaking*, 62 JUDICATURE 58 (1978); John T. Wold and Greg A. Caldeira, *Perceptions of "Routine" Decision-Making in Five California Courts of Appeal*, 13 POLITY 334 (1980).

27. *See* In the Interest of D.S., 622 A.2d 954 (Pa. Super. Ct. 1993).

28. *See* In the Interest of J.H., 622 A.2d 351 (Pa. Super. Ct. 1933).

constitutional considerations alone, one would anticipate that juvenile proceedings now feature the same contests over evidence as adult proceedings since only proof admissible in a criminal trial can be used to support a finding that the juvenile committed the offense.

A variety of less frequently raised claims of error involving procedural or discretionary rulings (amending charging documents; adequacy of notice in probation revocation hearings; severance or consolidation of bills of information or defendants) may occur on appeal from both juvenile and adult proceedings. Appeals from trial court denials of motions to withdraw a plea (an "admit" in the vocabulary of the juvenile court) also would seem to cut across boundaries, particularly if raised in conjunction with a suppression or other procedural ruling.

There are some issues that would not find a counterpart in the juvenile court system. Most prominent are challenges to jury selection (unrepresentative panel, scope of voir dire), jury management (sequestration, improper influences), the trial judge's instructions to the jury and issues relating to the legality or severity of a sentence.[29] In the post-*Gault* era, the rationale for a separate juvenile court is to a large extent grounded in the concept of individualized sentencing, and the broad discretion given to juvenile court judges that it implies. Appellate courts have been extremely reluctant to intrude upon that discretion. Conversely, Pennsylvania's sentencing code for criminal defendants seeks to channel trial court discretion through mandatory minimum penalties and sentencing guidelines, and appellate review is integral to that process.[30]

We also might expect criminal appeals more often to include claims of speedy trial violations and allegations of prosecutorial misconduct, the former because juvenile cases tend to move more quickly than adult cases, and the latter because of the increased opportunities for

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29. Evidence in support of a higher appeal rate in a determinate sentencing jurisdiction (Sacramento, California) in comparison to an indeterminate sentencing jurisdiction (Rhode Island) is presented in Roger A. Hanson and Joy A. Chapper, *What Does Sentencing Reform Do To Criminal Appeals?* 72 JUDICATURE 50 (1988). This one-page report uses only a subset of the data more thoroughly analyzed in UNDERSTANDING REVERSIBLE ERROR, *supra* note 26. However, a "startling" finding mentioned here which does not appear in the final report is that "sentencing is the only issue in 25 percent of the criminal appeals" decided by the Court of Appeals in Sacramento. Presumably, the figure is lower (less "startling") in Springfield -- the other jurisdiction referenced here and, significantly, a determinate sentencing jurisdiction -- and lower still in Rhode Island. Of course, this finding is relevant only to the degree that the determinate/indeterminate sentencing dichotomy corresponds, *mutatis mutandi*, to the criminal/juvenile court dichotomy.

30. *See* Joseph A. Del Sole, *Appellate Review in a Sentencing Guideline Jurisdiction: The Pennsylvania Experience*, 31 DUQ. L. REV 479 (1993), for a brief history of appellate review of criminal sentencing in Pennsylvania along with the case for expanding its present scope.

misconduct that a jury trial provides. Similarly, claims of ineffectiveness of counsel, though widely available to both groups of defendants,[31] find firmer footing in convictions arising from a jury trial.

With potentially more issues to contest, adults might be predicted to file more appeals than juveniles. The question remains how many more appeals should we predict, especially when consideration is limited to loss-of-liberty cases? From Chapper and Hanson's research, I estimate that the unique features of adult prosecutions nearly double the number of criminal appeals filed.[32] A reasonably conservative baseline prediction would then put the adult appeal rate at twice that of juveniles. At the risk of spoiling the suspense, the main empirical finding of the present study is that adults are found to appeal eleven times more often than juveniles. It isn't solely a matter of rates either: appeals from juvenile delinquency dispositions are a rare event in Pennsylvania. A

31. The Pennsylvania Supreme Court defines the standard as follows: "It is axiomatic that in order for Appellant to establish a claim of ineffective assistance of counsel, he must first demonstrate that the underlying claim is of arguable merit; that counsel's action or inaction was not grounded on any reasonable basis designed to effectuate his interest; and that the commission or omission so undermined the trial that the verdict is unreliable." Commonwealth v. Carpenter, 617 A.2d 1263, 1265 (Pa. 1992).

32. Chapper and Hanson constructed a percentage frequency distribution of issues raised on appeal (shown below) for the 1129 jury trial cases in their sample. Percentages sum to more than 100 because an appeal may raise more than one issue. Issues that would not arise (double underline) and issues that are less likely to arise (single underline) in a juvenile appeal represent about half of the total (46 percent). Absent more information, this suggests that the additional issues which adult appellants might raise roughly double the number of appeals. Inevitably, this figure must remain speculative since we could never actually count the number of appeals that juveniles would file if they had all the issues available to them that adults have.

Issues Raised	**Percent of Cases**
Evidentiary ruling	43.0
Sufficiency of evidence	35.1
Jury instruction	29.5
Sentence/sentencing hearing	24.4
Suppression evidence/statements	14.5
Prosecutorial misconduct	12.7
Judicial intrusion or management	9.7
Jury selection or deliberation	7.9
Improper lineup/identification	6.2
Lesser included offenses/merger	3.5
Speedy trial	3.3
Statutory interpretation	1.2
Constitutionality of statute	1.0
Total	**192.0**

These statistics were obtained from UNDERSTANDING REVERSIBLE ERROR, *supra* note 26, at 32.

five-fold departure from the baseline prediction is a clear sign that forces other than the formal differences between criminal and delinquency proceedings are at play.

IV. Data

The statistical analysis that follows relies on calendar year 1990 data from three sources. Criminal and juvenile appeal data were culled from the automated docketing system of the superior court.[33] Data on juvenile cases resulting in commitment[34] were provided by the Juvenile Court Judges' Commission of Pennsylvania which, through the county court probation departments, collects case-specific information on all juvenile dispositions in each of the 67 counties. The Pennsylvania Commission on Sentencing provided case-specific data on all non-DUI criminal sentences resulting in incarceration.[35] The three sets of data permitted the estimation of juvenile and criminal appeal rates at both the state and county levels, and by type of offense.[36]

In the present analysis the *juvenile appeal rate* will be defined as the total number of appeals from juvenile delinquency dispositions per 100 placements out of the home, and the *criminal appeal rate* will be defined as the total number of adult criminal appeals per 100 sentences of jail or prison. Note that in computing the appeal rates, non-confinement dispositions are excluded from the denominator. Since defendants

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33. Originally there was concern that the meager number of appeals docketed "juvenile" reflected a misclassification of the type of case, but interviews with public defenders and judges from a sample of courts confirmed the correctness of the numbers. In discussing delinquency appeals, a recurring comment was "I knew that we didn't have any appeals, but I didn't know that other counties didn't have them." If there is an undercount of delinquency appeals, and only those specifying an offense type are included, the interviews suggest that it is *de minimis*.

34. "Commitment" refers to any disposition which results in the removal of the child from the home, including placement in a secure institution, residential school, drug and alcohol treatment facility, group home, foster care, "outward bound" program, forestry camp, etc. Each of the placement types represents an involuntary loss of liberty.

35. DUI cases are excluded due to the short and sometimes flexible terms of incarceration (average minimum sentence was 34.2 days in 1990). 1990-1991 ANNUAL REPORT OF THE PENNSYLVANIA COMMISSION ON SENTENCING, at 42. There were no juvenile appeals filed in the superior court from DUI convictions in 1990. Of the 3,150 adult appeals, 222 were DUI.

36. Before discussing the methodology of measuring appeal rates, a summary of the main demographic features of the juveniles under study is in order. Most of the juveniles who were adjudged delinquent and committed (87 percent) ranged in age from 14 to 17 years at the time of their referral to juvenile court, with the median age at 16 years. The majority were male (93 percent) and living with one or both biological parents (80 percent). One parent households were the most frequent living arrangement (55 percent); typically, the mother was present and the father was absent (49 percent). Half of the juveniles committed were black, 39 percent were white, nine percent were hispanic, and the balance were classified as "other" or "unknown." Most were still in school (79 percent).

seldom appeal from sentences of probation, consent decrees, or the like, this population is less "at risk" for taking an appeal. Juvenile commitments and recommitments following mandatory placement and dispositional reviews[37] are excluded from the denominator for the same reason. As for the numerator, all juvenile and adult appeals filed in 1990 are included, regardless of the type of sentence or underlying proceeding. The reason is that there are very few juvenile appeals filed, and reducing the number further would not refine the analysis.

Table 2 sets forth the number of juvenile and criminal appeals, commitments and incarceration sentences, and rates of appeal for each county in Pennsylvania. The most striking feature of this table is the absence of juvenile appeals in 54 of the 67 counties (81 percent). While to be expected in small, one-judge counties such as Clarion, Huntingdon and Tioga, where there were only a handful of juvenile commitments or none at all, the lack of appeals is more counter-intuitive in mid-sized counties such as Berks, Lycoming and York. More surprising still is the dearth of appeals in Bucks, Chester, Delaware and Montgomery, the large suburban counties that ring Philadelphia, each of which committed more than 100 juveniles in 1990. Only Philadelphia had more than three juvenile appeals, and its appeal rate, 1.3 per 100 commitments, was just slightly higher than the state average of 1.0.

Most juvenile appeals, like adult criminal appeals, are brought through the county public defender's office or its equivalent.[38] Thus, it bears inquiry why the same organization of lawyers that files appeals in large numbers for its adult clients rarely does so for juveniles. For example, in Allegheny County (Pittsburgh and its surrounding municipalities), 488 adult appeals were filed in 1990, but only one juvenile appeal was filed. While there is variation across counties and from year to year (in 1991, five juvenile appeals were filed in Allegheny County), the state totals are stable and reveal that the adult appeal rate is at least ten times greater than the juvenile appeal rate. Recall that the issues raised on appeal could account, by our best judgment, for just one fifth of this disparity.

The propensity for filing more adult appeals does not seem to depend on the type of underlying offense. As seen in Table 3, the appeal

37. "The committing court shall review each commitment every six months and shall hold a dispositional review hearing at least every nine months." 42 PA. CONS. STAT. ANN. § 6353 (1981).

38. Juveniles were represented by public defenders in 71 percent of placement cases, by court appointed counsel in 15 percent, and by private counsel in 13 percent. *See* PENNSYLVANIA JUVENILE COURT DISPOSITIONS 1991, *supra* note 3. Here I use 1991 figures because 24 percent of the attorney data were missing in 1990. Non-reporting on this element was 0.0 percent in 1991.

rates are considerably greater for adults than for juveniles for each offense type: aggravated assault (14 times greater), rape (13 times greater), burglary (12 times greater) and robbery (17 times greater). Complications of matching offenses across the three data sets leave only these four offense categories for comparison,[39] but they are sufficient to show that the disparity in appeal rates is not attributable to any difference in the types of offenses for which children and adults are convicted. Even if fact patterns underlying the juvenile cases differ in some systematic way from adult fact patterns — and there is no *a priori* justification for that view — such differences cannot adequately explain the inequality in the rates of appeal. A more rigorous comparison of juvenile and adult appeal rates would include statistical controls for the type of underlying proceeding since more appeals follow trial convictions than guilty pleas.[40] Unfortunately, the juvenile court data set could not adequately distinguish between trials and pleas, and thus both are included in the denominator of the criminal and juvenile appeal rates. Based on interviews with juvenile court personnel across the Commonwealth (see "Interviews" section below), an informed guess is that about 50 percent of the juvenile placements in 1990 followed adjudicatory hearings and 50 percent followed pleas, although this figure varies considerably across judicial districts.[41] By contrast, 70.8 percent of the criminal sentences of incarceration followed pleas, 6.3 percent followed non-jury trials, 4.6 percent followed jury trials, and data are missing on this variable for 18.3 percent of the cases. The implication is plain: if the fraction of juvenile cases "going adversarial" is close to one-half, and if appeal rates are computed with only trials in the

39. The other major offense category, drugs, was too broad to allow meaningful comparison.

40. Chapper and Hanson report that "almost three-quarters of the appeals [in their sample] are from trial convictions. The remaining quarter are from pleas of guilty, revocations of probation and denials of post-conviction relief, and a handful of miscellaneous proceedings, such as criminal contempt and bail hearings" (footnote omitted). UNDERSTANDING REVERSIBLE ERROR, *supra* note 26, at 31. In a study of appellate case processing, the same research team found that trials were the underlying proceeding in 21 percent of all decided criminal appeals in the Arizona Court of Appeals (Division One in Phoenix), 51 percent in the Florida Second District Court of Appeal (in Lakewood), 85 percent in the Maryland Court of Special Appeals, and 64 percent in the New Jersey Superior Court Appellate Division. Of the nine appellate courts examined across the two studies, pleas outnumbered trials only in the Arizona Court of Appeals. JOY A. CHAPPER & ROGER A. HANSON, NATIONAL CENTER FOR STATE COURTS, INTERMEDIATE APPELLATE COURTS: IMPROVING CASE PROCESSING, FINAL REPORT (1990).

41. For example, juveniles rarely contest the allegations of the petition in Bucks and Allegheny Counties, while in Philadelphia, approximately 65 percent of placements followed adjudicatory hearings. *See also* PHILADELPHIA COURT OF COMMON PLEAS, 1990 ANNUAL REPORT OF THE FAMILY COURT DIVISION, at 23, Table 1.

denominator, then the 11-to-1 ratio of adult to juvenile appeals is, if anything, an underestimate of the true extent of the disparity.

The import of the statistical data must be kept in perspective. They document a strikingly large difference between juvenile and adult appeal rates, but for the most part they are silent as to the reasons this disparity exists. One explanation might be that adult defendants place greater store than juveniles in the notion of legal guilt (was every element of the offense proved beyond a reasonable doubt?) as opposed to factual guilt (did the accused commit the crime?) such that adverse rulings of the trial court may occasion more dissatisfaction with adults. Another explanation might be that adults face longer prison terms than minors and are more prone to appeal on that account. Still another might be that adolescents recognize that placement may serve a constructive purpose in their lives, where adults see incarceration more in terms of punishment. The available data are too sparse to rule out any of these or a myriad of alternative explanations. Since a valid account must square with the motives of the actors, I turned to the qualitative method of participant interviews for help in further interpreting the statistical data.

V. Interviews

One of the more direct ways to research the question of why juvenile appeals are hardly ever filed is to ask the public and private defenders handling juvenile delinquency cases to describe their participation in the decision-making process. Accordingly, I interviewed chief public defenders, supervisors and staff attorneys in the county public defender offices, and several private attorneys who practice criminal law and who occasionally represent children, approximately 30 in-depth interviews altogether. The interviews lasted, on average, about 45 minutes. In selecting persons to interview, I tried to obtain a mix of counties by geographic location and population size, but with concentration on the larger counties. I also interviewed a "cross-section" of juvenile court judges, masters, probation officers, prosecutors, administrators, and treatment staff. Follow-up interviews were held where responses needed to be clarified.

It is important not to overstate the precision of the interview methods.[42] The sample was *ad hoc* and the interview questions were open-ended. In interviewing the lawyers my aim was to get their

42. For a series of essays on measurement errors in the interview process, see MEASUREMENT ERRORS IN SURVEYS (Paul P. Biemer et al. eds., John Wiley & Sons, 1991).

perceptions of how the decisions to appeal or not to appeal were made, and in talking with the judges and court officials to understand their perspectives on the appeal process. Consequently, hypotheses emerging from the interviews must be considered preliminary and the conjectures open to revision and specification. This is exploratory research, not model-testing.

The defenders' interview responses quickly revealed an important aspect of the values and perspectives of the juvenile court community. While a few defenders view their roles as advocates whose sole job is to protect the child's legal rights, many see their roles in multi-dimensional terms. Concern with the long-term developmental needs of the child *and* with legal advocacy prompts some attorneys to see appeals as an obstacle to getting the child back on track. They fear that the taking of an appeal merely encourages the child to hold a cynical view. Exceptions, they say, are two-fold. If there is a serious substantive error, not merely a technical error as to form, they will lodge an appeal, but such errors, they say, are rare because judges seem to bend over backwards to treat children fairly. Nearly all defenders, however, profess an adversarial posture with respect to petitions to certify a juvenile to adult court.

Defenders observe that children don't always understand the consequences of court actions. In commitment cases, the child has often cycled through the court system before, perhaps several times, and some parents don't want the child to return to the home, especially if the placement involves a good school or drug and alcohol program. In consequence, many defenders view the attorney's role as a combination of advocate and guardian, with a goal of salvaging the children. In Philadelphia, where by all accounts the adjudicatory hearings are quite adversarial as well as fairly frequent, the same comments were heard with respect to appeals. Since children are far less aware of their rights than adults and far less assertive in securing them, many defenders feel they must perform balancing acts in helping them get along with their lives while at the same time representing their legal interests.

Clearly, the juvenile court system differs from county to county with respect to the level of cooperation between the offices of the district attorney, public defender and juvenile probation. In some areas, they may work jointly to avoid legal confrontation and to fashion a viable treatment plan for the child; in other counties, especially where the district attorney adopts an aggressive prosecutorial stance, the level of cooperation is less apparent.[43] Juvenile court judges often are

43. *See* Inger J. Sagatun and Leonard P. Edwards, *The Role of the District Attorney in Juvenile*

instrumental in shaping the working relationships. While no single organizational pattern prevails in Pennsylvania,[44] one procedural pattern has emerged from the interviews. Almost all of the defenders, in describing the decision not to take an appeal, omit any reference to the child or the parents or guardian as participants in the process. More typical is the total absence of any decision-making process at all. This is especially true in busy court systems where defenders have so little time between cases that the thought of an appeal often never even arises. Follow-up questions reveal, with only a few exceptions, that neither the juvenile nor the parents or guardians are advised of the right to appeal.

The defenders proffered several justifications for this practice. Some said that the likelihood of success on appeal is slim because the superior and supreme courts try very hard to affirm the trial judge. Others suggest that appeals are futile because children get short sentences and it takes months to decide an appeal.[45] Several defenders spoke of the chronic underfunding of their offices such that they simply don't have the resources to file juvenile appeals. Most even doubted whether taking appeals is truly in the child's best interests. On this point, one defender said that when taking an appeal, the client must be advised not to discuss the case with anyone, including placement counselors and teachers, during the pendency of the appeal. This means that the child may not be able to participate in available rehabilitation programs, such as group therapy, which are premised on the child's admission of the crime as a critical step toward emotional and psychological health. Taking an appeal could defeat the treatment plan.

Additionally, all of the defenders said that the trial court does not inform the juveniles of their appellate rights,[46] and there is no legal obligation to do so. Under the Pennsylvania Rules of Criminal

Court: Is the Juvenile Court Becoming Just Like Adult Court?, 30.2 JUV. & FAM. CT. J. 17 (May 1979).

44. A classification of juvenile courts based on dominant value orientations and associated structural traits is found in David P. Aday, Jr. and Jeanne A. Ito, *An Empirical Typology of American Metropolitan Juvenile Courts*, 88 AM. J. OF SOC. 549 (1982).

45. According to officials at the Pennsylvania Department of Welfare, the average time in placement during 1990-1991 was 9.6 months. For children in secure facilities, the average was slightly longer, 9.8 months. Eight of the 368 children in secure facilities (as of June 30, 1992) had been there longer than two years. The median time to dispose of an appeal, from date of docketing in the superior court to date of filed decision, is about 9 to 10 months (8.9 months in 1990 and 9.7 months in 1991). 1990 ANNUAL REPORT OF THE SUPERIOR COURT OF PENNSYLVANIA, at 34; 1991 ANNUAL REPORT OF THE SUPERIOR COURT OF PENNSYLVANIA, at 31.

46. The juvenile court judges I interviewed confirmed this point.

Procedure, adults must be advised of their post-trial rights on the record.[47] The procedural rules do not apply to juveniles.[48]

The juvenile court judges who were interviewed indicated mixed expectations as to the impact of appeals on minors. Some felt that appeals would undermine the rehabilitation process. Three types of harmful effects were predicted: (1) a child may not fully engage in the treatment program if he or she holds out hope of reversal on appeal; (2) an appeal might foster disrespect for the judicial system and the law (a "beat the system" attitude), especially if the appeal results in a windfall acquittal; and (3) a new adjudicatory or disposition hearing only prolongs the legal saga deflecting the child's attention and energy from more productive pursuits. According to the judges, each effect could increase the rate of juvenile recidivism. On the other hand, some judges thought that appeals might produce a positive result. "If there has been an error, or a miscarriage of justice, an appeal should remedy that. Unfair treatment only engenders contempt for the law."

VI. Discussion

The interviews evoke the question raised at the very beginning of this study, that of "the attorney's role or duty in relation to the appeal of the juvenile case."[49] Defenders are subject to a variety of cross-pressures. They are legal advocates,[50] yet they take on the role of "guardian *ad litem*" or substitute decision-maker when they decide not

47. "Upon the finding of guilt, the trial judge shall advise the defendant on the record . . . of the right to file post-verdict motions and of the right to the assistance of counsel in the filing of such motions and on appeal of any issues raised therein." PA. R. CRIM. P. 1123.

48. PA. R. CRIM. P. 1.

49. *See supra* note 2 and accompanying text.

50. This facet of their role is set out in statute: "The public defender shall be responsible for furnishing legal counsel, in the following types of cases, to any person who, for lack of sufficient funds, is unable to obtain legal counsel:

(1) *Where a person is charged with juvenile delinquency;*
(2) Critical pretrial identification procedures;
(3) Preliminary hearings;
(4) State habeas corpus proceedings;
(5) State trials, including pretrial and posttrial motions;
(6) *Superior Court appeals;*
(7) Pennsylvania Supreme Court appeals;
(8) Postconviction hearings, including proceedings at the trial and appellate levels;
(9) Criminal extradition proceedings;
(10) Probation and parole proceedings and revocation thereof;
(11) In any other situations where representation is constitutionally required.

16 P.S. § 9960.6 (emphasis added).

to inform juvenile defendants of their appellate rights. They are part of a "courtroom work group" which tries to guide children into a positive future, although they recognize that a juvenile record could be used by the adult sentencing court.[51] They serve as liaison between the court and the family, an important role as the family's and child's acceptance of the treatment plan is crucial to its success, yet they must seek and be guided by the client's wishes. Also, in comparison with their counterparts in the prosecutor's office, they frequently struggle with higher attorney caseloads, fewer investigative resources and weaker political support.[52]

If it is understandable that juvenile commitments are not followed by considerations of taking an appeal, regardless of whether the commitment is to an "open" or "secure" facility, it should be kept in mind that defender practices, like juvenile court practices generally, have evolved in response to conflicting pressures. In this regard, several defenders remarked that until the interview they never had occasion to think about counseling minors on appellate rights. A few others mentioned the seriousness of the issue and that they planned to discuss it with their colleagues. One supervisor telephoned back to say that after internal office review it was decided that staff defenders will begin giving minors appellate "advisories."[53] A judge of a medium-sized court reported a similar change of practice.

Apparently, part of the reluctance to advise juveniles of their appellate rights stems from the immaturity of the youngsters. Many attorneys feel that adolescents, particularly delinquent adolescents, have not reached the age of discretion and therefore lack the capacity to intelligently discern their own best interests. But the routine extention of these sentiments to the parents or guardian of the child is

51. *See supra* note 14.

52. The resource problems of indigent defense attorneys are so well known to lawyers (along with the perennial efforts to improve the situation) that they have become part of the folklore of the courts. *See, e.g.*, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY: FINAL REPORT, 1986; DAVID T. WASSERMAN, A SWORD FOR THE CONVICTED: REPRESENTING INDIGENT DEFENDANTS ON APPEAL (1990); Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473 (1982); Stephen G. Gilles, Comment, *Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee*, 50 U. CHI. L. REV. 1380 (1983); Note, *(Un)Luckey v. Miller: The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481 (1991).

53. A six-month follow-up indicated that the new policy was still in place. If there was concern initially that such a policy might prompt a flurry of appeals, it proved to be unfounded; no juvenile appeals were filed in this suburban court during the six months. Extrapolating the experience to other courts is problematic as the follow-up period was brief and the configuration of this court unusual (e.g., masters preside over nearly all placement cases).

inappropriate. If the child lacks the capacity to meaningfully participate in his own defense, and the parents are either unavailable or their interests conflict with those of the child, counsel should formally raise this concern with the court. Then, the court may appoint a qualified guardian *ad litem* to represent the child's interest to the attorney.[54] For the attorney to pre-empt the decision to appeal without any judicial proceeding on the issue of competency, and almost never to inquire as to the wishes of the parents or guardian, would appear to run contrary to the standards of professional conduct for lawyers.[55]

How best to reclaim those who have fallen into delinquency without slighting their legal rights is an important and difficult policy issue which should not be resolved through a casual balance of contending forces. Like other policy issues of statewide legal import, the discussion should be explicit and informed, with information and viewpoints collected from all segments of the affected community. The cautionary words apply with perhaps equal force to claims that appeals hinder or help the rehabilitation process. Whether there is a causal connection between appeals and juvenile recidivism is an empirical question for which there are currently no data. However, from interviews with treatment personnel, one may conjecture that research into this area may produce findings that vary with the circumstances of the child. For example, an appeals/recidivism link may be present or more pronounced in chemically dependent children who deny having a problem. Getting these children to buy into recovery is essential and a pending appeal might cut down on the motivation to come to terms with the addiction. By contrast, an appeal may have little or no effect on children whose main problem is the absence of "life skills" such as literacy, vocational and social skills. The appeals/recidivism relationship is unexplored territory, but the implications are serious and the research community should be encouraged to take up the question.

To summarize the argument to this point, according to the defenders and judges interviewed, most juveniles and their parents are not advised of the right to appeal, in part because of concerns that appeals will undermine the court's efforts to (1) rehabilitate the child and (2) break the cycle of recidivism. In keeping with the interview data, the statistics reveal a marked disparity between adult and juvenile appeal rates, a

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54. *See* JOHN A. PALMIERI, § 9.4.1(a)(1) PENNSYLVANIA LAW OF JUVENILE DELINQUENCY AND DEPRIVATION 94-95 (Supp. 1992).

55. "A lawyer shall explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation." PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT Rule 1.4(b).

disparity far beyond what would be expected given the differences in the types of issues which adults and juveniles might raise on appeal. But the statistics, while astonishing for the virtual absence of juvenile appeals, are collateral to the main argument. In Pennsylvania there exists among juvenile court practitioners a generally shared set of values, a juvenile court subculture, which, in the tradition of *parens patriae*, effectively nullifies the autonomy of juveniles and their parents to decide whether or not to challenge the legality of their adjudication or commitment. By the same process, the state juvenile court system bypasses appellate review and the accountability that review brings to judicial tribunals which function, in deference to the welfare of the affected party, without public access or citizen juries. All of this is not to deprecate the goals of rehabilitation. On the contrary, it attempts to direct attention to the children who choose to take an appeal, and who are not at liberty during its pendency, to make sure that they profit as much as possible from the available programs of treatment while awaiting the decision of the superior court.

VII. Conclusions

During the past three decades the juvenile courts of America have undergone a series of doctrinal crises, and advocates vehemently disagree over whether the new precepts are better than the old. For the "traditionalists," the due process revolution of the 1960s and '70s left the juvenile courts hamstrung, unable to freely assist children who desperately need the help of a benevolent judge and supportive social agencies. For the civil libertarians, the abuses of discretion carried on under the guise of "the best interests of the child" were intolerable to the point where the U.S. Supreme Court was required to step in to protect the basic constitutional rights of children. More recently, the critique of contemporary conservatives, taking aim at the "dangerous juvenile offender,"[56] has led to the grafting of societal protection concerns onto the rehabilitative ideal. The momentary truce attempts to accommodate the three perspectives, with due process concerns controlling the adjudicative stage and rehabilitative and public safety interests dominating the intake and dispositional stages.

The present study calls a portion of this compromise into doubt by questioning how the right to appeal is implemented in practice and finding that the protection of the juvenile defendant's appellate rights has

56. *See* 42 PA. CONS. STAT. ANN. § 6302 for the operational definition of "dangerous juvenile offender" in Pennsylvania.

lost its rightful place at the dispositional hearing. Indeed, it probably was never recognized. The right to appeal should not be overlooked or considered expendable because of the potential (but undocumented) harm that appeals may have on treatment efficacy and recidivism. Appellate review provides a necessary counterweight to the informality and confidentiality of the juvenile court. It would now be unthinkable, on accountability grounds alone, to eliminate from adult criminal proceedings in Pennsylvania the right to bail, the right to a jury trial, structured sentencing, and public access to hearings, trial and records. Yet none of these are present in the juvenile forum. The doctrine of *parens patriae* and the curtain of protective confidentiality were not intended to close off the only means of obtaining review. For the defendant and for the juvenile court system as a whole, an informed decision regarding the right of appeal is fundamental to the operation of justice.

On this point, the judges of the Pennsylvania Superior Court seem to be in general, but not complete accord. For example, *In the Interest of A.P.*,[57] a recent case decided *en banc*, the question before the superior court was: "What means, if any, are available to a juvenile to perfect his constitutional right to appellate review of a disposition order when his counsel was ineffective in failing to file a direct appeal, and relief is unavailable [to juveniles] under the Post Conviction Relief Act?"[58] The court concluded that "counsel's failure to properly effectuate appellant's constitutional right of appeal, unless expressly waived by the appellant, is ineffective *per se*."[59] A counter-argument that rehabilitation takes precedence over appeal was stated in a dissenting opinion: "Is it really in A.P.'s best interest, as a sixteen-year old youth, to now have his adjudication of delinquency reversed and the case remanded for further proceedings?"[60] This is a recurring policy dispute among the judges of the superior court.[61] For the discussion to make progress, global statements of policy preference must yield to the analysis of practical issues.

57. 617 A.2d 764 (Pa. Super. Ct. 1992). Of the seven votes cast, three dissented and one concurred in the result.

58. *Id.* at 766.

59. *Id.* at 767. The footnote to this sentence reads: "There is no indication in the present record that A.P. did not desire to appeal the disposition order."

60. *Id.* at 776.

61. *See, e.g.*, In the Interest of J.H., 622 A.2d 351 (Pa. Super. Ct. 1993); In the Matter of Brandon Smith, 573 A.2d 1077 (Pa. Super. Ct. 1990); In the Interest of Davis, 546 A.2d 1149 (Pa. Super. Ct. 1988).

This paper seeks to frame the issues of how best to realize the due process and rehabilitative goals at the post-adjudication stage. It seeks to ground the discussion empirically, focusing attention on the factors that appear to result in a constitutional right of appeal in name only. To implement the right to an effective appeal, the first item on the agenda should be a statewide procedural rule requiring trial judges to advise juvenile defendants of their appellate rights, as presently exists for adult defendants. The obligation of the judiciary here is unmistakable.[62] Trial counsel have obligations as well. As with adult clients, defense attorneys must take a positive role in counseling juveniles on the full extent of their rights.[63] Appeals that are legally hopeless should be discouraged, but without overreaching and with the full recognition that the decision rests with the client.[64]

When an appeal is taken, the decision of the superior court should come quickly, long before the child is returned from placement. However, most of the appeal processing time is consumed in the pre-argument stage: in the lodging of the transcript and in the preparation of briefs and the trial court opinion.[65] Once the appeal is perfected, a similar concentration of effort is required to expedite juvenile appeals

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62. "It should be the duty of the juvenile court judge to inform the parties immediately after judgment and disposition orally and in writing of the right to appeal, the time limits and manner in which that appeal must be taken, and the right to court-appointed counsel and copies of any transcript and records in the case of indigency." INSTITUTE OF JUDICIAL ADMINISTRATION--AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO APPEALS AND COLLATERAL REVIEW, Standard 4.2, at 37 (1980).

63. "On principle, apart from the legal argument, the least to be done, even absent a rule is to notify the child of his right to appeal and that he can do so free of charge, if poor." Theodore McMillian and Dorothy Lear McMurtry, *The Role of the Defense Lawyer in the Juvenile Court—Advocate or Social Worker?* 14 ST. LOUIS U. L.J. 561, 600 (1970).

> Whether or not trial counsel expects to conduct the appeal, he or she should promptly inform the client, and where the client is a minor and the parents' interests are not adverse, the client's parents of the right to appeal and take all steps necessary to protect that right until appellate counsel is substituted or the client decides not to exercise this privilege.

INSTITUTE OF JUDICIAL ADMINISTRATION—AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, Standard 10.3(b), at 197 (1980).

64. "Counsel on appeal, after reviewing the record below and undertaking any other appropriate investigation, should candidly inform the client as to whether there are meritorious grounds for appeal and the probable results of any such appeal, and should further explain the potential advantages and disadvantages associated with appeal. However, appellate counsel should not seek to withdraw from a case solely because his or her own analysis indicates that the appeal lacks merit." *Id.* at 197-98, Standard 10.3(c).

65. In 1991, the superior court established the "Overdue Records Program" in an "effort to minimize the delay in preparation and transmission of the original record from the trial court to the Superior Court." 1991 ANNUAL REPORT OF THE SUPERIOR COURT OF PENNSYLVANIA, at 24.

through the argument and decision stages in the face of huge and growing caseloads.[66]

The practical problems do not end here. Juvenile justice professionals must develop or modify treatment programs to take into account the defendants' legal interests during the pendency of an appeal so that the children get the maximum possible benefit. In this regard, thought should be given to legislation to protect the communications of juveniles in rehabilitative settings with respect to past violations of criminal law. Treatment specialists and defense lawyers should play a prominent role in drafting such legislation.

Few of the problems mentioned here admit of easy solutions. If the analysis is correct, it will take a great deal of effort to find and establish a new and principled equilibrium. The challenge lies in keeping faith with the commitment long recognized by the courts of Pennsylvania: Our children come first.

66. A total of 6,291 appeals were filed in the superior court in 1990. That number grew to 7,121 in 1992. With about 70 percent of all dispositions decided on the merits (the balance are discontinued, abandoned, or "washed out" by other means), and with a complement of fifteen judges and five senior judges, the caseload now averages approximately 250 majority decisions per judicial chamber per year. By any measure, this is a staggering volume of work.

TABLE 1: U.S. and Pennsylvania Constitutional Rights of Juvenile and Adult Defendants

Constitutional Rights	Delinquency Adjudications		Adult Prosecutions	
	Federal	Pennsylvania	Federal	Pennsylvania
Protection Against Unreasonable Search & Seizure	X	X	X	X
Notice of the Charges	X	X	X	X
Right to Bail				X
Protection Against Excessive Bail			X	X
Assistance of Counsel (if commitment is a possible outcome)	X	X	X	X
Right to Remain Silent	X	X	X	X
Speedy Trial	?	?	X	X
Public Trial			X	X
Jury Trial			X	X
Confront & Cross-Examine Witnesses	X	X	X	X
Compulsory Process (favorable witnesses)	X	X	X	X
Proof Beyond a Reasonable Doubt	X	X	X	X
Double Jeopardy	X	X	X	X
Direct Appeal		X		X

Legend: X = present; blank = absent; ? = undecided

TABLE 2: 1990 Pennsylvania Juvenile and Adult Commitments, Appeals, and Appeal Rates by County

County	A 1990 Juvenile Commitments	B 1990 Juvenile Appeals to the Superior Court	(B/A) x 100 Juvenile Appeal Rate	C 1990 Adult Jail/Prison Sentences	D 1990 Adult Appeals to the Superior Court	(D/C) x 100 Adult Appeal Rate
Adams	14	0	0.0	147	13	8.8
Allegheny	538	1	0.2	2,736	488	17.8
Armstrong	7	0	0.0	92	12	13.0
Beaver	16	0	0.0	258	19	7.4
Bedford	5	0	0.0	123	5	4.1
Berks	108	0	0.0	1,216	98	8.1
Blair	39	1	2.6	231	32	13.9
Bradford	9	0	0.0	111	12	10.8
Bucks	180	2	1.1	1,679	60	3.6
Butler	25	0	0.0	340	17	5.0
Cambria	31	0	0.0	282	18	6.4
Cameron	1	0	0.0	15	1	6.7
Carbon	5	0	0.0	133	8	6.0
Centre	13	1	7.7	259	44	17.0
Chester	*105	0	0.0	871	47	5.4
Clarion	0	0	0.0	46	6	13.0
Clearfield	8	0	0.0	188	15	8.0
Clinton	1	0	0.0	103	10	9.7
Columbia	11	0	0.0	130	15	11.5
Crawford	29	0	0.0	182	17	9.3
Cumberland	28	0	0.0	370	40	10.8
Dauphin	116	2	1.7	1,185	96	8.1
Delaware	129	0	0.0	1,179	132	11.2
Elk	3	1	33.3	53	5	9.4
Erie	102	0	0.0	646	124	19.2
Fayette	11	0	0.0	181	37	20.4
Forest	1	0	0.0	16	2	12.5
Franklin	24	0	0.0	195	30	15.4
Fulton	4	0	0.0	33	7	21.2
Greene	12	0	0.0	102	13	12.7
Huntingdon	6	0	0.0	8	4	50.0
Indiana	7	0	0.0	86	4	4.7
Jefferson	8	0	0.0	31	4	12.9
Juniata	1	0	0.0	26	4	15.4

TABLE 2 (continued)

County	A 1990 Juvenile Commitments	B 1990 Juvenile Appeals to the Superior Court	(B/A) x 100 Juvenile Appeal Rate	C 1990 Adult Jail/Prison Sentences	D 1990 Adult Appeals to the Superior Court	(D/C) x 100 Adult Appeal Rate
Lackawanna	42	0	0.0	275	24	8.7
Lancaster	80	3	3.8	532	49	9.2
Lawrence	10	0	0.0	295	33	11.2
Lebanon	5	0	0.0	259	36	13.9
Lehigh	60	1	1.7	519	42	8.1
Luzerne	33	1	3.0	352	29	8.2
Lycoming	49	0	0.0	442	76	17.2
McKean	9	0	0.0	78	7	9.0
Mercer	18	0	0.0	188	46	24.5
Mifflin	4	0	0.0	149	10	6.7
Monroe	23	0	0.0	149	42	28.3
Montgomery	133	3	2.3	1,574	98	6.6
Montour	0	0	0.0	52	7	13.5
Northampton	46	1	2.2	448	36	8.0
Northumberland	8	0	0.0	205	30	14.6
Perry	3	0	0.0	77	13	16.9
Philadelphia	1,335	**17	1.3	7,616	912	12.0
Pike	1	0	0.0	53	4	7.5
Potter	8	0	0.0	59	3	5.1
Schuykill	21	0	0.0	342	31	9.1
Snyder	1	0	0.0	69	3	4.3
Somerset	8	0	0.0	111	9	8.1
Sullivan	2	0	0.0	6	0	0.0
Susquehanna	4	0	0.0	126	5	4.0
Tioga	12	0	0.0	28	6	21.4
Union	0	0	0.0	49	2	4.1
Venango	5	0	0.0	123	9	7.3
Warren	13	0	0.0	122	8	6.6
Washington	22	0	0.0	278	17	6.1
Wayne	2	0	0.0	45	6	13.3
Westmoreland	32	1	3.1	288	36	12.5
Wyoming	1	0	0.0	45	7	15.6
York	91	0	0.0	750	75	10.0
TOTAL	3,678	35	1.0	28,957	3,150	10.9

* Corrected figue.

** Adjusted for two appeals arising from one defendant and one lower court docket number or sequence of numbers.

TABLE 3:
Appeal Rates by Offense Type: Comparison of Juveniles & Adults

Offense Type	1990 Juvenile Delinquency Cases			1990 Adult Criminal Cases		
	Appeal Commitments	Appeals to Superior Court	Juvenile Appeal Rate	Jail & Prison Sentences	Appeals to Superior Court	Adult Appeal Rate
Aggrav. Assault	222	3	1.4	1,270	247	19.4
Rape	45	2	4.4	277	156	56.3
Burglary	389	2	0.5	3,180	189	5.9
Robbery	247	2	0.8	1,875	252	13.4