Pennsylvania Juvenile Delinquency Benchbook

Revised 10/2018

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Pennsylvania Judicial Center
601 Commonwealth Avenue, Suite 9100
P. O. Box 62425
Harrisburg, PA 17120-0018
(717) 787-6910

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Foreword

Juvenile Delinquency Benchbook

The 2018 Juvenile Delinquency Benchbook is a completely rewritten version authored by members of the Benchbook Committee who dedicated countless hours to discussion, writing, revision and editing. The original Benchbook was written in 2003 and later revised in 2006.

The goal of our Committee was to provide both experienced and newer juvenile court judges, as well as other professionals working in the field of juvenile justice, with a practical resource containing identified best practices. The Juvenile Justice Academy events chaired by Judge John Cleland and facilitated by Judge Rea Boylan in 2013 and 2015 provided the foundation for topics that were further developed by our Committee for inclusion in this Benchbook.

Thanks go to each member of the Committee and to Patrick Griffin who served as our editor. A special thank you goes to the Edit Team including Richard Steele and Susan Blackburn of the Juvenile Court Judges' Commission, and James Anderson whose historical perspective, keen intellect and attention to detail were invaluable in both the writing and editing process.

We hope that you each find value in this resource as you work to make our communities safer, impose accountability and develop competencies in the youth that we serve.

Judge Carol Van Horn
Chair
2018 Benchbook Committee

Acknowledgements

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And finally, special thanks to Ms. Chris Heberlig and Ms. Monica Iskric of the Center for Juvenile Justice Training and Research who provided ongoing administrative support for this project.

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Introduction

Judge John Cleland [1]

This new edition of the Juvenile Delinquency Benchbook contains the introduction to the original Benchbook written by Judge Emmanuel Cassimatis, a mentor to many juvenile court judges. His advice and wise words are as true today as when he wrote them in 2003. Little can, or needs to be, added to his guidance.

I have been asked to provide a different perspective – a more personal account of my experience as a juvenile court judge. In doing so, I am acutely aware that mine is only one perspective; no more valid, and perhaps less valid, than many other juvenile court judges for whom I have such respect. But I trust that the collective experience of all who have contributed so much time, effort and especially expertise to preparing this Benchbook will be of benefit not only to judges but ultimately to the children who appear in our courts.

Experience shapes perspective. We know, for example, that psychologists have documented the stages of judicial development: being overwhelmed for the first couple of years; developing competence and confidence over the ensuing five years or so; and toward the final third of the first ten-year term developing strong views about the law, procedures, administration and the range of social and political issues that come before the court.

And then an interesting thing begins to happen. Sometime after year ten, while judges continue to be competent, even expert, in their work, they increasingly become less certain about the efficacy and effectiveness of those legal positions, procedures, and administrative practices they felt so strongly about only a few years before. But, at the same time, they develop a deepening loyalty to the purposes of the institution of the courts and the importance of the rule of law to the preservation of our democracy.

This has, in fact, tracked my own experience precisely. I came to the bench in the fall of 1984, at the age of 36. I was fully aware, as every neophyte should be, I hope, of how little I knew about the complexities of the law. In retrospect, however, I see that I also lacked the kind of awareness of the complexities of life that can only come from time and experience.

When I was about half way through my first term I was asked to give a speech on the role of the judge. I titled the speech "What Are Judges For?" Looking back on it, I was actually foolish enough to pose an answer to the question. The speech was written with all the self-assurance and self-delusion that only a neophyte could muster.

Now, thirty plus years into the job, I still ask myself the question, but I am less and less sure I know the answer.

An old dairy farmer up our way once said of his veterinarian: "He don't know much, and what he does know, he don't know for certain." I am afraid that I have become much like that veterinarian. What I think I know I am not at all sure I know for certain.

And so, it follows, that I approach the task of working in the juvenile court with some considerable humility and sense of the limits of my awareness and understanding.

Justice Oliver Wendell Holmes made the point in his usual memorable way: "I would not give a fig," he said, "for the simplicity this side of complexity, but I would give my life for the simplicity on the other side of complexity."

As we begin to move, as hopefully we all do, to the other side of complexity, and as we think about the role of the juvenile court judge, we must begin with, and never stray too far from, the purposes of the Juvenile Act.

In summary, the purpose of the Juvenile Act is:

- to preserve the unity of the family, or provide a substitute alternative;
- to provide for the care, protection, safety, and wholesome mental and physical development of the child;
- to provide supervision, care and rehabilitation with balanced attention to the child, the victim and the community;
- to separate the child from the child's parents only when necessary;
- to employ evidence-based practices;
- to use the least restrictive intervention;
- to impose confinement only when necessary and for the minimum time; and
- to ensure a fair hearing that protects constitutional and other legal rights.

In shorthand, of course, we refer to those purposes as "balanced and restorative justice." It is the goal to give balanced attention to youth redemption, victim restoration, and community protection; to consider always, in other words, the child, the victim, and the community.

As I think about the three pieces of our juvenile justice system – youth redemption,

community protection, and victim restoration – it seems to me that we do a pretty good job these days on the community protection and victim restoration pieces. It is with some sad irony, however, that I have come to the view that we have strayed from the one of the key objectives, the underlying purpose of the juvenile court in the first place, youth redemption.

At common law children were chattels of the family unit, and subject to the absolute right of parents to control and discipline them, a status that lasted well into the 19th century.

The common law also did not recognize a legal status of "juvenile delinquent." Law breakers were either "children" or "adults." Those under 7 years of age were conclusively presumed to be incapable of forming criminal intent because what was called "felonious discretion" was thought to be an "impossibility of nature" for a young child. Children over 14 were prosecuted as adults; and those between 7 and 14 could be prosecuted as an adult if the infancy defense was rebutted by the prosecution.

As the industrial revolution intensified in the 19th century and the abuses of child labor began to receive attention, the story of a ten-year old little girl named Mary Ellen McCormack, who lived in the Hell's Kitchen section of New York City, came to the public's attention. Neighbors, alarmed at the physical abuse and neglect of the child, alerted the Department of Public Charities and Correction. The investigator was powerless to protect Mary Ellen because of the lack of any child-protection laws. So the investigator took Mary Ellen McCormack into the shelter of the American Society for the Prevention of Cruelty of Animals, the ASPCA. The founder of the ASPCA likened Mary Ellen to the horses he routinely saved from violent stable owners – a little girl who was just another vulnerable member of the animal kingdom and who needed the protection of the state.

By 1899, Cook County, Illinois – Chicago – established what is generally considered to be the first juvenile court. The language and structure of that court is startlingly similar to the language and structure we use even today. It sought to regulate the treatment of "dependent, neglected and delinquent children" and directed that "as far as practical they shall be treated not as criminals but as children in need of aid, encouragement, and guidance." The "care, custody and discipline of a child" should approximate "as nearly as may be that given by its parents."

This idea of judge as parent, of course, also has deep roots in the common law. The English Court of Chancery applied the doctrine of *parens patriae,* which required a judge acting on behalf of the state to protect a child and to do "what is best for the interest of the child…and to put himself in the position of wise, affectionate, and careful parent and provision for the child accordingly."

We might keep that ancient standard in mind today as we consider what the statute and

rules mean when they instruct a juvenile court judge to protect the child's best interests.

Fast forward to 1995. This was a time involving serious concern about crime all over the country. Legislatures throughout the nation outdid themselves getting tough on lawbreakers, juveniles included. On the day after his inauguration, newly elected governor Tom Ridge called a Special Session of the Pennsylvania Legislature to focus exclusively on the issue of crime.

Unlike other states Pennsylvania adopted a juvenile justice system rooted in the philosophy of restorative justice. True, children who committed crime had to be held accountable; true, citizens had the right to live in safe and secure communities; but also true, and equally true, juveniles who came within the jurisdiction of Pennsylvania's juvenile justice system should leave the system more capable of being responsible and productive members of the community.

The enactment of restorative justice principles into Pennsylvania law, in that environment, is to the lasting credit of the Juvenile Court Judges' Commission and to James Anderson, then its Executive Director.

These principles of balanced and restorative justice drive our system as we seek to give attention to the victims of crime, juveniles who commit crimes and to the communities in which we all live.

That little bit of legal history demonstrates that the juvenile court is not just a watered-down version of the adult criminal courts. Juvenile court is not just different from adult criminal court in degree; the two are different in kind. The purposes clause of the Juvenile Act is worlds apart in language and tone from the purposes clause of the Crimes Code. However, while we may understand intellectually that this distinction exists, our actions do not always follow our intellectual understanding.

Consider our vocabulary, for instance. How often do we read that in adjudicating a child "delinquent" the judge found the child "guilty?" Or a "hearing" is referred to as a "trial." Or a "disposition" is described as a "sentence."

But it is only in the juvenile court that we can speak seriously about balanced and restorative justice, about genuinely helping children and their parents, about restoring the bonds of community in some meaningful way, and about guiding children through the throes of adolescence and into responsible adulthood.

Nevertheless, over the years I have become increasingly concerned about the criminalization of the juvenile justice system and the consequences of that trend.

When I was admitted to the Bar in 1972 it was assumed that adults – judges, prosecutors, defense attorneys – had the moral responsibility to protect children, and often to protect children from themselves. That understanding simply carried forward the basic tenets of the common law and underlay the philosophical origins of the juvenile court movement of the 1890s.

In the mid-1980s and up to the time of the Special Session on Crime in 1995, it was not unusual to adjudicate a dependent child as a delinquent child if there was a better treatment option in the delinquency system than in the dependency system. The adjudication of delinquency occurred with an understanding among the court, the prosecutor, defense counsel and the family that it was being done for the benefit of the child and that the juvenile adjudication would be expunged when the services were completed. That could likely never happen in today's environment.

Over time, slowly but surely, the juvenile justice system has become infected with many of the tensions and related direct and collateral consequences of the adversarial system in the adult criminal courts.

I understand how we got started down that road, logical step by logical step. But we must always be asking whether we are on the right road.

We must always be asking whether as judges we are meeting our overriding moral responsibility as adults to protect children and to care for their well-being; or whether we have unwittingly become accomplices to policies that unnecessarily drag children into the juvenile justice system, with all the pitfalls for children and their families that this entails.

I am reminded of Justice Robert H. Jackson's tribute to Mary Willard, his influential high school teacher. Of her, he wrote: "She had no belief that we were simply walking bundles of original sin. She accepted youth as wholesome, its errors due to lack of guidance more than lack of right intent."

How do each of us as juvenile court judges look at these kids? Do we see them as youth whose errors may result from lack of guidance more than lack of right intent? Or do we see them as walking bundles of original sin?

I understand I am treading here on near sacred dogma. We hear prosecutors say over and over that prosecuting juveniles teaches them accountability; and we hear defense attorneys say over and over that protecting a child's legal interests equates with protecting the child's best interests. But sooner or later we must lay aside theory and look reality in the face to ask whether as adults we are meeting our moral responsibility to exercise our judgment to protect children.

The criminal court judge sits, for the most part, as a neutral arbiter. But the juvenile court judge has an affirmative duty under some circumstances to protect the "best interest" of the child. What is "best interest?" And how does a judge protect it? While a criminal court judge decides facts, a juvenile court judge may have a duty to develop facts. How and when does a judge do that? In a variety of ways, the differences that mark the juvenile court imply a different set of judicial responsibilities.

How is it, exactly, that we go about meeting those responsibilities?

We begin, standing on this side of complexity, by applying the Juvenile Act and the Rules of Juvenile Procedure. It takes no great insight or expertise, in the routine case at least, to do that.

Nevertheless, we have seen that sloppiness, laziness, inattention, or merely being in a hurry causes some judges to cut corners, or ignore corners all together, and plow straight ahead in cavalier disregard of the statute and the rules, not to mention any notion of best practice.

Continuing education can help solve that problem. It involves the ongoing process of explaining not only what we must do, but why we must do it.

Developing this Benchbook, and the checklists, bench cards, and case law resources that it contains, is invaluable in helping us do our jobs competently and consistently.

When we start to move through complexity, and hopefully emerge at the other side, we must also begin to think about and apply "evidence-based practice" -- the application of the results of social science research to guide decisions and increase the chances that a child will benefit from effective services.

No child should ever be reduced to a data point on a graph, or thought of as an absolute number on a standardized test; and no judge should ever yield to the temptation to supplant judicial judgment with social science. On the other hand, it would be irresponsible to fail to use tools that can help us identify those programs that are most likely to be effective with any particular child. And for any one of us to think that our experience, our judgment, or our superior wisdom should not be polluted with social science assistance is hubris enriched with folly.

Nevertheless, it cannot be denied that social science research on juvenile antisocial behavior is still in its infancy. While the research shows much promise in helping us match the particular problems of a child with the particular program than can be effective, it is not exact by any means. We are talking about probabilities based on large samples of children.

Even acknowledging that this social science research is in its infancy, we still need to use

the results of this research where appropriate; to ensure that screening instruments are being properly administered, that the results are being properly analyzed, and that the conclusions are used for their intended purposes by judges, probation officers, and treatment providers; and to monitor how effective the tests and data are, given the unique cultural and criminogenic factors affecting the children that appear before us.

As judges we have a responsibility to take the lead to educate our fellow judges, the Bar, our probation staff, school administrators and teachers, service providers, and the public. It is from us they should hear the language of balanced and restorative justice and evidence-based practice.

I believe in the principles of balanced and restorative justice and the value of evidence-based practice. Nevertheless, I have concluded, after many years of hearing cases involving children, that I can say with assurance only two things:

I know that whether a child can weather the storms of life is not merely the result of the effectiveness of any given program, or the affirmation of a juvenile court judge, or the structure of a sound probation program. It is, instead, whether any or all those things in some mysterious way fosters a meaningful relationship between the child and a caring adult.

And I also know that we cannot reform children. We can coerce their compliance but we cannot compel them to change. The best we can do is to create, somehow, an environment, an atmosphere, in which a child chooses to reform himself.

Midway through my second term, then-Chief Justice John Flaherty gave me a book of essays about the judicial mind. An interesting book and meaningful gift, to be sure; but not as meaningful as the note from him that accompanied it. He wrote "I would have given you this book sooner, but you hadn't been a judge long enough to understand it."

I have learned since that the longer I have been a judge, the harder the job has become. The complexities have only become more complex, and the simplicity on the other side of that complexity harder to grasp. Experience has forced me to come to terms with the reality that understanding is elusive, and that, at best, we see through a glass, darkly.

And so, decades into this work, I continue to ask myself the question "what are judges for?" And especially I ask that question in the context of those young lives over whom we exercise such power, for good or ill.

That is, in the end, a question each judge must answer for him or herself, and only after searching both heart and head. We can only know for sure that, for a judge, patience and kindness are essential, and that, in the words of the poet, we must "walk softly in a world

where the lights are dim, and the very stars wander" and then trust that our devotion to "the least of these" makes us worthy to be called a judge of the juvenile court.

[1] Hon. John M. Cleland is among Pennsylvania's most highly respected judges. He was appointed to the McKean County Court of Common Pleas in 1984, subsequently elected in 1985, and reelected in 1995 and 2005. He served as President Judge in McKean County until 2008, when he was appointed to the Superior Court of Pennsylvania, where he served through 2010. He then returned to the trial court as a senior judge. Judge Cleland served as a member of the Juvenile Court Judges' Commission (JCJC) for twelve years, having been initially appointed by Governor Rendell in 2005, and subsequently reappointed by Governor Rendell, and twice by Governor Corbett. Judge Cleland has been a strong proponent of judicial education and was the leading force behind the creation of the Juvenile Justice Academies offered by the JCJC in partnership with the Administrative Office of Pennsylvania Courts.

Judge Cleland served as co-chair of the Education Committee of the Pennsylvania Conference of State Trial Judges for eight years and also served as President of the Conference's Juvenile Court Section. In 2009, he was appointed by the Chief Justice of Pennsylvania to chair the Interbranch Commission on Juvenile Justice, which was charged with investigating the judicial corruption leading to the breakdown of the juvenile justice system in Luzerne County that came to be known as the "Kids for Cash" scandal.

The many awards received by Judge Cleland throughout his distinguished career include the Heavy Lifting Award from the Pennsylvania Conference of State Trial Judges in 2012, the Robert I. Shadle Legal Excellence and Professionalism Award from the Herbert B. Cohen Chapter of the American Inn of Courts in York in 2010, the Golden Crowbar Award from the Pennsylvania Conference of State Trial Judges in 2003, the Clarity in Writing Award from the Pennsylvania Bar Association Plain English Committee in 2001, and the President's Distinguished Service Award from the Pennsylvania Conference of State Trial Judges in 2000.