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THE IJA-ABA JUVENILE JUSTICE STANDARDS

WHY FULL IMPLEMENTATION IS LONG OVERDUE

BY MERRIL SOBIE AND JOHN D. ELLIOTT

In 1980, the American Bar Association (ABA) promulgated a far-reaching comprehensive body of Juvenile Justice Standards, thereby providing a blueprint for the reform of a system that had serious deficiencies. Developed in partnership with the Institute of Judicial Administration (IJA) at New York University, the standards address the entire juvenile justice continuum, from police handling and intake to adjudication, disposition, juvenile corrections, and ancillary functions. Approximately 300 professionals collaborated for a decade to produce the 23 volumes approved by the ABA House of Delegates.

To this day, the standards remain relevant and reformist. Several have been implemented in whole or in part. However, since institutional resistance has compromised the meaningful consideration of the standards as a whole, the ABA must redouble its efforts to promote their acceptance and implementation.

This article looks at the history of the standards' development and implementation, and delineates the need for updating several provisions and the urgent need to advocate for their application.

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In the Beginning

In 1971, the IJA concluded its path-breaking work as the secretariat for the completion and approval of the ABA Criminal Justice Standards. It was thought, quite naturally, that a companion volume should address the juvenile justice system. One volume ultimately grew to 23, as the principal leaders discovered that juvenile justice and delinquency presented a disparate picture of practices and procedures around the country. A comprehensive solution was needed.

In 1973, the ABA became a cosponsor of the project, which became known as the IJA-ABA Joint Commission on Juvenile Justice Standards. Six years later, in 1979, the multivolume set of standards was submitted to the ABA House of Delegates at its Midyear Meeting. The House of Delegates approved 17 volumes at that meeting, and three more in 1980. Three standards were not approved by the ABA. The standards regarding noncriminal misbehavior, or status offenses, were tabled due to opposition to their primary goal, eliminating court jurisdiction over such offenses. The volume governing schools and education was withdrawn from consideration, and the standards on abuse and neglect were revised but never resubmitted for ABA approval. (For more background, see *How It Began: A Brief History of the Standards*, page 27.)

Resistance and Inertia

As the standards moved toward adoption by the ABA House of Delegates, their principal organizer and director, Barbara Flicker, envisioned a meaningful launch for national acceptance. In her *Summary and Analysis* of the standards, she recommended a plan of implementation similar to that of the ABA Criminal Justice Standards:

1. preparation of a state-by-state analysis comparing the standards with laws, statutes, and rules in the various jurisdictions;
2. appointment of an implementation task force of key leaders in each state;
3. goal-setting and strategic development to coordinate discussion of the standards with all components of the criminal justice system; and
4. education of practitioners and the public about the standards.

(BARBARA DANZIGER FLICKER, STANDARDS FOR JUVENILE JUSTICE: A SUMMARY AND ANALYSIS 261–62 (1977).)

Calling for a “massive drive” by the ABA to educate and recruit advocates for the adoption of the standards, supported with funding from foundations, nonprofits, and reform groups, Flicker warned against the inertia of gradualism. The goal was to avoid piecemeal adoption of discrete standards and gain acceptance of the standards to overhaul the fragmented juvenile justice system.

By 1980, the US Department of Justice (DOJ) and the Office of Juvenile Justice and Delinquency Prevention (OJJDP) had invested significant sums of money in the development of standards and guidelines to improve the functioning of the juvenile justice system. These included the IJA-ABA Juvenile Justice Standards, the National Advisory Committee for Juvenile Justice and Delinquency Prevention Standards for the Administration of Juvenile Justice, and those developed by the Task Force on Juvenile Justice and Delinquency Prevention of the National Advisory Committee on Criminal Justice Standards and Goals. OJJDP also helped fund the development of juvenile corrections standards by the American Correctional Association.

On June 16, 1982, OJJDP announced a solicitation for a demonstration program to further disseminate and implement the standards. Entitled the National Juvenile Justice Standards Resource and Demonstration Program, its objectives included demonstration projects in six jurisdictions to test revision of laws, court rules or policies reflecting the array of standards, resource materials to assist in the consideration or adoption of standards, and training.

Within a month, however, OJJDP abruptly cancelled the solicitation at the direction of the newly constituted National Advisory Committee for Juvenile Justice and Delinquency Prevention. The committee was asked to reconsider, but refused. Ultimately directed by the Appropriations Committee of the United States House of Representatives to continue the standards demonstration project as originally proposed, the edict was ignored.

The abrupt withdrawal of federal support meant that

standards efforts supported by the DOJ—those of the National Advisory Committee for Juvenile Justice and Delinquency Prevention and the National Advisory Committee on Criminal Justice Standards and Goals—were effectively a dead letter. The ABA was left to support and circulate the IJA-ABA Juvenile Justice Standards on its own, which it did.

It did so, though, in the face of increasingly punitive policies directed at the problem of violent juvenile crime, as much the subject of political hyperbole as concrete fact. With alarms raised about the specter of juvenile “super-predators” during the 1990s, many jurisdictions enacted legislation transferring juvenile offenders to the adult criminal courts. Ironically, it may be said that as the juvenile courts labored politically to cling tenaciously to sanction runaways and truants, they ceded responsibility for juveniles accused of serious offenses to the adult criminal justice system.

In the mid-1990s, the Criminal Justice Section attempted a revival of its juvenile justice standards initiative. (Robert E. Shepherd Jr., *ABA Juvenile Justice Standards: Anchor in the Storm*, CRIM. JUST., Winter 1996, at 39.) Its ability to do so, however, was hamstrung by a limited budget and the political headwinds then prevailing.

Hence, the inertia and gradualism that Flicker warned against affected the standards in the two decades after their adoption. By 1975, she noted in her *Summary and Analysis*, the ABA Criminal Justice Standards had been cited a total of 3,664 times in appellate decisions around the country. By comparison, the Juvenile Justice Standards, as of this writing, have been cited 60 times. That said, the Juvenile Justice Standards have in great measure proven successful. Although the project did not precipitate a juvenile justice “revolution,” the inherent validity of the standards have greatly contributed to the development of American juvenile justice.

Implementation

Although not the sweeping transformation of the system that reformers desired, the standards have been at least partially implemented, albeit on a more gradual and ad hoc basis than expected, influencing judicial decisions, legislation, administrative directives, and the enactment of state standards. Evolutionary acceptance has proceeded from the date of promulgation to the present. Although full implementation has not been achieved—and may never be achieved—the guidelines’ continuing utilization is a testament to their efficacy and relevance. What follows are a few examples in the life of the Juvenile Justice Standards.

First, the standards have been applied and cited in scores of appellate cases. One recent example is the 2010 Alaska Court of Appeals decision of *B.F.L. v. State*, in which the court adopted the ABA Dispositional Standards:

To fill this [dispositional] legislative vacuum, this Court exercised its common-law power to announce a standard that would govern the superior court’s choice of disposition: We therefore recognize the standards promulgated by the IJA-ABA Juvenile Justice Standards

Project, Standards Relating to Dispositions . . . [T]he court must consider and reject less restrictive alternatives *prior* to imposition of more restrictive alternatives. . . . The court must enter specific written findings *why* the less restrictive alternatives are inappropriate in a given case, and those findings must be supported by a preponderance of the evidence. (233 P.3d 1118, 1123 (Alaska Ct. App. 2010) (citing R.P. v. State, 718 P.2d 168, 169 (Alaska Ct. App. 1986)) (internal quotation marks omitted).)

Similarly, in *United States v. Juvenile*, 347 F.3d 778 (9th Cir. 2003), the court reversed a disposition that had violated the dispositional standards. (See also *In re Welfare of C.A.W.*, 579 N.W.2d 494, 497 (Minn. Ct. App. 1998) (stating that the IJA-ABA dispositional purpose standard had been “in identical form subsequently enacted by the Minnesota Legislature”).)

Several additional appellate decisions have been guided by the standards relating to waiver or transfer of a juvenile for adult criminal prosecution; see, for example, the Supreme Court of Iowa case of *State v. Wright*, 456 N.W.2d 661 (Iowa 1990), and the federal case of *People of Territory of Guam v. Kingsbury*, 649 F.2d 740 (9th Cir. 1981). The problematic issue of waiver of counsel by a child has been addressed by at least two appellate courts. Citing the standards, both decisions severely restricted waiver and required that counsel be appointed and participate at a hearing to determine whether waiver would be appropriate (the prewaiver appointment and participation by counsel greatly limits, if not precludes, a decision to waive). (State *ex rel.* J.M. v. Taylor, 276 S.E.2d 199 (W. Va. 1981); *In re T.R.B.*, 325 N.W.2d 329 (Wis. 1982).)

Last, courts have applied the standards in cases that did not involve juvenile justice. For example, the California Court of Appeals cited the standards in a tort case initiated by an emancipated minor. (*Gore v. Stowe*, 231 Cal. Rptr. 492 (Ct. App. 1986).) The Supreme Judicial Court of Massachusetts quoted the Standards Relating to Private Parties in concluding that an indigent parent is constitutionally entitled to the appointment of counsel in a consent to adoption case. (*Dep’t of Pub. Welfare v. J.K.B.*, 393 N.E.2d 406 (Mass. 1979).)

Over the course of the past 30 years, several specific standards have also influenced and encouraged the enactment of similar or identical state dispositional guidelines. For example, West Virginia has adopted state dispositional standards that replicate the IJA-ABA version. (See Facilities Review Panel v. Coe, 420 S.E.2d 532, 535–36 (W. Va. 1992).) The Minnesota legislature has enacted the dispositional purpose clause verbatim. (See *In re Welfare of C.A.W.*, 579 N.W.2d 494, 497 (Minn. Ct. App. 1998).) Most recently, Illinois enacted legislation effective January, 2012, that allows juvenile court judges to commit juveniles to confinement at disposition only after efforts were made to locate less restrictive alternatives and state reasons why those efforts were unsuccessful. (See, *Lisa Jacobs and Betsy Clark, Impact of Illinois’ Statutory Change Mandating the Least Restrictive Alternative Standard*, MODELS FOR CHANGE MEASUREABLE PROGRESS SERIES

(2014), assessing the impact of the legislation.)

At a wider level, the standards have directly and indirectly encouraged the promulgation of comprehensive juvenile justice state standards to guide counsel and structure court proceedings. For example, the New York State Bar Association has approved a series of standards for representing children in a wide range of cases, including juvenile delinquency, status offenses, child protective, and child support. (See NYSBA Comm. on Children and the Law, Standards for Attorneys Representing Children (2011), available at <http://tinyurl.com/kojlyrq>.) The New York standards were developed in the late twentieth century and have been revised and updated through several editions, and further revisions are pending. Although the New York standards do not completely follow the IJA-ABA version, most of the important ABA-suggested doctrines are largely incorporated, such as the role of counsel, the “least restrictive” dispositional rule, and the participation of the child’s parents. Several other states have also promulgated standards that closely resemble the IJA-ABA model.

Perhaps the most significant legislative development reflecting the IJA-ABA standards has been the right to counsel. New York effectively prohibited waiver in 1978. (N.Y. FAM. CT. ACT § 249-a.) Although theoretically permitting waiver, the section’s strictures have effectively prohibited the practice; since 1978, there has been no reported case in which waiver has been permitted. Several states, including Minnesota and, more recently, Pennsylvania, have prohibited waiver of counsel, while other states have severely limited the practice. Tellingly, a national survey found that of 99 appeals of waiver, the vast majority resulted in reversals. (See Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577 (2002).)

The role of counsel is another related issue that has evolved toward the ABA model. In 1979, the now-discredited “guardian ad litem” principles, whereby counsel advocates his or her perceived view of the child’s best interests, prevailed throughout the country. Today, the prevailing model is far more akin to the traditional client-driven representation paradigm (See JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES § 3.1.) The New York standards, for example, reflecting a court rule applicable to the representation of children in every family court case, stipulates that “the child’s attorney should maintain a traditional attorney-client relationship and zealously defend the child . . . there is a presumption that the [child’s] attorney will abide by a client’s decision concerning the objectives of representation.” (See N.Y. RULES OF THE CHIEF JUDGE, 22 N.Y.C.R.R. § 7.2.) Although not universally accepted, particularly in child protective cases, the contemporary paradigm is far closer to the attorney-client relationship established by the IJA-ABA standards.

A parallel development has been the tentative movement away from massive, largely rural custodial facilities for delinquent youths to small, nonsecure community-based programs. (See, e.g., N.Y. FAM. CT. ACT § 353.3 (implementing the “close to home” initiative, whereby nonsecure placements of juveniles adjudicated delinquent in New York City must be within the metropolitan area).) Several states have

implemented programs to reinvest dollars saved by limiting the use of large juvenile institutions to enhance community-based options, both nonresidential and residential. (See NAT'L JUVENILE JUSTICE NETWORK, BRINGING YOUTH HOME: A NATIONAL MOVEMENT TO INCREASE PUBLIC SAFETY, REHABILITATE YOUTH AND SAVE MONEY (2011).) The movement represents a twenty-first century progressive change long advocated by the standards, especially those relating to corrections and architecture of facilities, quite controversial in their day.

In sum, although the hopes for immediate reform were not realized, the 30 years of post-standards history have seen a gradual evolution toward implementation (not infrequently a two-step advance followed by a one-step retreat). Much remains to be accomplished. The standards nevertheless serve as a contemporary beacon for the judiciary, state legislatures, and the American bar. Writing in 1996, Robert Shepherd Jr. observed, "The Standards today can still serve as that critical anchor for the juvenile justice system . . . [T]he ultimate product is as valuable today as it was in 1979 and 1980 when the House of Delegates gave it its endorsement." (Shepherd, *Anchor in the Storm*, *supra*, at 41.) Professor Shepherd's conclusions are equally salient today.

The Need for Further Implementation

The standards have been widely cited over the course of several decades and, as noted, many have been gradually implemented by several jurisdictions. However, some important standards have failed to gain traction; for those, the 2014 landscape is virtually identical to that of 1980.

One significant example is the minimum age of juvenile delinquency responsibility. Section 2.1 of the Standards Relating to Juvenile Delinquency and Sanctions stipulates an age range of "not less than ten and not more than seventeen years." No state exceeds the maximum age, and in recent years several have joined the overwhelming national consensus by raising the age to 17. However, 35 states have not established a minimum age (15 states have enacted minimums ranging from ages six to 10). In fact, prosecution of the very young is prevalent. In 2011, approximately 45,000 cases involving children younger than 12 years of age were referred for juvenile delinquency prosecution, and approximately 7,000 were adjudicated as delinquent. (See Nat'l Ctr. for Juvenile Justice, *Easy Access to Juvenile Court Statistics: 1985–2011*, OJJDP, www.ojjdp.gov/ojstatbb/ezajcs (the survey does not differentiate by age below 12).) Prosecuting the very young raises fundamental legal and moral issues, including competency (how many six- or 10-year-olds understand judicial proceedings and can materially assist in their defense?), *mens rea* or specific intent, and diminished responsibility. The landmark twenty-first century brain development studies documented by the MacArthur Foundation (www.adjj.org), though focused on the older adolescents, may be of particular relevance to their younger "delinquent" colleagues and should encourage implementation of the long dormant standard. In fact, a strong argument can be advanced for raising the minimum age standard from age 10 to age 12.

A second example is appeals. The standards advocate a vibrant appellate process for every facet of the juvenile court system, necessary to regulate often unfettered discretion, correct errors, and develop precedent. Yet, as noted in a recent ABA Criminal Justice Section Report to the House of Delegates, the national rate of appeal for juvenile justice adjudications of guilt is dismal—five appeals per 1,000 juvenile delinquency convictions (the rate approaches zero percent in many states.) (See Megan Annitto, *Juvenile Justice on Appeal*, 66 U. MIAMI L. REV. 671 (2012).) Viewing the crucial area of the appellate process, the standards have had close to zero effect.

The above examples are illustrative; many additional standards, from among the voluminous whole, could be cited. Much work remains to be done.

Amending the Standards

The comprehensive body of standards has met the test of time remarkably well. Most are as relevant today as the day they were approved. Implementation has been gradual and sporadic, in fact painfully slow. Gradualism is a salient argument for reinvigoration, though, fortunately, the text as a whole does not need major revision.

The passage of three decades accompanied by the inevitable intervening developments, however, has rendered several specific provisions or groups of standards outdated. One example is capacity. Section 3.5 of the Standards Relating to Juvenile Delinquency and Sanctions stipulates in its entirety:

Juvenile delinquency liability should not be imposed if, at the time of the conduct charged to constitute the offense, as a result of mental disease or defect, the juvenile lacked substantial capacity to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of the law.

The standard is identical to its criminal law counterpart, i.e., the rule applicable to adult criminal defendants. However, the seemingly revolutionary techniques of adolescent brain imaging and resultant biological studies recognized and incorporated in a growing number of court decisions, from the US Supreme Court to the local juvenile courts, have rendered the standard obsolete. We now know that the lack of capacity in many youths is not the "result of mental disease or defect," but instead the result of normal but as yet incomplete brain development. The crucial scientific findings should form the basis of a revised standard (indeed, should be reflected in several standards).

The standards are also virtually silent concerning the collateral consequences of a delinquency finding. Collateral consequences were mild in 1975, but have burgeoned to major importance. Similarly, the educational policy of "zero tolerance" did not exist, but is now prevalent. To cite one additional example, Special Immigrant Juvenile Status, a path for immigrant children to achieve permanent residency and citizenship under federal law (8 U.S.C. § 1101(a)(27)

(J)) has become a major issue in child protective, guardianship, and delinquency litigation. The provision surely merits inclusion in the standards.

Several of the revisions outlined above would conform the standards to current ABA policies. In fact, one need only read ABA resolutions to draft contemporary standards concerning zero tolerance, collateral consequences, and appeals. Updating would maintain the standards' currency and would underscore their twenty-first century relevance. It would be impractical, as well as unnecessary, to promulgate a complete second edition; what is needed is a continuing endeavor to maintain timeliness. It's good to be able to say, as we have, that the standards have for the most part retained their importance and relevance. It would be better to say that the standards have been updated and maintained to fully address the contemporary juvenile justice world.

Conclusion

What is needed is a reinvigoration of the standards through enhanced dissemination and review, as well as a program to selectively update and augment several specific provisions. This is not a new idea—indeed it is overdue. In 1993, a working group empaneled by the ABA recommended just such a rejuvenation and updating of the standards. (A.L. Higginbotham Jr., *America's Children at Risk: A National Agenda for Legal Action*, 74 (1993).)

The standards should be widely disseminated to national legislative and judicial support organizations, such as the

National Center for State Courts, the National Judicial College, and the National Conference of State Legislatures. Juvenile justice and advocacy organizations, especially legal advocacy organizations, should feature the standards and commentary on their websites, including, for example, the National Juvenile Defender Center, the National District Attorneys Association, and the National Council of Juvenile and Family Court Judges.

The standards should also be widely circulated to practitioners, so that they may be cited and incorporated in their work. This would include public defender organizations, appellate public defense agencies, and law schools that maintain juvenile justice clinics or children's law centers.

Finally, there should be a continuing ABA program to gradually update those standards that need revision and add new standards that address twenty-first century cutting edge issues and ABA policy, as has been done for the Criminal Justice Standards.

As Barbara Flicker observed in her *Summary and Analysis*, the IJA-ABA Juvenile Justice Standards are an invaluable asset "packed with treasures: studies, statistics, decisions, references, well-defined positions, and carefully reasoned justifications." (Flicker, *A Summary and Analysis*, *supra*, at 270.) They merit renewed attention by practitioners, decision makers, and policy makers. The standards light the path to affording children due process and dignity, while distinguishing between minor and serious youthful misconduct. They are essential to protect the public, return confidence in the juvenile justice system, and afford our children a fair adjudication and rehabilitative environment. ■