FEED ME SEYMOUR: THE NEVER-ENDING HUNGER OF THE CRIMINAL PROCESS FOR PROCEDURAL RIGHTS AND REMOVING CHILDREN FROM ITS SHOP OF HORRORS

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ABSTRACT

In preparation for participation in Professor Arnold Loewy's Texas Tech University School of Law Annual Criminal Law Symposium, I was tasked with a specific query: Do (should) juveniles have more, less, the same, or different procedural rights than are accorded to adults? This Article briefly addresses the procedural rights of adults—delineating, contrasting, and comparing them to the rights of children within the modern juvenile justice process, primarily within the State of Texas. This histology of juvenile rights highlights the fundamental ongoing criminalization of our children. We must dissect the way we treat children accused of a violation of the criminal law at the very organic or cellular level. It is time to ignore the lies of the correctional monster we have created—a monster that must be continually fed with the lives of our young.

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Feed me! Feed me! Feed me!
Feed me, Seymour
Feed me all night long
That's right, boy
You can do it

Feed me, Seymour
Feed me all night long
'Cause if you feed me, Seymour
I can grow up big and strong

Would you like a Cadillac car?
Or a guest shot on Jack Paar?
How about a date with Hedy Lamarr?
You gonna git it.

How'd you like to be a big wheel,
Dinin' out for every meal?
I'm the plant that can make it all real
You're gonna git it

Hey, I'm your genie, I'm your friend
I'm your willing slave
Take a chance, just feed me, yeah
You know the kinda eats,
The kinda red-hot treats
The kinda sticky, licky sweets
I crave

Ow, Come on, Seymour, don't be a putz
Trust me and your life will surely rival King Tut's
Show a little initiative, work up the guts
And you'll git it. . .

Audrey II, Feed Me (Git it)
Little Shop of Horrors[1]

I. INTRODUCTION

I was charged by Professor Loewy to address this issue: Do (should) juveniles have more, less, the same, or different procedural rights than are accorded to adults? After some reflection, I determined full coverage of this topic could fill volumes. Consequently, I will first address a list of adult rights—mostly procedural and some substantive—and then provide a rather detailed explanation of juvenile procedural rights in Texas—mostly substantive and some merely procedural.[2] A comparison of the procedural rights of adults to the procedural rights of juveniles will have to be gleaned from an analysis by the reader of the similarities and differences intended

1. LITTLE SHOP OF HORRORS (Warner Bros. Pictures 1986).

2. I teach Texas Juvenile Law, and as the larger debate is often reflected by and in Texas law, I will primarily discuss juvenile rights as they exist and are applied in Texas.

by the application of these voluminous rules and rights. The protection of children's rights that differ from adults' are complicated by rules surely intended to protect the young. As one might expect, most of the procedural rights of both adults and juveniles are the same. There is, however, one defining issue that distinguishes these two cohorts—age. And it is age that cannot define culpability. With the modern trend to treat younger and younger children as adults—with all the penalties and pitfalls of the adult criminal courts—the attempt to provide children greater procedural protection is whitewashed by a flood of laws that are apparently oblivious to the developing citizen. This might appear to be an obvious observation, but with the increasing criminalization of children, age has now become the defining, yet penumbral, criterion.

In recent years, the Supreme Court has addressed age and punishment, finding that children's procedural rights are not the same as adults' on certain marginal punishment and procedural issues.[3] As my imperative is procedural rights, the lessons of the Court in those cases give my ever-cynical self optimism that, ever so slowly, our society is still evolving with decency and morality as its rudder, and maturity and true justice as its destination. Finally, Professor Loewy's mandate is whether children's rights "should" be more, less, the same, or different than those accorded to adults. My answer to the question of "should" will be in my Conclusion; our society cannot continue to treat our youth as another commodity of the criminal justice system used to feed its insatiable appetite for more to punish.[4] Just like Audrey II in the *Little Shop of Horrors*, our criminal justice system just wants to be fed and will make promises it never intends to keep to have its way.[5]

II. PROCEDURAL RIGHTS OF ADULTS

So what procedural rights do adults have in criminal matters? There are two basic sources of procedural rights: constitutions and statutes, including court rulings and interpretations, both state and federal.[6] As a

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3. *See* Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012) ("[M]andatory life [imprisonment] without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"); Graham v. Florida, 130 S. Ct. 2011 (2010). The Eighth Amendment prohibits the imposition of a sentence of life without parole on a juvenile who did not commit a homicide. *Graham*, 130 S. Ct. at 2034. These juveniles must have a meaningful opportunity to obtain release. *Id.* at 2030. The execution of those who were under eighteen years of age at the time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments of the United States Constitution. Roper v. Simmons, 543 U.S. 551, 574–75 (2005). A child's age properly informs the *Miranda* custody analysis "[s]o long as the child's age was known to the officer at the time of the interview, or would have been objectively apparent to any reasonable officer." J.D.B. v. North Carolina, 131 S. Ct. 2394, 2404 (2011).

4. *See infra* Part V.E

5. LITTLE SHOP OF HORRORS, *supra* note 1.

6. *See infra* Part II.A–D.

practitioner by experience, I can better address the proffered question by looking specifically at adult rights in this context and then contrasting and comparing them to the rights of juveniles in Texas.

A. Constitutional Rights

The basic document of our freedoms is the United States Constitution with its first ten amendments.[7] Through the application of the Fourteenth Amendment, most of the various rights set out therein have been found applicable to the states and their citizens.[8] There are those of note who believe the Constitution has always been only a foundation of rights, "not the basis of a uniform code of criminal procedure Federally imposed."[9] So the contents of the Bill of Rights are here briefly touched, not as the skeleton of the body of procedural rights, but more as the lifeblood of our liberties.[10]

B. The Bill of Rights

The first provision of the Bill of Rights to address issues of procedure was the Fourth Amendment to the United States Constitution.[11] The privileges and immunities of citizenship, or rights of citizenship, allow the citizens to be secure against unreasonable governmental searches and seizures.[12] Warrants were to be issued only upon a sworn application establishing probable cause, describing with particularity "the place to be searched, and the persons or things to be seized."[13] The warrant requirement of this amendment was made applicable to the states in *Aguilar*

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7. *See* U.S. CONST. amends. I–X.

8. *See id.* amend. XIV.

9. Felix Frankfurter, *A Notable Decision: The Supreme Court Writes a Chapter on Man's Rights*, N.Y. TIMES, Nov. 13, 1932, at E1.

10. *See generally* U.S. CONST. amends. I–X. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.* amend. I. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." *Id.* amend. II. "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." *Id.* amend. III. The first three amendments do not touch on procedural rights but were written at the behest of the Conventions of several states that "further declaratory and restrictive clauses should be added" to the Constitution "to prevent misconstruction or abuse of" the government's powers. U.S. BILL OF RIGHTS pmbl.

11. *See id.* amend. IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id.*

12. *See id.* amend. IV, § 2, amend. XIV.

13. *Id.* amend. IV.

v. Texas.[14] In addition, in *Wolf v. Colorado*, the Court made freedom from unreasonable searches and seizures applicable to the states.[15] From this amendment an entire body of law has developed,[16] which has been interpreted incessantly since its ratification by the states, including the confirmation of an exclusionary rule applicable to the states for evidence obtained in violation of its provisions.[17]

With the Fifth Amendment begins the litany of procedural and substantive rights afforded to those subject to the laws of the United States.[18] The only provision of the Fifth Amendment never made applicable to the states through the Fourteenth Amendment is the requirement that one charged with a capital or otherwise infamous crime must be indicted by the action of a grand jury, either by presentment or indictment, and this remains solely a federal right.[19] The double jeopardy clause in *Benton v. Maryland*,[20] the privilege against self-incrimination in *Malloy v. Hogan*,[21] and the just compensation clause in *Chicago B. & Q. R. Co. v. Chicago*[22] all found their way to applicability to the states through the application of the Fourteenth Amendment. Although the Due Process Clause of the Fifth Amendment is often thought to place limits only upon the federal government,[23] some believe that it likewise places additional requirements on the states.[24]

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14. *See generally* Aguilar v. Texas, 378 U.S. 108, 121–22 (1964), *abrogated by* Illinois v. Gates, 462 U.S. 213 (1983) (holding state police to the Fourth and Fourteenth Amendment standards for obtaining search warrants).

15. *See* Wolf v. Colorado, 338 U.S. 25, 27–28 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

16. *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 590 (2006) ("In *Weeks v. United States*, 232 U.S. 383 . . . (1914), we adopted the federal exclusionary rule for evidence that was unlawfully seized from a home without a warrant in violation of the Fourth Amendment. We began applying the same rule to the States, through the Fourteenth Amendment, in *Mapp v. Ohio*, 367 U.S. 643 . . . (1961).").

17. *See Mapp*, 367 U.S. at 660.

18. U.S. CONST. amend. V. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." *Id.*

19. *See generally* Hurtado v. California, 110 U.S. 516 (1884), *limited by* Albright v. Oliver, 510 U.S. 266 (1994) (upholding the Supreme Court of California's conviction of a defendant who was not indicted by a grand jury prior to trial and conviction). Other rights not fully incorporated are: "(1) the Third Amendment's protection against quartering of soldiers; . . . [(2)] the Seventh Amendment right to a jury trial in civil cases; and [(3)] the Eighth Amendment's prohibition on excessive fines." McDonald v. City of Chicago, 130 S. Ct. 3020, 3035 n.13 (2010). As an aside, in *McDonald*, the Court for the first time found the Second Amendment right to keep and bear arms binding upon the states. *Id.* at 3050.

20. Benton v. Maryland, 395 U.S. 784, 810–11 (1969).

21. Malloy v. Hogan, 378 U.S. 1, 33–35 (1964).

22. Chicago B. & Q. R. Co. v. City of Chicago, 166 U.S. 226, 260–63 (1897).

23. Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming

The Sixth Amendment specifically addresses procedural rights in criminal prosecutions.[25] All the following procedural rights have been made applicable to the states, to-wit: the right to a speedy trial in *Klopfer v. North Carolina*;[26] the right to a public trial in *In re Oliver*;[27] the right to be tried by a jury, even for petty crimes involving a potential of six months in jail in *Duncan v. Louisiana*;[28] the right to be confronted by the accusatory witnesses in *Pointer v. Texas*;[29] the right to have compulsory process for obtaining favorable witnesses in *Washington v. Texas*;[30] the right to have assistance of counsel in *Gideon v. Wainwright*;[31] and the right to appointment of counsel for indigent defendants who seek review on appeal in *Halbert v. Michigan*.[32] Of the three rights guaranteed by the Eighth Amendment,[33] the Court has never decided the issue of excessive fines.[34] The cases making the other two rights of the Eighth Amendment applicable to the states are *Robinson v. California* with respect to cruel and usual

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from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.").

24. Taylor v. Beckham, 178 U.S. 548, 601–02 (1900) (Harlan, J., dissenting) ("The requirement of due process of law is applicable to the United States as well as to the states; for the 5th Amendment—which all agree is a limitation on the authority of Federal agencies—declares that 'no person shall . . . be deprived of life, liberty, or property without due process of law.'").

25. U.S. CONST. amend. VI.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Id. "We have, moreover, resisted a uniform approach to the Sixth Amendment's criminal jury guarantee, demanding 12-member panels and unanimous verdicts in federal trials, yet not in state trials. *See Apodaca v. Oregon*, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972) (plurality opinion)." McDonald v. City of Chicago, 130 S. Ct. 3020, 3094 (2010) (Stevens, J., dissenting) (emphasis added).

26. Klopfer v. North Carolina, 386 U.S. 213, 225–26 (1967).

27. *In re* Oliver, 333 U.S. 257, 282–86 (1948).

28. Duncan v. Louisiana, 391 U.S. 145, 160–62 (1968).

29. Pointer v. Texas, 380 U.S. 400, 408–10 (1965).

30. Washington v. Texas, 388 U.S. 14, 22–23 (1967).

31. Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

32. Halbert v. Michigan, 545 U.S. 605, 622–24 (2005) (noting that due process and equal protection require such an appointment for "first-tier" review); *see also* Griffin v. Illinois, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring) (explaining that the State may not "bolt the door to equal justice" to indigent defendants).

33. U.S. CONST. amend. VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

34. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3035 (2010). "We never have decided whether the . . . Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause. *See Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276, n. 22 . . . (1989) (declining to decide whether the excessive-fines protection applies to the States)." *Id.* at 3035 n.13 (emphasis added).

punishment[35] and *Schilb v. Kuebel* in regard to the prohibition against excessive bail.[36]

Within the rights guaranteed by the first Eight Amendments, the founders enumerated substantive rights, which by their very nature are interlaced with procedural rights. The Supreme Court has, one by one, through "selective incorporation"—with few exceptions—directed the states to adopt these "'fundamental principles of liberty and justice which lie at the base of all *our* civil and political institutions,"[37] "deeply rooted in this Nation's history and tradition."[38] Sometimes, though, it is difficult, even for the schooled, not to confuse substantive and procedural rights, both being intertwined so completely in our constitutional protections.[39] And some Justices on the Court refuse to see what most everyone else sees: that procedural rights exist to protect substantive rights, even those not yet violated.[40] Instead, they choose only to acquiesce to the use of due process to extend the protections of the Bill of Rights, through the Fourteenth Amendment, to the states, believing that certain rights are fundamental to those who enjoy the privileges and immunities, i.e., rights of citizenship, in the United States of America.[41] Upon more enlightened reflection, Justice

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35. Robinson v. California, 370 U.S. 660, 666–68 (1962).

36. Schilb v. Kuebel, 404 U.S. 357, 370–72 (1971).

37. *McDonald*, 130 S. Ct. at 3034 (quoting Duncan v. Louisiana, 391 U.S. 145, 148 (1968)) (internal quotation marks omitted). "[T]he Court eventually moved in that direction by initiating what has been called a process of 'selective incorporation,' *i.e.*, the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments" and determining one by one whether a particular right in the "Bill of Rights guarantee[s] [were] fundamental to *our* scheme of ordered liberty and system of justice." *Id.* (citing *Duncan*, 391 U.S. at 148).

38. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)) (internal quotation marks omitted).

39. *See* Reno v. Flores, 507 U.S. 292, 292 (1993). Respondents, juvenile aliens being held by the Immigration and Naturalization Service (INS), complained, *inter alia*, that the procedural system set up for review of the detention and release of these children was unconstitutional because it did not require the INS to determine in the case of each individual juvenile alien that detention in INS custody would better serve his interests than release to some other "responsible adult[]." *Id.* at 292–98 (internal quotation marks omitted). Presented by the respondents as a procedural due process claim, the Court rejected it as a "substantive due process" argument recast in "procedural due process" terms. *Id.*

40. *See McDonald*, 130 S. Ct. at 3050. "All of this is a legal fiction. The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words." *Id.* at 3062 (Thomas, J., concurring).

41. *Id.* at 3088 ("In my view, the record makes plain that the Framers of the Privileges or Immunities Clause and the ratifying-era public understood—just as the Framers of the Second Amendment did—that the right to keep and bear arms was essential to the preservation of liberty. The record makes equally plain that they deemed this right necessary to include in the minimum baseline of federal rights that the Privileges or Immunities Clause established in the wake of the War over slavery . . . . I agree with the Court that the Second Amendment is fully applicable to the States. I do so because the right to keep and bear arms is guaranteed by the Fourteenth Amendment as a privilege of American citizenship."). One cannot help but wonder if Justice Scalia refers to the American Civil War as the "War over slavery." If so, he has indeed gone back in time to channel the framers and their attitudes about African-Americans. If the Civil War was over slavery, then World War I was because of

Stevens said that substantive and procedural rights relate so closely that words such as "liberty and due process of law" have substantive expression.[42] These incorporated rights and protections "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."[43]

Finally, the Ninth and Tenth Amendments make clear that the founders felt that the power of the federal government should be enumerated and that humans had certain "other" rights that were a natural part of the human condition.[44] Right by right, by the use of the Fourteenth Amendment, virtually all these rights protected by the United States Constitution were made applicable to state citizens, who also are citizens of the United States.[45]

C. Federal Rules of Criminal Procedure

In addition to these substantive and procedural rights, the United States has its Federal Rules of Criminal Procedure (FRCP), which codify, expand, and give application to those rights and "govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States."[46] Rule 2 gives a short, distinct explanation of the purpose of the FRCP: "These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in

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an assassination, World War II was to recover from the Great Depression, the Vietnam War was for the CIA to maintain its heroin trafficking industry, and the Iraq War was over oil.

42. *Id.* at 3090 (Stevens, J., dissenting) (quoting *Glucksberg*, 521 U.S. at 764 (Souter, J., concurring)). In the argument over whether Second Amendment rights should extend to the states through the Fourteenth Amendment and the inevitable discussion of interpreting substantive rights and procedural rights, Justice Stevens opined, "The first, and most basic, principle established by our cases is that the rights protected by the Due Process Clause are not merely procedural in nature. At first glance, this proposition might seem surprising, given that the Clause refers to 'process.' But substance and procedure are often deeply entwined. Upon closer inspection, the text can be read to 'impos[e] nothing less than an obligation to give substantive content to the words 'liberty' and 'due process of law.'" *Id.* at 3090 (quoting *Glucksberg*, 521 U.S. at 764 (Souter, J., concurring)).

43. Malloy v. Hogan, 378 U.S. 1, 10 (1964).

44. *See* U.S. CONST. amend. IX. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." *Id.* "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X; *see also* Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331 (2004) (explaining the difference between state and federal rights, specifically in terms of the Ninth Amendment).

45. U.S. CONST. amend. XIV, § 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*

46. FED. R. CRIM. P. 1(a)(1).

administration, and to eliminate unjustifiable expense and delay."[47] Following Rule 2 are only seventy additional rules in nine articles setting out the basics of a criminal proceeding from complaint and arrest, to trial and post-conviction, to the basics of a supplemental proceeding.[48] Additionally, the federal government provides rules, including procedures, for specialty proceedings and courts,[49] rules of evidence,[50] rules for appeals,[51] a specific list of crimes and procedures,[52] illegal immigration,[53] commerce,[54] drugs,[55] firearms,[56] sentencing,[57] post-conviction procedures,[58] money,[59] kickbacks,[60] and aircrafts.[61] All of these laws even include a procedure for a delinquency determination for children as young as thirteen who violate a federal law with punishment to include probation and commitment.[62] Suffice it to say, the manner and methods by which one may be charged with a federal crime are vast.

D. Texas Code of Criminal Procedure (TCCP)

But the amount of federal law is dwarfed by the sheer size of Texas law. For example, the Texas Code of Criminal Procedure (TCCP)[63] contains seventy-two articles with over 1,100 rules, with the stated purpose being:

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47. FED. R. CRIM. P. 2.

48. *See generally* FED. R. CRIM. P. 1–60 (listing the Federal Rules of Criminal Procedure).

49. *See generally* Immigration and Nationality, 8 U.S.C. §§ 1101–1537 (2012) (discussing the Rules for the Alien Terrorist Removal Court of the United States); SUP. CT. R. (listing the Rules of the Supreme Court of the United States).

50. *See generally* FED. R. EVID. (listing the Federal Rules of Evidence).

51. *See generally* FED. R. APP. P. (listing the Federal Rules for Appeals).

52. *See generally* Crimes and Criminal Procedure, 18 U.S.C. §§ 2–6005 (2006 & Supp. 2011) (consisting of Part I, entitled "Crimes" which contains chapters defining criminal behavior and punishments from arson to war crimes; Part II, entitled "Criminal Procedure," which sets out other rules not removed to the FRCP; Part III, entitled "Correction of Youthful Offenders"; and Part IV, entitled "Immunity of Witnesses").

53. *See* Aliens and Nationality, 8 U.S.C. §§ 1101–1537 (2012).

54. *See* Commerce and Trade, 15 U.S.C. §§ 1601–1693 (2012).

55. *See* Food and Drugs, 21 U.S.C. §§ 801–971 (2006 & Supp. 2011); Shipping, 46 U.S.C. §§ 70501–70508 (2006 & Supp. 2011).

56. *See* Internal Revenue Code, 26 U.S.C. §§ 5801–5872 (2006).

57. *See* Judiciary and Judicial Procedure, 28 U.S.C. §§ 991–998 (2006 & Supp. 2010).

58. *See* 28 U.S.C. §§ 2241–2255, 2261–2266 (2006).

59. *See* Money and Finance, 31 U.S.C. §§ 5301–5367 (2006 & Supp. 2010).

60. *See* Public Contracts, 41 U.S.C. §§ 101–153 (2006 & Supp. 2011).

61. *See* Transportation, 49 U.S.C. §§ 1101–1155, 46301–46319 (2006 & Supp. 2013), 46501–46507 (2006).

62. *See* Crimes and Criminal Procedure, 18 U.S.C. §§ 5031–5042 (2006). A juvenile under federal law is normally a person younger than eighteen. *See* 18 U.S.C. § 5031. A child as young as fifteen, however, can waive transfer or be transferred, after notice and hearing, to adult court for certain violent and drug crimes. *See id*. In fact, in certain situations, if the juvenile possessed a firearm during the offense, she may be prosecuted as young as thirteen as an adult upon proper procedure. *See* 18 U.S.C. § 5032, *validity called into doubt by* Graham v. Florida, 130 S. Ct. 2011 (2010).

63. *See* TEX. CODE CRIM. PROC. ANN.

> [T]o embrace rules applicable to the prevention and prosecution of offenses against the laws of [Texas], and to make the rules of procedure in respect to the prevention and punishment of offenses intelligible to the officers who are to act under them, and to all persons whose rights are to be affected by them.[64]

The massive size of the TCCP and the case law interpreting it makes a comprehensive analysis of adult procedural rights a monumental task and virtually impossible for these purposes. Texas has codified virtually all the federal procedural rights enumerated above.

1. Due Course of Law

Texas's version of the Fourteenth Amendment is found at the beginning of the TCCP: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."[65] The intent of the Texas statute is to provide at least the due process rights afforded by the Fourteenth Amendment, even with the use of "due course of law" instead of the federal "due process of law."[66]

2. Enumerated Procedural Rights

Next in the TCCP is an enumeration of the rights of one accused of a crime in Texas, with all seven rights of the Sixth Amendment and two of the Fifth Amendment: the accused shall have the right (1) to a speedy public trial;[67] (2) by an impartial jury;[68] (3) to demand the nature and cause

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64. CRIM. PROC. art. 1.03 (West 2005). Notice in the first two sentences, what begins as "prevention and prosecution" becomes "prevention and punishment." *Id.* What do prevention and punishment have to do with officers "who are to act under" this set of rules? *Id.* Police seldom act to prevent crime, but do react to crime. *See id.* And punishment is not the purpose of law enforcement. *See id.* That duty is saved for the courts and the citizens on juries. *See id.* This "purpose," written by the Texas legislature, means nothing. *See id.* There is little prevention in Texas, but much prosecution and punishment. *See id.* Should not a set of criminal procedure rules in its purpose initially speak of justice, or the prevention of wrongful prosecution, or conviction of the innocent, or the protection of the fundamental rights of citizenship, or that leaving people free to pursue their lives unencumbered by government should be the goal of any criminal justice system? *See id.* At their onset, these rules highlight the problem with "justice" in Texas. *See id.*

65. CRIM. PROC. art. 1.04 (West 2005). For reference, the subject part of the Fourteenth Amendment reads: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

66. CRIM. PROC. art. 1.04. Similar in wording to the Fourteenth Amendment to the United States Constitution, there is "no independent historical or policy basis to conclude that the state provisions were intended to offer greater protection than the federal ones." McCambridge v. State, 725 S.W.2d 418, 422 (Tex. App.—Houston [1st Dist.] 1987), *aff'd*, 778 S.W.2d 70 (Tex. Crim. App. 1989)).

67. CRIM. PROC. art. 1.05 (West 2005). The word "speedy" does not appear in Title 3 of the Family Code. *See infra* Part III. *Grayless v. State* is a Texas juvenile case which applied the flexible

of the accusation;[69] (4) to receive a copy of the accusation;[70] (5) not to be made to testify against himself;[71] (6) to be heard by himself, counsel, or both;[72] (7) to be confronted with the witnesses against him;[73] (8) with the right to compulsory process for obtaining favorable witnesses;[74] and (9) not to have to answer for "a felony unless on indictment of a grand jury."[75] Interestingly, Texas adds the requirement that the accused has a right to have a copy of the accusation, which is not a right in the United States Constitution, which speaks only of being informed of the nature and cause of the accusation.[76] The TCCP addresses this further in Chapter 25, requiring the sheriff to deliver a copy to the accused,[77] whereas the FRCP requires that the court ensure the defendant has a copy at arraignment.[78]

3. Substantive Rights

The substantive content of the Fourth Amendment is found in Article 1.06 of the TCCP, using twentieth century language.[79] The right to freedom from excessive bail and fines and that cruel and unusual punishment shall not be inflicted is found in the Eighth Amendment and word for word in Article 1.09 of the TCCP, except that in Texas, the prohibition is from cruel or unusual punishment.[80] The right to bail in Texas can be denied for

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balancing test of *Barker v. Wingo*, consisting of (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice to the defendant from the delay to determine if a child in Texas has been denied his Constitutional right to a speedy trial. Grayless v. State, 567 S.W.2d 216, 220 (Tex. Crim. App. 1978) (citing Barker v. Wingo, 407 U.S. 514 (1972)). The rights and remedies for adults and juveniles in Texas for violation of their right to a speedy trial are the same. *See id.*

68. CRIM. PROC. art. 1.05.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* The right to counsel is also found in CRIM. PROC. art. 1.051 (West 2005 & Supp. 2013), in FED. R. CRIM. P. 44, and in 18 U.S.C. § 3006A (2006 & Supp. 2011).

73. CRIM. PROC. art. 1.05.

74. *Id.*

75. *Id.*

76. U.S. CONST. amend. VI.

77. CRIM. PROC. art. 25.02 (West 2009).

78. FED. R. CRIM. P. 4(c)(1)–(3). This rule requires a marshal "or other authorized officer" to execute a warrant and summons, which must both have a description of the offense charged. *Id.* The manner of serving the summons involves giving the defendant a copy of the summons, or leaving a copy at his residence or place of abode, with conditions. *Id.* If the officer does not have the warrant with him, the FRCP require him to inform the defendant of the warrant's existence and the offense charged. *Id.*

79. CRIM. PROC. art. 1.06 (West 2005). This updated version of the Fourth Amendment allows that "people shall be secure in their persons, houses, papers and possessions" ("effects" in the Fourth Amendment) "from all unreasonable seizures or searches." *Id.* The second sentence contains the same requirement that a warrant to search or seize must contain a specific description and be made under oath or affirmation, but only with probable cause. *Id.*

80. CRIM. PROC. art. 1.09 (West 2005). One wonders what punishment might be cruel or unusual, but not both? *See id.*

capital offenses.[81] The double jeopardy provisions of the Fifth Amendment are codified in the TCCP with expanded language that does little to add further protection.[82] Texas also makes implicit the right to a jury when it says the "right of trial by jury shall remain inviolate" in a separate article of the TCCP.[83]

4. Waiver of a Jury Trial

The ability of an adult to waive his rights to a jury trial is certainly an area that highlights the difference in adult and juvenile procedural rights in Texas. The adult may waive a jury in any circumstance, except when the State is intending to seek the death penalty.[84] Except for an already-incarcerated individual who is pleading guilty,[85] "the waiver must be made in person by the defendant in writing in open court with the consent and approval of the court, and the attorney representing the state."[86] This right to waive a jury is independent of whether the defendant is represented by counsel, with one limitation—if the charge is a felony and the defendant is unrepresented, a lawyer shall be appointed to represent him.[87]

5. Waiver of Other Rights

In the next article of the TCCP, the ability of an adult to waive rights compared to that of juveniles is once again highlighted. Any rights the defendant secured "by law" may be waived, except the right to a jury, as explained in the foregoing paragraph.[88] With the one limitation in the

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81. CRIM. PROC. art. 1.07 (West 2005). In the federal system, an elaborate pretrial release program has been developed, with alternatives available for the posting of bonds and pretrial detention. 18 U.S.C. § 3142 (2006 & Supp. 2011).

82. CRIM. PROC. art. 1.10 (West 2005). "No person for the same offense shall be twice put in jeopardy of life or liberty; nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction." *Id.* For some reason, Texas adds another jeopardy provision in article 1.11, entitled "Acquittal a Bar," declaring that an acquittal exempts "a second trial or second prosecution for the same offense, however irregular the proceedings may have been," but allowing retrial if the defendant was acquitted in a court without jurisdiction. CRIM. PROC. art. 1.11 (West 2005). It must have been a curious set of circumstances that led to the drafting of this statute. *See id.* There is no codification of the Constitution's double jeopardy provision in federal procedure or statute. *See supra* note 78.

83. CRIM. PROC. art. 1.12 (West 2005).

84. CRIM. PROC. art. 1.13 (West 2005 & Supp. 2013) (entitled "Waiver of Trial by Jury").

85. *See* CRIM. PROC. arts. 27.18–.19 (West 2006 & Supp. 2013) (allowing incarcerated defendants to make in absentia guilty pleas either through video conferencing or in writing).

86. CRIM. PROC. art. 1.13(a).

87. *Id.* art. 1.13(c).

88. CRIM. PROC. art. 1.14(a) (West 2005). Paragraph (b) of this article sets out not a "right," but a limitation on the defendant's ability to later complain on appeal of "defect[s], error[s] or irregularity of form or substance in an indictment or information." *Id.* art. 1.14 (b). Certainly not a right, but a limitation on a right, our law has developed a plethora of such rules designed to perpetuate convictions and the status quo, of which I have complained before. *Id.* Nothing in this article speaks of the right to

article immediately preceding Article 1.14, the purpose of appointing an attorney to oversee the defendant's waiver of rights has more to do with the right to a jury than the other "rights secured him by law."[89] Although the right to counsel is provided elsewhere,[90] it would have been better to have included in this paragraph the right to assistance of counsel when waiving these "other rights" to prevent confusion.[91]

6. Waiver of Indictment; Waiver of Evidence (Stipulations)

Apparently a supplement to Article 1.14 is Article 1.141, which provides that if a person is represented by counsel, that person may waive the right to be accused by indictment.[92] The next article provides procedures to smooth the easy path to conviction if the defendant consents in writing "to waive the appearance, confrontation, and cross-examination of witnesses" by the use of stipulations of evidence to meet the article's requirement that the State introduce enough evidence to provide the basis for a judgment of guilt, whether to a jury or upon a plea.[93]

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counsel. *Id.* Our appellate courts must change their approach to the protection of freedoms. *See* Patrick S. Metze, *Speaking Truth to Power: The Obligation of the Courts to Enforce the Right to Counsel at Trial*, 45 TEX. TECH L. REV. 163 (2012).

> "Let me dare to speak truth to power. As long as the appellate courts continue to invent concepts such as harmless error, apply waiver whenever possible, invent standards that are virtually impossible to understand, and refuse to implement these standards except to deny relief to the appellant[] (such as they do when applying the *Strickland* standards and the abuse of discretion standard); as long as prosecutors are allowed to violate their duties by seeking convictions at all costs; and as long as trial judges make their rulings based on political expediency, there will be no improvement. The reason: we have fewer appellate judges today with the backbone to ensure that trial courts provide fair trials with all guaranteed constitutional protections for the accused. In our history, we had appellate courts and jurists who thoughtfully applied the Constitution without political consideration. I wonder what would Justice Fortus or Justice Black think of the progeny of *Gideon v. Wainwright*?"

Id. at 226–27.

89. CRIM. PROC. art. 1.14(a).

90. *See* 18 U.S.C. § 3006A (2006 & Supp. 2012); FED. R. CRIM. P. 44; CRIM. PROC. art. 1.051 (West 2005 & Supp. 2013) (entitled "Right to Representation by Counsel").

91. CRIM. PROC. art. 1.14(a).

92. CRIM. PROC. art. 1.141 (West 2005). Once again, article 1.141 is another rule providing the defendant the opportunity to make her prosecution easier for the court and the State. *Id.* Interestingly, unlike article 1.14, article 1.141 provides the ability to waive a right if represented by counsel, but does not speak of appointment of counsel. *Id.* By logical assumption, the law does not believe a defendant will be savvy enough to want to waive an indictment without being represented prior to the decision to do so. *Id.*

93. CRIM. PROC. art. 1.15 (West 2005).

7. Public Trials and Confrontation

The next provision of the TCCP of interest for this Article is the requirement that "proceedings and trials in all courts shall be public."[94] The Sixth Amendment guarantee of confrontation is set out in the next article, which states that a "defendant, upon a trial, shall be confronted with the witnesses, except" where testimony is by deposition.[95]

8. County Court Jurisdiction

As to courts, the jurisdictions of all the criminal courts, including the appellate courts, are in Chapter 4 of the TCCP.[96] Of interest for analysis of juvenile rights is Article 4.17, which speaks of transfer of jurisdiction to the district courts from county courts in which the judge is not a licensed attorney.[97] For those not familiar with Texas law, jurisdiction over most misdemeanors is in the county court when the fine exceeds $500, and the justice courts do not have exclusive jurisdiction.[98] These judges do not have to be lawyers, and many are not.[99] Therefore, when a judge who is not a lawyer is presiding over a misdemeanor potentially punishable by confinement in jail, "on the motion of the [S]tate or the defendant, the judge may transfer the case to a district court" in the county—or to a county court of law which has a lawyer judge—but only with the written consent of the district judge to which transfer is intended.[100] As a brief aside, the Texas Family Code also addresses the issue of nonlawyer judges in county court.[101] If the juvenile court is the county court (most usually occupied by a non-lawyer judge), at least one other court shall be designated as the juvenile court.[102] If the judge of the juvenile court is not an attorney, an alternate court shall also be designated whose judge is an attorney.[103]

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94. CRIM. PROC. art. 1.24 (West 2005).

95. CRIM. PROC. art. 1.25 (West 2005). Obviously, even where testimony is by deposition, the rights of confrontation would still apply. *Id.* This article was part of the original draft of the TCCP and should be amended to clarify this problem. *Id.*

96. CRIM. PROC. arts. 4.01–.18 (West 2005 & Supp. 2013).

97. CRIM. PROC. art. 4.17 (West 2005).

98. CRIM. PROC. art. 4.07 (West 2005).

99. *See* CRIM. PROC. art. 4.17.

100. *Id.*

101. TEX. FAM. CODE ANN. § 51.04(d) (West 2008 & Supp. 2013).

102. *Id.* § 51.04(c). County courts do not have jurisdiction over more serious juvenile crimes in which the grand jury is involved in approving the prosecution. FAM. § 53.045 (West 2005).

103. FAM. § 51.04(d).

9. Writ of Habeas Corpus and Limitations

An adult has a right to the protection of the writ of habeas corpus.[104] The Supreme Court has recently confirmed that habeas corpus is a procedural right.[105] And procedurally, there are limitations on the periods for filing cases against adults on which adults may rely.[106]

10. Venue

Venue for adults is quite complicated, with different rules for different crimes;[107] crimes committed wholly, or in part, outside the state;[108] crimes committed across different boundaries;[109] and crimes committed on vessels upon water.[110] If venue is not specifically provided, venue is proper in the county where the offense was committed,[111] or if the offense was committed within the state but the county of commission cannot be determined, "trial may be held in the county in which the defendant resides, in the county in which he is apprehended, or in the county to which he is extradited."[112]

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104. CRIM. PROC. art. 11.01 (West 2005).

105. Boumediene v. Bush, 553 U.S. 723, 802 (2008).

106. CRIM. PROC. arts. 12.01–.09 (West 2005 & Supp. 2013).

107. CRIM. PROC. art. 13.01 (West 2005), 13.02 (West 2005) (Forgery), 13.03 (West 2005) (Perjury), 13.08 (West 2005 & Supp. 2013) (Theft; Organized Retail Theft), 13.09 (West 2005) (Hindering Secured Creditors), 13.10 (West 2005) (Persons Acting Under Authority of this State), 13.12 (West 2005 & Supp. 2013) (Trafficking of Persons, False Imprisonment, Kidnapping & Smuggling of Persons), 13.13 (West 2005 & 2013) (Conspiracy), 13.14 (West 2005) (Bigamy), 13.16 (West 2005) (Criminal Nonsupport), 13.21 (West 2005 & Supp. 2013) (Organized Criminal Activity), 13.22 (West 2005) (Possession & Delivery of Marijuana), 13.23 (West 2005) (Unauthorized Use of a Vehicle), 13.24 (West 2005) (Illegal Recruitment of Athletes), 13.25 (West 2005) (Computer Crimes), 13.26 (West 2005) (Telecommunications Crimes), 13.27 (West 2005 & Supp. 2013) (Simulating Legal Process), 13.271 (West 2005 & Supp. 2013) (Prosecution of Mortgage Fraud), 13.28 (West 2005) (Escape; Unauthorized Absence), 13.29 (West 2005 & Supp. 2013) (Fraudulent Use or Possession of Identifying Information), 13.295 (West Supp. 2013) (Unauthorized Acquisition or Transfer of Certain Financial Information), 13.30 (West Supp. 2013) (Fraudulent, Substandard, or Fictitious Degree), 13.31 (West Supp. 2013) (Failure to Comply With Sex Offender Registration Statute), 13.315 (West Supp. 2013) (Failure to Comply with Sexually Violent Predator Civil Commitment Requirement), 13.32 (West Supp. 2013) (Misapplication of Certain Property), 13.34 (West Supp. 2013) (Crimes Against Children in the Texas Youth Commission), 13.35 (West Supp. 2013) (Money Laundering), 13.36 (West Supp. 2013) (Stalking).

108. CRIM. PROC. art. 13.01 (West 2005) (Offenses Committed Outside this State), 13.05 (West 2005) (Criminal Homicide Committed Outside this State).

109. CRIM. PROC. art. 13.04 (West 2005) (On the Boundaries of Counties), 13.045 (West 2005 & Supp. 2013) (On the Boundaries of Certain Municipalities), 13.06 (West 2005) (Committed on a Boundary Stream), 13.07 (West 2005) (Injured in One County & Dying in Another), 13.075 (West 2005 & Supp. 2013) (Child Injured in One County & Residing in Another).

110. CRIM. PROC. art. 13.11 (West 2005).

111. CRIM. PROC. art. 13.18 (West 2005).

112. CRIM. PROC. art. 13.19 (West 2005).

11. Arrests Without a Warrant

Arrest provides an interesting dichotomy between adult and juvenile law. With adults, for felonies and offenses against the public peace, any person may arrest someone without a warrant "when the offense is committed in his presence or within his view."[113] Peace officers may do the same without limitation as to the nature of the offense, as long as the offense is "committed in [their] presence or within [their] view."[114] Peace officers' rights to arrest without a warrant also extend to other matters not committed in their presence if specifically enumerated[115] or to prevent escape if a credible person reports that a felony has been committed.[116] For adults, upon arrest, they must be taken before a magistrate within forty-eight hours for the warnings required in Article 15.17 of the TCCP.[117] Except for public intoxication, if the crime is a Class C misdemeanor—meaning a fineable-only offense—the officer may issue a citation rather than take the individual before a magistrate.[118] For certain crimes, an officer may also issue a citation for Class A or B misdemeanors—meaning misdemeanors that carry potential jail sentences of up to one year or six months, respectively—in lieu of taking the person into custody and before a magistrate.[119]

12. Arrests With a Warrant

Chapter 15 of the TCCP sets out the requirements for arrests of adults with a warrant, and Chapter 23 contains the requisites for "The Capias."[120] A "warrant of arrest" is a written order from a magistrate to a peace officer

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113. CRIM. PROC. art. 14.01(a) (West 2005).

114. *Id.* art. 14.01(b).

115. CRIM. PROC. art. 14.03 (West 2005 & Supp. 2013). Those specifically enumerated situations occur when there is:

(1) a person in a suspicious place and under circumstances to show that the person guilty of a felony, disorderly conduct or related crimes, breach of the peace, public intoxication, or the person is threatening or is about to commit some offense;

(2) a "person[] who [the] officer has probable cause to believe ha[s] committed an assault" and a danger exists that the person may do it again;

(3) an officer who has probable cause to believe that a person violated a protective order;

(4) a person committing family violence;

(5) a person interfering with a 911 call; or

(6) a person who admits they committed a felony.

Id. arts. 14.03(1)–(6).

116. CRIM. PROC. art. 14.04 (West 2005).

117. CRIM. PROC. art. 14.06(a) (West 2005 & Supp. 2013).

118. *Id.* art. 14.06(b).

119. *Id.* art. 14.06(c). Those enumerated crimes are possession of marijuana or synthetic marijuana if four ounces or less; criminal mischief ($50–$500); graffiti (<$500); theft ($50–$500); theft by check ($20–$500); theft of service ($20–$500); contraband in a correctional facility (Class B only); and driving with an invalid license under § 521.457 of the Transportation Code. *Id.*

120. *See* CRIM. PROC. arts. 15.01 (West 2005), 23.01–.02 (West 2009).

or another individual "to take the body of the person accused of an offense, to be dealt with according to law."[121] The adult can be charged by a complaint, which is an affidavit made before a magistrate or prosecutor.[122]

13. Initial Arraignment

What is commonly known as a 15.17 hearing is required within forty-eight hours of arrest.[123] Detailed admonishments must be given to the accused, including his right to counsel, right to remain silent, right to have an attorney present during questioning, right to terminate any interview at will, right to have an examining trial, right to request appointment of counsel, right to receive instruction on how to request counsel (with provisions for those who require an interpreter for both language and hearing), right not to be required to make a statement, and right to know any statement may be used against him.[124] The magistrate must assure the availability of assistance with forms requiring assistance of counsel; if authorized to do so, the magistrate must also appoint counsel to an indigent person or see that a person with authority is notified to provide appointment, allow the person time to consult with a lawyer, and admit the accused to bail or release without bond.[125]

14. Examining Trial and Detention

In Chapter 16 of the TCCP, entitled "The Commitment or Discharge of the Accused," certain specific provisions affect adults differently than juveniles.[126] For example, an adult is entitled to an examining trial prior to indictment before a magistrate "to examine . . . the truth of an accusation" and to "determine the amount or sufficiency of bail," if charged with a felony.[127] An additional article of this chapter speaks of the magistrate committing a defendant to "the nearest safe jail in any other county" if there

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121. CRIM. PROC. art. 15.01.

122. CRIM. PROC. art. 15.04 (West 2005).

123. CRIM. PROC. art. 15.17(a) (West 2005 & Supp. 2013).

124. *Id.*

125. *Id.*

126. CRIM. PROC. arts. 16.01–.22 (West 2005 & Supp. 2013).

127. CRIM. PROC. art. 16.01. A child who has been transferred to criminal court may also be granted an examining trial, but only at the discretion of the court. *Id.* Although the TCCP makes reference to permissible examining trials after a child is transferred to adult criminal court for prosecution, § 54.02 of the Texas Family Code no longer makes reference to the right to an examining trial. TEX. FAM. CODE ANN. § 54.02 (West 2008 & Supp. 2013). The Texas Family Code has been revised to require the juvenile court, after a transfer hearing, to determine whether "there is probable cause to believe that the child before the court committed the offense alleged," which is, in effect, the same finding as in an examining trial. FAM. § 54.02(a)(3); *see, e.g.*, CRIM. PROC. art. 16.01. Juvenile experts believe the right to an examining trial no longer exists for transferred children. ROBERT DAWSON, TEXAS JUVENILE LAW 200 (7th ed. 2008).

is no safe jail in his county.[128] Further, "[e]very sheriff shall keep safely a person committed to his custody" with the limitation that he "shall use no cruel or unusual means to secure this end."[129]

15. Bail

An entire chapter of the TCCP is devoted to bail for adults,[130] including, among other things, personal bonds,[131] sureties,[132] rules for fixing the amount of bail,[133] re-arrest,[134] home curfew and electronic monitoring,[135] home confinement,[136] drug testing,[137] vehicle ignition interlock,[138] and other conditions of release.[139]

16. Miscellaneous Provisions

Several remaining chapters of the TCCP are written to affect adults, but juveniles will be treated in the same manner. The following rules will be applied equally if a juvenile finds herself in the adult criminal system: search warrants,[140] grand juries,[141] service of the indictments,[142] arraignments,[143] pleadings,[144] quashing indictments,[145] change of venues,[146] failures to indict,[147] trial priorities,[148] modes of trial (except for jury size in juvenile cases, which will be addressed below),[149] judgments and

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128. CRIM. PROC. art. 16.18.

129. CRIM. PROC. art. 16.21.

130. CRIM. PROC. arts. 17.01–.025 (West 2005 & Supp. 2013), 17.045 (West 2005), 17.05 (West 2005 & Supp. 2013), 17.08 (West 2005), 17.11 (West 2005 & Supp. 2013), 17.15 (West 2005), 22.01–.18 (West 2009) (Forfeiture of Bail).

131. CRIM. PROC. arts. 17.03–.032 (West 2005 & Supp. 2013), 17.04 (West 2005).

132. CRIM. PROC. arts. 17.06–.07 (West 2005 & Supp. 2013), 17.10, 17.13 (West 2005), 17.23 (West 2005).

133. CRIM. PROC. art. 17.15.

134. CRIM. PROC. arts. 17.16–.19 (West 2005 & Supp. 2013).

135. CRIM. PROC. art. 17.43 (West 2005).

136. CRIM. PROC. art. 17.44 (West 2005 & Supp. 2013).

137. *Id.*

138. CRIM. PROC. art. 17.441 (West 2005).

139. CRIM. PROC. arts. 17.40–.49 (West 2005).

140. CRIM. PROC. arts. 18.01–.23 (West 2005 & Supp. 2013).

141. CRIM. PROC. arts. 19.01–.42 (West 2005 & Supp. 2013) (Organization of the Grand Jury), 20.01–.22 (West 2005 & Supp. 2013) (Duties & Powers of the Grand Jury), 21.01–.31 (West 2009 & Supp. 2013) (Indictment & Information).

142. CRIM. PROC. arts. 25.01–.04 (West 2009).

143. CRIM. PROC. arts. 26.01–.15 (West 2009 & Supp. 2013).

144. CRIM. PROC. arts. 27.01–.18 (West 2006 & Supp. 2013).

145. CRIM. PROC. art. 28.05 (West 2006).

146. CRIM. PROC. arts. 31.01–.09 (West 2006 & Supp. 2013).

147. CRIM. PROC. art. 32.01 (West 2006).

148. CRIM. PROC. art. 32A.01 (West 2006).

149. CRIM. PROC. arts. 33.01–.09 (West 2006 & Supp. 2013).

sentences,[150] execution of judgments,[151] pardons and paroles,[152] expunction of records,[153] use of adult criminal histories,[154] subpoenas and attachments of witnesses,[155] pre-trial hearings,[156] continuances,[157] disqualifications of judges,[158] formations of juries,[159] trials before juries,[160] verdicts,[161] evidence,[162] discovery,[163] new trials,[164] and appeals.[165]

Finally, some chapters of the TCCP will never apply to juveniles, such as special venire in capital cases,[166] mental health provisions,[167] and adult sex offender registration.[168]

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150. CRIM. PROC. arts. 42.01–.23 (West 2006 & Supp. 2013).

151. CRIM. PROC. arts. 43.01–.26 (West 2006 & Supp. 2013).

152. CRIM. PROC. arts. 48.01–.05 (West 2006 & Supp. 2013).

153. CRIM. PROC. arts. 55.01–.06 (West 2006 & Supp. 2013).

154. CRIM. PROC. arts. 60.01–.21 (West 2006 & Supp. 2013).

155. CRIM. PROC. arts. 24.01–.29 (West 2009). Chapter 24A provides certain powers for the investigation and prosecution of online solicitation of minors, but does not limit the powers of Chapter 24 by the accused. CRIM. PROC. ch. 24A (West 2009).

156. CRIM. PROC. arts. 28.01 (West 2006), 28.02 (West 2006) (Order of Argument), 28.06 (West 2006) (describing discharge after limitations expired upon successful pre-trial hearing), 28.07–.11 (West 2006) (Attacking Indictments), 28.12 (West 2006) (Exception and Special Pleas), 28.13 (West 2006) (Former Acquittal or Conviction), 28.14 (West 2006) (Plea Allowed).

157. CRIM. PROC. arts. 29.01–.13 (West 2006).

158. CRIM. PROC. arts. 30.01 (West 2006 & Supp. 2013).

159. CRIM. PROC. arts. 35.01–.08 (West 2006 & Supp. 2013).

160. CRIM. PROC. arts. 36.01–.14 (West 2007), 36.15–.33 (West 2006 & Supp. 2013).

161. CRIM. PROC. arts. 37.01–.14 (West 2006).

162. CRIM. PROC. arts. 38.01–.05 (West 1979 & Supp. 2013), 38.06–.44 (West 2005 & Supp. 2013).

163. CRIM. PROC. art. 39.14 (West 2005 & Supp. 2013). Also in Chapter 39 of the TCCP are other provisions that affect depositions in criminal cases. CRIM. PROC. arts. 39.01–.14 (West 2005 & Supp. 2013). In a juvenile case, discovery is controlled by the TCCP, as reflected in § 51.17(b) of the Texas Family Code. TEX. FAM. CODE ANN. § 51.17(b) (West 2008).

164. CRIM. PROC. art. 40.001 (West 2006).

165. CRIM. PROC. arts. 44.01–.47 (West 2006 & Supp. 2013). Certain provisions of this chapter would not apply to juveniles and adults equally, such as bond or disposition of fines and costs, unless the juvenile had been certified and jurisdiction transferred to the criminal court. *Id.* Just as in adult criminal cases, in a juvenile plea of guilty or true, no appeal is available for the child without permission, except on matters raised prior to trial. FAM. § 56.01(n) (West 2008 & Supp. 2013). But unlike adult cases, an appeal of a juvenile case neither suspends the order of the juvenile court nor releases the child from custody, unless ordered. *Id.* § 56.01(g). Adults, on the other hand, as long as they are not in custody, find their punishments suspended and may make a bond because the court's judgment is not final until the mandate issues from the appellate court. CRIM. PROC. arts. 44.01–.47 (West 2006 & Supp. 2013). Because the juvenile court retains jurisdiction without regard to age while a case is on appeal, if the case is returned from the appellate court and the child is now at least eighteen years of age, the court can proceed with detention, release the person, or, as with other adults, allow the person to make a bond. FAM. § 51.041 (West 2008).

166. CRIM. PROC. arts. 34.01–.05 (West 2005). The reason this is a capital case, by definition, is because it includes the possibility of a death sentence, and juveniles may not suffer the penalty of death. TEX. PENAL CODE ANN. § 12.31(a)(1) (West 2011 & Supp. 2013). A child transferred from juvenile court into criminal court may only suffer a punishment of life. *Id.*

167. CRIM. PROC. art. 46.01 (West 2006), *repealed by* Acts of 1999, 76th Leg., ch. 561, § 8 (testing for AIDS and HIV); art. 46.02 (West 2006), *repealed by* Acts 2003, 78th Leg., ch. 35, § 15 (Incompetency to Stand Trial); art. 46.03 (West 2006 & Supp. 2013), *repealed in part and renumbered in part by* Acts 2005, 79th Leg., ch. 831, §1, *and* Acts 2011, 82nd Leg., ch. 787 (H.B. 2124), § 1 (Insanity Defense); art. 46.04 (West 2006) (transportation to a mental health facility or residential care

III. MODERN JUVENILE JUSTICE PROCESS

A. In re *Gault*

The constitutional genesis in modern juvenile law is *In re Gault*.[169] Justice Fortas wrote that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[170] But "wide differences" between the procedural rights of adults and juveniles have long existed.[171] "Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law."[172] Justice Fortas said "the Due Process Clause of the Fourteenth Amendment requires" fair treatment in a proceeding "to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed."[173] So, as to the specific issues presented in *Gault*, the Court found that (1) "[n]otice . . . must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded and it must 'set forth the alleged misconduct with particularity'";[174] (2) "the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child";[175] (3) "the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults";[176] and (4) "absent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination."[177]

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facility). As is discussed below, juveniles have their own rules when it comes to fitness to proceed (competency) and not being responsible for their conduct (insanity). *See* FAM. § 55.13 (West 2008).

168. CRIM. PROC. arts. 62.01–.408 (West 2006 & Supp. 2013). Juveniles are subject to this chapter, but are handled separately within the chapter. *See* CRIM. PROC. arts. 62.251–.408.

169. *See In re* Gault, 387 U.S. 1, 1–78 (1967).

170. *Id.* at 13.

171. *Id.* at 14. Justice Fortas highlights the differences between juvenile and adult procedural rights to bail, indictment, interrogation, and arrest. *Id.* (internal quotation marks omitted) (citing Kent v. U.S., 383 U.S. 541, 555 n. 22 (1966)).

172. *Id.* at 13 (quoting Haley v. Ohio, 332 U.S. 596, 601 (1948)).

173. *Id.* at 41.

174. *Id.* at 33 (quoting THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 87 (1967)).

175. *Id.* at 41. "There is no material difference . . . between adult and juvenile proceedings," when it comes to the accused needing "the assistance of counsel to cope with problems of law." *Id.* at 36. "The child 'requires the guiding hand of counsel at every step in the proceedings against him.'" *Id.* (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).

176. *Id.* at 55.

177. *Id.* at 57. The final question before the Court was whether the Due Process Clause made the juvenile statute unconstitutional because there was no right of appeal from a juvenile court order. *Id.* at 58. The Supreme Court had never held that "a State is required by the Federal Constitution 'to provide appellate courts or a right to appellate review at all.'" *Id.* (quoting Griffin v. Illinois, 351 U.S. 12, 18 (1956)). The Court found that it did not need to rule on this question, on the failure of the State to

B. Sources of Texas Juvenile Law

The primary procedural difference between juvenile and adult criminal law is the civil nature of juvenile justice law.[178] The source of law applicable to juveniles draws primarily from Title 3 of the Texas Family Code,[179] the Texas Penal Code,[180] the Texas Rules of Evidence,[181] the Texas Code of Criminal Procedure (TCCP),[182] and by default—and by history—the Texas Rules of Civil Procedure (TRCP).[183] When a conflict exists between the TRCP and the Family Code, the Family Code governs.[184] So in reality, the usefulness of the TRCP in juvenile matters in Texas is limited.[185]

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provide a transcript or recording of the hearing, or on the failure of the judge to state the grounds for his decision. *Id.* at 58. Under Texas law, juveniles have the right to appeal adjudication, disposition, modification, mental health or intellectual disability, and transfer orders of the juvenile court. TEX. FAM. CODE ANN. § 56.01(c) (West 2008 & Supp. 2013). But following a plea agreement, a child may appeal only with permission of the court or on matters raised by written motion before the plea or stipulation entered. *Id.* § 56.01(n).

178. *See In re* Hall, 286 S.W.3d 925, 927 (Tex. 2009).

179. FAM. tit. 3 (West 2008 & Supp. 2013).

180. *See* TEX. PENAL CODE ANN. This would also include case law interpreting that statute and any Attorney General opinions on the requisite issue. *Id.* In addition, in Texas, there are many criminal offenses defined throughout civil statutes and other codes. *See* FAM. § 51.01(2)(a) (West 2008). Subject to age limitations, any criminal law, despite its source, is applicable to juveniles if it fits within the definition of "delinquent conduct." *See, e.g.*, FAM. §§ 51.02(2) (West 2008 & Supp. 2013) (defining "age"), 51.03(a) (West 2008 & Supp. 2013) (defining "delinquent conduct"); *see infra* note 283. Basically, the age of responsibility for children in Texas is ten to seventeen, with exceptions. FAM. § 51.02(2).

181. FAM. § 51.17(c) (West 2008 & Supp. 2013). Specifically addressing the adjudication hearing, § 54.03(d) of the Family Code provides that "only material, relevant, and competent evidence in accordance with the Texas Rules of Evidence applicable to criminal cases and Chapter 38, Code of Criminal Procedure, may be considered in the adjudication hearing." FAM. § 54.03(d) (West 2008 & Supp. 2013). Occasionally, the Texas Rules of Evidence are not applicable in a juvenile matter or hearing if either the Texas Rules of Evidence or the Family Code so provide. *See, e.g.*, TEX. R. EVID. 101(d)(1)(F) (stating that a proceeding on justification for pretrial detention (juvenile detention hearing) not involving bail specifically makes the Texas Rules of Evidence inapplicable).

182. *See* FAM. § 51.17(c). Except as otherwise provided in Title 3, in judicial proceedings under Title 3, articles 33.03 (Presence of Defendant), 37.07 (Verdict Must be General; Separate Hearing on Proper Punishment), and Chapter 38 (Evidence in Criminal Actions), of the Code of Criminal Procedure apply. *See* TEX. CODE CRIM. PROC. arts. 33.03 (West 2006), 37.03 (West 2006), 38.01–.05 (West 1979 & Supp. 2013), 38.06–.44 (West 2005 & Supp. 2013).

183. FAM. § 51.17(a); *In re* R.J.H., 79 S.W.3d 1, 6 (Tex. 2002) (noting that the Texas Family Code requires delinquency proceedings to be conducted under the rules of civil procedure).

184. FAM. § 51.17(a). "Except as provided by 56.01(b-1) [motions for new trial] and except for the burden of proof to be borne by the state in adjudicating a child to be delinquent or in need of supervision under Section 54.03(f) or otherwise when in conflict with a provision of this title, the Texas Rules of Civil Procedure govern proceedings under this title." *Id.*

185. DAWSON, TEXAS JUVENILE LAW, *supra* note 127, at 560.

C. The Juvenile Board

Texas law places the responsibility for juvenile justice oversight at a local level on a county Juvenile Board.[186] The Juvenile Board is usually a committee of judges,[187] and the seats are paid positions.[188] The Juvenile Board may appoint an advisory council,[189] and some Juvenile Boards have public members.[190] The Juvenile Board establishes a juvenile probation department, employs the chief juvenile probation officer of the county, sets the budget, establishes policies, and may establish guidelines for initial assessments of children.[191] As the Juvenile Board is not involved in daily operation, the chief juvenile probation officer hires, fires, and deals with personnel.[192] The Juvenile Board has many additional duties with the recent creation of the Texas Juvenile Justice Department, a merging of the former Texas Juvenile Probation Commission (TJPC) and the Texas Youth Commission (TYC).[193] A reference herein to the TJPC or TYC is meant to be a reference to the Texas Juvenile Justice Department (the Department), created December 1, 2011.[194] As an example, some of the duties of the Juvenile Board are to provide an annual report to the commissioner's court on the suitability of the quarters and facilities of the juvenile court;[195] to designate the juvenile court(s)[196] (and at least one alternate court if the constitutional county court is designated as a juvenile court);[197] to designate the alternate juvenile court;[198] and to annually inspect pre-adjudication secure detention facilities,[199] post-adjudication correctional facilities that

186. TEX. HUM. RES. CODE ANN. §§ 152.0001–.0055 (West 2013 & Supp. 2013).

187. HUM. RES. § 152.0032 (West 2013).

188. HUM. RES. § 152.0034 (West 2013).

189. HUM. RES. § 152.0010 (West 2013).

190. HUM. RES. §§ 152.0001–.2571 (West 2013 & Supp. 2013).

191. HUM. RES. § 152.0007 (West 2013).

192. HUM. RES. § 152.0008 (West 2013).

193. HUM. RES. §§ 201.001–261.152 (West 2013 & Supp. 2013) (Juvenile Justice Services and Facilities).

194. HUM. RES. § 201.001(b) (West 2013).

195. TEX. FAM. CODE ANN. § 51.05(b) (West 2008); *In re* G.C., Jr., 980 S.W.2d 908, 909 (Tex. App.—Corpus Christi 1998, pet. denied).

196. FAM. § 51.04(b) (West 2008 & Supp. 2013); *In re* R.G., 388 S.W.3d 820, 823 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (quoting FAM. § 51.04(b)).

197. FAM. § 51.04(c); R.X.F. v. State, 921 S.W.2d 888, 893 (Tex. App.—Waco 1996, no writ) (reviewing the provisions of § 51.04(c)). A child may elect in writing, not later than ten days before trial, to be tried by the alternate court. FAM. § 51.18 (West 2008).

198. FAM. § 51.01(d) (West 2008); Deleon v. State, 728 S.W.2d 935, 936 (Tex. App.—Amarillo 1987, no writ) (noting that the instant case was transferred to an alternative designated court because the county judge was not a licensed attorney).

199. FAM. § 51.12(c) (West 2008 & Supp. 2013). A secure detention facility is a residential facility that restricts the physical movements and activities of its residents. *Id.* In the juvenile context, it is designed for the temporary placement of any juvenile accused of an offense, a non-offender or others. FAM. § 51.02(14) (West 2008 & Supp. 2013). If a child must be held in a building that also houses adults, there are restrictions that limit adults' access to the children by sight and sound, and that require a

are not operated by the TYC,[200] and non-secure correctional facilities[201] within the county.

D. Detention, Custody, and Intake

1. Place of Juvenile Detention

One of the significant differences between adult and juvenile process is the place of pre-adjudication detention of a child.[202] The Juvenile Board designates one or more places of detention within the county for a child to be detained.[203] This is usually where it is alleged the offense was committed or where a petition for adjudication is filed.[204] If there is no certified place of detention in the county, the Juvenile Board may designate a place of detention in another county.[205] If a child is held in an uncertified facility, she is entitled to immediate release, with one exception.[206] Children seventeen or older—although adults for criminal purposes in Texas[207]—may be held in juvenile detention for a TYC parole violation or for a probation modification or violation, the same as any juvenile, if they

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separation of adult and juvenile staff (except in treatment facilities) and a separate space designated for the temporary detention of only juveniles. *See* FAM. §§ 51.12(l), 54.01(p) (West 2008 & Supp. 2013).

200. FAM. § 51.125(b) (West 2008). A "'[s]ecure correctional facility' means any public or private residential facility, including an alcohol or other drug treatment facility" that restricts the physical movements and activities of its residents and is used for adjudicated juveniles, non-offenders, or others. FAM. § 51.02(13).

201. FAM. § 51.126(b) (West 2008 & Supp. 2013). A non-secure correctional facility "accepts only juveniles who are on probation and . . . is operated by or under contract with a governmental unit." FAM. § 51.02(8-a).

202. *See* FAM. § 52.02(a)(3) (West 2008).

203. *Id.* § 52.02(a)(3); *see* Baptist Vie Le v. State, 993 S.W.2d 650, 651–60 (Tex. Crim. App. 1999) (en banc) (discussing provisions of § 52.02(a) and deciding that the arresting officer failed to comply with § 52.02(a)(3)'s requirement mandating arresting officers to transport juveniles to a designated place of detention).

204. FAM. § 51.06 (West 2008); *In re* D.D.C, No. 05-97-01844-CV, 1998 WL 265178, at *2 (Tex. App.—Dallas May 27, 1998, no pet.) (not designated for publication) (discussing proper venue in juvenile proceedings). Venue for a juvenile proceeding is in the county in which it is alleged the offense or conduct occurred, or in the child's county of residence, with conditions. *See infra* Part III.O.1; *see also* FAM. § 51.12(e) (West 2008 & Supp. 2013). In enumerating the places of detention for a child, this section says "[i]f there is no certified place of detention in the county in which the petition is filed" being the child's county of residence with conditions or the county in which the alleged offense or conduct occurred, "the designated place of detention may be in another county." *Id.*

205. FAM. § 51.12 (e).

206. *Id.* § 51.12(d); *In re* G.T.H., 541 S.W.2d 527, 527 (Tex. Civ. App.—Eastland 1976, no writ) (mandating the release of a minor who was detained in an uncertified facility). If the child is alleged to have used, possessed, or exhibited a firearm while committing an offense, the child may be temporarily detained in a county jail or other facility if no certified facility is available in the county—but the child must be kept separate from adults, by both sight and sound, and must be with separate staff (subject to the firearms exception). FAM. §§ 51.12(l), 53.02(f) (West 2008), 54.01(p) (West 2008 & Supp. 2013).

207. TEX. PENAL CODE ANN. § 8.07(b) (West 2011 & Supp. 2013).

are not being held for an adult criminal charge.[208] If a child is transferred to adult criminal court for prosecution, has escaped from a facility, or has violated conditions of release from the TYC, she may be held in an adult place of detention (jail).[209]

2. Place of Police Custody

The Family Code is very specific about where a child may be held by police.[210] Only three places may be designated for temporary custody of a child: (1) a juvenile processing office designated by the Juvenile Board or the head of the local law enforcement agency,[211] (2) a non-secure location for custody for fineable offenses,[212] and (3) a juvenile curfew processing office.[213] The Juvenile Board further sets the conditions of police custody and the length of time a child may be held—a maximum of six hours.[214]

3. Taking Into Custody

A child is subject to the laws of arrest,[215] including orders of the juvenile court to apprehend.[216] Interestingly, a law enforcement officer may

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208. Tex. Att'y Gen. Op. No. DM-38 (1991). Under these circumstances, after age eighteen, a person can be housed in juvenile facility. *See id.* This situation only occurs, however, if there is no regular contact with children, and the person is not housed in the same compartment with juveniles. *See id.*

209. FAM. § 51.12(h).

210. FAM. § 52.02 (West 2008); *see* Baptist Vie Le v. State, 993 S.W.2d 650, 653 (Tex. Crim. App. 1999) (en banc); Martinez v. State, 337 S.W.3d 446, 456–57 (Tex. App.—Eastland 2011, pet. ref'd) (discussing the provisions of § 52.02 in relation to appellant's claim that the section was violated). If a child is taken into custody, "without unnecessary delay and without first taking the child to any place other than a juvenile processing office," she shall be released "to a parent, guardian, custodian . . . or other responsible adult upon that person's promise to bring the child before the juvenile court," or be taken to (1) an intake officer, (2) a designated detention facility, (3) a medical facility, or (4) her school. FAM. § 52.02(a)(1)–(7). The child may also be counseled and released pursuant to § 52.03. *Id.* § 52.02(a)(6). There is an alcohol exception to this section when there are reasonable grounds to believe that the child has been drinking and driving. *Id.* § 52.02(c). Law enforcement may not release a child under these provisions if delinquent conduct is alleged and the child used, possessed, or exhibited a firearm. *See id.* In this situation, the child can only be released by a judge. FAM. § 53.02(f) (West 2008).

211. FAM. § 52.025 (West 2008); *Baptist Vie Le*, 993 S.W.2d at 653 (noting that § 52.02(a) should be read in concert with § 52.025); *Martinez*, 337 S.W.3d at 457 (finding that officers took appellant to a designated processing office pursuant to § 52.025); Pham v. State, 125 S.W.3d 622, 629 (Tex. App.—Houston [1st Dist.] 2003), *aff'd*, 125 S.W.3d 767 (Tex. Crim. App. 2005) (discussing failure of officers to take juvenile to a designated processing facility).

212. TEX. CODE CRIM. PROC. ANN. art. 45.058(b) (West 2006 & Supp. 2013).

213. CRIM. PROC. art. 45.059 (West 2006).

214. FAM. § 52.025; Vega v. State, 255 S.W.3d 87, 94, 101 (Tex. App.—Corpus Christi 2007, pet. ref'd) (noting that appellant was held for over six hours, thereby violating § 52.025); Horton v. State, 78 S.W.3d 701, 707 (Tex. App.—Austin 2002, pet. ref'd) (noting that juveniles may be held in a designated detention facility for no more than six hours).

215. FAM. § 52.01(a)(2) (West 2008); *Martinez*, 337 S.W.3d at 454 (noting that the statute allows juveniles to be taken into custody); *In re* E.P., 257 S.W.3d 523, 526 (Tex. App.—Dallas 2008, no pet.)

also take a child into custody if there is probable cause to believe the child has violated a condition of probation.[217] A juvenile probation officer may do likewise[218] and may additionally take a child into custody when there is probable cause to suspect a condition of release has been violated.[219] The Family Code is careful to say that this is not an arrest.[220] As to parental notification, the person taking the child into custody "shall promptly give notice" to a parent, guardian, or custodian, giving a reason for the taking.[221]

4. Intake

When a child is taken into custody, the preference is to release the child to (1) a parent,[222] (2) an intake officer,[223] (3) a designated facility,[224] or

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(noting that authorities may arrest a juvenile based on probable cause that a law has been violated); *In re* E.M.R., 55 S.W.3d 712, 717 (Tex. App.—Corpus Christi 2001, no pet.) (listing the circumstances in which authorities may take a child into custody).

216. FAM. § 52.015 (West 2008); *In re* M.M.J.M., No. 08–99–00167–CV, 2002 WL 102203, at *11 (Tex. App.—El Paso Jan. 25, 2002, pet. denied) (not designated for publication) (listing circumstances in which a juvenile may be taken into custody). An arrest warrant in juvenile law is called a "directive to apprehend." *Id.* A law enforcement officer or a probation officer may ask a juvenile court to issue a directive to apprehend upon probable cause. *Id.*

217. FAM. § 52.01(a)(3)(C); Hampton v. State, 86 S.W.3d 603, 609 (Tex. Crim. App. 2002) (noting that the detective was in compliance with Texas laws when placing appellant into custody for a probation violation); *E.M.R.*, 55 S.W.3d at 717.

218. FAM. § 52.01(a)(4); *M.M.J.M.*, 2002 WL 102203, at *11; *E.M.R.*, 55 S.W.3d at 717.

219. FAM. § 52.01(a)(6).

220. *Id.* § 52.01(b). This paragraph says the act of taking a child into custody is not an arrest, except for the purpose of determining the validity of the seizure (intake) or the constitutionality of a search. *Id.*; *Martinez*, 337 S.W.3d at 454 ("Section 52.01(b) expressly states that the taking of a child into custody is not an arrest except for the purpose of determining the validity of taking him into custody or the validity of a search under the laws and constitution of this state or the United States.").

221. FAM. § 52.02(b) (West 2008); *see also* Gonzales v. State, 67 S.W.3d 910, 912 (Tex. Crim. App. 2002) (stating that failure of the police to attempt to notify the child's parents requires the child's statement to be excluded when there is a causal connection between the failure to notify and the statement); *In re* S.R.L., 546 S.W.2d 372, 373 (Tex. App.—Waco 1976, no writ) (holding that the reason for taking the child into custody must be related to the offense affecting the child, which may be distinct from the purpose of the officer in taking the child—such as to interrogate).

222. FAM. § 52.02(a)(1). This provision also allows release to a guardian, custodian, or other responsible adult upon the promise to bring the child before the juvenile court when requested. *Id.*; Baptist Vie Le v. State, 993 S.W.2d 650, 652–53 (Tex. Crim. App. 1999) (en banc) (quoting § 52.02(a)(1)); *Martinez*, 337 S.W.3d at 456–57 (discussing the provisions of § 52.02(a) in relation to appellant's claim that the section was violated).

223. FAM. § 52.02(a)(2); *Baptist Vie Le*, 993 S.W.2d at 652–53 (quoting § 52.02(a)(2)); *Martinez*, 337 S.W.3d at 456–57. If the one taking the child into custody has probable cause to believe that the child committed delinquent conduct, conduct indicating a need for supervision, or a violation of a juvenile probation term, the child may be brought before "the office or official designated by the juvenile board." FAM. § 52.02(a)(2)–(3). Practice teaches in most counties that the designated official is usually a juvenile probation officer, but sometimes it is the juvenile prosecutor. PATRICIA MCFALL TORBET, U.S. DEP'T JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE JUSTICE BULLETIN—JUVENILE PROBATION: THE WORKHORSE OF THE JUVENILE JUSTICE SYSTEM 2 (Mar. 2006), *available at* www.ncjrs.gov/pdffiles/workhors.pdf. Unlike adult probation officers, juvenile probation officers are involved with the child from the initial stages. *Id.* at 1. They actually become a part of the decision process of whether a child should be referred to a juvenile court or prosecutor for a

(4) her school "without unnecessary delay."[225] The only exception to this list is that the child may first be taken to a designated juvenile processing office.[226] If a police officer chooses to do so, based on local policy, the child may be counseled and released[227] or referred to a first-time offender program, if available.[228]

5. Intake Officer: Juvenile Probation Officer

If the law enforcement decision is to bring the child to a designated office or official—usually the intake officer or probation officer—two things must be decided. First, the intake officer must determine whether the person brought to her is a child.[229] Second, the intake officer must make a probable cause determination that the child "engaged in delinquent conduct

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petition to be filed, or whether the child should be handled in a post-judicial, informal way. *Id.* In some counties it is still the practice to call the juvenile probation officers the "juvenile officers," as if they were in line with law enforcement. *See supra* Part III.C.

224. FAM. § 52.02(a)(3)–(5); *Baptist Vie Le*, 993 S.W.2d at 652–53 (quoting § 52.02(a)(3)–(5)); *see Martinez*, 337 S.W.3d at 456–57. Subparagraph (3) allows the child to be taken to the designated detention facility in the county. FAM. § 52.02(a)(3). Subparagraph (4) is for counties that do not have such a facility. *Id.* § 52.02(a)(4). In those counties, the child may be taken to a secure detention facility (usually the county jail) as long as the facility has been designated by the juvenile board and meets certain statutory standards. FAM. § 51.12(j) (West 2008 & Supp. 2013). Subparagraph (5) allows a child who is believed to be suffering from a serious physical condition or illness to be taken to a medical facility. FAM. § 52.02(a)(5); *see supra* Part III.D.

225. FAM. §§ 52.01(e), 52.02 (West 2008). If a police officer has probable cause to believe a child is violating the compulsory school attendance law, the officer may return the child to the school campus by taking the child into custody. FAM. § 52.01(e). Other than taking a child first to the designated juvenile processing office, when a child is taken into custody, one of the named locations to which an officer may take the child is the child's school campus if school is in session and someone in authority agrees to assume responsibility for the child for the rest of the day—that person may be a principal, a designee, or a peace officer assigned to the school. FAM. § 52.02(a)(7).

226. *See* FAM. § 52.02; *Baptist Vie Le*, 993 S.W.2d at 653 (noting that an officer's choice to take a juvenile to a designated processing office is allowed, and that it is an option, not a requirement of the statute); *Martinez*, 337 S.W.3d at 458.

227. *See* FAM. § 52.02(a)(6), 52.03(a) (West 2008); *see also* T.W. v. State, No. 14–99–00564–CV, 2001 WL 1098186, at *2 (Tex. App.—Houston [14th Dist.] Sept. 20, 2001, no pet.) (not designated for publication) (allowing "informal disposition of a juvenile by a *law enforcement officer* . . . without a referral to a juvenile court" (first alteration in original)). This procedure, sometimes called "supervisory caution," gives an officer the opportunity to make contact with the child, and often the parent, to advise them of the consequences of the child's behavior, and may involve referral to agencies for services for at-risk youth. FAM. 52.02(a). This procedure is also available to other juvenile professionals, probation officers, prosecutors, and judges. *Id.* This can involve a referral to a social agency or referral for treatment—such as for inhalation or drug abuse. *See* FAM. § 264.301 (Child Welfare Services, Subchapter D, Services At-Risk for At-Risk Youth).

228. *See* FAM. § 52.031 (West 2008 & Supp. 2013). The Juvenile Board may establish such a program for children exhibiting (1) conduct that indicates a need for supervision, or (2) delinquent conduct, meaning misdemeanors not involving a firearm, illegal knife, club, or prohibited weapon. *See id.* § 52.031(a). The Family Code requires the Juvenile Board, with the "cooperation with each law enforcement agency in the county," to establish guidelines for the police to make referrals to the first offender program and to counsel and release a child (with supervisory caution). FAM. § 52.032 (West 2008 & Supp. 2013).

229. *See* FAM. § 53.01(a)(1) (West 2008).

or conduct indicating a need for supervision"[230] or whether the child should be held for other reasons.[231] If the answer to either inquiry is negative, the person must be immediately released.[232] Once both questions are answered in the affirmative, the decision is whether (1) the child should be detained[233] and a case referred to the juvenile court through the prosecutor,[234] (2) the child should be released,[235] or (3) the intake officer should proceed nonjudicially.[236]

6. Intake Review by a Juvenile Prosecutor

The intake officer—usually a juvenile probation officer—normally does not have his initial intake decisions reviewed. A prosecutor, however, must review intake determinations, including whether or not the intake officer found probable cause (1) when the subject offense is a capital murder or non-capital murder;[237] (2) by statutory default, when there is no local agreement;[238] or (3) through local agreement.[239] Just as in adult cases, a prosecutor has wide discretion whether to file a case and, prior to filing a petition, may first refer a case to a grand jury for filing review in the county

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230. *Id.* § 53.01(a)(2)(A). The test for probable cause for the intake officer is a reasonable belief that the child engaged in delinquent conduct or conduct indicating a need for supervision—the same test used by a grand jury or in an examining trial. *Id.* This is greater than a reasonable suspicion standard, but short of a preponderance standard. *Id.* The concept of probable cause is not this simple. The Texas Court of Criminal Appeals recently discussed probable cause: "[T]o effectuate a valid arrest, an officer must at that time have 'probable cause to believe that a criminal offense has been or is being committed' by the person in question. . . . Probable cause is a 'fluid concept' that cannot be 'readily, or even usefully, reduced to a neat set of legal rules.' Though the concept evades precise definition, it involves 'a reasonable ground for belief of guilt' that is 'particularized with respect to the person to be searched or seized.' 'Probable cause' is a greater level of suspicion than 'reasonable suspicion' and requires information that is more substantial in quality or content and a greater reliability with respect to the source of information. . . . Probable cause is a relatively high level of suspicion, though it falls far short of a preponderance of the evidence standard." Baldwin v. State, 278 S.W.3d 367, 371 (Tex. Crim. App. 2009) (footnotes omitted) (quoting Maryland v. Pringle, 540 U.S. 366, 370–71 (2003), and Alabama v. White, 496 U.S. 325, 330 (1990)). That clears it up.

231. *See* FAM. § 53.01(a)(2)(B). Probable cause is also needed if the child is a non-offender, being held solely for deportation. *Id.*

232. *See id.* § 53.01(b).

233. *See* FAM. § 53.02(b) (West 2008).

234. *See* FAM. § 53.01(d).

235. *See* FAM. § 53.02(a).

236. *See* FAM. § 53.03 (West 2008). A probation officer may place a child on a six-month deferred prosecution with the consent of the child and his parent, guardian, or custodian, under the direction of the juvenile court. *Id.* § 53.03(a).

237. *See* FAM. § 53.01(f). If a Juvenile Board adopts an alternate referral plan that is different than the statutory default, the alternate plan must include referral for all capital murders and murders. *Id.*

238. *See id.* § 53.01(d). The statutory default requires referral to the prosecutor for all felonies; violent misdemeanors with a firearm, illegal knife, or club; unlawful carryings of a weapon; or possessions of a prohibited weapon. *Id.*

239. *See id.* The Juvenile Board may approve a written procedure proposed by a prosecutor and chief juvenile probation officer that is different from the statutory default, and must register the alternate procedure with the Juvenile Probation Commission. *Id.* § 53.01(e).

where the offense is alleged to have occurred.[240] Should the grand jury not approve the filing of a petition or vote no action, the prosecutor shall not file a petition without successive action by a grand jury upon resubmission.[241] If the grand jury votes to approve the petition, the prosecutor still has the discretion of whether or not to file the petition.[242]

7. Detention Process

Once the intake officer has made the two initial determinations,[243] the child may be held in detention in a secure juvenile detention facility if one of six circumstances required by the Family Code exists.[244] The intake officer, though, has no discretion to release or detain a child who is alleged "to have used, possessed, or exhibited a firearm" during the commission of the offense, as only a judge can release a child in these circumstances.[245]

If a child is detained by the intake officer for delinquent conduct, a detention hearing must be "held promptly but not later than the second working day after the child is taken into custody."[246] As to status offenders[247] and non-offenders,[248] the detention hearing must be before the

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240. *See* FAM. § 53.035 (West 2008). As in an adult case, the "grand jury has the same jurisdiction and powers to investigate the facts and circumstances" of an offense referred to it. *Id.* § 53.035(b).

241. *See id.* § 53.035(c).

242. *See id.* § 53.035(d). Any approval under this section is not the same as grand jury approval for the purpose of seeking a determinate sentence after adjudication under the provisions of § 53.045. *See* FAM. § 53.035(e), 53.045 (West 2008 & Supp. 2013).

243. FAM. § 53.01(a) (West 2008). Initially it must be determined whether the individual in custody is a child and whether probable cause exists such that she "engaged in delinquent conduct or conduct indicating a need for supervision." *Id.*; *see also In re* R.R., 931 S.W.2d 11, 13–14 (Tex. App.—Corpus Christi 1996, no writ) (noting that intake officers must make determinations pursuant to § 53.01(a)).

244. FAM. § 53.02(b) (West 2008). The child in custody may be detained prior to a detention hearing by the Intake Officer if (1) "the child is likely to abscond or be removed from the jurisdiction"; (2) suitable supervision of the child is not being provided; (3) there is no parent, etc., to return the child to court; (4) the child may be a danger to himself or threaten the safety of the public; (5) the child has a prior adjudication for delinquent conduct and is likely to offend if released; or (6) the child's offense is a firearm offense requiring detention until released by a judge under § 53.02(f). *Id.*

245. *Id.* § 53.02(f). The police are also prohibited from releasing a child in these circumstances, as the child may be released only (1) at the direction of the juvenile court judge or his designee or (2) after a detention hearing is held. *Id.*

246. FAM. § 54.01(a) (West 2008 & Supp. 2013). If the Intake Officer decides to detain the child, "a request for detention hearing shall be made and promptly presented to the court." FAM. § 53.02(c). If the child is detained on a Friday or Saturday, the hearing "shall be held on the first working day after the child is taken into custody." FAM. § 54.01(a). The exception to this rule is that when a child is being held in an adult jail for a firearms offense, the detention hearing must be within twenty-four hours, excluding weekends and holidays. FAM. §§ 51.12(l) (West 2008), 54.01(a), (p). Reasonable notice of the detention hearing (oral, written, time, place, and purpose of hearing) must be given to the child and a parent, guardian, or custodian if they can be found. FAM. § 54.01(b).

247. FAM. § 51.02(15) (West 2008). A "status offender" is "a child who is accused, adjudicated, or convicted for conduct" indicating a need for supervision. *Id.*; *see also In re* E.G., 212 S.W.3d 536, 537 (Tex. App.—Austin 2006, no pet.) ("'[S]tatus offender' is a child accused, adjudicated, or convicted of conduct that would not be a crime if committed by adult, such as truancy or curfew violation.").

twenty-fourth hour after arrival at the detention facility, and the child must be released to a parent or a shelter, with two exceptions.[249]

Prior to the beginning of a detention hearing, "the court shall inform the parties of the child's right[s]."[250] The detention hearing "shall be recorded by stenographic . . . or other appropriate means" when requested.[251] The Texas Rules of Evidence are not applicable in a detention hearing, except as to privileges.[252] After the hearing, the court must order the child to be released unless at least one of five circumstances exists.[253] Detention orders are not appealable.[254] If detained, the order of detention is

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248. FAM. § 51.02(8). A non-offender is a child under Title 5 of the Family Code who is being protected because of abuse, dependency, or neglect, or a child in custody to be deported. *Id.*

249. FAM. § 54.011(a) (West 2008 & Supp. 2013). If a status offender is charged with violating a court order, the court can order up to seventy-two hours detention if (1) there is a finding of probable cause that the child violated a court order, and (2) the child is "likely to abscond or be removed from . . . jurisdiction," suitable supervision is not provided for the child, or no parent or other adult is available to return the child to court. FAM. §§ 54.01(e), 54.011(b), (e). Only one seventy-two hour extension can be granted. FAM. § 54.011(c). In short, if a child is in detention, adjudication on a charge of violation of a valid court order must be within seven days, excluding weekends and holidays, or the child must be released. *Id.* The second exception is for a runaway, who may be detained for five days to be returned home to another state, or ten days if the runaway makes a voluntary request for shelter. FAM. §§ 54.01(i)–(k), 54.011(e).

250. FAM. § 54.01(b). The Court shall inform the parties of the child's right to counsel and right to have counsel appointed if the family is indigent. *Id.* At the detention hearing, the preference is for the child to have an attorney. *See* FAM. § 51.10(d)–(g) (West 2008). If an attorney is not present, the court shall order a parent to employ a lawyer, if financially able, or the court shall appoint an attorney if the child is detained. FAM. § 51.10(d), (c). The child shall also be warned of the privilege against self-incrimination and that no statement by child at a detention hearing is admissible at any other hearing. FAM. § 54.01(b), (g).

251. *Id.* § 54.09 (West 2008); *In re* J.R., No. 04-98-00480-CV, 1999 WL 542609, at *3 (Tex. App.—San Antonio July 28, 1999, no pet.) (not designated for publication) (discussing appellant's claim that the case should be reversed because certain conferences were not recorded pursuant to § 54.09); *In re* S.P., 9 S.W.3d 304, 309 (Tex. App.—San Antonio 1999, no pet.) (discussing appellant's claim that the case should be reversed because certain conferences were not recorded pursuant to § 54.09).

252. TEX. R. EVID. 101(d)(1)(F). The Rules of Evidence do not apply in "a hearing on justification for pretrial detention not involving bail," except as to privileges. *Id.*

253. FAM. § 54.01(e). The court must find at least one of these to hold a child in detention after a hearing:

> (1) [the juvenile] is likely to abscond or be removed from the jurisdiction of the court; (2) suitable supervision, care, or protection for him is not being provided by a parent, guardian, custodian, or other person; (3) he has no parent, guardian, custodian, or other person able to return him to the court when required; (4) he may be dangerous to himself or may threaten the safety of the public if released; or (5) he has previously been found to be a delinquent child or has previously been convicted of a penal offense punishable by a term in jail or prison and is likely to commit an offense if released.

Id.; *In re* Hall, 286 S.W.3d 925, 929 (Tex. 2009) (listing instances in which a court may detain a child after a hearing).

254. FAM. § 56.01(c), (n) (West 2008 & Supp. 2013); *In re* J.R., No. 10-12-00201-CV, 2013 WL 135729, at *3 (Tex. App.—Waco Jan. 10, 2013) (mem. op., not designated for publication) (quoting and discussing the provisions of § 56.01(c)); *In re* R.G. 388 S.W.3d 820, 822 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (discussing the provisions of § 56.01(c) and why the court did not have jurisdiction). Only adjudication, disposition, modification, transfer, or orders out of a Chapter 54 or 55 hearing may be appealed, subject to the limitation on the appeal of matters raised prior to trial or appeal with the court's permission. FAM. § 56.01(c), (n).

valid until the conclusion of a disposition hearing, "but in no event more than 10 working days" without a subsequent detention hearing.[255] After the initial detention hearing, any subsequent detention orders shall likewise extend for no more than ten working days, with one exception for rural counties.[256]

A child who is detained is entitled to immediate release if a petition to adjudicate, transfer, or modify is not filed within thirty working days of the initial detention hearing and if the offense is a capital murder, aggravated controlled substance offense, or a first-degree felony.[257] Otherwise, the limit on detention without a petition filed is fifteen working days.[258] If the child is not in detention, the petition may be filed as promptly as is practicable.[259]

If the accused in a juvenile case in custody for possible transfer to adult criminal court is eighteen years of age or older, after a detention hearing, she shall be released, unless one of three conditions exists justifying detention.[260] A person so detained may be placed in a certified juvenile detention facility, separate from any children, or may be placed in an appropriate county jail or adult detention facility.[261]

Finally, when a child is released from detention by the intake officer or a court, there may be reasonable conditions placed on the child "to insure the child's appearance at later proceedings" with a written copy of the conditions given to the child.[262] Should the child be released by a court, and a juvenile probation officer has probable cause to believe the child has violated a condition, the probation officer may take the child into custody without first obtaining a directive to apprehend (warrant) from the court.[263]

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255. FAM. § 54.01(h); *see* D.B. v. State, 556 S.W.2d 845, 847 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ) (holding that § 54.01(h) was violated because a minor was detained for more than ten days).

256. FAM. § 54.01(h). If a county has no certified juvenile detention facility, subsequent orders "shall extend for no more than 15 working days." FAM. § 51.12(a)(3) (West 2008 & Supp. 2013), 54.01(h).

257. FAM. § 54.01(q)(1).

258. *Id.* § 54.01(q)(2).

259. FAM. § 53.04(a) (West 2008); *In re* W.R.M., 534 S.W.2d 178, 182 (Tex. Civ. App.—Eastland 1976, no pet.) (quoting the language of § 53.04(a) and discussing appellant's claim).

260. FAM. § 54.02(o) (West 2008 & Supp. 2013). This adult may only be kept in detention if he or she:

> (1) is likely to abscond or be removed from the jurisdiction of the court; (2) may be dangerous to himself or herself or may threaten the safety of the public if released; or (3) has previously been found to be a delinquent child or has previously been convicted of a penal offense punishable by a term of jail or prison and is likely to commit an offense if released.

Id.

261. *Id.* § 54.02(p), (q).

262. FAM. § 54.01(f). The only difference in the requirements for an intake officer and the court upon release is that the conditions of release by intake "must be in writing and filed with the office or official designated by the court." FAM. § 53.02 (a) (West 2008).

263. FAM. § 52.01(a)(4)–(6) (West 2008).

Upon delivery of the child to an intake officer,[264] the taking of the child into custody is "for the purpose of determining the validity of taking him into custody."[265]

E. Non-Judicial Disposition

In addition to law enforcement or other juvenile professionals releasing a child after being warned (supervisory caution) or being referred to a first-time offender program, the juvenile probation officer,[266] the juvenile prosecutor,[267] or the juvenile court,[268] as an alternative to seeking adjudication, may defer prosecution and place the child on an informal probation for six months.[269] This Deferred Prosecution Agreement (DPA) is available for virtually every criminal offense[270] if there is probable cause the child "engaged in delinquent conduct or conduct indicating a need for supervision." [271] As a protection for the child and to encourage the child's participation in the DPA, incriminating statements made during a DPA

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264. FAM. § 52.02(a)–(b) (West 2008); *see* Baptist Vie Le v. State, 993 S.W.2d 650, 652–54 (Tex. Crim. App. 1999) (en banc); Martinez v. State, 337 S.W.3d 446, 456–60 (Tex. App.—Eastland 2011, pet. ref'd).

265. FAM. § 52.01(b); *Martinez*, 337 S.W.3d at 454 ("Section 52.01(b) expressly states that the taking of a child into custody is not an arrest except for the purpose of determining the validity of taking him into custody or the validity of a search under the laws and constitution of this state or the United States.").

266. FAM. § 53.03(a) (West 2008). A juvenile probation officer may defer prosecution if further proceedings are authorized, if it is in the best "interest[s] of the public and the child," if the parent, guardian, or custodian and child consent, and if the child and parent, guardian, or custodian know they can terminate the deferred prosecution agreement (DPA) and ask for a hearing. *Id.* However, a probation officer may not defer a case required to be summarily referred to a prosecutor as per § 53.01(d). *Id.* § 53.03(e)(1). The probation officer can defer prosecution for a child previously adjudicated for a felony with the prosecutor's written approval. *Id.* § 53.03(e)(2).

267. *Id.* § 53.03(e). "A prosecuting attorney may defer prosecution for any child." *Id.*

268. *Id.* § 53.03(i). The court may defer prosecution at any time before a jury is sworn in a jury trial, before the first witness is sworn in a trial to the court, or prior to a child entering a plea in an uncontested adjudication. *Id.* A court may combine previous deferred prosecutions for no longer than a year. *Id*. § 53.03(j). The court may also consider professional representations, which are not admissible at trial if the DPA is rejected. *Id.* § 53.03(k).

269. *Id.* § 53.03(i)–(k). The court may order classes on self-responsibility and empathy, and may order voluntary restoration of property for a victim in a graffiti case. *Id.* § 53.03(h). A DPA under sanction level two is recommended for Class A and B misdemeanors that involve no firearms; contempt; conduct indicating a need for supervision for inhalation abuse; or violation of school conduct codes resulting in expulsion. FAM. §§ 53.03(g)–(h), 59.003(a)(2) (West 2008), 59.005(a) (West 2008). In addition, fees may be charged, counseling may be ordered, or community service and other terms of probation may be required. FAM. § 59.005(a).

270. *See* FAM. § 53.03(g). This section specifically names the offenses that may not be deferred: driving, boating, or flying while intoxicated; intoxication assault; intoxication manslaughter; third or subsequent charge of being a minor in consumption of alcohol; or a minor driving under the influence. TEX. ALCO. BEV. CODE ANN. §§ 106.04–.041 (West 2007 & Supp. 2013); FAM. § 53.03(g); TEX. PENAL CODE ANN. §§ 49.04–.08 (West 2011 & Supp. 2013).

271. FAM. §§ 53.01(a) (West 2008), 53.03(h).

probation may not be used in any court hearings, with one exception.[272] Consequently, as detention is forbidden while under a DPA[273] and because there is no carry-over into other proceedings of incriminating statements of a child while on a DPA,[274] the child may be placed under a DPA without counsel being involved.[275]

F. Judicial Probable Cause Determination

Whether or not the child is released after being taken into custody without a warrant,[276] a judicial probable cause determination is required by the Fourth Amendment to the United States Constitution[277] and the Texas Family Code.[278] This determination must be made promptly,[279] which is defined to be within forty-eight hours.[280] This determination does not have to be made within a detention hearing—it can be made at any time, without a hearing.[281]

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272. FAM. § 53.03(c). The exception to this paragraph is the requirement that information about child abuse or neglect must be reported to the police within forty-eight hours by certain named professionals; this duty overrides any other privilege. FAM. § 261.101(b)–(c) (West 2008 & Supp. 2013) (Failure to report is a Class B misdemeanor); PENAL § 12.22 (West 2011). Juvenile probation officers, detention and correctional officers, and volunteers or interns in a juvenile facility or program have a duty to report within twenty-four hours. *See* FAM. § 261.405 (West 2008); 37 TEX. ADMIN. CODE, chs. 341 (Tex. Juv. Just. Dep't, Texas Juvenile Probation Commission Standards), 343 (Tex. Juv. Just. Dep't, Secure Juvenile Pre-Adjudication Detention and Post-Adjudication Correctional Facilities), 347 (Tex. Juv. Just. Dep't, Title IV–E Federal Foster Care Programs), 348 (Tex. Juv. Just. Dep't, Juvenile Justice Alternative Education Programs), 349 (Tex. Juv. Just. Dep't, General Administrative Standards), 351 (Tex. Juv. Just. Dep't, Standards for Short-Term Detention Facilities) (2013).

273. FAM. § 53.03(b).

274. *Id.* § 53.03(c).

275. *See* FAM. § 53.01(a)–(f). There is no specific requirement that the child be represented by counsel in this section or in any other section of the Family Code that requires counsel. *Id.* See, for example, § 51.10 as to the appointment of attorneys, or § 51.095 for interrogation, or § 51.151 for polygraphs. FAM. §§ 51.095(a) (West 2008 & Supp. 2013), 51.10(a) (West 2008 & Supp. 2013), 51.151 (West 2008).

276. FAM. § 52.015(a)–(b) (West 2008). If the child is taken into custody based upon a directive to apprehend (warrant), a "no probable cause" determination is then necessary after detention, as the court must first make a probable cause finding to issue the directive. *Id*. Once a court finds probable cause, "additional findings . . . are not required in the same cause to authorize further detention." FAM. § 54.01(o) (West 2008 & Supp. 2013).

277. Gerstein v. Pugh, 420 U.S. 103, 126 (1975) (stating that a neutral judicial officer must promptly make a determination of probable cause); Moss v. Weaver, 525 F.2d 1258, 1260 (5th Cir. 1976) (holding that *Gerstein* is applicable to children).

278. FAM. § 54.01(o) (West 2008 & Supp. 2013). The court must decide if a child taken into custody without a directive to apprehend (a warrant) "has engaged in delinquent conduct, conduct indicating a need for supervision," or has violated a probation order within forty-eight hours of being taken into custody, including weekends and holidays. *Id.*

279. *Gerstein*, 420 U.S. at 126.

280. Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (stating that "promptly" means within forty-eight hours of arrest).

281. *Gerstein*, 420 U.S. at 123–24. The determination does not have to be made in an adversarial hearing. *Id.*

G. Classifications of Juvenile Offenders

There are two primary classifications of crime for children—delinquent conduct (DC) and conduct indicating a need for supervision (CINS).[282] Delinquent conduct violates a penal law punishable by imprisonment or confinement in jail and includes violation of a lawful court order to pay a fine in a fineable-only misdemeanor case, or for driving while intoxicated, flying while intoxicated, boating while intoxicated, intoxication assault, intoxication manslaughter, and the third offense of driving under the influence by a minor.[283] Conduct indicating a need for supervision includes a laundry list of conduct for which adults are not criminally responsible: truancy,[284] runaway (not including a married, divorced, or widowed child),[285] paint or glue inhalation,[286] fineable offenses (this would include fineable-only offenses under state law or local ordinances, but only if transferred to Juvenile Court—something that is mandatory with two previous convictions, excluding those for traffic offenses),[287] public intoxication,[288] violations of standards of student conduct leading to expulsion,[289] violation of a child-at-risk court order,[290]

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282. FAM. § 51.03(a)–(b) (West 2008 & Supp. 2013).

283. *See* TEX. ALCO. BEV. CODE ANN. §§ 106.04–.041 (West 2007 & Supp. 2013); FAM. § 51.03(a)(1)–(4); TEX. PENAL CODE ANN. §§ 49.04–.08 (West 2011 & Supp. 2013).

284. FAM. § 51.03(b)(2). "Truancy" is defined as "the absence of a child on 10 or more days or parts of days within a six-month period in the same school year or on three or more days or parts of days within a four-week period from school." *Id.*; Matthews v. State, 677 S.W.2d 809, 811 (Tex. App.—Fort Worth 1984, writ ref'd) (quoting the language of § 51.03(b)(2)).

285. FAM. § 51.03(b)(3). "Runaway" is defined as "the voluntary absence of a child from the child's home without the consent of the child's parent or guardian for a substantial length of time or without intent to return." *Id.*; Macias v. State, No. 13-04-00027-CR, 2007 WL 2265075, at *3 (Tex. App.—Corpus Christi Aug. 9, 2007, no pet.) (mem. op., not designated for publication) (defining "runaway").

286. FAM. § 51.03(b)(4). This definition includes the "inhalation of the fumes or vapors of paint and other protective coatings or glue and other adhesives and the volatile chemicals itemized in Section 485.001, Health and Safety Code." *Id.*; TEX. HEALTH & SAFETY CODE ANN. § 485.001 (West 2010).

287. FAM. § 51.03(b)(1). This section is subject to paragraph (f), which requires transfer under § 51.08(b) after two prior offenses. *Id.* Different rules apply to those living in rural counties. *See id.* § 51.03(g). In counties with a population smaller than 100,000, violation of § 25.094 of the Texas Education Code (failure to attend school) that is also a violation of a misdemeanor penal law punishable by fine only, and not a traffic offense (*see* FAM. CODE § 51.03(b)(1)(A)) is conduct indicating a need for supervision without the requirements of § 51.03(f), which requires referral with two prior offenses under § 51.08(b). *Id.* § 51.03(g). I am sure there are no equal protection issues. *See In re* B.L.B., No. 03-09-00264-CV, 2010 WL 2010805, at *1 n.1 (Tex. App.—Austin May 20, 2010, no pet. h.) (mem. op., not designated for publication) (indicating the difference between conduct that indicates a need for supervision and delinquent conduct, and noting that conduct needing supervision generally involves misdemeanors punishable by fine only).

288. FAM. § 51.03(b)(1)(A); PENAL § 49.02(c) (West 2011).

289. FAM. § 51.03(b)(5). The expulsion must be under § 37.007(c) of the Texas Education Code. TEX. EDUC. CODE ANN. § 37.007(c) (West 2012); FAM. § 51.03(b)(5).

290. FAM. § 51.03(6). After a hearing, if a court finds that children are at risk and are entitled to services under Chapter 264, Subchapter D (Services to At-Risk Youth), then §§ 264.301–.305 apply;

prostitution,[291] and sexting.[292] No procedures in adult criminal law so differentiate levels of offenders. As an adjunct to these classifications of juvenile offenders, there is one additional classification with very specific requirements—certification or waiver of juvenile court jurisdiction with transfer to adult criminal court.

H. Discretionary Transfer to Adult Criminal Court

When Title 3 of the Family Code was first written, if a child was subject to a court proceeding, she was charged with either delinquent conduct or conduct indicating a need for supervision if the prosecutor made the decision to treat her as a juvenile offender. Occasionally a child would be accused of a crime of such a nature that the ordinary juvenile process did not seem appropriate to those making the intake and prosecutorial decisions. Therefore, a proceeding was written into Title 3 to allow the prosecutor to seek a waiver of juvenile court jurisdiction with a transfer of that case to adult criminal court to be prosecuted as any other adult criminal case.[293] This procedure is known as a "discretionary transfer," a "certification," or a "waiver of juvenile court jurisdiction."[294]

1. Eligibility

a. Accused Under Eighteen at Time of Filing

When probable cause exists (1) that a child of fourteen years of age or older committed a capital felony, an aggravated controlled substance offense, or a first degree felony, or (2) that a child of fifteen years of age or older committed a second degree felony, a third degree felony, or a state jail felony, and "because of the seriousness of the offense alleged or the background of the child the welfare of the community requires," the case may be transferred to adult court.[295] If the child has never been adjudicated on that offense, the prosecutor may file a petition for transfer or a petition

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these sections affect children aged seven to seventeen, but are not applicable if the court finds that the child engaged in felony conduct other than a state jail felony while between the ages of ten to seventeen. FAM. §§ 264.301–.305 (West 2008 & Supp. 2013).

291. FAM. § 51.03(b)(7). This would normally be by definition a delinquent conduct offense, but this section specifically excludes it from delinquent conduct. *Id.*

292. *Id.* (dealing with the electronic transmission of certain visual material depicting minors).

293. FAM. § 54.02 (West 2008 & Supp. 2013).

294. *Id.*

295. *Id.* § 54.02(a); Navarro v. State, Nos. 01-11-00139-CR, 01-11-00140-CR, 2012 WL 3776372, at *4 (Tex. App.—Houston [1st Dist.] Aug. 30, 2012, pet. ref'd) (mem. op., not designated for publication) (discussing provisions of § 54.02(a)).

for adjudication with a motion for transfer if the child is still under eighteen years of age at the time of filing.[296]

b. Accused Over Eighteen at Time of Filing

On occasion, because of the seriousness of the offense or the background of the accused, the welfare of the community requires transfer of a juvenile case to adult court,[297] even though the accused may have reached the age of eighteen or older by the time proceedings are initiated or at the time of the court proceedings.[298] If the accused was never adjudicated as a juvenile for the crime,[299] a prosecutor may file a petition for transfer or a petition for adjudication with a motion for transfer upon two findings by the court.[300] First, the court must find probable cause to believe that the adult committed the alleged offense.[301] Next, the court must find that by a preponderance of the evidence, (1) it was not practicable for the prosecutor to proceed in the juvenile court before the accused's eighteenth birthday for a reason beyond the State's control, or (2) "after due diligence of the state it was not practicable to proceed in juvenile court" before the accused's eighteenth birthday because (i) the State lacked

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296. *See* FAM. § 54.02; *Navarro*, 2012 WL 37776372, at *4.

297. FAM. § 54.02(a)(3); *Navarro*, 2012 WL 3776372, at *4, *6 (discussing hearings for probable cause pursuant to § 54.02(a)(3)).

298. *See* FAM. § 54.02(j). This provision does not specifically say that the accused must be eighteen years of age or older at any time other than when the court waives its jurisdiction and transfers the case to the adult criminal court. *See id.* So whether the accused is eighteen years of age or older at the time the prosecutor initiates transfer proceedings, or the accused turns eighteen during the proceedings, the net effect is the same. *See id.* All this would be subject to statute of limitations concerns, where applicable. *See id.* My concern is where it comes into play under paragraph (j). *See id.* The age of exposure of the person transferred is expanded under this paragraph. *See id.* The three classifications of adults subject to this provision are (1) adults who are alleged to have committed a capital murder or murder between the ages of ten and seventeen; (2) adults who are alleged to have committed an aggravated controlled substance offense or a first degree felony while between the ages of fourteen and seventeen; and (3) adults who are alleged to have committed a second degree felony, a third degree felony, or a state jail felony while between the ages of fifteen and seventeen. *Id.* As capital murder and murder have no statute of limitations, I wonder about the equal protection problems of holding one to task for a crime committed at an age younger than the law allows prosecution if the proceedings are brought prior to the eighteenth birthday. *See id.* The legislature did not want a child criminally liable for these crimes if they were committed at age ten, eleven, twelve, or thirteen and were prosecuted prior to the juvenile's eighteenth birthday, but approved of prosecution after the juvenile's eighteenth birthday. *Id.*; *see also* Webb v. State, No. 08-00-00161-CR, 2001 WL 1326894, at *3–*4 (Tex. App.—El Paso Oct. 25, 2001, pet. ref'd) (not designated for publication) (quoting and discussing provisions of § 54.02(j)).

299. FAM. § 54.02(j)(3); *see* Hall v. State, 373 S.W.3d 168, 173 (Tex. App.—Fort Worth 2012, pet. ref'd) (citing § 54.02(j)(3)).

300. FAM. § 54.02(j)(4)–(5); *Webb*, 2001 WL 1326894, at *7 (discussing provisions of § 54.02(j)(4)); M.A.V. v. Webb Cnty. Court at Law, 842 S.W.2d 739, 749 (Tex. App.—San Antonio 1992, writ denied) ("The juvenile court may waive its exclusive original jurisdiction and transfer the child to a district court for criminal proceedings only if the court finds there is probable cause to believe that the child committed the alleged offense.").

301. FAM. § 54.02 (j)(5); *M.A.V.*, 842 S.W.2d at 749.

"probable cause to proceed in juvenile court and new evidence has been found since" the accused's eighteenth birthday; "(ii) the person could not be found; or (iii) a previous transfer order was reversed by an appellate court or set aside by a district court."[302]

c. Petition and Notice

The prosecutor may file an ordinary adjudication petition with a motion to transfer or a simple petition to transfer with the juvenile court.[303] The requirements of the summons and service are the same as an adjudication summons,[304] with the one proviso that the summons must state that the hearing set by the court and shown on the summons is for the purpose of considering waiver of jurisdiction or discretionary transfer to criminal court.[305]

d. Required Study, Evaluation, and Investigation

Upon setting the hearing, and "[p]rior to the hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense."[306] At least five days before the hearing, the child's attorney and the prosecutor shall be provided a copy of all written material.[307] Although an attorney must appear at the transfer hearing, the child's attorney may waive appearance at the child's examination.[308] After

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302. FAM. § 54.02(j)(4); *Webb*, 2001 WL 1326894, at *7.

303. FAM. § 53.04(a) (West 2008). This section names two kinds of petitions: a petition for adjudication hearing and a petition for transfer hearing. *Id.* Case law, however, allows the use of a motion for transfer, which can supplement the petition for adjudication that might have been filed before a decision was made to seek transfer. *In re* Edwards, 644 S.W.2d 815, 819 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.) (discussing a situation in which a child was charged in an adjudication petition with capital murder, and the State filed a separate motion to transfer the case to the criminal court); *In re* W.R.M., 534 S.W.2d 178, 182 (Tex. Civ. App.—Eastland 1976, no writ) (quoting the language of § 53.04(a) and discussing appellant's claim).

304. FAM. §§ 553.06–.07 (West 2008 & Supp. 2013), 54.02(b) (West 2008 & Supp. 2013); Thorn v. State, No. 12-10-00287-CR, 2011 WL 5877021, at *1 (Tex. App.—Tyler Nov. 23, 2011, no pet.) (mem. op., not designated for publication) (discussing the requirement of the juvenile court to issue a summons).

305. FAM. § 54.02(b) (West 2008 & Supp. 2013); *see also* R.K.M. v. State, 520 S.W.2d 878, 880 (Tex. App.—San Antonio 1975, no writ) (noting that it is mandatory that the summons in a transfer hearing "state that the hearing is for the purpose of considering discretionary transfer to criminal court").

306. FAM. § 54.02(d); *see* Rainey v. State, Nos. 01-07-00332-CR, 01-07-00333-CR, 2012 WL 2914221, at *1–2 (Tex. App.—Houston [1st Dist.] July 12, 2012, no pet. h.) (mem. op., not designated for publication) (discussing and analyzing the requirements of § 54.02(d)).

307. FAM. § 54.02(e); *Thorn*, 2011 WL 5877021, at *1 ("The present law requires that this material be provided at least five days prior to the transfer hearing.").

308. FAM. § 51.10(b)(1) (West 2008). The appearance of an attorney for the child is mandatory at a transfer hearing. *See id.* However, the Family Code does not require appearance for the examination leading to the production of the study required in transfer proceedings. *See id.* However, the child may

the hearing, if transferred, the study must be transferred to the appropriate prosecutor,[309] and a copy shall go with the person transferred to prison, if applicable.[310]

e. Transfer Hearing

The court shall hear the petition or motion to transfer without the benefit of a jury.[311] The rules of evidence obviously do not apply to the hearing, as a laundry list of written materials may be reviewed in addition to testimony.[312] If the court transfers jurisdiction, certain specific findings must be included with reasons for the decision to transfer.[313]

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not be made to discuss the details of the crime, but may be made to discuss merely his circumstances and the circumstances of the alleged crime. *In re* K.W.M. v. State, 598 S.W.2d 660, 662 (Tex. App.—Houston [14th Dist.] 1980, no writ). Even though a doctor is not required to give warnings prior to the examination, Mena v. State, 633 S.W.2d 564 (Tex. App.—Houston [14th Dist.] 1982, no writ), the Fifth and Sixth Amendments to the United States Constitution require a warning by a doctor of the effect and use of the child's statements during the examination and the child's right to remain silent, or the results of the examination will only be admissible at the transfer hearing. Estelle v. Smith, 451 U.S. 454, 461 (1981).

309. *See* FAM. § 54.02(h); *see also* Almanzar v. State, No. 01-11-01058-CR, 2012 WL 6645003, at *2 (Tex. App.—Houston [1st Dist.] Dec. 20, 2012, pet. ref'd) (discussing the specific findings a court must make prior to transfer pursuant to § 54.02(h) and finding that the court failed to make such findings).

310. TEX. CODE CRIM. PROC. ANN. art. 42.09(8)(c) (West 2006 & Supp. 2013).

311. FAM. § 54.02(c); *In re* B.T., 323 S.W.3d 220, 223 (Tex. App.—Tyler 2010, no pet.) ("Before any such transfer may occur, the juvenile court must conduct a hearing without a jury to consider transfer of the child.").

312. *See* FAM. § 54.02(e). "At the transfer hearing the court may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses." *Id.* Even illegally obtained evidence may be used. *See In re* S.J.M., 922 S.W.2d 241, 242 (Tex. App.—Houston [14th Dist.] 1996, no writ) (holding no constitutional right of confrontation in a transfer hearing); *In re* P.A.C., 562 S.W.2d 913, 916 (Tex. Civ. App.—Amarillo 1978, no writ) (permitting the use of affidavits in the absence of witnesses); B.L.C. v. State, 543 S.W.2d 151, 152 (Tex. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) (permitting use of an improperly obtained statement).

313. FAM. § 54.02(a). Besides the probable cause finding under § 54.02(a)(3), § 54.02 (a) sets out highly technical requirements for the court to use in its order, including certain specific findings as to the age of the accused, that the crime was a felony, that there was no prior adjudication in juvenile court for the offense, and that the seriousness of the offense and background of the accused make criminal proceedings necessary for the welfare of the community. *Id.* Also, in § 54.02(f), the criteria for transfer to be considered by the court includes whether the crime was against person or property, the sophistication and maturity of the accused, his record and previous history, and the prospects for protection of the public and chances of rehabilitation. *Id.* § 54.02(f). Finally, § 54.02(h) specifically requires that in its order, the court must state its reasons for waiver and the rationale of its order. *Id.* § 54.02(h); *In re* J.R.C., 522 S.W.2d 579, 583 (Tex. App.—Texarkana 1975, writ ref'd n.r.e.). If a petition alleges multiple offenses out of single transaction, the court must retain or transfer all offenses and the child is not subject to prosecution for any retained offenses. FAM. § 54.02(g). If multi-transaction cases are heard to determine probable cause, the juvenile court can retain jurisdiction over those other transactions. *See id.*; *see also* Navarro v. State, Nos. 01-11-00139-CR, 01-11-00140-CR, 2012 WL 3776372, at *4 (Tex. App.—Houston [1st Dist.] Aug. 30, 2012; pet. ref'd) (mem. op., not designated for publication) (discussing provisions of § 54.02(a)).

I. Mandatory Transfer

A procedure also exists for mandatory waiver of jurisdiction and transfer of a case to adult criminal court if (1) the child has previously been transferred on another case, and (2) the new offense is a felony, with exceptions.[314] No diagnostic study is required in a mandatory transfer case.[315] As to notice, "it is sufficient that the summons provide fair notice that the purpose of the hearing is to consider mandatory transfer to criminal court."[316] The petition or motion for transfer must (1) state the new felony offense, (2) identify the previous transfer order by cause number and date, and (3) state that none of the statutory exceptions apply.[317]

J. Miscellaneous Provisions

There are a few miscellaneous provisions dealing with transfer that affect a juvenile's rights differently than an adult facing criminal charges. After a case is transferred, the accused child is not entitled to an examining trial.[318] Also, after transfer, "the criminal court may not remand the child [back] to the jurisdiction of the juvenile court."[319] The criminal court record must provide evidence of the transfer showing the accused was a

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314. *See* FAM. § 54.02(m). The first of two requirements for mandatory transfer is in § 54.02(m)(1), which requires the mandatory transfer of a new case if "the child has previously been transferred to a district court or criminal district court for criminal proceedings under this section," unless in the previous case the child (1) was not indicted, (2) was found not guilty, (3) had the matter dismissed with prejudice, or (4) had the previous conviction reversed on appeal and appeal is final. *Id.* Also, as to detention of a child subject to a mandatory transfer proceeding, until the offense is transferred, the offense is still juvenile, and the child may be held as any other juvenile. *See* FAM. § 54.01 (West 2008 & Supp. 2013). Once transfer occurs and the criminal court acquires jurisdiction, the child may be held in county jail or released on bond as any other adult. FAM. § 54.02(h).

315. FAM. § 54.02(n). The study is not necessary because when the statutory requirements are proven, the case is mandatorily transferred. *Id.* The court has no discretion. *Id.*

316. *Id.* The requirement for the petition and notice in an ordinary transfer proceeding under § 54.02(b) is "that the purpose of the hearing is to consider discretionary transfer to criminal court [but this requirement] does not apply" to a mandatory transfer situation. *Id.*

317. *Id.* As stated in the foregoing note, the only difference in the petition and notice requirements is the change in the language as to the purpose of the hearing and, of course, the tailoring of the language to fit the statute's mandatory transfer requirements. *See id.* This would imply the same as to mandatory prayer content. *Id.* The petition, including the prayer, should clearly state that the prosecutor is invoking the mandatory transfer procedure. *Id.* The statute does not require a probable cause finding in a mandatory transfer, but commentators believe that if § 54.02(a)(3) requires such a finding for discretionary transfer, then the same should also be required for a mandatory transfer. DAWSON, TEXAS JUVENILE LAW, *supra* note 127, at 179–80. As with any petition in a juvenile matter, the petition should state the statutory requirements and that the exceptions are not applicable. FAM. § 53.04 (West 2008).

318. George v. State, No. 01-97-00973-CR, 1999 WL 351081, at *2 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (not designated for publication). The probable cause findings in the transfer hearing pursuant to § 54.02(a)(3) satisfy the need for another judicial probable cause finding, which is reserved in examining trials for adults prior to indictment. TEX. CODE CRIM. PROC. ANN. art. 16.01 (West 2005).

319. FAM. § 54.02(i).

child at the time of the offense,[320] or the resulting criminal conviction may be reversible on appeal, as the evidence is jurisdictional.[321] Until an indictment is returned by a grand jury, the criminal court does not acquire jurisdiction, and the juvenile court still has plenary power over the case and the accused, even if the matter is transferred.[322]

K. Appeal

There is no right to immediate appeal from a transfer proceeding.[323] To appeal, the accused must wait until after conviction or placement on adult deferred adjudication community supervision.[324] Appeals from juvenile hearings are usually civil in nature,[325] but appeals of certifications or transfer orders and the resulting criminal cases are criminal appeals.[326] Any defect in the transfer process, properly preserved, can be subject to this appeal, not just a challenge to the jurisdiction of the criminal court.[327]

L. Chapter 55: Mental Health and Intellectual Disabilities

1. Mental Illness

One of the most progressive chapters of Title 3 of the Family Code is Chapter 55. The chapter contains specific remedies and definitions for

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320. Whytus v. State, 624 S.W.2d 290, 291 (Tex. App.—Dallas 1981, no writ).

321. *Id. But see* Moss v. State, 13 S.W.3d 877, 885–86 (Tex. App.—Fort Worth 2000, pet. ref'd) (holding that all that is necessary is that the juvenile court enter a transfer order in a case in which no evidence of the transfer was available in the criminal court).

322. Cornealius v. State, 870 S.W.2d 169, 177 (Tex. App.—Houston [14th Dist.] 1994, writ granted), *aff'd*, 900 S.W.2d 731(Tex. Crim. App. 1995).

323. FAM. § 56.01(c) (West 2008 & Supp. 2013). Appeals may be taken from adjudication orders (§ 54.03), disposition orders (§ 54.04), modification orders (§ 54.05), Chapter 55 orders (mental health/intellectual disability), or transfer hearings to the custody of the adult prison (§ 54.11(i)(2)). FAM. §§ 54.03 (West 2008 & Supp. 2013), 54.04 (West 2008 & Supp. 2013), 54.05 (West 2008 & Supp. 2013), 54.11(i)(2) (West 2008 & Supp. 2013). Nothing in this provision allows appeal of a transfer order to criminal court. *See* FAM. § 56.01.

324. TEX. CODE CRIM. PROC. ANN. art. 44.47 (West 2006). This article deals specifically with the appeal of transfer orders from the juvenile court to the criminal court. *Id.* Paragraph (a) allows an appeal of the transfer order. *Id.* Paragraph (b) limits such an appeal to be only in conjunction with the appeal, a conviction in the case, or an order placing the child on adult deferred adjudication probation. *Id.*

325. FAM. § 56.01(a)–(b). Appeals from decisions of the juvenile court are civil in nature. *Id.*; *In re* R.G., No. 08-05-00261-CV, 2005 WL 2095693, at *1 (Tex. App.—El Paso Aug. 31, 2005, no pet.) (mem. op., not designated for publication) (noting that an appeal from an order of a juvenile court is to a court of appeals, and the requirements governing an appeal are as in civil cases generally).

326. CRIM. PROC. art. 44.47(c). An appeal under article 44.47 is a criminal matter governed by the TCCP and the Texas Rules of Appellate Procedure "that apply to a criminal case." *Id.*

327. *Id.* art. 44.47(d). The appeal is not just to test the jurisdictional nature of the transfer order, but can be on any matters that could have been raised on direct appeal prior to January 1, 1996. *Id.* Before this date, a child could take an immediate appeal of a transfer order before the criminal case was prosecuted and raise whatever issues were preserved at the transfer hearing stage. *See id.*

children suffering from mental illness[328] and the standards of care for inpatient mental health services and residential care for the intellectually disabled.[329] From its own observations, documents, professional statements, motions, and testimony, a court shall determine by probable cause whether a child has a mental illness.[330] If the court so finds, it shall temporarily stay the juvenile proceedings in its court and order an examination to determine if the child has a mental illness and meets the criteria for a civil commitment.[331] The Family Code provides for temporary or extended services or commitment for a child who meets the criteria[332] and requires this be settled before the juvenile proceedings may continue.[333] The adult criminal law does not provide a stay in the proceedings to address treatment for those with mental illness and intellectual disabilities as a prelude to prosecution as long as the person is competent to proceed to trial.[334]

2. Unfit to Proceed

In the adult court, the condition of being incompetent to stand trial brings the prosecution to a temporary halt.[335] In the juvenile court, it is the definition of a child being "unfit to proceed"—the juvenile equivalent of incompetence.[336] These two conditions are basically the same in the case of a child charged with delinquent conduct or conduct indicating a need for

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328. *See* FAM. § 55.01 (West 2008). A mental illness is "an illness, disease, or condition, other than epilepsy, senility, alcoholism, or mental deficiency, that (A) substantially impairs a person's thought, perception of reality, emotional process, or judgment; or (B) grossly impairs behavior as demonstrated by recent disturbed behavior." TEX. HEALTH & SAFETY CODE ANN. § 571.003(14) (West 2010 & Supp. 2013). Texas uses the definition of one suffering from intellectual or developmental disabilities as set out in *Ex parte* Briseno, 135 S.W.3d 1, 5–8 (Tex. Crim. App. 2004). This disability includes one with a significantly sub-average general intellectual functioning, meaning an IQ of less than seventy, with related limitations in adaptive functioning and an onset prior to age eighteen. *Id.* at 7 n.4; *In re* J.K.N., 115 S.W.3d 166, 169 (Tex. App.—Fort Worth 2003, no pet.) (defining mental illness and discussing fitness to proceed).

329. FAM. § 55.03 (West 2008). Inpatient mental health services for a child shall be as per Chapter 571 of the Texas Health and Safety Code. HEALTH & SAFETY §§ 571.001–.027 (West 2008 & Supp. 2013). Statutes addressing residential care for the intellectually disabled are located in Chapter 591 of the Texas Health and Safety Code, except as are provided by Chapter 55 of the Family Code. *See* FAM. § 55.03; HEALTH & SAFETY §§ 591.001–.025 (West 2010 & Supp. 2013).

330. FAM. § 55.11(u) (West 2008).

331. *Id.* § 55.11(b).

332. *See* FAM. §§ 55.12–.14 (West 2008).

333. *See* FAM. § 55.17 (West 2008). If no temporary or extended services are ordered, the juvenile court will dissolve the stay of proceedings provided by § 55.16, and the juvenile court proceeding shall continue. FAM. §§ 55.16–17.

334. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.003 (West 2006). "A person is incompetent to stand trial if the person does not have: (1) sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceeding against the person." *Id.* art. 46B.003(a).

335. CRIM. PROC. arts. 46B.003, 46B.071 (West 2006 & Supp. 2013).

336. *See* FAM. § 55.31(a) (West 2008).

supervision, the child is unfit to proceed if the child "lacks capacity to understand the proceedings in juvenile court or to assist in the child's own defense."[337] The adult test for competency has more to do with being able to rationally consult with the lawyer with an understanding of the proceedings and adds failure to have a factual understanding of the proceeding as an additional disqualifier.[338] Very little difference in these definitions is apparent, and the results are similar.

If a child is unfit to proceed, this creates a complete bar to further action in juvenile court to adjudicate, transfer, modify, or dispose of a juvenile case.[339] If the court makes this finding—upon motion, hearing, and its own observations—it shall temporarily stay the proceedings and order the child examined.[340] After the examination and the temporary stay period, a court or jury, by a preponderance of the evidence, may find the child unfit to proceed, and the juvenile proceedings are stayed for as long as the child remains incapacitated or while the child receives a ninety-day inpatient or outpatient evaluation.[341] There are similar safeguards in the adult criminal law for the treatment of one who is not competent.[342]

3. Child Not Responsible for Conduct

The most significant difference in the procedures affecting adults and children is on the issue of whether, at the time of the crime, the adult was

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337. *Id.*

338. *See* CRIM. PROC. art. 46B.003.

339. FAM. § 55.31(a).

340. *Id.* § 55.31(c); *In re* J.A.L., No. 01-07-00896-CV, 2008 WL 4763451, at *3 (Tex. App.—Houston [1st Dist.] Oct. 30, 2008, pet. denied) (mem. op., not designated for publication) (stating that the trial court may hold a separate hearing to determine if the child is fit to proceed). The examination authority is in § 51.20 of the Family Code. FAM. § 55.31(c); *see* FAM. § 51.20 (West 2008 & Supp. 2013). At any time, a court may order the child to be examined to determine whether the child has a mental illness or intellectual disability. *Id.* § 51.20(a). The expert must have the same qualifications as an expert examining an adult if the purpose is to resolve a question of fitness to proceed. *Id.* Upon a finding of reason to believe the child may have a mental illness or be intellectually disabled by intake or by a court professional, the child shall be referred to local authorities for evaluation and services, unless a petition has already been filed. *See* FAM. §§ 51.20(b), 51.21 (West 2008 & Supp. 2013). If the child is already on probation, and the child is not receiving services, the child shall be referred. FAM. § 51.20(c). Unlike an adult defendant, a child may be ordered to undergo a physical examination by a licensed physician. *Id.* § 51.20(e).

341. FAM. §§ 55.32 (West 2008), 55.33(f) (West 2008); Jimenez v. State, No. 13-99-776-CR, 2002 WL 228794, at *3 (Tex. App.—Corpus Christi Feb. 14, 2002, pet. ref'd) (not designated for publication) ("Unfitness to proceed as a result of mental illness or mental retardation must be proved by a preponderance of the evidence.").

342. *See* CRIM. PROC. art. 46B.004 (West 2006 & Supp. 2013). The procedures set out in the TCCP are far more complicated than those set out for juveniles, although the basic concept is the same. *See id.* The concept is that the adult or child should receive treatment if judged incompetent or unfit to proceed, until such time as he recovers. *See* CRIM. PROC. art. 46B.071 (West 2006 & Supp. 2013); FAM. § 55.33(a).

insane[343] versus whether the child was not responsible for the child's conduct,[344] both resulting in a prohibition for conviction for the alleged crime. The question is: Did the child, as a result of mental illness or intellectual disability, lack "substantial capacity either to appreciate the wrongfulness of the child's conduct or to conform the child's conduct to the requirements of law?"[345] On motion to the court making such a claim, the court shall order the child to be examined.[346] The court must order the expert to include "whether the child is not responsible for the child's conduct as a result of mental illness or mental retardation."[347] As in adult cases,[348] the issue is a matter of fact to be determined at the end of the adjudication hearing (culpability phase), and must be proven by a preponderance of the evidence.[349] If the court finds the child is not responsible, it shall proceed with commitment for treatment in a public or private facility, or on an outpatient basis.[350] The definition of insanity for adults narrows the adult's behavior to a severe mental disease or defect,[351] but it does not allow for a consideration of whether the adult could conform his behavior to the law.[352] The net effect of being found insane for an adult is similar to the effect for a child, with designated treatment.[353]

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343. *See* TEX. PENAL CODE ANN. § 8.01(a) (West 2005). "It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong." *Id.*

344. FAM. § 55.51(a) (West 2008). The relevant part of the statute states:

> A child alleged by petition to have engaged in delinquent conduct or conduct indicating a need for supervision is not responsible for the conduct if at the time of the conduct, as a result of mental illness or mental retardation, the child lacks substantial capacity either to appreciate the wrongfulness of the child's conduct or to conform the child's conduct to the requirements of law.

Id.

345. *Id.*; *In re* S.C., 229 S.W.3d 837, 843 n.8 (Tex. App.—Texarkana 2007, pet. denied) ("A child is not responsible for the conduct if as a result of mental illness or mental retardation he or she lacks substantial capacity either to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law.").

346. FAM. § 55.51(b); *S.C.*, 299 S.W.3d at 843 n.8 (stating that "on a motion by a party alleging that the child may not be responsible as a result of mental illness or retardation, the court shall order the child to be examined under Section 51.20, and obtain an expert opinion about whether the child is responsible"). The examination is as per § 51.20. FAM. § 55.51(b).

347. FAM. § 55.51(b).

348. TEX. CODE CRIM. PROC. ANN. arts. 46C.151–.152 (West 2006).

349. FAM. § 55.51(c)–(d); J.W. v. State, No. 01-11-01067-CV, 2012 WL 5295301, at *4 (Tex. App.—Houston [1st Dist.] Oct. 25, 2012, no pet. h.) (mem. op., not designated for publication) (noting that after the examination, "the issue of responsibility must be tried to either the court or a jury in the adjudication hearing, proved by a preponderance of the evidence, and the court or jury must state in its findings or verdict whether the child is not responsible for his or her conduct as a result of mental illness or mental retardation").

350. FAM. § 55.52 (West 2008).

351. TEX. PENAL CODE ANN. § 8.01 (West 2011).

352. *See* FAM. § 55.51(a).

353. *See* CRIM. PROC. arts. 46C.153–.154 (West 2006); FAM. § 55.51.

M. Records

Because of the civil nature of juvenile proceedings,[354] confidentiality of juvenile records and proceedings and exceptions to the confidentiality rule are a vast source of procedural confliction. The basic juvenile confidentiality rule says a child's adjudication or disposition records, and the evidence produced at such hearings, may only be used (1) in subsequent Title 3 proceedings in which the child is a party,[355] (2) in the sentencing phase of an adult criminal case against the former child,[356] and (3) in civil commitments.[357] However, many exceptions exist: if a witness opens the door by placing the character or reputation of a defendant in issue,[358] to examine the defendant's general reputation for being peaceful and law abiding,[359] to confront and cross examine a witness,[360] or if the witness, who

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354. FAM. § 51.13(a) (West 2008 & Supp. 2013). Juvenile proceedings do "not impose any civil disability ordinarily resulting from a conviction or operate to disqualify the child in any civil service application or appointment" except for civil commitments. *Id.* However, an order of adjudication or disposition that results in commitment to the Texas Youth Commission—under Family Code § 54.04(d)(2) (indeterminate sentence), § 54.04(d)(3) (determinate sentence), § 54.04(m) (habitual felony conduct), or § 54.05(f) (modification of a probation for such)—for a felony that occurred on or after January 1, 1996, does carry with it serious adult consequences and is considered a felony conviction for criminal enhancement purposes under § 12.42(a), (b), (c)(1), and (e) of the Texas Penal Code. FAM. §§ 51.13(d) (West 2008), 54.04(d)(2)–(3) (West 2008 & Supp. 2013), 54.04(m) (West 2008 & Supp. 2013), 54.05(f) (West 2008 & Supp. 2013); PENAL § 12.42(a), (b), (c)(1), (e) (West 2011 & Supp. 2013) (describing the enhancement of adult felony cases). Section 12.42(e) of the Texas Penal Code was repealed in 2011. Acts 2011, 82nd Leg., ch. 834 (H.B. 3384), § 6.

355. TEX. R. EVID. 609(d). This rule is qualified by the requirements of the Texas and U.S. Constitution. *Id.*; *see also* Ruth v. State, 522 S.W.2d 517, 519 (Tex. Crim. App. 1975) (stating that an adjudication of a juvenile is not a conviction).

356. PENAL § 12.42(a). If the delinquent act occurred after 1995, was a felony, and resulted in commitment to Texas Youth Commission (indeterminate or determinate), the adjudication is a final felony conviction for adult purposes. CRIM. PROC. art. 37.07, § 3(g) (West 2006 & Supp. 2013); *see also id.* art. 37.07, § 3(a) (stating a criminal record is admissible, whether the defendant was previously charged or convicted); *id.* art. 37.07, § 3(d) (permitting a judge to order a defendant's criminal and social history report, including juvenile history, whether or not the prior conduct resulted in an adjudication); Walker v. State, 493 S.W.2d 239, 240 (Tex. Crim. App. 1973) (noting that the court may question a defendant about his juvenile history); Garner v. State, 957 S.W.2d 112, 115–16 (Tex. App.—Amarillo 1997, no pet.) (stating that adjudication of delinquency of the grade of felony or delinquent conduct misdemeanor only is only a misdemeanor).

357. FAM. § 51.13(b).

358. Love v. State, 533 S.W.2d 6, 11–12 (Tex. Crim. App. 1976). In this scenario, the prosecutor may ask a witness "have you heard" questions about the juvenile's history, not specific to the adjudication, to test the witness's knowledge. *Id.* at 10.

359. CRIM. PROC. art. 37.07, § 3(a). This section allows testimony at the penalty phase of a criminal trial; if the defendant was a juvenile when the witness became aware of the defendant's reputation, the testimony will still be admissible. *See id.*; Anderson v. State, 717 S.W.2d 622, 634 (Tex. Crim. App. 1986).

360. *See* Davis v. Alaska, 415 U.S. 308, 320–21 (1974). The juvenile's history is admissible to confront and cross examine a State's witness. *Id.* The defendant shall be allowed to put on a defense, and the confidentiality of juvenile records will not defeat the constitutional right to confrontation. *Id.* at 315–19. Also, under article 39.14 of the TCCP, for good cause, the defendant should be able to discover a witness's prior juvenile record. CRIM. PROC. art. 39.14 (West 2005 & Supp. 2013); Medina v. State, 986 S.W.2d 733, 736–37 (Tex. App.—Amarillo 1999, pet. ref'd).

was a juvenile, is now unavailable to testify.[361] As to the confidentiality of the juvenile proceeding itself, the juvenile court has the discretion to decide whether the hearings are public;[362] whether the victim and family may generally attend;[363] and for the more serious determinate sentence, in an habitual offender or release or transfer proceeding, whether the hearing must be open to the public, unless the child waives the public hearing with the consent of her attorney and the court.[364]

With the installation of the Juvenile Justice Information System (JJIS) in 1995, juvenile records are kept on a statewide basis in an attempt to maintain confidentiality and uniformity of use.[365] Many juvenile records are specifically excluded from the confidentiality of the JJIS.[366] Adult records are primarily limited through traditional expunction procedures[367] and orders of non-disclosure for those completing a deferred adjudication probation.[368] Whereas with juveniles, many avenues exist to limit public availability of their records, including limiting access to the files of the juvenile court, clerk of the court, probation department, and prosecutor,[369] to the records of agencies—both public and private—providing services to the child,[370] to law enforcement records,[371] and to TYC records.[372] The

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361. TEX. R. EVID. 804(b)(1). If the witness is now unavailable and the party opposing the witness had a prior opportunity and similar motive to cross examine the witness, the prior testimony would be admissible even if the witness was a child at the time. *Id.*

362. FAM. § 54.08(a) (West 2008). If the juvenile is under fourteen years of age, the court must close the hearing unless it specifically finds the interests of the public or child are better served by an open hearing. *Id.* § 54.08(c).

363. *Id.* § 54.08(b) (stating a court may exclude the victim and family if the juvenile's testimony might be affected by their attendance at the hearing).

364. FAM. § 54.11(f) (West 2008 & Supp. 2013).

365. FAM. §§ 58.101–.113 (West 2008 & Supp. 2013). The purpose of the JJIS is to provide accurate information relating to children who come into contact with the juvenile system to allow juvenile records to be more easily transferred to the adult system (§ 58.107), to improve proposed legislation with better data (§ 58.112), and to allow a better review of the juvenile justice system; these records are available to adult justice agencies in some areas. FAM. §§ 58.103, 58.107, 58.112 (West 2008). The JJIS is not public, although there are exceptions. FAM. § 58.106(a) (West 2008 & Supp. 2013). A long list of information collected for the JJIS is in § 58.104. FAM. § 58.104 (West 2008).

366. *See* TEX. CODE CRIM. PROC. ANN. art. 15.27 (West 2005 & Supp. 2013); FAM. §§ 58.007(h) (West 2008 & Supp. 2013), 58.106, 261.201 (West 2008 & Supp. 2013); TEX. HUM. RES. CODE ANN. § 61.093 (West 2011), *deleted by* Acts of 2011, 82nd Leg., ch. 85 (S.B. 653) § 1.006. Some examples of records that are not confidential are motor vehicle operation records, criminal records of justice and municipal courts, TYC abuse reports (FAM. § 261.201), certain information needed to apprehend a wanted child (FAM. §§ 58.007(h), 58.106; TEX. HUM. RES. CODE § 61.093), sex offender registration (TEX. CODE CRIM. PROC. ch. 62), and certain information relating to the duty to inform schools of a child who is in custody, on probation, or on parole. (TEX. CODE CRIM. PROC. art. 15.27 (West 2008 & Supp. 2013)). CRIM. PROC. art. 15.27; FAM. §§ 58.007(h), 58.106, 261.201; HUM. RES. § 61.093.

367. CRIM. PROC. art. 55.02 (West 2006 & Supp. 2013).

368. CRIM. PROC. art. 42.12, § (5)(c-1) (West 2006 & Supp. 2013); TEX. GOV'T CODE ANN. § 411.081 (West 2012 & Supp. 2013).

369. FAM. § 58.007(b); *see also* Gallegos v. State, No. 08-07-00104-CR, 2009 WL 2623356, at *9–10 (Tex. App.—El Paso Aug. 26, 2009, no pet.) (not designated for publication) (discussing to whom juvenile records may be released).

370. FAM. § 58.005(a) (West 2008).

Texas Public Information Act (Open Records Act) does not allow violation of the strict rules on confidential juvenile records.[373] Also, the use of photographs and fingerprints of a child is closely regulated.[374] Finally, Texas law allows for the destruction of certain juvenile files and records,[375] the sealing of files and records,[376] the expunction of certain juvenile criminal records,[377] and the automatic restriction of access to certain juvenile records.[378]

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371. FAM. § 58.007(c).

372. TEX. HUM. RES. CODE ANN. § 244.003(b) (West 2013).

373. GOV'T § 552.101 (West 2011).

374. FAM. §§ 58.002–.0022 (West 2008).

375. FAM. § 58.001(c) (West 2008). Juvenile records must be destroyed when law enforcement fails to make a referral within ten days of arrest, on the successful completion of an informal disposition, or ninety days after successful completion of a first-time offender program. *Id.* Records may be kept to determine eligibility for a first-time offender program. *Id.* § 58.001(f). Records must also be destroyed when intake finds no probable cause and the child is not referred to a prosecutor, or when a prosecutor fails to find probable cause. FAM. § 58.006 (West 2008). On motion, a court may order destruction of sealed records if they relate to non-delinquent felony or misdemeanor conduct, five years have elapsed since the child's sixteenth birthday, and the child has not been convicted of a felony in the interim. FAM. § 58.003(l) (West 2008 & Supp. 2013). If the local Juvenile Board approves, the physical files and records of juvenile offenses may be destroyed when (1) the child turns eighteen and was previously charged with conduct indicating a need for supervision; (2) the child is at least twenty-one years of age and the most serious adjudications were misdemeanors and the most serious allegations were misdemeanors or felonies without adjudications; or (3) the person is at least thirteen years of age and the most serious adjudication was felony delinquent conduct. FAM. § 58.0071 (West 2008) (setting forth additional circumstances in which files may be destroyed).

376. *See* FAM. § 58.003(a) (identifying rules affecting the mandatory sealing by a court in misdemeanors and some felonies, with conditions). A court has the discretion, under certain conditions, to seal adjudications of felony delinquent conduct. *Id.* § 58.003(c). Except in a determinate sentence case, a court may seal the files if the child successfully completes drug court, with or without a hearing. *Id.* § 58.003(c-1). In a misdemeanor case, the court may seal the file after final discharge and must grant on a finding of not guilty. *Id.* § 58.003(d). Except for a subsequent capital prosecution, upon sealing, the adjudication of the child is vacated, the proceeding is dismissed, and the child may act as if the offense had never occurred. *Id.* § 58.003(g)(5). A court may also order the destruction of the records upon conditions. *See id.* § 58.003(l). There are limitations set out in the statute, but the effect of sealing is that a person may lie about his record. *Id.* § 58.003(j), (g)(4).

377. *See* TEX. ALCO. BEV. CODE ANN. § 106.12 (West 2007 & Supp. 2013) (referring to alcoholic beverage violation convictions in municipal or justice courts). Other codes refer to fineable-only offenses other than traffic or alcohol crimes. *See* TEX. CODE CRIM. PROC. ANN. art. 45.0216 (West 2006 & Supp. 2013); FAM. § 58.003. When the child turns eighteen and there are no subsequent convictions, expunction extends to a Class C conviction of failure to attend school and to a conviction for possession of tobacco by a minor in municipal and justice court. *See* CRIM. PROC. art. 45.055 (West 2006); TEX. HEALTH & SAFETY CODE ANN. § 161.255 (West 2010).

378. FAM. §§ 58.201–.211 (West 2008 & Supp. 2013). The creation of restricted access addresses the needs of children who do not have the means to petition for the sealing of their records. *See id.* In this case, the records are not destroyed or sealed. *See id.* However, the records are restricted to criminal justice agencies and to research done by the Department of Public Safety or the Criminal Justice Policy Council. *See* FAM. § 58.204 (West 2008 & Supp. 2013). For others, the records cease to exist and a child may deny that they exist. *See* FAM. § 58.206 (West 2008). This procedure occurs automatically through the Department of Public Safety and local juvenile justice agencies. *See* FAM. § 58.203 (West 2008 & Supp. 2013). The records become unrestricted if the child is later convicted or receives a deferred adjudication for a disqualifying offense (felony or Class A or B misdemeanor after turning seventeen). *See* FAM. § 58.211 (West 2008). This procedure requires certain restrictions and exceptions,

N. Confessions

The requirements of *Miranda v. Arizona* are well known to all students of the law.[379] With children, however, not only do the requirements of *Miranda* apply, but Texas law sets out specific requirements for the use of a child's statement.[380] As custody is the first qualifier under federal law, a child is in custody in a variety of places.[381] Also, we now know the courts should consider age in determining the reasonableness of a child's perception of when she is under arrest or equivalent restraint.[382] But the procedural requirements are a prelude to admissibility of a written confession or statement of a juvenile.[383] Much like adults, oral statements are admissible upon meeting certain exceptions.[384]

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but for a child who remains out of trouble, it allows the child to deny the events under some circumstances. *See* FAM. § 58.206.

379. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966).

380. FAM. § 51.095 (West 2008 & Supp. 2013). When a child becomes an adult in Texas—for criminal purposes, at age seventeen—the controlling statute is article 38.22 of the Texas Code of Criminal Procedure. CRIM. PROC. art. 38.22 (West 2005 & Supp. 2013). As an aside, unless a Class C misdemeanor is transferred to the juvenile court by the municipal or justice court, there are those who believe the requirements of § 51.095 of the Texas Family Code do not apply. FAM. § 51.095. However, caution is offered on the chance that what is thought to be a Class C misdemeanor may become the basis of delinquent conduct or conduct indicating a need for supervision adjudication. DAWSON, TEXAS JUVENILE LAW, *supra* note 127, at 435. There is nothing in § 51.095 of the Family Code, or in the Code of Criminal Procedure, that limits the use of juvenile statements in such situations. *See* FAM. § 51.095. In fact, *res gestae*, recorded statements and oral statements are all specifically allowed without limitation as to the classification of the offense. *Id.*

381. FAM. § 51.095(d). Custody of a child in Texas may be in a detention facility, in another place of confinement, in an officer's custody, or in the possession of the Department of Protective and Regulatory Services. *Id.* While the child is sometimes in school, a child is in custody for these purposes when the child's freedom of movement is restricted. *See In re* V.P., 55 S.W.3d 25, 31 (Tex. App.—Austin 2001, pet. denied) ("[C]ourts ask whether, based on the objective circumstances, a reasonable child of the same age would believe his or her freedom of movement was significantly restricted.").

382. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2394, 2403 (2011) ("A child's age properly informs the *Miranda* custody analysis, so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer.").

383. FAM. § 51.095(a)–(b). Prior to questioning a child in custody, a magistrate must administer certain warnings to the child—the *Miranda* warnings. *Id.* § 51.095(a)(1)(A). Once the child is warned, only after the child waives those rights and the magistrate certifies that the child knowingly, intelligently, and voluntarily waived her rights may the child be interviewed. *Id.* § 51.095(a)(1)(D). This procedure must be absent any law enforcement or prosecutorial presence. *Id.* § 51.095(a)(1)(B)(i). If the child then gives a statement to the police, after it is reduced to writing, it must be signed in front of the magistrate—again with no law enforcement or prosecutors present. *Id.* The magistrate must certify that the child understands the nature and content of the statement and is signing it voluntarily. *Id.* § 51.095(a)(1)(B)(ii).

384. *See id.* § 51.095. Oral statements found to be true and that tend to establish guilt, secreted or stolen property, or instruments of the crime are admissible, as are *res gestae* statements; statements in court or before a grand jury, other than those made at detention hearings; admissions to third parties; and statements recorded in accordance with the statute. *Id.* § 51.095(a)(2)–(5), (c), (f).

O. Pre-Trial Procedures

1. The Petition

Several pre-trial procedures affect the juvenile process in Texas. As in other civil matters, a petition is used to meet the notice requirements,[385] styled "In the matter of [the child's name],"[386] and may be brought upon information and belief.[387] Normally the petition is filed in "the county in which the alleged delinquent conduct or conduct indicating a need for supervision occurred."[388] However, unlike adult criminal cases, the petition may also be filed in the county in which the child resides at the time the petition is filed if one of three qualifying conditions is applicable.[389] In the petition, there is a liberal joinder of offenses, even offenses that are unrelated, and hearings on all offenses may be together.[390] If the child is in detention, or will be taken into custody, the court shall set a time for the adjudication hearing "not later than 10 working days after the petition [is] filed."[391] The petition's prayer should allege whether the child engaged in

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385. *See* FAM. § 53.04(d) (West 2008). The petition must state with particularity the alleged offense (time, place, and manner); the law violated; the "name, age, and residence of the child," if known; the name and residence of the parent, guardian, or custodian and spouse, if known, or the name and address of any known adult relative living in the county, or county nearest to the court, if the parent, guardian, or custodian lives outside the state or his residence is unknown. *Id.*; *see In re* J.B.M., 157 S.W.3d 823, 825 (Tex. App.—Fort Worth 2005, no pet.) (stating that the requirements of criminal indictments are more stringent than those of juvenile petitions; the juvenile must only be given notice of the offense charged). The particularity with which offenses must be described also applies to a petition for transfer for habitual felony conduct, and the previous adjudications required for such a transfer must be alleged. FAM. § 53.04(d)(5). These prior adjudications must be for felonies other than state jail felonies, and the second adjudication must be for conduct that occurred after the first adjudication became final, including all appeals. *See id.*; *In re* A.D.M., No. 04-12-00484-CV, 2013 WL 621525, at *2 (Tex. App.—San Antonio Feb. 20, 2013, no pet. h.) (mem. op.) ("Generally, a juvenile petition which tracks the language of the statute gives sufficient notice of the offense charged." (quoting *In re* M.T., No. 13-05-434-CV, 2007 WL 2265072, at *3 (Tex. App.—Corpus Christi Aug. 9, 2007, no pet.) (mem. op.) (internal quotation marks omitted))).

386. FAM. § 53.04(b).

387. *Id.* § 53.04(c); *In re* Edwards, 644 S.W.2d 815, 820 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.) (noting that compliance with this provision is good practice).

388. FAM. § 51.06(a)(1) (West 2008); *see also In re* D.D.C., No. 05-97-01844-CV, 1998 WL 265178, at *2 (Tex. App.—Dallas May 27, 1998, no pet.) (not designated for publication) (discussing proper venue in juvenile proceedings).

389. FAM. § 51.06(a)(2). The petition can be filed in the child's residence county if (1) the child is on probation in his home county at the time of the new offense; (2) the location of the new occurrence of delinquent conduct or conduct indicating a need for supervision cannot be determined; or (3) the county of the child's residence agrees to accept the case, with conditions. *Id.*; J.J.H. v. State, 557 S.W.2d 838, 839 (Tex. Civ. App.—Waco 1977, no writ) ("A proceeding under this title shall be commenced in: (1) the county in which the child resides; or (2) the county in which the alleged delinquent conduct or conduct indicating a need for supervision occurred." (quoting FAM. § 51.06(a)) (internal quotation marks omitted)).

390. FED. R. CIV. P. 51(a); *see, e.g.*, In re J.K.R., 986 S.W.2d 278, 286 (Tex. App.—Eastland 1998, pet. denied) (holding that consolidating three petitions on the day of trial was not an abuse of discretion).

391. FAM. § 53.05(b) (West 2008).

delinquent conduct or conduct indicating a need for supervision, whether the child is in need of rehabilitation, or whether the public or the child is in need of protection that requires disposition.[392] It is also customary to plead to have the child placed outside her home, but there is no specific requirement for this.[393] Finally, a petition for adjudication and a petition for transfer are subject to statutes setting limitations on filing, just as in adult cases.[394]

2. The Summons

Unlike adult criminal cases, the petition in a juvenile case must be served as in other civil proceedings.[395] A summons shall be issued, requiring the person served to appear at the designated time and place for court.[396] In the juvenile process, the summons must be served at least two days before the adjudication hearing, which can be done by mail under certain conditions.[397] Service may be waived by any party except the child.[398] Service of the summons with a copy of the petition must be on the

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392. FAM. § 54.04(c) (West 2008 & Supp. 2013).

393. *See id.* § 54.04(i). This section provides that the court must find that removal from the home is in the best interests of the child, that reasonable efforts to prevent or eliminate the need for removal were made so that it could be possible for the child to return home, and that the child cannot receive "the quality of care and level of support and supervision" to meet probation conditions in the child's own home. *Id.* Although there is no formal requirement that these matters be put in the prayer, good practice would include asking the court for findings and giving the court the necessary findings in the petition to make the final order meet the requirements of the statute. *See id.*; *In re* E.C.D., No. 04-05-00391-CV, 2007 WL 516137, at *11 (Tex. App.—San Antonio Feb. 21, 2007, no pet.) (mem. op.) (discussing what the order placing the child outside the home must include).

394. FAM. § 51.19 (West 2008); *see* TEX. CODE CRIM. PROC. ANN. arts. 12.01–.09 (West 2005 & Supp. 2013). Unless specifically addressed in Chapter 12 of the TCCP, or "other statutory law," generally, the limitation period is two years. FAM. § 51.19 (a), (c). A juvenile petition filed for adjudication or transfer is considered the equivalent of an indictment or information for the purposes of satisfying limitations restrictions. *Id.* § 51.19(b).

395. FAM. § 53.06(b) (West 2008); *see, e.g.*, *In re* L.A.C., No. 08-01-00221-CV, 2002 WL 1340965, at *1 (Tex. App.—El Paso June 20, 2002, no pet.) (not designated for publication) (discussing effective service).

396. FAM. § 53.06(b); *see L.A.C.*, 2002 WL 1340965, at *1 (discussing effective service).

397. FAM. § 53.07 (West 2008). If the person to be served is in the state, she must be served two days before the hearing, if possible. *Id.* If she cannot be found, whether in the state or outside the state, service in person, if possible, or by mail is permissible at least five days before the hearing. *Id.* This applies to a petition for an adjudication or a transfer hearing. FAM. § 53.04(a) (West 2008); *see also* Mosby v. State, No. 05-99-01356-CR, 2000 WL 1618469, at *1 (Tex. App.—Dallas Oct. 31, 2000, no pet.) (not designated for publication) ("The summons must be . . . served at least two days before the date of the hearing."); *In re* K.P.S., 840 S.W.2d 706, 709 (Tex. App.—Corpus Christi 1992, no writ) (noting that where the juvenile court personally served the child and guardian with copies of the petition in court, on the record and with no summons, oral notice of the time and place of the next hearing was sufficient notice).

398. FAM. § 53.06(e).

child, parent, guardian or custodian, guardian ad litem,[399] and any other proper or necessary parties.[400]

3. Pre-Trial Discovery

Discovery rules in juvenile matters are the same as in adult criminal cases,[401] governed by the TCCP[402] and the obligations of the prosecutor to disclose exculpatory and mitigating evidence in compliance with due process.[403] There is no reciprocal discovery in Texas state courts, adult or juvenile.

4. Attendance at Hearing

Besides the child, each parent, managing and possessory conservator, court-appointed custodian, and guardian of the person of the child are required to attend hearings in juvenile court.[404] They are entitled to a reasonable written or oral notice with the date, time, and place of the

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399. *Id.* The term "guardian ad litem" means one appointed by a court to appear with a child when a child's parent or guardian is not capable or willing to make decisions for the child in the child's best interest. *See* FAM. § 107.001(5) (West 2008). The guardian ad litem cannot be a law enforcement officer, probation officer, or other juvenile court employee. FAM. § 51.11 (West 2008). The court in a juvenile case must appoint a guardian ad litem for a child whenever the parent does not appear with the child. *Id.*

400. FAM. § 53.06(a); *see generally* R.M.R. v. State, No. 01-01-00347-CV, 2001 WL 1555304, at *1 (Tex. App.—Houston [1st Dist.] Dec. 6, 2001, no pet.) (not designated for publication) (discussing to whom service must be made).

401. FAM. § 51.17(b) (West 2008 & Supp. 2013). This section directs discovery in Title 3 of the Family Code and is governed by the TCCP and case interpretations in criminal cases. *Id.* Prior to 1995, in juvenile cases, the Rules of Civil Procedure provided access to depositions and other information-gathering tools usually unavailable to the criminal practitioner. *Cf.* M.B. v. State, 901 S.W.2d 620, 621–22 (Tex. App.—San Antonio 1995, no writ) (allowing depositions as a discovery tool, but noting that not all discovery procedures under the Rules of Civil Procedure are applicable in § 51.17). For example, now a juvenile must ask permission to take a deposition by filing an affidavit stating facts showing "good reason" for taking a deposition with an application; after notice and hearing, the court shall determine whether to grant or deny the application. TEX. CODE CRIM. PROC. ANN. art. 39.02 (West 2005 & Supp. 2013). From my experience, prior to the change in the law, the ability to depose witnesses provided a tactical advantage for the juvenile respondent in many situations. *In re* J.B.M., 157 S.W.3d 823, 829 (Tex. App.—Fort Worth 2005, no pet.) ("Discovery is now conducted pursuant to the Code of Criminal Procedure and case decisions in criminal cases.").

402. CRIM. PROC. arts. 39.01–.15 (West 2005 & Supp. 2013).

403. Kyles v. Whitley, 514 U.S. 419, 421–22 (1995); Brady v. Maryland, 373 U.S. 83, 89–90 (1963).

404. FAM. § 51.115(a) (West 2008). The hearings that must be attended are discretionary transfer hearings for those under age eighteen, waiver of jurisdiction hearings for those over the age of eighteen, adjudication hearings, disposition hearings, hearings to modify a disposition, and release or transfer hearings from the TYC. *Id.* Paragraph (b) provides three justifiable reasons to not attend. *Id.* § 51.115(b); *In re* T.L.V., 148 S.W.3d 437, 440 (Tex. App.—El Paso 2004, no pet.) ("[T]he Juvenile Justice Code requires parents to attend a number of hearings affecting the child, including adjudication and disposition hearings.").

hearing and that their attendance is required.[405] Failure to attend is enforceable by contempt and an order to attend counseling or an education and skills course on parenting duties and responsibilities.[406] There is certainly no requirement in adult criminal law for others to attend with the accused or punishment if they fail to do so.

5. Right to Counsel

A child must be represented by an attorney at all transfer hearings, adjudication hearings, disposition hearings, modification hearings to place the child in the TYC, and mental health or intellectual disability hearings.[407] The child may also be represented at detention hearings, modification hearings not involving commitment to the TYC, habeas corpus hearings, and on appeal.[408] The child may waive her right to an attorney by specific procedures,[409] but only for the hearings enumerated above that are not mandatory representation hearings.[410]

If an attorney is appointed for the child, that attorney normally represents the child until the case is terminated.[411] Adult criminal cases likewise do not allow the removal of a court-appointed attorney by the court.[412] If there was no appointment of counsel in relation to the child's

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405. FAM. § 51.115(c).

406. *Id.* § 51.115(d). The punishment for contempt under this provision is a fine of not less than $100 and not more than $1,000. *Id.* A skills course may be ordered in addition to or in lieu of the fine. *Id.*

407. *Id.* § 51.10(b) (West 2008); *In re* R.A., No. 03-11-00054-CV, 2012 WL 2989224, at *4 (Tex. App.—Austin July 20, 2012, no pet. h.) ("The family code states that juveniles are entitled to the assistance of counsel in adjudication and disposition hearings such as those at issue in this case.").

408. FAM. § 51.10(a). The use of the word "may" is important. *See id.* For example, just as with adults, the child has a statutory right to an attorney in post-adjudication writs of habeas corpus in non-capital cases. TEX. CODE CRIM. PROC. ANN. art. 11.07 (West 2005 & Supp. 2013); FAM. § 51.10(b). *But see* J.L.L. v. State, No. 01-09-00808-CV, 2011 WL 1631915, at *5 (Tex. App.—Houston [1st Dist.] Apr. 28, 2011, no pet.) (mem. op.) ("A juvenile has a right to the effective assistance of counsel at every stage of juvenile proceedings.").

409. FAM. § 51.09 (West 2008); *In re* A.J., No. 2-04-390-CV, 2005 WL 1475415, at *1 (Tex. App.—Fort Worth June 23, 2005, no pet.) (mem. op.) (per curiam) ("[A] child may waive any right granted to him if the waiver is voluntary.").

410. FAM. § 51.10 (a). Section 51.10(b) specifically identifies the hearings in which the child must be represented by an attorney. *Id.* § 51.10(b). Waiver of an attorney in all other hearings is by default. *See id.*

411. FAM. § 51.101 (West 2008). This section actually provides three different scenarios in which, once appointed, "the attorney shall continue to represent the child until the case is terminated, [unless] the family retains an attorney, or a new attorney is appointed by the juvenile court." *Id.* Those situations include instances in which the attorney is appointed at the initial detention hearing, the attorney is appointed after the detention hearing and the child is detained, or the attorney is appointed after the petition has been served on the child. *Id.* § 51.101(a)–(b), (d). Paragraph (e) provides for appointment of an attorney in a modification hearing where commitment to the TYC or placement in a secure correctional facility is sought. *Id.* § 51.101(e). The appointment shall extend until the court rules on the modification, the family retains an attorney, or a new attorney is appointed. *Id.*

412. Stearnes v. Clinton, 780 S.W.2d 216, 216 (Tex. Crim. App. 1989).

detention and the child was released or was never detained, on the filing of a petition, the court shall determine if the child's family is indigent.[413] If the court finds indigence, the court shall appoint a lawyer on or before the fifth working day after the petition is served on the child.[414] If the initial filing is a modification for placement in the TYC or in a secure correctional facility, the deadline for appointment is on or before the fifth working day after the motion to modify is filed.[415]

Any attorney representing a child, whether appointed or hired, is entitled to ten days to prepare for an adjudication or transfer hearing.[416] In adult cases, only appointed attorneys are entitled to this preparation time.[417] Time to prepare can be waived even without the child's consent.[418] The Texas Fair Defense Act applies to both adults[419] and juveniles[420] accused of an offense and requires each county to develop an indigent defense plan and qualification procedure for appointment of counsel. Unlike adult cases, the juvenile court shall order parents who are not eligible for a court-appointed attorney to employ an attorney[421] and may enforce by contempt its orders to hire an attorney or to pay a reasonable attorney's fee set by the court.[422] If the parents fail or refuse to hire a lawyer, the court may always appoint an attorney to protect the interests of a child.[423]

P. The Adjudication Hearing

The guilt-innocence or culpability stage of an adult trial is called the "adjudication hearing" in juvenile court,[424] once again, in an attempt to

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413. FAM. § 51.101(c).

414. *Id.* § 51.101(d).

415. *Id.* § 51.101(e).

416. FAM. § 51.10(h) (West 2008). There is no distinction in this provision between court appointed or hired counsel; it merely states "[a]ny attorney representing a child." *Id.* There is nothing specific in the statute as to when the ten days begins to run. *See id.* Professor Dawson believed three logical conditions had to be met before the time began to run: (1) the attorney must be retained or appointed; (2) the petition must be filed; and (3) "notice of the contents of the petition and the hearing date must be communicated to the attorney," which may be satisfied by serving summons on the child. DAWSON, TEXAS JUVENILE LAW, *supra* note 127, at 109; *see* R.X.F. v. State, 921 S.W.2d 888, 894 (Tex. App.—Waco 1996, no writ) (quoting the language of § 51.10(h) and analyzing its meaning).

417. TEX. CODE CRIM. PROC. ANN. art. 1.051(e) (West 2005 & Supp. 2013). In the adult criminal case, only court-appointed attorneys have the specific right to ten days to prepare. *Id.*

418. *R.X.F.*, 921 S.W.2d at 894; *see also* Ryan v. State, No. 01-96-00592-CR, 1997 WL 187306, at *2 (Tex. App.—Houston [1st Dist.] 1997, pet ref'd) (not designated for publication) (stating the right to waive the ten days is a right granted to the attorney and not the child).

419. CRIM. PROC. art. 26.04 (West 2009 & Supp. 2013).

420. FAM. § 51.102 (West 2008 & Supp. 2013).

421. FAM. § 51.10(d).

422. *Id.* § 51.10(e).

423. *Id.* § 51.10(g).

424. FAM. § 54.03 (West 2008 & Supp. 2013).

decriminalize the juvenile procedure.[425] Unlike in a criminal case, a juvenile prosecutor has several court procedures available in adjudication. If the case involves one of the classifications of conduct in need of supervision,[426] only an ordinary adjudication hearing is available.[427] If the adjudication petition will allege a felony offense, juvenile prosecutors often have the choice of proceeding with a normal delinquency adjudication[428] or prosecuting under the Determinate Sentence Act.[429] The determinate sentence adjudication involves the potential for commitment to the TYC with transfer to the Texas Department of Criminal Justice, Institutional Division—the adult prison—for up to forty years, depending on the seriousness of the offense.[430] Additionally, juvenile prosecutors often have a third choice of bypassing the prosecution of the alleged felony as a juvenile adjudication by seeking transfer of the case to the adult criminal court, asking the juvenile court to waive its jurisdiction.[431] Once the child is transferred and the criminal court obtains jurisdiction, other than certain considerations for pretrial detention of the child in a certified juvenile detention facility,[432] "the person shall be dealt with as an adult and in accordance with the Code of Criminal Procedure."[433]

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425. FAM. § 51.01(2)(B) (West 2008). This section provides as one of the stated purposes of Title 3 of the Family Code—the Juvenile Justice Code— "to remove, where appropriate, the taint of criminality from children committing certain unlawful acts." *Id.*; *In re* S.A.G., No. 04-06-00503-CV, 2007 WL 748674, at *3 (Tex. App.—San Antonio Mar. 14, 2007, no pet.) (mem. op.) (discussing purposes of the section and noting that one purpose is "to remove, where appropriate, the taint of criminality from children committing certain unlawful acts"); Roquemore v. State, 11 S.W.3d 395, 399 (Tex. App.—Houston [1st Dist.] 2000, pet. granted) ("[W]e note that the reasoning behind the rule is to 'avoid the "taint of criminality" inherent in interrogation conducted at the unsupervised discretion of law enforcement officers.'" (quoting Comer v. Texas, 776 S.W.2d 191, 196 (1989))).

426. *See infra* Part IV.C (Classification of Juvenile Offenders); *see also* FAM. § 51.03(b) (West 2008 & Supp. 2013) (defining conduct indicating a need for supervision).

427. FAM. § 54.03.

428. *Id.*

429. FAM. § 53.035 (West 2008) (Grand Jury Referral of Violent or Habitual Offenders—list of offenses); *see also* FAM. §§ 51.031 (West 2008) (subject to determinate sentence), 54.04(d)(3) (West 2008 & Supp. 2013) (determinate sentence of up to forty years), 54.04(m) (habitual felony conduct).

430. FAM. § 54.04(d)(3).

431. FAM. § 54.02 (West 2008 & Supp. 2013); Navarro v. State, Nos. 01-11-00139-CR, 01-11-00140-CR, 2012 WL 3776372, at *4 (Tex. App.—Houston [1st Dist.] Aug. 30, 2012, pet. ref'd) (mem. op.) (noting that a minor may be transferred to adult court for the commission of a felony).

432. FAM. § 54.02(h). This section of the Family Code allows for the child, while he is awaiting trial, to be held in a certified juvenile detention facility if the Juvenile Board of his county has established a policy allowing such detention for those younger than seventeen years of age. *See id.*; TEX. HUM. RES. CODE ANN. § 152.0015 (West 2013). The sad truth is that under the provisions of article 4.19 of the TCCP, notwithstanding the order to detain the child in a certified juvenile detention facility, "the judge of the criminal court having jurisdiction over the child may order the child to be transferred to another facility and treated as an adult as provided by this code." TEX. CODE CRIM. PROC. ANN. art. 4.19 (West 2005 & Supp. 2013).

433. FAM. § 54.02(h).

Just as with adults,[434] in a juvenile case there may be a stipulation of evidence, waiving of witnesses, and agreement on testimony if certain strict requirements of the Family Code are met that are not required in adult cases.[435] Such a stipulation and waiver can never be a waiver of the adjudication hearing, but only a waiver of the evidentiary basis needed for the court's adjudication and finding of true to the allegations.[436] Whereas the adult law now allows for pleas in absentia,[437] a juvenile's presence at the adjudication hearing may never be waived.[438] Unlike other civil matters, there is no authority for summary proceedings in a juvenile case.[439] Also unique to juvenile law, parents—or others collateral to the criminal matter to some extent—have the right to appear at the juvenile hearing with an attorney of their choice.[440]

1. Judicial Admonitions

Both adult and juvenile procedures have mandatory judicial admonitions at the beginning of a trial or adjudicatory proceeding—culpability and adjudication, respectively—with juvenile warnings emphasizing the peculiarities of juvenile law and the full range of

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434. *See* CRIM. PROC. art. 1.15 (West 2005). A defendant may waive the right to a trial by jury, but it is still necessary for the State to introduce evidence showing guilt, "accepted by the court as the basis for its judgment." *Id.* Evidence may be stipulated in writing, including the waiver of witnesses or the introduction of evidence by affidavit or through other documents. *Id.*

435. FAM. § 51.09 (West 2008); *In re* A.J., No. 2-04-390-CV, 2005 WL 1475415, at *1 (Tex. App—Fort Worth May 23, 2005, no pet.) (mem. op.) (stating that "a child may waive any right granted to him if the waiver is voluntary"). Stipulations are permitted in adjudication hearings. FAM. § 54.03 (West 2008 & Supp. 2013). Pursuant to § 51.09, there is no contrary intent within Title 3 to prevent a stipulation of evidence as the evidentiary basis for a court's judgment and a waiver of certain rights to implement the stipulation; these rights include the privilege against self-incrimination, right to trial, the right to confrontation of witnesses, and the right to trial by jury. FAM. § 51.09. The waiver requirements of § 51.09 mandate that "(1) the waiver is made by the child and the attorney for the child;" (2) the waiver is made after both "are informed of and understand the right and the possible consequences of waiving it; (3) the waiver is voluntary; and (4) the waiver is made in writing or in court proceedings that are recorded." *Id.*

436. *In re* M.H., No. 02-03-318-CV, 2005 WL 121726, at *2 (Tex. App.—Fort Worth Jan. 20, 2005, no pet.) (mem. op.) (holding that a stipulation will support a verdict in a juvenile case).

437. CRIM. PROC. art. 27.19 (West 2006 & Supp. 2013).

438. FAM. § 54.03. This section requires admonishments to the child at the beginning of an adjudication hearing, implying that his appearance is essential. *See In re* C.T.C., 2 S.W.3d 407, 410 (Tex. App.—San Antonio 1999, no pet.) (holding that the presence of the juvenile at the beginning of the adjudication hearing is sufficient if the juvenile voluntarily causes himself to be absent after the trial begins).

439. FAM. §§ 51.01–61.107 (West 2008 & Supp. 2013). Nothing in the Family Code addresses summary judgment. *See* State v. L.J.B., 561 S.W.2d 547, 549 (Tex. Civ. App.—Dallas 1977), *rev'd on other grounds by* C.L.B. v. State, 567 S.W.2d 795 (Tex. 1978). At the intermediate appellate level, the Court of Appeals said that detention hearings, adjudication hearings, disposition hearings, and modification hearings "all necessitate an evidentiary hearing with witnesses present so that all parties, including the court, can ascertain the best interest of the juvenile. To hold that the summary judgment procedure is appropriate under Title 3 would be to frustrate the very purpose of the act." *Id.* at 549.

440. Adair v. Kupper, 890 S.W.2d 216, 218 (Tex. App.—Amarillo 1994, writ denied).

substantive and procedural rights available to a child.[441] The juvenile court must warn the child and the parent, guardian, or guardian ad litem[442] that in delinquent conduct cases, the possible additional dispositions[443]—punishments—include (1) probation;[444] (2) commitment to the TYC for an indeterminate time;[445] (3) probation up to ten years that, in a Determinate Sentence Act case, allows for possible dispositions including probation up to ten years[446] or a determinate sentence of a maximum of forty, twenty, or ten years depending on the accusation;[447] and (4) if the delinquent conduct is a felony, upon the child's third felony adjudication, the child may be subject to becoming an habitual felony offender, permitting the child to be prosecuted under the Determinate Sentence Act.[448]

Other admonitions required in juvenile cases at the beginning of an adjudication hearing are "(1) the allegations made against the child,[449]

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441. FAM. § 54.03 (West 2008 & Supp. 2013); *In re* M.A.M., No. 04-97-00795-CV, 1998 WL 412430, at *1 (Tex. App.—San Antonio July 22, 1998, no pet.) (not designated for publication) (noting that the Family Code "requires certain admonitions be given to juveniles at the beginning of an adjudication hearing").

442. FAM. § 54.03(b). The required admonition does not speak of the child's custodian if that person is someone other than a parent, guardian, or guardian ad litem. *Id.*; *In re* M.C.S., Jr., 327 S.W.3d 802, 806 (Tex. App.—Fort Worth 2010, no pet.) (discussing pre-hearing warnings mandated by the statute).

443. FAM. § 54.03(b)(2). The judge must explain the possible consequences of the proceeding, which would include possible dispositional alternatives. *Id.*; *M.C.S., Jr.*, 327 S.W.3d at 806.

444. FAM. § 54.04(d)(1) (West 2008 & Supp. 2013); *In re* J.V.M., 318 S.W.3d 444, 447 (Tex. App.—El Paso 2010, no pet.) ("If the trial court finds that the child is in need of rehabilitation or that the protection of the public or of the child requires disposition, it may place the child on probation."). The probationary period for an ordinary delinquent conduct case, including extensions, may be for any period, but "may not continue on or after the child's 18th birthday." FAM. § 54.04(l).

445. FAM. § 54.04(d)(2); *In re* T.R., No. 04-10-00384-CV, 2011 WL 721496, at *2 (Tex. App.—San Antonio Mar. 2, 2011, no pet.) (mem. op.) ("When, as here, the adjudication is for conduct that is a felony, the juvenile court may, in its discretion, commit the juvenile to TYC."). The TYC loses jurisdiction and authority over a child on the child's nineteenth birthday, if the child is discharged by completing parole before that day. *See* TEX. HUM. RES. CODE ANN. §§ 61.001(6), *repealed by* Acts 2011, 82nd Leg., ch. 85 (S.B.) §§ 4.001,.084(e), (g) (West 2013).

446. FAM. § 54.04(q); *In re* A.R.D., 100 S.W.3d 649, 651 (Tex. App.—Dallas 2003, no pet.) (stating that "[t]his section allows the court at the original disposition hearing to grant probation to a child who has been adjudicated and sentenced to TYC for a definite term of not more than 10 years").

447. FAM. § 54.04(d)(3); *In re* J.B.L., No. 11-07-00221-CV, 2009 WL 545573, at *2 (Tex. App.—Eastland Mar. 5, 2009, pet. denied) (mem. op.) ("If the grand jury certifies the petition for determinate sentencing, a jury may sentence the juvenile to commitment to the Texas Youth Commission with a possible transfer to the Texas Department of Criminal Justice for a term not to exceed forty years.").

448. FAM. § 51.031 (West 2008). This section defines "habitual felony conduct." *Id.* Upon a child being charged with his third felony, other than a state jail felony (a low-level felony not involving penitentiary punishment), if two prior sequential final felony adjudications and all appeals have been exhausted, the child qualifies as an habitual felony offender. *Id.* Interestingly, the adjudication must have occurred subsequent to January 1, 1996, and "is final if the child is placed on probation or committed to the Texas Youth Commission." *Id.* § 51.031(b), (c); *see also supra* note 385 (discussing habitual felony conduct).

449. FAM. § 54.03(b)(1) (West 2008 & Supp. 2013). The question has arisen on occasion if the term "lesser-included offense" should be explained to the child under the requirement that the child be admonished as to the accusation. *See id.* The appellate courts are split on whether a child should be admonished on lesser-included offenses. *Compare* A.E.M. v. State, 552 S.W.2d 952, 955 (Tex. Civ.

(2) the nature and possible consequences of the proceedings,"[450] (3) the use of a juvenile adjudication record in adult criminal proceedings,[451] (4) the child's privilege against self-incrimination,[452] (5) the right to a trial,[453] (6) the right to be confronted by the witnesses against the child,[454] (7) the right to an attorney,[455] and (8) the right to a trial by jury.[456] In addition, other admonitions include (1) that the child is presumed innocent,[457] (2) that proof of the commission of "delinquent conduct or conduct indicating a need for supervision" must be by beyond a reasonable doubt as to each element,[458] (3) that if the child wishes to plead true or testify, she must waive her rights to self-incrimination in a very specific way,[459] and (4) that

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App.—San Antonio 1977, no writ) (holding an admonition insufficient where the court did not adequately explain that rape and aggravated assault were lesser included offenses of aggravated rape), *and* A.N. v. State, 683 S.W.2d 118, 120 (Tex. App.—San Antonio 1984, writ denied) (holding the court failed to explain to the child that he could have been convicted of criminal trespass on a charge of burglary; he was later convicted of criminal trespass), *with In re* D.L.K., 690 S.W.2d 654, 656 (Tex. App.—Eastland 1985, no writ) (refusing to require admonition on lesser included charges). No such admonition exists for adults. *See In re* M.C.S., Jr., 327 S.W.3d 802, 806 (Tex. App.—Fort Worth 2010, no pet.) (discussing pre-hearing warnings mandated by the statute); *D.L.K.*, 690 S.W.2d at 655.

450. FAM. § 54.03(b)(2); *M.C.S., Jr.*, 327 S.W.3d at 806 (discussing pre-hearing warnings mandated by the statute); *see In re* B.G.M., 929 S.W.2d 604, 606–07 (Tex. App.—Texarkana 1996, no writ) (holding that juvenile courts are not required to admonish a juvenile as to collateral matters such as sex offender registration); *see* TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(4) (West 2009 & Supp. 2013) (the TCCP does not require admonishment to children of immigration consequences); *In re* J.Y., No. 05-97-00024-CV, 1998 WL 265129, at *3 (Tex. App.—Dallas May 27, 1998, no pet.) (not designated for publication) (holding that, for some reason, the court does not have to admonish a child in a determinate sentence case of the possibility of later transfer to the adult prison from the TYC, including minimum stay requirements, or that the possibility exists for dismissal without a disposition).

451. *See* FAM. § 54.03(b)(2); *cf. In re* F.M., 792 S.W.2d 564, 565 (Tex. App.—Amarillo 1990, no writ) (holding that it is reversible error to not provide this admonition as to the potential use of a juvenile adjudication record in criminal court). If a child receives a felony adjudication in which the child is committed to the TYC, this is a prior felony conviction that can be used to enhance the punishment of the individual who was so committed as a child if he is later charged and convicted of a first, second, or third degree felony. *See F.M.*, 792 S.W.2d at 564–65. This does not apply to habitual offenders under Texas Penal Code § 12.42(d), for those who are subject to a mandatory life sentence for a second sex offense under § 12.42(c)(2), (b)(3), or offenders under § 12.42(a), (c)(1), (e). TEX. PENAL CODE ANN. § 12.42(a)–(c)(2), (d)–(e) (West 2011).

452. FAM. § 54.03(b)(3), (e); *M.C.S., Jr.*, 327 S.W.3d at 806 (discussing pre-hearing warnings mandated by the statute).

453. FAM. § 54.03(b)(4); *M.C.S., Jr.*, 327 S.W.3d at 806.

454. FAM. § 54.03(b)(4); *M.C.S., Jr.*, 327 S.W.3d at 806.

455. FAM. § 54.03(b)(5); *M.C.S., Jr.*, 327 S.W.3d at 806.

456. FAM. § 54.03(b)(6); *M.C.S., Jr.*, 327 S.W.3d at 806.

457. FAM. § 54.03(f); *In re* G.M.P., 909 S.W.2d 198, 201 (Tex. App.—Houston [14th Dist.] 1995, no writ) ("The legislature has also mandated that in a juvenile adjudication proceeding the juvenile is presumed innocent unless the State proves its case beyond a reasonable doubt.").

458. FAM. § 54.03(f); *In re* Winship, 397 U.S. 358, 368 (1970) (stating that the United States Constitution requires proof of delinquency beyond a reasonable doubt).

459. FAM. § 54.03(b)(3), (e). See § 51.09 for the requirements and limitations on waiver in a juvenile action:

> Unless a contrary intent clearly appears elsewhere in this title, any right granted to a child by this title or by the constitution or laws of this state or the United States may be waived in proceedings under this title if: (1) the waiver is made by the child and the attorney for the child; (2) the child and the attorney waiving the right are informed of and understand the

the trial must be by jury unless waived in writing or recorded in a very specific way.[460] Upon a plea of true to the allegations in the petition, the prosecutor informs the court if there is a plea agreement.[461] The court must inform the child that any agreement is not binding on the court,[462] and if the court accepts the plea or stipulation and the court's disposition is in accordance with the agreement, the child may not appeal the adjudication, disposition, or modification order without the court's permission unless the appeal is based on matters raised by written motion before the hearing.[463] If the court rejects the agreement, the child shall be told of the court's decision, and the child shall be given the opportunity to withdraw the plea or stipulation.[464] In such a situation, no evidence or document in regard to the proposed plea or statement of the child may be used in any subsequent hearings in the case.[465]

Adults, on the other hand, upon a plea of guilty, must be admonished as to "(1) the range of punishment attached to the offense";[466] (2) the fact that any recommendation by the prosecutor is not binding on the court;[467] (3) that the court will inquire as to a plea bargain, advise if the agreement will be approved, and if the agreement is rejected, provide the defendant the opportunity to withdraw the plea of guilty (or nolo contendere);[468] (4) that the rights to an appeal are severely limited in a plea bargain and what those limitations are;[469] and (5) that sex offender registration will be mandatory if

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right and the possible consequences of waiving it; (3) the waiver is voluntary; and (4) the waiver is made in writing or in court proceedings that are recorded.

FAM. § 51.09 (West 2008).

460. *See* FAM. § 54.03(c) (West 2008 & Supp. 2013). As is required by § 51.09, there is no contrary intent clearly appearing in the Family Code that would not allow a waiver of a jury. *See* FAM. §§ 51.09 (West 2008), 54.03(c); *In re* R.R., 373 S.W.3d 730, 735–36 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) ("Under the Family Code, jury trials are the default course of action, and a trial court has a duty to commence a trial by jury unless and until both the juvenile and his attorney release the trial court from that duty.").

461. *See* FAM. § 54.03(j); *In re* M.D.G., 180 S.W.3d 747, 749 (Tex. App.—Eastland 2005, no pet.) (discussing the plea agreement provision of 54.03(j)).

462. FAM. § 54.03(j); *M.D.G.*, 180 S.W.3d at 749.

463. FAM. § 56.01(n) (West 2008 & Supp. 2013); *In re* B.N.C., No. 04-02-00788-CV, 2003 WL 1232997, at *1 (Tex. App.—San Antonio Mar. 19, 2003, no pet.) (mem. op.) (stating that, generally, an appeal from a plea agreement is not possible unless the court gives permission to appeal or "the appeal is based on a matter raised by written motion filed before the proceeding in which the child entered the plea or agreed to the stipulation of evidence").

464. FAM. § 54.03(j).

465. *Id.*

466. TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(1) (West 2009 & Supp. 2013).

467. *Id.* art. 26.13(a)(2).

468. *Id.*

469. *Id.* art. 26.13(a)(3). The defendant must be told prior to his plea being accepted "that if the punishment assessed does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney, the trial court must give its permission to the defendant before [the defendant] may prosecute an appeal on any matter in the case except for those matters raised by written motions filed prior to trial." *Id.*

convicted of an offense that requires it.[470] Just as with children, no plea of guilty will be accepted unless the accused is mentally competent and is pleading freely and voluntarily.[471] Should an adult enter a plea of guilty to a felony and the punishment is not fixed by law,[472] then "a jury shall be impaneled to assess the punishment and evidence may be heard to enable them to decide thereupon," unless the right is waived.[473] Although children may waive their rights to a jury at adjudication,[474] a child is only entitled to a jury trial for punishment in a determinate sentence case.[475] The default for adults in the punishment phase is a jury—not so with juveniles.[476]

Adults are warned of their substantive and procedural rights within forty-eight hours of their arrest.[477] The person making an arrest shall take the accused before a magistrate "without unnecessary delay, but not later than 48 hours after the person is arrested," to be informed (1) of the accusation against him, (2) of his right to hire a lawyer, (3) of his right to remain silent, (4) of his right to the presence of his attorney during any law enforcement interviews, including those with prosecutors, (5) of his right to end any interview at any time, (6) of his right to an examining trial, (7) of the right to ask for the appointment of counsel if indigent, (8) of the procedures to request a lawyer, (9) of his right to refrain from making any statement, and (10) that if he does make a statement, it may be used against him.[478] The magistrate also has several duties to fulfill at this hearing, including appointing a lawyer at that time, if authorized, or transferring the application to the authorized person without unnecessary delay, but not later than twenty-four hours after the arrested person's request.[479] The procedure

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470. *Id.* art. 26.13(a)(5).

471. *Id.* art. 26.13(b).

472. *See* CRIM. PROC. art. 26.14 (West 2009). In a capital murder case in which the State has waived the death penalty, upon being found guilty, the defendant is automatically sentenced to life in prison, without the possibility of parole. TEX. PENAL CODE ANN. § 12.31(a)(2) (West 2011 & Supp. 2013). And see § 12.31(a)(1) of the Texas Penal Code, under which the penalty for a capital felony for a child transferred to criminal court under the provisions of § 54.02 of the Texas Family Code is life; the child will be eligible for parole when the "actual calendar time the inmate served, without consideration of good conduct time, equals 40 calendar years." *See* TEX. GOV'T CODE ANN. § 508.145(b) (West 2012 & Supp. 2013); *see also* PENAL § 12.42(2), (4) (West 2011 & Supp. 2013) (providing a raft of automatic life sentence and life without parole cases).

473. CRIM. PROC. art. 26.14.

474. *See* FAM. § 51.09 (West 2008). Nothing in the Family Code says otherwise. *Id.*; *In re* A.J., No. 2-04-390-CV, 2005 WL 1475415, at *1 (Tex. App—Fort Worth May 23, 2005, no pet.) (mem. op.) (noting that "a child may waive any right granted to him if the waiver is voluntary").

475. FAM. § 54.04(a) (West 2008 & Supp. 2013); *In re* T.A.W., 234 S.W.3d 704, 707 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (Frost, J., concurring) ("Because T.A.W. was in jeopardy of a determinate sentence under section 54.04(d)(3) of the Texas Family Code, T.A.W. had a right to a jury at the disposition hearing . . . .").

476. CRIM. PROC. art. 26.14.

477. CRIM. PROC. art. 15.17(a) (West 2005 & Supp. 2013).

478. *Id.*

479. *Id.* The magistrate also has the duty to make sure those who are deaf or are non-English speakers are appropriately informed. *See* CRIM. PROC. arts. 38.30–.31 (West 2005 & Supp. 2013). The

most similar to this in juvenile law is when a child is taken into custody and may be detained only upon the meeting of one of six criteria.[480] When the child is detained, the Family Code is specific about requiring a detention hearing within two working days,[481] with some exceptions.[482] Prior to the hearing, notice shall be given to the child of "the time, place and purpose of the hearing."[483] At the hearing "the court shall inform the parties of the child's right to counsel and to appointed counsel if they are indigent and of the child's right to remain silent with respect to any allegations of delinquent conduct, conduct indicating a need for supervision, or conduct that violates an order of probation."[484]

Much like adults,[485] juveniles must object to errors in the admonishments before testimony begins, or before the child pleads or agrees to a stipulation in an uncontested adjudication.[486] Without a trial

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magistrate shall give assistance in completing the forms for appointment of a lawyer, allow the person time and opportunity to consult with a lawyer, set bail, or release on bond. CRIM. PROC. art. 15.17(a)–(b).

480. FAM. § 53.02(b) (West 2008).

> A child taken into custody may be detained prior to hearing on the petition only if: (1) the child is likely to abscond or be removed from the jurisdiction of the court; (2) suitable supervision, care, or protection for the child is not being provided by a parent, guardian, custodian, or other person; (3) the child has no parent, guardian, custodian, or other person able to return the child to the court when required; (4) the child may be dangerous to himself or herself or the child may threaten the safety of the public if released; (5) the child has previously been found to be a delinquent child or has previously been convicted of a penal offense punishable by a term in jail or prison and is likely to commit an offense if released; or (6) the child's detention is required . . . .

Id. When the child is alleged "to have used, possessed, or exhibited a firearm" in the commission of the offense, he is to be released only by a judge. *Id.* § 53.02(f).

481. FAM. § 54.01(a) (West 2008 & Supp. 2013); *In re* Hall, 286 S.W.3d 925, 929 (Tex. 2009) ("The Code requires that a juvenile court promptly conduct a detention hearing to determine whether the child should be immediately released from custody.").

482. FAM. § 54.01(a). The exceptions are that the detention hearing shall be held on the first working day if the child is detained on a Friday or Saturday, and if the child is held in a rural county jail or other facility not authorized as a certified juvenile detention facility, the detention hearing must be held "not later than the 24th hour, excluding weekends and holidays, after the time the child is taken into custody." FAM. §§ 51.12(i) (West 2008 & Supp. 2013), 54.01(p).

483. FAM. § 54.01(b). The difference between the adult hearing, pursuant to § 15.17 of the Texas Code of Criminal Procedure, and a child's detention hearing is that the adult proceeding is much more concerned with informing the adult of his rights, and the detention hearing is more concerned with whether one of the enumerated reasons for detention provide the court with a reason to hold the child. *Id.*; *see* CRIM. PROC. art. 15.17.

484. FAM. § 54.01(b).

485. CRIM. PROC. art. 1.14(b) (West 2005). If no objection is made "to a defect, error, or irregularity of form or substance in an indictment or information before the date" of the trial, all rights to object are lost and may not be raised on appeal or in any post-conviction action. *Id.*; *see* TEX. R. APP. P. 33.1.

486. FAM. § 54.03(i) (West 2008 & Supp. 2013). To preserve a complaint about an admonition in a juvenile case, the child's attorney must comply with Texas Rule of Appellate Procedure 33.1. *Id.*; TEX. R. APP. P. 33.1; *In re* M.C.S., Jr., 327 S.W.3d 802, 806 (Tex. App.—Fort Worth 2010, no pet.) (quoting § 54.02(i) of the Family Code and concluding that "[n]either appellant nor his trial counsel complained about his statutory admonishments before appellant agreed to the stipulation of evidence; thus, we hold that appellant failed to preserve any error related to the admonishments").

objection, nothing is preserved for appeal.[487] Even with the objection properly preserved, the child must show harm to reverse the decision.[488]

2. Jury Trial

There is no constitutional right or requirement for juries in juvenile cases.[489] The right to a jury is guaranteed by Texas statute and is only available in adjudication (culpability) hearings or trials,[490] and not in disposition (punishment) hearings in an ordinary delinquent conduct case.[491] Contrastingly, in a determinate sentence case, an accused child has the right to a jury at both adjudication and disposition.[492] To exercise the right to have a jury set punishment in such a case, the child must elect to do so in writing before voir dire examination begins and may change that designation with consent of the State's attorney after adjudication.[493]

Although the right to a jury trial is constitutionally protected in federal courts, the right only extends to the culpability stage—or the guilt-innocence phase—not to punishment.[494] And in Texas adult prosecutions, the "right of trial by jury shall remain inviolate," at both culpability and punishment, unless waived.[495]

3. Waiver of Jury Trial

Waivers of the right to a jury may be made by adults,[496] and by children if the specific requirements of the Family Code are met.[497] The

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487. *See* FAM. § 54.03(i); TEX. R. APP. P. 33.1; *M.C.S., Jr.*, 327 S.W.3d at 806.

488. *In re* C.O.S., 988 S.W.2d 760, 767–68 (Tex. 1999).

489. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).

490. FAM. § 54.03(c). The default in juvenile adjudication hearings is the jury trial. *See id.*; *In re* J.P., 136 S.W.3d 629, 630 (Tex. 2004) ("An adjudication hearing incorporates many of the features of a criminal trial, including the right to a jury trial . . . ."); *In re* R.R., 373 S.W.3d 730, 735 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) ("Under the Family Code, jury trials are the default course of action . . . .").

491. FAM. § 54.04(a) (West 2008 & Supp. 2013); *J.P.*, 136 S.W.3d at 630 ("By contrast, at a disposition hearing after adjudication, a juvenile has a right to a jury only in cases of possible transfer to the Texas Department of Criminal Justice . . . .").

492. *J.P.*, 136 S.W.3d at 630.

493. FAM. § 54.04(a).

494. *See* FED. R. CIV. P. 32; Payne v. Nash, 327 F.2d 197, 200 (8th Cir. 1964) ("Under the federal law the court, and not the jury fixes the punishment . . . . Thus, there is nothing in the Due Process clause of the Fourteenth Amendment of the United States Constitution, nor in the Constitution and laws of the State of Missouri, which gave appellant the right to have his punishment assessed by the jury." (citing FED. R. CIV. P. 32, and Williams v. New York, 337 U.S. 241, 246 (1949))). The right to a jury in criminal cases in federal court is guaranteed. U.S. CONST. art. III, § 2; *see id.* amend. VI.

495. TEX. CODE CRIM. PROC. ANN. art. 1.12 (West 2005).

496. CRIM. PROC. art. 1.13(a) (West 2005 & Supp. 2013). Except in a death penalty case, the defendant has "the right, upon entering a plea, to waive the right of trial by jury" in writing, in person, and "in open court with the consent and approval of the court, and the attorney representing the State."

primary difference between the two—in waiving a jury—is that the prosecutor in a juvenile case does not have to acquiesce to the child's waiver of a jury and the child is unable to veto the waiver, forcing the prosecutor's demand for a jury.[498] In adult cases, the prosecutor must always agree to the waiver for it to take effect.[499] Another difference is the court in a juvenile case does not have to concur with the waiver of a jury, but must only find that the written waiver is executed properly—made in recorded court proceedings—that all understand the right, the possible consequences of the waiver, and that it is given voluntarily.[500] For the practitioner, the ability to short-circuit the State's veto of a waiver of a jury trial can occasionally be an effective trial tactic.

4. Jury Size

When comparing the size of juries between juvenile and adult cases, it is more a function of the court than the level of crime. In adult trials, the accused is entitled to a jury of six in county courts, inferior courts, and district courts in trials of misdemeanors.[501] In the district court, felony juries always have twelve people, and the district court has original jurisdiction of all felonies.[502] Similarly, in juvenile cases, if a district court is the juvenile court, felony juries have twelve members and misdemeanor juries have six.[503] If the juvenile court is a constitutional county court or a statutory county court, the jury size is always six in all cases—felony and

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Id. The defendant may waive the right to a jury in misdemeanor cases without an attorney. *Id.* art. 1.13(c).

497. *See* FAM. § 51.09 (West 2008).

> Unless a contrary intent clearly appears elsewhere in this title, any right granted to a child by this title or by the constitution or laws of this state or the United States may be waived in proceedings under this title if: (1) the waiver is made by the child and the attorney for the child; (2) the child and the attorney waiving the right are informed of and understand the right and the possible consequences of waiving it; (3) the waiver is voluntary; and (4) the waiver is made in writing or in court proceedings that are recorded.

Id. There is no contrary intent in the Family Code clearly appearing to forbid the waiver of a jury by the child and his attorney. *Id.*; *In re* A.J., No. 2-04-390-CV, 2005 WL 1475415, at *1 (Tex. App.—Fort Worth May 23, 2005, no pet.) (mem. op.) ("[A] child may waive any right granted to him if the waiver is voluntary.").

498. *See* FAM. § 51.09. Interestingly, unlike in civil law, under which no jury is granted unless a demand is made, in criminal and juvenile law, the jury trial is the default. FED. R. CIV. P. 216.

499. CRIM. PROC. art. 1.13.

500. FAM. § 51.09.

501. CRIM. PROC. art. 33.01 (West 2006); *see also* TEX. CONST. art. V, §§ 13, 17; TEX. GOV'T CODE ANN. § 62.301 (West 2013). Article 4.07 of the Texas Code of Criminal Procedure provides the county courts original jurisdiction in all misdemeanor cases except for fineable-only misdemeanors. CRIM. PROC. art. 4.07 (West 2005).

502. CRIM. PROC. arts. 4.05 (West 2005), 33.01(a); *see also* TEX. CONST. art. V, § 13; GOV'T § 62.201 (West 2013).

503. CRIM. PROC. art. 33.01.

misdemeanor—with one exception.[504] The primary difference between adult and juvenile juries is apparent when the child is being prosecuted in accordance with the Determinate Sentence Act.[505] If the adjudication petition has been certified by a grand jury to permit a determinate sentence, the jury always has twelve members, even if the trial is at the county court level.[506] Verdicts in adult criminal cases may be decided by fewer than all the jurors in certain circumstances;[507] however, in a juvenile case, the verdict must be unanimous—either six or twelve.[508]

5. Peremptory Challenges

The civil procedure ancestry of the juvenile law is seen in the rules affecting peremptory challenges in jury selection.[509] In a determinate sentence case, both sides are entitled to ten strikes in a felony case (excluding those for the death penalty), and in a multiple-defendant case, each defendant has six challenges, and the State has six challenges for each defendant.[510] In an ordinary delinquent conduct or conduct indicating a need for supervision case, each side has six strikes in the district court and three in the county court.[511]

6. Pleas of Guilty or True

Just as with pleas of guilty in adult felony cases,[512] in pleas of true in juvenile cases,[513] if the court does not accept a plea agreement between the

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504. FAM. § 54.03(c) (West 2008 & Supp. 2013) (referencing CRIM. PROC. art. 33.01(b)).

505. FAM. §§ 51.045 (West 2008), 54.03(c).

506. FAM. §§ 51.045, 54.03(c).

507. CRIM. PROC. art. 36.29 (West 2006 & Supp. 2013). Although the TCCP says a verdict must come from twelve jurors, if a juror dies or becomes disabled before the charge is read, the remainder of the jury may render verdict; and after the charge is read, if a juror becomes sick and no alternate is available, eleven jurors may render a verdict and assess punishment. *Id.*

508. FAM. § 54.03(c); *In re* J.L., No. 13-02-044-CV, 2006 WL 3803707, at *9 (Tex. App.—Corpus Christi Dec. 28, 2006, no pet.) (mem. op.) ("[J]uvenile proceedings require a unanimous verdict.").

509. CRIM. PROC. art. 35.16 (West 2006). Challenges for cause, however, remain the same in juvenile and adult cases. *See id.*

510. CRIM. PROC. art. 35.15(b) (West 2006) ("In non-capital felony cases . . . the State and defendant shall each be entitled to ten peremptory challenges. If two or more defendants are tried together each defendant shall be entitled to six peremptory challenges and the State to six for each defendant."); FAM. § 54.03(c) (In a determinate sentence case, "the jury must . . . be selected in accordance with the requirements in criminal cases.").

511. *See* CRIM. PROC. art. 35.15(c). A *Batson* objection applies in both juvenile and adult jury selection. *See* Batson v. Kentucky, 476 U.S. 79, 97 (1986). If an attorney is accused of using peremptory challenges for racial, ethnic, or gender reasons, the challenged attorney must give neutral reasons for using the strike. CRIM. PROC. art. 35.261 (West 2006); *Batson*, 476 U.S. at 97.

512. CRIM. PROC. art. 26.13(a)(2) (West 2009 & Supp. 2013). The recommendation of the prosecutor "is not binding on the court." *Id.* When the court inquires as to the existence of a plea bargain and informs the accused that it will reject the agreement, the court shall allow the defendant to withdraw his plea of guilty. *Id.* "This statute applies only when a defendant enters a plea of guilty or

State and the child and attorney, the court shall give the child a chance to withdraw the plea or stipulation of evidence.[514]

Q. The Disposition Hearing

The punishment phase of a juvenile trial is called the "disposition hearing."[515] In Texas, like most of adult criminal law, the disposition hearing must be a "separate, distinct, and subsequent" hearing from the adjudication hearing.[516] Similar to the adult procedure of using pre-sentence investigations,[517] at disposition, a juvenile court "may consider written reports from probation officers, professional court employees, or professional consultants," in addition to testimony, without regard to the rules of evidence or the criminal procedural rules.[518] This procedure is not a violation of due process,[519] hearsay,[520] relevance,[521] confrontation,[522] or with proper warnings, self-incrimination.[523]

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nolo contendere in a felony prosecution." Gutierrez v. State, 108 S.W.3d 304, 309 (Tex. Crim. App. 2003). Article 26.13 does not apply to misdemeanor cases. *Id.*; *see also* McGuire v. State, 617 S.W.2d 259, 260–61 (Tex. Crim. App. 1981) (finding that the court was not required to grant adult defendant's motion to withdraw his plea in a misdemeanor case).

513. FAM. § 54.03(j). This section makes no distinction between misdemeanor and felony delinquent conduct. *Id.*

514. *Id.* The Family Code goes beyond the TCCP to ensure there is no misunderstanding about its use and what exactly may be withdrawn. *Id.* In addition to being able to withdraw the plea, the juvenile can withdraw the stipulation of evidence, and the Code says "no document, testimony, or other evidence placed before the court that relates to the rejected agreement may be considered by the court in a subsequent hearing in the case," including statements made to investigators preparing a required social study. *Id.*

515. *See.* FAM. § 54.04 (West 2008 & Supp. 2013); *In re* N.S., No. 10-01-319-CV, 2004 WL 254215, at *13 (Tex. App.—Waco Feb. 11, 2004, pet. denied) (mem. op.) (Gray, J., concurring) ("Section 54.04 addresses the 'Disposition Hearing,' which is similar to the punishment phase of a criminal trial.").

516. FAM. § 54.04(a). There are no specific notice requirements, only mandating that the hearing be "separate, distinct and subsequent to the adjudication hearing." *Id.*

517. *See* CRIM. PROC. art. 42.12, § 9 (West 2006 & Supp. 2013) (Pre-sentence Investigations), 42.12, § 9A (Sex Offenders: Pre-sentence Investigation and Postsentence Treatment and Supervision).

518. FAM. § 54.04(b). "Notwithstanding the Texas Rules of Evidence or Chapter 37, Code of Criminal Procedure," the court may consider testimony or written reports of certain "professionals." *Id.* Unlike the court when it sets punishment, a jury in the sentencing phase of a determinate sentence case may not be given a social history report or social service file, and is, thus, limited to receiving only testimony to make its decision. FAM. § 54.03(d).

519. Tyler v. State, 512 S.W.2d 46, 48 (Tex. Civ. App.—Beaumont 1974, no writ).

520. FAM. § 54.04(b). This section specifically excepts the rules of evidence as to what the court may consider in disposition. *Id.*; *In re* V.J., No. 12-05-00324-CV, 2006 WL 1918181, at *2 (Tex. App.—Tyler July 12, 2006, no pet.) (mem. op.) ("Family Code Sections 54.04 and 54.05 provide a hearsay exception to allow a trial court to consider otherwise inadmissible information.").

521. FAM. § 54.04(b).

522. *In re* M.P., 220 S.W.3d 99, 112–13 (Tex. App.—Waco Feb. 7, 2007, pet. denied).

523. *In re* J.S.S., 20 S.W.3d 837, 842–44 (Tex. App.—El Paso June 8, 2000, pet. denied). In a disposition hearing, a child still has his privilege against self-incrimination protected by the Fifth Amendment of the United States Constitution, so if questioned about incriminating matters, he must be

There are significant differences in procedure at the punishment phase. Texas has implemented a progressive sanctions model for juvenile cases to attempt to standardize punishment throughout the state.[524] This is not an attempt to create sentencing guidelines as they exist in the federal system set by the United States Sentencing Commission.[525] The Texas Penal Code and other statutes set out punishments in ranges based upon the seriousness of the offense.[526] The juvenile progressive sanctions model has no enforcement provisions and is entirely discretionary in its adoption by each Juvenile Board.[527]

Unique to juvenile cases, after adjudication, a juvenile court may transfer a delinquent conduct case or a conduct indicating a need for supervision case to the juvenile court of the county of the child's residence for disposition, with consent of the receiving court.[528] Specific findings must be made in a juvenile case, or the child will be dismissed after adjudication and a final judgment entered without disposition.[529] Also, unlike adult cases, to place a child outside her home on probation or in the TYC, the juvenile court shall find in its order:

> (A) it is in the child's best interests to be placed outside the child's home; (B) reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home; and (C) the child, in the child's home, cannot

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warned. *Cf.* Estelle v. Smith, 451 U.S. 454, 463–70 (1981) (finding that self-incriminating testimony by a doctor during the sentencing of an adult prisoner violated the Fifth Amendment).

524. FAM. § 59.001 (West 2008). Although Chapter 59 places certain duties upon the local juvenile board, such as requiring data to be sent to the Texas Juvenile Probation Commission in the format specified, the duties to provide services for the children set out in the model create no liability on the state or local authorities for their failure to so provide. FAM. §§ 59.001, 59.013 (West 2008).

525. *See* 18 U.S.C. § 3551 (2006) (Chapter 227 of 18 U.S.C. § 3553 governs sentencing in federal court); 28 U.S.C. § 991 (2006 & Supp. 2010) (Chapter 58 of 28 U.S.C. § 991 governs the creation and operation of the United States Sentencing Commission).

526. *See* TEX. PENAL CODE ANN. §§ 12.01–12.51 (West 2011 & Supp. 2013). Title 3 of the Penal Code is entitled "Punishments," and includes Chapter 12, which sets out punishment classifications (both misdemeanor and felonies), the classification of crimes located outside the Penal Code, punishment for repeat and habitual offenders (both misdemeanor and felony), and related matters such as punishment for crimes of bias or prejudice, crimes in a disaster area or evacuated area, and for corporations and associations. *Id.* Examples of punishments outside the Penal Code are too numerous to list, but, for example, see the various punishments for drug crimes located in the Texas Controlled Substances Act. TEX. HEALTH & SAFETY CODE ANN. §§ 481.001–.354 (West 2010 & Supp. 2013).

527. FAM. § 53.013 (West 2008); *In re* Solis, No. 05-96-01449-CV, 1997 WL 599146, at *2 (Tex. App.—Dallas Sept. 30, 1997, no pet.) (mem op., not designated for publication) ("[E]ach juvenile board has the discretion to develop a progressive sanctions program using the guidelines.").

528. FAM. § 51.07 (West 2008 & Supp. 2013); *In re* D.L.T., No. 03-06-0069-CV, 2008 WL 2736902, at *1 n. 1 (Tex. App.—Austin July 9, 2008, no pet.) (mem. op.) ("[S]ection 51.07 of the family code authorizes a juvenile court to transfer a case for disposition from the county in which the offense occurred to the county of the child's residence.").

529. FAM. § 54.04(c) (West 2008 & Supp. 2013). For there to be a disposition, it must be found that "the child is in need of rehabilitation or the protection of the public or the child requires that disposition be made." *Id.* Otherwise, "the court shall dismiss the child and enter a final judgment without any disposition." *Id.*

> be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation . . . .[530]

Although dispositional alternatives are not a right, certain provisions of the juvenile law provide privileges and immunities, which, if violated, would be of constitutional dimension.[531]

1. Probation

A child,[532] like a qualified adult,[533] may have her commitment suspended by being placed on probation—sometimes called "community supervision" for adults[534]—upon "reasonable and lawful terms as the court may determine" in the child's home; the home of a relative or other fit person;[535] or with proper findings,[536] outside the home in a foster home, a

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530. *Id.* § 54.04(i)(1).

531. *See In re* J.T.H., 779 S.W.2d 954, 959–60 (Tex. App.—Austin Nov. 1, 1989, no writ). Failure of the juvenile court judge to make the three findings required in § 54.04(i) of the Family Code prior to removing the child from the home requires a new disposition hearing, even in a determinate sentence case. *Id.*

532. *See* FAM. § 54.04(q). If the court or jury in a determinate sentence case sentences a child to less than ten years confinement, the court or the jury may put the child on probation rather than place her in the TYC first. *Id.* When this happens, the court sets the length of probation for not more than ten years and may extend it by ten years if the extension can be completed before probation expires or the court loses jurisdiction to do so. *Id.* The advantage to this type of probation is that it is within the court's power to discharge the child from probation before the child's nineteenth birthday. *Id.* The court, however, still may transfer the probation to the district court before the child's nineteenth birthday. FAM. § 54.051 (West 2008 & Supp. 2013). There are several other advantages to this procedure. *See id.* One is that probation is transferred without regard to the nature of the underlying offense, whereas the courts in adult cases cannot place offenders on probation for certain violent and drug-related crimes. *Id.* § 54.051(e-1). A second advantage for the child is that the minimum terms of probation for adults (five years for a first degree felony, and two years for first and second degree felonies) do not apply. *See id.* Finally, the district court retains the power of the juvenile court to review the need for sex offender registration when appropriate. *Id.* § 54.051(h). The obvious disadvantage is the continuing possibility of revocation and the child ending up in adult prison. *See id.*; *In re* A.R.D., 100 S.W.3d 649, 651 (Tex. App.—Dallas 2003, no pet.) ("This section allows the court at the original disposition hearing to grant probation to a child who has been adjudicated and sentenced to TYC for a definite term of not more than 10 years.").

533. TEX. CODE CRIM. PROC. ANN. art. 42.12 (West 2006 & Supp. 2013). There are major restrictions on courts placing certain violent and drug offenders on probation without a jury recommendation. *Id.* art. 42.12, § 3g. A jury may give probation with certain limitations upon the sworn motion of the defendant that he has never before been convicted of a felony. *Id.* art. 42.12, § 4(e). No such requirement exists in juvenile law in Texas. *See id.*

534. *Id.* art. 42.12, § 2. The term "'[c]ommunity supervision' means the placement of a defendant by a court under a continuum of programs and sanctions, with conditions imposed by the court for a specified period during which: (A) criminal proceedings are deferred without an adjudication of guilt; or (B) a sentence of imprisonment or confinement, imprisonment and fine, or confinement and fine, is probated and the imposition of sentence is suspended in whole or in part." *Id.* The words "community supervision" and "probation" are used interchangeably throughout this Article and within the criminal justice system. *See id.*

535. FAM. § 54.04(d)(1)(A).

536. *Id.* § 54.04(d)(1)(B). Section 54.04(c) requires a finding that "the child is in need of rehabilitation or the protection of the public or the child requires that disposition be made." *Id.* This

public or private licensed residential treatment facility, or a public or private secure correctional facility.[537] Pursuant to the Family Code's supervisory powers in child welfare cases, when a child is removed from her home, the juvenile court may order permanency hearings pursuant to federal law.[538] Probation for a juvenile may extend for any period until her eighteenth birthday, but not beyond.[539] Regardless, unlike adults, sex offender probation must be a minimum of two years to end on the child's eighteenth birthday.[540] After a hearing, with some exceptions, the juvenile court may order mandatory community service for the child and the parents for a total of not more than five hundred hours.[541] One odd provision, which would

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section goes on to say no disposition may be made outside the child's home "unless the court or jury finds that the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of the probation." *Id.* Additional findings, however, are found in paragraph (i)(1). *See supra* notes 212, 214.

537. FAM. § 54.04(d)(1)(B). The statute provides that the public or private licensed residential treatment facility or secure correctional facility shall not be one operated by the TYC. *Id.*

538. *Id.* § 54.04(i)(2). Permanency hearings may be conducted by an administrative body pursuant to 42 U.S.C. § 675 (2006 & Supp. 2011). FAM. § 54.04(i)(2); *In re* T.A.W., 234 S.W.3d 704, 708–09 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (stating that the juvenile court "may approve an administrative body to conduct permanency hearings pursuant to 42 U.S.C. [s]ection 675 if required during the placement or commitment of the child").

539. *See* FAM. §§ 54.04(l), 54.05(b) (West 2008 & Supp. 2013). In Texas, children may be placed on probation for acts that occurred prior to their seventeenth birthday and may be supervised until they are eighteen. *See* FAM. § 54.05(b). This is peculiar, as the age of adult responsibility for criminal matters in Texas is seventeen. TEX. PENAL CODE ANN. § 8.07(b) (West 2011 & Supp. 2013); *In re* D.I.B., 963 S.W.2d 862, 864 (Tex. App.—San Antonio 1998), *aff'd*, 988 S.W.2d 753 (Tex. 1999) (quoting FAM. § 54.04(l)).

540. FAM. § 54.04(p). A term of the child's sex offender probation may require counseling and polygraph tests, shall require registration in accordance with Chapter 62 of the Texas Code of Criminal Procedure, and shall require a DNA sample. FAM. § 54.0405 (West 2008 & Supp. 2013). Further, the probation order may require parents to "attend four sessions of instruction" and go to monthly treatment groups. *Id.* § 54.0405(g)(1). Sex offender registration is quite different for children than adults. *See* TEX. CODE CRIM. PROC. ANN. art. 62.101 (West 2006 & Supp. 2013). For example, ten years after a child leaves the juvenile justice system, the requirement for registration ends. *Id.* Also, it is possible, during or after disposition, for the court to determine if the interests of the public require registration. CRIM. PROC. art. 62.351 (West 2006). A child can be exempted from registration, and the harm to the child and his family may be considered. CRIM. PROC. art. 62.352 (West 2006 & Supp. 2013). Further, a provision exists for de-registration for a child. CRIM. PROC. art. 62.353 (West 2006). As this registration for adults and juveniles has little to do with procedural rights—as long as the statute is deemed constitutional—a juvenile's sex offender registration requirements are only mentioned here to give context to differences in the way adults and children are treated. *See* CRIM. PROC. ch. 62 (West 2006 & Supp. 2013).

541. FAM. § 54.044 (West 2008). The community service requirement can be waived by the court if the child is physically or mentally incapable, if ordering community service will create a hardship on the child or family, or if the child has shown good cause why it should not be required. *See id.* The juvenile court can enforce its order by contempt. *Id.* § 54.044(h) (providing that orders for completion of community service may be enforced as provided in § 54.07 of the Family Code). As an aside, provision is made to allow insurance protection for the child and his parents while performing such community service. *Cf.* Puga v. City of Harlingen, No. 13-99-786-CV, 2000 WL 35729668, at *2 (Tex. App.—Corpus Christi Dec. 14, 2000, no pet.) (not designated for publication) (stating "Tex. Lab. Code Ann. § 504.012(a) . . . provides that a political subdivision may cover a 'child who is in a program established by the political subdivision to assist children in rendering personal services to a charitable or educational institution under Section 54.041(b), Family Code.' *See* TEX. LAB. CODE ANN. § 504.012(c). Section

certainly present interesting constitutional questions, is that a child is granted use immunity, and within thirty days of going on probation, is subject to mandatory disclosure of the source of any handgun she may have used during the commission of the delinquent conduct.[542] Three additional probation terms unique to children are the special requirements for graffiti probation,[543] alcohol violations,[544] and mandatory psychological counseling for cruelty to animals.[545]

2. Unique Provisions in a Conduct in Need of Supervision (CINS) Disposition

A "child who is accused, adjudicated, or convicted for conduct that would not, under state law, be a crime if committed by an adult" is referred to as a "status offender."[546] Status offenders, by definition, are granted different procedural rights than those accorded to adults and other children adjudicated delinquent.[547] For example, the status offender may not be committed to the TYC and may not be placed in a post-adjudication secure correctional facility.[548]

3. Special Provisions for Child Adjudicated for Contempt

If a child is adjudicated for contempt, she may not be placed in a post-adjudication secure correctional facility or in the TYC.[549] The need occasionally arises, though, to commit to a secure placement a status offender who has been adjudicated for violating a valid court order. This may be done only if the child received full due process and the juvenile probation department recommends it in a written report, and states "all

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54.041(b) of the Family Code allows the juvenile court to order the child or a parent to make full or partial restitution to the victim of the offense for property damage, loss or personal injury").

542. FAM. § 54.0406 (West 2008).

543. *See* FAM. §§ 54.046, 54.0481 (West 2008).

544. FAM. § 54.047 (West 2008).

545. FAM. § 54.0407 (West 2008).

546. FAM. § 51.02(15) (West 2008 & Supp. 2013); *In re* E.G., 212 S.W.3d 536, 537 (Tex. App.—Austin 2006, no pet.) ("'[S]tatus offender' is a child accused, adjudicated, or convicted of conduct that would not be a crime if committed by adult, such as truancy or curfew violation.").

547. FAM. § 51.02(15). Conduct creating a status offender, or conduct in need of supervision, includes (1) truancy (FAM. § 51.03(b)(2) (West 2008 & Supp. 2013)); (2) running away from home (*Id.* § 51.03(b)(3)); (3) a fineable-only offense (*Id.* § 51.03(b)(1)) transferred to juvenile court (FAM. § 51.08(b) (West 2008 & Supp. 2013)), but only if the offense is not criminal if committed by an adult; (4) failure to attend school (TEX. EDUC. CODE ANN. § 25.094 (West 2012)); (5) a violation of standards of student conduct (FAM. § 51.03(b)(5)); (6) a violation of a juvenile curfew ordinance or order; (7) a violation of the Alcoholic Beverage Code applicable to minors only; or (8) a violation of any other fineable-only offense under TEX. PENAL CODE ANN. § 8.07(a)(4)–(5) (West 2011 & Supp. 2013), but only if the offense is not criminal if committed by an adult. *Id.*; *see supra* notes 282–294, 426 (defining Conduct in Need of Supervision).

548. FAM. § 54.04(o)(1)–(2) (West 2008 & Supp. 2013).

549. *Id.* § 54.04(o)(3).

dispositions, including treatment, other than placement in a secure detention facility or secure correctional facility, have been exhausted or are clearly inappropriate," after reviewing the child's behavior, her circumstances, and the reasons for that behavior.[550]

4. Commitment to Texas Youth Commission for an Indeterminate Sentence

If the delinquency petition was not approved by a grand jury, was for a felony offense, and the court or jury make the required findings,[551] the court may commit the child to the TYC for an indeterminate period.[552] Certainly no adult offender is ever placed in confinement for an indeterminate period. Although it is called indeterminate, there are limitations. First, minimum lengths of stay apply to indeterminate sentences based upon the severity of the offense and an initial assessment of danger upon commitment.[553] Further, a child committed for an indeterminate period may be released on parole by the Texas Juvenile Justice Department.[554] In any event, when a child is committed in this manner, an indeterminate sentence shall end at the maximum age for the Department's control—the child's nineteenth birthday[555]—or when discharged from the Department's program.[556]

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550. *Id.* § 54.04(n)(2)(c); *E.G.*, 212 S.W.3d at 538 (discussing in detail the provisions of § 54.04(n)).

551. *See* FAM. § 54.04. To remove a child from her home, it must be found that "the child is in need of rehabilitation or the protection of the public or the child requires that disposition be made." *Id.* § 54.04(c). The juvenile court shall find in its order that:

> (1) it is in the child's best interests to be placed outside the child's home; (2) reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home; and (3) the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation . . . .

Id. § 54.04(i); *see supra* notes 213, 215.

552. FAM. § 54.04(d); *In re* L.A.M., No. 04-05-00913-CV, 2006 WL 2612622, at *2 (Tex. App.—San Antonio Sept. 13, 2006, no pet. h.) (mem. op.) ("A juvenile court has specific authority to commit a juvenile to TYC if the child engaged in delinquent conduct considered a felony.").

553. 37 TEX. ADMIN. CODE § 380.8525(d) (2013) (Tex. Juvenile Justice Dep't, Minimum Length of Stay/Minimum Period of Confinement). A child charged with a low-severity crime is sentenced to a minimum of nine months with a low and medium assessment level and twelve months if her risk is high. *Id.* § 380.8525(d)(1)(C). If the juvenile has committed a moderate-severity crime, her minimum stay will be twelve months for a low and medium-risk child and fifteen months for a high-risk child. *Id.* § 380.8525(d)(1)(B). As for the high-severity crime offender, for a low-risk child, her minimum stay is fifteen months, a medium-risk juvenile's minimum stay is eighteen months, and the high-risk assessment earns the offender a twenty-four-month minimum stay. *Id.* § 380.8525(d)(1)(A); *see also* TEX. HUM. RES. CODE ANN. § 244.001 (West 2013). High, medium, and low-severity crimes are defined by the Texas Juvenile Justice Department in their initial commitment assessment criteria and are collateral to this discussion and not cited here. *See* 37 ADMIN. §§ 380.8531 (West 2013) (Tex. Juvenile Justice Dep't, Temporary Admission Awaiting Transportation), 380.8527 (West 2013) (Tex. Juvenile Justice Dep't, Program Restriction Levels). The Texas Administrative Code calls these juveniles "Non-Sentenced Offenders." *See supra* note 238.

554. HUM. RES. § 245.051 (West 2013).

555. HUM. RES. § 245.151(d) (West 2013); *see also* 37 ADMIN. § 380.8501(19) (2013) (Tex. Juvenile Justice Dep't, Definitions). A "Non-Sentenced Offender" is therein defined as a juvenile who is

5. Disposition Subject to a Determinate Sentence

A unique juvenile procedure exists that has no parallel in adult criminal law. If a petition alleging specific delinquent felony conduct[557] is filed and approved by a grand jury,[558] upon adjudication,[559] if at the conclusion of the adjudication hearing the court or jury answer the qualifying special issues,[560] the court or jury may sentence a child to the Texas Juvenile Justice Department with a possible transfer to adult prison, with punishment lengths being dependent on the seriousness of the crime.[561]

Punishment maximums for determinate sentence cases are forty years if the offense is capital murder,[562] a first degree felony,[563] or an aggravated

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"committed to TYC for an indeterminate period of time, not to exceed age 19 (or age 21 for youth committed prior to June 9, 2007)." *See id.* § 380.8501(19).

556. HUM. RES. § 245.101 (West 2013).

557. *See supra* note 238 (discussing and listing the enumerated offenses).

558. TEX. FAM. CODE ANN. § 54.04(d)(3) (West 2008 & Supp. 2013). Approval by the grand jury must be by a vote of nine members "in the same manner that the grand jury votes on the presentment of an indictment" in adult cases. FAM. § 53.045(b) (West 2008 & Supp. 2013); TEX. CODE CRIM. PROC. ANN. art. 20.19 (West 2005). A prosecutor makes the decision to pursue a case for an offense specifically enumerated in § 53.045 of the Texas Family Code as an ordinary delinquent conduct adjudication or to present it to a grand jury under the Determinate Sentence Act at his sole discretion. *Id.* If the prosecutor chooses to present the petition to a grand jury, she does so in the county in which the petition is filed. FAM. § 53.045(a). There is nothing in the Family Code that prevents the petition from being presented to the grand jury before it is filed. *See id.* If the grand jury rejects the petition for treatment as a determinate sentence case, there is no prohibition in the Family Code preventing the prosecutor from then continuing to present the petition to the juvenile court as an ordinary delinquent conduct case and she can later resubmit the petition to the grand jury upon meeting certain conditions. *Id.*; *see* Bleys v. State, 319 S.W.3d 857, 863 (Tex. App.—San Antonio 2010, no pet.) (noting that the juvenile court waived its jurisdiction and transferred a sixteen-year-old to criminal court for prosecution on a charge of aggravated assault with a deadly weapon). On appeal, the defendant's complaint that the trial court should have first explored the possibility of a determinate sentence was denied. *Id.* The "decision to refer the petition to the grand jury [for approval for a determinate sentence] is at the State's option, and if the State never refers the petition, the . . . court has no jurisdiction to order determinate sentencing." *Id.* at 863 (citing *In re* S.J., 977 S.W.2d 147, 149 (Tex. App.—San Antonio 1998, no pet.)).

559. FAM. § 54.04(d)(3). The court or the jury, at the end of the adjudication hearing, must find that the child engaged in delinquent conduct by committing a crime listed in § 53.045(a). *Id.*

560. *Id.* § 54.04(c). For there to be a disposition, the court or the jury must answer by special issue whether "the child is in need of rehabilitation or the protection of the public or the child requires that disposition be made." *Id.* The discussion at this point is focused on placement of the child into the department under a determinate sentence. *Id.* Below, there will be a discussion of the possibility of placing the child on determinate sentence probation. *Id.* If the child is placed on probation in his home, no further findings are required. *Id.* If the court or jury desire to place the child "on probation outside the child's home[,] . . . the court or the jury" must also find "that the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of the probation." *Id.*; *see supra* text accompanying note 530.

561. FAM. § 54.04(d)(3); *see* FAM. § 53.045 (listing the offenses qualifying for a determinate sentence).

562. FAM. § 54.04(d)(3)(A). The adult maximum sentence is a death sentence. TEX. PENAL CODE ANN. § 12.31 (West 2011 & Supp. 2013); *In re* M.P., 220 S.W.3d 99, 116 (Tex. App.—Waco 2007, pet. denied) (noting that juveniles could face sentences up to forty years for certain crimes).

controlled substance felony;[564] twenty years if the offense is a second degree felony;[565] and ten years if the offense is a third degree felony.[566] As with indeterminate commitments, there are minimum lengths of stay—although they vary greatly from one year to ten years—that allow the Department to release a child on parole without the juvenile court's prior approval.[567]

a. Parole

The Texas Juvenile Justice Department does not need the court's approval to release a child to parole if not more than nine months remain before the child's discharge by completion of his sentence as explained in the preceding sentence.[568] If the child is still in the care of the department on the person's nineteenth birthday, the Department shall transfer that person to the adult prison system on that day "to serve the remainder of the person's sentence on parole."[569] This statute would also apply to a child who is on parole at age nineteen, and the Department could automatically transfer that child to adult parole.[570] The application of the adult parole rules in Texas law are somewhat different than the application of the juvenile determinate sentence parole rules, especially as they are affected by the presence of deadly weapons, which are not a major restriction in juvenile law for probation or parole eligibility until the child is transferred to the adult prison system.[571]

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563. FAM. § 54.04(d)(3)(A). The adult maximum sentence is life in prison with the possibility of parole. PENAL § 12.32 (West 2011 & Supp. 2013); *M.P.*, 220 S.W.3d at 116.

564. FAM. § 54.04(d)(3)(A). The adult maximum sentence is life in prison with the possibility of parole. TEX. HEALTH & SAFETY CODE ANN. § 481.112 (West 2010); *M.P.*, 220 S.W.3d at 116.

565. FAM. § 54.04(d)(3)(B). The adult maximum sentence for a second degree felony is likewise twenty years, plus a fine of $10,000. PENAL § 12.33 (West 2011).

566. FAM. § 54.04(d)(3)(C). The adult maximum sentence for a third degree felony is likewise ten years, plus a fine of $10,000. PENAL § 12.34 (West 2011).

567. TEX. HUM. RES. CODE ANN. § 245.051(c) (West 2013). To release a child so committed without the court's approval, the child must have served at least (1) ten years for capital murder, (2) three years for an aggravated drug felony or a first degree felony, (3) two years for a second degree felony, or (4) one year for a third degree felony. *Id.* The department can also seek approval for release on parole at any time. *Id.* § 245.051(d).

568. *Id.* § 245.051(g).

569. HUM. RES. § 245.151(e) (West 2013). Yes, if by some chance the child is still in the care of the Department on the child's nineteenth birthday, and of course, has not already been discharged or previously transferred to the prison system, the child goes directly from the Department into adult parole. *Id.* This would be an incredible opportunity for a child who reaches maturity to not have to suffer the effects of adult prison without the opportunity to complete parole under supervision outside the prison walls. *Id.*

570. *Id.*

571. *See* TEX. GOV'T CODE ANN. ch. 508 (West 2012 & Supp. 2013). Most of the rules for adult parole are in Chapter 508 of the Texas Government Code. *Id.* One aside—in a determinate sentence case, the court or jury is charged with making a finding on the child's use or exhibition of a deadly weapon during the commission or immediate flight from the offense. *Id.* Unlike adult crime, it must be personal use or exhibition by the child. TEX. FAM. § 54.04(g). If the fact finder finds affirmatively, it

b. Release or Transfer Hearing

Despite the child's length of stay, once a child in the care of the Texas Juvenile Justice Department reaches the age of sixteen—but before the age of nineteen—the Department may request approval of the juvenile court to transfer the child to adult prison,[572] or may request the approval of the juvenile court to release the child early on parole.[573]

c. Determinate Sentence Probation

If, after an adjudication by a court or jury under the Determinate Sentence Act, the court or jury finds the child "is in need of rehabilitation or the protection of the public or the child requires . . . disposition"[574]—a

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must be reflected on the disposition order. *Id.* If the child is eventually transferred to adult prison to complete the sentence, this will negatively affect his eligibility for parole. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3g (West 2006 & Supp. 2013). The adult provision speaks of a finding during the commission of a felony, or during the immediate flight therefrom, that the defendant used or exhibited or was a party to the offense and knew it would be used or exhibited. CRIM. PROC. art. 42.12, § 3g(a)(2). In an adult case, the court may assess a term in prison of sixty to one hundred twenty days as an additional term of probation in such a case. *Id.* This affects eventual parole eligibility if there is an affirmative finding in the child's disposition order, the "inmate"—being originally a child—"is not eligible for release on parole until the inmate's actual calendar time served, without consideration of good conduct time, equals one-half of the sentence or 30 calendar years, whichever is less," but never less than two calendar years. GOV'T § 508.145 (d)(1) (West 2012 & Supp. 2013). The effect of this on a child given a forty-year sentence as a fifteen-year-old, if transferred to prison, is that he will not be eligible to be considered for probation until he is thirty-five years old and will not be discharged until he is fifty-five years old. *Id.* This is perhaps better than the fifteen-year-old who is transferred to the district court and receives a life sentence for the same crime, who will not be eligible for the first parole consideration until he is forty-five years old and whose sentence will never be discharged. *Id.*

572. HUM. RES. § 244.014(a) (West 2013 & Supp. 2013). Normally this provision would be used by the Department when it becomes apparent that "the child's conduct . . . indicates that the welfare of the community requires the transfer." *Id.* § 244.014(a)(2). For a child who has previously been granted parole, the department may only ask for this transfer (1) if the child is adjudicated again for a felony while on parole, (2) if the child is convicted in adult court for a felony while on parole, or (3) a revocation of his parole is first required. *Id.* § 244.014(c). This provision makes it apparent that the department may ask for transfer directly from parole only after the child is convicted of a delinquent-conduct felony or adult felony criminal act while on parole, or after parole is revoked. *Id.* After the hearing, the Department may terminate its control of the person by transferring the person to the adult prison system for completion of the person's sentence pursuant to the juvenile court's order to transfer after hearing. HUM. RES. § 245.151(c).

573. HUM. RES. § 245.051(d). Even if a child has not reached his minimum length of stay in a determinate sentence, if the child is doing well, the Department can ask to release the child on parole. *Id.* At the release or transfer hearing, the child is entitled to a full complement of rights, including the right to an attorney, the right to notice, the right to confrontation, the right to present evidence and make argument in a public hearing on the record, and the right to a guardian ad litem, if necessary. *See* FAM. §§ 51.11 (West 2008), 54.11 (West 2008 & Supp. 2013). The juvenile "court retains jurisdiction over a person, without regard to the age of the person," who is referred to the court for a release or transfer hearing. FAM. § 51.0411 (West 2008). There is nothing in the adult criminal law to provide this level of supervision by a trial court over one previously committed. *Id.*

574. FAM. § 54.04(c); *In re* J.R.C.S., 393 S.W.3d 903, 914 (Tex. App.—El Paso 2012, no pet.) ("Unless the court or jury finds the child is in need of rehabilitation or the protection of the public or the

finding that allows the court to make disposition[575]—and if the resulting sentence is not more than ten years, the court or jury may place the child on probation.[576] The court sets the term of the probation, which may be extended up to ten years.[577] Unless the child has successfully completed probation and has already been discharged—unlike probation for ordinary delinquent conduct, which shall be discharged no later than the child's eighteenth birthday—if the term of a Determinate Sentence Act probation has not expired as the child nears her nineteenth birthday, upon motion, the juvenile court shall consider transferring the probation to the appropriate district court for completion as an adult probation or may merely release and discharge the child from probation on or before the child's nineteenth birthday.[578] Both delinquent-conduct and determinate-sentence probations may be "in the child's own home or in the custody of a relative or other fit person,"[579] or, with proper findings,[580] outside the home.[581] Great care is provided when it comes to placement of the child on probation, whereas adult probation simply orders the convicted to "[r]emain within a specified place"[582] or places the probationer in a variety of facilities for treatment,[583] punishment,[584] or to prevent access to others.[585]

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child requires that a disposition be made, the court must dismiss the child and enter a final judgment without any disposition.").

575. *J.R.C.S.*, 393 S.W.3d at 914.

576. FAM. § 54.04(q); *In re* A.R.D., 100 S.W.3d 649, 651 (Tex. App.—Dallas 2003, no pet.) ("This section allows the court at the original disposition hearing to grant probation to a child who has been adjudicated and sentenced to TYC for a definite term of not more than 10 years.").

577. FAM. § 54.04(q).

578. FAM. § 54.051 (West 2008). If the child's probation is to extend past his nineteenth birthday, on motion of the prosecutor, "the juvenile court shall hold a hearing to determine whether to transfer the child to an appropriate district court or discharge the child from the sentence of probation." FAM. § 54.051(a). The hearing must occur before the child turns nineteen. FAM. § 54.05(b) (West 2008 & Supp. 2013). The transfer may be without a showing that the child violated a condition of probation. *Id.* § 54.05(f); Krupa v. State, 286 S.W.3d 74, 76 (Tex. App.—Waco 2009, pet. ref'd) (noting that "[s]ection 54.051 provides for the transfer of a child placed on probation, which continues past his eighteenth birthday, to an appropriate district court.").

579. FAM. § 54.04(d)(1)(A).

580. *Id.* § 54.04(i)(1).

581. *Id.* § 54.04(d)(1)(B). Placements while on probation outside the home or outside the custody of a relative or other fit person shall be in "(i) a suitable foster home; (ii) a suitable public or private residential treatment facility licensed by a state governmental entity or exempted from licensure by state law, except a facility operated by the Texas Youth Commission; or (iii) a suitable public or private post-adjudication secure correctional facility that meets the requirements of Section 51.125, except a facility operated by the Texas Youth Commission." *Id.*

582. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 11(a)(7) (West 2006 & Supp. 2013).

583. *See id.* art. 42.12, §§ 9A (sex offenders—treatment & supervision), 11(d) (inpatient treatment for the mentally ill or one with intellectual disability), 14 (substance abuse treatment in prison), 18(b) (drug treatment).

584. *See id.* 42.12, §§ 8 (boot camp commitment), 12 (confinement as a condition of probation), 13A (confinement for crimes committed because of bias or prejudice).

585. *See id.* 42.12, § 13B, §§ 13D (creating child safety zones), 13G (preventing internet access), 14 (restricting communication with family violence victims).

d. Discharge

In any event, the Texas Juvenile Justice Department shall discharge a child when the sentence has been completed while in its care.[586]

R. The Modification Hearing

When a child is placed on probation, whether it is (1) for delinquent conduct in a traditional adjudication or with a determinate sentence, or (2) for conduct indicating a need for supervision, at some point it may become necessary to change the terms and conditions of the child's probation. The procedural requirements of a modification are similar to those in adjudication hearings, such as giving the child notice of the details of the original adjudication, the probation conditions alleged to be violated, the specific behavior of the child that is in violation of the conditions, and a prayer setting out the requested relief.[587] One interesting twist to a juvenile case is that the petition to modify does not have to be brought by a prosecutor; it may be brought by the child, a parent, a guardian, a guardian ad litem, the child's attorney, a probation officer, the court itself, or a prosecutor.[588] Reasonable notice of the hearing must be given to all parties,[589] and the burden of proof is by a preponderance "that the child violated a reasonable and lawful order of the court."[590] Unlike adjudication hearings, a plea of true to the violations is sufficient without further

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586. TEX. HUM. RES. CODE ANN. § 245.151(b) (West 2013). The child is entitled to credit for time in the TYC and for any time spent in connection with the subject offense in a secure detention facility before transfer to the TYC. FAM. § 54.052 (West 2008). In addition, it is my opinion that the child is entitled to good time credit during this pre-adjudication or pre-transfer period if granted by the facility. *See id.* In *Ex parte Gomez*, the Court of Criminal Appeals approved good time credit for a child who was certified as an adult, and tried and sentenced to prison as an adult. *Ex parte* Gomez, 15 S.W.3d 103, 104 (Tex. Crim. App. 2000). In practice, it is very seldom for one transferred to prison to receive any more than his day-to-day credit from the sheriff or another party holding the convict pre-disposition, but it is authorized by the Court of Criminal Appeals. *See id.*

587. FAM. § 54.05(d) (West 2008 & Supp. 2013). Actually, the Code only calls for a petition, identifies who may bring the petition, and requires that reasonable notice of the hearing "shall be given to all parties." *Id.* The Constitution, however, requires more specific notice. *See In re* Gault, 387 U.S. 1 (1967); J.C.O. v. State, No. 04-11-00019-CR, 2012 WL 76968, at *1 (Tex. App.—San Antonio Jan. 11, 2012, no pet.) (mem. op.) (stating that the section requires "'[r]easonable notice' of a hearing to modify disposition be given to all parties").

588. FAM. § 54.05(d); *In re* J.A.S., III, No. 13-06-00280-CV, 2008 WL 5248967, at *2 (Tex. App.—Corpus Christi Dec. 18, 2008, no pet.) (mem. op.) (quoting language stating who may bring the petition).

589. *See* FAM. §§ 51.02(10) (West 2008 & Supp. 2013), 54.05(d). The Code defines a party to an action under Title 3 to be "the state, a child who is the subject of proceedings under this subtitle, or the child's parent, spouse, guardian, or guardian ad litem." FAM. § 51.02(10).

590. *Id.* § 54.05(f); *In re* L.T., III, No. 12-05-00048-CV, 2005 WL 3725161, at *1 (Tex. App.—Tyler Jan. 31, 2006, no pet.) (mem. op.) ("The burden of proof in a modification hearing is by a preponderance of the evidence.").

proof.[591] "There is no right to a jury . . . ."[592] The child may not waive the modification hearing.[593] And the child is entitled to an attorney to be appointed[594] if the modification is intended to result in commitment to the Texas Juvenile Justice Department or to a post-adjudication secure correctional facility for a period longer than thirty days.[595] The courts are split on whether counsel should be given ten days to prepare for a modification hearing.[596]

If the modification is a commitment, the child may only be committed to the Department for a felony,[597] and if the child is subject to a determinate sentence, the term to which the child may be committed may not exceed the original sentence given by the court or a jury[598]—which would be ten years at a maximum, as a sentence greater than ten years would disqualify the child for probation.[599] The same rules are still applicable to the court's review of written reports,[600] which must include the same findings necessary to remove the child from the home required in disposition

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591. *In re* V.D.B., No. 04-97-00093-CV, 1997 WL 330988, at *1 (Tex. App.—San Antonio June 18, 1997, no writ) (mem. op., not designated for publication).

592. FAM. § 54.05(c); *In re* J.D.S., No. 06-06-00120-CV, 2007 WL 2188706, at *1 (Tex. App.—Texarkana Aug. 1, 2007, no pet.) (mem. op.) ("At a hearing to modify disposition, there is no right to a jury trial.").

593. FAM. § 54.05(h). This section forbids the waiver of a hearing in a disposition modification in which commitment to the Department or to a post-adjudication secure correctional facility for longer than thirty days is sought. *Id.*

594. FAM. § 51.10(b)(4) (West 2008). This section forbids the waiver of an attorney in a modification hearing in which commitment to the Department is sought. *Id.*

595. FAM. § 51.101(e) (West 2008 & Supp. 2013). The court shall determine if the child's family is indigent upon the filing of a motion or petition to modify; if the motion seeks commitment to the Department or placement in a secure correctional facility, the court must appoint an attorney on or before the fifth working day after the date the motion or petition is filed. *Id.*

596. *See* FAM. § 51.10(h). *Compare In re* J.C., 556 S.W.2d 119, 121 (Tex. Civ. App.—Waco 1977, no writ) (noting that "reasonable notice" of § 54.05(d) governs and eight days was reasonable (internal quotation marks omitted)), *with In re* M.L.S., 590 S.W.2d 626 (Tex. Civ. App.—San Antonio 1979, no writ) (noting that the ten-day requirement of § 51.10(h) of the Texas Family Code does apply to modification hearings).

597. FAM. § 54.05(f); *In re* J.G., No. 03-11-00892-CV, 2013 WL 490941, at *2 (Tex. App.—Austin Feb. 7, 2013, no pet. h.) (mem. op.) ("Commitment to the TYC by modification order is proper only if a juvenile originally committed a felony and subsequently violated one or more conditions of probation.").

598. FAM. § 54.05(j); *In re* D.A.O., No. 03-09-00483-CV, 2010 WL 3271812, at *2 (Tex. App.—Austin Aug. 19, 2010, no pet.) (mem. op.) ("[S]ection 54.05(j) . . . authorizes the juvenile court to modify disposition of a juvenile placed on probation pursuant to section 54.04(q) to commit the juvenile to the TYC 'for a term that does not exceed the original sentence assessed by the court or jury.'" (quoting FAM. 54.05(j))).

599. FAM. § 54.04(q) (West 2008 & Supp. 2013); *In re* A.R.D., 100 S.W.3d 649, 651 (Tex. App.—Dallas 2003, no pet.) ("This section allows the court at the original disposition hearing to grant probation to a child who has been adjudicated and sentenced to TYC for a definite term of not more than 10 years.").

600. FAM. § 54.05(e). After the court has a hearing on the merits of the allegations of violations of the conditions of probation, "the court may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of other witnesses." *Id.*

hearings.[601] Also, the court must specifically state its reasons for modification[602] and give the child a copy of its order.[603] The child may appeal the order of the court.[604]

IV. THE TEXAS JUVENILE JUSTICE CODE: TITLE 3 OF THE FAMILY CODE

A. Circa 2013: Purpose and Interpretation

The use of Title 3 of the Family Code to locate the procedural rules for children was initially an obvious attempt to decriminalize juvenile crime. The first section of Title 3 has always been used to define the purposes of the "Juvenile Justice Code," but has failed miserably from the beginning in its attempt to do so.

Title 3 of the Texas Family Code is intended to:

> (1) provide for the protection of the public and public safety, [and] (2) consistent with the protection of the public and public safety; (A) to promote the concept of punishment for criminal acts; (B) to remove, where appropriate, the taint of criminality from children committing certain unlawful acts; and (C) to provide treatment, training, and rehabilitation that emphasizes the accountability and responsibility of both the parent and the child for the child's conduct . . . .[605]

Without going further, it should be noted that it is not until the third numbered paragraph that the welfare of the child is mentioned. Political code words such as "public safety," "criminal act," and "accountability and responsibility of . . . the parent," do not move the discussion forward.[606]

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601. *Id.* § 54.05(m) (West 2008 & Supp. 2013). Just as in the order of removal from the home to place the child on probation or commitment required as in the original disposition hearing under § 54.04(i), to do the same in a modification, the court must find and include in its order that "(A) it is in the child's best interests to be placed outside the child's home; (B) reasonable efforts were made to prevent or eliminate the need for the child's removal from the child's home and to make it possible for the child to return home; and (C) the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation . . . ." *Id.*; *In re* C.J., No. 01-08-00771-CV, 2009 WL 1886614, at *1 (Tex. App.—Houston [1st Dist.] July 2, 2009, no pet.) (mem. op.) (discussing findings needed under § 54.05(m)).

602. FAM. § 54.05(i); *In re* J.M., 287 S.W.3d 481, 489 (Tex. App.—Texarkana 2009, no pet.) (quoting § 54.05(i) in its analysis).

603. FAM. § 54.05(i).

604. FAM. § 56.01(c)(1)(C) (West 2008 & Supp. 2013); *In re* K.T., No. 12-03-00094-CV, 2003 WL 1701973, at *1 (Tex. App.—Tyler Mar. 1, 2003, no pet.) (mem. op.) ("Section 56.01[(c)] . . . provides that an appeal may be taken from an order entered under section 54.05 regarding modification of a previous juvenile court disposition.").

605. FAM. § 51.01(1)–(2) (West 2008); *In re* Hall, 286 S.W.3d 925, 927 (Tex. 2009) ("The Legislature enacted the Juvenile Justice Code as a separate system for the prosecution, adjudication, sentencing, and detention of juvenile offenders to protect the public and provide for the wholesome moral, mental, and physical development of delinquent children.").

606. *See* FAM. § 51.01.

Where is protection of the child? Why do we qualify removing the "taint of criminality" with the words "where appropriate"?[607] Should it not always be the goal of a maturing society to enable those who falter in their youth to redeem themselves toward a long, productive, and happy life? Why must the "concept of punishment" be consistent with the protection of the public and public safety?[608] The retributive nature of our juvenile justice system must be reexamined.

Finally, paragraph 3 of § 51.01 of the Family Code states its purpose is "to provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions."[609] Is not all moral development "wholesome"? Is there unwholesome moral, mental, and physical development? Perhaps an unwholesome development would be of such a nature that the majority would disapprove.

The Family Code then once again returns to announcing the need to protect the welfare of the community,[610] as if protecting the public and public safety is not sufficient. Controlling "the commission of unlawful acts by children" is the next named purpose,[611] making the inane connection between *controlling* children's bad behavior and the community's welfare. Finally, all the foregoing is to be done in "a family environment whenever possible, separating the child from the child's parents only when necessary for the child's welfare or in the interest of public safety and when a child is removed from the child's family, to give the child the care that should be provided by parents"[612]—nonsense.

The Family Code's seeming afterthought finally says the purposes of the Juvenile Justice Code are to be fulfilled in a family environment when possible, reserving the removal of a child from parents for when it is in the child's interest or for the protection of the public, but expressly only for the purpose "to give the child the care that should be provided by parents."[613] It is care the child is entitled to receive—not punishment, not vengeance, but care through "treatment, training, and rehabilitation that emphasizes the accountability and responsibility of both the parent and the child for the child's conduct."[614]

Then why does the Family Code first speak of controlling "the commission of unlawful acts," "the concept of punishment for criminal acts," and "wholesome . . . development" of the child?[615] Controlling children for the purpose of protecting the community raises repugnant

607. *See id.*
608. *See id.*
609. *Id.* § 51.01(3).
610. *See id.* § 51.01(4).
611. *Id.*
612. *See id.* § 51.01(5).
613. *Id.*
614. *Id.* § 51.01(2)(C).
615. *See id.* § 51.01(1)(A), (3)–(4).

issues of restraint and managing children by taking charge of their development. The subjective determination of what is "wholesome" seems to add even more to the perception that children who violate the law are immoral—without responsibility or accountability—and so are their parents. Children, it would seem, must be punished and controlled for the safety and welfare of the community, society, and themselves—perhaps in that order. Even though those who set policy in Texas would deny they possess such a fatalistic attitude about juvenile offenders, and without wondering out loud why a society would look with such disdain at a segment of our population, a look at the Family Code's evolution when it comes to punishment procedures highlights what my criticism cannot.[616]

B. Circa 1990s: Purpose and Interpretation

When first passed by the Texas Legislature in 1973, the very first purpose of Title 3 was "to provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions."[617] In the mid-1990s, with the push toward the ill-fated and wrongly conceived zero-tolerance policy toward juvenile behavior,[618] the initial concern for the care of children was relegated to fifth in the purposes of Title 3.[619] In its place was first to provide for the protection of the public and public safety, and consistent with that founding concern, "to promote the concept of punishment for criminal acts."[620] This, in my opinion, is the codification of the cultural racist attitude that led to the creation of an entire system designed to insulate the ethnic majority from its responsibility to provide for the children of the minorities. What "these children" needed was a stricter application of the rod, which must have included exclusion from the great public education experiment, and surely they would become aware that they must conform their behavior to "right thinking" behavior. What occurred instead was a systematic exclusion from opportunity, criminalization, and marginalization of the very group the majority feared so much. Now, almost a generation later, with so many

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616. *See infra* Part IV.B.

617. Acts of May 25, 1973, 63rd Leg., R.S., ch. 544, § 51.01, 1973 Tex. Gen. Laws 1460, 1461 (amended 1995) (current version at TEX. FAM. CODE ANN. § 51.01(3) (West 2008)). When the Act was adopted, it amended TEX. PENAL CODE ANN. art. 30, and repealed TEX. REV. CIV. STAT. ANN. art. 2338–1, and TEX. REV. CIV. STAT. ANN. art. 5143, and TEX. REV. CIV. STAT. ANN. art. 5143a. Act of May 25, 1973, 63rd Leg., R.S., ch. 544, § 1, 1973 Tex. Gen. Laws 1460. It had been more than a generation since Texas had, to any great extent, updated its approach to children who are charged as delinquents, are in need of supervision, or have a mental illness or intellectual disability. *See id.*

618. Patrick S. Metze, *Plugging the School to Prison Pipeline by Addressing Cultural Racism in Public Education Discipline*, 16 U.C. DAVIS J. JUV. L. & POL'Y 203, 216–31 (2012).

619. FAM. § 51.01(5). In this rewrite of the original 1973 version of Title 3, the original Tex. Fam. Code Ann. § 51.01(1) was renumbered as § 51.01(3) by the 74th Legislature in 1995, to be effective January 1, 1996.

620. FAM. § 51.01(1)–(2)(A).

adults without an education suffering the net effects of their criminalization, the initial purposes of Title 3 are forgotten.

The second purpose of Title 3 was "to protect the welfare of the community and to control the commission of unlawful acts by children."[621] This purpose found itself pushed below the need to care, protect, and provide for the development of children. After the need to protect the public and punish the children, the new revision of the code completely changed the underlying benefit of "juvenile justice." Prior to the 1995 change, the third purpose was "consistent with the protection of the public interest"—not the new protection of the public and its safety—"to remove from children committing unlawful acts the taint of criminality and the consequences of criminal behavior and to substitute a program of treatment, training, and rehabilitation."[622] What more noble statement of concern for children could have been made? The question should arise whether it is possible with modern teenagers to treat them, train them, and rehabilitate them for a productive adult life with the ever-present taint of their childish behaviors and the consequences that fall so heavily upon adults for criminal behavior in today's society. During the growth of the zero-tolerance paranoia, those who established public policy were apparently concerned only with their own safety and the safety of their constituents. Let the "youth prisons" and adult correctional facilities handle the effects of criminal behavior. Create recidivism statutes that set mandatory minimums, enhance punishments for reoffenders, and expand the collateral consequences of criminal behavior. Soon, we in the United States found ourselves with over two million citizens locked up, all with less opportunity or chance for a productive life. And it began with the way we treated our children.

So, in 1995, Texas changed the language "remove . . . the taint of criminality"[623] to "remove, where appropriate, the taint of criminality from children committing certain unlawful acts."[624] The new language says nothing of protecting children from the consequences of their criminal behavior.[625] In the initial version, the purpose was to remove children from their criminal ways and the effects of that behavior and instead give them a program of "treatment, training, and rehabilitation."[626] Now, we are "to provide treatment, training, and rehabilitation that emphasizes the

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621. Act of May 25, 1973, 63rd Leg. R.S. ch. 544, § 51.01(2), 1973 Tex. Gen. Laws 1460, 1461 (amended 1995) (current version at FAM. § 51.01(4) (West 2008)).

622. Act of May 25, 1973, 63rd Leg. R.S. ch. 544, § 51.01(2), 1973 Tex. Gen. Laws 1460, 1461 (amended 1995) (current version at FAM. § 51.01(2) (West 2008)).

623. *Id.*

624. FAM. § 51.01 (2)(B), (3).

625. *See id.* § 51.01.

626. Act of May 25, 1973, 63rd Leg., R.S., ch. 544, § 51.01(3), 1973 Tex. Gen. Laws 1460, 1461 (amended 1995) (current version at FAM. § 51.01(2)(c) (West 2008)).

accountability and responsibility of both the parent and the child for the child's conduct."[627]

God forbid we spend money to modify behavior rather than to punish behavior. Individual "accountability" has been the watchword. It is this obvious political catch phrase, designed to insulate society from its obligation to protect the young and those in need and to limit societies' responsibilities to these groups, that has affected our miserable circumstances. In a society that bases its founding on the teachings of one who fed the hungry and protected the poor, and on concepts of welcoming the world's "huddled masses yearning to [be] free," we have become stingy and self-centered in the most unappealing way.[628] And we wonder why we have societal problems in the generation of children, now adults, who grew up during zero-tolerance.

The final two original purposes of Title 3 were slightly reworded, though not to affect their meaning, and were moved to the end of the statute.[629] But now, the purpose of achieving these goals "in a family environment . . . separating the child from the child's parents only when necessary" has little practical meaning.[630] Few would argue that our social welfare system in Texas encourages the original purpose of Title 3. And as far as the "simple judicial procedure through which [Title 3 is] executed and enforced" and "constitutional and other legal rights [are] recognized and enforced," juvenile law in Texas is never simple and often too complicated for the professionals to understand it.[631] The original version of Title 3 had forty-four sections covering proceedings before and during referral to court, judicial proceedings, children with mental illness and intellectual disabilities, and appeal. Now Title 3 has 260 sections covering every political hot potato in the last forty years. No longer "simple," our juvenile code is beyond understanding.[632]

C. Classification of Juvenile Offenders

1. Delinquent Conduct, Conduct Indicating a Need for Supervision, Transfer to Criminal Court

Juveniles under the new Family Code in 1974 were classified as those alleged to have committed delinquent conduct or conduct indicating a need

627. FAM. § 51.01(2)(c).

628. Emma Lazarus, *The New Colossus*, *in* THE OXFORD BOOK OF AMERICAN POETRY 184 (David Brehm ed., 2006).

629. *Compare* Act of May 25, 1973, 63rd Leg., R.S., ch. 544, § 51.01(4)–(5), 1973 Tex. Gen. Laws 1460, 1461 (amended 1995) (current version at FAM. § 51.01(5)–(6) (West 2008)), *with* FAM. § 51.01(5)–(6).

630. *See* FAM. § 51.01(5).

631. *See id.* § 51.01(6).

632. *See id.*

for supervision.[633] The juvenile court could waive its original jurisdiction and transfer a child to adult court if the child was fifteen or older, the alleged offense was a felony, and "after full investigation and hearing the juvenile court determine[d] that because of the seriousness of the offense or the background of the child the welfare of the community require[d] criminal proceedings."[634] But the vast majority of juvenile offenders were to be handled in juvenile court, and the dispositions were limited—mostly to probation in the home for a maximum of one year.[635] Now, of course, the definitions have expanded—responding to political necessity—but children at the beginning of Title 3 were either handled in the juvenile justice system, placed on probation or committed to the then-Texas Youth Council,[636] or certified as adults and transferred to the adult criminal court for adult prosecution, limited only to fifteen and sixteen-year-olds.[637]

2. Determinate Sentence Disposition

In 1987, in response to the public's perception of a dramatic rise in violent crime committed by those younger than fifteen, the Texas Legislature passed a determinate sentence act for children.[638] Believed to be a positive improvement in dispositional alternatives available for children,[639] it allowed prosecutors to seek to sentence children—still subject to juvenile court jurisdiction—found to be delinquent for up to thirty years confinement for only six named violent crimes: capital murder, murder, aggravated sexual assault, aggravated kidnapping, deadly assault on a law enforcement or corrections officer or a court participant, and attempted capital murder.[640]

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633. Act of May 25, 1973, 63rd Leg., R.S., ch. 544, § 54.02(a)(3), 1973 Tex. Gen. Laws 1460, 1462 (amended 1995) (current version at FAM. § 51.03 (West 2008 & Supp. 2013)).

634. *Id.* (amended 1995) (current version at FAM. § 54.02(3) (West 2008 & Supp. 2013)).

635. *See id.* § 54.04(d) (amended 1995) (current version at FAM. § 54.04(d) (West 2008 & Supp. 2013)).

636. *Id.* § 54.04 (amended 1995) (current version at TEX. FAM. CODE ANN. § 54.04 (West 2008 & Supp. 2013)). Children adjudicated delinquent were subject to being placed on probation, in or out of their home, or being placed in the Texas Youth Council (later to become the Texas Youth Commission) for an indeterminate time period, not to extend beyond their eighteenth birthdays. *Id.*

637. *Id.* § 54.02(h), (amended 1995) (current version at FAM. § 54.02(h) (West 2008 & Supp. 2013)).

638. Act of June 17, 1987, 70th Leg., R.S., ch. 385, § 7, 1985 Tex. Gen. Laws 1891, 1893 (amended 2013 (current version at FAM. § 53.04S (West 2008 & Supp. 2013)).

639. Robert O. Dawson, *The Third Justice System: The New Juvenile-Criminal System of Determinate Sentencing for the Youthful Violent Offender in Texas*, 19 ST. MARY'S L.J. 943 (1988) [hereinafter Dawson, *The Third Justice System*]. "The determinate sentencing legislation exists because the procedure it creates is preferable to the alternative of transferring a juvenile who has committed a violent offense to the criminal court for prosecution." *Id.* at 946.

640. *Id.* at 945–46. Professor Dawson noted that although he was not an "impartial commentator" on this legislation as he consulted in its writing, "I believe House Bill 682 is a needed and useful piece of legislation. I am firmly of the view that it is constitutional and that when implemented it will prove to

But as is all too often the case with the bloodlust that is criminal law, what started as six crimes applicable to a very small group of juvenile offenders has now reached seventeen enumerated subparagraphs expanding exponentially the list of offenses a prosecutor can now refer to a grand jury for determinate sentence disposition.[641] Those crimes are now murder; capital murder; manslaughter; aggravated kidnapping; sexual assault; aggravated sexual assault; aggravated assault; aggravated robbery; felony injury to a child, elderly individual, or disabled individual (other than a state jail felony); felony deadly conduct involving the discharge of a firearm; first degree felony or aggravated controlled substance felony violation of Chapter 481 of the Texas Health and Safety Code; criminal solicitation; indecency with a child; criminal solicitation of a minor; attempted murder; attempted capital murder, or an attempted offense listed in article 42.12, § 3g(a)(1) of the TCCP; arson causing injury or death; intoxication manslaughter; or criminal conspiracy to commit any offense listed in § 54.045(1)–(16).[642]

This is just another example of what I and others have called "the criminalization of children."[643] What began as an idealistic alternative to placing children ages fifteen and sixteen in prisons and to filling the disposition gap in children younger than fifteen for violent crimes[644] has now mushroomed into another overgrown, bloated statute that has long ago outlived its intended purpose by exposing more and more children to long sentences in prison for acts committed while they were juveniles.[645] And

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be a fair and effective way for the justice system to respond to violent offenses committed by juveniles." *Id.* at 943 n.**.

641. FAM. § 54.045(a) (West 2008).

642. *Id.* There are many relevant crimes that are not listed above, but are incorporated by reference in this section of the Family Code. *Id.* For example, there are many crimes in Chapter 481 of the Texas Health and Safety Code that are first degree felonies, as there are many aggravated felonies therein. TEX. HEALTH & SAFETY CODE ANN. ch. 481 (West 2008 & Supp. 2013). In addition, criminal attempt of all the crimes listed by article 41.12, § 3g(a)(1) of the Texas Code of Criminal Procedure includes all the violent crimes listed in § 54.045(a) of the Texas Family Code, plus many drug crimes that are not listed, as well as sexual performance of a child, compelling prostitution, and trafficking of persons. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3g(a)(1) (West 2006 & Supp. 2013). My estimate is that well over fifty crimes are now subject to a determinate sentence disposition.

643. Bernadine Dohrn, "*Look Out, Kid, It's Something You Did*": *The Criminalization of Children*, *in* THE PUBLIC ASSAULT ON AMERICA'S CHILDREN: POVERTY, VIOLENCE AND JUVENILE INJUSTICE 157, 160–62 (Valerie Polkaed ed., 2000); Metze, *Plugging the School to Prison Pipeline by Addressing Cultural Racism in Public Education Discipline*, *supra* note 618, at 260; Augustina Reyes, *The Criminalization of Student Discipline Programs and Adolescent Behavior*, 21 ST. JOHN'S J. LEGAL COMMENT. 73 (2007).

644. *See* Dawson, *The Third Justice System*, *supra* note 639, at 957. Professor Dawson discusses the bill as compromise for a raft of other legislation, including one proposal that attempted to lower the age of discretionary transfer to adult court to age thirteen for all felonies. *Id.*

645. FAM. § 54.04(d)(3) (West 2008 & Supp. 2013). Although the current version of the statute does provide for maximum sentences for second-degree felonies of twenty years, and third-degree felonies of ten years in these determinate sentencing cases, the length of sentence for a capital felony, a first-degree felony of any kind, or an aggravated controlled substance felony has now been extended to forty years. *Id.*

where in all this is the original purpose of Title 3—to care for, protect, and develop children, removing the taint of criminality and the consequences of their behavior by substituting programs of treatment, training, and rehabilitation?

3. Habitual Felony Conduct

Additionally, since the original version of the Texas Family Code, there is now a section (§ 51.031) entitled "Habitual Felony Conduct."[646] This statute, passed in 1995, allows for a classification of "[h]abitual felony conduct," which is the violation of a penal law of the grade of felony—other than a state jail felony—committed after the effective date of the statute if (1) the child "has at least two previous final adjudications" of felony delinquent conduct; "(2) the second previous final adjudication is for conduct that occurred after the date the first previous adjudication became final; and (3) all appeals relating to the previous adjudications . . . have been exhausted"—with final adjudications including probations and commitment to the TYC.[647] If a court or jury sentences a child as an habitual felon, the length of the maximum sentence follows that of determinate sentences based upon the level of felony adjudicated—now up to forty years.[648]

4. Accountability Now at Age Ten

As a final example of juvenile law gone mad, I submit § 54.02(j) of Title 3. First put forward only two years after the initial draft of Title 3,[649] paragraph (j) provided an opportunity to prosecute one who had already turned eighteen, had committed a felony between the ages of fifteen and seventeen, and had never been adjudicated—if after due diligence it was not practicable to proceed before the person's eighteenth birthday because there was no probable cause, new evidence was found, or the person could not be found.[650] In 1987, a judicial determination of probable cause was added to the statute.[651] A seemingly harmless fix to the original statute, this provision was intended to prevent a child from hiding out or preventing prosecution when new evidence was found after the person reached

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646. FAM. § 51.031 (West 2008).

647. *Id.*

648. FAM. § 54.04(d)(3). The Texas Family Code provides for maximum sentences of twenty years for second-degree felonies; ten years for third-degree felonies; and up to forty years for a capital felony, a first-degree felony of any kind, or an aggravated controlled substance felony. *Id.*

649. Acts Apr. 16, 1975, 64th Leg., R.S., ch. 693, § 16, 1975 Tex. Gen. Laws 2152, 2156 (amended 2013) (current version at FAM. § 54.02 (West 2008 & Supp. 2013)).

650. FAM. § 54.02(j).

651. Act of May 21, 1987, 70th Leg., R.S., ch. 140, §§ 1–3, 1987 Tex. Sess. Law Serv. 140 (West).

majority.[652] But the ages of responsibility remained the same: age ten remained the floor for juvenile offenses and age fifteen for certification.[653]

During the "legislature of enlightenment" of 1995, certification under paragraph (j) was lowered to age fourteen for a person charged with a capital felony, an aggravated controlled substance felony, or a first-degree felony; the ages fifteen to seventeen were reserved for second, third, and state jail felonies, and an additional exception was added that extended jurisdiction if a "previous transfer order was reversed by an appellate court or set aside by a district court."[654] And not to be easy on crime, the legislature in 1999 took the cake. Its changes to paragraph (j) included an additional provision that allowed adult prosecution—upon certification —of an individual as young as ten years of age for a capital felony or a murder.[655] This means that a grown person who committed a capital murder or murder at age ten, eleven, twelve, or thirteen—not subject to certification as an adult at the time of the crime—is subject to an adult prosecution and adult punishments upon reaching the age of eighteen.[656]

V. CONCLUSION

After a comparison of the procedural rights of adults and juveniles, my charge was to determine if those procedural rights should be more, less, the same, or different than those accorded to adults. My answer is simple, (1) more rights: yes—whenever possible, children's rights should always be greater than adults' by virtue of a child's status; (2) less rights: no—children's rights should only be less than adults' as they relate to their status as minors; (3) same rights: no—children's rights—both substantive and procedural—should never be the same as adults' by the very nature of being dependent; and (4) different rights: yes—their respective rights must be significantly different as the relationship of adults and children to society and their relative needs and protections are a function of society's and the individual's responsibilities to each other.

Procedural rights—whether constitutional or statutory—are necessary for those whose liberty may be subject to being limited or taken. If freedoms are not the litmus of rights, then procedure is ministerial. Children, by their mere minority, have limited freedom. If the juvenile justice system we have is to survive, my opinion that we need more procedural safeguards should surprise no one. In reviewing the procedures that are addressed above, I come to the conclusion that children in Texas have a wealth of procedural opportunity should the adults interpreting and

652. *Id.*
653. FAM. §§ 51.02(2) (West 2008 & Supp. 2013), 54.02(j)(2).
654. Act of May 31, 1995, 74th Leg., R.S., ch. 262, § 34, 1995 Tex. Sess. Law Serv. 262 (West).
655. Act of June 19, 1999, 76th Leg., R.S., ch. 1477, § 8, 1999 Tex. Sess. Law Serv. 1477 (West).
656. *See* FAM. § 54.02(j).

exercising those rights have wisdom in their application. It is the limitation of politics and the fear of the population that affect children's rights in an unproductive way. Children naturally suffer from certain limitations on their custody and autonomy, but those are a circumstance of their status, not a result of a lack of constitutional or statutory protection. Those who would argue that children possess too many rights, or that the procedures developed to protect juveniles are unnecessary, fail to understand what our Court is finally aware of.

Roper,[657] *Graham*,[658] and *Miller*[659] point out "three significant gaps between juveniles and adults."[660] First, a "lack of maturity and an underdeveloped sense of responsibility" lead children to "recklessness, impulsivity, and heedless risk-taking."[661] "Second, children 'are more vulnerable to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].'"[662]

A. The Child's Brain

Justice Kagan cites the brief for the American Psychological Association et al. as Amici Curiae 3 in *Miller v. Alabama*: "[A]n ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court's conclusions."[663] "It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance."[664]

Even the dissenters in *Miller* agree that "[p]erhaps science and policy suggest society should show greater mercy to young killers, giving them a greater chance to reform themselves at the risk that they will kill again."[665]

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657. Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

658. Graham v. Florida, 130 S. Ct. 2011, 2032–33 (2010).

659. Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012).

660. *Id.* at 2464 (quoting *Roper*, 543 U.S. at 569).

661. *Id.*

662. *Id.* (final alteration in original) (quoting *Roper*, 543 U.S. at 569–70) (internal quotation marks omitted).

663. *Id.* at 2464 n.5 (alteration in original) (quoting Brief for American Psychological Association et al. as Amici Curiae at 3, Miller v. Alabama, 132 S. Ct. 2455 (2012) (Nos. 10-0646, 10-9647)).

664. *Id.* (quoting Brief for J. Lawrence Aber et al. as Amici Curiae at 12–28, Miller v. Alabama, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647), 2012 WL 195300 (discussing post-*Graham* studies)).

665. *Id.* at 2482 (Roberts, C.J., dissenting) (noting that the usual four dissenters, Roberts, Scalia, Thomas, and Alito, found it difficult not to agree that the science is moving toward an understanding that the young suffer from influences the mature do not). If only maturation had something to do with the Second Amendment, a consensus would be so much easier to achieve. *See id.*

If the right wing of the Court can acknowledge that children are different, I suggest we treat children differently. Scientists are beginning to link adolescents' behavioral immaturity to their brains' anatomical immaturity.[666] Juveniles rely on a region of the brain associated with primitive responses to aggression and fear.[667] In modern society, where the demands on the young have profoundly changed[668] and life expectancy has been greatly extended,[669] it should be no wonder that adolescence and the corresponding delay in maturity should result. The late development of the brain's frontal cortex, which controls impulse and judgment, places the young adult in a precarious developmental dichotomy, able to understand and reason, but unable to control impulse and base reaction.[670] In fact, how today's eighteen to twenty-four-year-olds develop is "in many ways unprecedented."[671]

This development after late adolescence of the regions of the brain associated with moral reasoning, impulse control, and risk assessment sees the death rate for adolescents rise over 200% during the developmental period.[672] As adolescents are disproportionately more likely to engage in

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666. Brief for the Am. Med. Ass'n and the Am. Acad. of Child & Adolescent Psychiatry as Amici Curiae in Support of Neither Party at 13, Miller v. Alabama, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647), 2012 WL 121237.

667. *Id.*

668. Jeffrey Jensen Arnett, *New Horizons in Research on Emerging and Young Adulthood*, *in* EARLY ADULTHOOD IN A FAMILY CONTEXT 231 (Alan Booth et al. eds., 2012). Arnett coined the phrase "emerging adulthood" as a "new life stage" in a society in which adolescents go to school longer, the age for entering into marriage for many is higher, the age of parenthood is later, and the birth rate is lower. *Id.* at 232. Arnett contends it is difficult to define adolescence in modern times as our society is evolving in the sense that "today there is a great deal of ambivalence about reaching adulthood among 18- to 24-year olds." *Id.* at 233.

669. Laura B. Shrestha, *Life Expectancy in the United States*, CRS REP. FOR CONGRESS (2006), *available at* http://www.aging.senate.gov/crs/aging1.pdf. Life expectancy for men and women born between 1900 to 1902 was 49.2 years. *Id.* Life expectancy for those born in 2008 was seventy-eight years for both men and women, and it was projected that those born in 2015 would live to 78.9 years and those born in 2020 would live to 79.5 years. U.S. Census Bureau, *Statistical Abstract of the United States: 2012*, U.S. CENSUS BUREAU 1 tbl.104 (2012), http://www.census.gov/compendia/statab/2012/tables/12s0104.pdf. Logic would dictate that those living almost 59% longer (159% of 49.2 is equal to seventy-eight years) could conceivably take longer to mature than those of a different time.

670. *See Miller*, 132 S. Ct. at 2464–65; Brief for the Am. Med. Ass'n & the Am. Acad. Of Child & Adolescent Psychiatry as Amici Curiae in Support of Neither Party, *supra* note 666, at 2–3.

> The differences in [adolescent and adult] behavior have been documented by scientists along several dimensions. Scientists have found that adolescents as a group, even at later stages of adolescence, are more likely than adults to engage in risky, impulsive, and sensation-seeking behavior. This is, in part, because they overvalue short-term benefits and rewards, and are less capable of controlling their impulses making them susceptible to acting in a reflexive rather than a planned voluntary manner. Adolescents are also more emotionally volatile and susceptible to stress and peer influences. In short, the average adolescent cannot be expected to act with the same control or foresight as a mature adult.

Id.

671. Arnett, *supra* note 668, at 234.

672. Brief for the Am. Psychol. Ass'n, Am. Psychiatric Ass'n, & Nat'l Ass'n of Social Workers as Amici Curiae in Support of Petitioners at 4, Miller v. Alabama, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647), 2012 WL 174239; *see* U.S. DEP'T OF HEALTH & HUM. SERVS., 60 NAT'L VITAL STATISTICS

many high-risk behaviors—compared with adults—many would argue this comes from youthful ignorance, irrationality, delusions of invulnerability, or misperceptions of risk as their ability to perceive risk is apparently the same as the older—but they would be wrong.[673] The differences between adults and children have less to do with cognitive factors and more to do with emotional and social factors.[674]

One study evaluated the risky behaviors of individuals between the ages of ten and thirty.[675] The older participants showed greater avoidant behavior compared to the younger participants, with the older participants being increasingly less likely than younger participants to do things that were less likely to succeed.[676] The younger participants—those in mid to late adolescence—learned that the requisite behavior greatly improved their performance, but were more likely to take chances than the older participants.[677] "This higher level of approach behavior during adolescence coupled with the lesser inclination toward harm avoidance," Cauffman et al. concluded, "may help explain increased novelty-seeking in adolescence, which can lead to various types of risk taking, including experimentation with drugs, unprotected sex, and delinquent activity."[678] As to policy decisions aimed at addressing bad behavior in adolescents, "strategies that employ positive reinforcement of desirable behavior may be more effective than those that emphasize the costs of the risky activity."[679] This is why I have argued for the elimination of Disciplinary Alternate Education Programs in the public schools for adolescents and the incorporation of Positive Behavioral Interventions and Supports in the local schools.[680] With proper behavioral modification techniques, the vast majority of children can be diverted from the now punitive juvenile justice system.[681] The net effect will be a decrease in drop-out rates and an increase in education for this otherwise ostracized cohort.[682]

REPORT, No. 3, Dec. 29, 2011, at 23, *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_03.pdf (reporting the number of deaths for those aged ten to fourteen at 3,128 and those aged fifteen to nineteen at 11,520, an increase of 268%).

673. Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEV. PSYCHOL. 193, 194 (2010).

674. *Id.*

675. *See id.* at 195–204.

676. *Id.* at 201–02.

677. *Id.* at 201.

678. *Id.* at 206.

679. *Id.*

680. Metze, *Plugging the School to Prison Pipeline by Addressing Cultural Racism in Public Education Discipline*, *supra* note 618, at 203.

681. *Id.* at 211–12.

682. *Id.* at 308.

B. Emerging Adulthood

The term "emerging adulthood" refers to this relatively new stage in human sociological development, and the specific age boundaries of this period are blurred.[683] Justice Kennedy recognized that while it has been necessary in the past to draw a bright line at eighteen for adult consequences, this is just the age "today."[684] After all, "[c]hronological age is not an unfailing measure of psychological development."[685] In fact, the traits of the maturing person that we assume to measure the move from adolescence to adulthood are not as tangible as we may think. Education now lasts longer for a broad segment of the young population.[686] The current young generation is entering marriage and beginning families much later than in the past, with a birth rate at an all-time low.[687] In fact, "today there is a great deal of ambivalence about reaching adulthood among 18- to 24-year-olds."[688] Arnett labeled as a "mistake of conceptualiz[ation]" the traditional theorists of the twentieth century in their "*universal* and *uniform*" division of development (stages) and the belief that those who did not follow the stages of development were unhealthy or inadequately developed.[689] These stages of development were being rejected by developmental theorists by the beginning of this century as "[t]here is not just one emerging adulthood but many emerging adulthoods," and as an emerging adult is somewhere between adolescence "but not yet fully adult, trying out adult roles but not yet immersed in them, on the way to adulthood but not there yet."[690]

Juveniles not responsible for their conduct (adjudged insane) and these emerging adults—with their delayed brain development, risky "novelty seeking," impulse control, and minimizing risk assessment—fit the same

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683. Arnett, *supra* note 668, at 232.

684. Roper v. Simmons, 543 U.S. 551, 567 (2005). "[T]oday our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as 'categorically less culpable than the average criminal.'" *Id.* (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)). "Perhaps even more important than our specific holding today is our reaffirmation of the basic principle that informs the Court's interpretation of the Eighth Amendment. If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today. *See Stanford v. Kentucky*, 492 U.S. 361, 368, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989) (describing the common law at the time of the Amendment's adoption)." *Id.* at 587 (Stevens, J., concurring).

685. *Id.* at 601 (O'Connor, J., dissenting).

686. Arnett, *supra* note 668, at 232.

687. *Id.* Arnett shows the median age of women having children has changed from a little over twenty-one years of age in 1970 to twenty-five years of age in 2006. *Id.* This is almost a 20% increase in just one generation. *Id.* at 238.

688. *Id.* at 233.

689. *Id.* at 241 (alteration in original). "[T]heorists such as Freud, Piaget, Erikson, and Kohlberg proposed one-size-fits-all programs that all persons were supposed to follow or be deemed unhealthy or inadequately developed." *Id.*

690. *Id.* at 242. It is this in-between stage, while the brain is developing, that is the focus of my proposition that full adult criminal responsibility should be saved for those who have reached maturity. *Id.* If a bright line should be drawn in today's society, it should be at age twenty-five. *See id.*

definitions.[691] Even when a child knows the wrongfulness of his conduct, a child is not responsible for that conduct when the "child lacks substantial capacity . . . to conform the child's conduct to the requirements of law" as a "result of mental illness."[692] Without the tools of adulthood, a child should not be held to the same accountablility as adults, if his actions are the result of "mental illness."

C. Are Children Criminally Responsible for Their Conduct?

So the primary question is, what is mental illness in children? Defined by statute, a mental illness is a "condition" that "substantially impairs a person's thought, perception of reality, emotional process, or judgment."[693] I submit there has never been an adolescent drawn to delinquent conduct, or conduct indicating a need for supervision for that matter, who has not been impaired by his immature thoughts, impulsive perceptions of reality, lack of appropriate emotional process, or bad judgment—not because of his inability to perceive the risk or to weigh the cost, but because his emotional responses to stimuli are unable to be controlled because of his status as an emerging adult with an undeveloped brain incapable of proper adult avoidance behavior. Therefore, under our definition, perhaps all children charged with juvenile crime are not responsible for their conduct and should never receive the conventional punishment assigned by our law to those who transgress.[694]

D. Restorative Justice Alternative

The solution? Defer the traditional western approach to criminal offenders until these emerging adults mature. My suggestion is to divert all youth who are accused of violating an adult criminal law from traditional court proceedings without arrest or summons to civil, social welfare authorities to implement a plan of action using restorative justice outcomes to modify behavior and right the wrong. We must begin to protect our children to enable productive adult lives. Draw a bright line at twenty-five years of age. This would mean that until the age of twenty-five, a new

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691. TEX. FAM. CODE ANN. § 55.51(a) (West 2008). "A child alleged by petition to have engaged in delinquent conduct or conduct indicating a need for supervision is not responsible for the conduct if at the time of the conduct, as a result of mental illness or mental retardation, the child lacks substantial capacity either to appreciate the wrongfulness of the child's conduct or to conform the child's conduct to the requirements of law." *Id.*

692. *Id.*

693. TEX. HEALTH & SAFETY CODE ANN. § 571.003(14) (West 2010 & Supp. 2013). A mental illness is "an illness, disease, or condition, other than epilepsy, senility, alcoholism, or mental deficiency, that: (A) substantially impairs a person's thought, perception of reality, emotional process, or judgment; or (B) grossly impairs behavior as demonstrated by recent disturbed behavior." *Id.*

694. *See generally id.*

system of justice would have to be developed. This "new" system can be the use of systems long ago at play. Whether the system is called Family Group Conferences,[695] Victim Offender Conference,[696] Peacemaker Court,[697] Pre-contact Mãori Customary Law,[698] National Reconciliation,[699] Circle Sentencing,[700] Truth and Reconciliation Commission,[701] Gacaca Justice System,[702] Bloodfeud,[703] Ubuntu,[704] or Defense-Based Victim Outreach,[705] what was implemented in New Zealand over twenty years ago in its juvenile justice system was intended to emulate an ancient concept of restorative justice and to change the way juveniles who were charged with violating the law were treated.[706] We must develop a new way of dealing with our children, as the current model is not working.

Through family group conferencing, participation of all those concerned with a child's behavior is encouraged as the "gate-keeping" procedure to divert children whenever possible from the traditional court

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695. Allison Morris & Gabrielle Maxwell, *Restorative Justice in New Zealand: Family Group Conferences as a Case Study*, WEST. CRIMINOLOGY REV. 1 (1998), *available at* http://wcr.sonoma.edu/v1n1/morris.html.

696. Boyane Tshehla, *The Restorative Justice Bug Bites the South African Criminal Justice System*, 17 S. AFR. J. CRIM. JUST. 1, 14 (2004).

697. Raymond D. Austin, *Freedom, Responsibility, and Duty: ADR and the Navajo Peacemaker Court*, 32 JUDGES J., Spring 1993, No. 2, at 8, 8 (1993); *see also* Robert Yazzie, "*Life Comes From It": Navajo Justice Concepts*, 24 N.M. L. REV. 175, 183 (1994).

698. Robert Joseph, *Mãori Customary Laws and Institutions – Crimes Against the Person, Marriage, Interment, Theft* 4 (August 1999), *available at* http://lianz.waikato.ac.nz/PAPERS/Rob/Custom%20Law.pdf; *see also* Nandor Tanczos, *A Better Kind of Justice*, THE ECOLOGIST (June 13, 2000), http://www.theecologist.org/back_archive/20002009/269676/a_better_kind_of_justice.html.

699. Richard Ashby Wilson, *Anthropological Studies of National Reconciliation Processes*, 3 ANTHROPOLOGICAL THEORY 367 (2003).

700. Willie McCarney, *Restorative Justice: An International Perspective*, 3 J. CENTER FOR FAMILIES, CHILD. & COURTS 3, 8 (2001). Canadian aboriginals developed "circle sentencing," based on mutual forgiveness and the "responsibility" of every member of society to forgive. *Id.*

701. *See* TRUTH AND RECONCILIATION COMM'N, http://www.justice.gov.za/trc/ (last visited Nov. 7, 2013). "The South African Truth and Reconciliation Commission (TRC) was set up by the Government of National Unity to help deal with what happened under apartheid. The conflict during this period resulted in violence and human rights abuses from all sides. No section of society escaped these abuses." *Id.*

702. Alana Erin Tiemessen, *After Arusha: Gacaca Justice in Post-Genocide Rwanda*, 8 AFR. STUD. Q. 1, *available at* http://www.africa.ufl.edu/asq/v8/v8i1a4.html.

703. Jenny Wormald, *Bloodfeud, Kindred and Government in Early Modern Scotland*, *in* DISPUTES AND SETTLEMENTS: LAW AND HUMAN RELATIONS IN THE WEST 101 (John Bossy ed., 1983) (discussing bloodfeud as an early Scottish practice—during the fifteenth and sixteenth centuries—of offering compensation to the kindred of the victim).

704. A.M. Anderson, *Restorative Justice*, *The African Philosophy of* Ubuntu *and the Diversion of Criminal Prosecution*, NAT'L CRIM. JUST. REFERENCE SERVICE (2003), *available at* www.isrcl.org/Papers/Anderson.pdf.

705. Kristen F. Grunewald & Priya Nath, *Defense-Based Victim Outreach: Restorative Justice in Capital Cases*, 15 CAP. DEF. J. 315 (2003).

706. Morris & Maxwell, *supra* note 695. Some are critical of the system in New Zealand and believe it to be too much like the Western European retributive style of justice. *See* Juan Marcellus Tauri, *Gangs, Restorative Justice & Crime Control Policy*, YOUTUBE (June 15, 2011), http://www.youtube.com/watch?v=7Z6Ppn1ZoE0.

environment without arrest or summons.[707] Facilitated by a youth justice coordinator—a social welfare employee—a plan of action is created with the participation of all interested parties using "restorative outcome[s]."[708] Following indigenous principals of justice, this method considers the child not as an individual totally responsible for his misbehavior, but as a member of society who breached obligations to that society, which in return has obligations to the child.[709]

The New Zealand system uses the diversionary conference as the default—even for police.[710] Diverting children away from courts is the goal.[711] There is no intake decision based on the history of the child or the seriousness of the offense.[712] Consequently, as few as 11% of children who violated the law were arrested.[713] New Zealand saw a 66% reduction of those young people who appeared in their Youth Court the year following the implementation of the program.[714] Between 80% and 85% of all offenses are diverted by the police through designated warnings, parental conferences, victim meetings, and family group conferences, without much regard to the seriousness of the crime.[715] Even when charges are referred to the court, the court must send all matters to family-group-conferencing to make recommendations for disposition.[716] Most children elect the family-group-conference for disposition, even when trial is an option.[717] Before 1989, 12,000 children were appearing in court each year.[718] The following year, only 2,500 children made an appearance in Youth Court.[719] High compliance rates are seen, and victims are satisfied.[720]

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707. McCarney, *supra* note 700, at 7.

708. *Id.* A plan of action may include "[an] apology, financial reparation, work for the victim or for the community, a curfew, or some undertaking relating to future behavior." *Id.*

709. *See id.*

710. *Id.*

711. *Id.*

712. Fred W.M. McElrea, *Twenty Years of Restorative Justice in New Zealand*, TIKKUN (Jan. 10, 2012), http://www.tikkun.org/nextgen/twenty-years-of-restorative-justice-in-new-zealand.

713. Morris & Maxwell, *supra* note 695.

714. Chris Graveson, Restorative Juvenile Justice: The Challenges, The Rewards, First World Congress on Restorative Juvenile Justice (Nov. 4–7, 2009), *available at* http://www.unicef.org/tdad/3chris graveson(1).pdf. The rate of children ages fourteen to sixteen per 10,000 of population who had to appear in Youth Court dropped from a little under six hundred in 1989 to well under two hundred in 1990. *Id.* Since that time, the rate has gradually increased to a 2006 rate of three hundred, still half of the rate of 1989. *Id.*

715. McCarney, *supra* note 700, at 14.

716. *Id.*

717. *Id.*

718. *Id.*

719. *Id.*

720. *Id.*

E. Stop Feeding the Monster

So, should juveniles have more, less, the same, or different procedural rights than are accorded to adults? Justice Scalia's dissent in *Roper v. Simmons* talks about his previous decision in *Stanford v. Kentucky*, in which he gladly affirmed that capital punishment of a sixteen or seventeen-year-old was not cruel and unusual punishment under the Eighth Amendment:

> As we explained in *Stanford*, it is "absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards."[721]

Just as children, and many adults, do not drive safely, often drink irresponsibly, and vote for those who would put the likes of Justice Scalia back on the bench—if it were possible—this exactly addresses my point. The decisions of those under age twenty-five are made without the tools the adults possessed when they crafted the law. Further, whether children are driving, drinking, or voting, they should not be held criminally responsible for any wrongdoings—they are children. The physical difference between the brains of adults and children and the child's inability to conform his actions to the law are what make a child a child, not merely his years on this Earth.

We should not criminalize children any further. We have created what many call a "prison industrial-based economy," which houses millions of our citizens and places children in adult prisons by the hundreds of thousands, many relegated to being placed in the inhumane individual segregation units where they are forced into solitary living without human contact.[722] A system that must be constantly fed with the lives of our citizens, a constant flow of humanity—ever younger. An economy that relies upon ever increasing, longer sentences for the inmates.[723] Our society does not have to use criminal law to punish, stigmatize, and victimize our children in this way. Our children are our charge, and as such, we should

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721. Roper v. Simmons, 543 U.S. 551, 619 (2005) (Scalia, J., dissenting) (quoting Stanford v. Kentucky, 492 U.S. 361 (1989), *abrogated by Roper*, 543 U.S. 551) (citation omitted). Perhaps Justice Scalia was particularly defensive when the Court in *Roper* abrogated his previous decision, particularly because Justice Kennedy, who wrote the opinion for the majority in *Roper*, had previously joined him in *Stanford*. *See id.* at 607.

722. Elizabeth Chuck, Deirdre Cohen & Sarah Koch, *Criminal Justice System's 'Dark Secret': Teenagers in Solitary Confinement*, NBC NEWS (Mar. 22, 2013), http://rockcenter.nbcnews.com/_news/2013/03/22/17403150-criminal-justice-systems-dark-secret-teenagers-in-solitaryconfinement?lite&ocid=msnnp&pos=1; *see also* Howard Singer, *A Prison-Based Economy, Walk-In Clinics and University Steaks*, HOWARDSINGERONMARKETING (Mar. 24, 2013), http://howardsingeronmarketing.wordpress.com/2013/03/24/a-prison-based-economy-walk-in-clinincs-and-university-steaks/.

723. *See* Chuck et al., *supra* note 722.

treat them with the care and wisdom they deserve. Procedural rights will not be necessary by our traditional measure when children are truly removed from the taint of criminality and we stop feeding our criminal justice system with the lives of our young, who have yet to be given the opportunity or the reason to be productive citizens—like a national shop of horrors, I hear the monster say every day, "Feed me." And we do.`