



# WASHTENAW COUNTY

## OFFICE OF THE PROSECUTING ATTORNEY

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### POLICY DIRECTIVE 2021-11: POLICY REGARDING JUVENILE CHARGING

#### I. Introduction and Background

Children (and teenagers) are not small adults. That basic fact, recognized by any parent or teacher, is backed by voluminous scientific research and legal doctrine. Medical research indicates that the adolescent brain is “still developing . . . [and] is highly subject to reward- and peer-influence.”<sup>1</sup> What is more, both the “brain’s reward center [and] its fear circuit matures earlier than the prefrontal cortex”—the part of the brain that regulates behavior and allows for emotional control.<sup>2</sup>

In plain English, that means three things. *First*, the predominance of the adolescent brain’s “reward center” means that teenagers are more likely to engage in “risky behavior.”<sup>3</sup> *Second*, the early development of “the brain circuit for processing fear” means that teenagers are particularly susceptible to anxiety, fear, and trauma.<sup>4</sup> *Third*, the susceptibility to peer influence “suggests that the company of other teenagers fundamentally alters the calculus of adolescent risk taking.”<sup>5</sup>

All of this makes adolescents far more likely to run afoul of the law. “The prevalence of offending tends to increase from late childhood, peak in teenage years (from 15 to 19) and then decline in the early 20s.”<sup>6</sup> Teenagers, in other words, are far more likely than the general population to engage in unlawful behavior. But teenagers also tend to “age out” of crime.<sup>7</sup> The fact that a young person engages in risky or criminal activity does not indicate that unlawful behavior will continue into adulthood.

These basic biological facts have been recognized by the United States Supreme Court. In a series of recent cases, the Court has ruled that the death penalty and mandatory life without

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<sup>1</sup> Massachusetts General Hospital; Harvard Medical School Teaching Hospital, *Juvenile Justice and the Adolescent Brain*, available at <https://clbb.mgh.harvard.edu/juvenilejustice/>.

<sup>2</sup> Richard A. Friedman, *Why Teenagers Act Crazy*, *The New York Times* (June 28, 2014), available at <https://www.nytimes.com/2014/06/29/opinion/sunday/why-teenagers-act-crazy.html>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Dustin Albert, Jason Chein, & Laurence Steinberg, *The Teenage Brain: Peer Influences on Adolescent Decision Making*, 22(2) *Current Directions in Psychological Science* 22(2), 114, 114 (2013).

<sup>6</sup> National Institute of Justice, *From Juvenile Delinquency to Adult Offending* (Mar. 14, 2014), available at <https://nij.ojp.gov/topics/articles/juvenile-delinquency-young-adult-offending>.

<sup>7</sup> Jeffrey T. Ulmer & Darrell Steffensmeir, *The Age and Crime Relationships: Social Variation, Social Explanations*, in *THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY* 377, 391 (2014).

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*Justice, Justice, Shall You Pursue*

parole violate the Constitution when applied to minors.<sup>8</sup> Those cases rested on several basic precepts. *First*, studies have demonstrated that “only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior.”<sup>9</sup> *Second*, “the same characteristics that render juveniles less capable than adults—their immaturity, recklessness, and impetuosity—make them less likely” to be deterred by “potential punishment.”<sup>10</sup> *Third*, and perhaps most fundamentally, children and adolescents have diminished “moral culpability” for their crimes.<sup>11</sup> Young people’s unlawful behavior is driven, at bottom, by their transient stage of brain development. A person who commits a crime at the age of 16 will, in a very real sense, be a different person when they reach the age of 30.

These scientific and legal principles call into serious question the role of punishment in the juvenile justice system generally. Young people are far less likely to be deterred from criminal activity by the knowledge that they will be punished.<sup>12</sup> Tethering a young person to the justice system, moreover, is unlikely to be rehabilitative. Again: most young people will simply “age out” of crime. And far from catalyzing brain development, punishment often interferes with it. A decade-long, intensive economic study demonstrates that incarcerating young people makes it *more* likely they’ll commit crimes again.<sup>13</sup> That is in many ways unsurprising. Young people are more susceptible to trauma and to fear than adults, so a punitive approach can severely stunt a child’s neurological, emotional, and social growth.<sup>14</sup>

Even when the criminal legal system imposes consequences less severe than incarceration, the consequences can be dire. Sentencing a young person to formal probation, for example, can subject even minor adolescent slip-ups to criminal punishment. The highly publicized case of “Grace” illustrates the point. “Grace,” a 15-year-old Michigan girl, was sentenced to probation as a result of several relatively minor run-ins with the law.<sup>15</sup> One of her probationary requirements was that she remain up-to-date on her schoolwork. During the spring of 2020, Grace failed to complete online coursework that was assigned during the COVID-19 pandemic. As a result, the judge in Grace’s case “found that the girl had violated probation,” and ordered her incarcerated in a juvenile detention facility.<sup>16</sup>

In other words: because Grace had *already* been tethered to the criminal justice system, the mere act of failing to complete her homework resulted in incarceration. The unfairness, and inequities, largely speak for themselves.

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<sup>8</sup> See *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>9</sup> *Miller*, 567 U.S. at 471 (cleaned up).

<sup>10</sup> *Id.* at 472 (cleaned up).

<sup>11</sup> *Id.*

<sup>12</sup> See *id.*

<sup>13</sup> See Anna Aizer *et al*, *Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-Assigned Judges*, National Bureau of Economic Research Working Paper No. 19102 (June 2013).

<sup>14</sup> See Friedman, *supra* n. 2.

<sup>15</sup> Jodi S. Cohen, *A Teenager Didn’t Do Her Online Schoolwork. So A Judge Sent Her to Juvenile Detention*, ProPublica (July 14, 2020), available at <https://www.propublica.org/article/a-teenager-didnt-do-her-online-schoolwork-so-a-judge-sent-her-to-juvenile-detention>.

<sup>16</sup> *Id.*

Largely, but not entirely. It bears emphasis that Grace is a Black girl—and her experience reflects racial inequities that are endemic to the juvenile justice system. Put starkly: Black adolescence is far more likely to be criminalized than white adolescence. “Racial and ethnic disparities are a pervasive attribute of the juvenile justice system,” and “the disparities grow at each stage of the justice system.”<sup>17</sup> Nationwide, Black children are more than “four times as likely” to be sentenced to juvenile detention as white children; American Indian children “more than three times as likely,” and Hispanic children “61 percent more likely.”<sup>18</sup> Black and Hispanic youth, moreover, are more likely than white youth to receive “longer sentences” and “to be in locked facilities . . . *even when charged with the same offense as white[ ]*” children.<sup>19</sup> And lamentably, these disparities are evident in Washtenaw County. Approximately 70% of the children in Washtenaw County’s juvenile-justice system are Black, whereas Black people make up just 12% of the county’s population.<sup>20</sup>

The reasons for racial inequities in our system are complex and multifactorial. One key driver of those inequities, however, is the bias that exists throughout our system. Studies have demonstrated that actors in the criminal-justice system “viewed [B]lack boys as older and less innocent than white boys . . . beginning when youth were ten years old.”<sup>21</sup> Another study demonstrated that, “[b]eginning as early as five years old, participants viewed [B]lack girls as behaving and seeming older than their stated age.”<sup>22</sup> Black girls were also seen “as needing less protection and nurturing than white girls.”<sup>23</sup> These studies “lend support to the theory that decision makers” in the criminal justice system “may treat youth of color more harshly than white youth in part because of this” tendency “to ignore developmental immaturity in youth of color.”<sup>24</sup>

All of this gives rise to a simple conclusion: Our justice system needs to treat kids like kids. That is true regardless of who children are, or where they come from. And though the evidence demonstrates that a punishment-oriented approach to juvenile justice is largely counterproductive, it is not the case that nothing can be done to nudge young people onto the right path. “A large body of research shows that desistance from crime or exiting a criminal career is typically tied to the acquisition of meaningful bonds to conventional adult individuals

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<sup>17</sup> Joshua Rovner, *Racial Disparities in Youth Commitments and Arrests*, The Sentencing Project (Apr. 1, 2016), available at <https://www.sentencingproject.org/publications/racial-disparities-in-youth-commitments-and-arrests/>.

<sup>18</sup> *Id.*

<sup>19</sup> Frontline, *Is The System Racially Biased?*, PBS, available at <https://www.pbs.org/wgbh/pages/frontline/shows/juvenile/bench/race.html>.

<sup>20</sup> Friends of Restorative Justice, *Analysis of Data from Court Watching Pilot*, available at <http://www.friendsofrestorativejustice.org/wp-content/uploads/2018/10/report-of-data-analysis-final.pdf>; U.S. Census Quick Facts, Washtenaw County, available at <https://www.census.gov/quickfacts/washtenawcountymichigan>.

<sup>21</sup> National Juvenile Justice Network, *Implicit Bias Snapshot*, available at <http://www.njjn.org/our-work/implicit-bias-snapshot> (September 2017)

<sup>22</sup> *Id.* (emphasis added).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

and institutions, such as work . . . family, and community institutions.”<sup>25</sup>

Accordingly, it will henceforth be the policy of the Washtenaw County Prosecutor’s Office to avoid charging juveniles with minor offenses that are best resolved outside of the criminal-justice system. The Prosecutor’s Office is in the process of building out community partnerships that will allow for effective, rehabilitative, non-criminal interventions for youthful mistakes. In the interim, however, the Prosecutor’s Office should seek to avoid the unnecessary tethering of young people to the criminal-justice system—an outcome that does more harm than good.

## II. Policy Directive

**1. Generally Applicable Office Policies Regarding Charging—Application to Juveniles:** All of the Washtenaw County Prosecutor’s Office’s generally applicable charging policies apply with full force to the filing of delinquency petitions. Those include:

- Policy Directive 2021-01: Policy Eliminating “Zero Tolerance” Policies and Setting Standards for Plea Bargaining Conduct and Diversionary Opportunities
- Policy Directive 2021-04: Policy Regarding Resisting & Obstructing
- Policy Directive 2021-05: Policy Regarding Cannabis & Marijuana
- Policy Directive 2021-06: Policy Regarding Entheogenic Plants
- Policy Directive 2021-07: Policy Regarding Buprenorphine
- Policy Directive 2021-08: Policy Regarding Sex Work
- Policy Directive 2021-09: Policy Regarding Pretext Stops
- Policy Directive 2021-10: Policy Regarding Driver’s License-Related Offenses

If a charge would not be filed against an adult in the criminal system, a parallel delinquency petition should not be filed against a juvenile. By way of example, *Policy Regarding Cannabis and Marijuana* instructs that charges relating to distribution of marijuana should (1) be filed only in rare circumstances, (2) only against large-scale, profit-seeking distributors, and (3) only with the approval of the Chief Assistant Prosecuting Attorney or the Prosecuting Attorney. Those same parameters apply to the filing of a marijuana distribution-related delinquency petition against a minor.

All policies that may be enacted subsequent to this Policy, and which set standards for charging, are incorporated by reference into this Policy. Unless otherwise stated in a generally applicable charging policy, that policy applies with full force to delinquency petitions.

**2. Delinquency Petitions For Minor Offenses Not to Be Filed:** In addition to the generally applicable office policies regarding charging, as a general rule, the Washtenaw County Prosecutor’s Office will not file juvenile delinquency petitions related to the following offenses:

- A. Status-based crimes, such as truancy, curfew violations, “incorrigibility,” or running away from home<sup>26</sup>;

<sup>25</sup> Ulmer & Steffensmeir, *supra* n. 7, at 391.

<sup>26</sup> See MCL 712A.2(a)(2)-(4).

- B. Tobacco or vaping-related offenses;
- C. Marijuana and cannabis-related offenses, including the use, possession, or small-scale distribution of marijuana by a minor;
- D. Disorderly conduct-related offenses, including all crimes related to being a “disorderly person” under MCL 750.167.

**3. Minor in Possession of Alcohol:** In general, Assistant Prosecuting Attorneys (APAs) should avoid filing delinquency petitions relating to minors in possession of alcohol. A first minor-in-possession-of-alcohol offense is already categorized as a state civil infraction, but the statute prohibits a subsequent incident from being treated as a civil infraction.<sup>27</sup>

Accordingly, when a delinquency petition is sought relating to a second minor-in-possession-of-alcohol offense, an APA may opt to decline such a petition, or may seek amendment to a civil infraction such as littering. *See* MCL 324.8902.

**4. Cases Involving Serious Substance Use Issues—Treatment Provision and Consent Calendar:** Notwithstanding the foregoing, an APA may authorize a petition involving use of controlled substances if the underlying facts of the case indicate that a minor is dealing with a serious substance-use issue, and it is apparent that substance-use treatment resources are significantly more likely to be accessed if a petition is filed.

Importantly, the mere fact that a young person is engaged in alcohol or other substance use *is not sufficient* to conclude that the young person has a “serious substance-use issue.” Many teenagers experiment with alcohol, marijuana, or other substances without it meaningfully affecting their life trajectory. Indicators that a young person is dealing with a serious substance-use issue may include a pronounced drop-off in school attendance or performance, or a repeat history of run-ins with the law while under the influence of alcohol or a controlled substance.

Involving a young person in the juvenile system *should be a last resort, not a first option*. If an APA believes that a young person is dealing with a serious substance-use issue, the APA should seek to have treatment and conditions imposed as part of the juvenile consent calendar, not as part of the formal calendar. Charges should be dismissed once programming is successfully completed.

**5. Restorative Justice:** In a case involving a victim, APAs should consent to use of restorative justice to address the harm done *if the survivor of a crime wishes to pursue restorative justice*. The Prosecutor’s Office is in the process of setting up a partnership to dramatically expand the use of restorative justice in our community, and this Policy will be updated once those systems are in place. In the interim, however, the Prosecutor’s Office should consent to the use of restorative justice in the juvenile system as a means of dealing with the underlying issue so long as (1) the survivor and the person who committed harm wish to pursue that path; and (2) there is no imminent risk to public safety.

The only exceptions to this general rule favoring restorative justice in the juvenile system are

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<sup>27</sup>See MCL 436.1703.

cases involving intimate-partner violence or sexual assault. Such factual circumstances raise the potential for coercive control to be exercised over the victim—which, in turn, means that the survivor’s consent to restorative justice may not have been voluntary.

**6. School-Based Offenses and Offenses Involving Similarly Aged Peers:** The criminal-justice system should not be used as a mechanism for dealing with simple—and common—school-based offenses. When an offense occurs in the school setting, the presumption should be that consequences should be handled at a school level. It is generally inappropriate to file a delinquency petition arising out of, for example, a schoolyard fight, or a minor theft from a classroom. APAs should generally decline such charges, and allow the school to impose appropriate consequences.

Similarly, petitions relating to offenses between similarly aged peers outside of school property, that would otherwise be declined by the Prosecutor’s Office if they took place in a school setting, should generally be declined.

Notwithstanding the foregoing, however, petitions may be authorized if the factual circumstances of a case indicate a continued threat to the safety of others, or if the factual circumstances of the case are more severe than typical school-related misbehavior.

This is necessarily a fact-specific inquiry, and APAs should make every effort to analyze each case according to their unique facts. Some examples, however, may be helpful:

- A. School Fight Without Injury: Adam and Blake, a pair of 11<sup>th</sup> graders, get into a fistfight in the hallway during passing time. Neither Adam nor Blake is seriously injured, but a delinquency petition is sought against Adam, who started the fight. The Prosecutor’s Office should decline that petition, and allow the school to impose discipline as it sees fit.
- B. Out-of-School Fight Without Injury: Same facts as above, except that the fight takes place off school grounds. Because the petition would be declined if it took place on school grounds, it should also be declined in this circumstance.
- C. School Fight With Injury: Adam and Blake, a pair of 11<sup>th</sup> graders, get into a fistfight in the hallway during passing time. During the course of that fight, Blake throws a punch that ends up breaking Adam’s nose. The APA should carefully analyze all facts of the case before authorizing a petition. If the incident appears to be a one-off dispute, and there is no reason to believe Blake has a history of extreme violent behavior, it may be appropriate to deny the petition. A petition may, however, be appropriate if Blake has a demonstrated history of violent behavior, and if the evidence suggests Blake was the aggressor in that fight. In addition, a case of this type may be best addressed via restorative justice, and the Prosecutor’s Office should defer to that process if it is available.
- D. Out-of-School Fight With Injury: Same facts as above, except that the fight took place off school grounds. The same fact-specific inquiry as above should guide the APA in determining whether to authorize a petition.

- E. Fight Involving a Weapon: Adam and Blake, a pair of 11<sup>th</sup> graders, get into a scuffle following baseball practice at school. Adam picks up a baseball bat and strikes Blake in the head, causing injury. The factual circumstances in this case go beyond typical school incidents, and a petition against Adam will likely be appropriate. If, however, a restorative justice option is available, the Prosecutor's Office should defer to that process.
- F. Minor theft in school: Amanda, an 8<sup>th</sup> grade girl, steals a watch from Brenda's backpack while in class. Absent extenuating circumstances, the Prosecutor's Office should decline that petition, and allow the school to impose discipline as it sees fit.
- G. Minor theft out of school: Same facts as above, except that the theft takes place off school grounds. Because the petition would be declined if it took place on school grounds, it should also be declined in this circumstance.
- H. Major theft from a school building: Cameron, a 10<sup>th</sup> grade boy, steals computer equipment worth upwards of \$25,000 from his school, and attempts to sell the equipment online. The factual circumstances in this case go beyond typical school incidents, and a petition against Cameron will likely be appropriate. If, however, a restorative justice option is available—or if the school district prefers to handle the case outside of the criminal-justice system—the Prosecutor's Office should defer to that process.

**7. Children with Diagnosed Disabilities of Behavioral Disorders:** The Prosecutor's Office has a strong presumption against filing a delinquency petition against a young person where there is reason to believe that young person's behavior was a manifestation of a diagnosed disability or behavioral disorder. Before authorizing a petition in such circumstances, APAs should obtain approval from the Chief Assistant Prosecuting Attorney or the Prosecuting Attorney.

**8. Charges Should Be Supported by Evidence and in the Interests of Justice:** Nothing in this Policy shall be interpreted to mandate or encourage the filing of charges that are not covered by this Policy. If an APA believes that filing charges other than those covered by this Policy are not supported by the evidence, or are not in the interest of justice, the APA should not file those charges.

**9. No Substantive Rights Created:** This Policy is an exercise of discretion by the Washtenaw County Prosecuting Attorney's Office. Nothing in this Policy purports to affect the legality or propriety of any law enforcement officer's actions. Nothing in this Policy shall be interpreted to create substantive or enforceable rights.

**10. Exceptions:** All cases are different, and this Policy accordingly provides guidance that is presumptive only. Requests for deviations from this Policy shall be made in writing, and require the approval of the Chief Assistant Prosecuting Attorney or the Prosecuting Attorney. A deviation from this Policy will be granted only in exceptional circumstances, and where public safety requires that deviation.

A handwritten signature in black ink that reads "Eli Savit". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

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Eli Savit  
Prosecuting Attorney, Washtenaw County

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