

PANEL 1 LEGAL ISSUES AFFECTING JUVENILES

PROF. EKOW N. YANKAH: We're really pleased and frankly honored to have such a terrific, terrific panel in front of you for the morning. The only problem is that they are so impressive that were I to actually take the time to tell you a great deal about them, we would spend the day recounting their many accomplishments. So they have been kind enough to allow very short introductions. I will introduce them in the order in which I believe they are speaking. We're going to start with Steven Drizin who is the Director of the Center on Wrongful Convictions at Northwestern University. Next is Allison Redlich, a False Confession Expert at SUNY Albany. We're honored to have Judge Eduardo Padro of the New York County Supreme Court. After that will be Jose Arocho, and he's the Deputy Borough Chief of the Manhattan Family Court Division at the Office of the Corporation Counsel. And last, but certainly not least, is Donna Henken who is an attorney in the Adolescent Intervention and Diversion Project at the Legal Aid Society. We're thrilled to have them all. I know you'll join me in thanking them for coming.

MR. STEVEN DRIZIN: Good morning. The year was 1995 and sitting across from me in my office at Northwestern Law School was an 11-year-old boy. This 11-year-old boy had just been convicted of the brutal murder of an 83-year-old woman, his next door neighbor. According to a statement police said he gave, he had seen this elderly woman outside her home. She had made a nasty, racial comment to him as he walked across her lawn. He got angry. He went into her house. He followed her into her kitchen. He beat her with her cane until she was nearly unconscious. He dragged her by her hair through her apartment, into her bathroom. He brought her into her bathroom. He bound her. He gagged her. He went into her kitchen. He took a knife out of the drawer. He went back into the bathroom and he slit her throat.

The only evidence against this boy was a confession, a confession obtained by seasoned homicide detectives who had questioned him for hours outside the presence of parents or a guardian. No lawyer was present. It was not recorded. It was written down in a police report.

"I'm innocent!" he told me. "I didn't do it! I said I did it but I didn't do it." I didn't believe him because who would confess to a murder that they didn't commit. And so for the next seven years, I began to look into his case. I represented him on appeal. I didn't represent him at trial. He had already been convicted and in order to effectively represent him, I had to answer that question. Why would anyone confess to a crime they didn't commit? Why would a juvenile confess to a crime he didn't commit?

And I'm going to talk to you briefly today about what I've learned. The talk today is titled, "Interrogation Gone Bad: Common Pathways to False Confessions," and the message of this speech is that juveniles are much more vulnerable to police

pressure than adults. When police officers use the same tactics that are perfectly legal when used with adults on children, they often get unreliable confessions.

First some data. We know that false confessions exist. There have been hundreds of them in the post-*Miranda* age. Most of them occur in murder cases. That's counterintuitive. You would never expect anyone to confess to a crime that would put them on death row or life without parole, or have them transferred to adult court. But most documented false confessions are in murder cases and that's because it's in murder cases that you encounter the most seasoned, experienced detectives who know how to obtain confessions. About 18% of all the DNA exonerations to date involve false confessions. Most false confessions are filled with details. That's counterintuitive. Why would someone know the details of a crime if they didn't commit it?

How you tell truth from a false confession is that the perpetrator is able to tell you things about the crime scene, what the victim was wearing, whether she had jewelry, what kind of weapon was used, the layout of the room, how many times the victim was stabbed. Those things separate true confessions from false confessions, but most false confessions have those details. How do the innocent get those details? We'll talk about that.

We see a lot of cases with multiple false confessions in the same case. This afternoon, you are going to hear about two cases that my colleagues, Josh Tepfer and Laura Nirider worked on, with Craig Cooley of The Innocence Project. There were five juvenile false confessors in one case, three in another. And of course you have the Central Park Jogger-five here in New York. It's very common, especially with juveniles, that once they get one confession, police officers are easily able to get other defendants to confess. Most false confessions do not come from vulnerable suspects.

Juveniles and the mentally ill are particularly vulnerable, but if you look at the entire number of false confessions, the biggest piece of the pie are people like you or me, or people of normal or average intelligence. Everybody has a breaking point and police officers can reach that breaking point with anybody. Psychological tactics are the main cause of false confessions and you have to realize that if somebody confesses to a crime, whether true or false, that person is in all likelihood going to get convicted because confession evidence is the most powerful piece of evidence in a court of law. I've worked on numerous cases where you have a confession and you have DNA that suggests that confession is false, and jurors will believe the confession in most cases.

What do we know about juveniles? Well, the U.S. Supreme Court, in a recent case involving *JDB*, has finally recognized that the problem of false confessions is more acute when the suspect is a juvenile. This is a finding that is one of the most robust in all false confession literature. Kids are more vulnerable than adults when interrogated by police and Allison Redlich's been working on this issue for most of her career and will try to get at some of the reasons why that's the

case. But they're overrepresented in every known study of false confessions and in several studies, the rate that juveniles falsely confess seems to be two to three times that of adults. This is demonstrated in laboratory studies. It's demonstrated in case studies. It's demonstrated in the real world and even police administrators are reluctantly starting to recognize this fact.

So what happens in false confessions? What are the three things that happen that lead people to falsely confess? Well the first error in every false confession case is called the misclassification error. The misclassification error is that the police officers believe the person they're talking to in that room is guilty. You don't interrogate innocent people. You interrogate guilty people. You interview innocent people. So how do they make a judgment that somebody is guilty? Well, oftentimes it's based on little more than pseudoscience about the way the person looks, the way the person reacts, their body language, the kind of language they use. It's not based on evidence. It's based on gut hunch and instinct and that leads them down the wrong path. And we know from their police training manuals that this is how they determine whether someone is innocent or guilty.

The truthful suspect sits upright, is open and relaxed, leans forward, is frontally aligned with the interviewer, while the deceptive suspect slouches, retreats, has a bad posture. Don't ever cross your hands during a police interrogation or play with your hair because you'll be viewed to be deceptive, and most of the signals for deception probably sound like most teenagers when they encounter adults on a regular basis. So you have to ask yourself whether these kinds of behavioral cues already disadvantage the teenage suspect.

Here are some more adjectives that the training manuals claim to describe the innocent, versus the guilty or the deceptive versus the truthful suspect. There's also certain catchphrases that police officers look for. If you were to say "I swear to God I didn't do that," those kinds of qualifiers, according to police officers, indicate deception. They ask a bait question of almost every suspect, "What do you think should happen to the person who committed this crime?" If the suspect says they should get the death penalty, that person is innocent. If the suspect says well I think they should get a second chance, that person is guilty. It's hogwash. It's not true. I've seen many, many false confessions where the suspect says "I want that person to fry" but police officers believe the suspect is guilty and they run right through their own training.

This high confidence and the ability to detect deception is part of their training. The leading interrogation will tell them that they can detect deception at rates of 85%. Study after study after study says that police officers are no better at detecting deception than you or I, and that even the best people at detecting deceptions do little better than a coin toss. So they make these erroneous judgments and these erroneous judgments drive a perception that a suspect is guilty, and then that leads to the coercion. There are other things besides body language.

There's a lot of police criminal profiles of suspects, which oftentimes sends investigations along the wrong way. I'm not going to spend much time on that, but it's been the case that when police officers develop a suspect profile—a lone white male, an alienated youth—those are the kinds of people that police officers focus on. Then their investigation tries to confirm that profile.

There are also errors in police experience that may be true most of the time, but aren't true all of the time, that lead these investigations awry. When a child is killed within the home, someone within the family must have killed the child. Well that is true that many times the family members are suspects, but that is not evidence. That's based on odds. That's not evidence, and you don't focus solely on a family member when a child is killed. If there are no signs of forced entry, the killing must have been an inside job. All serial killers are white. We know that led the Beltway sniper investigation awry for more than two or three weeks because both of those snipers were black. All shootings in black and Latino neighborhoods are gang-related. That's not true. The last person who saw the victim must have killed the victim.

These kinds of beliefs often lead investigations awry and then they lead to the coercion error. When police officers believe a suspect is guilty and that suspect is denying their guilt and is insisting on innocence, they view that as even stronger evidence of guilt and they are trained to overrun denials, to make accusations, to use deception, which is allowed, and to do anything they can to get a confession because that is often the purpose of an interrogation. To get a confession, not to get the truth.

Most investigations follow a certain arc. An early period of rapport building where Miranda warnings are given, then police officers switch and become confrontational and they accuse the suspect of a crime. We are not here to determine whether you committed the crime. We already know that. Our investigation shows that. We want to know why you committed the crime because, depending upon what you tell us, we can figure out how your case is going to be handled. Maximization is telling the suspect that the evidence against him is rock solid and that nothing the suspect can do will change the interrogator's opinion of it. Minimization involves giving false explanations, justifications, and excuses for how the crime was committed. It was just an accident. You didn't mean to kill the person. You just snapped. It was impulsive rather than premeditated. It wasn't rape. She consented to having sex. Some of these are legal excuses, some of these are moral excuses, but they help to motivate the innocent suspect and the guilty suspect to confess and then the suspect will make a statement. "I was there at the crime scene. I witnessed it. I did it."

Most confessions, most simple admissions, are not enough to get a conviction so then police officers need to get the post-admission narrative because that is how you separate true from false confessions. The true confessor is going to give you details of the crime that only the true perpetrator would know. The true confessor

is going to lead you to information that the police don't know. The true confessor is not going to have mistakes all throughout his account of how the crime occurred. Most of these confessions that are false have a lot of truth to them. They match up with the objectively knowable facts of the crime. How does that happen? It happens because police officers, in their zeal to solve a case, feed these facts to suspects inadvertently.

I don't think they mean to frame suspects but they use leading questions. They show crime scene photos. They take the suspect to the crime scene. That's what they did in the Central Park Jogger case. And when you do that, you expose the innocent to details of the crime that he can later incorporate into a confession, and that confession appears to be reliable when in fact it is not.

So how do we solve these problems? Better police training will solve the misclassification error. Behavioral analysis training increases confidence in beliefs about guilt and leads to coercive interrogations. Police officers need to know that they cannot detect deception at 85% rates. And they need to launch interrogations based on evidence, not on hunches, not on suspicions, not on police theory. The coercion error also requires better police training. They need to know about the risk factors for false confessions. They need to know that when they question children the same way they question adults, that there is a very high risk of getting unreliable information. Also, the courts need to start recognizing that when police officers use even legally permissible tactics with children, that there is a greater chance that those confessions will be coerced and unreliable. The court system has to look more closely at the reliability of confessions before they let these matters go to juries. The only real solution to the contamination problem is electronic recording of interrogations from start to finish, from the minute someone walks into an interrogation room to the very end. The only way you can tell whether those facts were leaked to the suspect is if it is on tape.

I'll leave with these. What do juveniles tell us about why they falsely confess? This is Michael Crow and he described his ten hour ordeal before he confessed to murdering his sister this way. "Eventually they wear you down where you don't even trust yourself." This is his best friend, Joshua Treadway who also confessed to that murder. "I had a lot of pressure on me at the time. You just had to be there to know what I was going through." Marty Tancliff said, "It's like having an 18 wheeler driving on your chest and you believe that the only way to get that weight off, the only way is to tell the police whatever they want to hear." Calvin Owens, 14, said, "They told me that, you know, you just go ahead and cooperate and they will let you go home. I thought I was going home but it turns out I wasn't going home. I spent the next 15 years of my life locked up for a murder and rape I didn't commit." If you ask juveniles why they confessed to a crime they didn't commit, they almost always say "because I thought I could go home."

[applause]

MS. ALLISON REDLICH: So why do wrongful convictions happen? I think that's the question most of us are here to address. I wanted to first take two steps back, kind of take a bird's eye view. I think there are two answers to why wrongful convictions happen. The first is mistakes. A lot of what Steve was just talking about, the misclassification error, for example. Our criminal justice system is made up of humans and we all know that humans make mistakes. The police think they have the right guy but they don't. An eyewitness chooses the person she thinks is her attacker but she's wrong. A forensic examiner looks at a set of bite marks. He thinks they're consistent with the victim but he's in error.

The second answer is misfortune. So even a cursory examination of the hundreds of now identified wrongfully convicted people demonstrates the role of luck, or shall I say unluck, defendants who are at the wrong place at the wrong time. Those who were assigned the public defender who is an alcoholic or assigned a person in the same cell who has a penchant for snitching or whose case happens to be with the D.A. who is up for reelection.

Take the case of Walter Swift, a Detroit man who was exonerated after spending 26 years in prison for a rape and robbery he didn't commit. In that case, the investigating officer randomly decided that the next photo that the victim chooses, I'm going to bring that person in for a lineup. It just so happened to be Walter Swift's misfortune that he was the 8th person chosen.

So at a broad level, we have mistakes and misfortune. Taking one step forward, at a more narrow level, the Innocence Projects around the world have identified what are now known as six factors commonly contributing to wrongful convictions. We have eyewitness misidentification, false admissions, informants, forensic science errors, ineffective assistance of counsel, and governmental misconduct. But I think the real question that's before us today is, what is it about juveniles, per se, that make them more vulnerable to wrongful convictions, or, even are juveniles more vulnerable to wrongful convictions?

To be sure, we do not have the universe of these wrongful convictions. So we really don't know if juveniles are overrepresented among the factually innocent who are wrongfully convicted. In particular, we lack good data on crimes other than murder and rape, or 99.77% of arrests, cases that resulted in plea bargains, or 97% of all convictions, or juveniles who remain in juvenile court or about 98% of all juveniles who are formally processed through our systems.

What is it that distinguishes juveniles from adults? As a criminal justice system, we should be long past viewing juveniles as miniature adults. Is it their height, weight, presence of facial hair, skin color, all the things that we use to identify people? I'm quite sure there are 12- and 13-year-olds who are taller than I am. So, simply put, what distinguishes juveniles from adults are their development and their maturity. As everybody in this room who were all juveniles at one point know, adolescents are less mature. They are less developed cognitively, socially, emotionally, neurologically, and this immaturity in development leads to taking

risks, using bad judgment, misunderstandings of the law, the role of the attorney, everything that makes us “competent defendants.” So mistakes and misfortune.

Is there something about juveniles that increase their risk of being mistakenly identified or having the misfortune of being snitched on? Almost by definition, mistakes and misfortune are random. There should be no rhyme or reason. Perhaps juveniles are more likely to place themselves at the wrong place at the wrong time, but I think this is true of many adults, especially those 18 to 24. Perhaps they have a greater risk of receiving bad lawyering if they remain in juvenile court, and there are some convincing arguments along those lines, but that is really about the lawyer and the system, and not about the juvenile per se.

So what about our six contributing causes? Eyewitness misidentification is the leading cause of wrongful convictions identified thus far among the DNA murder and rape cases. The science may prove me wrong one day. I don't believe that there's anything specific to juveniles' faces or bodies that would increase their risk for being misidentified in a lineup or a photo array. Yes, children and even adolescents are worse at identifying their perpetrator but this is in their role as victim's witnesses, not in their role as the person standing in the lineup. Is there something about their blood or their DNA or hair that makes them more difficult to identify? I don't think so. So given that the differences between juveniles and adults relate to development and maturity, wrongful conviction cases that do not involve the juvenile and his or her capabilities directly should not result in an increased risk.

That said, juveniles, because of their characteristics per se, should be at no greater risk than adults of wrongful convictions because of bad lawyering, governmental misconduct, forensic science errors, and eyewitness misidentifications. There's a wonderful article written by my esteemed colleague over here, Steve Drizin, along with Gregory Luloff, entitled, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?* The evidence they provide presents a very compelling case of why the juvenile court system does enhance the likelihood of wrongful convictions, but again I'm not talking about the institutions, the juvenile court system or the adult court system.

I'm talking about the characteristics of juveniles per se that may or may not lead to wrongful convictions. Now of course there is one factor in which juveniles do play a prominent role, one in which their developmental capacities are highly relevant, and that is of course the interrogation room leading to false confessions. Of the six contributing causes to wrongful convictions, nowhere does a juvenile's utility come into play as strongly as in this circumstance. Like Steve just went over, by design, police interrogations manipulate, deceive, and mislead. By design, they presume guilt, isolate, induce stress and anxiety, and prey on vulnerabilities, and by definition, youth is a vulnerability.

In 2009, Sol Kassir and I had co-authored a chapter where we asked and answered four questions. The first question was, are juveniles different from

adults? As I just went over, there is a clear and resounding answer. The answer is yes. More than a hundred years of developmental science has demonstrated the ways in which juveniles and adolescents are different and our legal system makes it have segregated systems. We have bright lines. They make that distinction.

The second question was, are juveniles different than adults in the interrogation room? As Steve went over, the answer to this question is yes. Almost all studies that have been conducted have demonstrated that juveniles have deficits in understanding their Miranda rights, they're more suggestible and are more likely to take responsibility for acts not committed.

The third question was, are juveniles interrogated differently than adults? We've established that juveniles and adults are different in general and in the interrogation room specifically, but the police do not interrogate juveniles any differently than adults. We know this from interrogation training manuals. We know this from surveys of police law enforcement. We know this from field and case studies in which juvenile and adult interrogations have been observed.

The final question we posed was, why aren't juveniles and adults interrogated differently? Given the undeniable evidence that juveniles are less mature and less capable, why is it that interrogators don't make these distinctions? We don't have the answer to this question, but we suspect it's because law enforcement believe that the juveniles that they're interrogating are different than juveniles in general. As one officer put it, "the juveniles I interrogate aren't kids, they're monsters."

Returning back to our six contributing wrongful conviction factors. I've tried to argue that the defining and differentiating features of juveniles increase their risk of false confessions but don't affect eyewitness misidentifications, ineffective counsel, governmental misconduct, and forensic science errors. But what about snitches? Are juveniles at increased risk of being wrongfully convicted because of snitch testimony? It's true that most juveniles hang around with other juveniles. If they are going to be placed in a cell, they're going to be placed in cells most likely with other juveniles. I haven't seen any research yet examining the developmental tendencies toward snitching, but we can make hypotheses towards this.

Recently my student and I conducted a study among college students. We used the prisoner's dilemma, in which whoever confesses first gets the better deal, but you don't know what your co-suspect is going to do. They're off in another room. And this is a very common interrogation technique and is actually a very common way to study human decision making from many different standpoints. What would you do? Imagine you and an acquaintance are arrested for robbery, placed in different rooms and interrogated. If you both confess, you get 12 years in prison. If you both deny, you get eight years. If you confess and your friend denies, you get three years and your friend gets 25 years. But if you deny and your friend confesses, you'd get the 25 years and he'd get the three years. What would you do? Now what if you were innocent and your friend guilty? Would this

change your decision? What if you were guilty and your friend was innocent? What if both of you were innocent?

This is what we asked people to do in our study though not in that sequential manner. People were assigned to one of those four different conditions. What we found was fascinating. The overall confession rate was 34% but it ranged from zero to 71%. And for the most part, subjects did what they expected their friend to do, so they either both confessed or they both denied. But what is most interesting to me are the people who decided to do something other than what they thought their friend was going to do. The highest rate of defecting was actually when the subject was guilty and the friend was innocent. The guilty subject would get the three years leaving their innocent friend to get 25 years. These are the people that you don't want for your friends. I think I've determined that.

There was also a small, but significant minority, about 20% of innocent people who refused to admit to something they did not do. These are those people that just refuse to plead guilty to something even though it might be in their best interests. So, they opted to spend 25 years in prison, hypothetically of course.

Let me just conclude by saying that there's clear and convincing evidence that juveniles are at increased risk of false confessions. I tried to argue that the immaturity of juveniles does not place them at risk for the other four to five identified contributing causes of wrongful convictions. What I have not discussed is the role false confessions play in increasing the risk of the other factors occurring. Confessions equate guilt, so the D.A. who is convinced of the defendant's guilt withholds Brady material. The forensic examiner who is aware that the suspect confessed, "sees a match," or the lawyer, who in the back of his mind, does not want this rapist killer to go free is not as zealous as he or she should be. We can almost draw a diagram. Juveniles' lack of cognitive, social, and emotional development leads to false confession. False confessions in turn lead to increased risk of forensic errors, misled witnesses, governmental misconduct, ineffective counsel, and the other mistakes and misfortunes that plague our system. Thank you.

[applause]

HON. EDUARDO PADRO: Good morning. I was asked to speak more generally in terms of the juvenile offender part that I work in. Just a few disclaimers to start with. First, I am not speaking on behalf of the Office of Court Administration or the court leadership. The views and experiences I have had are my own. I'm not sure there is even an official position from the Office of Court Administration or our Chief Judge on these issues. Second, my views are based on 30 years of criminal law practice, 18 of those years as a judge. I spent eight and a half years in lower criminal court up in the Bronx. I have spent the last ten years here in Manhattan in Supreme Court and in the last four years running the Juvenile Offender Part. For the past two years, I have also served as one of the Drug

Diversion judges. All of this is also impacted by my lifelong residency in a poor community. I was born and raised in East Harlem and I still live there.

I'm going to point to some key issues which may open us for further discussion later on, or if you wish for my opinion or my experience on some of the issues raised by the first two presenters, then obviously I'll address those at that time.

The first issue is what is my part. It is commonly referred to as the youth part, but it's really the Juvenile Offender Part. Let me explain. Turn the clock back 40 years ago when we had a bright line at age 16. Before your 16th birthday, if you jumped the turnstile, did graffiti, or murdered somebody, you went to Family Court. You were seen as not having the competency to commit a criminal act. Everything was worded in terms of what would be a crime if you were an adult, and that protects you from having a criminal conviction for the rest of your life. Once you turn the magic age of 16, if you jumped that turnstile or you murdered somebody, you were officially an adult in New York State.

So, what happened 30 years ago? One particular kid was notoriously violent. We were beginning to see an increase in violence amongst younger people. It happened to dovetail with a political year. There was public outcry and political campaigning and we carve out an exception.

Now if you are 13 and you commit an intentional homicide or if you're 14 and 15 and commit a series of violent crimes, we take you out of the child category and we make you an adult. Still can't vote, still can't drive a car, but we have determined that when you took that gun and you shot it, you were empowered with adult-like abilities and so you are now officially at 14 and 15, an adult.

Some might answer that, Judge, wait until you are on the side of that gun, with it being pointed at you, and then talk to me about whether they are juveniles or whether they are committing adult-like acts. Alright, so these cases are the minority of juvenile cases. Let's be clear, the majority of the kids are not robbing people at gunpoint or doing things like that. But there is this subgroup that now ends up in adult court.

One of the issues it raises, obviously, is at what age should juveniles be prosecuted as adults? That is a hot topic right now in our state. When New York took that action of putting 14 and 15 year olds into the adult court, we were seen as at the vanguard. Thirty years later, we're the retro guard. There is only one other state left that will define a 16-year-old as an adult besides us, and those of you who may be following the discussions, the Chief Judge has staked out a claim on the non-violent 16, 17, and 18. He is kept away from the third rail which is those young folks that are allegedly, even at 14 and 15, committing violent acts.

The second issue is at what age we should draw that bright line? Is there any reason or rational basis to carve out an exception with those young people who are committing particularly violent crimes? In my court, that really translates into three-quarters of the cases, give or take, being robberies. So if a kid stops you as

you are on your way to the train and they threaten to beat you up but they have no weapon, they don't hurt you, they end up in family court.

It is at the point that they take out some type of weapon or what could be defined as a weapon, or that on top of asking for your cell phone or your laptop, they also need to beat you up. It is at the point that they beat you up on top of the robbery or that they use a weapon, that they end up in adult court.

Another area of discussion is that my court is seen as a quasi problem solving court. That is something that has been in our state for a couple of decades now. It started in the drug diversion area where we sort of talked about maybe there's a better way to address the issues of people with drug addiction than just incarcerating them and that maybe a lot of the crimes that they commit are drug-related.

It is carried over into domestic violence, understanding that if there are no ways to intervene, oftentimes the complaining witness which is usually a female is going to end up right back in the relationship with that person who is beating her. If we don't intervene with the defendant, the reality is that most of the time he is going to continue not only to beat his significant other, but if he leaves the significant other, he is going to beat the next significant other that he is in a relationship with. And I say he because the majority of the cases do tend to be hes.

In the juvenile area, I think that whole concept was embraced decades ago in the family court. I think the mindset when it came to the violent juveniles that end up in my part was, hey, they did what? Put them away unless you have an exception. But what do we know that is countervailing to that? The fact that we have been putting these young people away is such a topic of debate. We really have not been addressing what are some of the underlying issues. You spend about \$200,000 to \$220,000 per year in taxpayer dollars to put one of these kids away. And what happens is you are getting a more professional and oftentimes a more hardened criminal that is going to come back for the next encounter.

So that has created a whole discussion about how we handle young people in general. Mind you that a lot of the research has been about kids doing graffiti. Kids that have been incarcerated are not going to school. Young people are in need of supervision but a lot of that really does apply to the juvenile offenders. As I said, this continues to be the third rail because at the end of the day, nobody really wants to stake their political future on saying maybe that kid that's out there robbing with a gun needs some type of intervention, not just incarceration.

So what are some of the issues that I have to confront? Obviously, we are a criminal court. Obviously, the whole purpose is to determine what should be a reasonable punishment for the crime committed. Second is, of course, you are there to protect the safety of the community. But in the problem-solving courts, we try to go beyond that concept.

I say I'm a quasi problem-solving court because the part is not embraced by OCA. You don't have the same level of financial commitment, or staff that you

will see in the drug courts but it is kind of understood that that's how we operate without that financial support. However, if in the family court they have understood the importance of what is in the best interest of the young defendant, really in some ways that does enter my deliberations. Is there a way in which we can assist this individual in the strategies for ending conflict? Is there a way in which we can intervene where they are often the victims of either psychological, and less so but to some extent, sexual abuse, where there are clearly defined mental health issues, substance abuse issues, and learning disabilities?

You may say, why care? At the end of the day, they robbed somebody. Well maybe because of being concerned about the safety of the community, if we successfully intervene at this young age, we might stop a criminal for life. We may prevent a number of robberies and much more dangerous action. That is pretty much guaranteed based on the recent studies of what is happening with the young people that we are putting away.

In some ways, that type of a broader view, I would argue, is protective of the safety of the community because if we are able to reach this young person at this point and we turn them around, then the community is safe. It is not just about being soft on the kid or soft on crime.

What do we do in the juvenile offender part? As I said earlier, the bulk of the cases are these robberies. Every kid that comes before me stands in a very different situation. I can get a kid, Johnny, who's already had two or three robberies by the age of 11, 12, and 13. He now comes to me with a more serious robbery at the age of 14 in the adult court system. I can have Johnny, the good kid, who feels pressured, either because of some of the gang activity in the community or whatever else there may be, so gives in and goes along or wants to just demonstrate that he too is cool and he can hang with the bad boys. Sometimes he is just a lookout. Sometimes it is Johnny with the mental disabilities and they have him carry the gun because they know that, at the end of the day, the system is going to go harder on the person with the gun.

Johnnies come in all kinds of different situations and I have to figure out what I believe is the best intervention. The way we normally run it is, the kid will take a plea. One of the things the system does recognize is that I can give youthful offender status. So even though the young person pleads guilty, we vacate the felony conviction. Legally that conviction does not stand. Then when the young person applies to college or jobs, if they ask if they have ever been convicted, they can say no, and that is the law. Nothing gets shredded, nothing gets thrown away.

Those records could be unsealed. What we'll do is take a plea, and at a certain point I will let them out of jail, and they will work with a program for about a year. That is the ideal. Unfortunately, oftentimes I end up monitoring them for two to three years because they are not able to stay away from the weed and not able to stay away from jumping turnstiles, which are all crimes. As a result, we constantly struggle with trying to get them focused, and they often don't want to go

to school. But they are given an opportunity. There is an intervention with alternatives to incarceration programs.

I monitor them directly over the year, and then if at the end of the year or, like I said, sometimes it runs two, two and a half years, if they have earned that YO, if they have really made some significant strides, I get them the youthful offender status, and they get probation. If, unfortunately, they do not, they end up getting jail time. Depending upon the case in some of them, yes they do end up with a felony conviction at the age of 14 or 15 for the rest of their life.

[applause]

MR. JOSE AROCHO: Good morning. My name is Jose Arocho. I'm a prosecutor in Family Court. A lot of what you have heard so far this morning is about individuals, juveniles, who are prosecuted in the criminal court or criminal supreme parts throughout the country. Juveniles do, however, also get prosecuted in family court. Now as the Judge indicated, a juvenile delinquent is someone in New York who is under the age of 16, who commits what would be a crime if he had been an adult. The statute actually says anyone over the age of 7 and less than 16.

There are exceptions, as the Judge indicated, for more serious offenses, those being arson in the first degree, murder in the first and second degree, robbery in the first degree, rape in the first degree, and Family Court would not have jurisdiction over those cases. Those cases would actually go to the DA's office and be prosecuted in the Criminal Supreme Court parts that typically hear those cases.

There are differences in the two systems and I want to go over those. I think it will provide some context to a lot of what you have heard this morning. After police make an arrest, it is at the point when they are charging a case that determines whether it will go to Criminal or Family Court. And that depends strictly on the age of the individual and the charge.

If the case comes to Family Court, the case does not come directly to us, the prosecutors in Family Court. That is one difference between the two systems. If the case went to the DA's office, it would directly go to the DA's office. If a case comes to Family Court, the first stop is with the Department of Probation. The Department of Probation in New York basically does an intake of each case. The average number of arrests each year is about 13,000 in all five boroughs for individuals under the age of 16 that come to Family Court.

The Department of Probation interviews the victims in those cases. They interview the juveniles who are arrested, their parents, the police, and anyone else who has involvement with that particular case. They are looking to divert cases that do not need to go before a judge, cases that do not need to go to court. These are cases where they can provide services to the juveniles and address the issues that may exist, either with that particular juvenile or his family and keep that particular individual out of the court system. Over the last couple of years, the

average number of cases diverted through the Department of Probation was approximately 4,000.

Now we are down to about 9,000 cases that get referred to my agency. What does the Department of Probation do during the diversion period? They basically refer juveniles to services. As an example, if a particular kid has an issue with marijuana, they can make a referral to a marijuana program. If the particular kid has anger management issues, they can refer that kid to therapy, anger management. They can have the juvenile do community service. Just about anything that you can think of, they can address at that level.

What kinds of cases do they divert? Typically it is the lower offense cases, for kids with no prior histories. But in every instance, everyone involved in that case has to agree to the diversion. The kid has to agree, the juvenile's parent has to agree. If there is a victim, the victim would have to consent to diverting the case. The diversions typically last, from what I understand, approximately two to four months, depending on the needs.

What happens if a case is successfully diverted? The case automatically seals and the record is wiped from the records. The remaining 9,000 cases that come to us basically get assigned to an attorney. At this point, our individual attorneys investigate the cases. They interview witnesses. They interview the police, eyewitnesses, and gather as much evidence as is available. What are they looking for? They are looking to see if there is a legally sufficient case that can be brought.

Now, how many cases do we file? On average, I think in 2010 the number was around 3,900. However, just because a case is fileable doesn't mean that it gets filed. We too also look to divert cases and our criteria is slightly different than the criteria that is used by the Department of Probation. Cases that get diverted through us are lower offense cases such as fare evasion, turnstile jumps, graffiti type cases, and shoplifting cases.

Particularly here in Manhattan, the shoplifting cases are something that we receive quite often, and we use programs that are not run by our office, but which are typically run by a not-for-profit. In shoplifting cases, for instance, we use a program that teaches juveniles about the dangers, and pitfalls of what they have done, and why they should not continue with that sort of behavior in the future. We have programs that deal with graffiti and other programs that deal generically with cause and effect and why you shouldn't engage in certain types of behaviors.

Of the cases that get filed, the majority of them are robberies and assaults. Approximately 40% of the case load that gets filed falls into those two categories. Robbery is the greater of the two categories, and the typical robbery situation involves one juvenile or a group of juveniles engaging in a robbery of another individual. Typically the individual that they are robbing or assaulting is another juvenile who resides in the same community or who goes to school in the same community. Another big group of victims here are people whose first language is not English. In Manhattan in particular, more often than not, you find that it is a

delivery person. And it makes sense when you think it through that these people are the weaker people in society and that if you are looking for a target, that is who you are going to target.

These types of cases usually trigger police involvement because somebody is calling the police. Usually it is the complainant victim or an eyewitness and the police usually respond and make an arrest on scene. The arrest usually follows the robberies and the assaults. Most of the cases fall into that category. If we decide to divert a case because it fits into our criteria, we refer it to the program. Upon successful completion of the program, we automatically seal the case and it is the same kind of sealing that the Department of Probation does. The record is sealed for all intents and purposes for the future.

If a case is filed, the case goes before a Family Court judge. A difference in Family Court versus Criminal Supreme Court is that there are no juries in Family Court in New York City. If there is a trial, it is before a judge. The judge makes determinations on issues of fact and issues of law. Once you get past the trial and are into the sentencing stage, we actually call that disposition.

The standard that is used in Family Court is the least restrictive alternative that is consistent with the need of that particular juvenile. The judges typically order one of two reports. Sometimes they order both reports. The first report is called an investigative report, which is put together by the Department of Probation. It is basically a snapshot picture of a juvenile's life. They find out what failings, if any, there have been at school, any suspensions. Are they going to school? Are they passing all their classes? Why and why not? Has there been any kind of psychiatric history with this particular child or the family? What has been the behavior, both in school, out of school, and at home? And they speak to as many people as they can to put this report together.

They also report arrest histories. In certain instances, the Judge will also order a mental health report and that would be put together by psychiatrists who would interview and test the respondent. That is what we call the juveniles in Family Court. They would interview the parents and any other individuals who play an active role in the life of that particular juvenile. And they too make a report and make a recommendation to the Judge.

With these two reports and their recommendations, the parties in court often times resolve the cases. It is at this stage, I believe, that there is the most difference between the Family Court system and the adult Criminal Supreme Court case involving a juvenile. The number of services that we can offer, from what I hear, is much greater. A juvenile can receive an ACD, an Adjournment in Contemplation of Dismissal in Family Court. A juvenile can also receive a conditional discharge in Family Court. A juvenile can be placed on probation and a juvenile can be placed at either an OCFS facility, which stands for Office of Children and Family Service, or at one of the private placement facilities that the city contracts with.

So, what are the types of services that are available? More and more these days, you find that there is a move away from placement, and as a result of that, there have been these programs. There is the Juvenile Justice Initiative, and the Esperanza Program, which are diverting cases that would have ordinarily, in the past, gone to placement into another place. At that other place, the child is put on probation for a period of time. That period of time can be up to two years, depending on what the top finding is.

These programs often provide intensive services in the home. Programs typically last six months, sometimes nine months, and sometimes a year, depending on the services and the needs of the particular juvenile and the parent. You name the type of service that a particular juvenile will need and they will provide it. They will provide counseling, psychiatric care, and monitor, if the child is in need of taking certain types of medication to address behavioral issues. They will do drug treatment, tutoring, and safety plans for certain kids.

Safety plans are something that you hear in connection with kids who are more aggressive in the communities. You need a safety plan to address two things: one, leaving the home that they are in. Oftentimes you have to have a plan in place with the parties that are involved with that particular youth and that particular family. You also need plans in place to ensure that the youth is not associating with negative peers that, in the past, have triggered bad behavior in the community.

Initially, all of these programs are very intensive. Some of them come to the home as I indicated earlier, and the caseworkers are in the home several times a week, working both with the juveniles and the families. Oftentimes the counseling is not just for the juvenile but also for the family, so the juvenile could receive individual counseling and the family could also be requested to participate in family counseling. A lot of times the parents get services individually as well, such as parenting skills. How do you deal with your kid when you are telling your kid you can't go outside, and your child wants to go outside? Some parents just don't have these skills and need to be taught these skills to address the juvenile's behavior. That is what is going on through these programs on a daily basis with the juveniles that are involved in them.

Approximately 20% of the cases that we file are resolved in placement for juveniles. I believe it was almost 800 juveniles in 2010. The numbers for 2011, we don't have them yet. They are still working on them, but it should not be that much different.

What is interesting to me is that oftentimes with a lot of these kids, just broadly speaking, when looking through the reports that we receive when we are trying to craft a disposition that is appropriate for the juvenile, we notice that they have had involvement from city agencies even before there was an arrest. Oftentimes the Department of Education has been involved. Oftentimes, ACS has been involved. Oftentimes, other city agencies have been involved either through the parents or because of something that the kid is doing or not doing.

Going forward, I think one thing that can be done to address crime before it happens is to really look at that and try and put services in place before the crime happens. There is no reason why the services that we are offering after the crime cannot be triggered beforehand. I think that this is where we need to be going. I think that a lot of people are looking at this and trying to work on this kind of an approach, and I think that this is what is prompting a lot of the conversations that are currently occurring with regards to the changes in the law with regards to ages and where a kid goes and does not go.

With regards to statements, there are differences as well. In New York, police cannot interview anyone less than 16 unless there is a parent present, for the Miranda warning and for the interview itself. In New York, they must use what is called a juvenile room. They could also speak to a juvenile at their home or at a facility. If they are speaking to a juvenile at a facility, it must be a designated area within that facility by the Division of Juvenile Justice.

[applause]

MS. DONNA HENKEN: I come from a little bit of an unusual background. I started my career at the Manhattan District Attorney's office and I have spent more than half of my career as a prosecutor. I spent the last half of my career representing youth who are defendants in criminal cases.

I came to the Manhattan District Attorney's office in my mid-20s. I had been to New York a total of seven days in my life. It was the most exotic place on Earth. I had never been to parts of the city that I thought were dangerous, and my bird's eye view into those neighborhoods came from the police. The first two people who spoke talked about why defendants speak to the police, whether they are guilty or not. In a lot of my cases, my clients are guilty and I still say, well, why did you speak to the police? You got the Miranda warnings and your parents were there. The answer is that their experience with the police isn't negative.

My experience with the police when I worked at the DA's office is that they were funny, they were irreverent. Police officers know how to talk. Lawyers like to talk. So they came in, they were interesting. They gave us stories about the street. They took us on ride-alongs to neighborhoods. They were some of the most charitable people I had ever met. They were the funniest people I ever met. They were some of the most bigoted people I met. They were some of the most prejudice people I met. They came from all different backgrounds. They spoke Spanish and I don't. Some of them had come from foster care. Some of them had foster children. They were really an interesting group of people and they could show the greatest kindness.

When I worked at the DA's office, I spent the last seven years prosecuting child abuse cases. I'm going to start with an anecdote. I had a terrible case that was sort of infamous in New York City. It was a case of a child who was seven years old. Her name was Alicia, and she was a child who had been in foster homes and had been released, although she was under the auspices of Child Services to her

mother, who was a crack addict and who was abusive, and she was a target child. She was one of several children. I believe there were five children, and her mother killed her.

I was the child abuse DA. I went out and took a video of the mother where she confessed. The witnesses had been her children, who ranged in age from eleven to five, and the detectives were the people who removed those kids from the home. Detectives and police officers are often the first people on the scene. While they are seasoned, they are also often the heroes in these kids' lives. They come in. They remove the kids from a terrible situation. They go into fires. They go to places where the kids are in danger, and the kids like the attention the police give them. Regarding their experience with the police, they are somewhat ambivalent towards them because when they are younger, the police are heroic.

The detective on the case and I spent a lot of time with the siblings because their mother was in jail, their stepfather was in jail, their sister was dead, and they had to talk before the grand jury. We had to win over their trust, and we also felt really bad for them. We brought them Christmas gifts and the detective talked a lot to the oldest boy. The detective turned to me at one time and he said, "Well, there's a future 61." A 61 is a police report. In his mind, the kid who we were talking to, who was a victim, was going to be a future defendant because there is an intersection between trauma, neglect, and who becomes a defendant.

The kids who I have are terribly vulnerable. By the time they get to the police, they are vulnerable kids and the police know how to exploit that. The police know how to be kind. They know how to be your buddy, and they know how to talk to kids. When I had victims in cases, I realize in retrospect that the kids had a desire to please me and the police. When I had victims who came in to talk about a case they were going to testify on, if they didn't say the right thing, I'm sure I communicated to them my displeasure that they were not saying the right thing. I think they probably turned their testimony around and I probably was under the impression that I knew what the correct testimony was.

Much like the victims I had in child abuse cases, my current clients and their parents have a desire to please the police. Some of the mothers of my clients will say, yeah, well I told John to speak to the police because I wanted everything to be right because I said being honest is the best thing. So, sometimes my clients tailor their testimony to what the police want them to say and sometimes they just want to please the police. A lot of the time, my clients are telling the truth. I just don't want them to talk to the police. Since they have had experience with the police, and some of it has been negative, they still go in and give a full confession. I think, very often, it is because both they and their mother want to please the police. And they do because there is nothing better in a case than having a confession, as any prosecutor knows, and unfortunately as any defense attorney knows.

I currently represent clients who are 14 and 15 years old who are juvenile offenders, and 16 to 19 year olds who are trying to get a youthful offender so they

don't have a criminal record. My clients really come from the same background that the victims did in my cases at the DA's office. They are often kids who have been in and out of foster care. They are kids with learning disabilities, so they were targeted as victims, and then they are followers or they can't figure out how to get themselves away from relationships that are harmful to them.

I would like for prosecutors to look at the clients that I represent as they look at the victims in their cases, because they really often are. They have mental health issues. They have drug abuse issues. Our practice in the intervention unit is to try to get them help, as opposed to incarceration, so there is less recidivism, and to try to get them people in their lives who can help them. I think that is very often why you have confessions, because you have police officers who are men who these people want to be.

My clients are interviewed in pre-pleading investigations and they are not asked about the crime but they are asked about what they want to do in the future. I would say that 70% of my male clients say they want to be police officers, corrections officers, and court officers because that's a professional, stable male that they have seen. I think that when you are considering why people talk to the police and why they interact in the way they do, you really have to think about what their relationships with the police are, and how much good the police can do in the community.

[applause]

FEMALE VOICE 1: How do you deal with third party statements against a juvenile co-defendant when one of them commits the crime?

MR. DRIZIN: That's a very tough question. You have to attack the reliability of that third party statement the same way you would attack the reliability of a confession. You try to understand the circumstances under which that person confessed. Was he pressured? Was he coerced? Was he fed facts? The fact that he is fingering someone else is also an open area for cross-examination, so you want to find out what, if any, deal he's getting from the authorities in order to finger his co-defendant or his friend. But it is pretty much the same way you would attack a confession. It is all about reliability. It's not about trying to move to suppress a third party statement.

MR. FARBISH: I know that gang-related violence is pretty huge in New York City, especially since a lot of gangs are recruiting members even in middle school and early high school. They are even waiting outside the schools to recruit. How often are you finding that some of the juveniles that you are involved with, who are confessing or maybe not confessing, are involved in gangs?

MR. AROCHO: That is a phenomenon that is pretty new to the police department. That is something that they did not historically track. I think the police department did track adult gangs, but not youth gangs. That is something that you hear more and more about now, but it is a big problem because a lot of the more serious crime that occurs, especially here in Manhattan, is gang-related.

I recently prosecuted one case last year where one juvenile goes to a park in the city near Columbia University. The kids know that the people they are targeting will be at the park, so they go to the basketball court, meet them and shoot them. Shoot them in the face, and shoot them in the back, as they are running away. That presents a big problem to us. It presents a big problem to the community and those are the types of crimes that result as a response of angst between two different groups of people, which we take seriously.

HON. PADRO: I'm not an expert on gangs but having lived there my whole life, you see the cycles. For whatever reason, the resurgence of gangs seems to come in cycles, and right now in the last couple of years, there is no question that we have seen it. It is slightly different in the sense that historically almost all the gangs start out innocent. Kids get together. They are trying to protect themselves. They are trying to feel some sense of family, and then eventually things move in a certain direction that leads them into violence and fighting.

A lot of what has exploded recently are these very small, territorial coming together of kids that call themselves crews. They are running in crews, which we have called gangs. So it will be my housing project against your housing project. It might be literally my block against your block. If you can imagine West Side Story revisited, the difference is rather than 17 and 18 year olds, they have moved into the lower ages, 12, 13, and 14 year olds.

As opposed to the knives being pulled in West Side Story, somehow these kids are able to access guns the way I accessed bubble gum as a kid, and they don't hesitate to use them. And then there is a history. Your group did this to mine. Oftentimes these kids were in school together. They were at the same elementary school together. Now they are sworn enemies to death. It is not the big Bloods, even though the Bloods are there. The Latin Kings of ten years ago, or if we turn it back to the late 70s, a lot of it is literally housing project against housing project, block against block. The problem is that some of them are able to access guns and that the beatings that take place can be pretty severe. But there is no question that the resurgence is taking place.

MS. HENKEN: I have a little bit of a different perception of how gangs are used in court now because I have a lot of people, police and DAs, who come in and say that our kids are gang involved. I feel like it's almost a form of McCarthyism. They come in and they say this kid communes with this gang and they name some gang that is sort of shocking, and they come without much proof and they come in time after time and the parents of these kids keep saying to me well, where is the proof? How do they get to come in and say that? Where is the proof that these kids were involved with a gang? I think that all the courts often accept it without any more proof that the kids are gang involved, and it really hurts our kids. It sometimes affects their bail status and the kind of sentence that the Judge is willing to give.

I also think that, if kids are gang involved, they are gang involved because they feel like the gangs give them some kind of community. If the gangs are going to be weeded out of the community, the communities have to be seeded with something that is good for the kids. If the gangs are weeded out by the DA's office or by the police, I think they should go right back in there with youth programs that are good for the kids.

HON. PADOR: I'm on the receiving end of some of those comments, since we are colleagues on this. If we seek to intervene, we really have to look at what is it that makes these groups attractive to young kids? What is missing in their lives? The unfortunate factor is that with the breakdowns of families, the breakdowns of communities, they really don't have anybody, so the gang gives them what some of you might have been lucky enough to have had as a family unit. The gang gives them a sense of belonging. It gives them a sense of security. If you go up in the ranks, you get a certain level of prestige, just like you go to law school so that you want the prestige of being a lawyer. They get prestige from these relationships. A lot of times the kid does not join a gang because he wants to kill and knife people. That is not the agenda. The agenda is the same altruistic one that you had going to high school, to college, and to law school.

But they are in a different context. What happens is that unfortunately, once these gangs gain power, then there is the attraction that leads them often to other types of activities. Let me explain. If we turn the clock back to the early 90s, the Americans, i.e. the black kids and the Puerto Rican kids would gang up on the foreigners up in Washington heights who were the Dominicans. The Dominican kids band together to protect themselves from the attackers, which are the black and Puerto Rican kids.

Fast forward 15 years later, the Dominicans are in a fight to the death, killing each other, and of course there is drug dealing that comes in. You get the kids involved, and it is a concern that you hear the stories. For example, up in George Washington high school, the "good kids," growing up in the neighborhood are dropping out of school because they can't take the pressure of the gangs. You either have to become a gang member or your life is at risk, so you drop out. So, yes I do have a slightly different take than my colleague here on the defense side.

Now, the other side, for example, in East Harlem, we saw the same thing. The black and the Puerto Rican kids, the Americans attack the foreigners who happen to be the Mexican kids, so the Mexican kids begin to form their little gangs, which are basically self-protection so that they can get from the train to school, and from the school to home without being attacked. Fast forward, we are now watching Mexican kid gangs against Mexican kid gangs, shooting and knifing each other.

The problem is that these gangs terrorize the community, when they do come together and when that family grouping takes a turn for the negative. One of the alternatives to incarceration program told me a story recently. The representative

said her best friend's kid was brutally beaten in one of the housing projects in East Harlem. The mother had to make a decision. Do I now go to the police and put at risk all of my other kids, or do I chalk it up to the reality of living in the housing project? She perceived herself as having no other option, no other place where she could afford to live, so she accepted it. They never went forward to the police. The kid got beat up and that is a reality.

So, that is why I do listen when the DAs mention that there may be some type of affiliation. Now that doesn't stop my analysis. Oftentimes we have had conferences, especially when the lawyers challenge it. Sometimes the DA comes in with all of the Facebook materials, because the gangs all advertise on Facebook. They recruit on Facebook, and they make an easy case. Sometimes the materials they bring in, though, I have to question if it is really a low level involvement, and that will shift how I see the case.