Defender Advocacy Workshop 辩护律师工作坊

Juvenile Defense 青少年辩护

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Overview of the Chinese Criminal Juvenile Justice Process & the Role of Juvenile Defense Counsel 中国少年刑事司法程序概述及少年辩护律师的作用

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一、未成年人刑事诉讼的主要阶段

立案(公安机关)、侦查(公安机关)、审查起诉(检察院)、审判(法院)、执行(未成年犯管教所、社区矫正机构等)

I. The main stages of criminal proceedings for juveniles

Case initiation (public security bureaus), investigation (public security bureaus), examination and prosecution (procuratorates), trial (courts), execution (juvenile correctional institutions, community correctional institutions, etc.)

二、未成年人刑事诉讼的主要原则

- (一)教育、感化、挽救方针和教育为主, 惩罚为辅原则
- 教育、感化、挽救方针是中国法律、政策一直强调的处理 未成年人犯罪应当遵守的基本准则,《未成年人保护 法》、《预防未成年人犯罪法》、《刑事诉讼法》等均有 明确规定。
- 教育为主、惩罚为辅原则是根据未成年人自身特点和犯罪特性确定的,体现了刑法的谦抑性和刑罚个别化的思想。

II. The main principles of juvenile criminal proceedings

- (i) Policies on education, probation, and reform, and the principle of education as the main focus and punishment as a supplement
- The principles of education, probation, and reform are the basic guidelines that Chinese laws and policies have always emphasized in dealing with crimes committed by juveniles, which is clearly stipulated in the Law on the Protection of Juveniles, the Law on the Prevention of Juvenile Delinquency and the Criminal Procedure Law.
- The principle of education as the mainstay and punishment as a supplement is determined in accordance with the characteristics of juveniles themselves and the characteristics of the crimes, reflecting the restraint of the criminal law and the idea of individualizing penalties.

(二) 对未成年人给予特别保护的原则

- 一方面,《刑事诉讼法》以及最高人民法院、最高人民检察院有关的司法解释或其他规范性文件规定的所有犯罪嫌疑人、被告人在刑事诉讼中享有的诉讼权利,同样适用于未成年的犯罪嫌疑人、被告人。
- 另一方面,基于未成年人的特殊性,《刑事诉讼法》还规定了未成年人享有的一系列特殊权利。比如,合适成年人到场、法律援助、犯罪记录封存等。

(ii) The principle of giving special protection to juveniles

- On one hand, all the procedural rights granted to criminal suspects and defendants in criminal proceedings as stipulated in the *Criminal Procedure Law* and relevant judicial interpretations or other normative documents of the Supreme People's Court and the Supreme People's Procuratorate are equally applicable to juvenile criminal suspects and defendants.
- On the other hand, based on the special nature of juveniles, the *Criminal Procedure Law* also provides for a series of special rights granted to juveniles. For example, the presence of a suitable adult, legal assistance, and the sealing of criminal records.



(三) 司法专业化的原则

- 包括三个方面: 一是司法组织的专门化, 二是司法人员的专业化, 三是司法措施的专业化。
- 司法组织的专门化,是指设置专门的司法机构或办案组织来办理未成年人案件。
- 司法人员的专业化,是指办理未成年人刑事案件的办案人员,除了应当具有专业的法律知识外,还应当具备教育学、心理学等符合未成年人身心特点的相关专业知识,具有办理未成年人刑事案件的能力、素养、技巧和方法,以便对未成年人进行有针对性的专业帮教和矫治。
- 司法措施的专业化,是指采用与成年人司法不同的、专门适用于未成年人的司法程序和实体处置措施。

(iii) The principle of judicial specialization

- This includes three aspects: first, the specialization of judicial organizations; second, the specialization of judicial personnel; third, the specialization of judicial measures.
- The specialization of judicial organization refers to the setting up of special judicial institutions or case organizations to handle juvenile cases.
- The specialization of judicial personnel means that the case officers handling criminal cases of juveniles should have professional legal knowledge, as well as professional knowledge in pedagogy, psychology and other relevant professional knowledge in line with the physical and mental characteristics of juveniles, and have the ability, literacy, skills and methods to handle criminal cases of juveniles, so as to provide targeted professional help and correction for juveniles.
- The specialization of judicial measures refers to the adoption of judicial procedures and physical disposition measures that are different from adult justice and specifically applicable to juveniles.



(四)分别关押、分别管理、分别教育的原则

• 《刑事诉讼法》第280条第2款规定:"对被拘留、逮捕和执行刑罚的未成年人与成年人应当分别关押、分别管理、分别教育。"

(五) 强制辩护和法律援助的原则

强制辩护和法律援助的原则,是指未成年人刑事案件必须有辩护人的参与,如果未成年犯罪嫌疑人、被告人没有委托辩护人,公安机关、检察院和法院应当通知法律援助机构指派律师为其提供辩护。

(六) 隐私保护和不公开审理的原则

- 在侦查、审查起诉、审判和执行等各个诉讼阶段,都不得向外界披露该未成年人的姓名、住所、照片以及可能推断出该未成年人身份的其他资料,不得公开和传播查阅、摘抄、复制的未成年人刑事案件的案卷材料。
- 法院审理未成年人刑事案件时,不允许群众旁听,不允许记者采访,新闻媒体不得对案件情况进行公开报道。

(iv) The principle of separate detention, separate management, and separate education

 Article 280(2) of the Criminal Procedure Law provides that "Juveniles shall be detained separately from adults when held in custody, arrested, or serving criminal penalties, separately managed and separately educated."

(v) Principles of Compulsory Defense and Legal Aid

 The principle of compulsory defense and legal aid means that a juvenile criminal case must involve a defender, and if the juvenile suspect or defendant does not appoint a defender, the public security bureau, procuratorate and court shall notify the legal aid agency to assign a lawyer to provide advocacy for him.

(vi) Privacy protection and the principle of in private hearings

- At all stages of the proceedings, such as investigation, examination and prosecution, trial and execution, the juvenile's name, residence, photograph and other information that may infer the juvenile's identity shall not be disclosed to the outside world, and the materials in the case files of juvenile criminal cases that have been consulted, extracted or copied shall not be disclosed and disseminated.
- When the court hears a juvenile's criminal case, the public is not allowed to observe the case, no reporter is allowed to interview the case, and the news media is not allowed to publicly report on the case.



三、未成年人刑事诉讼的主要制度

(一) 社会调查制度

- 公安司法机关在办理未成年人刑事案件时,不仅要查清与案件有关的事实和证据问题,还要对涉罪未成年人的成长经历、犯罪原因、监护教育等情况进行调查。
- 社会调查的主体是公安机关、人民检察院和人民法院,公安司法机关既可以自行开展社会调查,也可以委托司法行政部门或者有关组织、机构进行社会调查。在适用阶段上,适用于未成年人刑事诉讼程序的全过程,包括侦查、审查起诉、审判和执行各个阶段。
- 形成社会调查报告, 供办案参考。

III. The main system of criminal proceedings for juveniles

(i) Social investigation system

- When handling criminal cases involving juveniles, the public security judicial bureaus must not only investigate the facts and evidence related to the case, but also investigate the upbringing, causes of crime, guardianship, and education of the juveniles involved in the crime.
- The Public Security bureaus, People's Procuratorates, and People's Courts conduct the social investigation. These public security judicial bureaus can either conduct social investigation on their own or entrust the judicial administrative departments, relevant organizations, or institutions to conduct social investigation. It is applicable to all stages of the entire process of criminal proceedings for juveniles, including investigation, review and prosecution, trial, and execution.
- Create a social investigation report for reference during the casehandling.



(二) 严格限制适用逮捕措施制度

- 对未成年犯罪嫌疑人、被告人应当严格限制适用 逮捕措施。通过羁押必要性审查,对已经被逮捕 的未成年犯罪嫌疑人、被告人,应当及时将其释 放或者变更为非羁押措施。
- 一是检察机关受理审查逮捕的未成年犯罪嫌疑人 数量大幅下降。
- 二是检察机关对未成年犯罪嫌疑人的批捕数逐年下降。
- 三是检察机关对未成年犯罪嫌疑人的不批捕率逐年上升,且上升幅度较大。

(ii) Strictly restrict the application of arrest measures

- The application of arrest measures for juvenile criminal suspects and defendants should be strictly limited. Through the review of the necessity of detention, juvenile criminal suspects and defendants who have been arrested should be released or changed to non-custodial measures in a timely manner.
- First, the number of juvenile criminal suspects accepted for review and arrest by the procuratorial bureaus has dropped significantly.
- Second, the number of arrests of juvenile criminal suspects by the procuratorial bureaus has been decreasing year by year.
- Third, the rate of non-approval of arrests of juvenile criminal suspects by the procuratorial bureaus has increased year by year, and the rate of increase is large.



(三) 合适成年人到场制度

对于未成年人刑事案件,在讯问和审判的时候,应当通知未成年犯罪嫌疑人、被告人的法定代理人到场。无法通知、法定代理人不能到场或者法定代理人是共犯的,也可以通知未成年犯罪嫌疑人、被告人的其他成年亲属,所在学校、单位、居住地基层组织或者未成年人保护组织的代表到场,并将有关情况记录在案。

(四) 附条件不起诉制度

检察机关对于罪行较轻的未成年犯罪嫌疑人,由于没有立即追诉的必要而作出暂时不予提起公诉的决定,要求其在一定的期限内遵守一定义务。在法律规定的期限内,如果犯罪嫌疑人没有违反法律的相关规定,并且履行了所要求的义务,检察机关就应作出不起诉的决定。否则,检察机关将依法对其提起公诉。

(iii) Appropriate Adult System

• In criminal cases involving juveniles, the legal representatives of the juvenile suspect or defendant shall be notified to be present during the interrogation and trial. If the legal representative cannot be notified, or if the legal representative is an accomplice, other adult relatives of the juvenile suspect or defendant, or representatives of the school, unit, grassroots organization, or minor protection organization in the place of residence may be notified and the relevant information shall be recorded.

(iv) Conditional non-prosecution system

• The procuratorial bureau makes the decision to temporarily not prosecute a juvenile suspect for minor crimes because there is no need for immediate prosecution, and requires them to comply with certain obligations during a certain period of time. If the suspect does not violate the relevant provisions of the law and fulfills the required obligations within the period prescribed by law, the procuratorial bureau shall make a decision not to prosecute. Otherwise, the procuratorial bureau will prosecute him or her in accordance with the law.



(五) 犯罪记录封存制度

- 对犯罪时未满十八周岁并被判处五年有期徒刑以下刑罚的未成年人的相关犯罪信息资料予以保密和不得公开,除司法机关为办案需要或者有关单位根据国家规定进行查询外,禁止对外泄露有关未成年人犯罪的所有信息的一项制度。
- 封存的范围:一是法院判处五年以下有期徒刑以下刑罚或免除刑事处罚的未成年人的犯罪记录。二是检察机关作出不起诉决定的未成年人的相关记录。三是未成年人的行政处罚记录和被刑事立案、采取刑事强制措施等记录。
- 封存的效力。一是公安司法机关不得向任何单位和个人提供被封存的相关信息。二是不得提供未成年人有犯罪记录的证明。三是免除未成年人的前科报告义务。

(vi) Criminal record sealing system

- A system in which information on crimes committed by juveniles who were under the age of eighteen at the time of committing the crime and sentenced to less than five years of fixed-term imprisonment is kept confidential and may not be disclosed, and all information on crimes committed by juveniles is prohibited from being disclosed to the public except for the needs of judicial bureaus for case handling or inquiries by relevant units in accordance with state regulations.
- The scope of sealing: First, the criminal records of juveniles sentenced by the court to less than five years of fixed-term imprisonment or exempted from criminal punishment. Second, the records related to juveniles who are subject to a decision by the procuratorial bureaus not to prosecute. Third, the records of administrative punishment and records of juveniles who have been criminally charged and criminal compulsory measures taken.
- Effect of Sealing: First, the public security and judicial bureaus shall not provide any unit or individual with information related to the sealing. Second, no proof of the juvenile's criminal record shall be provided. Third, juveniles are exempted from the obligation to report their previous convictions.



(六) 社区矫正制度

- 《社区矫正法》对未成年人执行社区矫正作出专 章规定。
- 社区矫正机构应当根据未成年社区矫正对象的年龄、心理特点、发育需要、成长经历、犯罪原因、家庭监护教育条件等情况,采取针对性的矫正措施。对未成年人的社区矫正,应当与成年人分别进行。

(vii) Community Correction System

- The Community Corrections Law provides a special chapter on the implementation of community corrections for juveniles.
- Community correction agencies shall take targeted corrective measures according to the age of the juvenile, psychological characteristics, developmental needs, growth experience, causes of crime, family guardianship and educational conditions. Community corrections for juveniles should be carried out separately from adults.

四、辩护律师在未成年人刑事诉讼中的角色

- 犯罪嫌疑人自被侦查机关第一次讯问或者采取强制措施之日起, 有权委托律师作为辩护人。委托1-2名辩护人。
- 辩护人的责任是根据事实和法律,提出犯罪嫌疑人、被告人无罪、罪轻或者减轻、免除其刑事责任的材料和意见,维护犯罪嫌疑人、被告人的诉讼权利和其他合法权益。
- 辩护律师享有一系列诉讼权利。
- (1) 职务保障权:辩护律师在执业活动中的人身权利不受侵犯, 在法庭上发表的代理、辩护意见不受法律追究。但是,危害国家安 全、恶意诽谤他人、严重扰乱法庭秩序的言论除外。
- (2) 会见、通信权:辩护律师可以同在押的以及被监视居住的犯罪嫌疑人、被告人会见和通信。

IV. The role of defense lawyers in the criminal proceedings of juveniles

- A criminal suspect has the right to appoint a lawyer as a defender from the date of the first interrogation or compulsory measures taken by the investigating authority. 1-2 defenders are appointed.
- The duty of the defense attorney is to present materials and opinions regarding the criminal suspect or defendant's innocence, guilt of a lesser crime, mitigation, or exemption from criminal liability, in accordance with the facts and laws, and to safeguard the procedural rights and other legitimate rights and interests of the criminal suspect or defendant.
- Defense lawyers have a series of procedural rights:
- (1) The right to job security/practice: Defense lawyers' personal rights shall not be infringed in the course of their legal practice; their advocacy in court, and defense opinions are not subject to legal prosecution. However, statements that endanger national security, maliciously defame others, or seriously disrupt the order of the court are excluded
- (2) The right to meet and communicate: Defense lawyers may meet and communicate with criminal suspects and defendants who are in detention or under surveillance.



- (3) 阅卷权:辩护律师自人民检察院对案件审查起诉之日起,可以查阅、摘抄、复制本案的案卷材料。
- (4) 调查取证权:辩护律师经证人或者其他有关单位和个人同意,可以向他们收集与本案有关的材料,也可以申请人民检察院、人民法院收集、调取证据,或者申请人民法院通知证人出庭作证。辩护律师经人民检察院或者人民法院许可,并且经被害人或者其近亲属、被害人提供的证人同意,可以向他们收集与本案有关的材料。
- (5) 依法提供辩护的权利:提出辩护意见、出庭辩护、拒绝辩护等。
- (6) 有权依法申请回避,并对驳回回避的决定申请复议。
- (7) 对侵犯公民诉讼权利和人身侮辱的行为,有权提出控告。
- (8) 在征得被告人同意后,可以对第一审判决、裁定提出上诉。
- (9) 有权得到与其行使辩护权相关的法律文书。
- (10) 对在执业活动中知悉的委托人的有关情况和信息, 有权予以保密。

- (3) The right to read the case file: The defense attorney may, from the date of examination and prosecution of the case by the people's procuratorate, review, extract, and copy the case file materials.
- (4) The right to investigate and obtain evidence: The defense lawyer may, with the consent of the witnesses or other relevant units and individuals, collect materials related to the case from them, or apply to the People's Procuratorate or the People's Court to collect and retrieve evidence, or apply to the People's Court to notify the witnesses to testify in court. The defense lawyer, with the permission of the People's Procuratorate or the People's Court, and with the consent of the victim or his close relatives or the witnesses provided by the victim, may collect from them materials related to the case.
- (5) The right to provide defense in accordance with the law: To submit defense opinions, to appear in court to defend, to refuse to defend, etc.
- (6) The right to apply for recusal in accordance with the law, and to apply for reconsideration of the decision to reject recusal.
- (7) The right to file a complaint for violation of citizens' procedural rights and personal insults.
- (8) The right to appeal the first trial decision or ruling with the consent of the defendant.
- (9) The right to receive legal documents related to the exercise of his or her right to defense.
- (10) The right to confidentiality of the client's relevant information and information known in the course of practice activities.



- 在未成年人刑事案件中,辩护律师除了享有与办理成年人刑事案件相同的诉讼权利外,如职务保障权、会见、通信权、阅卷权、调查取证权、提出意见的权利、参加法庭调查和辩论的权利等,《刑事诉讼法》还对律师参与未成年人刑事案件作了一些特殊规定。
- 例如,检察机关审查批准或者人民法院决定逮捕未成年犯罪嫌疑人、被告人时,应当听取律师意见;律师进行社会调查的权利等。
- In criminal cases of juveniles, defense lawyers have the same procedural rights as those for adults in criminal cases, such as the right to job security, the right to meet and correspond with the client, the right to read the file, the right to investigate and collect evidence, the right to give opinions, the right to participate in court investigations and debates, etc. The *Criminal Procedure Law* also makes some special provisions for lawyers in criminal cases of juveniles.
- For example, when the procuratorial bureau examines and approves or the People's Court decides to arrest a juvenile criminal suspect or defendant, it shall listen to the lawyer's opinion; the lawyer's right to conduct social investigation, etc.

- 2020年9月司法部公共法律服务管理局、中华全国律师协会颁布《未成年人法律援助服务指引(试行)》。
- 该指引适用于法律援助承办机构、法律援助承办人员办理性 侵害未成年人法律援助案件、监护人侵害未成年人权益法律 援助案件、学生伤害事故法律援助案件和其他侵害未成年人 合法权益的法律援助案件。
- 法律援助承办人员办理未成年人案件的工作要求: (一)与未成年人沟通时不得使用批评性、指责性、侮辱性以及有损人格尊严等性质的语言; (二)会见未成年人,优先选择未成年人住所或者其他让未成年人感到安全的场所; (三)会见未成年当事人或未成年证人,应当通知其法定代理人(监护人)或者其他成年亲属等合适成年人到场; (四)保护未成年人隐私权和个人信息,不得公开涉案未成年人和未成年被害人的姓名、影像、住所、就读学校以及其他可能推断、识别身份信息的其他资料信息; (五)重大、复杂、疑难案件,应当提请律师事务所或法律援助机构集体讨论,提请律师事务所讨论的,应当将讨论结果报告法律援助机构。

- In September 2020, the Public Legal Services Administration of the Ministry of Justice and the China Lawyers Association promulgated the Guidelines on Legal Aid Services for Juveniles (Trial Implementation).
- The Guidelines apply to legal aid agencies and legal aid contractors handling legal aid cases of sexual assault on juveniles, legal aid cases of guardians infringing on the rights and interests of juveniles, legal aid cases of student injury accidents and other legal aid cases infringing on the legitimate rights and interests of juveniles.
- Work requirements for legal aid contractors handling cases of juveniles: (i) communication with juveniles shall not use language of a critical, accusatory, insulting or degrading nature; (ii) when meeting with juveniles, priority shall be given to juveniles' residence or other places where juveniles feel safe; (iii) before meeting with juvenile clients or juvenile witnesses, shall notify their legal representatives (i.e. guardian) or other adult relatives and other appropriate adults to be present; (iv) to protect the privacy and personal information of juveniles, you shall not disclose the name, image, residence, school, and other data from which the identity of the juvenile accused or juvenile victim may be inferred or identified; (v) major, complex, and difficult cases should be submitted to the law firm or legal aid agencies for collective discussion; if submitted to a law firm for discussion, the results of the discussion shall be reported to the legal aid agency.

一些新的发展动态

- 第一,探索罪错未成年人分级处遇和保护处分制度,对未成年人违法 犯罪进行整体性设计和提供一揽子保护。
- 第二,加强未成犯罪嫌疑人、被告人与未成年被害人的双向保护:性侵害未成年人案件、校园欺凌、网络侵害等。
- 第三,对特殊案件适当降低刑事责任年龄:已满十二周岁不满十四周岁的人,犯故意杀人、故意伤害罪,致人死亡或者以特别残忍手段致人重伤造成严重残疾,情节恶劣,经最高人民检察院核准追诉的,应当负刑事责任。
- 第四,推行强制报告制度。最高人民检察院、民政部等9部门共同颁布《关于建立侵害未成年人案件强制报告制度的意见(试行)》,规定密切接触未成年人行业的各类组织及其从业人员,在工作中发现性侵、虐待、欺凌、遗弃、拐卖等9类未成年人遭受不法侵害情形,应当立即向公安机关报案或举报。
- 第五,强化检察机关的法律监督职责。《未成年人保护法》第105条:人民检察院通过行使检察权,对涉及未成年人的诉讼活动等依法进行监督。《预防未成年人犯罪法》第60条:人民检察院通过依法行使检察权,对未成年人重新犯罪预防工作等进行监督。

Some new developments

- First, explore the system of graded treatment and protective punishment for juveniles who have committed crimes, and design and provide a package of protection for juveniles in violation of the law in a holistic manner.
- Second, strengthen the two-way protection of juvenile crime suspects, defendants and juvenile victims: sexual assault cases against juveniles, school bullying, cyber assault, etc.
- Third, appropriately lower the age of criminal responsibility for special cases:
 a person who has reached the age of twelve or less than fourteen years old
 and commits intentional homicide or intentional injury, causing death,
 serious injury, or serious disability by particularly cruel means, with
 aggravating circumstances, shall be criminally responsible if approved by
 the Supreme People's Procuratorate for prosecution.
- Fourth, implement the mandatory reporting system. The Supreme People's Procuratorate, the Ministry of Civil Affairs and other nine departments jointly promulgated the *Opinions on the Establishment of a Mandatory Reporting System for Cases of Assault on Juveniles (Trial Implementation)*, which provides that all types of organizations and their practitioners in close contact with juveniles in the industry, found in the work of sexual abuse, abuse, bullying, abandonment, trafficking and other nine types of circumstances in which juveniles suffering from illegal abuse, should immediately report to the public security bureaus or report.
- Fifth, strengthen the legal supervision of the procuratorial bureaus. Article 105 of the *Law on the Protection of Juveniles*: Through the exercise of procuratorial power, the People's Procuratorates supervise litigation activities involving juveniles in accordance with the law. Article 60 of the *Law on the Prevention of Juvenile Delinquency*: Through exercising procuratorial power in accordance with the law, the People's Procuratorates supervise the prevention of juvenile recidivism, etc.





DEPRIVATION OF LIBERTY IS DEPRIVATION OF CHILDHOOD 对自由的剥夺就是对童年的剥夺

MANFRED NOWAK

Independent Expert leading the Global Study on Children Deprived of Liberty Secretary General, Global Campus of Human Rights 领导被剥夺自由的儿童问题全球研究的独立专家 以及全球人权校园秘书长

Recent Global Trends in Juvenile Justice 少年司法方面的最新全球趋势

10 March 2021 2021年三月10日



CHILDREN DEPRIVED OF LIBERTY **Manfred Nowak 30 YEARS** CONVENTION ON THE RIGHTS Independent Expert leading the UN Global Study on

Children Deprived of Liberty

OF THE CHILD

Why a UN Global Study on Children Deprived of Liberty? 为什么要进行关于被剥夺自由的儿童的联合国全球研究?

• **UN Convention on the Rights of the Child**: Deprivation of Liberty of Children only as a measure of last resort, and in exceptional circumstances if absolutely necessary, only for the shortest period of time.

联合国《儿童权利公约》: 剥夺儿童自由仅作为最后手段,在特殊情况下如有绝对必要采取并且时间应尽可能短。

- In **reality**, far too many children are detained in prisons, pre-trial detention centres, police lockups, children's homes, orphanages or other closed institutions for refugee and migrant children, child soldiers or children accused of terrorism.
 - 在现实中,有太多的儿童被关押在监狱、审前拘留中心、警察拘留所、儿童之家、孤儿院或其他封闭的难民和移民工儿童、儿童兵或被控恐怖主义的儿童机构中。
- Still, there is **no reliable statistical data** on the number of children deprived of liberty. We similarly lack information on the reasons for their detention as well as on alternative measures for the purpose of de-institutionalization and reducing the number of children deprived of liberty. 但是,仍然没有关于被剥夺自由的儿童人数的**可靠统计数据**。同样,我们也缺乏关于他们被拘留的原因以及为非机构化和减少被剥夺自由的儿童人数而采取的替代措施的资料。
- Childhood is a formative time in everyone's life. Putting children behind bars and depriving them of their right to personal liberty impacts both their lives and society in general. **宣年是每个人一生中的成长时期**。把儿童关进监狱,剥夺他们的人身自由权,既影响他们的人生,也影响整个社会。







- 1996: UN Report on the Impact of Armed Conflict on Children by Graça Machel leading to the appointment of a Special Representative of the Secretary-General on Children in Armed Conflict, Leila Zerrougui (2012-2017), Virginia Gamba (since 2017).
- 2006: United Nations Study on Violence against Children by Paulo Sérgio Pinheiro leading to the appointment of a Special Representative of the Secretary-General on Violence Against Children, Marta Santos Pais (2009-2019年); Najat Maalla M´jid (since 2019).
- 2014: General Assembly Resolution 69/157 of 18 December invited the UN Secretary General to commission an *in-depth Global Study on Children Deprived of Liberty*
- 2016: Manfred Nowak selected as Independent Expert leading the UN Global Study
- 2019: Manfred Nowak Presents GA report on 8 October in New York and the UN Global Study on 19 November in Geneva

- 1996年:《联合国关于武装冲突对儿童影响的报告》,由格 Graça Machel 撰写,导致任命了负责武装冲突中儿童问题的秘书长特别代表Leila Zerrougui(2012-2017年)和 Virginia Gamba(自2017年起)。
- 2006年: Paulo Sérgio Pinheiro 撰写的《联合国关于暴力侵害儿童问题的研究》导致任命了负责暴力侵害儿童问题的秘书长特别代表 Marta Santos Pais(2009-2019年); Najat Maalla M´jid(自2019年起)。
- **2014年: 联大12月18日第69/157号决议**请联合国秘书长委托开展一项关于被剥夺自由的儿童的全球深入研究。
- · 2016年: Manfred Nowak 被选为领导联合国全球研究的独立专家。
- **2019年**: Manfred Nowak 10月8日在纽约提交联大报告,11月19日在日内瓦提交联合国全球研究报告。





Main Objectives of the Global Study 全球研究的主要目标

- To assess the **magnitude** of this phenomenon, including the number of children deprived of liberty (disaggregated by age and gender), as well as the reasons invoked, the root-causes, type and length of deprivation of liberty and places of detention.
- To document good practices and experiences and to capture the views and experiences of children to inform the Global Study's recommendations.
- To raise awareness and promote a change in stigmatizing attitudes and behaviour towards children at risk of arrest or detention as well as children who are deprived of liberty.
- To provide recommendations for law, policy and practice to safeguard the rights of children concerned, prevent the detention of children and significantly reduce the number of children deprived of liberty through effective non-custodial alternatives guided by the best interests of the child.

- 评估这一现象的严重程度,包括被剥夺自由的儿童人数(按年龄和性别分列),以及所援引的理由、根本原因、被剥夺自由的类型和期限以及拘留地点。
- · 记录**良好实践和经验**,并收集**儿童的意见和经历**,为全球研究 报告的建议提供参考。
- 提高认识,促进改变对有被逮捕或拘留危险的儿童以及被剥夺自由的儿童的污名化的态度和行为。
- 为法律、政策和实践提供建议,以保障有关儿童的权利,防止 拘留儿童,并通过以儿童最大利益为指导的有效的非监禁替代 办法,大幅减少被剥夺自由的儿童人数。





Key Focus Areas of the Global Study 全球研究的主要重点领域



Children living in prisons with their primary caregivers

与主要照料者一起生活在监狱中的儿童



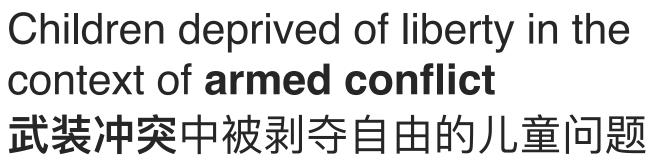




Children deprived of liberty for

因移徙相关原因被剥夺自由的儿童

migration-related reasons





Children deprived of liberty within the administration of justice 在司法过程中被剥夺自由的儿童问题



Children deprived of liberty on national security grounds 以国家安全为由被剥夺自由的儿童





Cross-cutting Areas of the Global Study

全球研究的交叉领域













Findings and Conclusions: Millions of Children Behind Bars 调查结果和结论: 数百万儿童被关在监狱里

Data collected for the Global Study indicate that, altogether, more than **7 million children** are currently deprived of liberty per year. 为全球研究收集的数据表明,目前每年共有700多万儿童被剥夺自由。

Situation 状况	Institutions 机构	Administration of justice 司法行政			Children living in detention with their parents 与父母生活在拘留所的儿童	Total 合计	
Children deprived of iberty 波剥夺自由的儿童	5.4 million 540万	1.4 million 140万	330,000 33万	35,000 3.5万	1,500	19,000 1.9万	7.2 million 720万





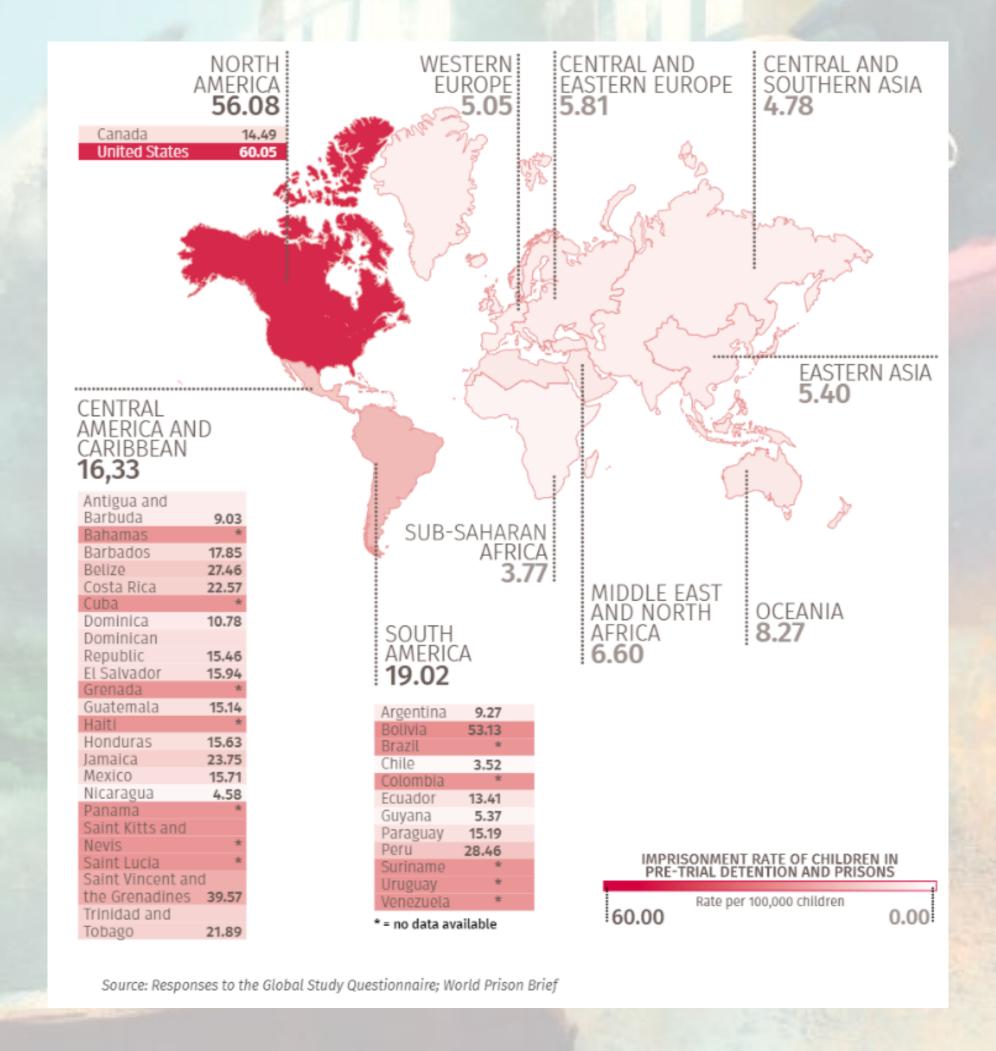
Administration of Justice 司法行政

- At a minimum 410,000 children are detained every year in prisons and pre-trial detention centers and roughly 1 million children are held in police custody.
- While boys commit roughly two-thirds of all criminal offences of children, they account for 94% of all child detainees.
- Root causes for the overuse of detention are: lack of effective child welfare systems, of support for family environments, 'tough-on-crime' policies, excessive criminalisation including status offences, low age of criminal responsibility (120 States still below 14 years of age), discrimination, lack of resources and corruption.
- States should establish effective child justice systems, apply diversion at every stage of the criminal procedure, increase the age of criminal responsibility to at least 14 years, decriminalise behaviour of children and shorten the length of detention
 - 每年至少有410 000名儿童被拘留在监狱和审前拘留中心,约有100万儿童被警方拘留。
 - 虽然男童犯下的刑事犯罪约占儿童犯罪总数的三分之二,但他们占所有被拘留儿童的94%。
 - 过度使用拘留的**根本原因**是:缺乏有效的儿童福利制度,缺乏对家庭环境的支持,"严厉打击犯罪 "的政策,包括身份罪在内的过度刑事化,刑事责任年龄低(120个国家仍在14岁以下),歧视,缺乏资源和腐败。
 - · 各国应建立有效的儿童司法制度,在刑事诉讼的每一个阶段采用转送办法,将刑事责任年龄至少提高到14岁,使儿童行为非刑罪化,并缩短拘留时间。





Regional Imprisonment Rate of Children 地区儿童监禁率







Recommendations 建议

States should:

- Decriminalise the behavior of children → e.g. by abolishing 'status offences' and other crimes not involving violence.
- Raise the minimum age of criminal responsibility to at least 14 years.
- **Abolish** capital punishment, life sentences and other excessive prison sentences for child offenders.
- Ensure **strict time limits for detention** of children at the stages of police custody (never longer than 24 hours), pre-trial detention (never longer than 30 days) and detention pending trial (with a maximum of six months).
- Ensure that all prison sentences for child offenders comply with the legal requirement of the **shortest appropriate period of time.**
- Apply diversion at every stage of the criminal justice proceedings.
- Establish specialised child justice systems → with special children's courts, judges, prosecutors, police officers and other law enforcement personnel undergoing special training on the rights and needs of children.

各国应该:

- **将儿童行为非刑罪化 →** 例如废除 "身份罪 "和其他不涉及暴力的罪行。
- · 将承担刑事责任的最低年龄提高到至少14岁。
- 废除对儿童罪犯的死刑、无期徒刑和其他过重的刑罚。
- · 确保在警方拘留(绝不超过24小时)、审前拘留(绝不超过30天)和 审前拘留(最多6个月)等阶段对儿童的拘留有**严格的时间限制**。
- 确保对儿童罪犯的所有刑期都符合最短适当时间的法律要求。
- 在刑事司法程序的每一个阶段都采用分流措施。
- 建立专门的儿童司法系统→由专门的儿童法庭、法官、检察官、 警官和其他执法人员接受关于儿童权利和需求的专门培训;



Recommendations 建议

States should:

- Tackle the root causes of crimes committed by children by strengthening parental support →establish well-functioning and well-resourced child protection systems.
- Ensure access to effective procedural safeguards and complaints mechanisms.
- Develop an effective system of independent and unannounced monitoring of all places of detention of children.
- Ensure that children deprived of liberty in the criminal justice system are treated with humanity and respect for their inherent dignity.
- Prohibit and punish all forms of torture, cruel and inhuman treatment or punishment, including corporal punishment, any violence or solitary confinement.
- Make widely available measures such as early release and post-release programmes.

各国应该:

- 通过加强父母支持,解决儿童犯罪的根本原因→建立 运作良好、资源充足的儿童保护制度。
- 确保获得有效的程序性保障和申诉机制。
- 建立一个对所有儿童拘留场所进行**独立和暗访的有效** 的制度。
- 确保在刑事司法系统中被剥夺自由的儿童受到人道待遇,其固有尊严得到尊重。
- · 禁止和惩处一切形式的酷刑、残忍和不人道的待遇或处罚,包括体罚、任何暴力或单独监禁。
- 广泛提供诸如提前释放和释放后方案等措施。









Thank you for your attention! 谢谢你的关听!

This Global Study is only the first step in liberating millions of children from detention.

Let us not lose this momentum to give children back their childhood! This requires a comprehensive follow up by the international community contributing to the ultimate goal of the Agenda 2030 to leave no one behind and, in particular, to leave no child behind bars.

这项全球研究只是将数百万儿童从拘留中解放出来的第一步。 让我们不要失去这一势头,让儿童重获童年! 这需要国际社会采取全面的后续行动,为实现《2030年议程》的最终目 标做出贡献,即不让一个人掉队,特别是不让一个儿童掉队。







概要

- L 少年犯罪
 - 趋势和数据
- U 少年司法体系
 - 纪律奖励模式
 - 从普通司法体系转移
- ▶ Ⅲ 少年司法现存问题
 - 未成年人刑事起诉的替代方法
 - 对少年犯严重罪行的量刑
 - 少年惩教所的投诉机制
- IV 我对代理青少年案件的反思与总结
 - 律师与客户的关系处理

Overview



- <u>I Juvenile Delinquency</u>
 - Trends and Statistics
- II The Juvenile Justice System
 - o Disciplinary Welfare Model
 - Diversion from the Justice System
- III Current Issues in Juvenile Justice
 - Alternatives to Criminal Prosecution of Juveniles
 - Sentencing of Juvenile Offenders for Serious Offences
 - Complaint Mechanism in Juvenile Correctional Institutions
- IV My Reflection on Representing Juveniles
 - o The Lawyer-Client Relationship

I. Juvenile Delinquency in Hong Kong 香港的少年犯罪



- Traditionally, the common offences committed by juvenile and young offenders in Hong Kong include:
 Theft, Shoplifting, Serious Assault, Criminal Damage, and Drug Trafficking.
 - 传统上,香港少年犯和青少年犯的常见罪行包括: 偷窃、入店行窃、严重伤人、刑事损害及贩毒。
- Crime rates for juvenile and young offenders have been falling since mid-1990.
 自1990年中期以来,少年罪犯的犯罪率一直在下降。
- The contributing factors may include the extensive youth supporting network, tightened level of security measures in Hong Kong, increased academic workload, widespread internet use, etc.
 - 原因可能包括广泛的青少年支援网络、香港安保措施的加强、课业负担的增加、互联网的广泛使用等。
- However, the rates (per 100,000 population) are still higher than Mainland China and Singapore.
 然而,这一比率(每10万人)仍然高于中国大陆和新加坡。

Trends in the Past Five Years 过去五年的趋势



"Juveniles" arrested (aged between 10 and 15): 10-15岁少年被捕人数

2015	2016	2017	2018	2019	2020
1309	1074 (-18%)	928 (-13.6%)	928 (0%)	1140 (+22.8%)	1218 (+6.8%)

"Young persons" arrested (aged between 16 and 20): 16-20岁青少年被捕人数

2015	2016	2017	2018	2019	2020
2826	2292 (-18.9%)	1804 (-21.3%)	1841 (+2.1%)	3128 (+69.8%)	2769 (-11.5%)

II. The Juvenile Justice System in Hong Kong 香港的少年犯罪司法体系



- Criminologist Dr. Patricia Grey described the juvenile justice system in Hong Kong as disciplinary welfare-orientated.
 犯罪学家格雷博士认为,香港的青少年司法制度是以纪律奖励为导向的。
- On one hand, many sentencing options exclusive to juvenile and young offenders emphasise rehabilitation via discipline:
 - 一方面,许多量刑方案只针对少年犯和青少年罪犯,强调**通过纪律进行改造**。
 - o The 3S model: "Short" (short period of term of imprisonment), "Sharp" (strict discipline) and "Shock" (unforgettable experience)
 3S模式:"短"(短期监禁)、"严格"(严格纪律)、"震撼"(难忘经历)
- On the other hand, statutes emphasize **welfare** as a priority throughout the operation of the juvenile justice system. 另一方面,法律强调少年的**福祉**是整个少年司法系统运作的优先事项。
 - o Section 8(8) of the Juvenile Offenders Ordinance (Cap. 226) and Article 11 of the Hong Kong Bill of Rights Ordinance (Cap. 383). 《少年犯条例》(第226章)第8(8)条及《香港人权法案条例》(第383章)第十一条
- Chapter 15 of the Prosecution Code states that 根据《公诉法典》第15章
 - o 'It is a longstanding legal requirement that in prosecuting juveniles **the court must give priority to their welfare**.' "这是一个长期存在的法律要求,在起诉少年时,**法院必须优先考虑他们的福祉**。"
 - o '... the prosecution often prefers to deal with allegations against juveniles by alternative methods to criminal prosecution, unless the seriousness of the offence or other circumstances require a prosecution in the public interest.
 - "...控方通常倾向于**采用刑事起诉以外的其他方法**来处理对未成年人的指控,除非罪行严重或为了公众利益而起诉的其他情况。

Diversion from the Criminal Justice System 从刑事司法系统转移



The Police Superintendent's Discretion Scheme 警司自由裁量方案

- Background: The PSDS was introduced in 1963. Its primary aim is to **divert juvenile and young persons from the criminal justice system.** 背景:警司自由裁量方案于1963年引入,主要目的是把青少年从刑事司法系统中分离出去。
- How it works: Police officers of Superintendent (SP) rank and above are empowered to **caution** young offenders for **minor offences**, and a number of other **thresholds** must be met.
 - 工作原理:警司及以上职级的警务人员获得就轻微罪行警告年轻违法者的授权,并须符合多项其他规定。
- Statistics: Used for around one-third of all juvenile arrestees, and the recidivism rate is around 16% post-PSDS. 统计数据:大约对三分之一的青少年被捕者使用了这种方法,之后的再犯率约为16%。

The Minimum Age of Criminal Responsibility 承担刑事责任的最低年龄

- Background: Prior to 2003, Hong Kong's minimum age of criminal responsibility was 7. In July 2003, it was increased to **10**. 背景:在2003年以前,香港的刑事责任最低年龄为7岁。2003年7月,增加到10岁。
- The Administration undertook to propose further raising the age to 12 once it has put forward additional supportive measures for unruly children under the minimum age. 政府承诺,一旦对不满最低年龄的少年提出额外的支持措施,将建议提高年龄至12岁。
- However, in 2006, the Secretary for Security confirmed that there were no further plans to increase the minimum age.
 然而,在2006年,安全部部长证实没有进一步提高最低年龄的计划。

III. Current Issues in Juvenile Justice 少年司法现存问题



Guiding Questions: 引导性问题

- Are we developing juvenile justice in the best interest of juvenile and young persons? 我们发展青少年司法是为了青少年和年轻人的最大利益吗?
- Are we effectively diverting juvenile and young persons from the criminal justice system?

我们是否有效地将青少年从普通刑事司法系统中分离了出来?

• Are we facilitating the rehabilitation of juvenile and young offenders within the criminal justice system?

我们是否在刑事司法制度内协助少年犯和青年罪犯的改过自新?

Three Stages for Consideration: 需要考虑的三个阶段

- 1. Prosecution: Introducing alternatives to criminal prosecution for juvenile and young persons 检方: 对青少年案件引入替代刑事检控的方案
- 2. Sentencing: Taking into account the rehabilitation needs of juvenile and young offenders

量刑: 考虑到青少年罪犯的改过自新的需要

3. Custodial Care: Protecting juvenile and young persons in custody from officer misconduct.

拘留照顾: 保护被拘留的青少年免受警察的不当行为

1. Adopting Alternatives to Criminal Prosecution 未成年人刑事起诉的替代方法



- In 2000, the Law Reform Commission recommended that the Administration should conduct a general review of the juvenile justice system.
 在2000年, 法律改革委员会建议政府就少年司法制度进行全面检查。
- In 2003, the Hong Kong Government commissioned the Youth Studies Group at the City University of Hong Kong to research into appropriate alternatives to prosecution in responding to young offenders.
 - 在2003年,香港政府委托香港城市大学青年研究小组研究应对少年违法除检控外的其他适当方法。
- The research team recommended six alternatives to prosecution to divert juvenile and young persons from crime. They hoped the report could provide a roadmap for the development of a new juvenile justice system that incorporates the principles of restorative justice-based practices. 研究小组提出了六种起诉的替代方案,以使青少年远离犯罪。他们希望该报告能够为发展新的少年司法系统提供一个路线图,该系统将恢复性司法实践的原则纳入其中。
- In 2006, the Government decided not to proceed with these recommendations, suggesting that there was insufficient empirical evidence to prove that restorative justice could have a positive effect on juveniles and could reduce re-offending. 在2006年,政府决定不继续执行这些建议,认为没有足够的经验证据来证明恢复性司法可以对青少年产生积极的影响并可以减少再犯。
- Since then, non-profit organizations are implementing restorative justice-based practice such as Family Conferences and Victim Offender Mediation outside of the mainstream criminal justice system for juveniles who have been cautioned by the police.从那时起,非营利组织开始在主流刑事司法体系之外,为受到警方警告的青少年实施恢复性司法实践,如家庭会议和受害者犯罪调解。

Restorative Justice across Foreign Jurisdictions 外国司法管辖区的恢复性司法



In the meantime, other neighbouring jurisdictions have been receptive to restorative justice-based practices.

与此同时,其他邻近的司法管辖区已接受以恢复性司法为基础的做法。

- **Mainland China**: Different forms of mediation were introduced throughout the criminal justice system. 中国大陆:刑事司法体系中引入了不同形式的调解。
- **Singapore**: Mediation and family conferencing were introduced in the pre-court and during-court stage for handling juvenile offenders. 新加坡:在审判前和审判期间引入调解和家庭会议。
- **New Zealand**: Introduced the *Children, and Young People's Well-being Act* (1989) to provide a statutory framework for using Family Group Conferencing to work with juvenile offenders.
 - 新西兰:通过了《儿童和青年福祉法》(1989年),为利用家庭小组会议与少年犯合作提供了法定框架。
- Australia (Queensland): Used Youth Justice Conferencing as a substitute for prosecution and to guide judges in determining sentencing for juvenile offenders.
 - 澳大利亚(昆士兰):利用青年司法会议机构代替起诉,并指导法官决定对青少年罪犯的量刑。

2. Sentencing Juveniles for Serious Offences 对严重犯罪青少年的量刑



- Hong Kong's juvenile justice system differentiates itself from the adult justice system in the area of **sentencing** where it follows a welfare-oriented approach that emphasises rehabilitation.
 - 在量刑方面,香港的少年司法制度与成人司法制度不同。香港的少年司法制度以福利为导向,强调改过自新。
- While the sentencing options for juvenile offenders emphasize the need for rehabilitation, many of them are custodial and emphasize hard physical labour and discipline to deter re-offending.
 - 虽然对少年犯的量刑方案强调了改造的必要性,但其中许多都是监禁,强调体力劳动和纪律,以防止再犯。
- Express legislative intention that imprisonment is always the last resort for sentencing juvenile offenders:
 - o Section 109A of the *Criminal Procedure Ordinance* (Cap. 221) and Section 11(2) of the *Juvenile Offenders Ordinance* (Cap. 226). 立法意图中明确以监禁作为判处少年犯的最后手段:《刑事诉讼程序条例》(第221章)第109A条及《少年犯条例》(第226章)第11(2)条。
- However, many juvenile offenders are being convicted for serious offences in recent years. In these circumstances, the young age of the offender can no longer be the primary consideration.
 - 然而,近年来,许多少年犯被判犯有严重罪行。在这种情况下,犯罪者的年龄不再是首要考虑因素。
- According to the Police Force's statistics, from 9 June 2019 to 31 October 2019, the Police arrested 165 juveniles for offences contrary to the Public Order Ordinance, and 19 were charged. It implies that at least 14% of juvenile arrests in 2019 are protest-related.
 - 根据警务处的统计数字,在2019年6月9日至2019年10月31日期间,警方逮捕了165名违反《公共秩序条例》的青少年,并 起诉了19名青少年。这意味着2019年至少有14%的青少年被捕与抗议有关。

Sentencing Juveniles for Serious Offences (Continued)



Secretary for Justice v SWS [2020] HKCA 788

- Sentencing young offenders, especially for serious offences, often involves a tension between: 对青少年罪犯判刑,尤其是严重罪行,通常会涉及以下两方面:
 - (a) the purposes of protection of the public, punishment, open condemnation and deterrence; <u>and</u> 保护公众、惩治、公开谴责和威慑的目的;以及
 - (b) the purposes of rehabilitation and reformation for young offenders, which not only caters for his own welfare and future prospect but also benefits the community as a whole.

使青少年罪犯改过及改造的目的,这不仅有利于他们自身的福利和未来,亦令整个社会受惠。

Secretary for Justice v S H Y [2020] HKCA 829

- On application of the general principles reviewed and set out in *Secretary for Justice v SWS*:
 在Secretary for Justice v SWS案件中涉及到的原则:
 - o the young age and personal background of a young person who has committed a serious offence would count very little or even pale into insignificance; and
 - 犯了严重罪行的青少年的年龄和个人背景作用较小,甚至微不足道;以及
 - o only by imposing a deterrent sentence could the purposes of protecting the public, openly condemning the offence and conduct in question and punishing the offender be achieved.只有实行威慑性判决,才能实现保护公众、公开谴责有关罪行和行为以及惩罚罪犯的目的。

Sentencing Juveniles for Serious Offences (Continued)



HKSAR v Kilima Abubakar Abbas [2018] HKCA 602

- The current Court of Appeal authority on the sentencing practice for the offence of trafficking in dangerous drugs. 目前上诉法院有权决定贩卖危险毒品罪的量刑。
- Sentencing in drug trafficking cases is based on tariff cases where the principal concern is the narcotic quantity of the particular dangerous drugs trafficked.
 - 毒品贩运案件的量刑依据关税,这些案件主要关注的是贩运的特定危险毒品的麻醉量。
- In the present case, the Court of Appeal clarified that the current tariffs are set for defendants of the lowest level of culpability. 在本案中,上诉法院澄清说,目前的关税是为有罪程度最低的被告设定的。
- The courts will not make distinction solely with reference to an accused's role and seniority within a drug operation. 法院不会仅仅根据被告在毒品行动中的作用和资历来加以区别。

Secretary for Justice v Chau Tsz Him [2015] 1 HKLRD 853

- The most recent guideline judgment concerning the sentencing of young persons who have been convicted of trafficking in dangerous drugs. 是最近的关于被判犯有贩运危险毒品罪的年轻人的判决指导裁判。
- The Court of Appeal made clear that public interest requires that the purpose of deterring other potential offenders must take precedence over the rehabilitation of the particular offender.
 - 上诉法院明确指出,公共利益要求,威慑其他潜在罪犯的目的必须优先于对特定罪犯的改造。
- It therefore concluded that imprisonment is often inevitable, whereas alternatives such as a detection centre order do not possess the qualities needed for a deterrent sentence, can be perceived to be lenient, and can so be described by drug traffickers to entice youngsters. 因此,最终的结论是监禁往往是不可避免的,而诸如侦查中心的命令等替代办法不具备威慑性判决所需要的品质,并且可以被认为是宽大的,甚至可以被毒品贩子用以引诱青少年犯罪。

3. Complaint Mechanism in Juvenile Correctional Institutions 青少年惩教所的投诉机制



- In early 2017, three former juvenile prisoners at Sai Kung's Pik Uk Correctional Institution told local newspaper Ming Pao that they were unable to complain against the prison officers. They said they feared that making a complaint would lead officers to write negative reports on them to submit to the court, leading to a longer sentence. 2017年初,西贡壁屋惩教所的三名前少年囚犯告诉当地报纸《明报》,他们无法投诉狱警。他们表示,他们担心投诉会导致警察写负面报告提交法庭,从而导致更长的刑期。
 - O See: http://www.mingpaocanada.com/tor/htm/News/20170613/HK-gca1_r.htm
- In 2017, the Juvenile Prisoners Human Rights Concern Group (青少年囚權關注組) called for ending the abuse of juvenile persons in custody in correctional institutions.
 - 2017年,青少年囚權關注組呼吁结束惩教机构对于被拘留的少年犯的虐待。
 - o See:

https://hongkongfp.com/2017/11/19/rough-justice-former-juvenile-offenders-speak-abuse-behind-bars-broken-complaints-system/

- In 2018, Hong Kong activist Joshua Wong filed a claim against the Secretary for Justice at the Small Claims Tribunal after he alleged to have been forced to answer questions while squatting naked at the Tung Tau Correctional Institution. The Tribunal dismissed his claims in 2019 citing inconsistencies and lack of details in his account. 2018 年,香港活动人士黄之锋在小额诉讼庭向律政司司长提出索赔,此前他声称自己在东头惩教所裸坐时被迫回答问题。他的指控在2019年被驳回,理由是他的描述存在矛盾和缺乏细节。
 - o See: https://hongkongfp.com/2019/02/28/hong-kong-activist-joshua-wong-appeal-court-throws-claims-abuse-prison-guards/

Quotes from Public Discourse



● "He says the life of a juvenile prisoner is 'like [that of] a dog', adding that 'during the process [of imprisonment] things like your dignity are slowly shattered." 他说"在少年监狱的生活就象条狗",并补充道"在监禁的过程中,像自尊这样的东西慢慢就破碎了。"

Hong Kong Free Press quoting Paul Fu, social worker and former juvenile person in custody.

• "According to the Annual Reports on Justice of the Peace Visits from 1999 to 2015, none of the complaints made by persons in custody to the Justices of the Peace against the Correctional Services Department were upheld. From 2006 and 1999 respectively until now, the Justices of the Peace have received no complaints during their visits to the two juvenile custodial institutions, Sha Tsui Correctional Institution and Shek Pik Correctional Institution." "根据一九九九年至一九九九年至今,治安法官在探访沙咀惩教所及石壁惩教所这两间少年惩教所期间,均没有接获投诉。"

Juvenile Prisoners Human Rights Concern Group, LC Paper No. CB(2)1400/17-18(05), Submission on an outline of the Third Report of the Hong Kong Special Administrative Region for the United Nations Human Rights Council Universal Periodic Review, 16 May 2018.

• "Under the existing system, if the young inmates complain and in case the Department or the Correctional officers are not satisfied with that, their sentence may be increased. After their discharge from the institutions, there will be a post-supervisory period for one or two years. Their cases will be followed up by the Correctional Services officers. If they misbehave, they may be recalled to prison at any time. This is one of the special arrangements for young offenders. We also hear that many young inmates dare not speak out or tell the truth because of this arrangement.在现行制度下,如少年犯提出投诉,而惩教署或惩教人员对此不满意,则可加重他们的刑期。少年犯离开后,会有一至两年的后监管期。惩教署人员会负责跟进他们的个案。如果他们行为不端,可能随时被召回监狱。这是针对少年犯的特别安排之一。我们还听说,由于这种安排,许多年轻囚犯不敢说话或说出真相。

Dr. Fernando Cheung, Official Record of Proceedings, Legislative Council of Hong Kong, Thursday, 18 January 2018.

IV. A Lawyer's Reflection on Representing Juveniles 从律师的角度反思代理少年案件



- The Lawyer-Client relationship. 律师和客户的关系
- In the US context, some studies found that youth defendants who were represented by legal counsel were more likely to be committed to a custodial institution than self- represented youths (Armstrong and Kim, 2011; Burruss and Kempf-Leonard, 2002)
 - 在美国的背景下,一些研究发现,由法律顾问代理的少年被告比自我代理的年轻人更有可能进入拘留机构。
- In the Canadian context, a study by Carrington and Moyer conversely found that youth defendants who have legal counsel were less likely to be convicted.
 - 在加拿大,相反的,一项研究发现,有法律顾问的少年被告被定罪的可能性较小。

Interviewing a Juvenile Client 如何与未成年当事人会面

Michael G. Karnavas

Defender Advocacy Workshop | 刑事律师讲习班 Mahidol University | 玛希隆大学 11 March 2021 | 2021年3月11日

Preparing for the initial interview 准备初次会面

- Read the case file, familiarize yourself with the law, and have a general understanding of the client 阅读案卷,熟悉法律,对委托人有基本了解
- Know what you want to accomplish during the initial interview 想清楚在初次会面中想要完成的目标
- Have a game plan 做好谋划
- Bring: 带上下列物品
 - Information about the charges and the facts 关于指控与案件事实的信息
 - Copies of the charging document 起诉文件的复印件
 - Copies of the client's statements 当事人陈述的复印件
 - Copies of statutory provisions (legal elements, defenses, sentencing) 法律法规(构成要素、辩护、刑罚等)的复印件

The initial interview: Broad objectives 初次会面: 整体目标

- Introduce yourself 自我介绍
- Understand the client and his/her needs 了解当事人及其需求
- Explain the charges and the law 解释指控和法律
- Explain the process 解释程序
- Get the client's narrative 获取当事人的陈述
- Manage expectations 设定对案件的期望

Make a good impression 留下好的印象

"You don't get a second chance to make a first impression"

"第一印象没有第二次机会"

Introduce yourself 自我介绍

- Explain who you are 你是谁?
- Explain your level of education and experience 你的教育水平和经验?
- Explain what lawyers do 律师是做什么的?
- Explain your familiarity with the types of cases you handle and the law 你对法律以及相关案件有多了解?
- Explain how you generally represent your clients 你如何代表当事人进行辩护?

Have the client talk about themselves 让当事人自我介绍

- Have the client introduce themselves: 让当事人自我介绍:
 - What is their level of education? 教育水平?
 - Where did they grow up? 在哪里长大?
 - What is his/her family situation? 家庭状况如何?
- Make eye contact 眼神交流
- Pay attention 集中注意力
- Gauge the client's mental state 判断当事人的精神状态
- Try not to take notes 尽量不要记笔记

Explain the law and the charges 解释指控和法律

- Provide the client with charging document and the relevant law 提供给当事人起诉文件和相关法律法规
- Explain what the Prosecution must prove for each count 说明对于每一项指控,检方必须证明什么
- Describe potential defenses 描述可能采取的辩护策略
- Make sure the client understands 确保当事人理解
- Do not try to get an explanation from the client 不要试图从当事人处得到解释

Explain the process 解释程序

- Walk the client through each stage of the proceedings from the initial appearance to appeal 介绍从初次出庭到上诉每一阶段的程序
- Explain the possibility of provisional release 解释变更强制措施的可能性
- Explain 解释:
 - How the process works 程序如何运作
 - What you are going to do 你要做什么
 - Why you are going to do it 为什么要这么做
 - The purpose of doing it 这么做的目的
- Show that you are *actually* doing it 展示你实际上在做什么

Explain what happens at trial 解释审判程序

- Many of the decisions at trial are the *client's* 审判中许多决定只有当事人才能作出
- The client's decisions must be: 当事人的决定应当是:
 - Knowing 理解其意义的
 - Voluntary 自愿的
 - Intelligent 明智的



Get your client's narrative 获取当事人的陈述

- Go through the statements with the client 倾听当事人的陈述
- Ask the client for his/her story: 询问当事人的经历:
 - Tell the client it must be accurate, complete, and truthful 告诉当事人经历应当是准确的、完整的、真诚的
 - Tell the client you will be relying on this information 告诉当事人你将会依赖这些信息进行辩护
- Ask the client about investigating: 询问当事人取证情况:
 - Names of people who may know about the events, victims, or witnesses 可能对事件、被害人有所了解的人,或证人
 - Whether evidence may need to be tested
 证据是否需要检验

Some precautions 以防万一

- Do not try to manipulate the client's memory and avoid saying something that may taint his/ her memory
 - 不要试图操纵当事人的记忆,避免说一些可能会影响当事人记忆的话
- Doing so could have serious consequences under Article 306 of China's Criminal Law: 这样做可能会违反《刑法》第306条:

"During the course of criminal procedure, any defender, law agent destroys, falsifies evidence, assist parties concerned in destroying, falsifying evidence, threatening, luring witnesses to contravene facts, change their testimony or make false testimony is to be sentenced to not more than three years of fixed-term imprisonment or criminal detention; when the circumstances are severe, to not less than three years and not more than seven years of fixed-term imprisonment."

"在刑事诉讼中,辩护人、诉讼代理人毁灭、伪造证据,帮助当事人毁灭、伪造证据,威胁、引诱证人违背事实改变证言或者作伪证的,处三年以下有期徒刑或者拘役;情节严重的,处三年以上七年以下有期徒刑。"

Manage expectations 设定对案件的期望

- Clients will be, confused, frightened, angry 当事人可能会 迷惑、惊恐、愤怒
- Calm the client down 让当事人冷静
- Do not heighten expectations 不要设定高期望值
- Do not offer any guarantees 不要给任何承诺

Concluding the initial meeting 结束初次会面

- Build rapport and trust with the client by asking: 通过询问以下问题来与客户建立融洽和信任的关系:
 - Is there anyone you want me to contact? 有想要联系的人吗?
 - Is there anything you want me to do? 有需要我去做的事儿吗?
- Little efforts count 水滴石穿
- Do not assume you deserve respect because you are a lawyer 不要因为自己是律师就认为自己值得尊敬和信任
- Set the ground rules of the attorney/client relationship 制定律师-当事人关系的基本准则
- Inform the client what you intend to do next and when he can expect to hear from you 告诉当事人你下一步打算做什么,什么时候能收到你的消息

Special considerations for juvenile clients 对未成年当事人的一些特殊考量

- Adjust to the juvenile's ability to understand and use simple language 根据未成年当事人理解能力调整并使用简单语言
- Limit your expectations on what to accomplish 限制你对要完成的事情的期望值
- Give the juvenile space to tell his/her version of the events 给予未成年当事人空间,让他/她讲述自己对事件的看法
- Keep the interview in a conversational tone 采访时要保持对话的语气
- Try not to interrupt 尽量不要打断
- Listen carefully and make eye-contact 认真倾听并进行眼神交流
- Show empathy and try not to sound judgmental 表现出同理心,尽量不要让人听起来有评判的感觉
- Establish a bond with the juvenile 与青少年建立联系
- Try to learn as much as you can about the juvenile 尽量多了解未成年当事人的情况
- Let the juvenile know that you are his/her lawyer, taking instructions from him/her 让未成年当事人知道你是他/她的律师,接受他/她的指示

Special considerations for juvenile clients 对未成年当事人的一些特殊考量

- Find out what kids do (you must relate to the client) 了解未成年人的行为模式 (你必须与当事人建立联系)
- Assess: 评估:
 - How does this child process information? 当事人是怎么处理信息的?
 - How does the child appear? 当事人的长相有什么特征?
 - What is the child's ability to provide useful answers? 当事人提供有效信息的能力如何?
 - Does the child have physiological or psychological issues? 当事人是否有生理或心理问题?

Special considerations for juvenile clients 对未成年当事人的一些特殊考量

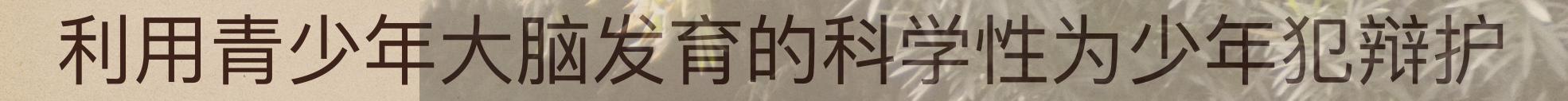
■ Be extra careful not to ask anything that would further incriminate the client 要格外小心,不要问任何会进一步加害客户的事情。

Be extra careful not to say anything that could be perceived as tampering with the juvenile's memory

要格外小心,不要说任何可能被认为是篡改当事人记忆的话。

Parents 家长

- One-way information approach 单向信息渠道
- Don't give information to the parents unless the client asks for 不要随意向当事人的父母提供信息,除非当事人主动要求
- Even if the parent is paying: 即使当事人的父母才是付钱的人:
 - The client is the child 当事人是未成年人,需要保护
 - The attorney-client relationship is with the **child**. 当事人才是你需要行使律师职责,帮助辩护的人



Using the Science of Adolescent Brain Development to Defend Juvenile Offenders

> Leslie J Rosenberg, J.D 2021 三月 March 2021 莱斯利·罗森博格

我将讨论什么

- How science proves the adolescent brain is different and still maturing
- ◆ 科学证明青少年大脑仍然发育
- The key United States Supreme Court cases which have used this science to develop the key legal principle that children are different
- ◆ 美国最高法院的主要案例利用这一科学发展了"孩子们是不同的"这一重要法律原则;
- How defense lawyers can apply this legal principle to all stages of their cases to better represent juvenile offenders
- ◆ 如何在你们的案例中运用这一法律原则,更好地代理少年犯的案件



青少年在三个重要方面与成人不同。

Adolescents differ from adults in three important ways:

- •青少年在情绪激动的情况下,不太能够调节自己的行为 Adolescents are less able to regulate their own behavior in emotionally charged contexts.
- •青少年对外界的影响更为敏感,如同龄人的存在和奖励的直接性。
 Adolescents are more sensitive to external influences such as the presence of peers and the immediacy of rewards.
- ●青少年较难做出需要考虑长远的知情决定。
 Adolescents are less able to make informed decisions that require consideration of the long term.



- Compared to adults they are more impulsive, take risks, do not consider the consequences of their actions or the future and are more influenced by their peers
- ◆ 与成年人相比,青少年比较浮 躁,敢于冒险;不要考虑他们行 为的后果;更受同龄人影响



全球法律教育平台

我们知道孩子们与成年人不一样,现在科学也证明了这一点。 Children are different from adults. We know it and now science has also proved it.







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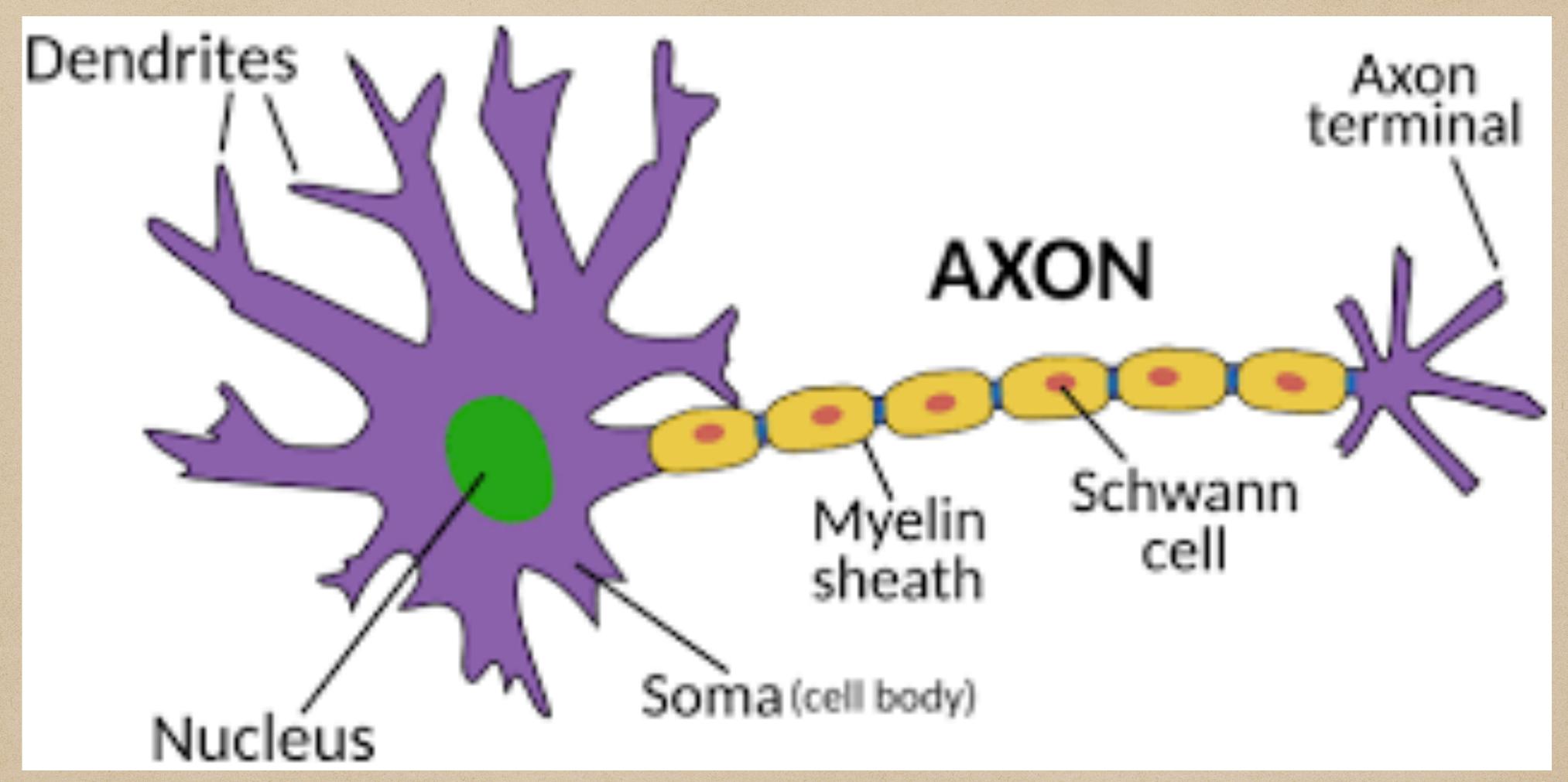
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孩子们为什么不同? Why are children different?

- ◆ 还在成长 * adolescent brain is still growing
- ◆ 大脑还在发育 * still developing
- ◆ 还在成熟 * still maturing



大脑中的神经细胞



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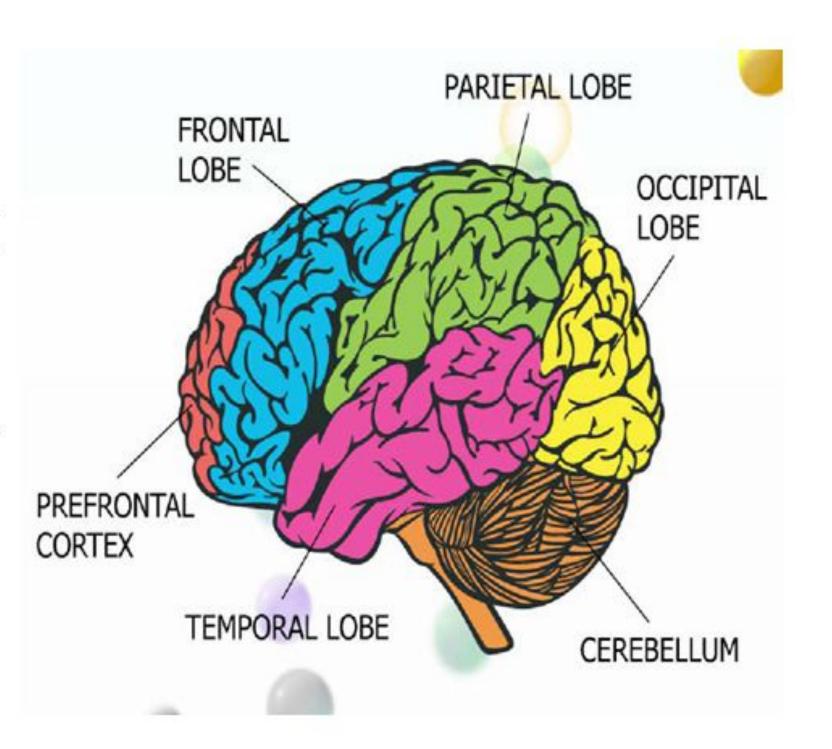


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Brain changes in Adolescents

- 18
- Prefontal Cortex
 - Myelination: adding white matter
 - Synaptic Pruning: decreasing number of connections
- Connections among regions

前额叶皮层最后发展



Developmental Issue

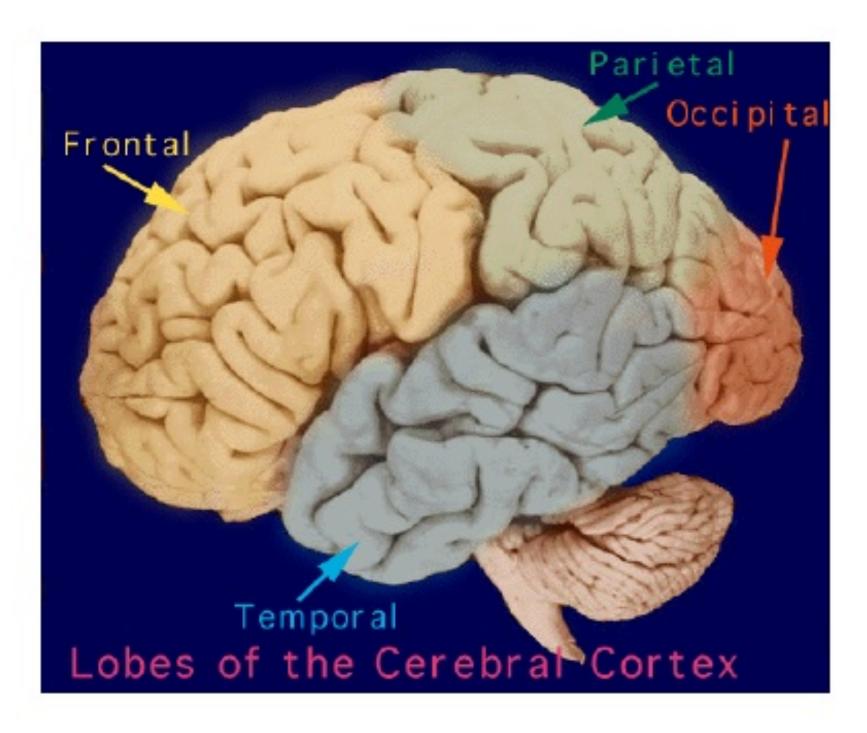
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青少年的大脑变化

- 前额叶皮层发展:
 - 髓鞘: 增加白质
 - 突触修剪: 减少连接的数量。
- · 提高神经区间的联 系的速度和效率

Adolescent Brain Development: Myelination



- Myelination happens in the temporal and parietal lobes before it happens in the frontal lobes. What does that mean?
- Teens are moving from concrete to abstract thinking.
- Teens tend to become very idealistic & cause-oriented.

青少年的大脑变化

- •髓鞘化发生在颞叶和顶叶,然后才发生在额叶。 动意味着什么?
- •青少年正从具象思维向抽象思维发展。
- 青少年往往会变得非常理想, 想化, 以追求为导向。

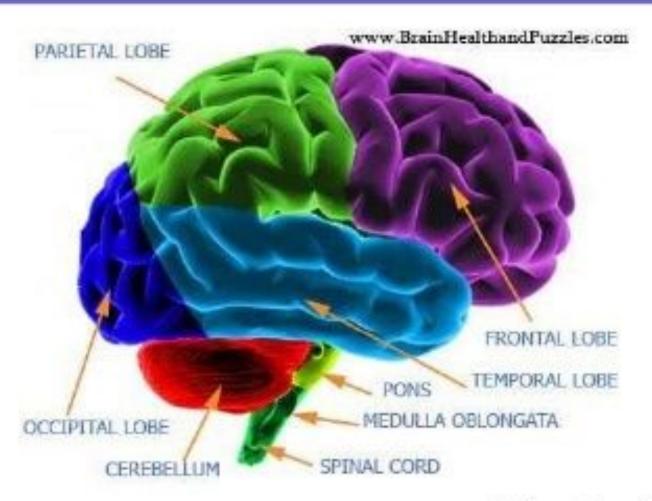
髓鞘形成



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Adult Vs. Teen Brain



- Most of the activity in the adult brain is in the frontal lobe
 - Thinking, reasoning, planning

- Most of the activity in the teen brain is focused in the center
 - Pleasure reward center

大人的大脑跟青少年大脑不一样

青少年和成人的大脑

- •成年人大脑中的大部分活动,如思维、推理、 活动,如思维、推理、 计划等都在额叶中进行
- 青少年大脑的大部分活动都集中在中枢: 是一个快感奖励的中心

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青少年的大脑 The Adolescent Brain

大脑成像显示,青少年的大脑有很多可塑性,这意味着它可以改变、适应和应对环境... 这就是为什么冒险和冲动的行为在青少年和年轻人中更常见。"这就是为什么同龄人的压力在人生的这个时期占主导地位。"

Brain imaging has revealed that the **teenage brain** has lots of plasticity, which means it can change, adapt and respond to its environment. ... It's why risk-taking and impulsive behavior are more common among **teens** and young adults. "This is why peer pressure rules at this time of life."



青少年的罪责比成年人轻

Adolescents are less culpable than adults



青少年大脑的理性部分要到25岁左右才会完全发育。

The rational part of a teen's brain isn't fully developed and won't be until **age 25** or so.



造成罪行的原因

Criminogenic factors

- ◆ 同龄人 * Peers
- ◆ 精神错乱 * Mental disorders
- ◆ 家庭功能障碍 * Family dysfunction
- ◆ 枪毒团伙 * Guns, Drugs, Gangs



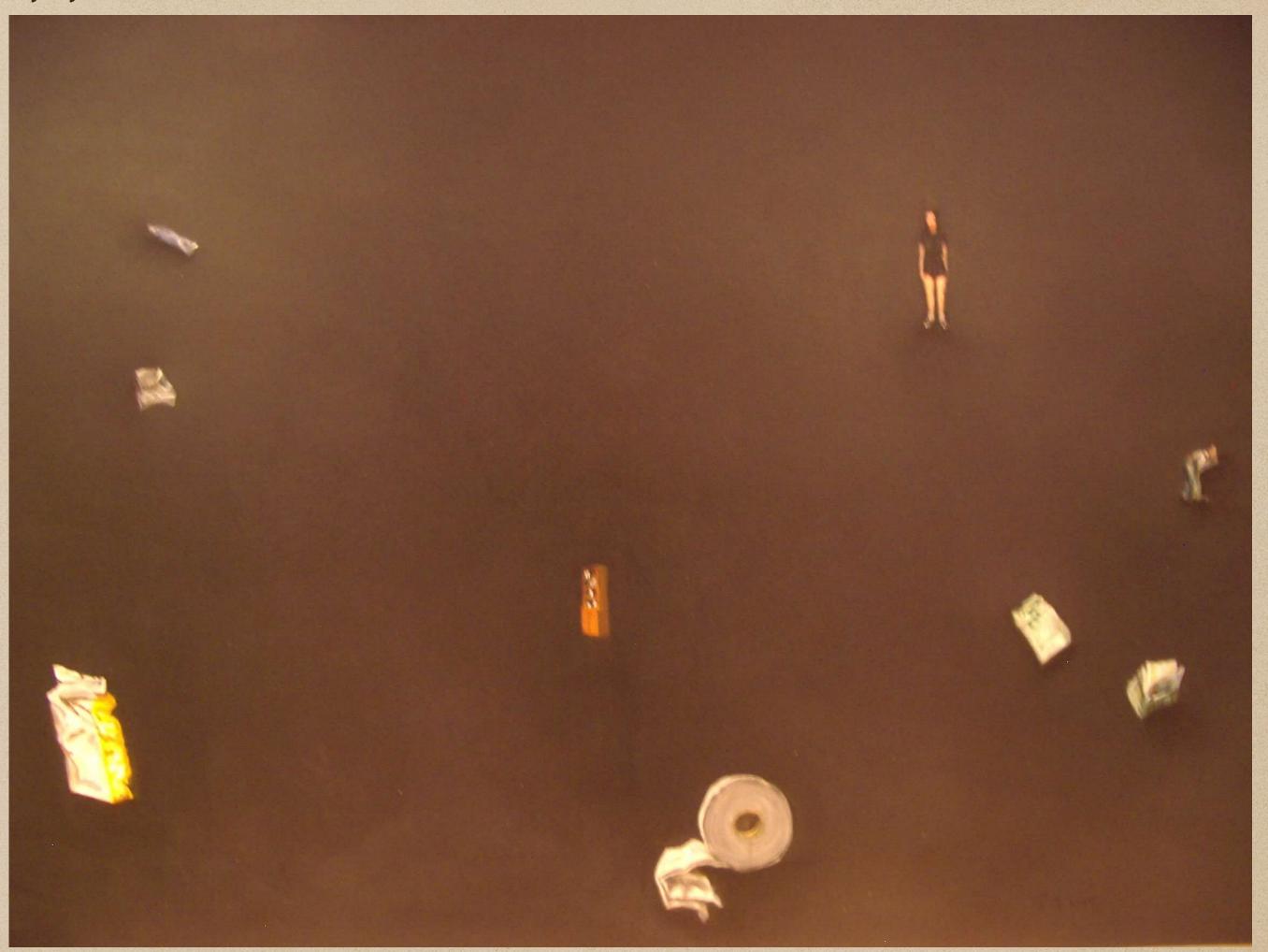
- ◆ 缺乏适当的监督
- Lack of adequate supervision



充满机遇的年龄 Age of Opportunity







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这是什么意思 What does it mean?

◆ 少年犯比成年人更容易改过自新。

Juvenile Offenders are more easily rehabilitated than adults

◆ 少年犯可以成长和改变

Juvenile Offenders can grow and change



- Roper v. Símmons2005
- Graham v Florida2010
- J.D.B. v. North Carolina.2011
- Miller v. Alabama.2012
- Montgomery v.Louisiana.2015
- Jones v. Mississippi
 (pending decision)

美国最高法院案件 U.S. Supreme Court Cases



公众在美国最高法院等听到法律争

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- ◆ 案件每个阶段的辩护人 *Advocate at each stage of the case
- ◆ 驳回动议*motion to dismiss;
- ◆ 从成人法庭撤诉的动议 *motion to remove from adult court;
- ◆ 暂停裁决的动议 *motion for stay of adjudication;
- ◆ 驳回供词 *dismiss confession;



由于缺乏意图而请求指示性裁决。 motion for directed verdict due to lack intent;

要求法官使用合理的少年标准。
request judge use reasonable juvenile standard;

请求使用年龄作为减刑因素 request use of age as mitigating sentencing factor

封存和删除 Sealing and expungement



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少年犯不应被判处成人刑事刑罚。

Juvenile Offenders should not receive adult criminal sentences



少年犯需要与发展相适应的方案设计

Juvenile Offenders need developmentally-appropriate programming

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Focus on Surveillance	Focus on Positive Behavior Change
Laundry list of supervision conditions	Developmentally appropriate conditions
Fixed and uniform case contact requirements	Contact requirements based on youth's assessed risk level
No collateral contact requirements	Required family and school collateral contacts
Large caseloads, "check-in" visits	Small caseloads with sessions focused on behavior change/skill development
Minimal training	Training in engagement and cognitive behavioral techniques
Minimal use of incentives/rewards	Frequent use of incentives/rewards

注重监督

- 监理条件的杂项清单
- 固定和统一的个案联系条件
- 无附属联系要求
- •案件量大,"签到"访问。
- 最低限度的培训
- •激励/奖励措施的使用最少

注重积极的行为改变

- 建立于适合发展的条件
- 根据青少年的评估风险等级提出的联系条件。
- 必要的家庭和学校附属联系
- 小规模的案例,以行为改变/技能发展为重点的会议。
- •参与和认知行为技术培训;
- 经常使用激励/奖励措施

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亨内平省青少年缓刑的目的和愿景* Purpose and Vision of Hennepin County Juvenile Probation

愿景声明 *Vision Statement:

我们设想的世界是一个赋予青年权力,让他们拥有一种可能性的世界。 We envision a world where youth are empowered to hold a sense of possibility.

宗旨声明*Purpose Statement:

我们对青年负责。我们与青年、少年司法伙伴和其他组织合作。 We are responsible to youth. We work in partnership with youth, juvenile justice partners, and communities in their pursuit of well-being.

价值观*Values

尊重、激励、责任心、意图和接受多样性。 respect, inspire, compassionate accountability, intention, and an embrace of diversity.



有效地确定积极的青年发展机会,重点是提高能力和认知技能的发展。 Effectively target positive youth development opportunities that focus on increasing competency and cognitive skills development.

筛查遭受的暴力和遗留的创伤。

Screen for exposure to violence and accompanying trauma

家庭的积极参与

Active participation of family



明尼苏达州为18~21岁的缓刑犯制定了新方案。该团队致力于解决持续存在的问题,如缺乏住房、缺乏工作等,这些问题可能导致被告重新犯罪。

Minnesota has new program for 18 - 21 y.o. on probation. Team works through persistent problems such as lack of housing, lack of job, etc. that could cause defendant to re-offend.

缓刑监督官是教练,而不是裁判:他们是培养人的,并有坚持不懈的投入。 Probation officers are coaches and not referees: they are nurturing And have relentless engagement.

这是基于青少年大脑研究的根本性变化发展。

This is a fundamental change based on research in youth brain development.



应用科学知识 Apply scientific knowledge

- ◆ 自学 * Educate ourselves
- ◆ 教育法官 * Educate the courts
- ◆ 教育检察官 * Educate the prosecutors
- ◆ 宣传民意 * Inform public opinion



目标 Goals

- ◆ 提高年龄 * Raise the age
- ◆ 将案件提交给儿童保护机构,而不是少年犯罪或成人法院
 * Send cases to child protection and not juvenile delinquency or adult court (currently, arrest or criminal charge does not meet criteria for child neglect/abuse investigation!)
- ◆ 停止罚款和收费并限制归还 * End fines and fees and limit restitution









Advocacy Skills

辩护技能

Examination and Cross Examination of Children 对儿童的询问和交叉询问









- Context: A Comparative
- Effective client interviewing techniques in general;
- Effective client interviewing techniques as applicable to juvenile and youth clients – and/or witnesses;
- Interviewing vulnerable witnesses;
- Client sensitivity, context and relationship/trust building

- 背景: 一个对比
- 有效的客户面谈技巧
- 适用于少年和青年客户和/或证人的有效客户访谈技巧
- 采访脆弱的证人
- 客户的敏感性、背景和建立关系/信任



Context: A Comparative 背景: 一个对比



- The age of criminal responsibility in the UK is 10
- It is the lowest in Europe.
- Such a low ACR contravenes international juvenile justice standards.
- An age of criminal responsibility of 10 years is seen as arbitrary and not evidence-based. It is also out of step with other legal age limits for children.
- Research shows that 10-year-old children are immature in terms of moral and brain development.
- Criminalising children adversely affects their future prospects and makes them more likely to reoffend as adults.

- 在英国,承担刑事责任的年龄是10岁。
- 是欧洲最低的年龄。
- 如此低的刑事责任年龄违反了国际少年司法标准。
- 10岁的刑事责任年龄被认为是武断的,不以证据为基础。它也与其他法定儿童年龄限制不一致。
- 研究表明,10岁的儿童在道德和大脑发育方面还不成熟。
- 将儿童定罪对他们的未来前景产生不利影响,使他们 成年后更有可能重新犯罪。



Context: UK 背景: 英国



"The evidence suggests that child defendants are 'doubly vulnerable' because of their young age and developmental immaturity in addition to their experience of other needs, including learning disabilities, mental health problems and communication difficulties."

Carlile Report

"证据表明,儿童被告由于年龄小、发育不成熟,再加上经历过其他需求, 包括学习障碍、心理健康问题和沟通困难,所以是'双重脆弱'的。"

Carlile报告





"Large numbers of young people currently in secure settings in England who have undiagnosed neurodevelopment conditions which have directly contributed to their offending behaviour."

Children's Commissioner of England and Wales, 2012

"英格兰目前在安全环境中的大量年轻人,他们的神经发育状况没有得到诊断,这直接导致了他们的犯罪行为。"

Children's Commissioner of England and Wales, 2012



Context: A Comparative 背景: 一个对比



Natural developmental immaturity: (Grisso et al (2003) and Cauffman and Steinberg (2012))

- 23 -32% have learning / intellectual disabilities (cf.
 2-4% of young people in the gen.pop)
- 43-57% have specific learning difficulties (c.f 10%)
- 60-90% have communication (speech and language) disorders (cf. 5-7%)
- 12% have ADD/ADHD (cf. 1.7-9%)
- 15% have an autism spectrum condition (cf. 0.6-1.2%) (Hughes and Ors 2012)
- Low IQ: 23% had IQs of under 70 (extremely low) and 36% had IQs of 70-79 (Harrington and Bailey 2005)

自然发育不成熟: (Grisso等人 (2003年) 和Cauffman和 Steinberg (2012年))

- 23-32%的人有学习/智力障碍(相比之下, 2-4%的年轻人在普通人群中)
- 43-57%有特殊的学习困难(比照10%)
- 60-90%的人有交流(言语和语言)障碍(参照5-7%)
- 12%有注意力缺失症/多动症(参照1.7-9%)
- · 15%的人有自闭症谱系疾病(参照0.6-1.2%)(Hughes和 Ors,2012年)
- 低智商: 23%的人智商在70以下(极低),36%的人智商 在70-79之间(Harrington和Bailey,2005年)



Context: BAME 背景: 黑人和少数名族背景



- 40% of children in custody are from Black and Ethnic Minority (BAME) backgrounds – Lammy Review 2017
- Children from BAME backgrounds account for 45% of the custodial population despite making up 18% of 10-17 year old general population (2016 – 17 Youth Justice Statistics)
- HMIP analysis of children in custody 2017-18 over half (51%) of boys in YOIS identified as being from a black or minority ethnic background
- Over 50% of children on custodial remand are from BAME backgrounds
- Arrests of black children has doubled over the last ten years. Black children are 4 times as likely as white children to be arrested, (2017 – 18 Youth Justice Statistics)
- Over 25% of 17 year olds who were cautioned or sentenced in 2018 were BAME (YJ statistics 2017 2018).

- 40%的在押儿童来自黑人和少数民族背景 -- -- 《2017年Lammy审查》;
- 尽管来自黑人、亚裔和少数族裔背景的儿童占10-17岁总人口的18%,但他们占被拘留人口的45%(2016-17年青年司法统计)
- HMIP对2017-18年在押儿童的分析----YOIS中超过一半(51%)的男孩被确认为来自黑人或少数民族背景。
- 超过50%的还押儿童来自黑人、亚裔和少数族裔背景;
- 在过去的十年里,黑人儿童的被捕人数增加了一倍。黑人儿童被逮捕的可能性是白人儿童的4倍,(2017-18年青年司法统计)
- 在2018年被警告或判刑的17岁少年中,超过25%是BAME(YJ统计 2017-2018)。





- Looked after children are five times more likely
 to be cautioned or convicted than children in the
 general population. Children in residential care
 are 15% more likely to be criminalised.
- 38% in Young Offender institutions and 52% in secure training centres have been in care.

被照看的儿童被警告或定罪的可能性是普通人口中儿童的五倍。寄宿照料的儿童被定罪的可能性高出15%。

 在青少年犯罪机构中,38%的人和在安全 培训中心的52%的人曾接受过照料。



The Basics... 基础知识...



- •One 16 year old said: 'Adults might get the words but to teenagers like me, it was all long posh words.'
- •A 17 year old said: 'You don't really understand what they're saying but they're saying something about you, and then say they've made a decision.'
- •Another 17 year old described a judge as using 'all these big fancy words''.

- •一个16岁的孩子说: '成年人可能会明白这些话, 但对我这样的青少年来说, 都是长长的豪言壮语'。
- •一个17岁的孩子说:'你并不真正理解他们在说什么,但他们在说你的事情,然后说他们已经做出了决定。
- ·另一个17岁的孩子描述说,一个法官使用' 所有这些花哨的大词''。



Simplify 简化



- •Modify your language according to the child's needs.
- •Avoid tag questions. Use of sarcasm, metaphors, being judgmental.
- •Don't say, 'Do you understand?'. Ask them to tell you in their own words.

- •根据孩子的需要,修改你的语言。
- •避免使用标签式的问题。使用讽刺、比喻、判断。
- ·不要说"你明白吗?",请他们用自己的话告诉你。



Do you need to ask the question 你需要问这个问题吗?



•Have they told someone else this all before?

•Avoid re-traumatising. Think about whether you need to ask the child to re-tell their story, especially if it involves a traumatic event.

•他们之前有没有跟别人说过这一切?

·避免再次造成创伤。思考是否需要要求孩子重新讲述他们的故事,特别是当故事涉及到创伤性事件时。

Question Techniques 提问技术



- •'Socratic questioning' ask 'when', 'where', 'who' and 'why' questions to encourage the child or young person to express themselves.
- •'Columbo technique' place the child or young person in the position of being the expert in their own experiences. You would do this by asking a question like, "can you help me to understand why...". By communicating genuine interest in the responses and a sense of curiosity in the answers, you can encourage a more full and honest disclosure.
- •"苏格拉底式提问"--提出 "何时"、"何地"、" 谁 "和 "为什么 "的问题,鼓励儿童或青少年 表达自己的想法。
- •"科伦坡技巧"—把孩子或年轻人放在他们自己的经验专家的位置上。你可以通过这样的问题来实现,比如 "你能帮助我理解为什么……"。通过交流对回答的真正兴趣和对答案的好奇心,你可以鼓励更全面和诚实的披露。





Be prepared for guarded, uncaring or aggressive responses to questioning, and be ready to 'roll with resistance', change topic and give opportunities for the child or young person to express emotion throughout the process.

做好准备,以应对对提问的戒备、无情或咄咄逼人的反应,并在整个过程中准备好"抵制"、改变话题,并给儿童或青少年提供表达情感的机会。





Advocacy Skills: Examination in chief and leading a juvenile defendant as a witness

辩护技巧: 主审和带领未成年被告人作证







Overview 概括



- Special considerations applicable to child defendants
- Advanced skill set
- Dealing with one of most vulnerable demographics
- Radically different approach guided by the child's needs and abilities
- Overarching consideration: Facilitating effective participation
- Comparative

- 适用于儿童被告的特别考虑因素
- 高级技能组合
- 处理最脆弱的人口群体之一的问题
- •完全不同的方法--以孩子的需要和能力为指导。
- 总体考虑: 促进有效参与
- •比较



Move to Specialism and Mandatory Training Recommendations 转为专业和强制性培训建议



Law Commission's Report on Fitness to Plead (2016)

'There should be mandatory specialist training on participation issues which should be extended to all legal practitioners and members of the judiciary engaged in cases involving children defendants in any court.

Taylor Review (2016)

The Ministry of Justice should review the fee structure of cases heard in the Youth Court in order to raise their status and improve the quality of legal representation for children; The Bar Standards Board and the Solicitor's Regulation Authority should introduce mandatory training for all lawyers appearing in the Youth Court.

《法律委员会关于适格辩护的报告(2016年)》

'应该对参与问题进行强制性的专门培训,培训范围应扩大到所有法律从业人员和在任何法院从事涉及儿童被告案件的司法人员。

《泰勒点评(2016年)》

司法部应审查少年法庭审理案件的收费结构,以提高他们的地位,改善儿童法律代表的质量;律师标准委员会和律师监管局应对所有在少年法庭出庭的律师进行强制性培训。



Move to Specialism and Mandatory Training Recommendations 转为专业和强制性培训建议



We confirm, if confirmation is needed, that the principles in Lubemba apply to child defendants as witnesses in the same way as they apply to any other vulnerable witness. We also confirm the importance of training for the profession...We would like to emphasise that it is, of course, generally misconduct to take on a case where an advocate is not competent. It would be difficult to conceive of an advocate being competent to act in a case involving young witnesses or defendants unless the advocate had undertaken specific training. That consequence should help focus the minds of advocates on undertaking such training, whilst the Regulators engage on the process of making such training compulsory. We continue to press the Ministry of Justice for further resources to extend the training of judges; it would, if resources permitted, be desirable to provide more extensive training in respect of evidence given by young defendants and witnesses.

LCJ, Grant-Murray and Ors

我们确认,如果需要确认的话,Lubemba案的原则适用于作为证人的儿童被告,就像适用于任何其他易受伤害的证人一样。我们还确认了对这一行业进行培训的重要性.我们要强调的是,当然,一般来说,在辩护人不胜任的情况下接手案件是一种不当行为。除非辩护人接受过专门的培训,否则很难想象他有能力处理涉及年轻证人或被告人的案件。这一后果应有助于使辩护人集中精力接受这种培训,同时监管机构也参与强制执行这种培训的进程。我们继续敦促司法部提供更多资源,以扩大对法官的培训;如果资源允许,最好就年轻被告和证人提供的证据提供更广泛的培训。

LCJ、Grant-Murray和Ors



An individual approach 个别方法



'Advocates must adapt to the witness, not the other way round.'

"律师必须适应证人,而不是相反。"

Lady Justice Hallett in R v Lubemba; R v JP [2014] EWCA Crim 2064, para 45.

Lady Justice Hallett在R诉Lubemba案; R诉 JP案[2014] EWCA Crim 2064, 第45段



Ground Rules Hearing 听证会基本规则



- Applicable to examination in chief and cross examination
- Applies to vulnerable witnesses
- Discusses and orders/directions made about the conduct of XIC and XX and practical considerations e.g. special measures/trial adaptations
- Questions drafted in advance and considered by the Judge (XX)

- 适用于主问和交叉询问
- 适用于弱势证人
- 讨论并就XIC和XX的行为和实际考虑因 素(如特别措施/审判调整)发出的命令/指 示
- · 事先起草并由法官审议的问题(XX)



Practical considerations 实际考虑



- Start evidence when a child is alert and fresh: morning but not before 10am
- Breaks and how/who to signal need for a break
- Adult support
- Removal of wigs/gowns/court dress
- All on same level

- 在孩子早上神清气爽的时候开始取证: 但不要在上午10点之前
- 休息时间以及如何/由谁发出需要休息的信号
- 成人支助
- 摘掉假发/礼服/宫廷服装
- 都在同一水平线上



Advocacy Aids 辩护援助



- Intermediaries: Communication experts
- Tools: timelines, distraction aids, body maps, pictoral aids, drawings, dolls, photos
- Special measures: Breaks, live links, location in court
- Principles that apply to 'vulnerable witnesses' apply equally to child defendants

- 中间人: 通信专家
- 工具:时间轴、分心辅助工具、身体图、图形辅助工具、图画、玩偶、照片
- 特别措施。休息时间、现场链接、法庭地点
- 适用于 "弱势证人 "的原则同样适用于儿童被告。



Purpose and Aims of Examination in Chief 总监考试的目的和目标



- Enable the child to tell their story
- In their words
- Identify and address key issues in the case

- 让孩子讲述自己的故事
- 用他们的话说
- 查明并解决案件中的关键问题。



Key Principles 主要原则



- Use of Headlines to change topic, fixate child
- Chronological/Subject
- Open Questions:
 - Who, what, when where?
 - Describe, tell me more about…
- One concept per question
- Short questions

- 利用标题来改变话题,固定孩子的注意力。
- 按时间顺序/主题
- 开放性问题: "谁、什么、何时、何地?
 - 谁,什么,时间,地点?
 - 描述,告诉我更多关于……
- 每个问题一个概念
- 简短问题



Examination in Chief 主考



- One question at a time
- Pace of questions
- Allow processing and comprehension time
- Do not fill pauses
- Do not interrupt

- 一次一个问题
- 问题的速度
- 留出处理和理解的时间
- 不要填补停顿
- 不要中断



XIC...



- Age/cognitive ability appropriate questions
- Use words the child uses
- Use information from the answer to ask the next question

- 适合年龄/认知能力的问题
- 使用孩子使用的词语
- 利用答案中的信息提出下一个问题。



Examination in Chief: Don'ts 审查中的"不要"



- Do not lead
- Avoid tagged questions
- Avoid pronouns he, she, they him, her. Use names.
- Avoid abstract words
- Avoid jargon, e.g. defendant, charge, arrest, detain

- 不要导致
- 避开标签问题
- 避免使用代词--他、她、他们、他、她。使用名字。
- 避免使用抽象的词语
- 避免使用行话,如被告、指控、逮捕、拘留等。



Examination in Chief: Don'ts 审查中的"不要"



- Avoid double negatives
- Avoid multiple questions/concepts/ compound questions:
- 'what were they wearing?'
- 'did you see him, where was he?'
- Never ask a child to demonstrate where touched/sexual acts on their own bodies

- 避免双重负数
- 避免多问/概念/复合问题:
 - "他们穿的是什么?"
 - "你看到他了吗,他在哪里?"
- 永远不要让孩子展示自己身体上被触碰/性行为的地方



Examination in chief: Caution 主考: 注意



- Check understanding 'do you understand?' is unlikely to be sufficient
- Dates and times fix by reference to significant events in the child's life e.g. birthdays/celebrations/school holidays/school year or class or daily routine – before breakfast/after school
- Length and Frequency of Events
- Weight, height, distance estimates (relative values)
- Time estimates

- 检查理解——"你明白吗?"不太可能是充分的。
- 日期和时间——参照儿童生活中的重大事件来确定,如生日/庆祝活动/学校假期/学年或班级或日常活动——早餐前/放学后。
- 活动时间和频率
- 体重、身高、距离估计值(相对值)
- 时间估计



Caution 注意



- Suggestive
- You did see <u>the</u> gun, didn't you? '
 - Tagged
 - '<u>the</u>' compared with '<u>a</u>' result in greater levels of erroneous responses
 - 'The' presupposes the existence of an item
- Question: Why? Difficult for children
- Closed questions

- 建议性
- 你确实看到了那把枪,对不对?'
 - 标签
- "那个"与"一个"相比,错误的反应更多。
- '那个'的前提是存在一个项目
- 问题: 为什么? 对孩子来说有困难
- 非开放问题



Examples 例子



Q; It was about 1pm, what was the weather condition? Was it foggy, rainy, sunny, what was the situation?

Q: What was the weather like?

Q: Were there any obstructions to your line of sight?

Q: Was there anything between you and the car?

Q: One time, the other time at Bob's house?

Q. How many times have you been to Bob's house Headline: I am going to ask you questions about the second time you went to Bob's house.

问: 当时是下午1点左右,天气情况如何?是雾天、雨天、

晴天,是什么情况?

问: 当时的天气是怎样的?

问: 你的视线有没有什么障碍物?

问: 你和车之间有什么东西吗?

问:一次是在鲍勃家,另一次是在鲍勃家?

问: 你去过鲍勃家多少次?

标题: 我要

问你关于你第二次去鲍勃家的问题。



Non-Verbal Clues 非语言线索



- Non-verbal clues to miscommunication
- e.g. puzzled looks, knitted eyebrows, downcast eyes and long pauses.
- Defence mechanisms, such as shutting down, dissociating, outbursts and laughing are all observed in young defendants

- 沟通不畅的非语言线索
 - 如: 疑惑的表情、皱眉、低垂的眼睛和长时间的停顿。
- 在年轻的被告人身上,都能观察到防御机制,如关闭、解离、爆发和大笑等。





Advocacy Skills:

Cross Examination of a Child Defendant/Witness

辩护技巧:

对儿童被告/证人的交叉询问







Comparative 对比



- England and Wales: Advocacy and the Vulnerable
- Consequence of poor practice in cases involving sexual offences
- New approach to cross examination
- Moves away from leading/tagged questions
- Put your case

- 英格兰和威尔士: 辩护和弱势群体
- 涉及性犯罪案件的不良做法的后果
- 盘问的新方法
- 摆脱引导性/标记性问题
- 把你的案子



Aims and Purpose of Cross Examination 盤問的目的和宗旨



- To advance your case
- To undermine the child defendant/witness's account on the key issues in an authentic way
- To expose inconsistency
- Do you need to ask or can you achieve in another way

- 为了推进您的案件
- 以真实的方式破坏儿童被告/证人对关键问题的陈述
- 揭露不一致的地方
- 你是需要问,还是可以用其他方式实现



Key Principles 主要原则



- Plan cross examination
- Consider drafting out questions in advance
- Open/closed answer questions
- No tagged questions
- Tone: not aggressive, sarcastic, demanding
- Avoid nodding when asking a question e.g. influencing answer

- 计划盘问
- 考虑提前起草问题
- 开放式/封闭式回答问题
- 没有标记的问题
- 语气: 不咄咄逼人, 不讽刺, 不苛求
- 提问时避免点头,如影响回答





Principles of Preparation

- 1. Ground Rules Hearing
- 2. Identify Key Issues
- 3. Pre-Draft

编制原则

- 1. 基本规则听证会
- 2. 确定关键问题
- 3. 草稿





Principles for Conduct

行为原则

4. Rapport

4. 关系

5. Pace

5. 步伐

6. Behaviour

6. 行为

7. Distress

7. 危难





Principles for Questioning

8. Ask, don't tell

9. Chronology

10. Signposting

11. No repetition

12. Avoid statements put as questions

质询的原则

8. 问,不要说

9. 年表

10. 10. 路标

11. 不重复

12. 避免作为问题的发言





Principles for Questioning

- 13. Avoid pronouns
- 14. Avoid 'remember' questions
- 15. Telling someone else (collusion)
- 16. Consider avoiding 'how'/'why' questions

质询的原则

- 13. 避免使用代词
- 14. 避免 "记住 "问题
- 15. 告诉别人(合谋)
- 16. 考虑避免 "如何"/"为什么 "的问题。





Principles for Questioning

17. No 'tag' or 'directive' leading questions

18. No compound questions

19. Ask direct questions

20. No leading questions

质询的原则

17. 没有 "标签 "或 "指令性 "的引导问题。

18. 无复合问题

19. 直接提问

20. 无引导性问题





- Rolled out course.
- 20 principles (see handout)
- Resources: <u>www.icca.ac.uk</u> and Toolkits for questioning
- Example of reformulating a question

- 推出课程。
- 20条原则(见讲义)
- 资源: www.icca.ac.uk 和提问工具箱
- 重新提出问题的例子



Case Preparation 案件准备

Michael G. Karnavas

Defender Advocacy Workshop 辩护律师工作坊 Mahidol University 玛希隆大学 12 March 2021 2021年3月12日



Trial activities are dependent on the investigation 审判活动取决于调查

- Evidence gathered will have a direct impact on the examination of witnesses (direct, cross, and re-direct examination)
- The purpose of gathering evidence is to strengthen the defense case for trial
- The extent to which the defense lawyer is able to investigate is determined by the applicable law

- 收集到的证据将直接影响到对证人的 询问(直接询问、交叉询问和再直接 询问)。
- 搜集证据的目的是为了加强辩护人的 审判能力
- 辩护律师能够调查的范围是由适用的 法律决定的

Learning your case 学习您的案例

- Read the charging document (arrest warrant, indictment, etc.):
 - Break down the charging document
 - Read the supporting material
 - Have a clear understanding of the available facts
 - List:
 - Good facts
 - Bad facts
 - Wishful facts

- 阅读指控文件 (逮捕令、起诉书等):
 - 细分指控文件
 - 阅读辅助材料
 - 对现有事实有清楚的了解
 - 列表:
 - ■良好事实
 - ■不良事实
 - ■一厢情愿的事实



Learning your case 学习您的案例

Read the law:

- List all legal arguments or defenses that appear relevant
- List all the elements of each charge to focus on what must be proved/what must be challenged
- List all potential issues that may be relevant to the case

■ 阅读法律:

- 列出所有相关的法律论点或辩护理由。
- 列出每项指控的所有内容,重点是必须证明什么/必须质疑什么。
- 列出可能与案件有关的所有潜在问题。



The theory of the case and theme 案例理论和主题

- The theory of the case is the reason, justification, or explanation:
 - Why the defense should prevail at trial;
 - Why the client is overcharged; or
 - Why the client should receive a lenient sentence
- The **theme** is the dominant human emotion which assists the court in understanding why the accused acted the way he did

- 案件理论是指的原因、理由或解释:
 - 为什么辩方要在审判中获胜?
 - 为什么当事人被过度指控;或者
 - 为什么当事人应该从宽判决?
- 主题是人类的主要情感,有助于法院理解被告为什么会这样做。

Brainstorming the theory of the case 就案例理论集思广益

- The theory of the case depends on the:
 - Charges
 - Facts
 - Law
 - Possible defenses
 - Admissible evidence
 - Alternative plausible explanations

- 案件理论取决于:
 - 指控
 - 事实
 - 法律
 - 可行的辩护
 - 可接受的证据
 - 其他合理的解释



Brainstorming the theory of the case 集思广益的案例理论

- Brainstorming: the dissection of the facts and applicable law and the distillation of the case to its essentials
 - Start with the law
 - Consider what facts the Prosecutor will be relying on
 - List possible legal defenses together with anticipated attacks for each legal theory
 - The theory of the case should be developed as early as possible

- 集思广益:对事实和适用法律进行剖析,并对案件进行提炼,使之成为案件的精华
 - 从法律入手
 - 考虑检察官将依据哪些事实;
 - 列出可行的法律辩护理由,并列出 对每种法律理论的预期攻击。
 - 应尽早形成办案理论体系



Start with the law 从法律入手

- List the elements of each charge
- List all available defenses
- Determine the need for:
 - Legal motions
 - Investigative tasks
 - Consultation with expert witnesses

- 列出每项指控的内容
- 列出所有可用的防御措施
- 确定是否需要:
 - 法律动议
 - 调查任务
 - 与专家证人的协商



Consider the Prosecution's facts 考虑检方的事实

- What are the facts telling us?
- What are they not telling us?
- Can the facts in the charging document be disproved and how?
- Are there any possible explanations to damaging facts?
- What other facts do we need for our theory?
- Are the witnesses biased, prejudiced, or unreliable?
- How were the questions formulated?
- Was the witness or suspect listening to the questions?
- What was the witness's or suspect's response?

- 事实告诉我们什么?
- 事实没有告诉我们什么?
- 起诉文件中的事实能否被推翻,是如何被 推翻的?
- 是否有对害性事实的实用解释?
- 我们的理论还需要哪些事实?
- 证人是否有偏见、有成见或不可靠?
- 问题是如何提出的?
- 证人或嫌疑人是否在聆听问题?
- 证人或嫌疑人的反应是什么样的?



List possible defenses with anticipated attacks 列出可能的防御措施和预期的抨击

- What is your theory of the case?
 - The client did not commit the crime
 - Self-defense
 - Reasonable doubt
- Select the best possible theory of the case
- You must *know* your case before you can develop a theory

- 您对本案有什么样的理论?
 - 当事人没有犯罪
 - 自卫
 - 合理怀疑
- 尽可能地选择最佳案例理论
- 您必须先了解您的案件,然后才能发展理论



Identify investigative tasks 确定调查任务

- Investigation is part and parcel of developing the theory of the case
- Identify what investigations need to be done from:
 - The client's instructions
 - The evidence already gathered
- Theories will emerge which will focus investigative efforts

- 调查是发展案件理论的重要组 成部分
- 确定需要从哪些方面进行调查:
 - 客户的指示
 - 已收集的证据
- 重点调查工作的理论将会随即 呈现



Draft a general analysis 起草一份总体分析报告

- When brainstorming, draft a general analysis to facilitate discussions:
 - Anticipated legal issues
 - Possible theories of the defense case
 - The defense lawyer's impressions of the complaining witnesses or client
 - Need for experts
 - Inconsistencies within the documents
 - A general list of possible investigative assignments

- 集思广益时,起草一份总体分析报告,以便于讨论:
 - 预期的法律问题
 - 解护案件的可能理论
 - 辩护律师对投诉证人或委托人的印象
 - 一对专家的需求
 - 文件中的不一致之处
 - 可能需要进行的调查任务总清单



Difficulties in investigating 调查方面的困难

- Throughout the investigation process defense lawyers are likely to come across various obstacles
- Difficulties in finding witnesses, documents, and obstruction by the Prosecution or other authorities will require lawyers to find the ways of overcoming these difficulties, while remaining within the legal and ethical boundaries prescribed by the law and the lawyer's codes of conduct.

- 在整个调查过程中,辩护律师很可能会遇到各种阻碍
- 在寻找证人、文件方面的困难, 以及检方或其他当局的阻挠,都 需要律师想方设法克服这些困 难,同时又要遵守法律和律师行 为守则规定的法律和道德界限



Special considerations for juvenile clients 对少年犯的特别考虑

- As early as possible, determine what is the ultimate goal
- The ultimate goal may be for the juvenile to accept responsibility and to propose a nonpenal sentence
- In addition to investigating the facts, the lawyer should also evaluate:
 - The juvenile's physiological and psychological profile
 - The juvenile's personality traits
 - The juvenile's family situation
 - The juvenile's living and learning environment
 - Whether anything traumatic happened to him/her

- 尽早确定"最终目标是什么"
- 最终的目标可能是让青少年承担责任,并提出非刑罚性的判决
- 除了调查事实,律师还应该评估
 - 少年的生理和心理状况
 - 少年的个性特征
 - 少年的家庭状况
 - 少年的生活和学习环境
 - 他/她是否发生过任何创伤



Special considerations for juvenile clients 对少年犯的特别考虑

- Education and rehabilitation should be the primary focus
- Leverage and mobilize all possible social resources
- Special attention must be given to the juvenile's privacy rights
- Efforts should be made to safeguard special litigation rights for juveniles
- The juvenile should be processed separately from co-accused, especially adults
- It is advisable <u>not</u> to concurrently represent two juveniles

- 教育和康复应是主要重点
- 利用和调动一切可能的社会资源
- 必须特别注意青少年的隐私权
- 应努力保障青少年的特殊诉讼权利
- 少年应与同案犯,特别是成年人, 应分开处理
- 最好不要同时代理两个少年犯



青少年及虚假招认

Juveniles and False Confessions

讲者: 李菀梓

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Speaker: Jessica Li

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全球法律教育平台



青少年的定义

Meaning of juveniles in Hong Kong

- ・第226章《少年犯条例》:第2条
- ・儿童:未满14岁的人
- · 少年人: 年满14岁但未满16岁的人

- Juvenile Offenders Ordinance, Cap.226
 - s.2: definition
- Child: under the age of 14 years
- Young person: 14 years of age or upwards and under the age of 16 years



招认及其形式 Confessions & its Forms

- 招认: 使自己入罪的陈述, 例如「我偷了一个手袋」
- 招认的形式
 - ・口头招认
 - 事后补录口头招认
 - 会面纪录 pol.857
 - 录影会面纪录

- Confession: a statement to incriminate the statement maker i.e. I stole the handbag
- Forms of confession
 - oral
 - post-recorded
 - Pol.857 i.e. written statement
 - video recorded interview



「虚假」的意思

Meaning of "false"

- · 讲了一些事但其实是谎话, 即是并非事实
- 根本没有作出任何招认
- 招认是不自愿地作出的

- Did say something but that is a lie i.e. not truth
- Did not make any alleged confession at all
- The confession is involuntarily made



作为控方 As prosecution

· 控方若想依赖招认作为证据,而 该个招认是向权威人士 (person in authority) 例如警察 / 海关人 员 / 入境处人员作出,则控方需 要证明该招认是自愿作出的 Prosecution must prove voluntariness for the confessions to be used as evidence in court if that statement is made to a person in authority e.g. police / C&E / immigration



法庭程序 Court procedure

- 当招认的可呈堂性受争议时
 - 裁判法院及区域法院: 交替程序
 - 原讼法庭: 案中案
- 原理一样,由法官去裁定招认是否自愿作出, 有没有任何不公平的情况令法庭需要将招认从 证据中剔除
- 若只是关于招认内容是否事实或有否作出过该招认,则不会有交替程序又或案中案

- When admissibility of confessions in dispute
 - Magistracy and District Court: alternative procedure (no jury involved)
 - Court of First Instance: voire dires (jury involved)
- Same effect: for the judge to decide whether the confession was voluntarily made and whether should be excluded by reason of fairness
- If only whether the said confessions are truth or not, no alternative procedure or voire dires would be adopted, same as with whether the juvenile said the confession or not



查问疑犯及录取口供的规则及指示

Rules and Directions for the Questioning of Suspects and the Taking of Statements

· 警务人员如要接见儿童或16 岁以下的青少年(不论是否涉嫌犯罪),在可行情况下应尽量安排一名家长或监护人在场,不然,亦应在一名非警务人员并与该名儿童或青少年性别相同的人士面前会面

 Children and young persons under the age of 16 years (whether suspected of a crime or not) should only be interviewed in the presence of a parent or guardian, or, in their absence, some person who is not a police officer and is of the same sex as the child or young person



青少年作出虚假招认的原因

Why would juvenile give false confession?

- 暴力
- 诱使 (例如: 承认罪责 / 签署会面纪录 就可以获准保释)
- 威吓 (例如: 恐吓拘捕家人)
- 压迫 (例如: 不准饮食/睡觉/上洗手间)
- 其他原因

- Violence
- Inducement e.g. bail will be granted if the juvenile admits guilty / sign the statement
- Threat e.g. threat to arrest the juvenile's family
- Oppression e.g. the juvenile won't be allowed to drink / eat / sleep / go to washroom
- Other reasons



在什么情况下可以裁定招认不可呈堂

On what grounds can the confession be ruled inadmissible?

- •暴力/诱使/威吓/压迫
- 不公平的情况 (由法庭使用酌情权决定是否将自愿作出的招认剔除),例如没有警诫/没有监护人在场

- Violence / inducement / threat / oppression
- Unfair (residue power of the court to ruled out voluntarily made confession which is otherwise admissible) e.g. no caution / without presence of guardian



- 环境
- 整个会面纪录花了多长时间
- 由什么时间开始被扣留
- 是否有监护人人陪同
- •是否有其他证人见证招认
- 招认的详情
- 口头招认及会面纪录私内容是否一致
- 有没有在警员记事册记录了声称招认

- The environment when confession is made
 - How long did the whole statement taking took?
 - How long has the juvenile be detained since arrest?
 - Was the juvenile accompanied by a guardian?
 - Any witness when the confession is made
- The details of the confession
 - Whether oral confession consistent with po.857 written statement?
 - Whether there is any police notebook record to echo the confession?



- 笔迹
 - 是否所有问与答都是由警员书写
- 声明
 - 是否本人的字迹
 - ·是否反映了现实 (例如该青少年是不识字,标准的声明如「我已阅读」是完全反映不了事实)
- · 签名
 - 是否对应本人的名字或与以往的签名一致

- The handwriting
 - All questions and answers by the police?
- The declarations
 - Whether handwriting of the juvenile?
 - Whether it records the truth e.g. if juvenile is illiterate, the standard "I have read" would not be correct at all
- The signature
 - Consistent with the juvenile's name or past signature?



- 青少年清楚自己的法律权利吗?
- · 给了多少时间阅读 pol.153 被羁留人士通知书
- ·有没有阅读及解释pol.153给该青少年
- 他有被允许打电话给亲友或律师吗

- Whether juvenile is well aware of his or her legal rights
 - How much time was given to the juvenile to read the pol.153 notice to person in detention?
 - Was the pol.153 be read and explained to the juvenile?
 - Was the juvenile allowed to call his family or lawyer?



- ・证人
 - 是否有作出任何记录
- 任何身体上的伤痕
 - 被捕后有没有接受诊治
 - 有没有事先存在的心理或精神问题
- 其他特别情况
 - 是否 文盲 / 聋 / 盲 / 长期疾病
 - 是否说外国语言? 有没有安排翻译?

- Any witness whether for the pros or for the juvenile
 - If for the pros, all records consistent? e.g. notebook and witness statement
- Any trace of physical abuse or injury
 - Any post-arrest medical treatment received?
 - Any pre-existing psychological or psychiatric condition?
- Any special circumstances?
 - Whether illiterate / deaf / blind / long-term illness?
 - Whether speaking foreign language? Any interpreter arranged?



例子 1 Example 1

- 小明是一个15岁的巴基斯坦人
- 他在大厦的梯间被警察截停
- 在对他搜身的过程中,发现了他身上有一些毒品
- 警察用英文问小明「这是什么?」
- 小明摇头
- 警察拘捕了小明及用广东话警诫了小明
- 小明用英文回答「是一个朋友给我的」(口头招认)
- 小明现在想要挑战该个口头招认的可呈堂性

- Ernest is a 15 aged Pakistani.
- He was stopped by police in the staircase of a building.
- A body search was conducted and some dangerous drugs was found on the him.
- The police officer asked Ernest in English "what is this?".
- Ernest shook his head.
- The police officer arrested and cautioned him in Cantonese.
- Ernest replied in English "a friend gave this to me" (oral confession).
- Ernest wants to challenge the admissibility of the oral confession.



例子 2 Example 2

- · 警员甲及警员乙扫荡了一个赌档并拘捕了一个叫小玉的14岁女孩
- 小玉被带回警局
- 小玉单独的和两个男警员进行了会面纪录
- 小玉全程都被手铐扣着
- 小玉在会面纪录签了名字「小王」
- 小玉现在想要挑战会面纪录的可呈堂性

- Police A and Police B raided on a gambling centre and arrested a 14-year-old local girl called Zoe.
- Zoe was brought back to the police station.
- She was interviewed by two male police officers alone.
- She was all along handcuffed during the interview.
- She signed her name in the pol.857 written statement as "Zooe".
- Zoe wants to challenge the admissibility of the pol.857 written statement.



在性犯罪案件中为青少年辩护 Defending Juveniles in Sex Offender Cases

Leslie J Rosenberg, J.D 2021年三月 March 2021 莱斯利·罗森博格

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少年辩护人检查清单 Juvenile Defender Checklist (Develop a theory of the case – six steps) 发展法律案件的理论-六个步骤

- 1. Age * 年龄
- 2. Developmental Stage * 发展阶段
- 3. Origin of Story * 故事的起源
- 4. Investigation * 调查工作
- 5. Legal Defense * 法律辩护
- 6. Trial Strategy*审判策略

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AGE

年龄

- ◆ Both are minors? If child cannot consent, then child cannot be offender 两人都是未成年人? 如果孩子不能同意,那么孩子就不能成为犯罪者。
- ◆ Age difference? (close in age?)
 年龄差距? (相近?)
- ◆ Gender?(discriminatory, selective prosecution)
 性别?(歧视性、选择性起诉)
- ◆ Normal sexual development? Consult with expert. Motion to dismiss. 性发育正常吗?咨询专家。动议驳回。



ORIGIN OF STORY 指控是如何开始的

- ◆ Circumstances of incident (fantasy, game, misunderstanding)
 事件的情况(幻想、游戏、误会)
- ◆ First Report (when? recorded? words used?)

 第一次报案(何时?记录?用过的词?)
- ◆ Motive to lie (divorce, relationship troubles, family dynamics) 撒谎动机 (离婚、感情问题、家庭动态)



DEVELOPMENTAL STAGE 发展阶段

- ◆ Mental Age * 心智年龄
- ◆ Mental Disabilities * 精神残疾
- ◆ Cultural Factors * 文化因素

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INVESTIGATION

调查

- ◆ Authorities Contacted? When?*联系的主管部门? 什么时候联系?
- ◆ Medical records * 医疗记录
- ◆ Witness statements * 证人陈述
- ◆ DNA evidence * DNA证据
- ◆ Location of offense * 犯罪地点
- ◆ Other sources of sexual knowledge * 其他性知识的来源



Interviewing the accuser 采访指控者

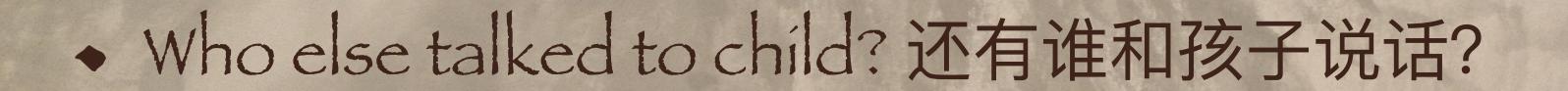
- ◆ Is the interviewer trained in Cornerhousestyle techniques?
- Forensic interviewers are experts on interviewing, not psychological assessment of child sexual abuse.
- This is a task for which most psychiatrists, psychologists, and clinical social workers lack competence.

- ◆ 面谈者是否接受过创伤知情法医 面谈技术的培训?
- ◆ 法医面谈人员是面谈专家,而不 是儿童性虐待的心理评估专家。
- ◆ 这是一项大多数精神病学家、心理学家和临床社会工作者都缺乏能力的任务。

OBJECTIONS 反对意见

- ◆ Leading questions * 引导性问题
- ◆ Repeating child's answer * 重复孩子的回答
- ◆ Praising child * 赞美孩子
- ◆ Failing to ask follow-up questions * 未能提出后续问题
- ◆ Use of "anatomically correct" dolls, pictures, re-enactments * 使用解剖学玩偶、图片、重现。
- ◆ Failure to discuss consequences of lying *未能讨论说谎的后果
- ◆ Inconsistencies * 不一致的地方





◆ Changes in story? 故事的变化?



Forensic Evidence 法医证据

Mostly, sexual abuse does not cause physical injury. Any injuries are typically minor and heal rapidly, especially after the lapse of 72 hours.

大多数情况下,性虐待不会造成身体伤害。任何伤害通常都是轻微的,而且很快就会痊愈,特别是在72小时之后。



It was once thought that the size of the hymenal orifice could provide evidence of penetration, but it is now understood that the size of the opening varies from child to child.

In the same child the size of the orifice can change as the child changes position.

人们曾经认为处女膜口的大小可以提供插入的证据,但现在的理解是,开口的大小因儿童而异。

在同一个孩子身上,随着孩子体位的改变,处女膜口的大小也会发生变化。

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Even DNA evidence can be challenged

即使是DNA证据也会受到质疑

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No vouching 无担保

No "consistent with" testimony such as delayed reported, bed-wetting, anxiety, fears, etc. 没有与证言"一致",如迟报、遗尿、焦虑、恐惧等。

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All of the stress-related symptoms observed in sexually absed children are seen to a greater or lesser extent in non-abused children.

在性虐待儿童身上观察到的所有与压力有关的症状,在未受虐待的儿童身上或多或少都能看到。

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LEGAL DEFENSE 法律辩护

- ◆ Conditions under which juvenile offender was interrogated?
 少年犯是在什么条件下被讯问的?
- ◆ Does accusation fit elements of the statute? (definition of terms) 指控是否符合法规要素? (术语定义)
- ◆ Reasonable Juvenile Standard (intent, purpose)
 合理的少年标准(意图、目的)



- Sexual or aggressive intent
- Intimate parts; how defined?
- Reasonable juvenile standard
- Motive of accuser
- Opportunity
- Inconsistencies in story or facts
- Alternative perpetrators

- ◆ 性或攻击性意图
- ◆ 私密部位; 有多明确?
- ◆ 合理的少年标准
- ◆指控者的动机
- ◆ 机会
- ◆故事或事实的不一致
- ◆替代性犯罪人



TRIALSTRATEGY 审判策略

- Competency to Testify
- Competency to Swear an Oath
- Object to lack of confrontation, closed courtroom, support person

- ◆出庭作证的能力
- ◆宣誓的能力
- ◆ 反对缺乏对质、封闭式法 庭、支助人员;

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- Object to leading questions
- 反对引导性问题
- ◆Challenge credentials of any expert 对任何专家的证书提出质疑
- ◆ Have juvenile offender evaluated by expert and propose treatment protocol
 - 由专家对少年犯进行评估,并提出治疗方案。
- Risk Assessment
 - 风险评估





未成年人保护与犯罪预防的新趋势

New Trends in Juvenile Protection and Crime Prevention

苑宁宁 中国政法大学 Yuan Ningning China University of Political Science and Law







未成年人保护法 Law on the Protection of Juveniles

保障未成年人权益的综合性、基础性法律,确立了最有利于未成年人原则,一方面根据未成年人成长规律和需求,大幅充实了家庭保护、学校保护、社会保护,增加网络保护,另一方面落实未成年人保护的国家责任,增加政府保护,实现司法保护的全覆盖、全阶段。

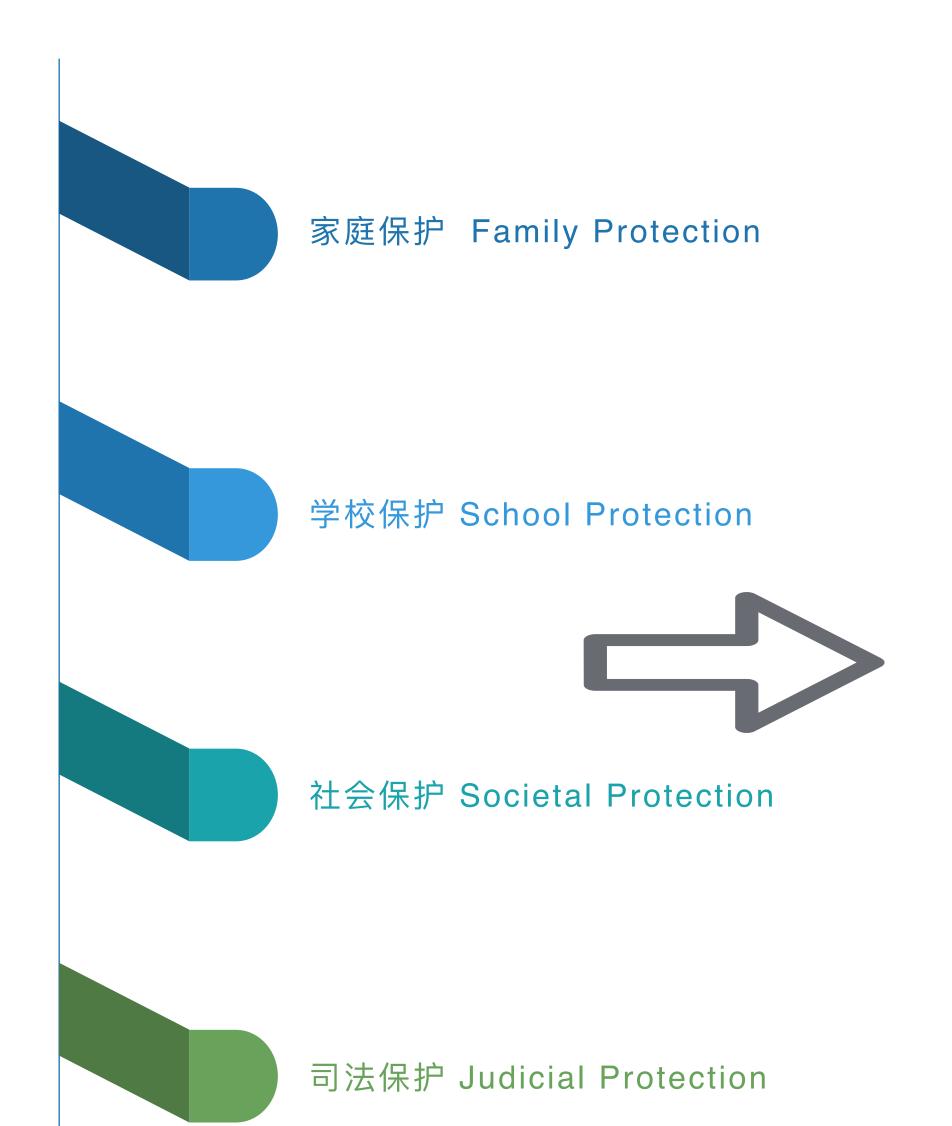
The comprehensive and fundamental law to protect the rights and interests of juveniles establishes the principle of most favorable to juveniles, significantly enriches family protection, school protection and social protection, and increases network protection according to the laws and needs of juvenile growth on the one hand, and implements state responsibility for juvenile protection, increases government protection, and achieves full coverage and stages of judicial protection on the other.



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篇章体例 Chapter Content





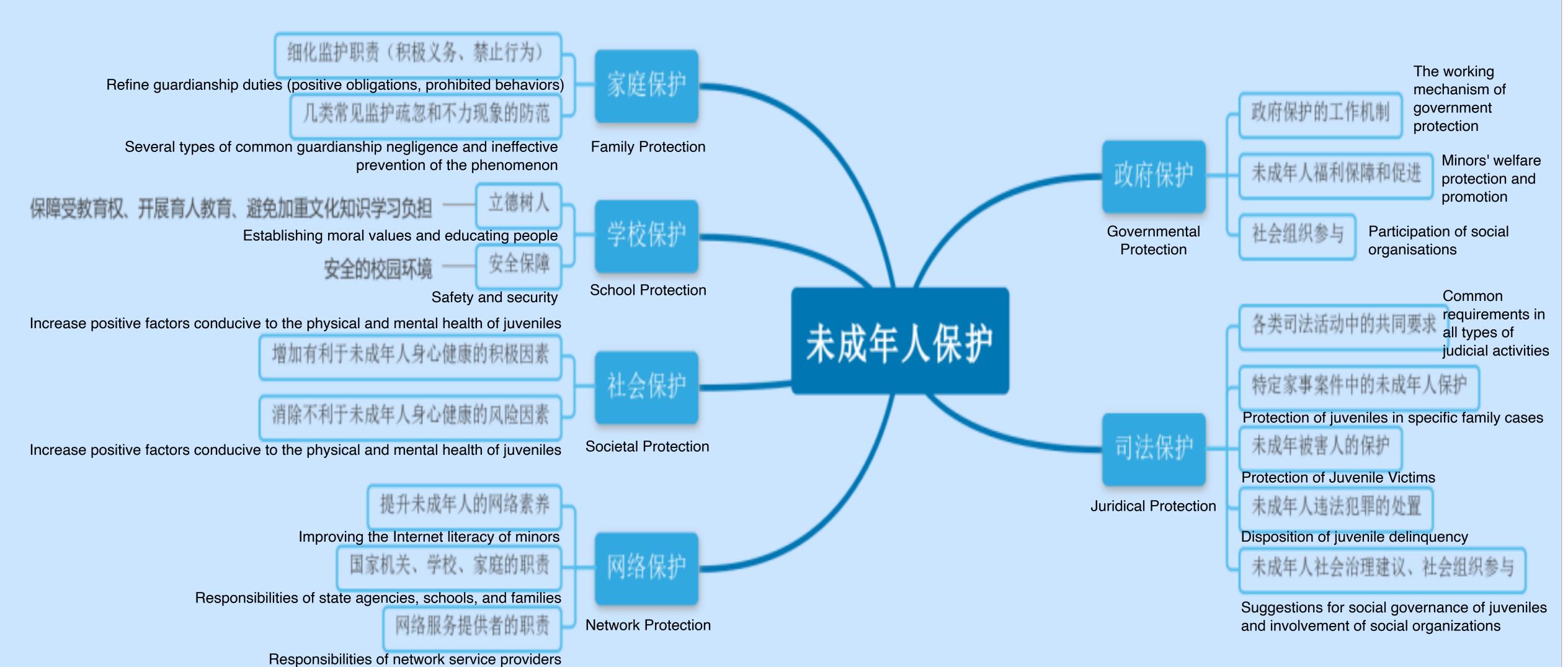


国家责任: 政府保护+司法保护

State Responsibility: Government Protection + Judicial Protection

主要内容 Main Content





家庭保护 Family Protection

未成年人的父母离婚时,应当妥善处理未成年子女的抚养、教育、探望、财产等事宜,听取有表达意愿能力未成年人的意见。不得以抢夺、藏匿未成年子女等方式争夺抚养权。

When parents of the minor divorce, they shall properly handle the maintenance, education, visitation and property of the children and listen to the views of the minor who has the ability to express his or her will. They shall not compete for custody by snatching or hiding their children.





监护的积极行为

未成年人的父母或者其他监护人应当履行下列监护职责:

- (一) 为未成年人提供生活、健康、安全等方面的保障;
- (二) 关注未成年人的生理、心理状况和情感需求;
- (三)教育和引导未成年人遵纪守法、勤俭节约,养成良好的思想品德和行为习惯;
 - (四)对未成年人进行安全教育,提高未成年人的自我保护意识和能力;
- (五) 尊重未成年人受教育的权利,保障适龄未成年人依法接受并完成义务教育;
- (六)保障未成年人休息、娱乐和体育锻炼的时间,引导未成年人进行有益身心健康的活动;
- (七) 妥善管理和保护未成年人的财产;
- (八) 依法代理未成年人实施民事法律行为;
- (九) 预防和制止未成年人的不良行为和违法犯罪行为,并进行合理管教;
- (十) 其他应当履行的监护职责。

Positive Behavior of Guardianship

The parents or other guardians of minors shall perform the following guardianship duties.

- (a) To provide for the minor's life, health, safety and other aspects
- (b) Pay attention to the physical and psychological conditions and emotional needs of minors
- (c) Educate and guide minors to obey the law, be diligent and thrifty, and develop good moral and behavioral habits
- (d) Educating minors on safety and improving their awareness and ability to protect themselves
- (e) Respect the right of minors to education and ensuring that minors of school age receive and complete compulsory education in accordance with the law
- (f) Guarantee time for rest, recreation and physical exercise for minors, and guiding minors to engage in activities that are beneficial to their physical and mental health
- (g) Properly manage and protect the property of minors
- (h) Represent minors in the execution of civil legal acts in accordance with the law
- (i) Prevent and stop delinquent behavior and delinquency of minors, and provide reasonable discipline
- (j) Other guardianship duties should be performed.



监护的禁止行为

未成年人的父母或者其他监护人不得实施下列行为:

- (一) 虐待、遗弃、非法送养未成年人或者对未成年人实施家庭暴力;
- (二) 放任、教唆或者利用未成年人实施违法犯罪行为;
- (三)放任、唆使未成年人参与邪教、迷信活动或者接受恐怖主义、分裂主义、极端主义 等侵害;
- (四)放任、唆使未成年人吸烟(含电子烟,下同)、饮酒、赌博、流浪乞讨或者欺凌他 人;
- (五) 放任或者迫使应当接受义务教育的未成年人失学、辍学;
- (六)放任未成年人沉迷网络,接触危害或者可能影响其身心健康的图书、报刊、电影、 广播电视节目、音像制品、电子出版物和网络信息等;
- (七)放任未成年人进入营业性娱乐场所、酒吧、互联网上网服务营业场所等不适宜未成年人活动的场所;
- (八) 允许或者迫使未成年人从事国家规定以外的劳动;
- (九) 允许、迫使未成年人结婚或者为未成年人订立婚约;
- (十) 违法处分、侵吞未成年人的财产或者利用未成年人牟取不正当利益;
- (十一) 其他侵犯未成年人身心健康、财产权益或者不依法履行未成年人保护义务的行为。

Prohibited acts of guardianship

The parents or other guardians of minors shall not commit the following acts.

- (a) Abuse, abandonment, illegal delivery of minors or domestic violence against minors.
- (b) Indulge, abet or use minors to commit illegal and criminal acts
- (c) Allow or instigate minors to participate in cults, superstitious activities or accept terrorism, separatism, extremism, etc.
- (d) Allow or abet minors to smoke (including electronic cigarettes, the same below), drink alcohol, gamble, vagrancy and begging or bullying others
- (e) Allow or force minors who should receive compulsory education to miss school or drop out of school.
- (f) Allow minors to indulge in the Internet, access to books, newspapers, magazines, movies, radio and television programs, audio and video products, electronic publications and network information that are harmful or may affect their physical and mental health
- (g) Allow minors to enter places of business entertainment, bars, Internet access service business premises and other places that are not suitable for minors' activities
- (h) Allow or force minors to engage in labor other than that prescribed by the state
- (i) Allow or force a minor to marry or enter into a marriage contract for a minor
- (j) Illegal disposal, misappropriation of property of minors or use of minors for improper gain.
- (k) Other violations of the physical and mental health of minors, property rights and interests or failure to fulfill the obligations of protection of minors in accordance with the law.

学校保护

学校、幼儿园应当建立安全管理制度,完善安保设施,配备安保人员,禁用危险校舍、设施和场所,建立健全校车安全管理制度,突发事件应急和处置制度,人身伤害及时救助制度,建立学生欺凌防控工作制度,建立预防性侵害、性骚扰未成年人工作制度。

Schools and kindergartens should establish a safety management system, improve security facilities, security personnel, disable dangerous school buildings, facilities and places, establish a sound school bus safety management system, emergency response and disposal system, personal injury timely relief system, the establishment of student bullying prevention and control work system, the establishment of prevention of sexual assault, sexual harassment of minors work system.



司法保护

- ◆ 司法活动中对未成年人保护的共性要求:
- 专门机构或专门人员;
- 使用未成年人能够理解的语言和表达方式;
- 个人信息保密;
- 法律援助或司法救助;
- 检察机关的法律监督;
- 检察机关支持、督促起诉。
- Common requirements for the protection of juveniles in judicial activity:
- Specialized agencies or specialized personnel.
- Use of language and expressions that juveniles can understand.
- Confidentiality of personal information.
- Legal assistance or access to justice.
- Legal supervision by the procuratorial authorities.
- Support and supervision of prosecution by the procuratorial authorities.



司法保护

- ◆ 特定类型民事案件中对未成年人的保护:
- 审理继承案件,依法保护未成年人的继承权和受遗赠权。
- 审理离婚案件,涉及未成年子女抚养问题的,尊重已满八周岁未成年子女的 真实意愿,根据双方具体情况,按照最有利于未成年子女的原则依法处理。
- 审理离婚、抚养、收养、监护、探望等案件涉及未成年人的,可以自行或者委托社会组织对未成年人的相关情况进行社会调查。
- Protection of juveniles in specific types of civil cases:
- When hearing inheritance cases, the right of juveniles to inheritance and the right to be bequeathed is protected in accordance with the law.
- In divorce cases involving the maintenance of children, the true will of children who have reached the age of eight shall be respected, and the case shall be handled according to the specific circumstances of both parties and in accordance with the principle most favorable to juveniles in accordance with the law.
- Hearing divorce, custody, adoption, guardianship, visitation and other cases involving juveniles, you can conduct a social investigation on your own or entrust social organizations on the relevant situation of juveniles.



司法保护

- ◆ 刑事案件中对未成年人被害人的保护:
- 询问时合适成年人到场,适当方式、适当场所,同步录音录像,尽量一次完成,未成年被害人是女性的,应当由女性工作人员进行;
- 一般不出庭,必须出庭的,应当采取保护其隐私的技术手段和心理干预等保护措施。
- 实施必要的心理干预、经济救助、法律援助、转学安置等保护措施。
- Protection of juvenile victims in criminal cases:
- The presence of an appropriate adult at the time of questioning, in an appropriate manner and place, with simultaneous audio and video recording, as much as possible in one sitting, and if the juvenile victim is female, it shall be conducted by a female staff member.
- Generally do not appear in court, must appear in court, should take technical means to protect their privacy and psychological intervention and other protective measures.
- Implementation of the necessary psychological intervention, economic assistance, legal aid, transfer placement and other protective measures.



预防未成年人犯罪法

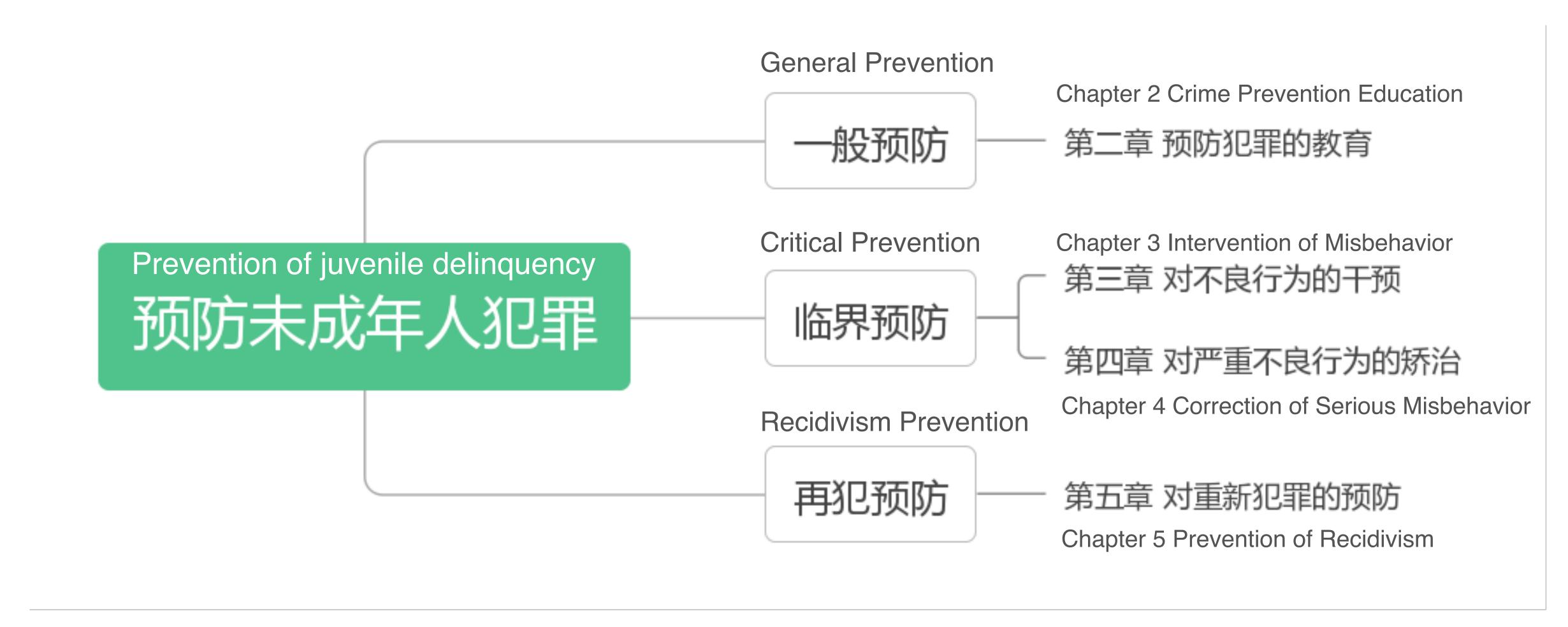
是一部分级预防未成年人犯罪的专门性法律,从一般预防、临界预防、再犯预防三个层面作出了体系化设计,进一步健全了我国对未成年人偏常行为的干预和矫治措施体系。

It is a part of a special law for the prevention of juvenile delinquency, which is systematically designed at three levels: general prevention, critical prevention, and recidivism prevention, further improving the system of intervention and correction measures for the deviant behavior of juveniles in China.



篇章体例 Chapter Structure





主要内容



Prevention of Juvenile Delinquency

预防未成年人犯罪

一般预防:预防犯罪的教育

General Defense: Education for Crime Prevention

法治教育

Legal Education

心理健康教育

Mental Health Education

学生欺凌防控

Student Bullying Prevention and Control

驻校社工

School-based Social Worker

临界预防:对不良行为的干预和对严重不良行为的矫治

Critical prevention: intervention for maladaptive behaviors and correction of serious maladaptive behaviors

对不良行为的干预

Interventions for malpractice

由家庭、社区、学校共同干预

Joint family, community, and school interventions

对严重不良行为的矫治

Correction of severe misbehavior

矫治教育措施

Correctional education measures

专门教育措施

Specialized educational measures

专门矫治教育措施(仅适用于不予刑事处罚行为)

再犯预防:对重新犯罪的预防

Recidivism Prevention: Prevention of Recidivism

社会调查、心理测评、合适保证人、社会观护

Social Adjustment, Heart Assessment, When to Guarantor, Social View Care

法治教育、义务教育、职业技术教育

Rule of law education, compulsory education, vocational and technical education

分别关押、教育和管理、社区矫正

Separate incarceration, education and management and community corrections

记录封存、安置帮教

Record sealing, resettlement and reeducation

Specialized correctional education measures (only applicable to non-criminal punishment behavior)

对重新犯罪的预防

- ◆ 心理测评:根据实际需要并经未成年犯罪嫌疑人、被告人及其法定代理人同意,可以对未成年犯罪嫌疑人、被告人进行心理测评。可以作为办理案件和教育未成年人的参考。
- ◆ 合适保证人:公安机关、人民检察院、人民法院对于无固定住所、无法提供保证人的未成年人适用取保候审的,应当指定合适成年人作为保证人,必要时可以安排取保候审的未成年人接受社会观护。
- Psychological assessment: According to the actual needs and with the consent of the juvenile criminal suspects and defendants and their legal representatives, psychological assessment can be conducted on juvenile criminal suspects and defendants. It can be used as a reference for handling cases and education of juveniles.
- ◆ Suitable guarantor: public security bureaus, People's Procuratorates, People's Courts for juveniles without a fixed residence, can not provide a guarantor for the application of bail pending trial, should designate a suitable adult as a guarantor, if necessary, can be arranged for bail pending trial of juveniles to receive social observation.



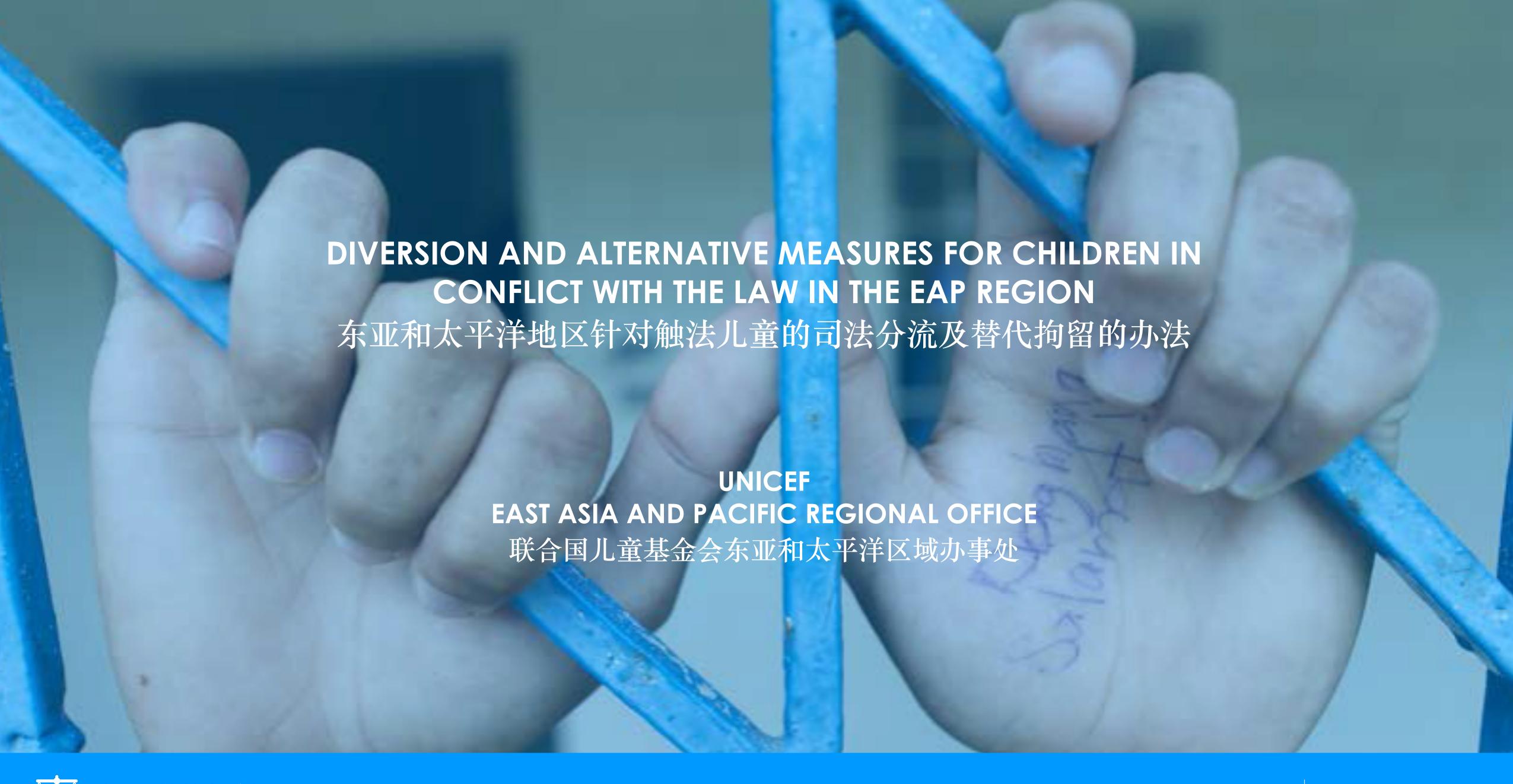
对重新犯罪的预防

◆ 记录封存制度:未成年人的犯罪记录依法被封存的,公安机关、人民检察院、人民法院和司法行政部门不得向任何单位或者个人提供,但司法机关因办案需要或者有关单位根据国家有关规定进行查询的除外。依法进行查询的单位和个人应当对相关记录信息予以保密。未成年人接受专门矫治教育、专门教育的记录,以及被行政处罚、采取刑事强制措施和不起诉的记录,适用前款规定。

Record sealing system: juveniles' criminal records are sealed in accordance with the law, the Public Security Bureau, People's Procuratorates, People's Courts and judicial administrative departments shall not be provided to any unit or individual, except for the judicial organs for the needs of the case or the relevant units in accordance with the relevant state regulations for inquiries. According to the law to inquire about the units and individuals should be confidential information on the relevant records.

Juveniles receiving special correctional education, special education records, as well as administrative punishment, criminal compulsory measures and non-prosecution records, the provisions of the preceding paragraph shall apply.





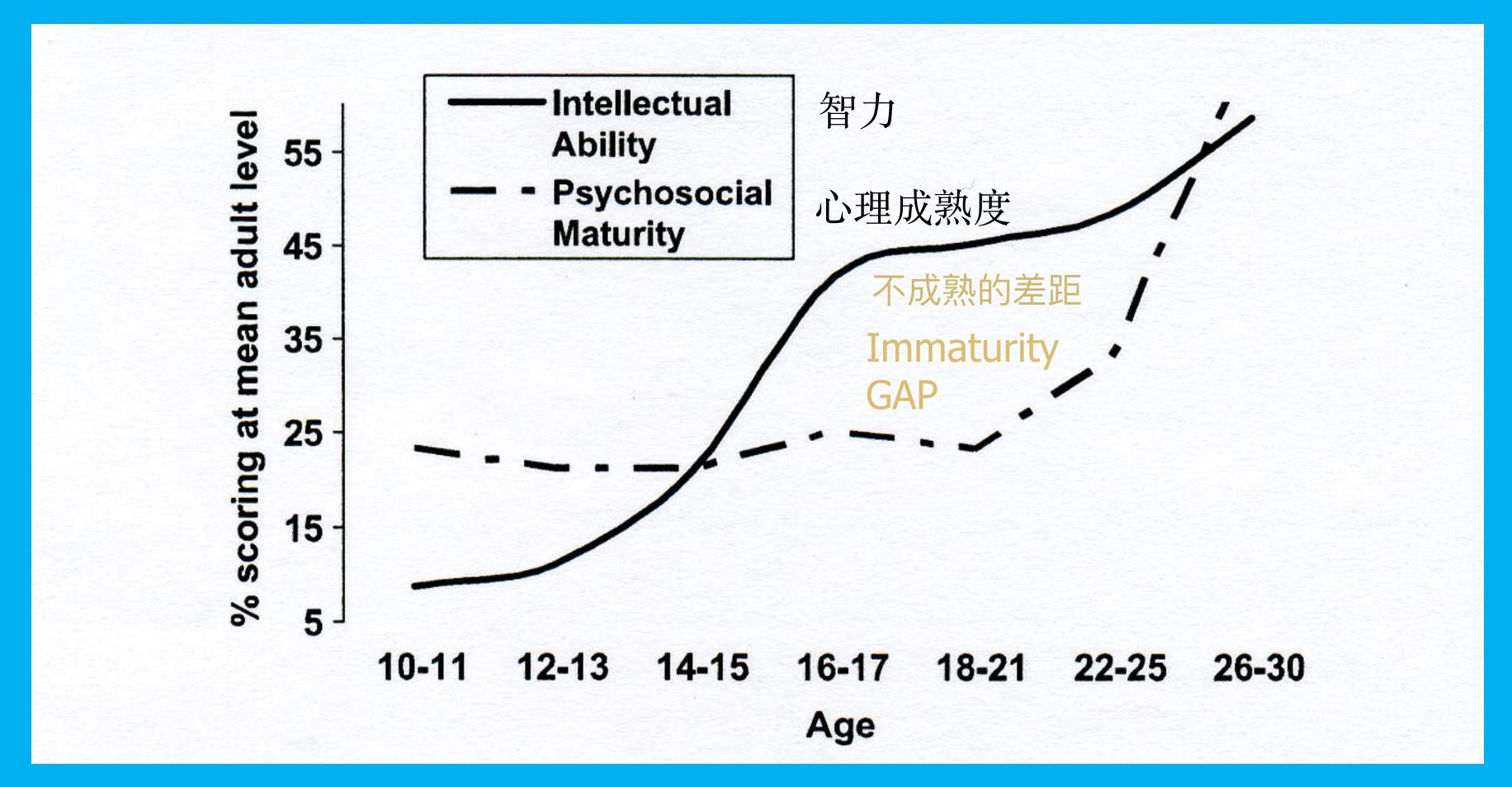


Minimum Age of Criminal Responsibility Compliance in East Asia* 东亚最低刑事责任年龄的遵守情况

12 15 16 14 years old/岁 years old/岁 years old/岁 years old/岁 China & Mongolia & Cambodia Lao PDR **Viet Nam** 老挝 柬埔寨 中国、蒙古和越南 Indonesia 印度尼西亚 **Philippines DPR Korea Timor-Leste** 朝鲜 菲律宾 东帝汶



"Basic intellectual abilities reach adult levels before the process of psycho-social maturation is complete."
"在基本智力达到成人水平之后,社会心理成熟过程才完成"。





Steinberg (2008)

Dev Review 28; 88-106

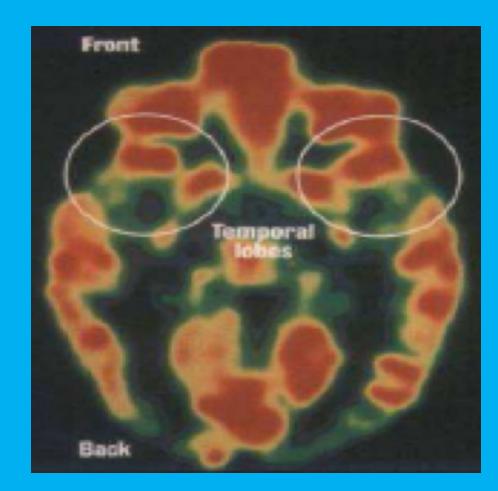
Functions of the Neo-cortex (Last part of the brain to develop) 新皮质的功能(大脑发育的最后一部分)

- Planning
- Reasoning
- Impulse Control
- Thinking Ahead
- Regulation of Emotions
- Learning from Experience
- Weighing of risks and rewards

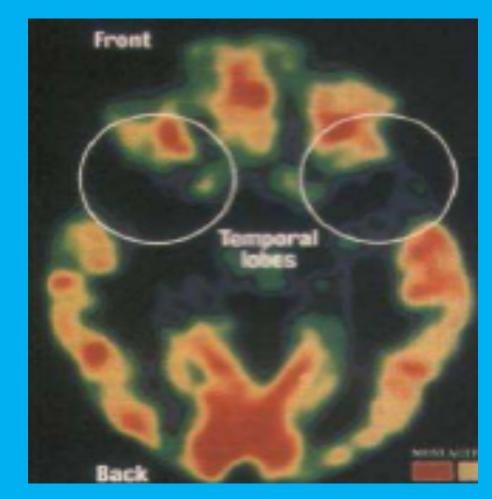
- 规划
- 推理
- 冲动控制
- 前瞻性思考
- ■情绪的调节
- 从经验中学习
- 风险和回报的权衡

Toxic Stress Damages Brain Architecture 负面压力会损害大脑结构

- Excessive and repeated stress causes the release of chemicals that impair cell growth and interfere with the formation of healthy neural circuits in the brain
- Toxic stress can damage the brain's stress response system and contribute to premature ageing of the body
- · 过度和反复出现的压力会导致某些化学物质的释放,这些化学物质会员 损害细胞的生长,干扰大脑健康神经回路的形成。
- · 负面压力会破坏大脑的应激反应系统,导致人体过早的衰老



Healthy brain



Abused brain



International Standards 国际标准

- Convention on the Rights of the Child (CRC)
- UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)
- UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)
- UN Rules for the Protection of Juveniles Deprived of their Liberty (JDL or the Havana Rules)
- UN Minimum Rules for Non-Custodial Measures (Tokyo Rules)
- Guidelines for Action on Children in the Criminal Justice System (the Vienna Guidelines)
- UN Model Strategy on the Prevention of VAC in the Criminal Justice System
- 《儿童权利公约》
- 《联合国少年司法最低限度标准规则(北京规则)》
- 《联合国预防少年犯罪准则(利雅得指南)》
- 《联合国保护被剥夺自由少年规则(JDL或哈瓦那规则)》
- 《联合国非拘禁措施最低限度规则(东京规则)》
- 《关于刑事司法系统中儿童问题的行动准则(越南规则)》
- 《联合国在刑事司法系统中预防家庭暴力示范战略》



Diversion

- Conditional channelling CICL away from formal judicial proceedings
- May be dealt with by non-judicial bodies, thereby avoiding a criminal record
- Cannot be imposed, but require the informed consent of the child
- Only applies to children who are NOT formally processed through the criminal justice system

分流

- 有条件地将触犯法律的儿童从正式的司法程序中转移出来。
- 可由非司法机构处理,从而避免刑事记录;
- 不能强制执行,但需要儿童的知情同意。
- 只适用于未通过刑事司法系统正式处理的儿 童。

DIVERSION \(\neq \) ALTERNATIVE MEASURES

分流≠替代措施

Alternative measures

- Measures that do not encompass deprivation of liberty of CICL
- E.g. Instead of pre-trial detention, CICL is released into custody of parents to await trial

拘留替代办法

- 不包括剥夺触犯法律的儿童自由的措施。
- 例如,触犯法律的儿童不是被审前拘留,而是获释,在父母监护下等待审判。

CRITERIA FOR PROMISING/GOOD PRACTICES

有希望/良好做法的标准

- Implemented in accordance with (some) international juvenile justice and/or restorative justice standards
- No closed residential options
- No pure financial options
 - E.g. monetary bail, fine and financial compensation of the victim
- 根据(某些)国际少年司法和/或恢复性司法标准实施。
- 不采用封闭式住所
- 不提供纯金钱的解决方案例如,保释金、罚款和对受害者的经济补偿。



EXAMPLES ON THE EARLY STAGES OF THE CONTINUUM

关于连续体早期阶段的例子

1. Unconditional warning

Police warning (PNG, Samoa)

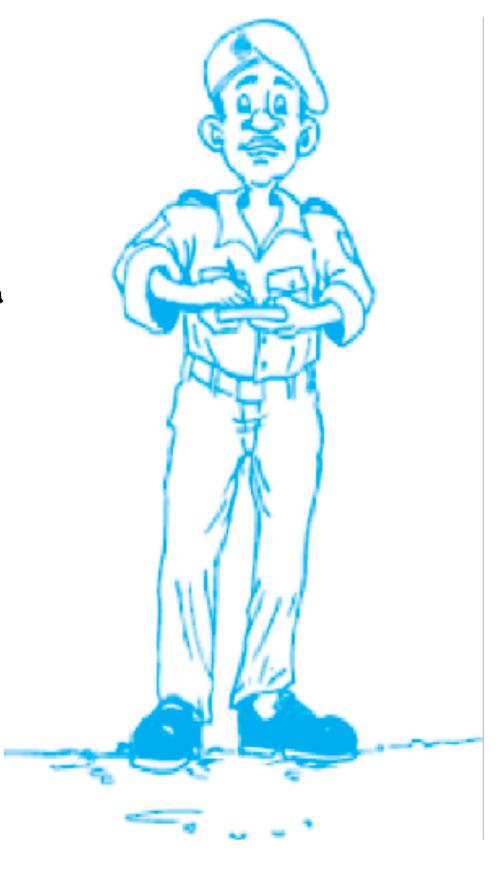
2. Diversion from formal judicial proceedings

 Community service as primary penal sanction (Indonesia)

3. Alternatives to pre-trial detention

- Conditional pre-trial release to parents (Thailand)
- Release to parents, family & community leaders (Fiji)

- 1. 无条件警告
 - 警方警告(巴布亚新几内亚、萨摩亚)
- 2. 从正式司法程序分流
 - · 作为主要刑事制裁的社区服务(印度尼西亚)
- 3. 审前拘留的替代办法
 - 审前有条件释放给父母(泰国)
 - 释放给父母、家庭和社区领袖(斐济)



EXAMPLES OF APPROACHES

方法示例

- Restorative juvenile justice approach
 - Compensation of victim by offender (Philippines)
 - Pre-sentencing meeting (Samoa)
- Community justice approach (23 CO, 18 w/law)
 - Village Courts (PNG)
 - Village Justice System(Philippines)
 - Traditional Mediation (Timor-Leste, Samoa)

- 恢复性少年司法办法
 - 犯罪者对受害者的赔偿(菲律宾)
 - 判前会议(萨摩亚)
- 社区司法办法(23个国家办事处,18个法律)
 - 乡村法院(巴布亚新几内亚)
 - 乡村司法系统(菲律宾)
 - 传统调解 (东帝汶、萨摩亚)



FINDINGS: ALTERNATIVES TO POST-TRIAL DETENTION

调查结果: 审后拘留的替代办法

Documented good practices

Malaysia, Thailand, Vietnam, Fiji, Kiribati, PNG,
 Samoa, Vanuatu & 9 Pacific-countries

Case study in brief: Community-based education in Viet Nam

- CBE is the most common alternative to post-trial detention in Vietnam
- Child is placed under supervision and education of local communes or social organizations but can remain with their families and must meet study, labour and rehabilitation obligations
- The president of the local people's committee decides whether the child must participate, following a meeting with local police chiefs, legal representatives, local mass organizations and families of those who may be required to participate
- Agencies meet with the child to implement a plan of action and report on the child's progress



记录在案的良好的做法

• 马来西亚、泰国、越南、斐济、基里巴斯、巴新、萨摩亚、瓦努阿图和9个太平洋国家。

案例研究简介:越南的社区教育(CBE)

- 在越南, CBE是审判后拘留的最常见的替代办法。
- 将儿童置于当地乡镇或社会组织的监督和教育之下,但可以与家人在一起,必须履行学习、劳动和康复的义务。
- 当地人民委员会主席在与当地警察局长、法定代表人、当地群众组织和可能被要求参加的人的家属开会后,决定该儿童是否必须参加
- 各机构与儿童会面,执行行动计划,并报告儿童的进展情况。

FINDINGS: RESTORATIVE JUVENILE JUSTICE APPROACHES

调查结果:恢复性少年司法方法

Documented good practices

 Indonesia, Papua New Guinea, Philippines, Thailand, Kiribati, & Samoa

Case study in brief: Family community group conferencing in Thailand

- Director of Juvenile Observation Centre prepares tailored rehabilitation plan incorporating conditions for reform (e.g. religious activities, school attendance, community work hours, employment activities)
- Rehabilitation plans are developed through a restorative justice approach – family/community group conferencing
- If the judge agrees with the plan and considers it in the child's best interests, they may order implementation

记录在案的良好做法

• 印度尼西亚、巴布亚新几内亚、菲律宾、泰国、基里巴斯和萨摩亚

案例研究简介:泰国的家庭社区小组会议

- 少年观察中心主任制定有针对性的改造计划, 纳入改造条件(如宗教活动、上学、社区工作 时间、就业活动)
- 通过恢复性司法办法---家庭/社区小组会议----制定康复计划。
- 如果法官同意该计划,并认为该计划符合儿童的最大利益,他们可以命令执行该计划;

FINDINGS: COMMUNITY JUVENILE JUSTICE

调查结果: 社区少年司法

Documented good practices

- Lao PDR, Myanmar, PNG, Philippines, Samoa & Timor-Leste Case study in brief: Village child mediation units in Lao
- Mediation is embedded in the culture; practiced for centuries
- Formalized by MOJ through Village Mediation Units
- Guidelines set out steps for mediation e.g. that children and parents/guardians be present, that children have the opportunity to speak
- Outcomes are agreed on by both parties, and include apologies, compensation, and re-education by parents/ social organizations

记录的良好做法

• 老挝人民民主共和国、缅甸、巴布亚新几内亚、菲律宾、萨摩亚和东帝汶

案例研究简介: 老挝的乡村儿童调解单位:

- 调解已融入到文化中;已实践了几个世纪。
- 司法部通过村级调解小组正式确定了这一做法
- 准则规定了调解的步骤,例如儿童和父母/监护人在场,儿童有机会发言;
- 双方商定结果,包括道歉、赔偿和家长/社会组织的再教育。







FINDINGS: COMMUNITY JUVENILE JUSTICE

调查结果: 社区少年司法

Case study in brief: Respected community members in Myanmar

- Society is still regulated by customs
- •Anecdotal evidence suggests informal justice systems are used more frequently locally than formal ones, especially where the community mechanism is linked with strongly represented ethnic groups
- •Usually the outcome is compensation or payment and apology; sometimes, symbolic settlement
- •If outcomes aren't satisfactory, they may come to the attention of the police, department of social welfare or township committee on the rights of the child

案例研究简介: 缅甸受尊敬的社区成员

- •社会还是要靠习俗来调节
- •轶事证据表明,非正式司法系统在当地的使用频率高于正式司法系统,特别是在社区机制与具有强大代表性的族裔群体有联系的地方。
- •通常结果是赔偿或付款和道歉;有时,象征性地解决。
- •如果结果不令人满意,可向警方、社会福利部或乡镇儿童权利委员会反映。

ALTERNATIVE MEASURES: MAIN ENABLERS

替代措施: 主要促进因素

- Child-specific legislation on alternative measures (AMs)
- Awareness, understanding and commitment of JJ-professionals and stakeholders involved in AMs
- Support/commitment of national/local **governments** to AMs
- Guidelines, SOPs, rules and/or policies on how to implement alternative measures
- Capacity building of JJ-professionals (& other stakeholders) on AMs
- Existing traditions, customs and practices that support AMs
- Acceptance of AMs by the **general public**, parents & communities
- Coordinating, implementing & monitoring mechanisms for AMs
- Sufficient **human resources**, especially social workers/probation officers, and **specialized** JJ-professionals (& volunteers)
- Community-based services and programmes for children in conflict with the law
- Pilots and practices that **prove** the effectiveness of AMs and provide lessons-learned for replicating and scaling-up

- 针对儿童的替代措施立法
- 参与替代措施的未成年人司法专业人员和所有利益攸关方提高认识、理解和承诺。
- 国家/地方政府对替代措施的支持/承诺。
- 关于如何实施替代措施的准则、标准作业程序、规则和/或政策。
- 未成年人司法专业人员(和其他利益攸关方)在替代措施方面的能力建设。
- 支持替代措施的现有传统、习俗和做法。
- 公众、家长和社区对替代措施的接受程度。
- 替代措施的协调、执行和监测机制;
- 足够的人力资源,特别是社会工作者/监护官和专门的儿童司法专业人员(和志愿者);
- 为违法儿童提供社区服务和方案
- 针对替代方案有效性推出试点和做法,提供经验教训,有助做法推广和扩大规模。

ALTERNATIVE MEASURES: MAIN BARRIERS

替代措施: 主要障碍

- Lack of awareness, understanding & commitment of local governments and/or juvenile justice professionals involved in AMs
- Lack of (child specific) legal framework on AMs
- Lack of guidelines, SOPs, protocols or procedures on how to implement alternative measures
- Lack of human resources
- No leadership
- Lack of support from general public, communities, parents and/or victims to alternative measures
- Opinion that crime should be **punished** among juvenile justice professionals & general public
- Lack of **CBOs**, **services & options** for children in conflict with the law
- Lack of coordinating, implementing and monitoring mechanisms for AMs
- No funding for alternative measures

- 参与调解的地方政府和/或少年司法专业人员对替代措施的工作缺乏认识、理解和投入度。
- 缺乏(专门针对儿童的)关于替代措施的法律框架;
- 缺乏关于如何实施替代措施的准则、标准作业程序、议 定书或程序。
- 缺乏人力资源
- 没有领导力
- 缺乏公众、社区、父母和/或受害者对替代措施的支持;
- 少年司法专业人员和公众强调严打严惩犯罪
- 缺乏针对违法儿童的支援社区组织、服务和选择;
- 缺乏对替代措施的协调、执行和监测机制;
- 没有为替代措施提供资金

OVERALL RECOMMENDATIONS (1) 总体建议(1)

- Agreeing on terminology and definitions used regarding diversion, alternatives to pre-trial and posttrial detention and restorative justice approaches
- Sharing promising/good practices, pilot-outcomes, lessons-learned, enablers and barriers for alternative measures
- Systematically collecting data on alternative measures
- Regulating alternative measures through either a separate law on juvenile justice or special chapters of the general criminal and procedural law
- Harmonising the MACR with international standards
- Preparing social inquiry reports of good quality in all cases of CICL and ensuring legal assistance throughout the juvenile justice process

- 统一关于转送、审前和审后拘留的替代办法以及恢复性司法办法的术语和定义。
- 分享有希望的/良好做法、试点成果、经验教训、替代措施的促进因素和障碍。
- 系统地收集关于替代措施的数据
- 通过关于少年司法的单独法律或一般刑事和诉讼 法的特别章节对替代措施作出规定;
- 最低刑事责任年龄(MACR)应与国际标准一致
- 为所有触犯法律的儿童案件编写高质量的社会调查报告,并确保在整个少年司法程序中提供法律援助;

OVERALL RECOMMENDATIONS (2) 总体建议(2)

- Preparing child-centred reintegration/restorative plans/ agreements
- Creating coordination, implementation and monitoring bodies and sufficient community-based services & programmes for children in conflict with the law
- Encouraging coordination and collaboration between the juvenile justice sector and social welfare sector
- Building juvenile justice programming on community (juvenile) justice mechanisms that respect basic human rights principles and standards
- Incorporating the continuum of six alternative measures in (child-specific) law and applying the alternative measures in line with international standards
- Using unconditional diversion in cases of non-serious offences and where the family, school or other informal social control institution has already reacted or is likely to react in an appropriate and constructive manner

- 制定以儿童为中心的重返社会/恢复性计划/协议;
- 建立协调、执行和监测机构,并为违法儿童提供充分的社区服务和方案;
- 鼓励少年司法部门与社会福利部门之间的协调与合作;
- 在尊重基本人权原则和标准的社区(少年)司法机制的基础上制定少年司法方案。
- 在(针对儿童的)法律中纳入六种替代措施的连续性,并根据国际标准适用替代措施;
- 在非严重犯罪的情况下,以及家庭、学校或其他非正式 社会控制机构已经或可能以适当和建设性的方式作出反 应的情况下,采用无条件的转送方式;

OVERALL RECOMMENDATIONS (3) 总体建议(3)

- Applying diversion from formal judicial proceedings as a measure of first resort, as much as possible and not limited to children who commit minor offences and are first-time child offenders, and preferably with a restorative justice approach
- Reviewing children's pre-trial detention on a regular basis and releasing them from pre-trial detention as soon as possible, without or with conditions
- Applying alternatives to sentencing & post-trial detention as a measure of second resort and as much as possible
- Reviewing children's post-trial detention on a regular basis and releasing them from post-trial detention as soon as possible, without or with conditions

- 尽可能将从正式司法程序中转移出来作为第一手措施,不局限于犯有轻罪的儿童和初犯儿童,最好采用恢复性司法办法
- 定期审查儿童的审前拘留情况,并尽快无条件或有条件地释放他们;
- 尽可能多地采用其他办法来替代判刑和审后拘留。
- 定期审查儿童的审后拘留情况,并尽快无条件或有条件地释放审后拘留的儿童;



CRC GENERAL COMMENT NO. 24 (2019) 《儿童权利公约》第24号一般性意见(2019年)

- 1. Term child justice used throughout instead of juvenile justice
- 2. MACR now at 14 but those with higher MACR are urged to keep them at that level
- 3. Although the setting of a minimum age of criminal responsibility at a reasonably high level is important, an effective approach also depends on how each State deals with children above and below that age
- 4. States are urged to set one appropriate minimum age and to ensure that such legal reform does not result in a retrogressive position regarding the minimum age of criminal responsibility
- 5. Commends States that allow the application of the child justice system to persons aged 18 and older whether as a general rule or by way of exception. This approach is in keeping with the developmental and neuroscience evidence that shows that brain development continues into the early twenties.

- 1.通篇使用儿童司法一词,而不是少年司法
- 2.现定最低刑事责任年龄为14岁,且鼓励那些最低刑事责任年龄高于14岁的国家继续保持
- 3.虽然将最低刑事责任年龄设定在一个合理的高水平 上是重要的,但有效的办法还取决于每个国家如何 处理高于和低于这一年龄的儿童案件
- 4.促请各国确定一个适当的最低年龄,并确保这种法律改革不会导致司法倒退
- 5.赞扬那些对 18 岁及以上的人(普遍或特殊)应用儿童司法系统的国家,因为发育和神经科学的证据表明,大脑持续发育到二十岁出头的年龄。

CRC GENERAL COMMENT NO. 24 (2019) 《儿童权利公约》第24号一般性意见(2019年)

- 6. Children with developmental delays or neurodevelopmental disorders or disabilities (for example, autism spectrum disorders, fetal alcohol spectrum disorders or acquired brain injuries) should not be in the child justice system at all, even if they have reached the minimum age of criminal responsibility. If not automatically excluded, such children should be individually assessed.
- 7. States should refrain from using only medical methods based on, inter alia, bone and dental analysis, which is often inaccurate, due to wide margins of error, and can also be traumatic for determining age.
- 8. Case-law reports relating to children should be anonymous, and such reports placed online should adhere to this rule.
- 9. Clarification of what diversion is
- 10. Covers specific issues, such as issues relating to children recruited and used by non-State armed groups, including those designated as terrorist groups, and children in customary, indigenous or other non-State justice systems. States parties that expand their criminal law provisions to prevent and combat terrorism should ensure that those changes do not result in the retroactive or unintended punishment of children.

- 6. 有发育迟缓或神经发育障碍或残疾(例如,自闭症谱系障碍、胎儿酒精谱系障碍或后天性脑损伤)的儿童,即使已达到承担刑事责任的最低年龄,也根本不应纳入儿童司法系统。如果不是自动排除,应该对这类儿童进行单独评估。
- 7. 各国应避免仅使用基于骨骼和牙齿分析等的医学方法,由于误差范围大,这种方法往往不准确,而且对于确定年龄也会造成误差。
- 8. 与儿童有关的判例法报告应匿名,而于网上共享该类报告也应匿名。
- 9. 厘清司法分流的定义
- 10. 涵盖特定情况,如涉及非国家武装团体(包括被指定为恐怖团体的武装团体)招募及利用儿童,以及处于民俗、原住民或其他非国家司法系统中的儿童。为预防和打击恐怖主义而扩大其刑法规定的缔约国应确保这些修订不会导致对儿童的追溯性或意外惩罚。

We read in the papers and hear on the air

Of killing and stealing and crime everywhere

We sigh and say as we notice the trend,

This young generation where will it end?

But can we be sure it's their fault alone Are we less guilty who place in their way Too many things that lead them astray 我们在报纸上读到,在广播中听到。 到处都是杀戮、偷窃和犯罪 我们在注意到这一趋势时,叹息着说。 这年轻的一代会在哪里结束?

但我们能确定这只是他们的错吗? 难道我们的罪过少了吗? 太多事情让他们误入歧途

Too much money, too much idle time
Too many movies of passion and crime
Too many books not fit to read
Too much evil in what they hear said
Too many children encouraged to roam
Too many parents who won't stay home

太多钱,太多闲暇时间 太多激情和犯罪的电影 太多激情和犯罪的电影 太多的书不适合阅读 他们听到了太多邪恶的言论 鼓励太多儿童流浪 太多父母不愿意呆在家里

Kids don't make the movies, They don't write the books They don't paint gay pictures of gangsters and crooks They don't make the liquor, and they don't run the bars They don't make the laws and they don't make the cars They don't make the drugs that muddle the brain That's done by older folks greedy for gain

孩子们不拍电影 他们不写书 他们不会画黑道和骗子欢乐的图画 他们不制造烈酒 他们不经营酒吧 法律不是他们制定的 而且他们不制造汽车 他们不制造混淆大脑的药物 那是年长的贪图利益人们的行为

Delinquent teenagers oh how we condemn

For the sins of the nation and blame it on them

For in some many cases, it's sad but it's true

The title delinquent fits older folks too

违法犯罪的青少年 哦,我们是如何谴责的因为国家的罪过而责备他们。

因为在很多情况下,这是很可悲的,但这是事实。

成年人也适合用 "不良分子 "这个称号

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