

The Cost of Justice: How Low-Income Youth Continue To Pay the Price of Failing Indigent Defense Systems

Katayoon Majd and Patricia Puritz*

“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”¹

“I don’t have a real lawyer. I have a public defender.”—juvenile client²

No right is more fundamental for youth in delinquency cases than the right to counsel. In 1967, the United States Supreme Court held in *In re Gault*³ that this right belongs to all youth, regardless of income. As the last four decades have shown, however, the juvenile indigent defense systems created in *Gault*’s wake have consistently failed to provide quality representation to the low-income youth they were designed to serve. Major obstacles and inequities persist in the implementation of the right to counsel in juvenile courts, and the burden of these floundering juvenile indigent defense systems—and the attendant denials of other due process rights—fall overwhelmingly on low-income youth and youth of color.

In this article, we examine the range of structural, cultural, and systemic barriers that impede access to counsel and quality of legal representation for low-income youth. We focus in particular on the juvenile indigent defense systems, which by their very nature serve only those youth who cannot afford private counsel. Given the socio-economic inequities pervading the juvenile justice system, these indigent defense systems are responsible for providing legal representation to a large percentage of the juvenile justice population.⁴

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1. *Griffin v. Illinois*, 351 U. S. 12, 19 (1956) (holding that states are required to provide a free trial transcript to any indigent defendant appealing his conviction on non-federal grounds).

2. NAT’L JUVENILE DEFENDER CTR. ET AL., *FLORIDA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS* 51 (2006), <http://www.njdc.info/pdf/Florida%20Assessment.pdf> [hereinafter *FLORIDA ASSESSMENT*].

3. 387 U.S. 1 (1967).

4. See, e.g., ROBIN L. DAHLBERG, *ACLU, LOCKING UP OUR CHILDREN: THE SECURE DETENTION OF MASSACHUSETTS YOUTH AFTER ARRAIGNMENT AND BEFORE ADJUDICATION* 8 (2008), available at http://www.aclum.org/lockingupkids/locking_up_our_children_web.pdf (noting that 90% of juvenile respondents in Massachusetts cannot afford to hire an attorney and must rely instead on the state’s indigent defense system).

Although the crisis in juvenile indigent defense is acute, we highlight recent innovations geared toward improving representation around the country and provide recommendations to guide comprehensive juvenile indigent defense reform in the states.

I. THE CRITICAL IMPORTANCE OF THE RIGHT TO COUNSEL IN DELINQUENCY CASES

Juvenile defense is a relatively young profession. Prior to 1967 when *In re Gault* was decided, youth rarely had legal representation in juvenile courts.⁵ The juvenile court's stated purpose of rehabilitation rather than punishment and the state's *parens patriae* authority were used to justify the denial of due process protections to youth in delinquency cases. With *Gault*, the Supreme Court clearly rejected those paternalistic justifications and held that, under the Due Process Clause of the Fourteenth Amendment, youth in delinquency courts have the right to counsel, as well as the right to notice of charges, the right to confrontation and cross examination of witnesses, and the privilege against self-incrimination. Observing that juveniles were getting the "worst of both worlds," with neither the due process protections of the adult criminal system nor the benevolent, rehabilitative support of the juvenile system,⁶ the Court declared that juveniles facing "the awesome prospect of incarceration" need counsel for the same reasons that adults facing criminal charges need counsel.⁷

In subsequent cases, the Court further expanded the rights of youth in delinquency cases, requiring the "beyond a reasonable doubt" standard of proof⁸ and holding that double jeopardy bars criminal charges of adjudicated delinquent acts.⁹ Though the Court stopped short of affording youth the right to jury trials for fear that it would undermine the unique nature of juvenile court,¹⁰ the Court's jurisprudence regarding juvenile court proceedings taken as a whole demonstrates that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."¹¹

Gault marked a watershed moment in juvenile justice precisely because the role of the juvenile defender is so critical to fair and effective juvenile courts. As commentators have noted, the unique characteristics of youth make them particularly "ill-equipped to understand, manage, or navigate the complexities of the modern juvenile (or adult) justice system on their own".¹² Attorneys are necessary to help young clients invoke their due process rights, hold the state to its burden of proof, advocate for fair dispositions, appeal adverse rul-

5. Jerry R. Foxhoven, *Effective Assistance of Counsel: Quality of Representation for Juveniles Is Still Illusory*, 9 BARRY L. REV. 99, 100 (2007) (noting estimates that only five percent of youth were represented by counsel in pre-*Gault* courts) (citation omitted).

6. *Gault*, 387 U.S. at 19 n.23 (citing *Kent v. United States*, 383 U.S. 541, 556 (1966)).

7. *Gault*, 387 U.S. at 36.

8. *In re Winship*, 397 U.S. 358 (1970).

9. *Breed v. Jones*, 421 U.S. 519 (1975).

10. *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971).

11. *Gault*, 387 U.S. at 13.

12. Marsha Levick & Neha Desai, *Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel at All Stages of the Juvenile Court Process*, 60 RUTGERS L. REV. 175, 182 (2007).

ings, and protect their client's interests while incarcerated or on probation¹³. Effective defense attorneys are also necessary for the proper functioning of the justice system. As the Federal Advisory Committee on Juvenile Justice (FACJJ), which is charged with providing advice to the President and Congress regarding juvenile justice, has recently emphasized, providing counsel to every child can remedy some of the most disturbing problems in the juvenile justice system, including disproportionate minority contact, inhumane conditions of confinement, inappropriate transfers to the adult system, and inadequate rehabilitative services.¹⁴

Since *Gault*, standards and guidelines promulgated by a range of professional organizations, including the Institute of Judicial Administration, the American Bar Association, the National Council of Juvenile and Family Court Judges, the American Council of Chief Defenders and the National Juvenile Defender Center have underscored the singularly important role defenders play in delinquency courts.¹⁵ Yet as even the United States Congress has recognized on more than one occasion, significant work remains to be done in order to achieve faithful implementation of *Gault's* mandate.¹⁶ In the meantime, broken indigent defense systems increase the likelihood that low-income youth will suffer the consequences of false confessions, unconstitutional guilty pleas, wrongful convictions, pretrial detention, and incarceration in secure facilities.¹⁷ In addition, as will be discussed further in Section III, denying youth

13. See *Gault*, 387 U.S. at 41 (citations omitted).

14. FED. ADVISORY COMM. ON JUVENILE JUSTICE, 2008 ANNUAL REPORT 26, available at <http://www.facjj.org/annualreports/FACJJ%20Annual%20Report%2008.pdf> [hereinafter FACJJ REPORT] (quoting ABA's Presidential Working Group on the Unmet Legal Needs of Children and their Families).

15. See INST. OF JUDICIAL ADMIN. & AM. BAR ASS'N, JUVENILE JUSTICE STANDARDS, Standards Relating to Counsel for Private Parties 1.1 (1996) [hereinafter IJA/ABA STANDARDS FOR PRIVATE COUNSEL] (noting that counsel is "essential to the administration of justice and to the fair and accurate resolution of issues at all stages of the proceedings"); see also NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 25 (2005), available at <http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/JDG/juveniledelinquencyguidelinescompressed.pdf> [hereinafter NCJFCJ GUIDELINES] ("youth charged in the formal juvenile delinquency court must have qualified and adequately compensated legal representation"); NAT'L ASS'N OF COUNSEL FOR CHILDREN, POLICY AGENDA: JUVENILE JUSTICE POLICY (1997), available at http://www.naccchildlaw.org/?page=Policy_Agenda [hereinafter NACC JUVENILE JUSTICE POLICY] (recommending that juveniles accused of offenses should be represented by competent counsel in all court proceedings, including postdisposition proceedings); AM. COUNCIL OF CHIEF DEFENDERS & NAT'L JUVENILE DEFENDER CENTER, TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH INDIGENT DEFENSE DELIVERY SYSTEMS I (2008 2d ed.), available at http://www.njdc.info/pdf/10_Core_Principles_2008.pdf [hereinafter TEN CORE PRINCIPLES].

16. See INST. OF JUDICIAL ADMIN. & AM. BAR ASS'N, JUV. JUST. STDS. ANN. xvi (Robert E. Shepherd, Jr. ed., 1996) (noting that in 1992, the United States Congress included language about the importance of juvenile defenders, and the failings of public defender offices, in its reauthorization of the Juvenile Justice Delinquency Prevention Act); see also S. Res. 194, 110th Cong. (2007) (commemorating the 40th anniversary of the *Gault* decision and resolving "to acknowledge and address the modern day disparities that remain for children after the *Gault* decision.").

17. See Levick & Desai, *supra* note 12, at 175.

effective legal representation in delinquency courts perpetuates the socio-economic and racial injustices in the system, helps fuel the cycle of poverty, and ultimately undermines the effectiveness of the juvenile justice system.

II. BARRIERS TO EFFECTIVE REPRESENTATION OF LOW-INCOME YOUTH IN DELINQUENCY COURTS

Despite the overwhelming professional consensus that the right to counsel is crucial to the fair administration of justice, modern-day juvenile courts continue to deny many low-income youth nationwide the legal representation to which they are entitled under the United States Constitution.¹⁸ Numerous systemic shortcomings have converged to create the current crisis in juvenile indigent defense, including structural shortcomings like inadequate funding and oversight, continued hostility toward affording due process rights to youth, and a number of other barriers that reflect a fundamental lack of understanding of, and respect for, the juvenile defense role.

A. Structural Characteristics of Indigent Defense Delivery Systems Affecting Quality of Juvenile Representation

Without specific guidance from the Supreme Court in *Gault* and other cases involving the right to counsel for adults, states have developed different methods for providing attorneys to individuals who cannot afford to hire private counsel.¹⁹ Consequently, the delivery of juvenile indigent defense services varies greatly state-by-state and often county-by-county.

1. Variations in Delivery Methods

Jurisdictions have adopted three primary models for structuring the delivery of defense services: the assigned counsel, contract, and public defender models. While effective representation is certainly possible under all of these models, certain disadvantages are associated with the assigned counsel and contract models, in particular.

First, under the assigned counsel model, private attorneys are appointed to represent indigent clients either by judges on an ad hoc basis or by an over-

18. See *id.* at 175 (stating that right to counsel remains today “a patchwork of disparate state and local laws, policies and practices that fail to assure that all youth receive skilled representation throughout their involvement with the juvenile justice system”); see also Joanna S. Markman, *In re Gault: A Retrospective in 2007: Is It Working? Can It Work?*, 9 BARRY L. REV. 123, 134 (2007).

19. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (finding a right to counsel for any criminal defendants, including those charged with petty offenses and misdemeanors, where they face possibility of incarceration); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (holding that indigent criminal defendants have a Sixth Amendment right to counsel in felony cases and that the right applies to states through the Fourteenth Amendment); *Douglas v. California*, 372 U.S. 353 (1963) (asserting the right to counsel in direct criminal appeals); see also Tony Fabelo, *What Policy-makers Need to Know to Improve Indigent Defense Systems*, 29 N.Y.U. REV. L. & SOC. CHANGE 135, 135 (2004) (noting that the “Supreme Court left it to the states to decide how public defense would be provided to criminal offenders unable to pay for private counsel.”).

sight body on a systematic basis.²⁰ Assigned counsel are paid either an hourly rate or flat rate per case, which generally varies depending on the type of case and hearing.²¹ A number of aspects of this model can negatively impact quality of counsel. First, under ad hoc systems, judges often appoint attorneys without requiring any delinquency training or experience.²² In addition, the level of on-going training, supervision and support provided to assigned counsel varies, but is generally limited.²³ In systems where judges, rather than an oversight body, appoint counsel, defenders might temper their advocacy to please the judge because they fear losing future appointments.²⁴ Finally, assigned counsel typically must petition the court in order to retain experts or investigators,²⁵ making counsel dependent on the court's approval to pursue important litigation strategies.²⁶

The second model is the contract model, in which the state, county or other jurisdiction enters into contracts with private attorneys, law firms, bar associations, or non-profits to represent indigent defendants in some or all cases.²⁷ For example, the contracts might provide for representation in certain types of cases, such as delinquency, misdemeanor, or felonies, or in cases involving conflicts of interest for the public defender office.²⁸ Generally two types of contracts are used. One is a fixed-price contract providing a flat fee for representation of an undetermined number of cases within a set contract period.²⁹ The second is a fixed-fee-per-case contract, which requires the individual attorney or organization to represent a certain number of cases for a set fee per case.³⁰ Drawbacks of this model include the fact that flat fees create a disincentive for attorneys to spend a significant amount of time on any one case.³¹ In addition, many contract attorneys only work part-time and supplement their income with paying clients, which creates a financial incentive to spend less time on

20. Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 32-33 (1995).

21. AM. BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 2 (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf> [hereinafter ABA, GIDEON'S BROKEN PROMISE]; THE SPANGENBERG GROUP, RATES OF COMPENSATION FOR COURT-APPOINTED COUNSEL IN CAPITAL CASES AT TRIAL: A STATE-BY-STATE OVERVIEW 1 (2007), available at http://www.abanet.org/legalservices/sclaid/defender/downloads/2007FelonyCompRatesUpdate_Capital.pdf; Charles J. Ogletree, Jr. & Yoav Sapir, *Keeping Gideon's Promise: A Comparison of the American and Israeli Public Defender Experiences*, 29 N.Y.U. REV. L. & SOC. CHANGE 203, 209 (2004).

22. Spangenberg & Beeman, *supra* note 20, at 33.

23. See Ogletree, Jr. & Sapir, *supra* note 21, at 209.

24. *Id.*

25. *Id.*

26. *Id.*

27. See Spangenberg & Beeman, *supra* note 20, at 34; see also ABA, GIDEON'S BROKEN PROMISE, *supra* note 21, at 2; THE SPANGENBERG GROUP, *supra* note 21, at 1.

28. Spangenberg & Beeman, *supra* note 20, at 34.

29. *Id.*

30. *Id.*

31. Ogletree, Jr. & Sapir, *supra* note 21, at 209-10.

the cases involving indigent clients.³² Moreover, most contracts do not cover costs for investigators and experts, creating a potential conflict of interest between the attorney's financial interests and the low-income client's right to a zealous defense.³³

Finally, many jurisdictions employ the third model, the public defender office, in which a public or private non-profit entity with salaried full- or part-time attorneys provides legal representation to indigent defendants.³⁴ While public defender offices contend with many obstacles to achieve the quality representation discussed below, the main advantage of this model is, if properly resourced, it allows for a "reliable professional staff of well-trained and well-supported" attorneys to represent indigent defendants in a jurisdiction. By providing salaries to attorneys, it also avoids some of the pitfalls of the other models, which create built-in disincentives for defenders to spend a significant amount of time on any one case. Acknowledging the relative benefits of this model, national standards recommend use of public defender offices in jurisdictions where populations and caseloads justify such programs.³⁵ These standards find support in at least one recent study, conducted in Mississippi, which determined that full-time public defenders achieved better outcomes for their clients than part-time assigned and contract counsel.³⁶

Most states, and even counties, use a combination of these three models to deliver defense services to indigent defendants.³⁷ Different jurisdictions organize these services at different levels of government, including state, county, judicial district, or region.³⁸ Only three states rely mainly on an assigned counsel system, with or without contract defenders, and one of these (Maine) relies

32. *Id.* at 209; see also AM. BAR ASS'N JUVENILE JUSTICE CTR. ET AL., WASHINGTON: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE OFFENDER MATTERS 45-46 (2003), available at <http://www.njdc.info/pdf/wareport.pdf> [hereinafter WASHINGTON ASSESSMENT].

33. Ogletree, Jr. & Sapir, *supra* note 21, at 210.

34. See Spangenberg & Beeman, *supra* note 20, at 32; ABA, GIDEON'S BROKEN PROMISE, *supra* note 21, at 2; THE SPANGENBERG GROUP, *supra* note 21, at 2.

35. Ogletree, Jr. & Sapir, *supra* note 21, at 210; NAT'L LEGAL AID & DEFENDER ASS'N, A RACE TO THE BOTTOM: SPEED AND SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS 7 (2008), available at <http://www.michigancampaignforjustice.org/docs/Michigan%20NLADA%20report.pdf>. [hereinafter A RACE TO THE BOTTOM].

36. See Miriam S. Gohara, James S. Hardy & Damon Todd Hewitt, *The Disparate Impact of an Under-Funding Patchwork Indigent Defense System on Mississippi's African Americans: The Civil Rights Case for Establishing a Statewide, Fully Funded Public Defender System*, 49 HOWARD L. J. 81, 88-89, 94-95 (2005) (revealing that part-time, court-appointed counsel in Mississippi tend to provide less meaningful advocacy than full-time public defenders in all stages of the criminal proceedings, which results in harsh convictions and sentences even for non-violent, minor crimes).

37. See, e.g., Spangenberg & Beeman, *supra* note 20, at 32; ABA, GIDEON'S BROKEN PROMISE, *supra* note 21, at 2; THE SPANGENBERG GROUP, *supra* note 21, at 2; WASHINGTON ASSESSMENT, *supra* note 32, at 20 (reporting that in Washington state, which has no statewide system, six counties have public defender offices, five counties contract with non-profits to provide defense, most rural counties contract with individuals or private firms, and a few counties use assigned counsel).

38. ABA, GIDEON'S BROKEN PROMISE, *supra* note 21, at 2.

exclusively on assigned counsel to provide indigent defense.³⁹ Eighteen states use public defender offices, and twenty-nine states deliver indigent defense services through a combination of public defender, assigned counsel, and contract defenders.⁴⁰ It is not uncommon for one county to use only one method of delivery while another county in the same state uses an entirely different model.⁴¹ Similarly, even in the eighteen states that rely primarily on public defender offices, private attorneys are appointed in cases the public defenders cannot handle because of conflicts of interest.⁴²

Within jurisdictions, even those using a blend of models, juvenile defense representation is sometimes provided using only one delivery model. For instance, throughout many jurisdictions in Massachusetts, privately assigned counsel provide almost all of the juvenile delinquency representation.⁴³

2. Threats to Independence of the Defense Function

Regardless of the indigent defense model used, interference by the judiciary into the defense function poses significant problems. National standards emphasize the importance of ensuring that the public defense system is “independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel,⁴⁴ and that administrators of indigent defense programs, rather than judges or elected officials, should appoint counsel to clients.⁴⁵ Studies have shown, however, that regardless of the delivery method used, many jurisdictions fail to meet this standard and judges themselves regularly appoint counsel to cases.⁴⁶ This poses potential conflicts of interest for the attorneys who might provide less than zealous advocacy to their clients so as to avoid angering the judge upon whom they rely for appointments.

3. Inadequate Funding

Lack of adequate juvenile indigent defense funding creates obstacles to effective representation, as well. Depending on the state, responsibility for indigent defense delivery rests with the state, the counties, or a combination of the two.⁴⁷ In a majority of states, indigent defense remains the responsibility

39. Fabelo, *supra* note 19, at 138.

40. *Id.*

41. THE SPANGENBERG GROUP, *supra* note 21, at 2.

42. *Id.*

43. ABA, GIDEON'S BROKEN PROMISE, *supra* note 21, at 27.

44. AM. BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 1 (2002), available at <http://www.abanet.org/legal-services/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf> [hereinafter ABA, TEN PRINC. OF PUB. DEF. DELIVERY].

45. ABA, GIDEON'S BROKEN PROMISE, *supra* note 21, at 20.

46. *Id.*

47. See THE SPANGENBERG GROUP, STATE INDIGENT DEFENSE COMMISSIONS 1 (2006), available at http://www.abanet.org/legal-services/sclaid/defender/downloads/state_indigent-defense_febo7.pdf [hereinafter STATE INDIGENT DEFENSE COMMISSIONS]; see also ABA, GIDEON'S BROKEN PROMISE, *supra* note 21, at 2 (finding that “funds for defense services may derive from the

of the state, which provides both funding and oversight.⁴⁸ Twenty-eight states have indigent defense systems fully funded by the state.⁴⁹ In three other states, over half of the funding for indigent defense comes from the state,⁵⁰ while in seventeen states county funds provide at least half the total funding for indigent defense.⁵¹ Only two states, Pennsylvania and Utah, have systems funded entirely by counties.⁵²

Over time, states have moved toward increasing the proportion of state funding for indigent defense.⁵³ This trend finds support in national standards, which recommend that “[s]ince the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.”⁵⁴ In addition, some studies have indicated that fully state-funded systems generally tend to provide higher quality services than primarily locally-funded systems.⁵⁵ Because local revenues vary greatly between low-income and high-income communities, experts argue that a county-funded system creates great disparities at the local level.⁵⁶ Moreover, as experts have noted, “since less affluent counties also tend to have a higher percentage of their population qualifying for indigent defense services, *the counties most in need of indigent defense services are often the ones that least can afford to pay for it.*”⁵⁷

State funding alone, however, does not ensure quality services; the indigent defense system must have *adequate* funding and oversight as well.⁵⁸ In reality,

state, counties, cities, court fees or other assessments, or a combination of these sources.”).

48. STATE INDIGENT DEFENSE COMMISSIONS, *supra* note 47, at 1.

49. *Id.* at 5 (noting that as of July 2006, these states included Alaska, Arkansas, Colorado, Connecticut, Delaware Florida, Hawaii, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming).

50. *Id.* at 5 (identifying these states as Alabama, Kansas and Oklahoma).

51. *Id.* at 5 (identifying these states as Arizona, California, Georgia, Idaho, Illinois, Indiana, Louisiana, Michigan, Nebraska, Nevada, New York, Ohio, South Carolina, South Dakota, Texas, and Washington).

52. *Id.* at 1.

53. *Id.*

54. ABA, TEN PRINC. OF PUB. DEF. DELIVERY, *supra* note 44, at 2.

55. STATE INDIGENT DEFENSE COMMISSIONS, *supra* note 47, at 5 & n.14 (noting Arizona, California, Georgia and Washington as exceptions to the authors’ general experience that fully state-funded systems provide higher quality legal representation than county-funded systems); *see also* Gohara et al., *supra* note 36, at 84 (“A statewide, full-time indigent defense system would significantly improve the quality of counsel available to all indigent defendants” in Mississippi).

56. A RACE TO THE BOTTOM, *supra* note 35, at 5.

57. *Id.* at 6 (emphasis in original).

58. STATE INDIGENT DEFENSE COMMISSIONS, *supra* note 47, at i. *But see* G. Paul Marx, *Dogma and Disaster in Vindicating the Right to Counsel: How Ideology Can Wreck the Right to Counsel*, 9 LOY. J. PUB. INT. L 221 (2008); Norman Lefstein, *The Movement Toward Indigent Defense Reform: Louisiana and Other States*, 9 LOY. J. PUB. INT. L 125, 131 (2008) (“While on balance, funding of indigent defense solely from the state may lead to a better-funded indigent defense system, there is still considerable risk that state appropriations will not keep pace with the needs of the state’s defense program, thereby undermining its capacity to furnish effective defense services”).

jurisdictions regularly fail to fund indigent defense systems adequately,⁵⁹ and the level of state funding remains “grossly insufficient” even in states that provide some or all of the funding for indigent defense.⁶⁰ Funding shortfalls have a particularly devastating impact on juvenile clients because the insufficient resources of indigent defense systems traditionally have been spent disproportionately on adult defense, leaving juvenile representation with very little. For example, a study of quality of representation in Mississippi found that, “[w]hile resources for the defense of adults are scarce, even fewer resources are devoted to the defense of juveniles. As a result children in some youth courts are routinely ‘adjudicated delinquent’ without the benefit of anything resembling legal advocacy.”⁶¹ Similarly, a report on the state of indigent defense in Michigan found that “[j]uvenile justice representation is considered in many ways an afterthought all across the state of Michigan. As inadequate as adult representation is, the treatment of kids in delinquency proceedings is far worse.”⁶²

4. Lack of Meaningful Oversight of Indigent Defense Delivery

Another barrier to effective representation is the lack of meaningful oversight of indigent defense delivery systems. National standards recommend that “a nonpartisan board should oversee defender, assigned counsel, or contract systems” to ensure quality and uniformity of services and provide system accountability.⁶³ Such oversight bodies can serve the critically important role of maintaining the independence of the indigent defense system from political and judicial influence.⁶⁴ In addition, such bodies ideally can adopt and enforce standards regarding a range of issues including client income eligibility determinations, attorney qualifications and performance, appointment practices, independence of counsel, attorney compensation, workloads, supervision, training, and case management.⁶⁵ Oversight bodies can also ensure attorneys have adequate support services and resources.⁶⁶

A clear trend has emerged among states toward developing some level of statewide oversight.⁶⁷ Forty-two states now have state oversight for some or all

59. See Levick & Desai, *supra* note 12, at 175; see also ABA, GIDEON’S BROKEN PROMISE, *supra* note 21, at 39 (funding is “shamefully inadequate”).

60. ABA, GIDEON’S BROKEN PROMISE, *supra* note 21, at 9.

61. NAACP LEGAL DEFENSE & EDUC. FUND, ASSEMBLY LINE JUSTICE: MISSISSIPPI’S INDIGENT DEFENSE CRISIS 14 (2003), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/ms-assemblylinejustice.pdf>.

62. A RACE TO THE BOTTOM, *supra* note 35, at 34.

63. ABA, TEN PRINCIPLES OF PUBLIC DEFENSE DELIVERY, *supra* note 44, at 2; see also ABA, GIDEON’S BROKEN PROMISE, *supra* note 21, at 21.

64. STATE INDIGENT DEFENSE COMMISSIONS, *supra* note 47, at 18.

65. ABA, GIDEON’S BROKEN PROMISE, *supra* note 21, at 42-43.

66. *Id.*

67. See STATE INDIGENT DEFENSE COMMISSIONS, *supra* note 47, at 2; see also Lefstein, *supra* note 58, at 125-26 (noting that before 2000, 28 states created state entities with responsibility for indigent defense services, and that since 2000, North Carolina, Oregon, Texas, Georgia, Virginia, Montana, North Dakota, South Carolina, and Louisiana have passed new legislation creating state oversight).

indigent defense services, though the extent of oversight and the way in which the oversight is structured varies. In many states, a state commission provides oversight, regardless of whether there is a statewide public defender program, while in other states, the chief public defender carries out the oversight function.⁶⁸ Seven states have no statewide oversight,⁶⁹ and two states with elected public defenders, Tennessee and Florida, have no statewide oversight presumably because of the independent nature of elected positions.⁷⁰

The increased emphasis on oversight is encouraging, but significant gaps still exist.⁷¹ Oversight bodies in different states hold varying levels of authority and responsibility. For example, some boards will set policy for services and advocate for resources, while others will monitor costs and caseloads or even develop and oversee compliance with performance standards.⁷² Several state commissions have only partial authority over indigent defense.⁷³ In some states, for instance, the commission will oversee indigent defense services only in certain types of cases, such as appeals. As studies have found, the amount of funding a state provides often determines how much authority the commission holds and the ultimate effectiveness of the commission.⁷⁴ The more local money is used to fund indigent defense services, the less authority the state commission has.⁷⁵ As a result, some state commissions have authority over only certain geographic areas that receive state money based on their compliance with standards the commission develops.⁷⁶ The variability in statewide oversight and structure in many places has created a justice system for the poor that “is unpredictable and subject to local political and budgetary pressures.”⁷⁷

5. Uneven Representation Within and Across States

The combination of different delivery systems, inconsistent oversight structures, and inequitable funding has translated into disparities in the quality of representation provided to youth.⁷⁸ For example, a report of the Indigent Defense Commission in Nevada, where counties are primarily responsible for indigent defense, found that the state’s two urban counties, which have public defender offices and a contract system for conflict and overflow cases generally have enough attorneys, whereas rural and other less populated counties “must import defense lawyers from neighboring counties or urban centers often at

68. STATE INDIGENT DEFENSE COMMISSIONS, *supra* note 47, at 2.

69. *Id.*

70. *Id.*

71. *Id.* at 3.

72. *Id.* at 4.

73. *Id.* at 3.

74. *Id.* at 4.

75. *Id.*

76. *Id.* at 7-8.

77. ABA, GIDEON’S BROKEN PROMISE, *supra* note 21, at 21.

78. See Jay D. Blitzman, *Gault’s Promise*, 9 BARRY L. REV. 67, 85 (2007) (“quality of counsel provided for juveniles is quite variable”); see also ABA, GIDEON’S BROKEN PROMISE, *supra* note 21, at 9 (noting reports that in California, Nebraska, Pennsylvania, and Washington, variations in funding result in unequal quality of representation throughout the state).

a considerable expense.”⁷⁹ The report found that high caseloads, as well as a lack of uniform standards, data collection, and oversight of contract attorneys significantly impeded the quality of representation in rural counties.⁸⁰ The relatively lower quality of representation in rural areas is not unique to Nevada. In fact, a national assessment of juvenile defense representation in the mid-1990s found that in many rural counties, the barriers to quality representation were particularly challenging.⁸¹ Disparities are relative, however, and numerous studies have shown that broken indigent defense systems impact urban and suburban areas as well.⁸²

B. Additional Barriers to Quality of Representation in Juvenile Courts

While the structural issues impeding indigent defense delivery systems impact both juvenile and adult clients, a multitude of unique factors negatively impact juvenile defense representation in particular. Arguably the most notable is the culture in many juvenile courts that distorts, and devalues the importance of, the juvenile defender’s role.

1. The Continuing Resistance to Zealous Advocacy in Juvenile Courts

One of the most insidious barriers to effective delinquency representation is juvenile court professionals’ continuing resistance to affording youth their constitutional rights. Despite *Gault*, practitioners often justify denials of due process with claims that they are advancing the “best interests” of the youth in a particular case.

Role confusion on behalf of juvenile defenders themselves is partly to blame. The professional rules of responsibility, relevant legal scholarship,⁸³

79. INDIGENT DEFENSE COMM’N, NEVADA SUPREME COURT, FINAL REPORT & RECOMMENDATIONS OF SUPREME COURT INDIGENT DEFENSE COMMISSION 7 (2007), available at <http://clearinghouse.wustl.edu/detail.php?id=10603> [hereinafter NEVADA INDIGENT DEF. COMM’N REPORT].

80. *Id.*

81. See AM. BAR ASS’N JUVENILE JUSTICE CTR., YOUTH LAW CTR. & JUVENILE LAW CTR., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 45, 52 (1995), available at <http://www.njdc.info/pdf/cfjfull.pdf> [hereinafter A CALL FOR JUSTICE] (finding that in rural counties youth waived their right to counsel at higher rates, attorneys faced particularly intense pressure in the courtroom to “get along” with the judge and prosecutor which tempered the zeal with which they advocated); see also Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1242 (1989) (stating that “public defenders predominate in the counties with high and medium rates of representation—primarily urban and suburban county courts—while court appointed lawyers predominate in the rural counties with lowest rates of representation.”).

82. See, e.g., A RACE TO THE BOTTOM, *supra* note 35, at i (finding that “[t]hrough the level of services varies from county to county [in Michigan]—giving credence to the proposition that the level of justice a poor person receives is dependent entirely on which side of a county line one’s crime is alleged to have been committed instead of the factual merits of the case—...none of the public defenders services in the sample counties [studied] are constitutionally adequate.”).

83. For more in-depth discussion of the ethical duties of juvenile defenders, see Patricia Puritz & Katayoon Majd, *Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice*, 45 FAM. CT. REV. 466 (2007); Kristin Henning, *Loyalty, Paternalism,*

and professional standards and guidelines⁸⁴ all affirm that juvenile defenders have an ethical duty to represent the client's expressed interests, as opposed to their best interests. Like criminal defense attorneys, juvenile defenders owe their clients the ethical duties of loyalty, communication, and confidentiality and must "zealously asser[t] the client's position under the rules of the adversary system".⁸⁵ These ethical duties apply whether the attorney is a public defender, appointed counsel, contract attorney, or privately retained counsel.⁸⁶ Many juvenile defenders, however, violate their ethical duties by advocating for what they believe will serve the "best interests" of their clients, rather than allowing the client to direct the representation.⁸⁷ For instance, at disposition hearings, some defense attorneys will argue against their clients' interests for more severe dispositions than even those recommended by the probation department.⁸⁸ Other examples exist of defenders waiving probable cause at detention hearings on behalf of clients because they believe that the youth will fare better in an out-of-home placement than with their parents. Not only are such subjective judgments often made after spending only minimal time with youth, but they also can be driven by a defender's own cultural and socio-economic biases. Most importantly, in acting on their own notions of what is in the client's best interests, defense attorneys violate their professional re-

and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases, 81 NOTRE DAME L. REV. 245, 256 (2005); Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 356 (2003); Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399, 1412, 1424 (1996); *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301, 1312, (1996); Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 LOY. U. CHI. L.J. 259, 270 (1995).

84. See IJA/ABA, STANDARDS FOR PRIVATE COUNSEL, *supra* note 15, at 17, § 3.1(a). & § 3.1(b) (ii)[a]; see also NCJFCJ GUIDELINES, *supra* note 15, at 30; TEN CORE PRINCIPLES, *supra* note 15, at Principle 1.

85. CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, at PREAMBLE (2009) (zealous advocacy); *id.* at R. 1.4, 2.1 (communication with client); *id.* at R. 1.6 (confidentiality of information); *id.* at R. 1.7-1.12 (loyalty to client); *id.* at R. 1.14 (requiring that attorneys maintain a normal attorney/client relationship with young clients "as far as reasonably possible").

86. See *Polk County v. Dodson*, 454 U.S. 312, 318-25 (1981) (asserting that public defenders owe the same obligations to their clients as any other defense attorney).

87. See N. Lee Cooper, Patricia Puritz & Wendy Shang, *Fulfilling the Promise of In Re Gault: Advancing the Role of Lawyers for Children*, 33 WAKE FOREST L. REV. 651 (1998) (citing Robert E. Shepherd, Jr. & Adrienne Volenik, *Juvenile Justice: The Right to Effective Counsel*, 2 CRIM. JUST. 33, 34 (1987)); Henning, *supra* note 83, at 246; NAT'L JUVENILE DEFENDER CTR. ET AL., INDIANA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 40 (2006), available at <http://www.njdc.info/pdf/Indiana%20Assessment.pdf> [hereinafter INDIANA ASSESSMENT]; AM. BAR ASS'N JUVENILE JUSTICE CTR. ET AL., VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 31 (2002), available at <http://www.njdc.info/pdf/Virginia%20Assessment.pdf> [hereinafter VIRGINIA ASSESSMENT]; NAT'L JUVENILE DEFENDER CTR. ET AL., ILLINOIS: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 22-23 (2007), available at http://www.njdc.info/pdf/illinois_assessment.pdf [hereinafter ILLINOIS ASSESSMENT].

88. See, e.g., FLORIDA ASSESSMENT, *supra* note 2, at 51-52.

sponsibility to enforce their client's due process rights. As Professor Martin Guggenheim has explained.

Lawyers are, first and foremost, law enforcers. . . . Unless children are allowed by lawyers to set the objectives in their cases, they would not only be effectively deprived of a number of constitutional rights, they would be denied procedures that are fundamental to the rule of law. The lawyer, not the child, would decide whether the child should forgo his or her right to remain silent. The lawyer, not the trier of fact, would effectively decide what outcome is in the child's best interests.⁸⁹

Usurping client autonomy in this way also destroys client trust, the fundamental underpinning of an effective attorney/client relationship.⁹⁰ In fact, research has documented that juvenile clients, particularly African American clients and those represented by public defenders or court-appointed attorneys, tend to mistrust and misunderstand their attorney's role.⁹¹ Defenders' lack of understanding of their own role threatens the fair administration of justice, for a fair trial cannot occur "unless the accused receives the services of an effective and independent advocate"⁹² who advances "the *undivided interests* of his client."⁹³

Ambivalence on behalf of some defenders about advocating for the expressed interests of juvenile clients reflects a larger court culture that continues to view zealous advocacy as antithetical to rehabilitation.⁹⁴ Judges often allow paternalistic notions of what is best for the child to justify procedural shortcuts that effectively deprive youth of their constitutional rights.⁹⁵ Some judges and prosecutors express open disapproval of zealous defense advocacy, believing that juvenile court should not be adversarial.⁹⁶ A premium is placed

89. Guggenheim, *supra* note 83, at 1423-24.

90. Norman Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 GEO. J. LEGAL ETHICS 521, 527 n.36 (1988) (quoting AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE RELATING TO THE DEFENSE FUNCTION § 4-3.1(a) (2d ed. 1980)); see also ILLINOIS ASSESSMENT, *supra* note 87, at 47 (quoting a judge as saying, "There is a trust issue. . . . Kids believe that the Public Defender is working with the State.").

91. See Melinda G. Schmidt, N. Dickon Repucci & Jennifer L. Woolard, *Effectiveness of Participation as a Defendant: The Attorney-Juvenile Client Relationship*, 21 BEHAV. SCI. & L. 175, 181, 190-92 (2003); see also Henning, *supra* note 83, at 272-73 (citing studies addressing the difficulty children face in trusting their lawyers); Jones v. Barnes, 463 U.S. 745, 761 (1983) (Brennan, J., dissenting) ("It is no secret that indigent clients often mistrust the lawyers appointed to represent them.").

92. *Polk County*, 454 U.S. at 322.

93. *Id.* at 318-19 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979)); see also *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (asserting that the attorney has a duty to advocate the client's cause).

94. See Thomas F. Geraghty, *Symposium on the Future of the Juvenile Court: Justice for Children: How Do We Get There?* 88 J. CRIM. L. & CRIMINOLOGY 190, 231 (1997).

95. *Id.* at 214 (explaining that many judges are reluctant to fully implement the due process protections provided in *Gault* and the cases that followed).

96. See A CALL FOR JUSTICE, *supra* note 81, at 9, 51; see also TEXAS APPLESEED ET AL., SELLING JUSTICE SHORT: JUVENILE INDIGENT DEFENSE IN TEXAS 21 (2000) [hereinafter TEXAS ASSESSMENT]; AM. BAR ASS'N JUVENILE JUSTICE CENTER ET AL., GEORGIA: AN ASSESSMENT OF ACCESS TO COUNSEL

on maintaining a friendly atmosphere in the courtroom, which discourages some attorneys from filing motions or pursuing defenses at trial.⁹⁷ Attorneys and judges discourage children from taking cases to trial, with an overwhelming number of cases resolved through plea agreements,⁹⁸ frequently very early in the process.

Examples also exist of judges who will punish youth for attempting to exercise their right to a trial. For example, in an assessment of Georgia's juvenile defense system, one judge admitted imposing a "trial tax" on youth, stating, "I tell the minor, I will up the sentence if you take it to trial, because you could have pleaded and saved us all this trouble."⁹⁹ In those instances when cases do go to trial, some judges will not faithfully hold the government to its burden of proving the charges beyond a reasonable doubt.¹⁰⁰ These strong systemic pressures discourage and impede the many well-intentioned juvenile defenders nationwide from protecting their clients' fundamental due process rights.¹⁰¹

2. Failure to Recognize the Important, Specialized Nature of Juvenile Defense

While in many respects the juvenile defender's role is similar to that of a criminal defense attorney, juvenile defense practice is a highly specialized area of law that requires a unique set of skills, knowledge, and training.¹⁰² In addition to understanding criminal law and procedure and possessing trial advocacy skills, juvenile defenders must be trained in related areas of law, such as child welfare, education, public benefits, and immigration.¹⁰³ Also, lawyers need to be prepared to face the specific issues affecting the fair treatment of youth of color, girls, and lesbian, gay, bisexual, and transgender youth in de-

AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 31(2001) [hereinafter GEORGIA ASSESSMENT] (finding that "the nonadversarial culture of juvenile court undoubtedly affects the level of zealous advocacy that lawyers feel they can engage in."); VIRGINIA ASSESSMENT, *supra* note 87, at 31; AM. BAR ASS'N JUVENILE JUSTICE CTR. ET AL., MAINE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 27 (2003) [hereinafter MAINE ASSESSMENT] (reporting the friendliness between defenders and court personnel that results in the juvenile court's "culture of camaraderie").

97. A CALL FOR JUSTICE, *supra* note 81, at 9.

98. See Geraghty, *supra* note 94, at 231.

99. See GEORGIA ASSESSMENT, *supra* note 96, at 31.

100. See Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655, 1678-79 (1996) (stating that "Juvenile court judges have . . . fail[ed] to assiduously apply the burden of proof.").

101. See generally *id.* at 1678-79.

102. IJA/ABA STANDARDS FOR PRIVATE COUNSEL, *supra* note 15, at 2.2(b)(iii); TEN CORE PRINCIPLES, *supra* note 15, at Principle 2; GEORGIA PUBLIC DEFENDER STANDARDS COUNCIL, THE STATE OF GEORGIA PERFORMANCE STANDARDS FOR JUVENILE DEFENSE REPRESENTATION IN INDIGENT DELINQUENCY AND UNRULY CASES, Performance Standard 2.1, available at http://www.gpdsc.com/docs/cpdsystem-standards-juvenile_cases.pdf [hereinafter GEORGIA PERFORMANCE STANDARDS]; see also A RACE TO THE BOTTOM, *supra* note 35, at 34 (stating "Kids deserve attorneys specially trained in these matters"); Puritz & Majd, *supra* note 83, at 477.

103. See TEN CORE PRINCIPLES, *supra* note 15, at Principle 7; see also VIRGINIA ASSESSMENT, *supra* note 87, at 14; GEORGIA ASSESSMENT, *supra* note 96, at 9-11.

linquency courts.¹⁰⁴ Moreover, defenders who represent youth must possess a sophisticated understanding of normative adolescent development, and the impact of disabilities and trauma on development.¹⁰⁵ As an ever-expanding body of research has shown, and the United States Supreme Court has acknowledged, adolescents differ from adults in critical ways that affect both the legal issues in a case¹⁰⁶ and the attorney-client relationship.¹⁰⁷ Continuous training on these and other issues is critical, but many juvenile defenders receive minimal training at best.¹⁰⁸ In fact, juvenile court is frequently treated as a “kiddie court,” or a training ground for adult criminal court, leaving the

104. See TEN CORE PRINCIPLES, *supra* note 15, at Principle 7.

105. Levick & Desai, *supra* note 12, at 182 (noting that “juveniles need lawyers precisely because they are juveniles”); see, e.g., GEORGIA PERFORMANCE STANDARDS, *supra* note 102, at 2.2 (directing counsel to be knowledgeable about, and seek ongoing training in, areas as diverse as child and adolescent development; brain development and the effect of trauma on brain development; mental health issues; special education laws; substance abuse issues; cultural diversity; working with and interviewing children; immigration laws; and school related issues); TEN CORE PRINCIPLES, *supra* note 15; VIRGINIA INDIGENT DEFENSE COMM’N, VIRGINIA STANDARDS OF PRACTICE FOR JUVENILE DEFENSE COUNSEL, Standard 2.2 (2006), available at <http://www.indigentdefense.virginia.gov/PDF%20documents/Standards%20of%20Practice.pdf> [hereinafter VIRGINIA PERFORMANCE STANDARDS]; NEVADA INDIGENT DEFENSE STANDARDS OF PERFORMANCE: JUVENILE DELINQUENCY CASES, Standard 2, available at <http://clearinghouse.wustl.edu/detail.php?id=10603> (as an attachment to NEVADA INDIGENT DEFENSE COMMISSION REPORT, *supra* note 79) [hereinafter NEVADA DEFENSE STANDARDS].

106. See *Roper v. Simmons*, 543 U.S. 551, 569-72 (2005); see also Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST. 1009, 1011-1014 (2003).

107. See e.g., Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child’s Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 271-272, 321 (2005) (“To achieve the delicate balance between advice and client autonomy, the [juvenile defense] lawyer must understand how developmental factors may affect the attorney-client relationship and develop concrete methods to improve interviewing, counseling, and decisionmaking with young clients”); Melinda G. Schmidt, N. Dickon Reppucci & Jennifer L. Woolard, *Effectiveness of Participation as a Defendant: The Attorney-Juvenile Client Relationship*, 21 BEHAV. SCI. & L. 175, 181, 193 (2003) (“Attorneys must be made aware of youths’ potential [developmental] deficits as defendants, be given guidance on how to be effective counselors for juveniles in the increasingly adversarial arena of juvenile justice, and be afforded the time necessary to develop a mutually beneficial attorney-client relationship”).

108. A CALL FOR JUSTICE, *supra* note 81, at 50; see also GEORGIA ASSESSMENT, *supra* note 96, at 2, 26-27; VIRGINIA ASSESSMENT, *supra* note 87, at 28-30; MAINE ASSESSMENT, *supra* note 96, at 26 (providing that no training is required or available in Maine); TEXAS ASSESSMENT, *supra* note 96, at 28; AM. BAR ASS’N JUVENILE JUSTICE CTR. ET AL., THE CHILDREN LEFT BEHIND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN LOUISIANA 57 (2001), available at <http://www.njdc.info/pdf/LAreport.pdf> [hereinafter LOUISIANA ASSESSMENT]; AM. BAR ASS’N JUVENILE JUSTICE CTR. ET AL., JUSTICE CUT SHORT: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN OHIO 38 (2003), available at http://www.njdc.info/pdf/Ohio_Assessment.pdf [hereinafter OHIO ASSESSMENT]; CTR. FOR FAMILIES, CHILDREN & THE COURT, JUDICIAL COUNCIL OF CALIFORNIA, JUVENILE DELINQUENCY COURT ASSESSMENT 25 (2008), available at <http://www.courtinfo.ca.gov/programs/cfcc/resources/publications/JuvenileDelinquency.htm> [hereinafter CALIFORNIA ASSESSMENT] (when rating various aspects of attorneys’ performance, “judicial officers are relatively less satisfied with attorneys’ knowledge about community resources.”).

most inexperienced attorneys with the difficult task of representing youth facing delinquency offenses.¹⁰⁹

3. Inadequate Resources

Vast inequities in resources also impact the quality of legal representation in juvenile court, creating disparities across jurisdictions.¹¹⁰ As the *IJA/ABA Juvenile Justice Standards Relating to Provision of Counsel* acknowledge, “Competent representation cannot be assured unless adequate supporting services are available,” such as “investigatory, expert and other nonlegal services.”¹¹¹ Yet defenders often must represent clients without the most basic tools that private sector attorneys take for granted, including computers, internet access, legal research tools, and even office space, as well as necessary support staff (such as investigators, social workers, paralegals, interpreters, and administrative assistants),¹¹² and access to critical expert witnesses.¹¹³ In contrast, prosecutors tend to have more resources, including investigators and administrative staff,¹¹⁴ and receive more training than their defender counterparts.¹¹⁵ These resource disparities further exacerbate the already significant disadvantage that a juvenile respondent faces vis-à-vis the state.

4. Attorney Compensation and Lack of Pay Parity

National standards declare that “[l]awyers participating in juvenile court matters, whether retained or appointed, are entitled to reasonable compensation for time-and-services performed according to prevailing professional standards.”¹¹⁶ Yet inadequate attorney compensation seriously limits the quality of representation provided to juvenile clients.¹¹⁷ In many jurisdictions, the defender salaries or hourly fees are unrealistically low and attorneys must move to representing adults before getting pay increases; these factors all result in high turnover (and therefore a lack of developed expertise) among ju-

109. See, e.g., ILLINOIS ASSESSMENT, *supra* note 87, at 63-64 (describing how the juvenile court is often utilized as a training ground); GEORGIA ASSESSMENT, *supra* note 96, at 2, 29; LOUISIANA ASSESSMENT, *supra* note 108, at 58.

110. Levick & Desai, *supra* note 12, at 177-78.

111. IJA/ABA STANDARDS FOR PRIVATE COUNSEL, *supra* note 15, at 2.1(c).

112. See *id.* (finding that “Competent representation cannot be assured unless adequate supporting services are available,” such as “investigatory, expert and other nonlegal services.”); see also A CALL FOR JUSTICE, *supra* note 81, at 11; LOUISIANA ASSESSMENT, *supra* note 108, at 54 (finding that most juvenile defenders working part-time have to supply their own office space, phones, computers, files and clerical support.); ILLINOIS ASSESSMENT, *supra* note 87, at 64-65; TEN CORE PRINCIPLES, *supra* note 15, at Principle 3.

113. See TEXAS ASSESSMENT, *supra* note 96, at 21 (noting a lack of investigators and experts within the juvenile system); see also LOUISIANA ASSESSMENT, *supra* note 108, at 66 (pointing out the rarity of defense experts); VIRGINIA ASSESSMENT, *supra* note 87, at 30.

114. Marrus, *supra* note 83, at 359.

115. A CALL FOR JUSTICE, *supra* note 81, at 22 (citing Feld, *supra* note 81).

116. IJA/ABA STANDARDS FOR PRIVATE COUNSEL, *supra* note 15, at 2.1.

117. See, e.g., Blitzman, *supra* note 78, at 85 (finding that, “[s]ome states rely on private attorneys or bar advocates to represent indigent juvenile clients at hourly rates that are often inadequate; whereas, other states feature full-time salaried state public defenders.”).

venile defenders in particular jurisdictions.¹¹⁸ In other jurisdictions, shockingly low fee caps and payment structures that limit reimbursement to attorneys for time spent out of court create disincentives to providing thorough representation.¹¹⁹ The little value placed on juvenile defense representation becomes increasingly apparent when compared to the resources spent on prosecution. In many jurisdictions, prosecutors earn higher salaries than defense attorneys.¹²⁰ Nationally, only two percent of total state and federal criminal justice expenditures go toward indigent defense; in comparison, more than half of the spending goes toward funding police and prosecution.¹²¹

5. High Caseloads and Workloads

Unreasonably high caseloads seriously hamstringing defenders in their ability to provide quality representation to youth who cannot afford private counsel.¹²² Ethical rules and professional standards make clear that defenders must maintain reasonable caseloads so they can effectively handle each case and avoid conflicts of interest.¹²³ In addition, a 2006 ABA ethics opinion requires individual lawyers and their supervisors to control their workloads so that matters are competently and diligently handled; in particular, the opinion directs attorneys not to accept new cases or to move to withdraw from cases when necessary.¹²⁴

118. See, e.g., LOUISIANA ASSESSMENT, *supra* note 108, at 54 (salaries in some jurisdictions are as low as \$22,000-30,000 a year); OHIO ASSESSMENT, *supra* note 108, at 35; NAT'L JUVENILE DEFENDER CTR. ET AL., MISSISSIPPI: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN YOUTH COURT PROCEEDINGS 8 (2007) [hereinafter MISSISSIPPI ASSESSMENT] (asserting Mississippi juvenile defenders contended that they do not receive adequate compensation for their critically important work and that judges, attorneys, and youth court personnel all agree that low fees prevent court-appointed defenders from investing the necessary time on youth court cases); ILLINOIS ASSESSMENT, *supra* note 87, at 64 (concluding that pay is better in felony court).

119. See, e.g., TEXAS ASSESSMENT, *supra* note 96, at 19; MAINE ASSESSMENT, *supra* note 96, at 30-31 (noting that lawyers can spend six hours per client given fee caps/hourly rates); VIRGINIA ASSESSMENT, *supra* note 87, at 19 (finding that fees in juvenile cases were capped at \$112 per case); TEN CORE PRINCIPLES, *supra* note 15, at Principle 3 (finding that "[t]he public defense delivery system encourages juvenile specialization without limiting access to promotions, financial advancement, or personnel benefits for attorneys and support staff...").

120. LOUISIANA ASSESSMENT, *supra* note 108, at 55; see also GEORGIA ASSESSMENT, *supra* note 96, at 2, 27.

121. Book Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1734 (2005).

122. See, e.g., NEVADA INDIGENT DEF. COMM'N REPORT, *supra* note 79, at 7 (stating that, "if caseloads are too high, adequate representation simply cannot be provided and Nevada cannot meet its obligation to provide defense services for those who are unable to afford to retain counsel.").

123. See MODEL RULES OF PROF'L CONDUCT, at R. 1.3 & cmt. 2 (finding that a lawyer's workload "must be controlled so that each matter may be handled competently"); see also *id.* at R. 1.4, 1.7(b); IJA/ABA STANDARDS FOR PRIVATE COUNSEL, *supra* note 15, at 2.2 ("defender office should not accept more assignments than its staff can adequately discharge"); NCJFCJ GUIDELINES, *supra* note 15, at 25, 78; NEVADA DEFENSE STANDARDS, *supra* note 105, at 3 (stating that, "[c]ounsel should not carry a workload that by reason of its excessive size or representation requirements interfere with the rendering of quality legal services, endangers the juvenile's interested in the speedy disposition of charges or risks breach of professional obligation.").

124. AM. BAR ASS'N STANDING COMM. ON ETHICS & PROFESSIONAL RESPONSIBILITY, FORMAL

Determining what constitutes a “reasonable”¹²⁵ juvenile caseload is challenging, however. Juvenile cases range in seriousness from minor misdemeanors to very serious felonies, and the touchstone for determining reasonability is whether the attorney can provide effective representation to each client.¹²⁶ For these reasons, commentators have argued the more appropriate standard is “workload” rather than caseload.¹²⁷ Nonetheless, some organizations have set numerical guidelines which provide a rough frame of reference. For example, both the National Advisory Commission on Criminal Justice Standards and Goals and the Nevada Indigent Defense Commission have recommended caseload limits of 200 juvenile cases per year.¹²⁸ While caseloads vary widely from jurisdiction to jurisdiction, public defenders regularly represent far more clients than such standards allow. In one jurisdiction, public defenders reported handling up to an astounding 1,400 juvenile cases per year,¹²⁹ and in others juvenile defenders regularly handle average caseloads of 400 cases per year.¹³⁰

Unreasonable caseloads constitute “one of the most pressing issues facing indigent defense programs,” and create significant disparities in the quality of representation paying clients and indigent clients receive.¹³¹ The high caseloads also negatively impact indigent *juvenile* clients more than indigent *adult* clients. Public defenders who handle overwhelming caseloads of both criminal and delinquency cases often make “triage” decisions, and it is not unusual for defenders to focus most of their attention on adult felony cases, at the expense of their delinquency clients.¹³² In addition to seriously compromising each aspect of the representation, the constant burden of unrealistic caseloads also fosters anxiety, burnout, and job dissatisfaction among attorneys who, through no fault of their own, cannot provide even minimally adequate representation to each of their clients.¹³³ It is no surprise, then, that a California study found many juvenile defenders in the state identified reduction of caseloads as the most significant step the court could take to improve their work lives.¹³⁴

OPINION 06-441: ETHICAL OBLIGATIONS OF LAWYERS WHO REPRESENT INDIGENT CRIMINAL DEFENDANTS WHEN EXCESSIVE CASELOADS INTERFERE WITH COMPETENT AND DILIGENT REPRESENTATION (May 13, 2006); *see also* BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, KEEPING DEFENDER WORKLOADS MANAGEABLE 4 (2001), *available at* <http://www.ncjrs.gov/pdffiles1/bja/185632.pdf> [hereinafter KEEPING WORKLOADS MANAGEABLE].

125. *See* NEVADA DEFENSE STANDARDS, *supra* note 105, at 3.

126. *See* KEEPING WORKLOADS MANAGEABLE, *supra* note 124, at 7.

127. *Id.* at 3.

128. *Id.* at 8.

129. 2 AM. BAR ASS'N ET AL., NO EXCEPTIONS: A CAMPAIGN TO GUARANTEE A FAIR SYSTEM OF JUSTICE FOR ALL 3 (2003), *available at* http://www.noexceptions.org/pdf/june_pub.pdf (citing a report that found that defenders in Clark County, Nevada carried caseloads seven times the national standard).

130. *See, e.g.*, WASHINGTON ASSESSMENT, *supra* note 32, at 41; ILLINOIS ASSESSMENT, *supra* note 87, at 3 (excessive caseloads impede client contact); MISSISSIPPI ASSESSMENT, *supra* note 118, at 44 (“court appointed defenders have virtually unlimited caseloads”).

131. KEEPING WORKLOADS MANAGEABLE, *supra* note 124, at 1-2.

132. *Id.* at 4.

133. A CALL FOR JUSTICE, *supra* note 81, at 8.

134. CALIFORNIA ASSESSMENT, *supra* note 108, at 25.

C. Barriers to Access to Counsel

In addition to the many obstacles limiting *quality* of representation, serious barriers also impede *access* to counsel. Large numbers of youth navigate the court process without any legal representation at all because they waive their right to counsel at the urging of others without understanding the consequences.¹³⁵ Even for those youth who ultimately receive representation, attorneys do not consistently provide representation at each critical stage of the proceedings, including the detention and post-disposition stages.

I. High Rates of Waiver of Counsel

The excessively high rates of youth waiving their right to counsel explains, in large part, why so many youth go unrepresented in court.¹³⁶ The National Council of Juvenile and Family Court Judges *Juvenile Delinquency Guidelines* strongly discourage judges from accepting waivers of the right to counsel by youth in delinquency cases.¹³⁷ While some states require that youth meet with counsel before waiving the right to counsel,¹³⁸ and three states prohibit waiver altogether,¹³⁹ in many jurisdictions, large percentages of youth (up to eighty to ninety percent) waive their right to counsel without first being given the opportunity to consult with an attorney.¹⁴⁰

A strong presumption exists against waivers of fundamental rights and such waivers are only valid if given knowingly, intelligently, and voluntarily;¹⁴¹ how-

135. See Samuel M. Davis, *The Role of Attorney in Child Advocacy*, 32 U. LOUISVILLE J. FAM. L. 817, 823 (1994) (citing Barry Feld, *In re Gault Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 CRIME & DELINQ. 393, 406 (1988) (finding that in some states, fewer than one half of the juveniles appearing in delinquency court—including those charged with status offenses -- were represented by counsel)); see also Stevens H. Clarke & Gary G. Koch, *Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference?* 14 LAW & SOC'Y REV. 263, 299 (1980) (citing an earlier study yielding similar results found that only one half or a little more than one half of juveniles were represented by counsel).

136. See A CALL FOR JUSTICE, *supra* note 81, at 7-8; see also Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 581 (2002); ABA, GIDEON'S BROKEN PROMISE, *supra* note 21, at 26 (noting that while waiver of counsel is a problem in adult criminal court, "[t]he problem is especially acute with respect to juveniles").

137. NCJFCJ GUIDELINES, *supra* note 15, at 25.

138. Foxhoven, *supra* note 5, at 107 n.110.

139. See 705 ILL. COMP. STAT. ANN. 405/5-170(b) & 725 ILL. COMP. STAT. ANN. 5/115-1.5 (referencing an Illinois law prohibiting children under the age of 17 from waiving their right to counsel in any judicial proceeding); State v. Doe, 621 P.2d 519 (N.M. 1980) (stating a child cannot waive the initial appointment of counsel provided for by N.M. Child. Ct. R. 22(d)); N.C. GEN. STAT. § 7B-2000 (prohibiting juveniles from waiving their right to counsel at any stage of their proceedings, under any circumstances).

140. See Judith B. Jones, *Access to Counsel*, OJJDP JUVENILE JUSTICE BULL., June 2004, at 2, available at <http://www.ncjrs.org/pdffiles1/ojjdp/204063.pdf>; see also GEORGIA ASSESSMENT, *supra* note 96, at 1; LOUISIANA ASSESSMENT, *supra* note 108, at 59-60; OHIO ASSESSMENT, *supra* note 108, at 25 (noting that up to eighty percent of juveniles waive the right to counsel); VIRGINIA ASSESSMENT, *supra* note 87, at 23 (finding that about fifty percent of juveniles waive the right to counsel); FLORIDA ASSESSMENT, *supra* note 2, at 27-28 (noting that up to seventy-five percent of juveniles waive the right to counsel in some jurisdictions).

141. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

ever, ample evidence suggests that, in practice, courts do not ensure that youth understand the magnitude of the decision they are making when they waive counsel.¹⁴² Developmental psychology research demonstrates that juveniles' limited decision-making abilities and understanding of legal rights raise serious questions about their ability to effectively exercise their waiver rights.¹⁴³ Yet even in the small number of states which have strict requirements regarding juvenile waiver, it appears that judges often fail to provide juveniles with even the most basic of advisories about their rights.¹⁴⁴

In addition to inadequate advisements, some judges will pressure youth to waive counsel by suggesting that an attorney is not necessary because, for example, the youth will not face serious consequences at disposition.¹⁴⁵ In addition, parents sometimes encourage waivers because they fear having to pay for an attorney or because the judge tells them that they will not have to return to court again if their child waives counsel and pleads guilty at the first appearance.¹⁴⁶

A recent lawsuit in Luzerne County, Pennsylvania, reveals the shocking miscarriages of justice that can occur when youth appear unrepresented in delinquency courts.¹⁴⁷ In 2008, the Juvenile Law Center filed a lawsuit to challenge the disturbingly high numbers of youth appearing unrepresented in Luzerne County juvenile court.¹⁴⁸ Data from 2005 and 2006 showed that one of every two youth in delinquency courts appeared without counsel and without lawful waivers of counsel, and nearly sixty percent of delinquency dispositions for these unrepresented youth resulted in out-of-home placements.¹⁴⁹ Arguing that these waivers of counsel did not meet constitutional standards, the plaintiffs' attorneys sought to compel the court to identify every case in which an unrepresented youth was adjudicated delinquent and asked the state Supreme

142. See Berkheiser, *supra* note 136, at 601 (citing *Zerbst*, 304 U.S. at 464 (1938)).

143. Berkheiser, *supra* note 136, at 582.

144. *Id.* at 617; see also A CALL FOR JUSTICE, *supra* note 81, at 7, 44-45 (describing a nation-wide assessment of indigent systems conducted in 1993 that revealed, for example, that only about half of youth were first advised by the judge of their rights before they waived counsel, and many youth reported that they did not understand the judges' colloquies or they were intimidated by the proceedings); OHIO ASSESSMENT, *supra* note 108, at 27 (explaining that in some cases the content of the colloquy was "lacking in form and substance, and confusion on the part of the juvenile and/or parent was evident").

145. See Davis, *supra* note 135, at 823 (citing Feld, *supra* note 135, at 395); see also ABA, GIDEON'S BROKEN PROMISE, *supra* note 21, at 25 (noting a report that judges in Maryland "habitually suggest to juveniles that they waive their right to an attorney.").

146. See A CALL FOR JUSTICE, *supra* note 81, at 7-8, 45; see also OHIO ASSESSMENT, *supra* note 108, at 28.

147. *In re J.V.R.*, No. 81, M.M. 2008 (Pa. Sup. Ct. M.D. 2008). Documents pertaining to the lawsuit are available at <http://www.jlc.org/luzerne/>.

148. Application For An Exercise of Either King's Bench Power or Extraordinary Jurisdiction From Delinquency Dispositions Entered by the Luzerne County Court of Common Pleas—Juvenile Division, *In re J.V.R.*, No. 81, M.M. 2008 (Pa. Sup. Ct. M.D. 2008) available at http://jlc.org/files/luzernecounty/JLC_Luzerne_Application_Part2.pdf.

149. *Id.* at 10.

Court to vacate the adjudications of all unrepresented youth who were adjudicated delinquent since October 1, 2005.¹⁵⁰

Initially, in January, 2009, the state Supreme Court denied the plaintiffs' request to reopen their cases.¹⁵¹ In a shocking twist, criminal allegations surfaced thereafter that two Luzerne County judges, including the juvenile court Judge Mark A. Ciavarella, Jr. and his colleague Judge Michael T. Conahan, were taking kickbacks to send youth to privately-run detention centers.¹⁵² When allegations surfaced, the Pennsylvania Supreme Court reversed its decision and appointed a Special Master to review all Luzerne County juvenile court adjudications and dispositions in which the judge committed juveniles to the private detention facilities and in which it is alleged that juveniles were denied their right to counsel.¹⁵³ In the meantime, on February 11, 2009, the two judges pled guilty in federal court to wire fraud and income tax fraud for the kickback scheme,¹⁵⁴ and on March 26, 2009, the Pennsylvania Supreme Court entered its first order vacating the adjudications and expunging the records of a large class of youth who appeared unrepresented between 2003 and 2008. The class included those youth who did not properly waive their right to an attorney and who had been charged with certain low-level offenses. On October 29, 2009, the state Supreme Court entered a remarkable order vacating the delinquency adjudications of all youth appearing before former Judge Ciavarella between 2003 and 2008.¹⁵⁵ At the time of this writing, the case and a related federal civil rights lawsuit remain pending.¹⁵⁶

While it represents a particularly egregious miscarriage of justice (that has been described as the "most serious judicial scandal in the history of the United States")¹⁵⁷, the Luzerne County experience demonstrates just how vul-

150. *Id.* at 8.

151. See Motion for Reconsideration of Denial of Application for the Exercise of King's Bench Power or Extraordinary Jurisdiction and to Amend Application, *In re J.V.R.*, No. 91 M.M. 2008 (Pa. Sup. Ct. M.D. 2009) at 1, available at http://jlc.org/files/luzernecounty/motion_for_reconsideration.pdf.

152. See *id.*

153. Order, *In re J.V.R.*, No. 81 M.M. 2008 (Pa. Sup. Ct. M.D. Feb. 11, 2009), available at <http://www.aopc.org/OpPosting/Supreme/out/81mm2008pc02.pdf>.

154. Ian Urbina & Sean D. Hamill, *Judges Plead Guilty in Scheme to Jail Youths for Profit*, N.Y. TIMES, Feb. 12, 2009, at A22. U.S. District Court Judge Kosik rejected the defendants' guilty pleas on July 31, 2009, citing obstruction of justice and stating that the plea agreements were well below sentencing guidelines. See Order, Case no 3:09-cr-28 (U.S. Dist. Ct. M.D. Pa. July 31, 2009), available at http://www.justice.gov/usao/pam/Victim_Witness/Luzerne_County_Corruption/Ciavarella_Conahan/Conahan%20%20Ciavarella%20%20Kosik%20Order%20Rejecting%20Plea.pdf.

155. See Order, *In re: Expungement of Juvenile Records and Vacatur of Luzerne County Juvenile Court Consent Decrees or Adjudications from 2003-2008*, related to *In re J.V.R.*, No. 81 MM 2008 (October 29, 2009), available at <http://jlc.org/files/luzernecounty/81mm2008pc06.pdf>.

156. The federal civil rights case is *H.T. et al. v. Ciavarella et al.*, No. 3:09-cv-0357 (M.D. Pa 2009). The amended complaint is available at <http://www.jlc.org/files/luzernecounty/Amended-Master-Complaint-August-27-09.pdf>.

157. See Juvenile Law Center statement on October 29, 2009 order at http://jlc.org/news/28/court_decision_9_29_09/.

nerable unrepresented youth are to abuses by the state. Even under normal circumstances, the consequences of waiving counsel can be devastating.¹⁵⁸ Denials of counsel expose youth to unconstitutional admissions of guilt and unnecessary out-of-home placements and subject youth to the stigma of, and collateral consequences associated with, adjudications.¹⁵⁹

2. Indigence Determinations and Fees

The lack of guidance from the Supreme Court or other sources on how jurisdictions should decide who is entitled to a court-appointed attorney is another significant obstacle to the provision of counsel for low-income youth. As a result, eligibility determinations “hang on the serendipity of where an individual lives, the personal characteristics of the decision-maker, institutional conflicts of interest, or any of the other improper factors that substitute for more reliable standards and procedures.”¹⁶⁰ The inconsistency in how indigence determinations are made across jurisdictions creates inequities in implementation of the right to counsel.¹⁶¹ In Florida, for example, the law provides that individuals are eligible for public defense services if their income is not greater than two hundred percent of the federal poverty guidelines or if retaining private counsel would pose substantial hardship.¹⁶² Yet in practice, these indigence rules are not uniformly adhered to; for example, in two counties visited as part of statewide indigent defense assessment, investigators described the clerk’s “standard” as follows: “if the parent has \$5.00 in his bank account, he is not indigent.”¹⁶³ Similarly, in Illinois, where no standardized written procedures exist, whether someone receives an attorney turns in part on where that individual lives.¹⁶⁴ In some counties, for example, attorneys are automatically appointed.¹⁶⁵ In others, judges apply federal poverty guidelines or use arbitrary, unwritten guidelines to decide eligibility,¹⁶⁶ and some other counties leave eligibility determinations to the public defender office.¹⁶⁷

Unique issues arise when determining eligibility for youth, as opposed to adults. Most youth are financially dependent on a parent or guardian and cannot afford private counsel on their own, and it is problematic for courts to rely on parents’ income because parents may have conflicts of interests with their

158. See Blitzman, *supra* note 78, at 91 (“Having waived counsel, youth have thrown themselves on the mercy of the court.”).

159. See Levick & Desai, *supra* note 12, at 175-76.

160. BRENNAN CTR. FOR JUSTICE, ELIGIBLE FOR JUSTICE: GUIDELINES FOR APPOINTING DEFENSE COUNSEL I (2008), available at <http://www.brennancenter.org/page/-/publications/Eligibility.Report.pdf>.

161. See generally Foxhoven, *supra* note 5, at 101 (citing FLORIDA ASSESSMENT, *supra* note 2, at 33).

162. FLORIDA ASSESSMENT, *supra* note 2, at 33.

163. Foxhoven, *supra* note 5, at 101 (quoting FLORIDA ASSESSMENT, *supra* note 2, at 33) (reporting the attitude that “if the parent has \$5.00 in his bank account, he is not indigent”).

164. ILLINOIS ASSESSMENT, *supra* note 87, at 34-35.

165. *Id.*

166. *Id.*

167. *Id.*

child and be unwilling retain an attorney for the case.¹⁶⁸ Failing to understand the significant potential consequences of a juvenile adjudication, as well as the possible defenses available to their child, some parents might pressure their children to waive the right to counsel and plead guilty to avoid having to pay attorney's fees.¹⁶⁹ In other cases, such as those involving domestic disputes, parents might be the complaining witness, creating an even more direct conflict of interest. In situations in which parents choose to pay fees, the defender might confuse to whom she owes her ethical duties; instead of representing the expressed interests of the youth, the attorney might be tempted to allow the parents to direct the course of the litigation.¹⁷⁰

As a result, some courts assume the indigence of juveniles based on their own lack of income, regardless of the parents' income,¹⁷¹ and parents are not ordered to reimburse the state for the cost of legal representation provided their children.¹⁷² In other jurisdictions, youth are provided counsel when their parents are unwilling to hire private counsel, but the state can then seek reimbursement from the parents.¹⁷³ Many courts, however, are reluctant to assume indigency and instead consider parent's income for eligibility determinations, which serves as a barrier to representation for some youth.¹⁷⁴

The attorneys' fees (and other surcharges) that are often assessed against youth in delinquency cases also create another obstacle for low-income families. For example, in some counties in Illinois, even when attorneys are automatically appointed, families may be forced to pay attorney's fees ranging from \$30-100, in addition to probation costs and other surcharges.¹⁷⁵ In Florida, a statute requires individuals to pay a \$40 fee to apply for indigent defense services.¹⁷⁶ And parents who are deemed not to be indigent and who do not hire counsel for their child must pay attorneys' fees ranging from \$50 to \$500; the fees vary depending on the jurisdiction, and in some courtrooms, on whether the attorney is a public defender or private appointed counsel.¹⁷⁷

168. See MISSISSIPPI ASSESSMENT, *supra* note 118, at 28 (finding that not factoring parents' income in indigency determinations is commendable because parents cannot be required to pay lawyer's fees for their child when conflicts of interest exist).

169. See Andrea L. Martin, *Balancing State Budgets at a Cost to Fairness in Delinquency Proceedings*, 88 MINN. L. REV. 1638, 1659 (2004) ("The co-payment statute frustrates the juvenile's straightforward due process right to counsel by making a parent, whose interests may conflict with the juvenile's interests, responsible for paying for the juvenile's right to counsel."); see also ILLINOIS ASSESSMENT, *supra* note 87, at 34-35; FLORIDA ASSESSMENT, *supra* note 2, at 33.

170. See ILLINOIS ASSESSMENT, *supra* note 87, at 34-35.

171. See MISSISSIPPI ASSESSMENT, *supra* note 118, at 28.

172. *Id.*

173. See e.g., *In re J.B.*, 603 A.2d 368, 368 (Vt. 1991).

174. See Marrus, *supra* note 83, at 325-26; see also OHIO ASSESSMENT, *supra* note 108, at 34 (regarding lack of clear procedures for determining indigency); FLORIDA ASSESSMENT, *supra* note 2, at 33 (addressing the cost and administrative burden of the court's indigency determination).

175. ILLINOIS ASSESSMENT, *supra* note 87, at 35.

176. FLORIDA ASSESSMENT, *supra* note 2, at 33.

177. *Id.*

These fee structures interfere with the fundamental constitutional rights of indigent youth by imposing financial burdens on the exercise of those rights. Given the unique nature of adolescence, which makes juveniles susceptible to coercion and pressure from their parents and less likely to understand the consequences of waiving counsel, commentators have argued that such fees should not apply in delinquency cases.¹⁷⁸

3. Failure to Ensure Counsel at All Critical Stages

Although professional standards and guidelines require that counsel be available to youth at all stages of a delinquency case, in many courtrooms, youth are denied access to counsel at critical stages of the proceedings, including at detention hearings and after disposition.¹⁷⁹

Late Appointments and Detention Advocacy

Due process necessitates that counsel be appointed at the earliest stage of a delinquency case in order to provide sufficient time to advise the client, investigate the case, ensure that youth do not waive critical rights, and prepare for the detention hearing.¹⁸⁰ In practice, however, many defense attorneys are appointed right before the detention hearing;¹⁸¹ not surprisingly, without any time to prepare, they fail to advocate effectively at these hearings.¹⁸² Even more disturbing, a survey of attorneys around the country revealed that twenty-two percent were appointed after the detention hearing.¹⁸³ Denying counsel to youth at detention hearings is unconscionable because, as Justice Marshall wrote in his dissent in *Schall v. Martin*, detention of youth “gives rise to injuries comparable to those associated with the imprisonment of an adult.”¹⁸⁴ Denial of counsel at this early stage also places youth at a disadvantage for the remainder of the case since youth who are detained pretrial are more likely to be formally processed, adjudicated, and placed out of home at disposition.¹⁸⁵

178. See *Martin*, *supra* note 169, at 1671-72.

179. See Levick & Desai, *supra* note 12, at 184-89 (arguing that the Sixth Amendment critical stage analysis applies to juveniles).

180. See A CALL FOR JUSTICE, *supra* note 81, at 31 (finding, “[e]arly intervention by lawyers—to investigate charges, provide legal advice, and explore alternatives to secure detention—may have significant impact on the entire course of delinquency proceedings.”).

181. See *id.* at 9; see also OHIO ASSESSMENT, *supra* note 108, at 16.

182. See DAHLBERG, *supra* note 4, at 8 (noting that very few court-appointed defense attorneys reported consistently challenging the detention of their clients); see also ILLINOIS ASSESSMENT, *supra* note 87, at 3; INDIANA ASSESSMENT, *supra* note 87, at 42.

183. See A CALL FOR JUSTICE, *supra* note 81, at 49; see also VIRGINIA ASSESSMENT, *supra* note 87, at 2.

184. *Schall v. Martin*, 467 U.S. 253, 291 (1984) (Marshall, J., dissenting).

185. See, e.g., BARRY HOLMAN & JASON ZIEDENBERG, THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 5 (JUSTICE POLICY INSTITUTE 2006), available at http://www.justicepolicy.org/images/upload/06-11-REP_DangersOfDetention_JJ.pdf.

Failure to Provide Post-disposition Representation

Post-disposition representation is critical to help youth contest unconstitutional conditions of confinement, file appeals, and advocate for particular rehabilitation services.¹⁸⁶ Effective post-disposition representation can also reduce recidivism by helping to ensure youth successfully reintegrate into their communities once their case has closed.¹⁸⁷ Yet during this critical stage of the proceedings, countless youth remain unrepresented,¹⁸⁸ in violation of national standards.¹⁸⁹

The barriers to post-disposition representation vary across jurisdictions. For example, an assessment of access to counsel in Florida revealed that most attorneys and public defender offices end their representation at the disposition hearing.¹⁹⁰ A similar assessment in Mississippi found that many contract attorneys mistakenly assumed that they were prohibited from representing their clients post-disposition, and as a result, most never visited their incarcerated clients.¹⁹¹ Even where the duty to engage in post-disposition representation is explicitly acknowledged, the quality of representation falls below what would be expected. In California, juvenile defenders identified lack of time, funding, and resources as key obstacles to fulfilling their post-disposition duties, which are outlined in a court rule.¹⁹² As a result, only about one-half of defenders surveyed maintained frequent client contact, and just one-fourth visited clients frequently.¹⁹³ In Illinois, many of the attorneys interviewed for an assessment admitted that they did not contest charges of probation violations because of the state has to meet only a “low burden of proof” in such proceedings.¹⁹⁴

186. See A CALL FOR JUSTICE, *supra* note 81, at 55; see also Sandra Simkins, *Out of Sight, Out of Mind: How the Lack of Postdispositional Advocacy in Juvenile Court Increases the Risk of Recidivism and Institutional Abuse*, 60 RUTGERS L. REV. 207, 219-21 (2007); FACJJ REPORT, *supra* note 14, at 27 (explaining that “[e]ffective assistance of counsel requires attorneys to visit their clients and monitor how they are treated in jails and lockups.”).

187. See Simkins, *supra* note 186, at 220-21.

188. See A Call For Justice, *supra* note 81, at 10; see also Simkins, *supra* note 186, at 209 (noting that the lack of mandatory review hearings and postdispositional representation, which are often the lowest priority for delinquency attorneys and the court system, is a cause for great concern as they have the power to reduce recidivism, decrease juvenile justice expenditures, and prevent institutional abuse); FLORIDA ASSESSMENT, *supra* note 2, at 3 (asserting that post-disposition advocacy was “virtually nonexistent”).

189. See NCJFCJ GUIDELINES, *supra* note 15, at 169; see also IJA/ABA STANDARDS FOR PRIVATE COUNSEL, *supra* note 15, at 10.1; NACC JUVENILE JUSTICE POLICY, *supra* note 15, at 1; TEN CORE PRINCIPLES, *supra* note 15, at Principle 1.

190. FLORIDA ASSESSMENT, *supra* note 2, at 47.

191. MISSISSIPPI ASSESSMENT, *supra* note 118, at 41-42.

192. CALIFORNIA ASSESSMENT, *supra* note 108, at 27.

193. *Id.* at 26.

194. ILLINOIS ASSESSMENT, *supra* note 87, at 60.

Juvenile defenders also rarely appeal delinquency cases,¹⁹⁵ and some public defender offices are not authorized to handle appeals.¹⁹⁶ In other jurisdictions, court-appointed attorneys cited their own lack of expertise, the fact that they did not get paid to file an appeal, or their belief that filing appeals was futile as reasons for not challenging adverse rulings.¹⁹⁷ The lack of appeals is disastrous because it means that some youth's rights will go unprotected and judges' discretion will remain unchecked.

III. THE IMPACT OF BROKEN JUVENILE INDIGENT DEFENSE SYSTEMS ON LOW-INCOME YOUTH AND YOUTH OF COLOR

Because of the numerous systemic barriers compromising access to and quality of counsel, low-income youth served by the juvenile indigent defense systems face significantly harsher treatment in the justice system than youth who have access to private counsel. Youth with private attorneys are less likely to be held in detention pretrial.¹⁹⁸ In addition, "middle class kids whose families have the resources to retain lawyers and kids with roots in affluent communities are more likely to land at the 'soft end' [of consequences] than their lower class counterparts."¹⁹⁹ Representation by a private attorney also "significantly improves a youth's chances of being acquitted or having the cases returned to juvenile court if they were originally prosecuted as adults."²⁰⁰ Notably, this is true, regardless of racial and ethnic background of the child.²⁰¹ These disparities in outcomes obtained by private attorneys compared to indigent defenders reflect the serious systemic failings of the juvenile indigent defense system discussed above.²⁰²

195. See, e.g., LOUISIANA ASSESSMENT, *supra* note 108, at 69; VIRGINIA ASSESSMENT, *supra* note 87, at 28; OHIO ASSESSMENT, *supra* note 108, at 32-33; FLORIDA ASSESSMENT, *supra* note 2, at 32; LAVAL S. MILLER-WILSON & PATRICIA PURITZ, PENNSYLVANIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 6 (Juvenile Law Center et al. eds., 2003), available at <http://www.njdc.info/pdf/pareport.pdf> [hereinafter PENNSYLVANIA ASSESSMENT].

196. See A CALL FOR JUSTICE, *supra* note 81, at 10 (detailing a survey that showed thirty-two percent of public defender offices are not authorized to handle appeals, and of those that are, forty-six percent took no appeals in juvenile cases during the year prior to the survey).

197. MISSISSIPPI ASSESSMENT, *supra* note 118, at 41-42.

198. See ANNIE E. CASEY FOUNDATION, RACE MATTERS: UNEQUAL OPPORTUNITIES FOR JUVENILE JUSTICE (2006), available at http://www.aecf.org/upload/publicationfiles/fact_sheet12.pdf [hereinafter RACE MATTERS] (finding that having a private attorney significantly improves a youth's chances of "being acquitted or having the cases returned to juvenile court if they were originally prosecuted as adults.")

199. Barbara Bennett Woodhouse, *Youthful Indiscretions: Culture, Class Status, and the Passage to Adulthood*, 51 DEPAUL L. REV. 743, 757 (2002).

200. See RACE MATTERS, *supra* note 198, at 2 (citing ELEANOR HYNTON HOYTT ET AL., PATHWAYS TO JUVENILE DETENTION REFORM: REDUCING RACIAL DISPARITIES IN JUVENILE DETENTION (Annie E. Casey Foundation 2001); see also JESSICA SHORT & CHRISTY SHARP, CHILD WELFARE LEAGUE OF AMERICA, DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM 15 (2005) (citing JOLANTA JUSZKIEWICZ, YOUTH CRIME/ADULT TIME: IS JUSTICE SERVED? (2000), available at <http://www.buildingblocksforyouth.org/ycat/ycat.html>).

201. See SHORT & SHARP, *supra* note 200, at 15 (citing JUSZKIEWICZ, *supra* note 190).

202. See SHORT & SHARP, *supra* note 200, at 15.

The impact of these broken indigent defense systems falls disproportionately on youth of color. African American, Latino/a, Native American, and Asian American youth are less likely to come from families that can afford legal representation.²⁰³ Studies have shown that white youth are twice as likely as African American youth to be able to afford representation by a private attorney, while African American youth must rely more often on the indigent defense system.²⁰⁴ Another study found that twenty-one percent of white youth, compared to only eleven percent of African American youth, retain private attorneys in delinquency cases.²⁰⁵

A. Disparities in Legal Representation Perpetuate the Socioeconomic and Racial Injustices of the Juvenile Justice System.

The failings of the juvenile indigent defense system serve only to perpetuate and exacerbate the injustices imbedded in the juvenile system as a whole. Strong indigent defense systems are “essential to shield poor citizens, and indirectly all citizens, against abuses by the state,” such as the overreaching of police and prosecutorial discretion.²⁰⁶ These abuses “tend to occur first against poor people alienated from the socioeconomic and political mainstreams.”²⁰⁷ This applies with equal effect in delinquency courts. When low-income youth are denied effective representation, they stand little chance of protecting their rights and defending themselves against the abuses of state power.

The juvenile justice system is not an equal opportunity institution.²⁰⁸ Countless studies have documented the overrepresentation of youth of color within the juvenile justice system.²⁰⁹ Racial disparities are found at every stage

203. See RACE MATTERS, *supra* note 198, at 1 (“African American, Latino/a, and Native American youth disproportionately live in families with lower incomes.”); see also WORKING GROUP ON JUVENILE JUSTICE, U.S. HUMAN RIGHTS NETWORK, CHILDREN IN CONFLICT WITH THE LAW: JUVENILE JUSTICE AND THE U.S. FAILURE TO COMPLY WITH OBLIGATIONS UNDER THE CONVENTION FOR THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION II (2008), available at <http://www.juvenilejusticepanel.org/resource/items/U/S/USHRNWGroupJJUSFailureICERDo8.pdf> (finding that, “[b]ecause the United States has both a disproportionate number of people of color living in poverty, and a disproportionate percentage of children of color involved with the juvenile justice system, it stands to reason that the client population of many juvenile indigent defenders is disproportionately African American, Latino, Asian American and Native American”); Shirley Tang, *Challenges of Policy and Practice in Under-Resourced Asian American Communities: Analyzing Public Education, Health, and Development Issues with Cambodian American Women*, 15 ASIAN AM. L.J. 153, 154 (2008) (stating that, “[a]ggregate data may seem to show that Asian Americans excel educationally and economically; however, when disaggregated by ethnic group, data indicate that certain communities, especially Southeast Asians, have some of the highest poverty rates of any group locally or nationally.”).

204. See RACE MATTERS, *supra* note 198, at 2 (citing HOYTT ET AL., *supra* note 200); see also SHORT & SHARP, *supra* note 200, at 15.

205. SHORT & SHARP, *supra* note 200, at 15 (citing JUSZKIEWICZ, *supra* note 190).

206. Fabelo, *supra* note 19, at 136.

207. *Id.*

208. See Woodhouse, *supra* note 199, at 745 (disparities based on socioeconomic status and race).

209. See, e.g., EILEEN POE-YAMAGATA & MICHAEL A. JONES, AND JUSTICE FOR SOME: DIFFEREN-

of the juvenile court process,²¹⁰ beginning at the initial arrest decision,²¹¹ and these disparities cannot be explained by differences in offense rates.²¹² In fact one Office of Juvenile Justice and Delinquency Prevention study found that African American youth were arrested for drug offenses at rates twice as high as white youth, even though more white youth reported selling drugs than African American youth.²¹³ As youth progress deeper into the system, the disparities only widen, with youth of color significantly more likely to be detained pretrial²¹⁴ and be placed out of home after adjudication.²¹⁵

The powerful role of race is intertwined with the socio-economic disparities pervading the system. Youth from the middle and upper classes are “under-represented” in the system, while “lower-class youths...are substantially over-represented in the juvenile justice system.”²¹⁶

Studies confirm that low-income youth receive more severe dispositions than other youth, even when controlling for other relevant legal factors, such as severity of the underlying offense.²¹⁷ In fact, as the poverty rate in a particular jurisdiction increases so does that jurisdiction’s willingness to incarcerate the youth living there.²¹⁸

TIAL TREATMENT OF MINORITY YOUTH IN THE JUSTICE SYSTEM 1-3 (2000), available at <http://www.buildingblocksfor youth.org/justiceforsome/jfs.pdf>; Donna M. Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis*, 86 J. CRIM. L. & CRIMINOLOGY 392, 392 (1996); Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 402-05 (2007).

210. See Tamara A. Steckler, *Litigating Racism: Exposing Injustice in Juvenile Prosecutions*, 60 RUTGERS L. REV. 245, 247 (2007).

211. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, STATISTICAL BRIEFING BOOK (2008), available at http://ojjdp.ncjrs.org/ojstatbb/crime/JAR_Display.asp?ID=qao5260 (comparing data from 2007 when there were about 5,698 arrests of white juveniles for every 100,000 white persons ages 10-17 in the population with the arrest rate for black juveniles, which was more than twice the arrest rate for white youth.); Blitzman, *supra* note 78, at 78 (noting that African Americans comprise only seventeen percent of the youth population overall, but forty-three percent of all juvenile arrests) (citing HOWARD N. SNYDER, U.S. DEP’T OF JUSTICE, JUVENILE ARRESTS 2001, at 1-4, 6-10 (2003), <http://www.ncjrs.gov/html/ojjdp/201370/page8.html>).

212. See HOLMAN & ZIEDENBERG, *supra* note 185, at 2-3.

213. See PHILLIP BEATTY, AMANDA PETTERUTI, & JASON ZIEDENBERG, THE JUSTICE POLICY INST., THE VORTEX: THE CONCENTRATED RACIAL IMPACT OF DRUG IMPRISONMENT AND THE CHARACTERISTICS OF PUNITIVE COUNTIES 7 (2007).

214. See HOLMAN & ZIEDENBERG, *supra* note 185, at 2-3; see also Bishop & Frazier, *supra* note 209, at 392 (approximating that sixty-two percent of youth who are held in detention facilities pretrial are racial minorities).

215. See NAT’L COUNCIL ON CRIME AND DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 20-21 (2007), available at http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf (noting that African American youth comprise thirty percent of the juveniles adjudicated delinquent, yet thirty-five percent of the dispositions involving out-of-home placement; conversely, white youth constitute only sixty-one percent of out-of-home placements though they comprise sixty-seven percent of the youth adjudicated delinquent).

216. Woodhouse, *supra* note 199, at 756-57. (quoting Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 881 (1988)).

217. *Id.* at 757; see also RACE MATTERS, *supra* note 198, at 3; AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM (2007), *supra* note 215, at 2, 12.

218. See BEATTY ET AL., *supra* note 213, at 17.

The socio-economic disparities reflect, in part, greater police targeting of neighborhoods with high concentrations of low-income people of color.²¹⁹ In addition, the way in which police and other justice system personnel view youth behavior reflects a serious class bias; the same behaviors that when committed by upper class youth are seen as “youthful indiscretions” or “pranks” are viewed as “juvenile crime” when committed by low-income youth.²²⁰ Differential access to community resources also creates a socio-economic bias in the system; the system tends to view children from more affluent families or communities with plentiful resources as more amenable to rehabilitation and therefore less in need of secure confinement.²²¹ Conversely, “[w]hen resources are scarce, [sic] [juvenile justice decision makers] are more likely to conclude that rehabilitation will not be effective.”²²² As a result, “it is the poor kid in trouble (especially if he is Black) who is likely to end up in jail and the rich kid in trouble who is likely to end up in boarding school, a private drug program, or a mental health facility.”²²³

Juvenile defense attorneys have a professional responsibility to highlight and challenge these racial and socioeconomic disparities in the juvenile justice system that “ultimately favor [] affluent children.”²²⁴ Effective defense attorneys can creatively argue at each stage of the proceedings that class and race biases, rather than objective factors relevant to the court process, are driving decisions.²²⁵ They can also advocate vigorously for alternatives to detention and incarceration, which many view as critical to reducing racial disparities.²²⁶ These attorneys can point out, for example, “the inherent unfairness in allowing different courts in different communities to treat normative teen behavior in completely disparate ways, simply because low-income communities do not have the same amenities that affluent communities offer their residents.”²²⁷ Without effective legal representation, it is virtually impossible for low-income youth of color to challenge these injustices in the system and protect their own rights.²²⁸

219. See, e.g., Steckler, *supra* note 210, at 247.

220. Woodhouse, *supra* note 199, at 749, 752, 755.

221. *Id.* at 749, 757.

222. *Id.* at 757-58. (citing Ed Mulvey & N. Dickon Repucci, *The Context of Clinical Judgments: The Effect of Resource Availability on Judgments of Amenability to Treatment in Juvenile Offenders*, 16 AM. J. COMMUNITY PSYCH. (1988)).

223. *Id.* at 754-55.

224. See Steckler, *supra* note 210, at 245; see also TEN CORE PRINCIPLES, *supra* note 15, at Principle 10; Puritz & Majd, *supra* note 83, at 472-73.

225. See Steckler, *supra* note 210, at 252.

226. FACJJ *Report*, *supra* note 14, at 27.

227. See Steckler, *supra* note 210, at 252.

228. See *id.* at 248.

B. Barriers to Legal Representation Fuel the Cycle of Poverty by Leaving Youth Vulnerable to the Serious Collateral Consequences of Juvenile Court Involvement.

Given the increasingly punitive nature of the juvenile justice system, the juvenile defender's role in protecting youth's rights is all the more paramount. When *Gault* was decided, the Supreme Court acknowledged that the consequences of juvenile delinquency proceedings were as serious as those of felony prosecutions.²²⁹ More than forty years later, the juvenile justice system is even more punitive, and the stakes attached to denying youth the right to counsel have only increased.²³⁰ The serious collateral consequences that accompany juvenile adjudications further exacerbate the already-significant barriers to opportunity that many youth living in poverty face.

1. Transfer to Adult Court

In the last two decades, states have passed laws that have resulted in a significant increase in the number of youth tried in adult court.²³¹ As many as 200,000 juveniles are transferred to adult court each year, the majority of whom are not tried for serious, violent crimes.²³² These transfer laws undermine the very purpose of separate juvenile courts and ignore the well-established research on adolescent development, which suggests that youth are less culpable for their actions than adults.²³³ The quality of defense representation youth receive "can be the difference between whether a youth is prosecuted as an adult or is considered in the justice system."²³⁴

Youth facing transfer need the assistance of counsel to help protect them from the serious negative consequences associated with being tried in adult court. These can include incarceration in adult facilities, where youth are particularly vulnerable to sexual and physical abuse, or placement on probation in the adult system, where rehabilitative services for youth are sorely lacking.²³⁵ The stigma associated with an adult criminal conviction can follow youth throughout their lives, limiting their employment and education opportuni-

229. See Levick & Desai, *supra* note 12, at 182 (arguing that defense representations "help blunt the increasingly punitive edge of the juvenile justice system").

230. See Levick & Desai, *supra* note 12, at 182 (arguing that defense representations "help blunt the increasingly punitive edge of the juvenile justice system").

231. *ee* CAMPAIGN FOR YOUTH JUSTICE, CONSEQUENCES AREN'T MINOR: THE IMPACT OF TRYING YOUTH AS ADULTS AND STRATEGIES FOR REFORM 3-4 (2007), available at http://www.campaign4youthjustice.org/Downloads/NEWS/National_Report_consequences.pdf [hereinafter CONSEQUENCES AREN'T MINOR].

232. *Id.* at 6.

233. See generally *id.* at 3; Steinberg and Scott, *supra* note 106, at 1010; Elizabeth S. Scott and Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILDREN 15, 19-20 (2008), available at http://www.futureofchildren.org/futureofchildren/publications/docs/18_02_02.pdf ("Research in developmental psychology supports the view that several characteristics of adolescence distinguish young offenders from adults in ways that mitigate culpability. These adolescent traits include deficiencies in decision-making ability, greater vulnerability to external coercion, and the relatively unformed nature of adolescent character").

234. *Id.* at 10.

235. *Id.* at 9, 13.

ties and diminishing their chances for achieving economic success.²³⁶ These impacts are disproportionately borne by communities of color,²³⁷ and cannot be justified as means to enhance public safety. In fact, studies show that transfer policies actually increase recidivism.²³⁸ With so much at stake, youth need effective legal representation to vigorously advocate on their behalves. As a report from the Campaign for Youth Justice explained, “[t]he best way to prevent youth from entering the adult criminal system... is to have effective legal advocates to help make the case for keeping the youth in the juvenile justice system.”²³⁹

2. Collateral Consequences of Juvenile Court Involvement

While juvenile court may still be preferable to adult court, the reality is that serious long-term consequences flow from juvenile adjudications as well. For low-income youth, these collateral consequences can further fuel the cycle of poverty. For instance, the greater likelihood of detention for low-income youth of color has a negative impact not just on the youth themselves, but also on the communities in which they live. Time spent in detention is associated with negative mental and physical health outcomes, as well as limited education opportunities and future earnings potential.²⁴⁰ Significantly, time spent in detention is also associated with a greater likelihood of recidivism.²⁴¹

A delinquency adjudication can also limit a youth’s educational opportunities (by resulting in expulsion from school or rejection from college), preclude the youth from public housing, and bar the youth from military service.²⁴² Adjudicated youth’s employment opportunities are also compromised because the youth are sometimes required to report adjudications on job applications and certain professions deny licensure to individuals based on prior involvement in the justice system.²⁴³ Youth who are adjudicated delinquent can also face serious immigration consequences.²⁴⁴ In addition, adjudications can be used in criminal cases to enhance sentences.²⁴⁵

236. *Id.* at 13.

237. *Id.* at 11-12.

238. *See id.* at 14; *see also* Task Force on Cmty. Prevention Servs., Ctr. for Disease Control & Prevention, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System*, 56 MORBIDITY & MORTALITY WKLY. REP. (RECOMMENDATIONS & REP.) 7-10 (2007), available at <http://www.cdc.gov/mmwr/pdf/rr/rr5609.pdf>.

239. CONSEQUENCES AREN’T MINOR, *supra* note 231, at 32.

240. HOLMAN & ZIEDENBERG, *supra* note 185, at 2.

241. *Id.* at 2-3.

242. *See* Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles about the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111, 1114-15 (2006); *see also* Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities be Notified?*, 79 N.Y.U. L. REV. 520 (2004); Levick & Desai, *supra* note 12, at 176; Bonnie Mangum Braudway, *Scarlet Letter Punishment for Juveniles: Rehabilitation Through Humiliation?*, 27 CAMPBELL L. REV. 63, 81 (2004) (discussing education and employment consequences).

243. Pinard, *supra* note 242, at 1114.

244. *See* Berkheiser *supra* note 136, at 649.

245. *See* RANDY HERTZ, ET AL., TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT

Under the federal Adam Walsh Act, youth as young as 14 are also subject to sex offender registration laws, in many cases for the rest of their lives, which undermine the rehabilitative purposes of the juvenile justice system.²⁴⁶ By labeling youth as “sex offenders”, registration requirements “stigmatiz[e] the youth and clos[e] available doors for treatment and involvement in the community.”²⁴⁷ Youth placed on registries have difficulty completing school, are more likely to associate with youth who engage in delinquent behavior, and are less likely to be connected to schools and religious institutions in their communities that help to promote successful outcomes.²⁴⁸ Ultimately, these requirements “raise barriers to successful participation in society” without reducing recidivism or increasing public safety.²⁴⁹

Denying youth effective legal representation in delinquency proceedings makes them more vulnerable to these numerous collateral consequences.²⁵⁰

C. Broken Indigent Defense Systems Undermine the Effectiveness of the Juvenile Justice System as a Whole

Broken juvenile indigent defense systems also undermine the effectiveness of the juvenile justice system as a whole. Counsel plays a pivotal role in holding the juvenile justice system accountable. As the American Bar Association’s Presidential Working Group on the Unmet Legal Needs of Children and their Families acknowledged, “Many of the problems that plague the juvenile justice system—including appalling conditions of confinement, inappropriate transfer to adult court, overrepresentation of children of color, and inadequate health and educational services—could be remedied if every child accused of a crime was well represented by competent counsel, knowledgeable about juvenile justice issues and committed to furthering that child’s interests at all points in the juvenile justice process.”²⁵¹ In addition, a justice system that denies effective representation to youth is likely to lose legitimacy in the eyes of the public.²⁵² Ensuring the right to counsel helps to promote the notion that the system is fair, and when citizens view the system as fair, they are more likely to support it.²⁵³ Studies show that individuals, particularly those from low-

276-78 (ALI-ABA 2007).

246. See AMANDA PETTERUTI & NASTASSIA WALSH, REGISTERING HARM: HOW SEX OFFENSE REGISTRIES FAIL YOUTH COMMUNITIES 9 (2008)[hereinafter REGISTERING HARM].

247. *Id.* at 25.

248. *Id.* at 24.

249. *Id.* at 25.

250. Although juvenile defense attorneys have a duty to counsel their clients about these collateral consequences, they routinely fail to do so and many youth plead guilty without understanding the severity of the consequences. See Pinard, *supra* note 242, at 1114-15; see also IJA/ABA STANDARDS FOR PRIVATE COUNSEL, *supra* note 15, at Standard 3.1(b)(ii)[a] (stating that, “[i]t is appropriate and desirable for counsel to advise the client concerning the probable success and consequences of adopting any posture with respect to those proceedings.”).

251. FACJJ Report, *supra* note 14, at 26.

252. See Gohara et al., *supra* note 36, at 95 (arguing that effective indigent defense systems enhance the legitimacy and effectiveness of criminal justice system).

253. See Fabelo, *supra* note 19, at 136-37.

income neighborhoods, are more likely to support the police when they perceive that the police are treating them fairly because it sends the message that the public values the law.²⁵⁴ Conversely, systems perceived as unfair reinforce the idea that the public “values power and privilege instead of the law.”²⁵⁵ The *Gault* Court understood this danger, emphasizing that denials of due process would make youth feel they had been treated unfairly, which could in turn impede their rehabilitation.²⁵⁶ Finally, inadequate indigent defense systems waste money because they are likely to result in higher rates of unnecessary incarceration, expensive appeals and retrials, and high turnover in the juvenile defense profession.²⁵⁷

IV. EMERGING REFORMS TO IMPROVE JUVENILE INDIGENT DEFENSE

Although juvenile indigent defense systems are in deep crisis, momentum for reform is building, and advocates in many states have made significant strides toward tackling some of the most challenging infringements on youth’s right to counsel.

A. Expanding Access to Counsel

1. Ensuring Representation at Critical Stages of the Proceedings

Some recent reforms have focused on ensuring representation by counsel at the detention and post-disposition stages of delinquency proceedings. For example, recognizing the importance of zealous advocacy at detention hearings, the Illinois legislature enacted a law that requires counsel to be appointed “immediately upon the filing of a petition” in cases in which youth are detained.²⁵⁸ The legislation, which became effective in January, 2009, also provides that a detention hearing shall not be held “until the minor has had adequate opportunity to consult with counsel.”²⁵⁹ In California, as a result of a settlement agreement in *L.H. v. Schwarzenegger*, a recent class action brought by the Youth Law Center, the state must now provide attorneys to all juvenile parolees charged with parole violations within eight business days of the parole hold.²⁶⁰

In addition to these statewide reforms, local innovations have also focused on expanding access to counsel at discrete, critical stages of delinquency proceedings.²⁶¹ For example, at least one site participating in the Annie E. Casey

254. *Id.*

255. *Id.* at 137.

256. *Gault*, 387 U.S. at 26 (1967) (citations omitted); see also Bernard P. Perlmutter, “Unchain the Children” *Gault*, *Therapeutic Jurisprudence, and Shackling*, 9 BARRY L. REV. 1, 38 (2007); Henning, *supra* note 83, at 855-56; see also Marrus, *supra* note 83, at 346; Puritz & Majd, *supra* note 83, at 476.

257. See Richard C. Goemann, *First You Cripple Public Defense: Musings on How Policymakers Dismantle the Adversarial System in Criminal Cases*, 9 LOY. J. PUB. INT. L. 239, 244-47 (2008).

258. Ill. Comp. Stat. Ann. 405/5-415(2) (2008).

259. *Id.*

260. *L.H. v. Schwarzenegger*, 519 F.Supp.2d 1072 (E.D. Cal. 2007); see also Youth Law Ctr. -*L.H. v. Schwarzenegger*, <http://www.ylc.org/viewDetails.php?id=69> (last visited August 28, 2009).

261. SHORT & SHARP, *supra* note 200, at 19-26.

Foundation's Juvenile Detention Alternatives Initiative has created a detention response unit to enhance the quality of representation youth receive at detention hearings.²⁶² The unit consists of two paralegals who interview detained youth, conduct discovery, investigate community-based services, and ensure the participation of families at their children's detention hearings.²⁶³ With the critical assistance that the paralegals provide, defenders are able to advocate more effectively for alternative placements for their clients, reducing the unnecessary detention of youth without compromising public safety or creating a risk of flight.²⁶⁴

Other local efforts have focused on representation after disposition. For example, in 2007, the Maryland Public Defender Nancy Forster responded to horrifying stories of youth being abused and injured in secure facilities by creating the Juvenile Protection Division.²⁶⁵ The division employs both lawyers and social workers who work to ensure that the state abides by commitment orders and that incarcerated clients remain safe in facilities.²⁶⁶ At the time of this writing, the Office of the Public Defender Board of Trustees had recently removed Ms. Forster from her position as State Public Defender, in part because she refused to disband the unit as they had directed.²⁶⁷ Because the Board's decision to disband the unit deprives the youngest public defender clients of their constitutional right to representation, it has been met with protest by some in the juvenile defense community. The Maryland example serves as a caution about just how tenuous reforms can be, particularly in times of budget crisis.

2. Waiver of Counsel

Other state reforms have focused on addressing the high numbers of unlawful waivers of counsel. For example, in May, 2008, the Florida Supreme Court adopted a new rule providing that "waiver of counsel can occur only after the child has had a meaningful opportunity to confer with counsel regarding the child's right to counsel, the consequences of waiving counsel, and any other factors that would assist the child in making the decision to waive counsel."²⁶⁸ The Court found that "a meaningful opportunity to consult with counsel before waiving the right to counsel is a necessary step in effectuating and protecting the child's substantive right to counsel."²⁶⁹ The Washington Supreme Court adopted a similar court rule which imposes an additional re-

262. *Id.* at 22.

263. *Id.*

264. *Id.*

265. Simkins, *supra* note 186, at 223.

266. *Id.*

267. Julie Bykowicz and Tricia Bishop, *Md. oversight board fires top public defender*, BALT. SUN, Aug. 22, 2009.

268. FLA. R. JUV. P. 8.165(a).

269. *In re* Amendment to Florida Rule of Juvenile Procedure 8.165(a), 981 So.2d 463, 466 (Fla. 2008).

quirement that the youth and his or her defense attorney sign a written waiver form before the court can accept a youth's waiver.²⁷⁰

The Ohio Supreme Court also recently addressed the issue of waiver of counsel in a 2007 case, *In re C.S.*²⁷¹ The Court held that juveniles may not waive their right to counsel unless they are first counseled and advised by a parent, custodian or guardian, or have consulted with an attorney.²⁷² The Court further held that a judge must appoint counsel for a juvenile if a conflict exists between the juvenile and parent regarding whether to waive counsel.²⁷³ Although the decision does not provide as much protection to youth as the Florida and Washington court rules do, it represents a significant step forward in protecting against uncounseled waivers.

B. Improving Quality of Counsel

In addition to expanding access to counsel, some reforms in other parts of the country have focused on improving the quality of counsel youth receive in delinquency court.

1. Clarifying the Role of Counsel

One strategy for improving the quality of legal representation youth receive is to clarify lingering confusion about the role of juvenile defense counsel, particularly defenders' ethical duties. For example, in 2008, Alabama passed the sweeping Juvenile Justice Act which reorganized the state's juvenile code and enacted several reforms.²⁷⁴ The Act clarifies that a juvenile defender is "[a] licensed attorney who provides legal services for a child...and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child or minor as is due an adult client."²⁷⁵ The Act also clearly requires juvenile defenders to represent the expressed interests of the child, meaningfully communicate with and counsel clients, thoroughly investigate cases, attend all hearings, file necessary motions, and advocate at disposition.²⁷⁶

Other states have adopted attorney performance standards to delineate clear expectations for juvenile defenders. In 2007, the Virginia Indigent Defense Commission adopted *Standards of Practice for Juvenile Defense Counsel* that mandate specific training topics for defenders and detail the obligations of the defender to engage in expressed interests advocacy at each stage of the process.²⁷⁷ The Standards also mandate specific training topics for defend-

270. Wash. Juv. Ct. R. 7-15.

271. *In re C.S.*, 874 N.E.2d 1177 (Ohio 2007).

272. *Id.* at 1191.

273. *Id.* at 1192.

274. See SOUTHERN JUVENILE DEFENDER CTR., A GUIDE TO THE ALABAMA JUVENILE JUSTICE ACT OF 2008 (2008), available at <http://www.juveniledefender.org/files/GuideALJJAct08.pdf>.

275. ALA. CODE §12-15-102(5) (2008) (defining a 'child's attorney' under the Act). See also Ala. Code § 12-15-102(10).

276. ALA. CODE §12-15-202(f) (2008).

277. See VIRGINIA PERFORMANCE STANDARDS, *supra* note 105.

ers and detail the obligations of the defender at each stage of the process.²⁷⁸ Similarly, in 2008, the Nevada Supreme Court ordered the implementation of performance standards for juvenile defenders, which confirm that they must represent their clients' expressed interests rather than substituting their own judgment for that of their clients.²⁷⁹

2. Increasing Resources, Training, and Support for Juvenile Defenders

To provide sorely-needed support to the attorneys representing youth in delinquency cases in their states, advocates in Illinois and Pennsylvania have begun to establish juvenile defender resource centers. In Illinois, the state legislature passed a law that allows for the creation of a Juvenile Defender Resource Center to develop and implement model juvenile indigent defense delivery systems, and provide attorneys with support and training in order to equip them to effectively represent their clients.²⁸⁰ In addition, advocates in Pennsylvania created the Juvenile Defender Association of Pennsylvania in 2006, which will serve as a resource center and engage juvenile defenders across the state in policy debates relevant to the field.

In two other states, a different model has emerged to increase support for juvenile defenders. In North Carolina, the state created the position of Juvenile Defender to serve as a central resource on juvenile indigent defense issues, coordinate and engage in legislative advocacy on relevant issues, and develop standards for appointed juvenile defenders.²⁸¹ In Washington, the non-profit organization TeamChild received funding from the MacArthur Foundation to establish a Special Counsel position responsible for providing training, mentoring and technical assistance to juvenile defenders, helping create models of effective defense practices, and engaging juvenile defenders in systemic reform efforts.²⁸²

3. Elevating Juvenile Defense as a Specialized Practice

Acknowledging the specialized nature of juvenile defense practice, Louisiana created the first standalone office to focus exclusively on juvenile defense in 2007.²⁸³ Juvenile Regional Services (JRS), a non-profit organization, contracts with the state to defend youth in all delinquency cases in Orleans Parish.²⁸⁴ By focusing exclusively on juvenile defense practice, JRS can commit

278. *See id.* at Standards 2.1-2.3

279. NEVADA DEFENSE STANDARDS, *supra* note 105, at Standard 1.

280. Illinois Public Act 095-0376 (c)(6).

281. North Carolina Juvenile Defender, Office of Indigent Defence Servs., *Mission Statement*, <http://www.aoc.state.nc.us/www/ids/Juvenile%20Defender/JuvDef%20HomePage.htm>.

282. TEAM CHILD, MODELS FOR CHANGE WASHINGTON STATE: SPECIAL COUNSEL FOR ENHANCING JUVENILE INDIGENT DEFENSE 1, *available at* <http://www.teamchild.org/pdf/Special%20Counsel%20Information.pdf>.

283. Juvenile Regional Servs., *About Us*, JUVENILE REGIONAL SERVS., <http://www.jrsla.org/about/history.php>.

284. *Id.*

the resources of an entire organization toward ensuring effective delinquency representation.

4. Implementing State Oversight

In order to increase state oversight of indigent defense, in 2007 Louisiana passed comprehensive legislation geared toward ensuring uniform delivery of indigent defense representation across the state.²⁸⁵ Significantly, the Louisiana Public Defender Act provides that standards be developed specifically to govern juvenile representation and creates two positions focused exclusively on juvenile defense.²⁸⁶ Under the law, the Director of Juvenile Defender Services works with all three branches of the government to promote juvenile policies, especially those concerning mental health and education, and ensure that the board recognizes the difference between adults and children.²⁸⁷ The second position, the Juvenile Justice Compliance Officer, monitors district compliance with guidelines related to juvenile delinquency and reports to the board on compliance.²⁸⁸

While not an exhaustive list, these innovative reforms reflect a more concerted focus on juvenile indigent defense than we have seen in previous years. States can capitalize on the momentum created by these important, on-going efforts to raise the standard of practice in delinquency courts and breathe life into the unfulfilled promise of *In re Gault*.

V. MOVING TOWARDS COMPREHENSIVE JUVENILE INDIGENT DEFENSE REFORM

Given the importance of the interests at stake, and the serious negative consequences that result when youth are denied counsel, states and local jurisdictions must commit to creating high-quality juvenile indigent defense systems. The growing momentum around the country to improve delinquency representation can serve as a catalyst for more comprehensive reforms in individual states. While solutions will necessarily vary depending on the needs and resources of the particular state and community, the overarching goals will remain fundamentally consistent across jurisdictions. Specifically, meaningful juvenile indigent defense reform must focus on ensuring the following: (1) recognition of the highly specialized nature of juvenile defense practice; (2) engagement of all relevant stakeholders; (3) clear acknowledgement of the elements of effective representation at each stage of a case; (4) provision of adequate funding; and (5) development of data collection, monitoring and accountability systems to ensure high quality representation.

285. See David J. Carroll, *Sounding Gideon's Trumpet: The Right to Counsel Movement in Louisiana*, 9 LOY. J. PUB. INT. L. 139, 139 (2008).

286. LA. REV. STAT. ANN. §15:150 (A) (2008).

287. See *id.*

288. See *id.*; see also Carroll, *supra* note 285, at 152.

A. Effective Juvenile Indigent Defense Reform Efforts Recognize That Juvenile Delinquency Representation Is A Highly Specialized Practice.

Advocates and policymakers must consciously infuse recognition of the highly specialized nature of juvenile defense practice into reform efforts.²⁸⁹ Improving the adult indigent defense system alone will not have a trickle-down effect on delinquency representation. While overlap of issues certainly exists, the challenges associated with delinquency court practice are distinct from those in criminal court practice; addressing these unique challenges requires specially tailored responses. Moreover, the historical devaluing of juvenile defense has meant that previous reform efforts have often paid no more than an afterthought to delinquency court practice. A more focused effort is needed to ensure that delinquency representation is elevated to the importance it deserves. For example, advocates and policymakers must be cognizant to ensure that resources within the indigent defense system are not only adequate, but are also equitably distributed between the juvenile and adult defenders. This includes ensuring juvenile-specific training and providing juvenile defenders with pay on par with that of prosecutors and criminal defense attorneys. In addition, defender offices must create sustainable career paths for those wanting to specialize in delinquency representation over the long term.

B. Effective Juvenile Indigent Defense Reform Efforts Engage All Relevant Stakeholders.

Effective reform must involve all relevant stakeholders, including judges, defenders, prosecutors, probation officers, the broader legal community, and the public. The pervasive hostility toward zealous advocacy that persists in delinquency courts poses one of the most seemingly intractable obstacles to effective representation. Reform efforts must be cognizant of this often deep-seated aspect of court culture and take concerted steps to address it. Engaging all the relevant stakeholders in the reform process will provide one important opportunity for educating all system-players about the dangers inherent in denying due process rights to youth, not only for individual youth but also for the effective operation of the justice system and the safety of the public. The reform process must also engage the public, some of whom have been or will be the consumers of juvenile indigent defense services. Holding community forums, interviewing youth and families who have had experience in the justice system, and creating client satisfaction surveys can all provide defender offices and policy-makers with compelling information to identify problems and devise solutions.

In addition, reform efforts should engage government officials, private law firms, community groups, law schools, and bar associations.²⁹⁰ Law schools can create clinical programs to handle a portion of cases in a particular jurisdiction and encourage law students to pursue a juvenile defense career. Bar associations can also play an important role by coordinating *pro bono* represen-

289. TEN CORE PRINCIPLES, *supra* note 15, at Principle 2.

290. See ABA, GIDEON'S BROKEN PROMISE, *supra* note 21, at 45.

tation of indigent youth, provide training opportunities, and develop specialized certifications for juvenile defenders. Law firms can help build the capacity of the juvenile defense bar by bringing impact litigation to challenge systemic obstacles to the right to counsel.

The engagement of other advocacy organizations is also essential to help educate the public and policymakers about the importance of counsel, the link between the juvenile justice system and other related systems, and the importance of implementing specific reforms.

C. Effective juvenile indigent defense reform efforts are guided by a clear understanding of the specific responsibilities of counsel at each stage of a case.

Developed by the American Council of Chief Defenders and the National Juvenile Defender Center, the *Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems* lay out the critical elements for providing defense services in delinquency cases.²⁹¹ Advocates for reform can use these principles as a guidepost. In addition, advocates should examine the unique aspects of their juvenile codes to ensure that the defenders are equipped to meet any additional responsibilities to clients unique to their particular jurisdiction. Understanding the role of counsel at every stage of a case will help jurisdictions develop caseload standards²⁹², adopt attorney practice standards, set training requirements, and develop appropriate funding and oversight mechanisms.²⁹³

D. Effective Juvenile Indigent Defense Reform Efforts Ensure Adequate Funding Based on an Understanding of the Complex Role Defenders Play Throughout a Delinquency Case.

Adequate funding is essential to the proper functioning of the juvenile indigent defense system. Of course, in times of budget crisis, advocates face an incredibly steep battle in securing additional funds for indigent defense, an issue which is politically unpopular. Yet continuing to deprive low-income youth of their constitutional rights is simply unacceptable.²⁹⁴

National standards and commentators suggest that state funding tends to lead to better indigent defense systems than those financed at the county level.²⁹⁵ More research is needed however to assess the impact of different funding schemes on juvenile defense, in particular, and the current level of indigent defense funding spent on juvenile, as opposed to adult, representation.²⁹⁶ In addition, each state should undertake an analysis to determine how much it costs to provide youth within their jurisdiction with effective representation at

291. TEN CORE PRINCIPLES, *supra* note 15.

292. See KEEPING WORKLOADS MANAGEABLE, *supra* note 124, at 8, 15.

293. See Fabelo, *supra* note 19, at 140-41.

294. See ABA, GIDEON'S BROKEN PROMISE, *supra* note 21, at 41.

295. See *id.*; see also Jessa DeSimone, *Bucking Conventional Wisdom: The Montana Public Defender Act*, 96 J. CRIM. L. & CRIMINOLOGY 1479, 1487 (2006).

296. See Fabelo, *supra* note 19, at 138 (discussing the lack of data and systemic policy analysis on indigent defense system as a barrier to reform).

each critical stage of proceedings. Such an analysis should consider the cost of providing the necessary resources, training, and support services to defenders, and should determine reasonable workload standards for juvenile defenders that account for the wide variation in the complexity of delinquency cases.

Advocates should also build on the efforts of the American Bar Association and the Federal Advisory Committee on Juvenile Justice (FACJJ) to advocate for federal funding for juvenile indigent defense. The FACJJ recently recommended that “Congress amend the [Juvenile Justice and Delinquency Prevention] Act to require the provision of competent, effective, and zealous representation for both juveniles and the State (i.e., prosecutors) in juvenile proceedings; require these attorneys to possess specialized knowledge and/or experience with child and adolescent development and in juvenile law and related matters and procedures; and require States to adopt juvenile caseload and practice standards.”²⁹⁷ The federal government can and should play a leadership role in encouraging and supporting states to fund juvenile indigent defense systems adequately.

E. Effective Juvenile Indigent Defense Reform Provides for Data Collection, Standards, Monitoring, and Accountability at the State and Local Levels to Ensure Effective Representation Across Jurisdictions.

Effective accountability systems are needed to ensure that low-income youth receive the quality of representation to which they are entitled.²⁹⁸ The basic elements of such an accountability system include regular data collection, analysis, and reporting on clearly defined measures; an independent oversight body to review data and monitor compliance with standards; and mechanisms in place to allow for intervention when services fall below acceptable levels.²⁹⁹ As discussed above, the standards and outcomes should be tailored to the special nature of delinquency representation. Standards should focus on topics such as attorney performance and duties at each stage of the proceedings, workloads, training requirements, attorney qualifications, appointment practices, and client eligibility determinations. Jurisdictions must be required to collect and report data on these elements on a regular basis, and mechanisms should be created to provide increased support to those offices or defenders who fall short of the standards.

VI. CONCLUSION

Juvenile defenders play a singularly important role in the justice system; for the youth who stands accused, “the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his deal-

297. FACJJ REPORT, *supra* note 14, at 27; *see also* ABA, GIDEON’S BROKEN PROMISE, *supra* note 21, at 41.

298. *See* ABA, GIDEON’S BROKEN PROMISE, *supra* note 21, at 42.

299. *See* Fabelo, *supra* note 19, at 140-41; *see also* NEVADA INDIGENT DEF. COMM’N REPORT, *supra* note 79, at 7 (recommending the use of uniform data collection and reporting, including demographic data for race and ethnicity).

ing with the police and the courts.”³⁰⁰ The juvenile indigent defense systems that were designed to ensure that the right to counsel applies equally to youth, regardless of income, have consistently failed low-income youth and youth of color. In jurisdictions across the country, justice still comes with a price; and those who cannot pay are denied fundamental due process rights with often tragic consequences. The obstacles to effective representation in delinquency courts are numerous, but with a concerted reform effort, states can elevate the practice of juvenile indigent defense to the position of prominence it warrants and move towards achieving the vision of fair and equitable courts mandated by the Constitution.

300. *Fare v. Michael C.*, 442 U.S. 707, 719 (1979).