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The Legal Defense of Juveniles: Struggling But Pushing Forward

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First the Bad News: Defenders Are Overburdened and Courts Are Jammed With Minor Offenders

A court's two juvenile defenders complained to me in late 2009, "We are bombarded and overburdened. The state files so many dumb charges like curfew, loitering and prowling, pedestrian in the roadway, simple battery for throwing a firecracker. Kids are on probation a long time and are brought back in on another dumb charge. We wait long hours for our court hearing to begin. We're not incorporated into the system. We have no investigator. We desperately need a third defender."

Defense lawyers in another state complained, as well, that too many lesser delinquency cases are formally petitioned. They are critical of the risk instrument used by the probation shop as it leads to unnecessary detentions, both initially and following a mild re-offense. Probation is overly punitive, they assert.

And defenders in a third jurisdiction protest that its court "defines itself as all things to the community. The police have an open door here. Schools and parents have this open door, as well. Intake files so many nickel and dime cases. And the court often adjudicates and has a disposition the same day, even with detained juveniles, which gives us insufficient time to make our investigation."

Critical Statewide Review of Juvenile Defense in Nebraska

Continuing its longstanding practice of assessing juvenile defense practices across the country, the National Juvenile Defender Center in Washington, DC, completed an examination of access to counsel and quality of juvenile legal defense in Nebraska in the fall of 2009. This systematic statewide evaluation found discouraging results—in effect, an indictment of the state's juvenile and even criminal courts:

- The vast majority of youth charged with law violations waive counsel and plead guilty at the initial juvenile court hearing, which is often the detention hearing, and are sentenced immediately, usually to several months of probation. This is done usually without benefit of any legal advice, examination of discovery, or independent investigation.
- Preparation for adjudicatory and dispositional hearings was "rushed", characterized by minimal investigation. There were very few pretrial motions and very few trials.
- The vast majority of 15 and 16 year olds charged with a felony were direct-filed in criminal court. Some of the most "egregious" instances of waiver of counsel were observed with juveniles charged in adult criminal court.

Critical Statewide Review of Juvenile Defense in South Carolina

South Carolina fares somewhat better in the National Juvenile Defender Center's Winter 2010 report documenting its state's juvenile defense practices, although the state's most frequently referred offense, "disturbing school," is normally a very minor offense. South Carolina maintains a state commission on indigent defense and scored one very high mark in that its court with juvenile jurisdiction, the family court, allows no waiver of counsel. As for flaws in the system, the study found:

- 100% of defenders interviewed stated they had little or no training before handling their first juvenile case.
- Most meet with their clients for the first time just prior to the first court hearing, even though this is usually 12 weeks after the alleged offense and six weeks from the prosecutor's charging decision. The vast majority of guilty pleas take place at the first hearing.

- The lack of resources, high caseloads, insufficient access to investigations and support staff, and limited client contact have made meaningful investigation and trial practice an anomaly in most of the family courts.
- Few defenders visited their juvenile clients in a detention facility in order to better prepare for a detention hearing.
- One-third of defense attorneys juggled large adult caseloads along with their juvenile cases. Criminal court defense attorney requests for investigator assistance took priority over requests from juvenile defenders.

Now for the Better News

Juvenile defense, long the stepchild of the juvenile justice system, is standing somewhat taller today. At the local level, more resources are generally committed to juvenile prosecution than to defense. As a result, juvenile prosecution remains significantly better staffed and attorneys are often better paid than are defenders; prosecution maintains better investigative capability and often has greater influence on juvenile court decision-making. But something is happening across the way in the defense world; it is on the offensive in more local jurisdictions and even more so nationally. Juvenile defense has been garnering more allies.

The MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice has proven to be a remarkable ally, with its multi-year commitment to funding research programs aimed at helping practitioners and policy makers make more informed, more effective decisions concerning juveniles. By bringing together a broad spectrum of scholars, policy experts, and practitioners in several areas of social science, psychology, and the

law, the Network produced significant research on adolescent brain development. Indeed, one of its most prominent efforts was cited five times in the U.S. Supreme Court's majority opinion in **Roper v. Simmons**, 543 U.S. 551 (2005), the case that altered a prior opinion to prohibit capital punishment for any juvenile offender whose offense occurred prior to his or her eighteenth birthday. In addition, the MacArthur Foundation assists numerous other projects that act to improve juvenile justice at state and local levels, probably all consistent with juvenile defender goals.

The National Juvenile Defender Center

Another significant ally is the National Juvenile Defender Center, NJDC, in Washington, DC, which was established by the American Bar Association in 1999 to build the capacity of the juvenile defense bar and to improve access to counsel and quality of representation for children in the justice system. The center became an independent entity in 2005.

NJDC trains defense lawyers and provides technical assistance. It has done assessments of defense counsel strengths and weaknesses in different states—16 to date—and stimulates post-study efforts to implement its recommendations, often causing important changes, as in Florida (see below). NJDC collaborates with nine Regional Juvenile Defender Centers to help compile and analyze juvenile indigent defense data, facilitate organizing and networking opportunities for juvenile defenders, and provide case support with complex or high profile cases.

It manages the MacArthur Foundation funded Juvenile Indigent Defense Action Network (JIDAN), a Models for Change effort launched in 2008 to engage leadership in targeted strategies to improve juvenile indigent defense policy and practice by improving access to counsel for juveniles and creating juvenile defense resource centers to build capacity for juvenile attorneys.

NJDC's 25-page publication, *The Role of Juvenile Defense Counsel in Delinquency Court* (2009), gives valuable guidance to defense counsel, public or private. One NJDC listserv reports important appellate case decisions and legislative changes that may inspire defense attorneys or defender organizations in

other states to seek or oppose similar actions in their own states. A regional center listserv connects with regional audiences.

Bringing Neuroscience Into Juvenile Courts

Juvenile advocates are bringing to judicial attention, to prosecutor and probation intake staff attention, and to legislative and public attention this key concern: whether juveniles shall be held less responsible for their offenses due to immature brain development. Along with well publicized, multiple research findings that juvenile justice has better results than criminal justice for comparable youth, and that policy and practice have swung too far and removed far too many youth from the juvenile justice system and into the criminal court stream unnecessarily, there is new or renewed energy for seeking changes to handle more juveniles by diversion or within juvenile rather than criminal courts.

Two Virginia defenders responded to my recent question whether they were applying these neuroscience findings: (1) "We use it all the time on a variety of issues—transfer/certification, correctional versus non-correctional sentences, **Miranda**, accomplice liability, applicability of adult sentencing guidelines, etc. Basically, we try to work it in whenever we can"; (2) "I'm using it in a case on transfer next week. We will present an expert to speak with the court about it."

Separately, the Commonwealth attorney's office in Norfolk has brought in an expert on adolescent brain development to train its entire office, and a lead juvenile prosecutor there has gone public in announcing her office will no longer use the threat of transfer as a way to get juveniles to plead guilty in juvenile court. (Campaign4Youth Justice Newsletter, July 2009).

In a different context, a Virginia organization of juvenile advocates worked for several years to change a transfer law provision and finally succeeded so that now, when a direct-filed youth is found guilty in criminal court for a lesser offense for which there is no direct-file authority, the youth is returned to juvenile court jurisdiction. In support of this, the director of the Mid-Atlantic Juvenile Defender Center, one of the regional centers developed by the National Juve-

nile Defender Center, provided key testimony.

National Advocacy

Other allies are at work, including foundations and advocacy organizations that care about juveniles and seek more fair and enlightened treatment. They collaborated with *amici* briefs in **Roper v. Simmons**, and again with the *amicus* filed by the Juvenile Law Center in Philadelphia in a challenge to juvenile life without parole (LWOP), in a case in which a decision is expected shortly. Other *amici* briefs challenging LWOP as cruel and unusual were filed by the American Bar Association, the American Medical Association, and the American Psychological Association.

A brace of allies formed the Campaign for the Fair Sentencing of Youth to support and assist advocates in several states where legislation to eliminate life without parole sentences for youth has been active or planned, including Michigan, Illinois, Texas (eliminated), Florida, Washington, California, Louisiana, Massachusetts, Iowa, and Nebraska.

NJDC Assessment Leads to Shackling Rule Change in Florida

Recommendation 6 from NJDC's Fall 2006 assessment of the juvenile defense function in Florida stated: "State legislators, local policy makers, and juvenile court judges should end the practice of shackling youth by hand, foot and belly chain for court appearances unless an extenuating individual situation warrants such restraints. Under any circumstance the practice of shackling youth to each other in a group or to a fixed object in the courtroom should be strictly prohibited."

In December 2009, the Florida Supreme Court announced an amended juvenile court rule that constrained the use of restraints in a courtroom unless the judge found there was such a substantial risk of flight or of physical harm to the youth or another for which there was no less restrictive alternative. Florida judges now begin their court hearings with a mandated legal presumption that juveniles shall not be shackled in any form.

This Supreme Court had embraced the supportive recommendation of The Florida Bar's Juvenile Court Rules

Committee, which had heard testimony mostly pro, some con, as to the proposed rule change. The first-named “pro” witness when this committee heard testimony was Carlos J. Martinez, Public Defender, Eleventh Judicial Circuit, Miami. He had challenged this practice in his home district’s juvenile court, issuing a public statement that complained, in part, “By allowing children to appear before them in chains, judges are conveying to the children that they are dangerous animals. Shackling them for no reason at all is an affront to the very principles of fairness.”

Defense Counsel Actively Engages in Public Policy Advocacy

The same Carlos J. Martinez has now begun a campaign to change Florida’s direct filing law that, since 1994, has given prosecutors essentially unfettered discretion to decide that juveniles as young as 14 years could be moved into criminal court without first having gone through a carefully conducted transfer hearing in juvenile court before a juvenile court judge. Florida has long been considered the easiest state for moving a youth into the criminal court fold. In 1995, prosecutors decided to try more than 7,000 juveniles in the state’s criminal courts, approximating the 9,700 total of all other states combined that year. Butts, J.A. & Harrell, A. (1998). *Delinquents or Criminals: Public Options for Young Offenders*. Washington, DC: The Urban Institute.

Martinez’s comments, posted in the *Miami Herald* on February 7, 2010, were: “No checks and balances. No hearing. No right to be heard. No right to appeal the decision. The results of this experiment are in: Prosecutorial transfer laws produce worse outcomes for youth, victims and the public.” Martinez continued: “Today, 16 years later, we know there was no juvenile-predator wave. We know a great deal more about adolescent brain development. We know definitively that juvenile intervention programs are

superior to adult jail/prison in reducing recidivism by young offenders.”

Working for Reform in Connecticut

Chris Rappillo, Connecticut’s chief juvenile defender for juvenile matters, also co-chairs the steering committee of the Connecticut Juvenile Justice Alliance, which was the leading force in the successful campaign to raise the state’s maximum juvenile court age from 16 to 18 years. The Alliance director, Abby Anderson, writes: “Chris is invaluable to our advocacy in both behind the scenes and visible ways. Chris knows exactly what is happening in the juvenile courts across Connecticut. If there are trends in terms of a type of offense or charge on the rise or fall, she will know about it and give us the heads up. The cadre of public defenders and their experiences are also a great resource as Chris can collect data and statistics from them. However, they can also—within the rules of confidentiality—give us specific examples of situations that highlight a specific issue or policy that we would like to promote.

“Chris is the first person we turn to in order to clear up areas of confusion we might have on a statute. Chris has also been a tremendous resource as we work with various committees of the legislature to consult on legislation. Because Chris speaks ‘lawyer,’ she can advise us about the language in specific bills regarding what we like and don’t like and what would have to change to garner our support.”

Public defenders often recognize and act on the perception that what they might facilitate in the public policy arena will have benefit in their day-to-day representation of youth in the juvenile court process.

A Federal Interest in Furthering Juvenile Defense

The US Department of Justice sponsored a Symposium on Indigent Defense, in February 2010, which aimed at furthering the effectiveness of both juvenile and adult defense counsel. Its final session

featured a pledge of assistance in translating conference ideas and learning into actions in participants’ jurisdictions following their return. Symposium session subjects illustrate the concerns and broadly-based directions of today’s and tomorrow’s juvenile defense counsel:

1. Using brain research and adolescent psycho/social development in examining juvenile competence to exercise legal rights during interrogations and confessions.
2. The privatization of juvenile punishment: Has it gone too far?
3. Reaching out to the community, engaging the media, advocating for policies that enhance the integrity of the courts.
4. Juvenile defense as a specialty: Solutions to transferring juvenile defenders out to another court to advance in the office.
5. MacArthur Juvenile Indigent Defense Action Network (JIDAN) in four states.
6. Using nonprofit law centers and law school clinics with representation and other strategies.
7. Collaboration with private attorneys representing indigent juveniles.
8. Juveniles competence to exercise legal rights and confessions.
9. Post disposition advocacy: Making a critical difference in outcomes for youth.

Earlier, federal assistance had appeared to favor prosecutor funding and technical assistance. Now a more balanced approach is becoming visible that could enable juvenile defense to better push forward.

Conclusion

Improving access for juveniles to well trained, qualified defenders remains a serious challenge in this country, but for the moment, there is clear evidence that support for doing so continues to increase. This, coupled with legislative initiatives to improve the juvenile justice system that are based on the extensive in-depth research conducted in the last decade, suggests that positive change is in the making. ■

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