

**Testimony of Tim Curry,  
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on Access to Justice in the United States**

**Submitted to the U.S. Government  
for the NGO Consultation preceding the Universal Periodic Review and the review of the  
International Convention on the Elimination of all forms of Racial Discrimination (CERD)**

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Good afternoon. My name is Tim Curry, and I am the Managing Attorney at the National Juvenile Defender Center (NJDC). Our mission is to promote justice for all children by ensuring excellence in juvenile defense. To this end, NJDC provides national leadership on juvenile indigent defense issues, delivering training, technical assistance, and support to juvenile defenders across the country. A key component of our work has focused on conducting in-depth assessments on the access to and the quality of juvenile defense representation across the country.

Without question, the level of justice that juveniles receive in American delinquency courts is directly related to their access to qualified juvenile defense attorneys. Yet, what we see is that far too many youth in this country are either denied access to counsel at key points of their case or coerced into giving up their right to counsel in the name of efficiency or a belief that courts can help youth better if defense counsel is not in the way. The reality, however, is that the lack of counsel for young people in juvenile court contributes a lack of procedural justice for youth, the indiscriminate shackling of youth, the overuse of harmful detention practices, an over-reliance on incarceration, and an overall juvenile court system that results in disproportionate outcomes for racial minorities.

**The Vital Role of Juvenile Defense Counsel**

For the past 100 years, youth have generally been tried in juvenile courts, separate from adult criminal courts. This is a sensible dichotomy. Youth are not just miniature adults. On average, young people are far more immature and impressionable than adults.<sup>1</sup> Because the juvenile brain develops well beyond adolescence, a developmentally-appropriate, rehabilitative focus is more appropriate for juvenile courts.<sup>2</sup> In the early years of the juvenile court, there was little role for defense attorneys or an adversarial system. Juvenile courts pursued a rehabilitative vision at the expense of, rather than in conjunction with, checks and balances and due process. Little existed to ensure youth were treated humanely or that their rights were being respected within these systems.

Then, in 1967, the United States Supreme Court ruled in the case *In re Gault*,<sup>3</sup> that children are guaranteed many of the same due process rights as adults, including the right to remain silent, the

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<sup>1</sup> Elizabeth Scott and Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, in THE FUTURE OF CHILDREN: JUVENILE JUSTICE, (2008).

<sup>2</sup> See, e.g., Richard J. Bonnie et al., *Reforming Juvenile Justice: A Developmental Approach* (2012).

<sup>3</sup> 387 U.S. 1 (1967)

right to notice of charges, the right to confront witnesses against them, the right to compulsory process, and the right to counsel. Underlining the right to counsel, the Court said:

There is no material difference in this respect between adult and juvenile proceedings... The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child ‘requires the guiding hand of counsel at every step in the proceedings against him.’<sup>4</sup>

The Supreme Court was unequivocal in its position that courts cannot deprive youth of their due process rights, even if their intentions are motivated by a desire to help children. Depriving youth of their rights does not help them. The Court recognizes as much. “Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure...Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.”<sup>5</sup> Unfortunately, nearly 47 years after the *Gault* decision, vast numbers of children across the country still regularly appear in court and face severe consequences without any assistance from a defense attorney. In those 47 years, juvenile courts have become increasingly more punitive, with youth facing years of incarceration and penalties that last well into adulthood. The idea that juvenile court has little to no consequences is long gone. Access to education, employment, housing, military service, citizenship, and a host of public benefits can be placed in jeopardy, or denied outright, based on a juvenile adjudication.

While the decision in *Gault* was grounded in procedural justice, its wisdom has been buoyed by advancements in adolescent and child developmental science. Studies show that a youth’s ability to make decisions becomes increasingly impaired when he or she is under stress and does not have sufficient time, opportunity, and information to consider consequences, which makes the aid of defense counsel all the more crucial.<sup>6</sup> Adolescent development and brain research also shows that youth’s ability to process information and weigh consequences differs from adults in ways that hold serious implications for determining what constitutes legally sufficient waivers of rights or for assessing culpability.<sup>7</sup> Such research—recognized and cited repeatedly by the Supreme Court<sup>8</sup>—affirms the important role juvenile defense counsel has in guiding youth

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<sup>4</sup> 387 U.S. at 36.

<sup>5</sup> 387 U.S. at 18-19.

<sup>6</sup> Lawrence Steinberg et al., *Are Adolescents More Mature than Adults?: Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip-Flop”*, 64 *Am. Psychologist* 583 (2009).

<sup>7</sup> Thomas Grisso, *Adolescents’ Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 *NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT* 3 (2006)

<sup>8</sup> *Roper v. Simmons*, 543 U.S. 551 (2005)(abolishing the death penalty for juveniles, pointing to a vast amount of research supporting the concept that juvenile offenders are generally less culpable than adults who commit the same crimes); *Graham v. Florida*, 130 S.Ct. 2011 (2010)( using the same reasoning to prohibit juvenile life without parole for youth who commit non-homicide crimes); *J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011) (holding that a child’s age was a factor in whether or not he felt free to leave a policy interrogation, saying “[C]hildren generally are less mature and responsible than adults... they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them... [and] they are more vulnerable or susceptible to ... outside pressures than adults.”); *Miller v. Alabama*, 132 S.Ct. 2455 (2012)(finding even in cases of homicide, automatic

through legal decision-making, identifying developmentally appropriate services, and navigating the delinquency system. Juvenile defense counsel is indispensable to a youth's understanding of legal rights and the juvenile justice system.

Beyond the constitutional requirements, the right to counsel is also recognized in many international human rights instruments, some of which are the International Convention on Civil and Political Rights (ICCPR) and the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules). The right to counsel is also expressly recognized in the UN Convention on the Rights of the Child, though the United States stands alongside Somalia and South Sudan as being the only countries to not ratify this important treaty.<sup>9</sup> The sheer number of human rights instruments that are specifically aimed at the treatment of children reflects the reality that kids are different from adults.

Just as kids are different from adults, so too is the role of the juvenile defender different from a defender in adult court. The juvenile defense community recognizes that the scope of representation for youth should begin *no later than* the initial hearing and continue through the vast array of possible post-dispositional hearings, including, but not limited to appeals, placement decisions, conditions of confinement, re-entry planning, education, and probation revocation. Unlike with many adult cases, juvenile defenders must remain engaged with their clients well after the judge has imposed a sentence. This is not only good practice; it helps accomplish the rehabilitative goals of the juvenile system and gives youth a better chance to succeed.

The Department of Justice has articulated its support for access to counsel for juveniles. In 2012, the Attorney General's Task Force on Children Exposed to Violence reported that:

Defense counsel plays an important role in ensuring fairness and equity in the juvenile justice system and protecting children from abuses of power by judges, prosecutors, probation officers, and correctional officials. In addition, defense attorneys are the only parties in the proceedings required by law to represent the *expressed interest* of the child. They protect the due process rights of their clients by filing pretrial motions, petitions for habeas corpus, challenges to evidence, and appeals.<sup>10</sup>

The Department of Justice, using its authority under the Civil Rights Act and the Violent Crime Control and Enforcement Act,<sup>11</sup> also launched investigations into the deprivation of juvenile due process and the equal protection for youth of all races in county courts in Tennessee, Mississippi,

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juvenile life without parole was prohibited because children deserve an individualized assessment of the developmental factors that play into mitigation and culpability for young people).

<sup>9</sup> *Status of Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en) (last visited 3/24/2014).

<sup>10</sup> U.S. DEP'T OF JUSTICE ET AL., REPORT OF THE ATTORNEY GENERAL'S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE 186 (2012) (emphasis in original).

<sup>11</sup> 42 U.S.C. § 14141.

and Missouri. These investigations have led, to agreements, consent decrees, and lawsuits aimed at protecting youth access to justice.<sup>12</sup>

While NJDC applauds the Department of Justice for taking these crucial steps to ensure the rights of youth are protected, the problem of access to defense counsel for youth remains a problem.

### **Denial of Access to Counsel**

Throughout the United States, juvenile justice is largely a local affair. How juvenile courts operate, how they are funded, and the rules they follow vary from state to state, county to county, community to community. NJDC, through its assessments of systems across the country,<sup>13</sup> has seen too often that the idea of “justice” for children – and even access to that justice – is largely a question of geography. While there are areas of excellence, we at NJDC have followed several disturbing barriers youth face in accessing justice and challenges to their fundamental rights and dignity within these systems.

One of the most shocking practices we see is the alarming number of children accused of crimes who, to this day, appear in court without the assistance of a lawyer.<sup>14</sup> As the DOJ’s 2012 *Defending Childhood Report* acknowledged:

The rates at which children give up their right to counsel vary dramatically across jurisdictions. Some systems ensure that every child in the system is represented, while others allow 80–90 percent of youth who are charged with offenses to appear without counsel.<sup>15</sup>

These statistics beg the question that if the right to counsel is so clearly embedded as a matter of due process, how does this problem persist? The answer lies in three interrelated problems: (1) the failure of courts to appoint counsel at an early enough stage in the proceedings, (2) practices and procedures that coerce youth into waiving their right to counsel, and (3) a failure to recognize, as a starting point, that all children are indigent and entitled to counsel.

#### *Failure to Appoint Counsel in a Timely Manner*

In juvenile courts around the country, youth who have been arrested by police and detained, must be brought before a judge, generally within 48 hours, for a hearing on whether continued detention of that child is justified. The purpose of this hearing is to decide whether or not a child should be held in a juvenile jail pending trial or returned to his or her family. This decision has

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<sup>12</sup> You can learn more about these investigations online, at <http://www.justice.gov/crt/about/spl/findsettle.php#juv>.

<sup>13</sup> To see all 21 state assessments conducted by NJDC of the access to and quality of defense counsel, visit <http://www.njdc.info/assessments.php>.

<sup>14</sup> See, e.g., NATIONAL JUVENILE DEFENDER CENTER, MISSOURI: JUSTICE RATIONED: AN ASSESSMENT OF ACCESS TO AND QUALITY OF JUVENILE DEFENSE REPRESENTATION IN DELINQUENCY PROCEEDINGS 38-39 (2013), (finding 60% of youth in Missouri juvenile courts in fiscal year 2012 appeared without an attorney); COLORADO JUVENILE DEFENDER COALITION, KIDS WITHOUT COUNSEL: COLORADO’S FAILURE TO SAFEGUARD DUE PROCESS FOR CHILDREN IN JUVENILE DELINQUENCY COURT (2013) (finding 45.7% of youth going unrepresented in 2012 in Colorado delinquency courts).

<sup>15</sup> U.S. DEP’T OF JUSTICE ET AL., REPORT OF THE ATTORNEY GENERAL’S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE 186 (2012).

undeniable implications for the child's liberty, which should automatically invoke the right to counsel. Yet, in many places, children are not given access to lawyers at this stage. Some courts take the position that juveniles only have a right to an attorney once formal charges have been filed, which could be days or weeks after the judge decides to detain a child. At detention hearings in which a youth has no attorney, there is generally a probation officer, a prosecutor, and a judge who will discuss whether the child should be kept in detention pending trial. Parents may or may not be there to speak for the child. As the adults debate the child's immediate fate, if he or she speaks up, the child is waiving the right to remain silent, meaning anything that child says can be used in future proceedings against the child. If a defense attorney is present, the child's voice is heard, without waiving the right to silence. The attorney can challenge facts that the probation officer or prosecutor put forward, provide mitigation to contextualize the situation, and suggest community-based, lesser-restrictive alternatives to detention that would ensure the public's safety. The American juvenile delinquency system is an adversarial system, but when youth are not given access to defense attorneys, the court is not benefiting from a full and rigorous testing of the facts.

### *The System Encourages Waiver of Counsel*

Even at stages of the proceedings where the court recognizes the right to counsel, youth often appear without counsel because the child has been convinced to waive (or been deemed to have waived) his or her right to counsel. In many jurisdictions, children or their parents often have to affirmatively ask for a lawyer in order to get one. Thus, in many courts, if the child and family ask for an attorney, the case will be continued to a later date, and the child may be kept in detention pending the new hearing. The vast majority of juvenile courts are not properly equipped to provide attorneys upon request for youth who choose to exercise their right to counsel. In order to qualify for an attorney in most places, parents must fill out a host of financial forms, provide tax returns or pay stubs, and answer a barrage of very personal questions. The process for qualifying for a court-appointed lawyer can take days. Parents, many of whom have already taken time off work for that day's hearing, may have to take off more time to apply for the attorney, and then take off another day to come back for the hearing they were expecting to have originally. While the courts claim these procedures are necessary and not intended to be punitive, one cannot help but conclude that youth in these systems are being punished for trying to exercise their right to counsel. These hurdles alone will force many youth to waive their right to an attorney because the process is too complicated or cumbersome.

In 2010, the United States Supreme Court recognized that youth's limited understanding put them at a "significant disadvantage in criminal proceedings."<sup>16</sup> Studies show that adolescent decision-makers are on average are less future-oriented and less likely to properly consider the consequences of their actions.<sup>17</sup> Moving things along quickly by waiving the right to counsel seems tempting to the average young person. Unfortunately, that decision carries numerous unforeseen ramifications. Without an attorney, children regularly find themselves facing an offer to take a plea deal in exchange for a speedy conclusion to their case. Understandably, this is incredibly appealing to many children, regardless of their actual guilt or innocence and whether they fully understand the consequences of their decisions. Juveniles without counsel often

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<sup>16</sup> *Graham v. Florida*, 130 S.Ct. 2032 (2010).

<sup>17</sup> Brief for the American Psychiatric Association as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2004) (No. 03-633), 2004 WL 1636447.

precipitously enter admissions without any knowledge of possible defenses or mitigation or understanding of the short- and long-term consequences of such an admission. Youth without counsel may be influenced by probation officers, prosecutors, or judges, who are not in a position to provide disinterested advice and may not have a professional obligation to do so. Additionally, many parents mistakenly believe that proceeding without a lawyer will lead to better results and do not appreciate how an adjudication can affect their child's life for years to come.

Research shows that without appropriate guidance that is delivered in developmentally appropriate language, juveniles are unlikely to understand rights they are asked to waive, let alone the consequences of waiving them.<sup>18</sup> Even prior court experience bears no direct relationship to juveniles' ability to understand their legal rights. As stated earlier, experts find that youth are able to make much better decisions when informed and unhurried than when under stress and peer or authority influences—meaning juveniles are less likely to waive their rights, including their right to counsel, if they are able to consult with counsel first.<sup>19</sup>

#### *Failure to Presume that All Juveniles are Indigent*

The issues of waiver of counsel and the failure to appoint defense counsel in a timely manner often arise out of the need for youth to prove to the court that they are too poor to hire their own lawyers. Children rarely have financial resources of their own. Therefore, almost every child is inherently indigent. Currently only six states<sup>20</sup> presume that all youth are indigent for the purpose of appointment of counsel, while seven states have an initial presumption of indigence but may then require the juvenile or parents to reimburse costs.<sup>21</sup> In the vast majority of states, the juvenile court system predicates the indigence determination on the family's resources, not the child's. What such schemes fail to recognize is that children do not control the family finances. Even if a family is not indigent, the cost of hiring a lawyer is often too much for families who live paycheck to paycheck. That creates an inherent conflict between the child who needs a lawyer and the family that either must struggle to supply a lawyer or refuses to do so. In either case, this creates great pressure on children to plead guilty or waive counsel in order to keep the bills down. It certainly does not promote access to justice for these children.

#### **Overuse of Youth Detention and Incarceration in the United States.**

Today, in the face of juvenile court systems that are increasingly punitive, the juvenile defender is even more critical. The need to provide children with zealous representation in delinquency hearings is amplified by the increasingly serious and far-reaching consequences that can flow from a juvenile adjudication. No one other than counsel for the juvenile has the duty to argue for the expressed interest of the child. Without defense counsel to argue on their behalf, juveniles face an increased risk of punishment – which may not be proportionate to the offense – whether they are adjudicated delinquent after trial or due to a plea.

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<sup>18</sup> Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Court*, 54 FLA. L. REV. 577 (2002) (citing THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 193-194 (1981)).

<sup>19</sup> Lawrence Steinberg et al., *Are Adolescents More Mature than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, 64 AM. PSYCHOLOGIST 583 (2009).

<sup>20</sup> Indiana, Louisiana, Michigan, New York, North Carolina, and Pennsylvania.

<sup>21</sup> Arkansas, California, Idaho, Kansas, Kentucky, South Carolina (for detention hearings), Virginia (for detention hearings).

The United States detains a larger portion of its youth population than any country in the world. In 2011, the last year for which we have data, there were 68,815 youth in juvenile detention, 18,839 of whom were in private, for-profit facilities.<sup>22</sup> This data does not reflect youth who are in adult facilities. Detention and incarceration have long-term, serious consequences for youth. Youth in detention are separated from their community and support systems and are left to feel isolated and disconnected, which impedes their rehabilitation. Temporary detention and long-term incarceration both interrupt whatever positive influences the child has, such as school, family, church, or community groups. Worse still, youth in detention are vulnerable to assault, suicide, and sexual abuse, and are more likely to commit crimes after release than non-detained youth.<sup>23</sup> Detention facilities are notoriously ill-equipped to deal with youth who have mental health issues.<sup>24</sup> The stress associated with separation and detention, let alone the entire court process, can exacerbate mental health and trauma issues. Without a defender to contextualize these problems to the courts and advocate for appropriate responses to any delinquent behavior, children may be at greater risk for harm.

The repeated use of detention of status offenders – youth who are charged with an offense that only a child can commit, such as truancy, running away, or being “ungovernable” – is especially disturbing. Research shows that it is almost never appropriate to detain status offenders.<sup>25</sup> Removing youth from their communities and support networks for minor offenses is less effective than community-based programming, costs far more, and is associated with higher rates of recidivism.<sup>26</sup> Despite the fact that the Juvenile Justice and Delinquency Prevention Act (JJDP) specifically calls for the deinstitutionalization of status offenders, it allows for their detention if they fail to follow valid court orders (VCOs) related to their cases. NJDC calls on the U.S. Congress to remove the VCO exception from the JJDP and to reinforce its commitment to deinstitutionalizing status offenders.

Given the challenges youth in secure facilities face, not the least of which is their inherent vulnerability, it is extremely important that they have access to lawyers – and thereby access to courts – to rectify abuses or mistreatment that may occur. While some federal laws, such as the Prison Rape Elimination Act,<sup>27</sup> do provide juveniles with a statutory right to file grievances in situations of abuse within facilities, without access to attorneys to monitor these grievances and ensure action, access to justice for these youth often remains elusive.

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<sup>22</sup> Office of Juvenile Delinquency and Prevention, *Statistical Briefing Book*.

<sup>23</sup> ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION (2011).

<sup>24</sup> Committee on Government Reform, Special Investigations Division, Minority Staff, Incarceration of youth who are waiting for Community Mental Health Services in the United States, Prepared for Sen. Susan Collins, and Rep. Henry A. Waxman, available at <http://www.hsgac.senate.gov/download/incarceration-of-youth-who-are-waiting-for-community-mental-health-services> (2004).

<sup>25</sup> JAMES AUSTIN ET AL., ALTERNATIVES TO THE SECURE DETENTION AND CONFINEMENT OF JUVENILE OFFENDERS 1-3 (Sept. 2005).

<sup>26</sup> JAMES AUSTIN ET AL., ALTERNATIVES TO THE SECURE DETENTION AND CONFINEMENT OF JUVENILE OFFENDERS 1-3 (Sept. 2005); B. HOLMAN & J. ZIEDENBERG, ET AL., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES (2006).

<sup>27</sup> 42 U.S.C. § 15601 et seq.

Solitary confinement of youth both in the juvenile and adult systems remains a problem in the United States. Especially troubling is the all-to-common practice of placing lesbian, gay, bisexual, and transgender (LGBT) youth into isolation under the rationalization that the separation is necessary to protect them from other inmates.<sup>28</sup> The UN Special Rapporteur on Torture has repeatedly called on the U.S. – citing the Convention against Torture and the UN Rules for the Protection of Juveniles Deprived of their Liberty – to eliminate the use of solitary confinement and isolation on children, given the particularly grave effects it has on their psychological development and mental health.

Juveniles who have access to attorneys post-disposition have greater access to justice in these cases. Defenders who learn of isolation of their clients can raise the issue in administrative hearings at facilities or in formal court hearings. Because so few youth have access to defense attorneys once they are placed in long-term secure facilities, however, the abuses continue.

While juvenile defenders have a duty to “independently collect information on the client’s progress and monitor whether service providers and/or facilities are adhering to the terms of the disposition order,”<sup>29</sup> in the vast majority of jurisdictions, youth have little or no access to attorneys after disposition of their cases. In many jurisdictions, the right to counsel at this stage is unclear or undefined. Many court-appointed defenders who want to represent youth after disposition find that they are unable to get paid to do that work because funding is not authorized by the court or local government.

### **The Inappropriate Use of Shackling**

In many juvenile courts, youth in custody are forced to appear in court shackled with leg irons, belly chains, and handcuffs. This is often done indiscriminately, lacking any assessment of an individual child’s risk for dangerousness. The practice of restraining youth who pose no safety threat unnecessarily humiliates, stigmatizes, and traumatizes young people. Shackling youth is inconsistent with the rehabilitative goals of the juvenile justice system and offends due process. Youth who are deprived of their dignity in this way do not have full access to the court system, and the restraints themselves can create physical and psychological obstacles to accessing the proceedings and exercising their rights. Physically, restraints in court can impede a child’s ability to communicate with his or her attorney, including making it impossible to write and pass notes during hearings. The psychological effects shackling can have on young minds that are still developing their sense of identity can impede their view of themselves and breakdown their will to participate in the proceedings.

The *UN Rules on the Protection of Juveniles Deprived of their Liberty* hold that instruments of force and restraint should be used only exceptionally, when other methods have failed, and as authorized.<sup>30</sup> The rules go on to provide that restraints “should not cause humiliation or

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<sup>28</sup> THE EQUITY PROJECT, HIDDEN INJUSTICE (2009), available at [http://www.equityproject.org/pdfs/hidden\\_injustice.pdf](http://www.equityproject.org/pdfs/hidden_injustice.pdf)

<sup>29</sup> NATIONAL JUVENILE DEFENDER CENTER, NATIONAL JUVENILE DEFENSE STANDARDS, § 7.5(b): REPRESENT THE CLIENT POST-DISPOSITION 52 (2012) [hereinafter NAT’L JUV. DEF. STDS.]

<sup>30</sup> United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Adopted by General Assembly resolution 45/113 of 14 December 1990.

degradation, and should be used restrictively and only for the shortest possible period of time.”<sup>31</sup> Juvenile courts that shackle youth without an individualized assessment of need, are in violation of these human rights standards.

Again, access to juvenile defense counsel would help address the problem of shackling. Juvenile defenders are obligated to challenge the indiscriminate shackling of children in custody.<sup>32</sup> In recent years, juvenile defense attorneys have led the charge against this horrible practice in courtrooms and before rule-making bodies across the country. In at least 10 states, they have been successful in eliminating the practice, either statewide or in select counties.<sup>33</sup>

### **Racial Inequities Remain an Obstacle for Accessing Justice in the United States**

It is without question that youth from racial and ethnic minorities are over-represented in the justice system. These youth are more at risk of disparate treatment, which is compounded when they do not have adequate access to counsel. There is evidence that race matters above and beyond the characteristics of an offense. Data consistently shows that youth of color are overrepresented at every stage of the juvenile justice system, starting with the early stages – arrest, referral to court, and placement in secure detention. There is a well-documented problem of police profiling young people of color and targeting them for stops-and-frisks. School disciplines practices tend to criminalize minority youth. Over 70% of students who are involved in school-related arrests or who are referred to law enforcement being Hispanic or African-American.<sup>34</sup> The disparity in the way youth are treated with respect to discipline starts as early as preschool. Just within the past two weeks, the Department of Education released findings that showed while 18% of children enrolled in school-based preschool programs are black, black preschoolers represent nearly half of the students suspended more than once. The fact that 6% of school districts with preschools have even suspended preschoolers—children typically under the age of five—indicates a disturbing unwillingness to constructively address negative behaviors within schools, especially when it comes to children of color.

NJDC is encouraged to see that the Department of Justice and the Department of Education have recently launched a Supportive School Discipline Initiative, which will, in part, try to address racial disparities in school disciplinary procedures that often act as a feeder to the juvenile court system. Additionally, the White House’s My Brother’s Keeper Initiative—a taskforce aimed at identifying and promoting community programs that build opportunities for boys of color in areas of employment and education—has tremendous potential for identifying diversion programs that can keep youth from entering the delinquency system.

Racial disparities in the juvenile system are not confined to the entry-points, however. Numerous national and local studies provide evidence that bias within the justice system continues as youth move deeper into the process and that, in nearly all juvenile justice systems,

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<sup>31</sup> United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Adopted by General Assembly resolution 45/113 of 14 December 1990.

<sup>32</sup> NAT’L JUV. DEF. STDS., § 2.8: OBLIGATION TO INVESTIGATE AND ADDRESS CUSTODIAL MISTREATMENT.

<sup>33</sup> These states include California, Colorado, Florida, Maine, Massachusetts, Nevada, New York, North Carolina, North Dakota, and New Mexico. In March 2014, a bill passed one house in South Carolina’s legislature to eliminate the practice in the state.

<sup>34</sup> U.S. Dep’t of Educ., Civil Rights Division Factsheet, *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf>

youth of color remain in the system longer than white youth. The Burns Institute reports that youth of color comprise 38% of the youth population in the United States, yet comprise nearly 70% of those who are confined once they enter the court system.<sup>35</sup>

Here again, access to justice for youth can be improved with better access to qualified defense counsel. It is a juvenile defender's duty to address racial disparities. Defenders are obligated to challenge the disparate treatment of minority or vulnerable clients by making courts aware of the evidence of systemic bias and drawing corollaries to individual cases before the court.<sup>36</sup> Juvenile defenders, working in individual cases or in conjunction with civil attorneys on a systemic level, can challenge discriminatory police practices in court. Defense attorneys working to ensure that youth clients in the juvenile justice systems are protected from individualized or systemic bias, treated with respect, provided culturally competent services, and offered appropriate cultural support and alternate dispositions where available, are imperative to gaining positive outcomes for court-involved youth.

### **Juvenile Defense Systems are Underfunded and Overworked.**

While better access to juvenile defense counsel can help to alleviate the human rights problems associated with access to justice for our nation's youth, it is of little help if juvenile defenders are not adequately resourced and trained. Underfunding of indigent defense systems in general, and of juvenile indigent defense systems in particular, is a chronic problem. Lack of resources allocated to defense means that attorneys are hobbled by crushing workloads and are not provided with adequate training. Local and state governments must take the rights of children seriously and recognize that access to justice in an adversarial system depends on adequately resourcing defense systems. The federal government can assist with this by publicly supporting indigent defense and allocating resources or support services to state and local systems wherever possible.

### **Conclusion**

NJDC acknowledges that the Obama Administration, especially through the Department of Justice, has taken some significant steps in addressing the human rights of youth with respect to access to justice and racial equality in the juvenile justice system. Most notable is its work on systemic due process violations and racial inequity in Shelby County, TN and Lauderdale County, MS, as well as its commitment to advancing indigent juvenile defense in all states. Unfortunately, there is still much work to do. The challenge is that the heart of these issues often lies at state and local levels that are sometimes difficult for the federal government to directly influence. We encourage all branches of the federal government to vocally and systematically support indigent defense services. We call on the U.S. Congress to amend the JJDPA to remove language that allows for the detention of status offenders who violate valid court orders and to provide greater funding to state and local governments to support historically underfunded indigent defense services. We encourage state and local governments to recognize the constitutional right to counsel for all juveniles and rectify the barrier within their systems that prevent adequate access to counsel. Finally, we call on federal, state, and local legislatures and

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<sup>35</sup> Burns Institute, What is R.E.D? Fact Sheet, <http://www.burnsinstitute.org/what-is-red/fact-sheet/> (last visited March 24, 2014).

<sup>36</sup> NAT'L JUV. DEF. STDS., § 2.7: CHALLENGE DISPARATE TREATMENT OF VULNERABLE CLIENTS.

courts to immediately ban the indiscriminate shackling of children and end the practice of isolating youth in detention.

By taking clear and concrete steps on these items, the United States will be able to demonstrate in its report under the UPR and CERD that it is taking its obligations seriously.

Thank you.