



NATIONAL JUVENILE DEFENDER CENTER  
WASHINGTON, DC

# DEFEND CHILDREN

**NOVEMBER 2016**

**A BLUEPRINT  
FOR EFFECTIVE  
JUVENILE  
DEFENDER  
SERVICES**

This project was supported in part by Grant No. 2013-JL-FX-K002 awarded by the Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice. Points of view or opinions in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

Please contact the National Juvenile Defender Center (NJDC) at [inquiries@njdc.info](mailto:inquiries@njdc.info) if you are interested in receiving a hard copy of this report or if NJDC can assist you in assessing, analyzing, and reforming your juvenile defense system.

When citing to this report, please use the following recommended citation:

NAT'L JUVENILE DEFENDER CTR., DEFEND CHILDREN: A BLUEPRINT FOR EFFECTIVE JUVENILE DEFENDER SERVICES (2016).

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## **DEDICATION**

This Blueprint is dedicated to Patricia Puritz, founding executive director of the National Juvenile Defender Center, for her leadership, vision, perseverance, and grace in building a juvenile defense community and a home base for its support at the National Juvenile Defender Center. This Blueprint would not exist but for her unwavering commitment to establishing effective systems of juvenile defense for children.

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The National Juvenile Defender Center (NJDC) is a non-profit, non-partisan organization dedicated to promoting justice for all children by ensuring excellence in juvenile defense. NJDC provides support to public defenders, appointed counsel, private counsel, law school clinical programs, and non-profit law centers to ensure quality juvenile defense for youth in urban, suburban, rural, and tribal areas. NJDC gives juvenile defense attorneys a permanent and enhanced capacity to address practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in national and local conversations about juvenile defense and juvenile justice.

NJDC offers a wide range of integrated services including: training, technical assistance, assessment and evaluation, policy development and analysis, and opportunities for leadership, collaboration, and innovation. NJDC also regularly provides information, advice, and assistance regarding juvenile defense issues to governmental and non-governmental organizations at the federal, state, local, and tribal levels.

NJDC's website, [www.njdc.info](http://www.njdc.info), is a comprehensive clearinghouse of information on juvenile defense practice and policy issues, accessible to the general public, stakeholders, and juvenile defenders.

NJDC's initiatives emanate from the field through its network of Regional Juvenile Defender Centers. Each Center coordinates activities within and among states in its region, including: compiling and analyzing juvenile indigent defense data; facilitating opportunities for juvenile defenders to organize and network; offering tailored, regional, and state-based training and technical assistance; and providing targeted case support specifically addressing the complexities of juvenile defense practice.

NJDC participates in a range of collaborative reform efforts led by the federal government, private foundations, and local and state justice partners.

May 15, 2017, marks the 50th anniversary of the *In re Gault* decision holding that the Fourteenth Amendment of the United States Constitution guarantees children a right to counsel in juvenile court. More information on this historic United States Supreme Court decision and commemorative events can be found at NJDC's *Gault* at 50 website, [www.gaultat50.org](http://www.gaultat50.org).

# ACKNOWLEDGEMENTS

The National Juvenile Defender Center (NJDC) would like to thank the Department of Justice—and particularly Administrator Robert L. Listenbee of the Office of Juvenile Justice and Delinquency Prevention (OJJDP), and his staff—for the opportunity to develop this Blueprint.

This Blueprint would not have been possible without the invaluable observations, expertise, and assistance from the field. In addition to the staff and leadership from many sections of the Department of Justice, NJDC would like to express our deepest appreciation to the following front line juvenile defenders, clinical law professors, directors of non-profit law centers, chief public defenders, judges, court administrators, court-appointed counsel, administrators of state-operated programs and facilities, policy advocates, subject matter experts, and other interested stakeholders from across the country for their significant contributions to this Blueprint.\*

Elton Anglada, Philadelphia Defender Association, Juvenile Unit

Neelum Arya, UCLA School of Law

Laura Austen, Ohio Public Defender, Juvenile Division

Jill Beeler, Ohio Office of the Public Defender, Juvenile Division

Garry Bevel, Partnership for Child Health

Betsy Biben, Office of Rehabilitation and Development, District of Columbia  
Public Defender Services

Dr. Robert Bidwell, Hale Ho'omalua Juvenile Detention Facility and Hawaii Youth  
Correctional Facility, John A. Burns School of Medicine, University of  
Hawaii at Manoa

Jeanne Bishop, Cook County Public Defender's Office

Arthur Bowie, Sacramento County Public Defender, Juvenile Division

Janet Brown, Office of the Public Defender, Lafayette, Louisiana

Jacqueline Bullard, Illinois State Appellate Defender, 4th District

Sue Burrell, Youth Law Center

Tom Burrows, The Legal Aid Society, Juvenile Rights Practice

Elizabeth Clarke, Illinois Juvenile Justice Initiative

Cait Clarke, Defender Services, Administrative Office of the United States Courts

Laura Cohen, Rutgers Law School

Cathryn Crawford, Independent Juvenile Defense Consultant

Carmen Daugherty, Campaign for Youth Justice

Erin Davies, Ohio Juvenile Justice Coalition

Tracy Davenport, Louisiana 15th Judicial District Public Defender's Office

Jacqueline Deane, The Legal Aid Society, Juvenile Rights Practice

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Donna Esposito, New Hampshire Public Defender

Mishi Faruquee, American Civil Liberties Union

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Alison Flaum, Children & Family Justice Center, Northwestern University  
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Laura Garnette, Santa Clara County Probation Department

Kristin Henning, Georgetown Law Juvenile Justice Clinic

Hon. Paula Hepner (Ret.), New York State Family Court

Randy Hertz, New York University School of Law

Eileen Hirsch, Wisconsin State Public Defender's Office

Dr. Angela Irvine, National Council on Crime and Delinquency

Shaena Johnson, Louisiana Center for Children's Rights

James Johnston, Maryland Office of the Public Defender

Dr. Antoinette Kavanaugh, Forensic Clinical Psychologist

Emily Keller, Juvenile Law Center

Christina Kleiser, Knox County Public Defender's Community Law Office

Jasmine King, Maui Public Defenders

Deborah LaBelle, ACLU Juvenile Life Without Parole Project

Jody Kent Lavy, Campaign for the Fair Sentencing of Youth

Anne Lee, TeamChild

Devon Lee, Wisconsin State Public Defender

Patricia Lee, San Francisco Office of the Public Defender

Marsha Levick, Juvenile Law Center

Hector Linares, Louisiana State University Paul M. Hebert Law Center,  
Juvenile Defense Clinic

Jefferson Liston, Tyack, Blackmore, Liston & Nigh

Kaarin Lueck, Wayne County Public Defender's Office

Jennifer Lutz, Defender Association of Philadelphia

Robert Mahaffey, Rural School and Community Trust

Dennis Marks, Sarpy County Public Defender

Jody Marksamer, Law Office of Jody Marksamer

Ellen Marrus, The University of Houston Law Center

Rob Mason, Florida Office of the Public Defender, 4th Judicial Circuit

Tracy McClard, Families and Friends Organization for Reform of Juvenile Justice

## ACKNOWLEDGEMENTS

Xavier McElrath-Bey, Campaign for the Fair Sentencing of Youth  
Marcy Mistrett, Campaign for Youth Justice  
Christopher Northrop, University of Maine School of Law  
Jenay Nurse, Adolescent Defense Project, The Bronx Defenders  
Peter Ohman, Montana Office of the State Public Defender  
Susan Oker, Massachusetts Committee for Public Counsel Services,  
Youth Advocacy Division  
Marie Osborne, Miami Dade Public Defender, Juvenile Division  
Emily Pelletier, John Jay College of Criminal Justice  
Megan Perez, Defender Association of Philadelphia, Juvenile Special  
Cases Section  
Joshua Perry, Louisiana Center for Children's Rights  
Bradley Peterson, Legal Services of North Dakota  
Amanda Petteruti, Justice Policy Institute  
Christina Phillis, Maricopa County Office of the Public Advocate  
Heidi Pihl-Buckley, Massachusetts Department of Youth Services  
Nicole Pittman, Human Rights Watch  
Chris Provost, Provost Law Office  
Maria Ramiu, Youth Law Center  
Chris Rapillo, Connecticut Division of Public Defender Services,  
Juvenile Delinquency Defense and Child Protection  
Ashley Ratliff, Colorado Alternate Defense Counsel  
Susan Roske, Clark County Public Defender  
Jessica Sandoval, Campaign for Youth Justice  
Andrew Shookhoff, Shookhoff and Associates

Sandra Simkins, Rutgers-Camden School of Law  
Brenda Smith, American University Washington College of Law  
Tobie Smith, Legal Aid Society of Birmingham  
Stephanie Snyder, Alexandria Public Defender Office  
Ji Seon Song, Contra Costa County Public Defender's Office  
Deborah St. Jean, Maryland Office of the Public Defender  
Tamara Steckler, The Legal Aid Society, Juvenile Rights Practice  
Chase Strangio, American Civil Liberties Union LGBT & AIDS Project  
Kim Tandy, Children's Law Center  
Lisa Thureau, Strategies for Youth  
Abigail Trillin, Legal Services for Children  
Whitney Untiedt, Office of the Public Defender, Eighth Judicial District of  
Florida  
Pamela Vickrey, Utah Juvenile Defender Attorneys  
Randee Waldman, Emory University School of Law, Barton Juvenile Defender  
Clinic  
Wesley Ware, Youth BreakOUT!  
Shannan Wilber, National Center for Lesbian Rights  
Wendy Wolf, Massachusetts Committee for Public Counsel Services - Youth  
Advocacy Division  
Rob Woronoff, Rob Woronoff Consulting  
George Yeannakis, TeamChild  
Judy Yu, Correctional Association of New York  
Uhuru Zen'on-Rodriguez, Sociedad para Asistencia Legal de Puerto Rico  
Eric Zogry, North Carolina Office of the Juvenile Defender

Finally, NJDC would like to thank our many dedicated staff, law clerks, and consultants, past and present, who devoted their time and talent to developing this Blueprint, especially: Rey Banks, Sarah Bergen, Tim Curry, Kim Dvorchak, Sarah Edwards, Christina Gilbert, Serena Holthe, HyeJi Kim, LaNita McWilliams, Mary Ann Scali, Nadia Seeratan, Hillela Simpson, Sonia Slone, Teayra Turner, and most especially, Patricia Puritz, founding executive director of the National Juvenile Defender Center, and Rebecca Trent, former senior staff attorney for the Special Initiative at the National Juvenile Defender Center.

\*Numerous contributors have moved to new positions but are listed with their professional affiliations at the time of their input to the *Blueprint* project. Their listing here is in recognition of their input and participation in the development of the *Blueprint* but the final conclusions and recommendations are those of the National Juvenile Defender Center.



# INTRODUCTION

**“The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is the essence of justice.”**

*Kent v. United States*, 383 U.S. 541, 561 (1966).

The goal for *Defend Children: A Blueprint for Effective Juvenile Defender Services* is rooted in the United States Constitution: to ensure the right to counsel is fulfilled for every child. The National Juvenile Defender Center and many others who work in the justice field recognize the need for better and more consistent delivery of defense services for children who are arrested. We seek a comprehensive and system-wide approach to ensure this fundamental right is realized for children, regardless of race, ethnicity, gender identity, sexual orientation, zip code, or ability to pay. We must draw from a wide range of strategies, including legislation, funding, and research, to improve the provision of counsel and achieve justice for children in the juvenile and criminal justice systems.

## HISTORY

The first delinquency court was founded on the notion that “kids are different” from adults and should therefore be treated differently in the justice system. On April 21, 1899, the State of Illinois created a juvenile court as part of a legislative act establishing the Juvenile Court Division of the Circuit Court for Cook County.<sup>01</sup> The landmark legislation codified a more progressive way to treat “wayward” youth. Instead of showing them the error of their

ways through punishment, the state aimed to help youth correct their course and become productive, law-abiding citizens. The early juvenile court applied the English common law *parens patriae*—or state-as-parent—philosophy and was afforded broad discretion to provide individually tailored guidance to youth to steer them toward a life as responsible adults.<sup>02</sup> The system required only cursory legal proceedings with no focus on due process and no role for a juvenile defense attorney.<sup>03</sup>

The fundamental purpose and function of the first juvenile court embodied the public’s interest in rehabilitating youth—regardless of their behavior or delinquent conduct—for the betterment of society. Social workers and behavioral scientists advised the court on the most appropriate outcomes for cases, and, for the first time, detained youth were separated from adults and placed in training and industrial schools, as well as private foster homes and institutions.<sup>04</sup> This type of juvenile court was quickly replicated across the country. By 1925, some form of juvenile court existed in all but two states.<sup>05</sup>

The stated mission of these new juvenile delinquency courts was to help youth become productive citizens through treatment and rehabilitation. While this mission was rooted in compassion, it led to striking procedural and substantive differences between the juvenile delinquency and adult criminal court

01 1899 Ill. Laws 131 § 3; see also Sacha M. Coupet, *What to Do with the Sheep in Wolf’s Clothing: The Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. PA. L. REV. 1303, 1312 (2000).

02 See AM. BAR ASS’N DIV. FOR PUB. EDUC., *DIALOGUE ON YOUTH AND JUSTICE: PART I: THE HISTORY OF JUVENILE JUSTICE* 5, <http://www.abanet.org/publiced/features/DYJpart1.pdf>; FRANKLIN E. ZIMRING, *AMERICAN JUVENILE JUSTICE* 42 (Oxford Univ. Press 2005); LAURENCE STEINBERG & ROBERT G. SCHWARTZ, *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 9, 12 (Thomas Grisso & Robert G. Schwartz eds., 2000).

03 See HOWARD N. SNYDER & MELISSA SICKMUND, *NAT’L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT* 96 (2006).

04 See *id.* at 95.

05 *Id.* at 94.

## “[The juvenile] requires the guiding hand of counsel at every step in the proceedings against him.”

*In re Gault*, 387 U.S. 1, 36 (Fortas, J.) (1967) (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

systems, raising concerns about fairness for children.<sup>06</sup> In the 1950s and 1960s, public confidence in the juvenile justice system began to wane as questions grew over the disparities in treatment that resulted from the unfettered discretion of juvenile courts.<sup>07</sup> While the rehabilitative goal of the system itself was not in question, there were concerns about the number of youth institutionalized indefinitely for treatment and the vastly different sentences that similarly situated youth could receive based on the personal philosophy of individual judges.<sup>08</sup>

Despite growing concerns regarding the lack of substantive and procedural safeguards and the disparate treatment of individual youth in the juvenile justice system, constitutional challenges to juvenile court practices and procedures were consistently overruled until the 1960s.<sup>09</sup> While case law held that juvenile proceedings were civil in nature and were meant to be rehabilitative as opposed to punitive,<sup>10</sup> research began to show the pitfalls of a system without due process: juvenile court judges often lacked legal training;<sup>11</sup> probation officers were undertrained and their heavy caseloads often prohibited meaningful social intervention; children were regularly housed in secure, adult correctional facilities; and juvenile correctional institutions were often overcrowded and violent, serving as little more than breeding grounds for further criminal activity.<sup>12</sup> Beginning in 1963, a series of landmark decisions by the United States Supreme Court bolstered numerous rights for defendants. The Court held in *Gideon v. Wainwright*<sup>13</sup> that the Sixth Amendment

right to counsel requires that adults charged with a felony offense who are unable to afford an attorney be appointed one at public expense. Although the decision applied only to adults, it was critical in paving the way for the *In re Gault* decision that affirmed children’s right to counsel a few years later. In *Gideon*, a unanimous Court wrote that any person too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him, explaining that “lawyers in criminal courts are necessities, not luxuries.”<sup>14</sup>

In the wake of *Gideon*, the Supreme Court began extending the right to counsel and other bedrock elements of our modern justice system to youth facing delinquency proceedings.<sup>15</sup> In 1966 in *Kent v. United States*, the Court held that the transfer of a child from juvenile court to adult criminal court requires certain legal protections: “[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.”<sup>16</sup>

In 1967, the Supreme Court ruled in *In re Gault*<sup>17</sup> that youth in delinquency court have the right to counsel under the Due Process Clause of the United States Constitution, applied to the states through the Fourteenth Amendment. The Court observed that youth in juvenile court were receiving “the worst of both worlds,” explaining that they had “neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”<sup>18</sup>

06 U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE JUSTICE: A CENTURY OF CHANGE 2-3 (1999) [hereinafter A CENTURY OF CHANGE], <https://www.ncjrs.gov/pdffiles1/ojdp/178995.pdf>.

07 See *Juvenile Justice History*, CTR. ON JUVENILE AND CRIMINAL JUSTICE, <http://www.cjcl.org/education1/juvenile-justice-history.html> (last visited Sept. 22, 2016).

08 *Id.*; A CENTURY OF CHANGE, *supra* note 6, at 3.

09 See, e.g., *Pee v. United States*, 274 F.2d 556, app. B (D.C. Cir. 1959) (summarizing the general absence of constitutional protections for juveniles, including but not limited to: no right to bail, no privilege against self-incrimination, no right to confront witnesses, no right to jury trial, no right to counsel, no right to grand jury).

10 See *In re Gault*, 387 U.S. 1, 16-17 (1967); *Pee*, 274 F.2d at 559.

11 *Gault*, 387 U.S. at 14 n.14.

12 See, e.g., *Nelson v. Heyne*, 491 F.2d 352, 354, 356 (7th Cir. 1974) (describing an overcrowded boys’ correctional institute at which staff imposed severe corporal punishment on and administered tranquilizing drugs to residents); *McKeiver v. Pennsylvania*, 403 U.S. 528, 560 (1971) (“In 1965, over 100,000 juveniles were confined in adult institutions . . . Even when juveniles are not incarcerated with adults the situation may be no better. One Pennsylvania correctional institution . . . is a brick building with barred windows, locked steel doors, a cyclone fence topped with barbed wire, and guard towers.”) (Douglas, J., dissenting) (citing in part President’s Commission on Law Enforcement and Administration of Justice, *Challenge of Crime in a Free Society* 179 (1967)).

13 *Gideon v. Wainwright*, 372 U.S. 335 (1963).

14 *Id.* at 344.

15 See, e.g., *Kent v. United States*, 383 U.S. 541 (1966) (holding that before the District of Columbia Juvenile Court could transfer youth to criminal court, it must grant at least some protection of due process, including a transfer hearing, allowing defense counsel access to the youth’s social records in advance of said hearing, and accompanying its waiver order with a statement of reasons for transfer).

16 *Id.* at 554.

17 *In re Gault*, 387 U.S. 1 (1967).

18 *Id.* at 18 n.23 (citing *Kent*, 383 U.S. at 556).

## "A child's age is far more than a chronological fact. It is a fact that generates commonsense conclusions about behavior and perception."

*J.D.B. v. North Carolina*, 564 U.S. 261, 2397 (2011) (citations and internal quotation marks omitted).

The Court concluded that no matter how many court personnel were charged with looking after the child's best interests, any child facing "the awesome prospect of incarceration" needed "the guiding hand of counsel at every step in the proceedings against him" for the same reasons that adults facing criminal charges need counsel.<sup>19</sup>

The *Gault* decision required the introduction of defense lawyers and affirmed the critical need for constitutional protections in what had become a dangerously informal juvenile court process.<sup>20</sup> Significantly, it was the Supreme Court's intention that youth accused of delinquent acts were to become participants, rather than spectators, in their court proceedings.<sup>21</sup> In addition to the right to counsel, *Gault* affirmed children's right to notice of the charges against them,<sup>22</sup> the privilege against self-incrimination,<sup>23</sup> the right to compulsory process of witnesses,<sup>24</sup> and the right to confront and cross-examine adverse witnesses.<sup>25</sup> In condemning the harms of the early system, the Court famously stated, "The condition of being a boy does not justify a kangaroo court."<sup>26</sup>

The Supreme Court's call for fundamental fairness for youth resonated beyond the steps of the courthouse and was answered by federal and state policymakers. In 1974, Congress passed the Juvenile Justice and Delinquency Prevention Act (JJJPA),<sup>27</sup> legislation that sought to regulate the function of the juvenile justice system and its treatment of children. It still stands as the country's primary federal legislation regulating juvenile justice.

In 1988, Congress made addressing disproportionate minority contact a core requirement of the JJJPA.<sup>28</sup> In 1992, when Congress reauthorized the JJJPA, it affirmed the importance of the role of defense counsel in delinquency proceedings.<sup>29</sup> Also in the 1992 reauthorization of the JJJPA, Congress charged OJJDP with establishing and supporting advocacy programs and services that protect due process rights of youth in juvenile court and called for an improvement of the quality of legal representation for youth in delinquency proceedings.<sup>30</sup>

The JJJPA has served as the foundation for federal leadership and support for the juvenile justice community across the nation for the past 40 years. A reauthorized, reinvigorated, and well-resourced Act focused on promoting positive outcomes for youth is essential to implementing developmentally informed juvenile courts and guiding the community of juvenile justice professionals forward.

Today, there is a renewed focus on reforming our nation's juvenile justice systems grounded in adolescent behavioral and neuroscience research as well as overwhelming evidence of racial disparities. The dual injustices imposed by violating the civil rights of youth through disparate treatment coupled with violating the due process rights of youth through denial of access to effective counsel cannot be tolerated. Bipartisan initiatives should decriminalize adolescence, eliminate racial disparities, and ensure systems of effective juvenile defense. As this nation considers, implements, and enhances juvenile justice reform, children's access to juvenile defense

19 *Id.* at 36.

20 *Id.* at 61 ("As a juvenile . . . [Gerald Gault] was put through a more or less secret, informal hearing by the court, after which he was ordered, or more realistically, 'sentenced,' to confinement in Arizona's Industrial School . . . the Arizona law as applied here denied to the parents and their son the right of notice, right to counsel, right against self-incrimination, and right to confront the witnesses against young Gault.") (Black, J., concurring).

21 *See, e.g., id.* at 36, 38 n.65.

22 *Id.* at 33 ("Due process of law requires . . . notice which would be deemed constitutionally adequate in a civil or criminal proceeding.")

23 *Id.* at 55 ("[T]he constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults.")

24 *Id.* at 56 (finding that the Arizona Supreme Court's requirement for "sworn testimony . . . of all witnesses" was "not enough" to protect due process rights).

25 *Id.* (finding that "confrontation and sworn testimony by witnesses available for cross-examination were essential").

26 *Id.* at 28.

27 Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109, *amended by* Pub. L. No. 107-273, 116 Stat. 1871 (2002).

28 *See* Legislation/JJDP Act Authorizing Legislation, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, <http://www.ojjdp.gov/about/legislation.html> (last visited Sept. 23, 2016).

29 *See* Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 102-586, 106 Stat. 4982 (1992) (reauthorizing the Act for fiscal years 1993-1996), *amended by* Pub. L. No. 107-273, 116 Stat. 1871 (2002).

30 *Id.*

counsel and the quality of representation provided must be a central component of every initiative. It is our hope that *Defend Children: A Blueprint for Effective Juvenile Defender Services* will serve as a pathway to achieving that reality.

## CHALLENGES

Tackling systemic juvenile defense issues, understanding gaps, measuring progress, educating stakeholders about emerging trends, supporting courtroom advocacy, initiating true partnerships with communities, and ensuring professional and ethical management is not possible without consistent data collection, assessment and evaluation, court observation, and research on existing juvenile defense systems. Unfortunately, most states lack a process for collecting data and evaluating juvenile defense performance at a statewide level.<sup>31</sup> Research on current juvenile defense practices are scarce, hindering efforts to better identify and reform inadequate practices in juvenile court. Unlike the child welfare system, which has benefitted from decades of U.S. Department of Health and Human Services support through the Court Improvement Program,<sup>32</sup> no such comparable resources have ever existed for the delinquency side of juvenile court.

The data that we do have, however, shows that racial and ethnic disparities deeply pervade the juvenile justice system.<sup>33</sup> Decades of delinquency prevention policies focused on control and enforcement, rather than on positive youth outcomes, have resulted in

legally sanctioned mass incarceration of youth of color.<sup>34</sup> Systemic reform efforts must target implicit and explicit bias in delinquency court and promote bias-free juvenile defense systems and training for juvenile defenders on how to effectively raise issues of disparities and overrepresentation throughout a child's involvement in the justice system. Existing best practices and resources should be reviewed and expanded to address how to effectively remove bias and disparities in the juvenile court system.

## The dual injustices imposed by violating the civil rights of youth through disparate treatment coupled with violating the due process rights of youth through denial of access to effective counsel cannot be tolerated.

Concerns regarding the inadequacy of juvenile defense systems are heightened in rural, remote, and underserved communities. Juvenile defense stakeholders in these communities lack resources and support and feel disconnected from the broader juvenile defense community. In addition, rural communities often lack specialized juvenile defenders, support staff, disposition alternatives for clients, and resources for effective representation.<sup>35</sup> Defenders who represent children in these communities face unique challenges that make it difficult to provide client-centered and expressed-interest representation for youth.

31 See generally *State Assessments*, NAT'L JUVENILE DEFENDER CTR., <http://njdc.info/our-work/juvenile-indigent-defense-assessments> (last visited Sept. 22, 2016) [hereinafter NJDC Assessments].

32 See generally *Court Improvement Program*, CHILD WELFARE INFORMATION GATEWAY, <https://www.childwelfare.gov/topics/systemwide/courts/reform/cip/> (last visited Sept. 22, 2016) (The highest court of each State and territory participating in the Court Improvement Program (CIP) receives a grant from the Children's Bureau aimed at, for example, improving the timeliness and quality of hearings, reducing attorney and judicial caseloads, enhancing the quality of legal representation, and using computer technology and management information systems.).

33 While racial and ethnic minority children make up 46% of the general population of children in the United States, they are overrepresented in residential placements, comprising 68% of the children in residential placement facilities (which includes pre-adjudicatory detention, post-disposition commitment, and placement in facility in lieu of adjudication as part of a diversion agreement). See Charles Puzanchera, Anthony Sladky & Wei Kang, *Easy Access to Juvenile Populations: 1990-2015*, NAT'L CTR. FOR JUVENILE JUSTICE (2016), <http://www.ojjdp.gov/ojstatbb/ezapopl/> (narrowed by those under age 18 in 2014, with row variable set to race and column variable set to ethnicity); Melissa Sickmund et al., *Easy Access to the Census of Juveniles in Residential Placement: 1997-2013*, NAT'L CTR. FOR JUVENILE JUSTICE (2015), <http://www.ojjdp.gov/ojstatbb/ezacjrp/> (narrowed by those under age 18 in 2013, with row variable set to race and column variable set to placement status general).

34 ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 219 (2016) [hereinafter THE MAKING OF MASS INCARCERATION].

35 See, e.g., NAT'L JUVENILE DEFENDER CTR. & COLO. JUVENILE DEFENDER COALITION, COLORADO: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE DELINQUENCY PROCEEDINGS (2012) [hereinafter NJDC COLORADO ASSESSMENT]; AM. BAR ASS'N & NEW ENGLAND JUVENILE DEFENDER CTR., MAINE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE DELINQUENCY PROCEEDINGS (2003) [hereinafter NJDC MAINE ASSESSMENT]; AM. BAR ASS'N & MID-ATLANTIC JUVENILE DEFENDER CTR., MARYLAND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE DELINQUENCY PROCEEDINGS (2003) [hereinafter NJDC MARYLAND ASSESSMENT]; NAT'L JUVENILE DEFENDER CTR. & CENTRAL JUVENILE DEFENDER CTR., MISSOURI: JUSTICE RATIONED: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE DELINQUENCY COURT (2013) [hereinafter NJDC MISSOURI ASSESSMENT]; NAT'L JUVENILE DEFENDER CTR., SOUTH CAROLINA: JUVENILE INDIGENT DEFENSE – A REPORT ON ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2010) [hereinafter NJDC SOUTH CAROLINA ASSESSMENT]; AM. BAR ASS'N & MID-ATLANTIC JUVENILE DEFENDER CTR., VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2002) [hereinafter NJDC VIRGINIA ASSESSMENT]; NAT'L JUVENILE DEFENDER CTR., WEST VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE DELINQUENCY COURT (2010) [hereinafter NJDC WEST VIRGINIA ASSESSMENT].

Across the country, juvenile indigent defense is burdened by a scarcity of resources.<sup>36</sup> As such, there are few dedicated or stand-alone juvenile defense offices. In the vast majority of states, indigent defense resources pale in comparison with the resources of other entities, such as law enforcement and prosecutors. Further, the limited resources that do exist for indigent defense are often managed by larger adult defense systems that do not provide juvenile defense with the necessary specialization, expertise, and leadership the field needs.

Overcoming these barriers, including the research gap, racial and ethnic disparities, challenges in rural areas, and insufficient funding, will require close and thoughtful review of the statutory framework for the funding and administration of juvenile defense at the state and local levels. Over the past decade, the JJDP Act has not been reauthorized, and total funds appropriated to OJJDP have decreased significantly.<sup>37</sup> Raising the appropriation level for juvenile indigent defense, as proposed in the President's 2016 and 2017 Budgets,<sup>38</sup> will provide additional resources to help states move in the right direction.

The vast differences in the provision of juvenile defense services across state and local jurisdictions make clear that only a truly comprehensive and systemic approach to reform can achieve significant progress in the field. Such an approach requires increased investments at all levels of government and significant stakeholder collaboration at the local and state levels.

## **Children's access to juvenile defense counsel and the quality of representation provided must be a central component of every initiative.**

This Blueprint provides the case for reform and offers recommendations for solutions, highlighting innovations and promising practices from around the country. With national, state, local, and tribal leadership, healthy and developmentally sound juvenile defense systems can emerge to fulfill the promise of *Gault* for our children.

<sup>36</sup> See generally NJDC Assessments, *supra* note 32.

<sup>37</sup> See Legislation/JJDP Act Authorizing Legislation, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, <http://www.ojjdp.gov/about/legislation.html> (last visited Sept. 23, 2016); KRISTIN FINKLEA, JUVENILE JUSTICE FUNDING TRENDS, CONGRESSIONAL RESEARCH SERVICE (2016), <https://www.fas.org/sgp/crs/misc/RS22655.pdf>.

<sup>38</sup> See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2017 66 (2016), <https://www.whitehouse.gov/sites/default/files/omb/budget/fy2017/assets/budget.pdf>.

## INNOVATIONS

Appearing throughout the report are special sections that feature “Innovations.” Each innovation provides examples of successful programs and practices in the topic area of the section in which it appears. While the obstacles to reform are real, these working solutions demonstrate they are not insurmountable. We hope reformers will use the innovations to inform and inspire future work to uphold children’s rights in juvenile court.

# RECOMMENDATIONS



## 01 Champion, Uphold, and Fund Children's Right to Counsel



### 02 Ensure Meaningful Access to Counsel Throughout the Delinquency Process

Every child who faces arrest, prosecution, or sanctions imposed by the state should be represented by counsel until the child is no longer under the supervision of the justice system.



### 03 Implement Strong, Well-Resourced, and Specialized Juvenile Defense Systems

All juvenile defense systems should be sufficiently funded, due process-based, technologically equipped, developmentally sound, and respectful of and responsive to cultural differences.



### 04 Eliminate Racial and Ethnic Disparities

The over-inclusion and disproportionate treatment of children of color in our juvenile justice system is undeniable. It is critical to address this disproportionality and combat implicit and explicit bias throughout the justice system.



### 05 Attract and Retain New and Diverse Talent to the Field of Juvenile Defense

Specific attention must be paid to developing a corps of excellence and attracting a diverse body of talent, expertise, and leadership to the juvenile defense field.



### 06 Protect the Rights of Youth Who Face Additional Discrimination and Violation of Their Constitutional Rights

Children who face additional risks and barriers to fair treatment require specialized attorneys who are trained to recognize, monitor, and uphold their rights.



### 07 Fund and Implement Mechanisms to Collect Data, Conduct Assessments and Court Observations, and Initiate Evaluation and Research

Dedicated juvenile defense research, evaluation, and data collection must be established in order to measure progress and sustain effective juvenile defense systems.

**EVOLUTION OF  
THE UNIQUE  
JURISPRUDENCE OF  
JUVENILE RIGHTS**

**A TIMELINE OF KEY UNITED STATES SUPREME COURT CASES**

**FIRST JUVENILE COURT**

Cook County, Illinois establishes first juvenile court, recognizing youth are not simply small adults and thus deserve a distinct court system.

**1899**

**GALLEGOS V. COLORADO**

Building on *Haley*, the Court again recognizes that youth are more susceptible to coercion and notes that a youth “would have no way of knowing what the consequences of his confession were without advice as to his rights – from someone concerned with securing him those rights...” 370 U.S. 49, 54 (1962).

**1962**

**1967**

**IN RE GAULT**

The Court holds the Due Process Clause of the Fourteenth Amendment guarantees youth the right to counsel. The Court also finds that due process requires youth have the right to notice of charges against them, the right to confront and cross-examine witnesses, and the privilege against self-incrimination.

“Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.” 387 U.S. 1, 18 (1967).

**IN RE WINSHIP**

The Court finds that juvenile adjudications require proof “beyond a reasonable doubt.”

“The same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child.” 397 U.S. 358, 365 (1970).

**1970**

**1948**

**HALEY V. OHIO**

U.S. Supreme Court recognizes that youth are more susceptible to coercion during an interrogation.

The Court notes, “[t]hat which would leave a man cold and unimpressed [during an interrogation] can overawe and overwhelm a lad in his early teens.” 332 U.S. 596, 599 (1948).

**1966**

**KENT V. UNITED STATES**

The Court holds that youth are entitled to procedural due process protections at transfer hearings.

“There is no place in our system of law for reaching a result of such tremendous consequences without ceremony – without hearing, without effective assistance of counsel, without a statement of reasons.” 383 U.S. 541, 554 (1966).

**1971**

**MCKEIVER V. PENNSYLVANIA**

The Court fails to extend the constitutional right to a trial by jury to juveniles. 403 U.S. 528 (1971).



**BREED V. JONES**

The Court holds that the Double Jeopardy Clause of the Fifth Amendment applies to youth in delinquency court. 421 U.S. 519 (1975).

1975

**ROPER V. SIMMONS**

The Court abolishes the death penalty as applied to minors based on the Eighth Amendment prohibition against "cruel and unusual punishment." In eliminating the juvenile death penalty the Court relies on developmental research highlighting "general differences between juveniles under 18 and adults ...." 543 U.S. 551, 569 (2005).

"The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." *Id.* at 572-73.

2005

**J.D.B V. NORTH CAROLINA**

The Court rules that a child's age must inform the *Miranda* custody analysis by law enforcement during juvenile interrogations. The decision includes underpinnings to support a "reasonable child standard" in legal contexts.

The Court recognizes that "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." 564 U.S. 261, 272 (2011).

2011

**MONTGOMERY V. LOUISIANA**

The Court reinforces that children are constitutionally different from adults and holds that *Miller's* prohibition of mandatory juvenile life without parole is a substantive rule of constitutional law and is therefore retroactive.

"In light of what this Court has said in *Roper*, *Graham*, and *Miller* about how children are constitutionally different from adults in their level of culpability...[children sentenced to mandatory life without parole] must be given the opportunity to show their crime did not reflect irreparable corruption...." 136 S.Ct. 718, 736 (2016).

2016

1984

**SCHALL V. MARTIN**

The Court authorizes pre-trial detention of youth accused of delinquency acts without the right to bail. 467 U.S. 253 (1984).

2010

**GRAHAM V. FLORIDA**

The Court holds it is unconstitutional to impose the penalty of life imprisonment without the possibility of parole on juveniles (JLWOP) for non-homicide offenses.

"As compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'" 560 U.S. 48, 68 (2010) (internal citations omitted).

2012

**MILLER V. ALABAMA**

The Court, again citing developmental science, holds that juveniles cannot be sentenced to a mandatory life without parole sentence, even for homicide offenses.

"Our decisions rested not only on common sense—on what 'any parent knows'—but on science and social science as well." 132 S.Ct. 2455, 2464 (2012) (internal citations omitted).

# THE CASE FOR REFORM

More than a million times a year, children in America are charged with crimes in juvenile court.<sup>39</sup> Most children are accused of non-violent property offenses (35%), drug law violations (13%), and public order offenses (26%)<sup>40</sup>—adolescent misconduct that is developmentally normative but unequally prosecuted among poor youth and youth of color. In fact, Black youth are nearly five times more likely to be confined than white youth, and Latino and American Indian and Alaska Native youth are two to three times more likely to be confined.<sup>41</sup> Though the total number of juvenile cases has decreased since the mid-1990s, the inclination to criminalize childhood continues and the racial and economic disparities remain the same.<sup>42</sup>

The outlawing of adolescence causes real and lasting harms in the lives of youth. All too often, juvenile court becomes the default response when other systems fail to provide developmentally appropriate support, saddling young people with enduring juvenile records—and potentially putting them on a pathway into the adult criminal justice system—on the basis of perceived needs rather than safety concerns. Juvenile court involvement cannot be a social service.

For children in the justice system, access to *justice* at its very core requires access to *counsel*. It is an open secret in America's justice system

that countless children accused of crimes are prosecuted and convicted every year without ever seeing a lawyer.<sup>43</sup> In many jurisdictions, children routinely waive their right to counsel without first consulting with an attorney; the National Juvenile Defender Center observed such excessive waiver of counsel in 62 percent of states NJDC has assessed to date.<sup>44</sup> Fair treatment of children in delinquency courts is virtually impossible without the availability of specialized and highly skilled lawyers advocating for the expressed legal interests of the children they represent.

**It is an open secret in America's justice system that countless children accused of crimes are prosecuted and convicted every year without ever seeing a lawyer.**

It is the child's lawyer—the juvenile defender—who is required to insist upon fair and lawful juvenile court proceedings, to guarantee that the child's voice is heard at every stage of the process, and to safeguard the due process and equal protection rights of the child. This role is distinct from other juvenile court stakeholders who are required to consider the “best interests” of the child; the juvenile defender is instead required to consider the

39 See SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2013 52 (2015).

40 *Id.* at 7.

41 THE ANNIE E. CASEY FOUND., REDUCING YOUTH INCARCERATION IN THE UNITED STATES 2 (2013) [hereinafter REDUCING YOUTH INCARCERATION]; PATRICK MCCARTHY, VINCENT SCHIRALDI, AND MIRIAM SHARK, THE FUTURE OF YOUTH JUSTICE: A COMMUNITY-BASED ALTERNATIVE TO THE YOUTH PRISON MODEL, NEW THINKING IN COMMUNITY CORRECTIONS BULLETIN (U.S. Dep't of Justice, Nat'l Inst. of Justice 2016) [hereinafter THE FUTURE OF YOUTH JUSTICE].

42 See NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 157 (2014) [hereinafter 2014 NCJJ REPORT]; THE FUTURE OF YOUTH JUSTICE, *supra* note 41, at 16-17.

43 See NJDC Assessments, *supra* note 31.

44 Of the 21 states formally assessed, NJDC observed excessive waiver of counsel in 13. NJDC MISSOURI ASSESSMENT, *supra* note 35; NJDC COLORADO ASSESSMENT, *supra* note 35; NAT'L JUVENILE DEFENDER CTR., NEBRASKA: JUVENILE LEGAL DEFENSE: A REPORT ON ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION FOR CHILDREN IN NEBRASKA (2009) [hereinafter NJDC NEBRASKA ASSESSMENT]; NJDC MARYLAND ASSESSMENT, *supra* note 35; NAT'L JUVENILE DEFENDER CTR., FLORIDA: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2006) [hereinafter NJDC FLORIDA ASSESSMENT]; NAT'L JUVENILE DEFENDER CTR. & CENTRAL JUVENILE DEFENDER CTR., INDIANA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2006) [hereinafter NJDC INDIANA ASSESSMENT]; AM. BAR ASS'N ET AL., OHIO: JUSTICE CUT SHORT: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN OHIO (2003) [hereinafter NJDC OHIO ASSESSMENT]; AM. BAR ASS'N & JUVENILE LAW CTR., PENNSYLVANIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2003) [hereinafter NJDC PENNSYLVANIA ASSESSMENT]; AM. BAR ASS'N, NAT'L JUVENILE DEFENDER CENTER, & NORTHWEST JUVENILE DEFENDER CTR., WASHINGTON: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE OFFENDER MATTERS (2003) [hereinafter NJDC WASHINGTON ASSESSMENT]; NJDC VIRGINIA ASSESSMENT, *supra* note 35; AM. BAR ASS'N ET AL., KENTUCKY: ADVANCING JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2002) [hereinafter NJDC KENTUCKY ASSESSMENT]; AM. BAR ASS'N & SOUTHERN CTR. FOR HUMAN RIGHTS, GEORGIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2001) [hereinafter NJDC GEORGIA ASSESSMENT]; AM. BAR ASS'N ET AL., THE CHILDREN LEFT BEHIND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN LOUISIANA (2001) [hereinafter NJDC LOUISIANA ASSESSMENT]. See also *infra* note 76.

“expressed interests” of the child.<sup>45</sup> The shameful fact is that few youth in this country actually receive meaningful access to constitutionally required and qualified defense counsel in delinquency proceedings.<sup>46</sup> All too often, justice-involved youth enter into blind plea agreements without consulting an attorney and without having a complete picture of the lifelong, direct, and collateral impacts of juvenile court adjudications, including incarceration.<sup>47</sup> A legal right has no bearing if it cannot be accessed.

## A state “deprives children of their right to counsel if its courts allow them to waive that right without first consulting with competent counsel.”

The juvenile defense systems in most jurisdictions are inadequate or wholly lacking in their capacity to defend children’s rights.<sup>48</sup> Youth do not have access to a lawyer early enough in the court process, and the method of appointing counsel often depends on the judge’s discretion, perpetuating the misguided but common notion that the appointment of counsel is optional. Further, many youth waive their right to counsel without ever having had the opportunity to discuss this important decision with a lawyer. This lack of access to counsel often persists through disposition and post-disposition, as too many children languish unnecessarily without lawyers in costly confinement institutions and face significant hurdles upon returning to their communities.

Children’s access to counsel is determined in large part by statutory schemes and juvenile codes that proscribe when counsel is appointed, how counsel

is appointed, whether and how counsel is waived, and when counsel’s appointment terminates. Statutes that limit access on the front and back ends of the juvenile court process create barriers to representation and impede children’s access to justice. These statutory schemes are often a patchwork of laws established one at a time without comprehensive analysis to ensure children are consistently represented at all stages of the proceedings.

Overwhelming evidence now shows that detention—even minimal and short-term detention—has an enduring effect on young people that exacerbates symptoms of stress, trauma, anxiety, and mental illness.<sup>49</sup> Additionally, detention prior to trial has been linked to recidivism rather than an increase in public safety.<sup>50</sup> An ideal juvenile justice system works to minimize the use of detention, and to minimize the time that a youth spends in detention if it is deemed necessary. To achieve this goal, however, children appearing before the court must have the benefit of counsel not merely at a future trial date, but *prior* to the youth’s initial detention hearing.

Current systems allow a staggering number of justice-involved youth to appear in court without a lawyer.<sup>51</sup> That is despite the fact that the United States Supreme Court established the juvenile right to counsel nearly 50 years ago.<sup>52</sup> One reason youth face prosecution without a lawyer is the coercive, and often arbitrary and burdensome indigence determination process imposed in many jurisdictions before youth are able to obtain a court-appointed lawyer.<sup>53</sup>

45 The juvenile defense attorney has a duty to advocate for a client’s “expressed interests,” regardless of whether the “expressed interests” coincide with what the lawyer personally believes to be in the “best interests” of the client. *In re Gault*, 387 US 1 (1967); see generally, Model Rules of Professional Conduct 1.2, 1.3, 1.4, 1.8, & 1.14. “Expressed-interest” (also called stated-interest) representation requires that counsel assert the client’s voice in juvenile proceedings. In comparison, “best interest” representation requires advocates to assert their own opinion about what they believe is best for the child. No other juvenile court decision makers are mandated to represent the “expressed interests” of youth. If juvenile defenders do not abide by this ethical obligation to provide “expressed interest” advocacy, youth are deprived of their fundamental right to counsel. See U.S. Dep’t of Justice Statement of Interest for N.P. et al. v. Georgia, No. 2014-CV-241025 at 12-15 (Ga. Super. Ct. 2014) [hereinafter Statement of Interest in N.P.].

46 See ATTORNEY GEN. NAT’L TASK FORCE, U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, CHILDREN EXPOSED TO VIOLENCE 185-87 (2012), <https://www.justice.gov/defendingchildhood/cev-rpt-full.pdf> [hereinafter CHILDREN EXPOSED TO VIOLENCE]; NJDC Assessments, *supra* note 31; COLO. JUVENILE DEFENDER COALITION, KIDS WITHOUT COUNSEL: COLORADO’S FAILURE TO SAFEGUARD DUE PROCESS FOR CHILDREN IN JUVENILE DELINQUENCY COURT (2013) [hereinafter KIDS WITHOUT COUNSEL].

47 Wallace J. Mlyniec, *In re Gault at 40: The Right to Counsel in Juvenile Court—A Promise Unfulfilled*, 44 No. 3 CRIM. LAW BULLETIN 5 (2008).

48 See generally NJDC Assessments, *supra* note 31.

49 See e.g., BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 8-9 (2006), [http://www.justicepolicy.org/images/upload/06-11\\_rep\\_dangersofdetention\\_jj.pdf](http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf); JAMES AUSTIN, KELLY DEDEL JOHNSON & RONALD JOHN WEITZER, U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, ALTERNATIVES TO THE SECURE DETENTION AND CONFINEMENT OF JUVENILE OFFENDERS 2-3 (2005), <https://www.ncjrs.gov/pdffiles1/ojdp/208804.pdf>.

50 HOLMAN & ZIEDENBERG, *supra* note 49, at 4.

51 See *infra* note 77.

52 See *In re Gault*, 387 U.S. 1, 34-43 (1967).

53 Indeed, a recent report by the U.S. Department of Justice Civil Rights Division found that the family court in St. Louis County, Missouri systematically fails to provide adequate representation for children in delinquency proceedings, due in part to the arbitrary system of determining eligibility for public defender services. See U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE ST. LOUIS FAMILY COURT, ST. LOUIS, MISSOURI (2015).

Juvenile waiver of counsel is as pervasive as it is troubling. Countless youth across the country are encouraged to waive their right to counsel without adequate knowledge of the benefits of legal representation.<sup>54</sup> This is unacceptable.

Access to and consultation with an attorney prior to waiving the right to counsel is critical for justice-involved youth. Indeed, as the United States Department of Justice recently clarified, a state “deprives children of their right to counsel if its courts allow them to waive that right without first consulting with competent counsel.”<sup>55</sup>

Children who are treated fairly in the legal system are more likely to trust their attorneys and other court personnel, actively engage in the court process, and find value—and legitimacy—in their case outcomes.<sup>56</sup> Research demonstrates that this perception of fairness, known as “procedural justice,” is a significant precursor to positive behavior over time.<sup>57</sup> As a child’s strongest link to

the court system, high-quality juvenile defenders are critically important to guaranteeing procedural justice for youth.<sup>58</sup>

This Blueprint calls for a comprehensive and systemic approach to ensure children’s right to counsel. There is no “one-size-fits-all” solution. This Blueprint was developed with a full appreciation for the existing array of juvenile defense systems across the country (e.g., county/state public and private defender offices, appointed counsel systems, and law school clinics in urban, suburban, and rural settings) and an understanding that the daily practices of juvenile defenders are greatly influenced by the type of juvenile defense system or jurisdiction in which they practice. The building of competent juvenile defense delivery systems requires the full engagement of high-level, non-defender stakeholders and decision makers, including legislators, state supreme courts, court administrators, juvenile judges, and others who work in or with juvenile court systems.

54 See *infra* note 77.

55 See Statement of Interest in N.P., *supra* note 45, at 7.

56 See Jeffrey A. Fagan & Alex R. Piquero, *Rational Choice and Developmental Influences on Recidivism Among Adolescent Felony Offenders*, 4 J. EMPIRICAL LEGAL STUDIES 715 (2007), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2818334/pdf/nihms-154757.pdf>; REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 192-93, 197-98 (Richard J. Bonnie, Robert L. Johnson, Betty M. Chemers & Julie A. Schuck eds., The National Academies Press 2013), <https://www.nap.edu/catalog/14685/reforming-juvenile-justice-a-developmental-approach> [hereinafter REFORMING JUVENILE JUSTICE].

57 Jeffrey Fagan & Tom Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUSTICE RESEARCH 217 (2005).

58 See REFORMING JUVENILE JUSTICE, *supra* note 56, at 198.

# 1.0

## CHAMPION, UPHOLD, AND FUND CHILDREN'S RIGHT TO COUNSEL

The framework for justice in this nation is the United States Constitution and leaders of all branches of government must champion, uphold, and defend the rights it endows—especially rights for children. On May 15, 1967, the United States Supreme Court affirmed that children facing prosecution are entitled to due process protections under the Fourteenth Amendment—most importantly, the right to counsel.<sup>59</sup> The *In re Gault* decision was based on the notion that, “[d]ue process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.”<sup>60</sup> Effective juvenile defense reform begins with championing the due process rights of children.

The essence of access to justice for children *is* access to counsel. The fate of our children facing prosecution depends in no small part on the deliberate and immediate implementation of children’s right to counsel. As decision makers look to improve outcomes for justice-involved youth, representation for children in court must be recognized as a necessary component of a developmentally appropriate juvenile justice system.

When thinking through the design, structure, and implementation of juvenile justice and juvenile defense systems, behavioral differences between youth and adults and the impact of court interventions on children must be considered.<sup>61</sup> The vast majority of children involved in the juvenile justice system have endured exposure to violence and the resulting trauma of those experiences.<sup>62</sup> Scientific knowledge about adolescent development, the impact of trauma on youth, and the biological immaturity of the brain, coupled with the strong legal precedent set forth by the United States Supreme Court in a line of recent cases, requires an immediate shift in policy and practice.<sup>63</sup> The field must align the goals of the

juvenile justice system—holding youth accountable, developing youth competencies, and protecting communities—with a developmental approach that promotes positive youth behavior. State, local, and tribal jurisdictions urgently need assistance, and practitioners urgently need guidance, on how to implement fair, developmentally sound, due-process-based, trauma-informed, juvenile defense systems for children who come into contact with the justice system.

### The essence of access to justice for children *is* access to counsel.

Juvenile justice leaders should work in partnership with juvenile defense experts and juvenile defenders to establish systems that are fair, specialized, and measurable. Resources and leadership at all levels of government are required to surmount the historical minimization of juvenile delinquency practice and to promote significant reforms of juvenile defense systems across the nation.

59 See generally *In re Gault*, 387 U.S. 1 (1967).

60 *Id.* at 20.

61 See generally RICHARD J. BONNIE ET AL., *REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH* (National Research Council of the National Academies, 2013).

62 See *CHILDREN EXPOSED TO VIOLENCE*, *supra* note 46, at 21.

63 See *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016); *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *J.D.B. v. North Carolina*, 564 U.S. 261 (2011); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

## **RECOMMENDATION 2.0**

### **ENSURE MEANINGFUL ACCESS TO COUNSEL THROUGHOUT THE DELINQUENCY PROCESS**

#### **2.1**

**Guarantee Early, Timely, and Meaningful Access to Juvenile Defense Counsel**

#### **2.2**

**Appoint Counsel for All Children Without Requiring a Determination of Indigence**

#### **2.3**

**Prohibit Waiver of Counsel Without Prior Consultation with a Defense Attorney**

#### **2.4**

**Support, Fund, and Expand Access to Counsel to Include Post-Disposition Representation and Reentry Planning**

# 2.0

## ENSURE MEANINGFUL ACCESS TO COUNSEL THROUGHOUT THE DELINQUENCY PROCESS

Every child who faces prosecution or sanctions imposed by the state, including children accused of status offenses, should be represented by counsel throughout the duration of their case. Counsel is the gateway through which a child receives crucial rights, protections, and entitlements—and those can only be meaningfully guaranteed if a child first has access to an attorney.

### RECOMMENDATION 2.1

## GUARANTEE EARLY, TIMELY, AND MEANINGFUL ACCESS TO JUVENILE DEFENSE COUNSEL

Juvenile court systems should provide children with timely access to a defense attorney in advance of their first appearance before a judge, allowing the attorney time to prepare for the hearing. Juvenile defenders appointed at the early stages of a case are better situated to help youth understand their rights, the direct and long-term consequences of juvenile court involvement, and how to navigate an increasingly complex juvenile justice system.<sup>64</sup> Qualified juvenile defenders who have the opportunity to consult with youth prior to the initial hearing are essential to helping youth make informed decisions about their cases.<sup>65</sup> However, in many states, there is a failure to provide adequate time for the juvenile defender to meaningfully represent the child at the first hearing.<sup>66</sup> In some states or counties, the child may be entirely unrepresented at early proceedings, including the detention hearing and initial hearing.<sup>67</sup> In others, counsel is appointed either during the detention hearing or immediately before the hearing, leaving the juvenile defender without an opportunity to meet and talk with the child or to prepare for the hearing.<sup>68</sup>

Juvenile courts should ensure youth have meaningful access to counsel, which mandates youth be given enough time to both receive information from and share information with their lawyer. Navigating the complexities of the delinquency process and making informed decisions at all junctures of a case requires meaningful opportunities to interact with a lawyer. Juvenile courts and indigent defense systems should acknowledge the developmental differences of youth and allow juvenile defenders to invest the proper time, care, and resources to actively engage children in the court process.

Juvenile defenders appointed early in the delinquency process can work to protect youth from the consequences of false confessions and uncounseled guilty pleas, seek diversion or case dismissal for their clients, and limit exposure to costly and harmful detention.<sup>69</sup> They are also better positioned to build a strong defense strategy that includes investigations, find alternative placements, obtain discovery, file motions, and encourage clients to exercise other rights, such as the right

64 See Kenneth J. King, Patricia Puritz & David A. Shapiro, *The Importance of Early Counsel in Juvenile Court*, in NAT'L CTR. FOR STATE COURTS, TRENDS IN STATE COURTS: 2014, 13, 14 (2014).

65 See Statement of Interest in N.P., *supra* note 45, at 12-13, 15 ("Every child who faces the loss of liberty must be represented from the time of arrest through the disposition of their case . . . . [I]f [the lawyers] do not have the time or resources to engage in effective advocacy or if they do not receive adequate training or supervision . . . then they will inevitably fail to meet the minimum requirements of their clients' right to counsel. These conditions lead to *de facto* nonrepresentation.").

66 See NJDC Assessments, *supra* note 31.

67 *Id.*

68 *Id.*

69 See generally NAT'L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS (2012) (explaining the role of counsel throughout the process of assisting a juvenile client) [hereinafter NATIONAL JUVENILE DEFENSE STANDARDS].

## RECOMMENDATION 2.1

to remain silent. Additionally, early appointment of counsel keeps the goals of juvenile court in focus by allowing juvenile defenders to develop case

plans that address children's unique strengths and circumstances.<sup>70</sup> Courts can then make informed decisions that lead to youth success.

### INNOVATION

### LAWS PROVIDING FOR JUVENILE ACCESS TO COUNSEL DURING POLICE INTERROGATION

Effective January 1, 2017, Illinois law will require that any juvenile under 15 years of age at the time of the alleged commission of certain statutorily defined offenses must be provided access to a defense attorney during a custodial interrogation.<sup>71</sup>

## RECOMMENDATION 2.2

### APPOINT COUNSEL FOR ALL CHILDREN WITHOUT REQUIRING A DETERMINATION OF INDIGENCE

Juvenile courts should forgo indigence determinations of children, at least for the purpose of appointing counsel. The indigence determination process delays a child's access to a lawyer—even for a child in detention—and can create conflict between the child and family, putting added pressure on a child to waive their right to counsel. Whether by statute, court rule, or policy, juvenile courts should deem children eligible for indigent defense services by virtue of their legal and developmental status as children.

In most states, a child's ability to be appointed a public defender or court-appointed lawyer hinges on a determination of eligibility for indigent defense services. Indigence determinations are usually based on a set of specific formulas that vary from state to state, but often include some percentage above the federal poverty guidelines or general "ability to pay" guidelines.<sup>72</sup> The indigency process for children in delinquency court is often the same as for adult defendants; however, children typically do not have their own income or assets, so the determination rests on an investigation of the parent or guardian's income. Indigence determinations consider assets that are not under the control of the

child, and the investigation of parents' and/or other relatives' resources often leads to fear and concern for the family and child.

The indigence application process can impede children's access to counsel. Parents or guardians usually have to complete an application and are typically required to provide proof of their inability to pay. Some states even charge a fee to apply for indigent defense services. Thus, the indigence determination process itself can disrupt or delay the appointment of, or one's willingness to seek, counsel.

Parents who do not qualify for indigent defense services for their children are faced with the prospect of hiring an attorney at significant expense,<sup>73</sup> which can force children to choose between their families' financial welfare and the protection of their own due process rights. If parents incur the cost of representation, a potential conflict may develop between the parent and the child over direction of the case. All children should be deemed eligible for appointment of counsel by virtue of their status as children to avoid pressured waiver or conflicts in representation.

<sup>70</sup> *Id.*

<sup>71</sup> 705 ILL. COMP. STAT. ANN. 405 / 5-170 (2013), amended by 2016 Ill. Legis. Serv. P.A. 99-0882 (SB 2370).

<sup>72</sup> See generally WASHINGTON UNIVERSITY SCHOOL OF LAW, CRIMINAL JUSTICE CLINIC, INDIGENCY GUIDELINES (2012).

<sup>73</sup> See NJDC Assessments, *supra* note 31; KIDS WITHOUT COUNSEL, *supra* note 46, 5-6.



## INNOVATION

## ADDRESSING PROBLEMS WITH INDIGENCE DETERMINATIONS

Pennsylvania law provides that all juveniles are presumed indigent, and if a juvenile appears at any hearing without counsel, the court shall appoint counsel for the juvenile prior to the commencement of that hearing. A parent or guardian's ability to pay shall have no bearing on whether counsel is provided to the child.<sup>74</sup> Louisiana and North Carolina statutes presume juveniles are indigent in order to appoint counsel, but that presumption may be challenged at a later date.<sup>75</sup>

## RECOMMENDATION 2.3

## PROHIBIT WAIVER OF COUNSEL WITHOUT PRIOR CONSULTATION WITH A DEFENSE ATTORNEY

Waiver of counsel in juvenile court is a problem nationwide.<sup>76</sup> Courts should ensure, in line with the Department of Justice's recommendations in its 2015 Statement of Interest in *N.P. v. Georgia*,<sup>77</sup> that no child be allowed to waive his or her right to counsel unless and until that child has the opportunity to meaningfully consult with an attorney about the full implication of the waiver of that right.

Children require the advice and assistance of counsel to make decisions that carry lifelong consequences in the highly charged setting of a juvenile court proceeding. Yet, multiple systemic factors directly or indirectly encourage children to waive their right to an attorney.

The most troubling factor regarding waivers of counsel is that children are often put in the untenable position of making a decision about waiving their right to representation before they

have an opportunity to speak with an attorney. At a child's very first court date, he or she may be offered a plea bargain that will "resolve" the case that day. In this all too common scenario, a judge may conduct a "mass advisement" to inform children in the courtroom of their constitutional rights, and then accept guilty pleas and dole out sentences—all in the absence of qualified defense counsel.<sup>78</sup> The lure of "resolving" the case in a single court appearance is understandably appealing to children and families; however, it grossly underestimates the direct and collateral consequences of a juvenile adjudication that can lead to years of court supervision, potential incarceration, and numerous fees. This practice also fails to provide critically important checks and balances on the juvenile court system.

State and local laws governing public defense agencies may also limit the presence of defense attorneys and induce waiver of counsel without

74 42 PA. CONS. STAT. ANN. § 6337.1 (West 2014) (children in delinquency cases are presumed indigent, and must be appointed counsel by the court if they arrive at any hearing without counsel).

75 LA. CHILD. CODE ANN. art. 320(A) & art. 848 (2016); N.C. GEN. STAT. ANN. §§ 7B-2000(b), 7A-450.1, 7A-450.3 (2016).

76 Excessive waiver of counsel and lack of counsel was observed in 62 percent of the 21 states in which NJDC has conducted state-specific assessments of youth access to counsel. Though each state assessed has subsequently worked towards reform, the data cited reveals the pervasiveness of the problem nationwide. NJDC MISSOURI ASSESSMENT, *supra* note 35, at 39 (finding that "the number of youth who proceed without counsel is alarmingly high in many counties"); NJDC COLORADO ASSESSMENT, *supra* note 35, at 40 ("[J]uvenile court stakeholders repeatedly estimated that as many as 75% to 90% of juveniles waive counsel and enter into unconseled plea agreements."); NJDC NEBRASKA ASSESSMENT, *supra* note 44, at 21 ("[I]n many jurisdictions, large percentages of youth (up to 80 - 90%) are allowed to waive their right to counsel without first being given a meaningful opportunity to consult with an attorney."); NJDC MARYLAND ASSESSMENT, *supra* note 35, at 25 ("In four of the jurisdictions visited, at least 40 to 58% of the youth routinely waived the right to counsel."); NJDC FLORIDA ASSESSMENT, *supra* note 44, at 28 ("In many . . . counties, half or more of the youth who appear in delinquency court waive the fundamental right to counsel."); NJDC INDIANA ASSESSMENT, *supra* note 44, at 8 ("[A]pproximately 50% of youth in the jurisdictions visited routinely waived their right to counsel. In two jurisdictions, it was found that as many as 80% of youth waive their right to counsel."); NJDC OHIO ASSESSMENT, *supra* note 44, at 25 ("[I]n all but two of the twelve jurisdictions reviewed . . . waiver of counsel was a common and pervasive practice, with as many as 80% of youth proceeding through the system without the benefit of counsel."); NJDC OHIO ASSESSMENT, *supra* note 44, at 44 ("In spite of the law's clear mandate for counsel and the harmful consequences of not having a lawyer . . . legal representation was waived in 11% of all delinquency dispositions involving hearings."); NJDC WASHINGTON ASSESSMENT, *supra* note 44, at 27 ("[I]n some counties, children appear without counsel up to 30% of the time."); NJDC VIRGINIA ASSESSMENT, *supra* note 35, at 2 (finding a "high incidence of children waiving their right to counsel without prior consultation with a lawyer or trained advocate," estimated by some participants to be about 50 percent); NJDC KENTUCKY ASSESSMENT, *supra* note 44, at 15 ("Waiver of counsel at the detention hearing stage occurred often or very often in nearly 1/4 of the jurisdictions responding, and nearly 60% of jurisdictions noted waiver of counsel occurred often or very often at other stages."); NJDC GEORGIA ASSESSMENT, *supra* note 44, at 1 ("In some jurisdictions, it is estimated that as many as 90% of the children waive counsel in delinquency proceedings, almost always without the benefit of consulting with a lawyer beforehand and no warnings of the dangers of proceeding without a lawyer."); NJDC LOUISIANA ASSESSMENT, *supra* note 44, at 60 (noting that prosecutors, defenders, probation officers, and judges approximated that children waived counsel in 50 percent to 60 percent of cases).

77 Statement of Interest in *N.P.*, *supra* note 45, at 1.

78 *See, e.g.*, NJDC COLORADO ASSESSMENT, *supra* note 35.

## RECOMMENDATION 2.3

providing youth an opportunity to consult with an attorney. Public defenders or court-appointed counsel might be statutorily prohibited from appearing during the early stages of juvenile court proceedings because indigence determinations are not finalized or the court has not yet made the appointment. In other circumstances, public defenders' excessive workload may precipitate agency decisions to limit attorney staffing of juvenile courtrooms. Comprehensive review of this issue must look beyond court rules or statutes about the

waiver process itself and include public defender enabling statutes and the structure of delivery systems.

All children must be appointed a defense attorney prior to their first court appearance. In the event waiver of counsel is considered, the youth must have meaningful consultation with an attorney about his or her decision, and the court must find the waiver is knowing, intelligent, and voluntary.

### INNOVATION

### STEMMING WAIVER OF COUNSEL

In New York, youth may only waive their right to counsel in limited circumstances after consultation with counsel and a hearing on the record.<sup>79</sup> Similarly, in Kentucky, youth may only waive their right to counsel in limited circumstances after a hearing and finding of fact that the child waived the right knowingly, intelligently, and voluntarily.<sup>80</sup>

The Department of Justice's statement of interest in *N.P. v. Georgia* suggested: "If a child decides to waive the right to an attorney, courts should ensure that the waiver is knowing, intelligent, and voluntary by requiring consultation with counsel before the court accepts the waiver."<sup>81</sup>

79 N.Y. FAM. CT. ACT § 249-a (McKinney 2011) (presuming that minors cannot waive counsel, which is rebuttable only after consultation with an attorney and a showing at a hearing that there is clear and convincing evidence that the "(a) the minor understands the nature of the charges, the possible dispositional alternatives and the possible defenses to the charges, (b) the minor possesses the maturity, knowledge and intelligence necessary to conduct his or her own defense, and (c) waiver is in the best interest of the minor").

80 Ky. REV. STAT. ANN. § 610.060(2) (West 2009).

81 Statement of Interest in *N.P.*, *supra* note 44, at 1.

## SUPPORT, FUND, AND EXPAND ACCESS TO COUNSEL TO INCLUDE POST-DISPOSITION REPRESENTATION AND REENTRY PLANNING

Juvenile courts should provide youth access to counsel following disposition, including during appeals and reentry. Juvenile courts should identify and remedy any issues that impede access to counsel post-disposition. Federal, state, local, and tribal governments can help achieve this change by developing legislative strategies to amend the right to counsel provisions in their statutes to explicitly include both the right to and the mechanism for provision of post-disposition counsel.

### As long as a child is incarcerated or otherwise under the supervision of the court, he or she needs access to counsel.

The post-disposition phase of the juvenile court process is critical to preventing deeper court involvement and ensuring successful outcomes for youth. Appellate considerations are an essential part of post-disposition practice to protect and uphold due process rights for children; however, most jurisdictions lack a system or any infrastructure for youth to pursue a writ or appeal in a delinquency case.<sup>82</sup> Even where appellate offices exist, adult appeals can take precedence, because they often lack the resources or specialized personnel to take on both adult and juvenile cases.

Beyond appellate issues, post-disposition representation includes legal advocacy both in and outside of the courtroom. In court, attorneys

must represent youth in post-disposition hearings, such as probation and parole review; violation and revocation hearings; modification of disposition; proceedings related to the payment of fees and fines stemming from court involvement; and pleadings and proceedings related to record expungement and deregistering as sex offenders. Out of court, attorneys should monitor conditions of confinement; ensure that probation or parole officers are providing opportunities that promote youth success; facilitate access to requested family, education, mental health services, and social service providers; and ensure successful implementation of their clients' reentry plans, including re-enrolling in school upon return home. In systems that facilitate defense representation post-disposition, defenders contribute to the greater success of their clients, ensure their rights are protected, and promote procedural justice. Without counsel during the post-disposition stage, youth and their families are left alone to navigate the child's success, safety, and release from the system.

As long as a child is incarcerated or otherwise under the supervision of the court, he or she needs access to counsel.<sup>83</sup> Innovative mechanisms or collaborations can stimulate the provision of and capacity for post-disposition representation. Partnerships between juvenile defenders and civil legal service providers or state protection and advocacy systems can address a range of collateral delinquency issues.<sup>84</sup>

82 See NJDC Assessments, *supra* note 31; Jerry R. Foxhoven, *Effective Assistance of Counsel: Quality of Representation for Juveniles is Still Illusory*, 9 BARRY L. REV. 99, 112 (2007) ("[A] 1995 national study [showed] . . . many [juveniles] do not have access to counsel or effective representation from arrest through disposition and post-disposition.") (citing AM. BAR ASS'N JUVENILE JUSTICE CTR. ET AL., *A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS* 67 (1995)).

83 See, e.g., 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, 191 (2007) ("[T]o the extent the state has granted juveniles . . . postdisposition review hearings, the right of the effective assistance of counsel at each mandated hearing is constitutionally protected.")

84 See, e.g., *Juvenile Justice*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/juvenile-justice> (last visited Sept. 23, 2016); *Protection and Advocacy Systems in Juvenile Corrections*, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, <http://www.ojjdp.gov/pubs/walls/sect-04.html> (last visited Sept. 23, 2016).

## INNOVATION

## COLLABORATIONS BETWEEN DEFENDER AGENCIES AND OTHER ORGANIZATIONS CAN IMPROVE ACCESS TO POST-DISPOSITION REPRESENTATION

**Rutgers School of Law Post-Disposition Advocacy Project:**

In partnership with the New Jersey Office of the Public Defender, clinical law students are able to fill the gap in post-disposition services by, among other things, monitoring conditions of confinement and the delivery of education, health, and mental health services; educating and advising youth on institutional grievance procedure and parole classification; advocating on the youths' behalf at parole hearings; assisting youth in bringing administrative appeals to disciplinary and other agency decisions; working with youth and their families to engage in reentry planning; and instituting court actions on youths' behalf when necessary.<sup>85</sup>

## INNOVATION

## LAWS EXPLICITLY PROVIDING FOR A RIGHT TO COUNSEL POST-DISPOSITION

**California:** "A child is entitled to have the child's interests represented by counsel at every stage of the proceedings, including postdispositional hearings. Counsel must continue to represent the child unless relieved by the court on the substitution of other counsel or for cause."<sup>86</sup>

**Idaho's** statute explicitly provides for youth to be represented post-disposition, "(a)... beginning with the earliest time and including revocation of probation or recommitment; (b) to be represented in any appeal; and (c) to be represented in any other post-adjudication or review proceeding that the attorney or the juvenile considers appropriate, unless the court in which the proceeding is brought determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense and is therefore a frivolous proceeding."<sup>87</sup>

**New Mexico:** "The child shall be represented by counsel at all stages of the proceedings on a delinquency petition, including all post-dispositional court proceedings. If counsel is not retained for the child or if it does not appear that counsel will be retained, counsel shall be appointed for the child."<sup>88</sup>

85 See, e.g., NAT'L JUVENILE DEFENDER CTR., PROTECTING RIGHTS, PROMOTING POSITIVE OUTCOMES: POST-DISPOSITION ACCESS TO COUNSEL 2 (2014), <http://njdc.info/wp-content/uploads/2014/10/Post-Disposition-HR-10.13.14.pdf>.

86 CAL. RULES OF CT. R. 5.663(c).

87 IDAHO CODE ANN. § 20-514(2).

88 N.M. STAT. ANN. § 32A-2-14(H).

## RECOMMENDATION 3.0

### IMPLEMENT STRONG, WELL-RESOURCED, AND SPECIALIZED JUVENILE DEFENSE SYSTEMS

#### 3.1

Support Autonomous Juvenile Defense Systems and Semi-Autonomous Juvenile Units

#### 3.2

Ensure the Method of Attorney Appointment is Fair and Does Not Create Any Conflicts of Interest

#### 3.3

Implement Juvenile-Specific Standards and Training

#### 3.4

Develop and Fund State- or Regionally-Based Resource Centers and Provide Coordination, Training, and Support to Juvenile Defense Attorneys

#### 3.5

Adequately Fund and Support Effective Juvenile Defense Services in Rural, Remote, and Underserved Regions

# 3.0

## IMPLEMENT STRONG, WELL-RESOURCED, AND SPECIALIZED JUVENILE DEFENSE SYSTEMS

Given the highly specialized nature of juvenile defense practice and the unique demands that accompany the juvenile defender's role, an autonomous juvenile defense system with a well-funded and robust early and post-disposition practice is the preferred method of service delivery. In an autonomous system, chief juvenile defenders are able to make hiring and firing decisions, determine and seek out appropriate budgetary allocations, oversee quality control and support services, and take responsibility for operating a first-rate, highly specialized law practice for children, rather than the piecemeal representation seen in most jurisdictions today.

However, few autonomous juvenile defense systems currently exist.<sup>89</sup> Accordingly, opportunities for juvenile defense leadership are also scarce. Without an autonomous system that is separate from the adult criminal defense system, the representation of youth is often not prioritized. Further, when juvenile and adult defense systems are intermingled, as most are, juvenile-specific budgets may not exist, and juvenile defenders may exercise little influence over how funds are spent.

Achieving autonomy will strengthen the specialization of juvenile defense practice and cultivate greater opportunities for dedicated leadership. This structure and leadership will help to develop juvenile-specific mechanisms for oversight, as well as the coordination of training and supervision for private counsel, contract attorneys, and juvenile public defenders to ensure high-quality representation of children in delinquency proceedings.

### RECOMMENDATION 3.1

## SUPPORT AUTONOMOUS JUVENILE DEFENSE SYSTEMS AND SEMI-AUTONOMOUS JUVENILE UNITS

Funding aimed at developing effective juvenile defense systems will spark innovation and provide local leaders with the support needed to drive change. In order to reach constitutional and ethical thresholds, juvenile defense systems should have the resources to be effective, due-process-based, specialized, developmentally and procedurally sound, technologically equipped, community oriented and respectful of and responsive to cultural differences.

Leaders at all levels should develop funding strategies to support autonomous juvenile defense systems through direct and indirect approaches. Without autonomy, implementing a true

developmental framework will become increasingly difficult, and juvenile defense will continue to be viewed as the lesser component of the adult indigent defense system. From the local to federal level, governments should establish dedicated juvenile defense leadership positions and promote policies to ensure juvenile defenders have seats on boards, task forces, and commissions.

In the absence of autonomous juvenile defense systems, ensuring that defense offices include dedicated juvenile units with their own juvenile defense leadership are the next best delivery method. Juvenile units should include: a juvenile defense chief who is supported by a core group of

89 See NJDC Assessments, *supra* note 31.

experienced juvenile defense attorneys equipped to provide representation from pre-detention through post-disposition, a dedicated training attorney, an appellate attorney, support staff, social workers, and investigators. These units should be equal in pay and promotion with adult defense units—individual attorney advancement should not be predicated on moving “up” to adult defense practice. Likewise, juvenile defense supervision and performance evaluations should be based upon juvenile defense standards.

Whether a jurisdiction adopts an autonomous juvenile defense system or a dedicated juvenile unit, the workload of a juvenile defender must be reasonable. Unreasonable workloads hurt defenders’ ability to advocate for their clients. Because no two juvenile delinquency cases are alike, caseload limits by themselves are an imperfect tool to ensure effective advocacy. Instead, an assessment of workload, rather than a concrete number of cases, is a better measure. In setting limits on workload, it is important to view each case holistically and take into consideration the resources required—such as investigators, social workers, and experts—and the circumstances of the individual client. The need to reduce excessive workloads and regularly monitor the workloads of public defenders has been recognized by organizations including The Constitution Project,<sup>90</sup> the American

Bar Association,<sup>91</sup> the National Association for Public Defense,<sup>92</sup> the National Association of Criminal Defense Lawyers,<sup>93</sup> the National Legal Aid and Defender Association,<sup>94</sup> and the United States Department of Justice Civil Rights Division.<sup>95</sup>

## **Federal, state, local, and tribal governments need to invest in juvenile defense systems on par with investments for agencies that prosecute juveniles, such as prosecutors, police, and crime labs.**

At a minimum, federal, state, local, and tribal governments need to invest in juvenile defense systems on par with investments for agencies that prosecute juveniles, such as prosecutors, police, and crime labs. Consistent with DOJ’s guidance from the Statement of Interest filed in *N.P. v. Georgia*, competent and effective juvenile defense requires more than just a body in the courtroom.<sup>96</sup> Government leaders should ensure juvenile defense systems have sufficient resources to access investigators, social workers, computers, and other support, as well as ample time to meet with clients, conduct investigations, develop motions, prepare for trials and dispositions, and monitor and advocate for clients post-disposition.

90 See NAT’L RIGHT TO COUNSEL COMMITTEE, THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 12 (2009) (“Recommendation 6—The Board or Commission should establish and enforce workload limits for defense attorneys, which take into account their other responsibilities in addition to client representation, in order to ensure that quality defense services are provided and ethical obligations are not violated.”).

91 See AM. BAR ASS’N, JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES 15, 63 (1980).

92 See NAT’L ASS’N FOR PUBLIC DEFENSE, NAPD STATEMENT ON THE NECESSITY OF MEANINGFUL WORKLOAD STANDARDS FOR PUBLIC DEFENSE DELIVERY SYSTEMS (2015).

93 See Written Statement of John Wesley Hall, President, National Association of Criminal Defense Lawyers, to House Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, regarding Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States 4-6 (2009).

94 See NAT’L LEGAL AID & DEFENDER ASS’N, STANDARDS FOR THE DEFENSE, STANDARD 13.12 WORKLOAD OF PUBLIC DEFENDERS (1973), [http://www.nlada.net/sites/default/files/nac\\_standardsforthedefense\\_1973.pdf](http://www.nlada.net/sites/default/files/nac_standardsforthedefense_1973.pdf).

95 Statement of Interest in *N.P.*, *supra* note 45, at 14 (“A juvenile division should have the resources to monitor workloads so that attorneys are available to advocate for clients at intake and during detention and probable cause hearings. Outside of court, they need adequate time to meet with clients, investigate the prosecution’s factual allegations, engage in a robust motions practice, devote time to preparing for trial and the disposition process, and to monitor and advocate for the needs of post-disposition clients who are still within the court’s jurisdiction.”).

96 See Statement of Interest in *N.P.*, *supra* note 45, at 14.

## INNOVATION

## AUTONOMOUS JUVENILE PUBLIC DEFENSE OFFICES

**Non-Profit Office:**

The Louisiana Center for Children’s Rights (LCCR) is a nonprofit, specialized juvenile defense law office that provides direct representation for youth in New Orleans delinquency courts and provides juvenile defense policy advocacy and training statewide.<sup>97</sup> Its independence, flexibility, and focus have helped to develop a replicable, best-practice, evidence-based model of holistic advocacy that makes a long-term difference in the lives of the children they serve. LCCR is reinventing defense advocacy for young people in the Louisiana juvenile justice system.

**County Agency:**

The Office of the Public Advocate (OPA) in Maricopa County, Arizona, is an independent office that is responsible for the representation of indigent youth in the county’s delinquency courts, and is separate from the Office of the Public Defender, which only provides adult representation.<sup>98</sup> While the attorneys at OPA also take dependency and mental health cases, their independence from the larger public defender system allows them to have a sense of permanency in juvenile court, which engenders specialization in juvenile defense practice, enables them to become experts in local juvenile services and systems that affect their clients outside of the courtroom, and focuses their training on targeted juvenile defense skills. As recognized experts in juvenile defense and juvenile justice, office leadership is a regular participant in juvenile justice stakeholder meetings and reform discussions at the county, state, and national level.

**Private Contract Office:**

The Utah Juvenile Defender Attorneys, LLC, is a private law firm in Salt Lake County, Utah, that is contracted to serve as the primary indigent defense provider for youth in the county’s delinquency courts.<sup>99</sup> As a standalone entity, this office is able to focus its energy on developing a specialized, well-trained corps of juvenile defense attorneys that provides developmentally sound representation in line with national best practices. The office staff includes not only defense attorneys, but also a dedicated forensic social worker and a juvenile appellate attorney. Office leadership also extends its expertise around the state by providing training to juvenile defenders in other jurisdictions and serving on numerous boards dedicated to developing legislation and policy to improve juvenile justice.

<sup>97</sup> See generally LA. CTR. FOR CHILDREN’S RIGHTS, <http://www.laccr.org/> (last visited Sept. 23, 2016).

<sup>98</sup> See generally OFFICE OF THE PUBLIC ADVOCATE, <http://www.maricopa.gov/opa/> (last visited Sept. 23, 2016).

<sup>99</sup> Interview with Pamela Vickery, Executive Director, Utah Juvenile Defender Attorneys (Feb. 20, 2014) (for further information about Utah Juvenile Defender Attorneys, contact the National Juvenile Defender Center).



## INNOVATION

## ESTABLISHING JUVENILE DEFENDER UNITS WITHIN PUBLIC DEFENSE OFFICES

**County Agency:**

In several jurisdictions across the country, dedicated juvenile defense units have been created within individual county public defender offices. Notable examples include the San Francisco Public Defender Juvenile Unit<sup>100</sup> and the Miami-Dade Public Defender's Office.<sup>101</sup> Most recently, as mandated by the U.S. Department of Justice (DOJ) Civil Rights Division's 2012 Memorandum of Agreement Regarding the Juvenile Court of Memphis and Shelby County,<sup>102</sup> the county established a juvenile unit in the Law Offices of the Shelby County Public Defender.<sup>103</sup>

**Statewide Public Defense System:**

The Youth Advocacy Division (YAD) of the Massachusetts Committee for Public Counsel Services ensures that every indigent child across Massachusetts has access to zealous legal representation that incorporates a Youth Development Approach. The program is composed of nine staff offices (each has a social worker), a panel of approximately 400 specially trained and certified private counsel, a juvenile appeals unit, a training unit, an education advocacy unit, a specialized juvenile murder panel, a juvenile-lifer parole panel, and a juvenile parole revocation panel.<sup>104</sup>

**Non-Profit Office:**

The Juvenile Rights Practice of the Legal Aid Society represents most children who appear before the Family Court in New York City on juvenile delinquency petitions.<sup>105</sup> The Practice was established concurrently with New York State's Family Court in 1962, five years before the U.S. Supreme Court ruled in *Gault* that children have a constitutional right to counsel at government expense, and was one of the first organizations in the country to represent children in a juvenile court. Since then, the Juvenile Rights Practice has grown into one of the nation's leading organizations in the field of child advocacy, providing specialized, dedicated, and holistic juvenile defense services.

100 See generally *Juvenile Unit*, SAN FRANCISCO PUBLIC DEFENDER, <http://sfpublicdefender.org/services/juvenile-unit/> (last visited Sept. 23, 2016).

101 See generally *About Our Office*, MIAMI DADE PUBLIC DEFENDER, [http://www.pdmiami.com/our\\_office.htm](http://www.pdmiami.com/our_office.htm) (last visited Sept. 23, 2016) (describing divisions including the Juvenile Division).

102 U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, MEMORANDUM OF AGREEMENT REGARDING THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY 14-15 (2012), <https://www.justice.gov/iso/opa/resources/87720121218105948925157.pdf>.

103 See generally *Office of the Juvenile Defender*, SHELBY COUNTY TENNESSEE, <http://www.shelbycountyttn.gov/index.aspx?NID=377> (last visited Sept. 23, 2016) (for further information about the juvenile unit of the Shelby County Public Defender, contact the National Juvenile Defender Center).

104 See generally *Youth Advocacy Division*, <https://www.publiccounsel.net/ya/> (last visited Sept. 23, 2016).

105 See generally *Juvenile Rights Practice*, THE LEGAL AID SOCIETY, <https://www.legal-aid.org/en/juvenilerights/juvenilepractice.aspx> (last visited Sept. 23, 2016).

**ENSURE THE METHOD OF ATTORNEY APPOINTMENT IS FAIR AND DOES NOT CREATE ANY CONFLICTS OF INTEREST**

Most systems use contracts with individuals or independent entities to provide some aspect of juvenile defense representation.<sup>106</sup> Even those jurisdictions with statewide defense systems rely on appointed or contract counsel to handle conflict cases and/or to represent the cases that the state public defender offices otherwise do not have the capacity to handle. Model contracts can be developed to establish a clear role for court-appointed juvenile defense counsel, mandate specialized juvenile defense training, establish workloads, provide for oversight and evaluation, and allow for early and post-disposition access to counsel.<sup>107</sup>

The method of appointing counsel varies widely across the country. In many jurisdictions, judges have wide discretion in assigning counsel for children in delinquency cases.<sup>108</sup> This can pose a real or perceived conflict of interest, as an attorney may be placed in a position of having to choose between zealously advocating on behalf of the client’s expressed interests and appearing favorably to the

judge who controls future assignments for cases. To prevent such barriers to effective representation of children, it is critical that the appointment of counsel is independent from the judicial and executive branches of government and that oversight and training of counsel are guided by standardized and uniform procedures that apply equally to public defenders and court appointed private counsel.

**It is critical that the appointment of counsel is independent from the judicial and executive branches of government.**

Government at all levels must ensure the process and procedure for appointment of counsel is fair and unencumbered by any real or perceived conflicts. State, local, and tribal governments should establish centralized oversight and coordination of private counsel appointment, procedures, and contracts.

**INNOVATION**

**CREATING MODEL JUVENILE DEFENSE CONTRACTS**

Representatives from the juvenile defense bar and law school faculty in Washington State worked with the State Office of Public Defense to develop a model juvenile indigent defense contract that could be tailored to suit the varying needs of the more than 30 Washington county defense services systems.<sup>109</sup> The model contract includes provisions establishing juvenile-specific training requirements for attorneys accepting appointments in juvenile court; mandates a caseload cap of 250 cases yearly; provides for adequate supervision; and allows for post-disposition representation.

106 See NJDC Assessments, *supra* note 31.

107 See, e.g., NAT’L JUVENILE DEFENDER CTR., RAISING THE BAR WITH COMPREHENSIVE JUVENILE INDIGENT DEFENSE CONTRACTS 2 (2014) [hereinafter RAISING THE BAR] <http://njdc.info/wp-content/uploads/2014/10/Contracts-HR-10.9.14.pdf>.

108 See NJDC Assessments, *supra* note 31.

109 See RAISING THE BAR, *supra* note 107.

## IMPLEMENT JUVENILE-SPECIFIC STANDARDS AND TRAINING

The role of the juvenile defender is to bring the expressed interests of youth before the court. Juvenile defenders must have knowledge of delinquency laws and procedures; be versed in adolescent development and the evolving juvenile-specific jurisprudence; be competent to effectively counsel youth on making critical legal decisions; be able to convey complex legal principles to their young clients and families; engage community partners; and have a clear understanding of the obligations of the educational and other systems impacting the lives of youth clients. The United States Department of Justice Statement of Interest in *N.P. v. Georgia* highlights the need for specialized juvenile defense standards and training as necessary steps toward fulfilling due process: “Indeed, the unique qualities of youth demand special training, experience and skill for their advocates.”<sup>110</sup> Government at all levels must take the necessary steps to ensure that specialized juvenile defense standards and training are established so that juvenile defense delivery systems can fulfill the demand for such resources.

### Juvenile defense, in all its complexity, requires adherence to a specialized set of best-practice standards.

The first step in promoting specialization is to combat the pervasive perception of juvenile court as “kiddie court” or simply a training ground for inexperienced attorneys. Such attitudes and actions are a direct threat to fair treatment and due process for youth.

Federal, state, local, and tribal jurisdictions must recognize and memorialize the obligations of the juvenile defender through specialized standards and guidelines. Juvenile defense, in all its complexity, requires adherence to a specialized set of best-

practice standards. Government at all levels should convene specialized committees or commissions to promulgate, adopt, and enforce standards tailored for juvenile defense practice that account for unique laws, procedures, and obstacles that impact the role of the juvenile defense attorney.<sup>111</sup> These standards should be considered when monitoring and evaluating both individual and system performance related to juvenile defense. Development of bar certifications to establish juvenile defense standards and training requirements should also be explored.

Despite the highly specialized skills that are required of juvenile defenders, many states report non-existent or inadequate training for juvenile defenders.<sup>112</sup> Specialized training is crucial to help defenders develop these practice skills and keep pace with an evolving body of scientific research and legal jurisprudence that applies directly to the representation of children. Some states have addressed the need for juvenile defense specialization and training by creating state bar certification programs.<sup>113</sup> State certification programs can set requirements for legal education hours attorneys must attain before representing children in juvenile court.<sup>114</sup>

Juvenile justice system decision makers need access to high-quality, low-cost, ongoing and specialized training to keep up with the rapidly evolving juvenile jurisprudence, developmental research, and best practices emerging in today’s juvenile courts. Juvenile defense training must adhere to juvenile-specific standards that lay out the ethical duties and professional responsibilities of attorneys who defend children. Specialized training is the foundation for comprehensive advocacy by juvenile defenders and ensures that the constitutional rights of youth are protected.

110 Statement of Interest in *N.P.*, *supra* note 45, at 11.

111 See, e.g., JUVENILE JUSTICE PROJECT OF LOUISIANA & S. JUVENILE DEFENDER CTR., THE LOUISIANA JUVENILE DEFENDER TRIAL PRACTICE MANUAL (2007), [http://www.jrsla.org/pdfs/publications/la\\_trial\\_manual.pdf](http://www.jrsla.org/pdfs/publications/la_trial_manual.pdf); N.D. COMM’N ON LEGAL COUNSEL FOR INDIGENTS, MINIMUM ATTORNEY PERFORMANCE STANDARDS: JUVENILE UNRULY AND DELINQUENCY MATTERS, <http://www.nd.gov/indigents/docs/juvenileUnrulyMatters.pdf>; THOMAS ROB YOUNG, NORTH CAROLINA JUVENILE CODE: PRACTICE AND PROCEDURE (2015).

112 See generally NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 69.

113 See NJDC Assessments, *supra* note 31.

114 See *Sources of Certification*, AM. BAR ASS’N, [http://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/specialization/resources/resources\\_for\\_lawyers/sources\\_of\\_certification.html](http://www.americanbar.org/groups/professional_responsibility/committees_commissions/specialization/resources/resources_for_lawyers/sources_of_certification.html) (last visited Sept. 23, 2016).

## INNOVATION

## NATIONAL AND STATE JUVENILE DEFENSE PRACTICE STANDARDS

**The National Juvenile Defense Standards:** The Standards set forth a framework for access to counsel and quality of representation that is anchored in law, science, and professional codes of responsibility.<sup>115</sup> Several states are either reexamining their current state-based guidelines or developing new juvenile defense standards following the *National Juvenile Defense Standards*.

## INNOVATION

## TRAINING TO DEVELOP JUVENILE DEFENSE SPECIALISTS

**Juvenile Training Immersion Program (JTIP):** JTIP is an intensive, 41-lesson training program for effective juvenile defense practice addressing topics ranging from the specialized role of the juvenile defender to representation from pre-trial to post-disposition.<sup>116</sup> JTIP is the only training curriculum focused on providing a substantive overview of juvenile and criminal law integrated with developing strong trial advocacy skills exclusively for juvenile defenders.

## INNOVATION

## TRAINING TO ESTABLISH DEVELOPMENTALLY SOUND JUVENILE COURTS

**Toward Developmentally Appropriate Practice: A Juvenile Court Training Curriculum:** Designed for all juvenile court stakeholders, this five-module training program, produced in collaboration with the MacArthur Foundation's Models for Change initiative, focuses on adolescent development; screening, assessing, and evaluating youth; special education and disability rights; legal questions about youth's capacities; and communicating with youth.<sup>117</sup> Training sessions based on the Curriculum can focus on one or any combination of modules.

<sup>115</sup> See *id.*

<sup>116</sup> See *Training*, Nat'l Juvenile Defender Ctr., <http://njdc.info/our-work/training/> (last visited Sept. 23, 2016).

<sup>117</sup> See NAT'L JUVENILE DEFENDER CTR., JUVENILE LAW CTR. & MODELS FOR CHANGE, TOWARD DEVELOPMENTALLY APPROPRIATE PRACTICE: A JUVENILE COURT TRAINING CURRICULUM (2d ed. 2009), <http://www.modelsforchange.net/publications/255>.

## DEVELOP AND FUND STATE- OR REGIONALLY-BASED RESOURCE CENTERS AND PROVIDE COORDINATION, TRAINING, AND SUPPORT TO JUVENILE DEFENSE ATTORNEYS

State- or regionally-based juvenile defense resource centers can support both public defender offices and private contract attorneys. Such centers draw on a national knowledge base and network of experts to support both practice and policy initiatives, and leverage resources to support juvenile defenders statewide. In rural and remote areas where there may be just one contract attorney, state or regional resource centers can provide ongoing training and mentoring to ensure that attorneys cultivate the specialized expertise required to meet their ethical and professional duties when representing youth, even if it is not their full-time practice.

Government at all levels should support the development of juvenile defense resource centers to facilitate specialized training and technical assistance and to support and monitor consistency across a network of juvenile defenders—including the private bar and contract counsel—and to connect rural communities and urban centers. State- and regionally-based resource centers should track how well or poorly juvenile defense reform is moving within a region, state, or locality, and articulate strategies for what is needed to improve access to justice and fundamental fairness for youth.

### INNOVATION

#### CREATING STATE- AND REGIONALLY-BASED JUVENILE DEFENSE RESOURCE CENTERS

**The Regional Juvenile Defender Centers** were established by the National Juvenile Defender Center in 1997 to build a network of juvenile defenders across the country grounded in front line practice. For almost two decades these centers have been run by dedicated juvenile defense leaders on a volunteer basis, providing training, technical assistance, and an invaluable network of colleagues and mentors.<sup>118</sup>

**The Juvenile Defender Association of Pennsylvania (JDAP)** is a statewide association created to provide juvenile defense leadership, expertise, policy development, and training.<sup>119</sup> JDAP's mission is to improve the quality of juvenile representation throughout Pennsylvania. JDAP is a certified Continuing Legal Education provider and sponsors several training programs each year to improve representation of juveniles accused of delinquency, reaching both urban and rural communities.

**Nebraska Youth Advocates (NYA)** was founded in 2015 as a resource center for juvenile defense attorneys across the state, promoting best practices in the juvenile justice system.<sup>120</sup> The project provides training and resources in-line with the National Juvenile Defense Standards that are tailored to Nebraska specific practice. NYA participates in statewide and local juvenile justice reform initiatives; provides hands-on training, resource development, and technical assistance; and is helping to build a network of well-trained defense attorneys who ensure a youth's voice is heard in court.

118 See generally *Regional Centers*, NAT'L JUVENILE DEFENDER CTR., <http://njdc.info/about-njdc/regional-centers/> (last visited Sept. 23, 2016).

119 See JUVENILE DEFENDER ASS'N OF PENNSYLVANIA, PERFORMANCE GUIDELINES FOR QUALITY AND EFFECTIVE JUVENILE DELINQUENCY REPRESENTATION (2010), <http://njdc.info/wp-content/uploads/2016/03/PA-Performance-Guidelines-for-Quality-Effective-Juv-Del-Representation-2010.pdf> (for further information on JDAP, contact the National Juvenile Defender Center).

120 For further information about Nebraska Youth Advocates, contact the National Juvenile Defender Center.

## ADEQUATELY FUND AND SUPPORT EFFECTIVE JUVENILE DEFENSE SERVICES IN RURAL, REMOTE, AND UNDERSERVED REGIONS

The lack of juvenile defense infrastructure and resources in remote, rural, and underserved communities is extreme.<sup>121</sup> The challenges faced by juvenile defense systems nationwide, including lack of attention and underfunding, are exacerbated in these communities and hurt defenders' ability to meaningfully represent their clients.

Government at all levels must invest in juvenile defense delivery in rural, remote, and underserved regions to safeguard the timely appointment of counsel and the provision of training and support to ensure attorneys develop expertise. All justice systems, even those with the logistical hurdles that rural systems face, have a constitutional obligation to ensure that a child's right to qualified counsel is protected.

Juvenile court leaders in remote, rural, and underserved regions should consider public-private partnerships as a means to strategize, design, and develop new tools for practitioner training and support. Federal, state, local, and tribal governments should convene task forces or think tanks to promote private innovations and support for communication and transportation issues faced by juvenile defenders, youth, and families in these regions.

Government at all levels should support and fund creative solutions to improve the delivery of juvenile defense services to youth in rural, remote, and underserved areas. Juvenile defense providers should take advantage of existing non-judicial structures in these areas and test new approaches and innovations. Juvenile courts should explore creative options available through technological innovations as well as satellite offices or campuses that can be developed or enhanced to address the specific juvenile defense needs of communities.

### **The lack of juvenile defense infrastructure and resources in remote, rural, and underserved communities is extreme.**

Defense services are not the only services in rural, remote, and underserved areas that face challenges with resources. Across the country, however, communities are developing community-based partnerships to provide greater access to legal and non-legal services that may be leveraged or replicated to provide juvenile defense services.

<sup>121</sup> See, e.g., JUDITH B. JONES, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, ACCESS TO COUNSEL (2004); NJDC COLORADO ASSESSMENT, *supra* note 35; NJDC MAINE ASSESSMENT, *supra* note 35; NJDC MARYLAND ASSESSMENT, *supra* note 35; NJDC MISSOURI ASSESSMENT, *supra* note 35; NJDC SOUTH CAROLINA ASSESSMENT, *supra* note 35; NJDC VIRGINIA ASSESSMENT, *supra* note 35; NJDC WEST VIRGINIA ASSESSMENT, *supra* note 35.

## INNOVATION

## INCREASING ACCESS TO JUVENILE DEFENSE SERVICES IN RURAL, REMOTE, AND UNDERSERVED REGIONS

In Maine, a largely rural state, 100 percent of juvenile defense is provided by appointed counsel. The Juvenile Justice Clinic at the University of Maine School of Law provides practice and policy backup and support to court-appointed counsel working on delinquency cases across the state.<sup>122</sup> The Clinic plays a vital role in supporting effective juvenile defense in jurisdictions beyond the urban centers.

In Michigan, Access Legal Care, PLLC, is a private law office in Detroit, Michigan, that delivers affordable legal services to clients throughout Michigan from a “primary care” office in Detroit.<sup>123</sup> The model is an urban-to-rural partnership whereby a primary care attorney in an urban area coordinates with a local “litigation” attorney in a rural part of the state. Clients communicate with their “primary care” lawyer through technology, as does the local attorney, who is part of a network of rural attorneys linked to the urban office. The local attorney then meets clients in court to handle proceedings. Although not specific to the juvenile defense context, the model is one that could be replicated to support juvenile defenders who practice outside urban centers.

In Wisconsin, the Milwaukee Justice Center’s Mobile Legal Clinic (MLC) provides an innovative example of reaching previously underserved populations. While civil in nature, the MLC is a project of Marquette University Law School and the Milwaukee Bar Association to deliver free legal services to isolated neighborhoods where it is difficult for residents to reach free legal assistance.<sup>124</sup> Similar programs could be developed to reach youth needing access to juvenile defense counsel.

In many rural communities, schools serve as one of the few places where children and families living great distances from each other come together on a regular basis. In an effort to understand the varied rural communities across the nation and the roles of schools in those communities, partnerships can be developed with schools and/or rural education advocacy organizations—such as The Rural School and Community Trust<sup>125</sup>—to address how the juvenile defense community can actively and effectively use schools as resources to increase access to legal counsel and/or legal information.

122 See generally *Juvenile Justice Clinic*, MAINE LAW, <http://mainelaw.maine.edu/academics/clinics-and-centers/clac/juvenile-justice/> (last visited Sept. 23, 2016).

123 See generally ACCESS LEGAL CARE, <https://www.accesslegalcare.com/> (last visited Sept. 23, 2016).

124 See MILWAUKEE JUSTICE CTR., <http://milwaukee.gov/MJC/MJC-Mobile-Legal-Clinic.htm> (last visited Sept. 23, 2016).

125 See THE RURAL SCH. AND CMTY. TRUST, <http://www.ruraledu.org/> (last visited Sept. 23, 2016).

## RECOMMENDATION 4.0

### ELIMINATE RACIAL AND ETHNIC DISPARITIES

#### 4.1

Eliminate Racial and Ethnic Disparities in Juvenile Court Through Advanced Training and Policy Reform

#### 4.2

Support the Implementation of Best Practices and Resources to Eliminate Racial and Ethnic Disparities



# 4.0

## ELIMINATE RACIAL AND ETHNIC DISPARITIES

Youth of color face the dual injustices of having their civil rights violated through disparate treatment and their due process rights violated through lack of access to effective lawyers in the justice system. The over-inclusion of youth of color in our states' juvenile justice systems and their disproportionate treatment once involved is well documented and undeniable.<sup>126</sup> Youth of color receive harsher treatment at virtually every stage of the juvenile court process, including disproportionate confinement and removal from their homes and communities, while less restrictive alternatives are offered to white youth under similar circumstances.<sup>127</sup> Disparities are so pervasive that addressing disproportionate minority contact in the juvenile justice system has been a core requirement of the JJDP Act since 1988.<sup>128</sup> Yet, practices and policies leading to the criminalization of adolescent behavior of youth of color remain and the disparities continue.<sup>129</sup> Effective advocacy by juvenile defenders is critical to combat implicit and explicit bias in juvenile courts and to address policies leading to disproportionality in the juvenile justice system.

Juvenile defenders must actively work to combat their own internal implicit bias as well as that of other system stakeholders in order to consciously counter bias and end the practice of allowing a youth's race, ethnicity, or other outward characteristics from becoming a factor in decision-making in juvenile court. Defenders can do this by correcting for bias in strategic case decisions, providing bias-free zealous advocacy in individual representation, raising race in the courtroom through written or oral motions, and by advocating for systemic reform to provide youth of color with equal opportunities for success.

### RECOMMENDATION 4.1

## ELIMINATE RACIAL AND ETHNIC DISPARITIES IN JUVENILE COURT THROUGH ADVANCED TRAINING AND POLICY REFORM

Juvenile courts must aggressively support efforts to end implicit and explicit bias both in and out of the courtroom, and to eliminate the overrepresentation of children of color in the juvenile justice system. Examining bias is more than an individual defender's responsibility; it requires a culture from within defender offices that supports the need to overcome internal bias and effectively challenge bias in other systems and stakeholders. Defense

offices and agencies should develop clear internal policies and practices that acknowledge implicit bias and normalize the conversations about racial disparities.

Public defense systems must also provide juvenile defenders with ongoing training on how to effectively address racial and ethnic disparities in the juvenile justice system. Well-intentioned paternalism is

126 See, e.g., 2014 NCJJ REPORT, *supra* note 42; *Fact Sheet*, BURNS INST., <http://www.burnsinstitute.org/what-is-red/fact-sheet/> (last visited Sept. 23, 2016); JOSHUA ROVNER, THE SENTENCING PROJECT, DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM (2014), <http://www.sentencingproject.org/wp-content/uploads/2015/11/Disproportionate-Minority-Contact-in-the-Juvenile-Justice-System.pdf>; DEV. SERVS. GRP., INC., U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, DISPROPORTIONATE MINORITY CONTACT (2014), [http://www.ojjdp.gov/mpg/litreviews/Disproportionate\\_Minority\\_Contact.pdf](http://www.ojjdp.gov/mpg/litreviews/Disproportionate_Minority_Contact.pdf); ELEANOR HINTON HOYT ET AL., THE ANNIE E. CASEY FOUND., REDUCING RACIAL DISPARITIES IN JUVENILE DETENTION (2001).

127 See REDUCING YOUTH INCARCERATION, *supra* note 41, at 2; Ellen Marrus & Nadia Seeratan, *What's Race Got to Do With It? Just About Everything: Challenging Implicit Bias to Reduce Minority Youth Incarceration in America*, 8 J. MARSHALL L. J., 437, 440 (2015) (internal citations omitted).

128 See Legislation/JJDP Act Authorizing Legislation, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, <http://www.ojjdp.gov/about/legislation.html> (last visited Sept. 23, 2016).

129 THE MAKING OF MASS INCARCERATION, *supra* note 34, at 223.

## RECOMMENDATION 4.1

a hallmark of the juvenile court system.<sup>130</sup> Even defense attorneys making decisions about cases and advising their clients can be impacted by ideas of what may be best, despite their ethical duty to abide by their clients' stated interests and goals.<sup>131</sup> Unfortunately, this sense of justice system paternalism is "particularly vulnerable to distortion by implicit racial bias"<sup>132</sup> when what is deemed "best" is driven by race-based assumptions. Education about implicit bias and cultural sensitivity is necessary to teach defenders how to self-correct for biases that may be affecting interactions with and representation of youth of color.

Juvenile defense attorneys must also become skilled at raising racial bias and disparities at every stage of

the proceedings against their clients, from the point of contact through release from the system. This may include making motions that discuss race and the bearing that bias has on outcomes for system-involved youth of color. Through training, juvenile defenders need to gain familiarity with data, research studies, and other sources that demonstrate certain practices have a disproportionate impact on youth of color and develop strategies for identifying alternative approaches. Policy reforms must focus on laws, rules, and guidelines that lead to disparate enforcement practices in schools, neighborhoods, and other public areas. Juvenile defenders should also be included and participate in broader coordinated efforts to eliminate racial and ethnic disparities in the juvenile justice system.

### INNOVATION

#### INSTITUTE TRAINING TO ELIMINATE RACIAL AND ETHNIC DISPARITIES

A targeted JTIP Lesson, *Raising Race*, teaches juvenile defenders to combat racial bias in their individual juvenile cases.<sup>133</sup> The *Raising Race* lesson was developed to provide juvenile defenders with practical information about how to raise and combat racial and ethnic disparities in the treatment of their youth clients throughout a case, from arrest to release from court intervention. The lesson also encourages defenders to engage in policy reform efforts to bring attention to and eliminate disparities.

<sup>130</sup> See generally Kristin Henning, *Race, Paternalism and the Right to Counsel*, 54 AMER. CRIM. L. REV., 12-17 (forthcoming April 2017).

<sup>131</sup> *Id.* at 17-19.

<sup>132</sup> *Id.* at 3.

<sup>133</sup> See *Training*, NAT'L JUVENILE DEFENDER CTR., <http://njdc.info/our-work/training/> (last visited Sept. 23, 2016); NAT'L JUVENILE DEFENDER CTR., JUVENILE TRAINING IMMERSION PROGRAM (2013).

## SUPPORT THE IMPLEMENTATION OF EXISTING BEST PRACTICES AND RESOURCES TO ELIMINATE RACIAL AND ETHNIC DISPARITIES

Federal, state, local, and tribal governments should replicate successful strategies to eliminate racial and ethnic disparities throughout the juvenile justice system. Juvenile courts should establish intentional efforts focused on decreasing disparities by building stakeholder collaboration, identifying and implementing known effective methods, and monitoring implementation. Collecting data on race by outcome at specific decision points—such as school referral, police contact, arrest, diversion, petition, detention, evidentiary rulings, adjudication, disposition, and probation revocation—can help highlight areas where implicit bias may be adversely affecting youth of color in concrete terms and can provide all stakeholders with a baseline for corrective action.

Public defense systems must ensure that juvenile defenders participate in internal and external reforms to address racial bias and disparities in the court. Leaders at all levels of government should coordinate and facilitate collaborations among, within, and across youth-serving systems to develop new approaches to eliminate racial and ethnic disparities, provide stakeholders with intensive technical assistance, and share and promote best practices from successful jurisdictions.

It is critical that all decision makers engage communities of color in addressing racial disparities to guard against the potential for paternalism and implicit bias.

### INNOVATION

#### IMPLEMENT BEST PRACTICES TO ADDRESS RACIAL AND ETHNIC DISPARITIES

The Center for Children’s Law and Policy’s Racial and Ethnic Disparities (“RED”) Practice Manual provides principles and practices to assist in reducing and eliminating racial and ethnic disparities in the juvenile justice system.<sup>134</sup>

### INNOVATION

#### YOUTH, FAMILY, COMMUNITY, AND DEFENDER PARTNERSHIPS

Community members and juvenile defenders are engaged in partnerships to strengthen youth voices, engage the community, and improve defense capacity through what the Albert Cobarrubias Justice Project at Silicon Valley De-Bug calls “participatory defense.” This collaborative initiative uses a community organizing model to empower people facing charges, their families, and the community to have a concrete impact on the outcomes of individual cases and to bring needed reform to the justice system. Young people and their communities work with defenders to create a cooperative and supportive approach to a child’s defense, rather than having court be an isolating and dehumanizing experience. Families and communities are able to assist defenders by developing mitigation materials for individual clients and helping to identify community-based supports that will enable youth to return to their neighborhoods. (For further information, please visit <https://acjusticeproject.org/>).

134 CTR. FOR CHILDREN’S LAW AND POLICY, RED PRACTICE MANUAL: INTRODUCTION AND CHAPTER 1: BEGINNING OR RESTARTING WORK TO REDUCE RACIAL AND ETHNIC DISPARITIES (2015), <http://www.cclp.org/wp-content/uploads/2016/06/RED-Practice-Manual-Chapters-1-7.pdf>.

## **RECOMMENDATION 5.0**

### **ATTRACT AND RETAIN NEW AND DIVERSE TALENT TO THE FIELD OF JUVENILE DEFENSE**

#### **5.1**

Support the Expansion of Public and Private Law School  
Clinical and Experiential Learning

#### **5.2**

Engage Historically Black Colleges and Universities,  
Hispanic Serving Institutions, and Tribal Colleges and  
Universities

#### **5.3**

Establish Dedicated Juvenile Defense Committees in  
Bar Associations

#### **5.4**

Expand Legal Incubator Programs to Promote Juvenile  
Defense

# 5.0

## ATTRACT AND RETAIN NEW AND DIVERSE TALENT TO THE FIELD OF JUVENILE DEFENSE

Specific attention must be paid to developing a corps of excellence and a pathway for young lawyers to find their way to permanent jobs and opportunities in the field of juvenile defense. The simple fact that many people are not even aware that juvenile defense is a practice different and apart from adult criminal defense is an obstacle to recruitment. Attracting and retaining new and diverse talent to juvenile defense is of paramount importance. Increasing the creation and visibility of juvenile defense clinics, units, leadership positions, and opportunities to engage will also promote juvenile defense as a viable career choice.

### RECOMMENDATION 5.1

## SUPPORT THE EXPANSION OF PUBLIC AND PRIVATE LAW SCHOOL CLINICAL AND EXPERIENTIAL LEARNING

Federal, state, local, and tribal governments should invest in the expansion of law school clinical programs focused on juvenile defense.<sup>135</sup> Juvenile courts should work with clinical juvenile defense programs as they raise the level of practice in courtrooms and provide new attorneys with intensive supervision and feedback. Defender organizations should partner with law schools and offer juvenile defense-specific internship opportunities to introduce the practice,

pique student interest, and encourage careers in juvenile defense after graduation. Public and private law schools should broaden juvenile defense practice opportunities through expanded classroom learning, internship and externship partnerships or collaborations with juvenile defense entities, and innovative experiential learning programs that fill needed gaps in the delivery of juvenile defense, such as post-disposition representation.

### RECOMMENDATION 5.2

## ENGAGE HISTORICALLY BLACK COLLEGES AND UNIVERSITIES, HISPANIC SERVING INSTITUTIONS, AND TRIBAL COLLEGES AND UNIVERSITIES

Juvenile court stakeholders should engage historically Black colleges and universities, Hispanic-serving institutions, and tribal colleges and universities to advance interest in juvenile defense as a career from undergraduate studies through law school. Public defense systems across the country should promote student engagement through formal and informal internships, externships, and mentorship opportunities geared toward students in historically Black colleges and universities,

Hispanic-serving institutions, and tribal colleges and universities to encourage interest in juvenile defense. Private firms, philanthropic entities, and other civic-minded organizations should establish juvenile defense-specific fellowships for law schools and create opportunities to engage law students and recent graduates from historically Black colleges and universities, Hispanic-serving institutions, and tribal colleges and universities.

135 NAT'L JUVENILE DEFENDER CTR., JUVENILE DEFENSE LAW SCHOOL CLINICS: BUILDING LEADERS, CLIENT CAPACITY, AND INNOVATION 1 (2014).

### RECOMMENDATION 5.3

## ESTABLISH DEDICATED JUVENILE DEFENSE COMMITTEES IN BAR ASSOCIATIONS

National, state, local, and tribal bar associations should establish dedicated juvenile defense committees to raise the prominence and profile of juvenile defense as a viable career. Juvenile defense committees should create mentorship programs for young lawyers and provide leadership opportunities for juvenile defenders to influence national, state,

local, and tribal bar policies. Defense service providers should be intentional about diversifying the field and conduct targeted outreach to minority law student committees in bar associations to offer internships, externships, and volunteer opportunities in juvenile defender offices.

### RECOMMENDATION 5.4

## EXPAND LEGAL INCUBATOR PROGRAMS TO PROMOTE JUVENILE DEFENSE

Law firms, non-profits, law schools, and other legal service providers should design self-sustaining Legal Incubator programs to connect practical training for newer lawyers with opportunities to provide affordable or free legal assistance to children

in need. Juvenile defense service providers should explore these programs as a means to bring new lawyers into juvenile defense as well as establish and maintain juvenile defense practice in rural and remote areas.

### INNOVATION

#### THE CREATION OF LEGAL INCUBATOR PROGRAMS

Lawyers for Affordable Justice (LAJ), launched in January 2016 among three Boston-area law schools, provides low-cost legal services to people who cannot afford conventional legal services, while simultaneously equipping law students with practical skills. This program teaches aspiring lawyers new strategies that utilize technology to deliver legal services at lower costs, which enables lawyers to serve low- and moderate-income clients while learning how to build a successful career in solo or small private practice.<sup>136</sup> Though this program does not currently include juvenile defense representation, it serves as a model for juvenile defense-specific ventures.

<sup>136</sup> See *Lawyers for Affordable Justice Joint Project Among BC, BU and Northeastern Law Schools to Launch in 2016*, NORTHEASTERN UNIV. SCH. OF LAW (July 15, 2015), <https://www.northeastern.edu/law/news/announcements/2015/laj.html>; Sofia Lingos, *Lawyers for Affordable Justice Incubator Opens in Boston*, THE LAWYER INCUBATOR BLOG (Sept. 3, 2015), <http://www.lawyerincubators.com/?p=30>.

## RECOMMENDATION 6.0

### PROTECT THE RIGHTS OF YOUTH WHO FACE ADDITIONAL DISCRIMINATION AND VIOLATION OF THEIR CONSTITUTIONAL RIGHTS

#### 6.1

Ensure Meaningful Access to Counsel for American Indian and Alaska Native Youth

#### 6.2

Support System-Wide Training and Develop Policies that Promote Cultural Competence for Lesbian, Gay, Bisexual, Transgender, Queer/Questioning, and Gender Non-Conforming (LGBTQ-GNC) Youth

#### 6.3

Ensure Youth in Facilities Have Access to Counsel

#### 6.4

Develop Specialized Defense Expertise for Youth Charged with Sex Offenses

#### 6.5

Remove All Youth from the Adult System and, Until Then, Develop Specialized Public Defense Units for Youth in the Adult System

# 6.0

## PROTECT THE RIGHTS OF YOUTH WHO FACE ADDITIONAL DISCRIMINATION AND VIOLATION OF THEIR CONSTITUTIONAL RIGHTS

Justice-involved youth, by virtue of their contact with the justice system, are in need of representation to ensure they receive fair treatment through due process of law and have opportunities to lead successful lives; however, certain populations of youth require special attention and protections because they face unique risks and barriers in the court system. Such population groups include, but are not limited to: American Indian and Alaska Native youth; lesbian, gay, bisexual, transgender, queer/questioning, and gender non-conforming (LGBTQ-GNC) youth; youth in secure custody; youth charged with sex offenses; and youth facing prosecution as adults.<sup>137</sup>

### RECOMMENDATION 6.1

#### ENSURE MEANINGFUL ACCESS TO COUNSEL FOR AMERICAN INDIAN AND ALASKA NATIVE YOUTH

American Indian and Alaska Native youth need access to a fair juvenile justice system—encompassing due process and equal protection under the law—that respects the traditions of their tribal community. American Indian and Alaska Native youth are disproportionately exposed to violence at rates higher than any other population in the United States, often leading to toxic stress reactions and severe trauma.<sup>138</sup> American Indian and Alaska Native youth “experience posttraumatic stress disorder at the same rate as veterans returning from Iraq and Afghanistan and triple the rate of the general population.”<sup>139</sup> This level of toxic stress and trauma is further aggravated by the high rates of poverty, homelessness, and loss that American Indian and Alaska Native youth often face.<sup>140</sup> Further, American Indian and Alaska Native women experience the highest rates of sexual assault and domestic violence in the country,<sup>141</sup> often leaving children especially vulnerable to justice system contact.

For American Indian and Alaska Native youth prosecuted in federal, state, and local courts, constitutionally required juvenile defense counsel should be culturally competent and familiar with tribal services that might affect the delinquency case. In tribal courts where youth may not have a right to counsel, children would nonetheless benefit from dedicated advocates who could help the tribal court contextualize the youth’s individual developmental and behavioral situation, and empower the youth to be an active participant in his or her case.

Law school clinical programs, non-profit law centers, and other legal organizations should consider partnership with government at all levels to develop a cadre of lawyers trained to assist American Indian and Alaska Native youth in navigating court. Defender offices that handle large numbers of American Indian and Alaska Native cases should designate “Juvenile Tribal Specialists” who are trained to align principles of tribal justice with

<sup>137</sup> Although each unique population of youth could benefit from heightened due process protections, this Blueprint is only able to focus on a few. Exclusion of the many other youth populations was not intended to diminish their importance, but was simply beyond the scope of this effort.

<sup>138</sup> ATTORNEY GEN. ADVISORY COMM. ON AM. INDIAN AND ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, ENDING VIOLENCE SO CHILDREN CAN THRIVE 6, 37-38 (2014), <http://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2014/11/18/finalaianreport.pdf> [hereinafter ENDING VIOLENCE SO CHILDREN CAN THRIVE].

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 37-39, 98, 217.

<sup>141</sup> *Id.* at 38.



## RECOMMENDATION 6.1

the concepts of due process and equal protection and who work closely with tribal communities on matters related to children. Defender offices should help American Indian and Alaska Native youth understand the complexities of the various systems and guard against dual prosecution.<sup>142</sup>

Government at all levels should invest in training on the concept of due process and its benefit to American Indian and Alaska Native youth in court.

Training should include principles of procedural justice and developmentally informed advocacy within the cultural context of the tribal courts. Training should account for the unique cultural considerations involved, as well as the particular developmental considerations that may be at play—given the documented high rates of native children who are exposed to trauma and violence—and ensure they are incorporated into defense advocacy.

## RECOMMENDATION 6.2

### **SUPPORT SYSTEM-WIDE TRAINING AND DEVELOP POLICIES THAT PROMOTE CULTURAL COMPETENCE FOR LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER/QUESTIONING, AND GENDER NON-CONFORMING (LGBTQ-GNC) YOUTH**

LGBTQ-GNC youth are disproportionately drawn into the delinquency system.<sup>143</sup> Advocacy on behalf of LGBTQ-GNC youth can be challenging because of the heightened need to respect confidentiality and privacy against the backdrop of needing to gather information about the client to advocate for the client's expressed interest.<sup>144</sup>

Government at all levels should support system-wide training and develop policies that promote cultural competence about sexual orientation, gender identity, and gender expression (SOGIE). Public defense organizations must provide juvenile defenders with the tools, knowledge, and skills needed to effectively represent LGBTQ-GNC youth and to understand how issues of SOGIE affect youth within the justice system. Juvenile courts should

engage court-involved LGBTQ-GNC youth in reform efforts to address gaps and provide needed support within the system.

As part of a broader research agenda, government at all levels should collect data and conduct impactful research on issues faced by LGBTQ-GNC youth in juvenile courts. Data and research efforts must be conducted sensitively and privately; youth must maintain control over disclosure of identifiable information; and information gathered must only be used to advance the youth's expressed interests in individual cases or to inform research on an aggregate level. The data and research should also include demographic questions (e.g., race/ethnicity) to ensure that a full picture of LGBTQ-GNC youth is captured.

142 See *United States v. Lara*, 541 U.S. 193 (2004) (finding that prosecution of Native American tribal members by both the tribe and the federal government for the same act does not violate the Double Jeopardy Clause of the U.S. Constitution because each is a separate sovereign).

143 Angela Irvine & Aisha Canfield, *The Overrepresentation of Lesbian, Gay, Bisexual, Questioning, Gender Nonconforming and Transgender Youth Within the Child Welfare to Juvenile Justice Crossover Population*, 24 J. GENDER SOC. POL'Y & L. 243, 248 (2016) (20% of all youth in juvenile detention identify as LGBTQ/GNCT).

144 See EQUITY PROJECT, *LGBT YOUTH IN JUVENILE COURT: PRACTICE TIPS FOR JUVENILE DEFENDERS 2-3* (2012), <http://www.nclrights.org/wp-content/uploads/2013/07/LGBTYouthForWeb.pdf>; COMMITTEE OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER MATTERS, *CONFIDENTIAL REP. TO THE ADMINISTRATIVE JUDGE OF THE NEW YORK CITY FAMILY COURT 10-11, 31* (Dec. 31, 2011) [hereinafter *CONFIDENTIAL REPORT*] (noting that youth are the gatekeepers of information related to their sexual orientation, gender identity, and gender expression, and may not be "out" at all, or "out" to everyone at the same time or to the same degree); Angela Irvine, *"We've Had Three of Them": Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-Conforming Youths in the Juvenile Justice System*, 19 COLUM. J. GENDER & L. 675, 679-80 (2010) (noting that defenders interacting with LGBTQ-GNC youth should never make assumptions about a client's sexual orientation or gender identity, and should also protect clients' confidentiality, as youth often fear rejection, bullying, or harassment by parents, teachers, peers, and/or juvenile delinquency system stakeholders if their sexual orientation and/or gender identity is disclosed).

## INNOVATION

## IMPROVING LGBTQ-GNC CULTURAL COMPETENCY AMONG JUVENILE JUSTICE SYSTEM STAKEHOLDERS

**Conducting Targeted Training:** *Toward Equity: A Training Curriculum for Understanding Sexual Orientation, Gender Identity, and Gender Expression and Developing Competency to Serve Lesbian, Gay, Bisexual, and Transgender Youth in the Juvenile Justice System* is a six-module curriculum developed by the Equity Project<sup>145</sup> that introduces comprehensive, interactive training lessons designed to increase competence about SOGIE, while providing practitioners with increased knowledge, tools, and resources for working with LGBTQ-GNC youth in the juvenile justice system.<sup>146</sup>

**Increasing SOGIE-Inclusive, Non-Discrimination, and/or Juvenile Justice Policies Regarding Treatment of LGBTQ-GNC Youth:** To date, approximately 12 states have created policies explicitly addressing LGBTQ-GNC youth in their juvenile justice systems and/or detention centers—a significant increase from just a few years ago.<sup>147</sup>

**Collecting Data on LGBTQ-GNC Youth in the Juvenile Justice System:** While there is still limited data about LGBTQ-GNC youth in the juvenile justice system, recently updated research across the country and in the State of California found that 20% of youth in juvenile detention identify as LGBTQ-GNC.<sup>148</sup> Moreover, 85% of those youth are youth of color.<sup>149</sup>

145 The Equity Project is a unique collaborative initiative of organizations founded to ensure that LGBT youth in juvenile courts are treated with dignity, respect, and fairness. The Equity Project receives critical guidance from the Equity Project Advisory Committee, which is comprised of individual leaders from across the country with a range of different expertise—from social science researchers to probation officers to defenders—in working with LGBT youth in the delinquency system.

146 See *Toward Equity Training Curriculum*, THE EQUITY PROJECT, <http://www.equityprojects.org/training-type/curricula/> (last visited Sept. 23, 2016).

147 See *Policies*, THE EQUITY PROJECT, <http://www.equityprojects.org/type/policy/> (last visited Sept. 23, 2016) (listing examples of SOGIE-inclusive non-discrimination and/or juvenile justice LGBT policies).

148 Irvine & Canfield, *supra* note 143; THE EQUITY PROJECT, FACT SHEET: LGBTQ YOUTH & JUVENILE JUSTICE (2014), <http://www.equityprojects.org/wp-content/uploads/2014/12/ACT4JJ-LGBT-Fact-Sheet-November-2014.pdf>.

149 *Id.*

## ENSURE YOUTH IN FACILITIES HAVE ACCESS TO COUNSEL

Youth in confinement are particularly vulnerable to harm. Detrimental room confinement and isolation, restraint practices, sexual and physical abuse, and lack of adequate medical, mental health, and educational services are well-documented in juvenile facilities around the country.<sup>150</sup> Youth in secure custody are further at risk because they are often out of sight of lawyers, families, and the courts.

Federal, state, local, and tribal governments must ensure youth in custody have access to defense attorneys who will monitor conditions of confinement and provide access to courts when those conditions violate children's rights or inhibit positive youth development. Justice systems must develop specific policies to enhance the monitoring and protection of youth in confinement. In particular, they must ban solitary confinement of youth in facilities. The

practice is inconsistent with the goals of juvenile court and is likely to cause children lasting harm.<sup>151</sup> Juvenile defenders must be trained on standards of care that exist to protect the rights and safety of youth in custody at every juncture.<sup>152</sup>

Federal, state, local, and tribal governments must ensure that youth in custody have access to education services in line with the Individuals with Disabilities Education Act<sup>153</sup> and the Americans with Disabilities Act,<sup>154</sup> as well as state education laws—all of which require appropriate services in facilities. Education and justice agencies should work together to ensure juvenile defenders and civil education advocates are prepared and available to address inadequate educational services for youth in custody.

### INNOVATION

#### ADDRESSING HARMS TO YOUTH IN SECURE CUSTODY

**Utilizing the Project on Addressing Prison Rape:** The Project on Addressing Prison Rape, housed at American University's Washington College of Law, provides information that juvenile defenders can access and use about the history of the history of the Prison Rape Elimination Act (PREA), all PREA and National Prison Rape Elimination Commission documents, 50-state surveys, checklists, maps, graphic novels, case law digests, news, training, curricula, and links to other important sites and information.<sup>155</sup> The Project also provides training, technical assistance, legal expertise regarding sexual abuse in custodial settings, and guidance on issues advocates face in addressing PREA and responding to sexual abuse in custodial settings.<sup>156</sup>

**Executive Order Ending Solitary Confinement for Juveniles:** In January 2016, President Obama directed the Department of Justice to ban the use of solitary confinement on juveniles in the custody of the federal Bureau of Prisons.<sup>157</sup>

150 See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2012 9 (2013) [hereinafter BJS REPORT ON SEXUAL VICTIMIZATION IN JUVENILE FACILITIES]; RICHARD MENDEL, THE ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 5-7, 14 (2011), <http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf>.

151 See, e.g., MENDEL, *supra* note 150.

152 See, e.g., THE ANNIE E. CASEY FOUND., JUVENILE DETENTION FACILITY ASSESSMENT: A GUIDE TO JUVENILE DETENTION REFORM (2014), <http://www.aecf.org/m/resourcedoc/aecf-juvenile-detention-facility-assessment-2014.pdf>; Prison Rape Elimination Act Standards for Juvenile Facilities, 28 C.F.R. Part 115(D) (2012).

153 Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (2010).

154 Americans with Disabilities Act, 42 U.S.C. § 12101 (2009).

155 See generally *End Silence: The Project on Addressing Prison Rape*, AM. UNIV., WASHINGTON COLLEGE OF LAW, <https://www.wcl.american.edu/endsilence/> (last visited Sept. 23, 2016).

156 *Id.*

157 *Factsheet: Department of Justice Review of Solitary Confinement*, THE WHITE HOUSE (Jan. 25, 2016), <https://www.whitehouse.gov/the-press-office/2016/01/25/factsheet-department-justice-review-solitary-confinement>; U.S. DEP'T OF JUSTICE, REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING (2016), <https://www.justice.gov/dag/file/815551/download>.

## RECOMMENDATION 6.4

### DEVELOP SPECIALIZED DEFENSE EXPERTISE FOR YOUTH CHARGED WITH SEX OFFENSES

Research demonstrates that youth adjudicated of sex offenses are different from adult sex offenders in the reasons they offend, the kinds of offenses they commit, their risk of recidivism, and their amenability to treatment.<sup>158</sup> Despite this, juveniles charged with sex offenses are often wrongly labeled as predators and relegated to sex offender registries, sometimes for life. The definition of what constitutes a “sex offense” is expanding to criminalize normative adolescent behavior that is being immortalized through “sexting” and other social media and technological advancements. Juvenile courts should provide training on the developmental underpinnings of sexual conduct in order to better assess whether prosecution is

appropriate and, when interventions are necessary, that they are developmentally appropriate. Public defense organizations should provide specialized training for juvenile defenders on the scientific studies regarding juvenile sex offending; an understanding of its causes and interventions will equip juvenile defenders to better represent youth charged with sex offenses and provide the proper developmental context to the court.

Federal, state, local, and tribal governments should abolish juvenile sex offender registries.<sup>159</sup> Such laws do not deter sexual offending behavior or promote public safety, and instead harm youth success.<sup>160</sup>

## RECOMMENDATION 6.5

### REMOVE ALL YOUTH FROM THE ADULT SYSTEM AND, UNTIL THEN, DEVELOP SPECIALIZED PUBLIC DEFENSE UNITS TO DEFEND YOUTH IN THE ADULT SYSTEM

Youth under the age of 18 should not be prosecuted in the adult criminal justice system. For more than a decade, the United States Supreme Court has made profound and emphatic statements regarding the developmental differences between youth and adults. Five major decisions handed down by the Court have honed in on developmental aspects of youth as the basis for: (1) eliminating the juvenile death penalty (*Roper v. Simmons*);<sup>161</sup> (2) eliminating life without parole for non-homicide juvenile offenses (*Graham v. Florida*);<sup>162</sup> (3) requiring that law enforcement

consider age for purposes of administering *Miranda* warnings (*J.D.B. v. North Carolina*);<sup>163</sup> (4) eliminating mandatory life without parole sentences for youth convicted of homicide committed prior to age 18 (*Miller v. Alabama*);<sup>164</sup> and (5) applying *Miller*’s decision to eliminate mandatory life without parole sentences retroactively (*Montgomery v. Louisiana*).<sup>165</sup>

Adolescent development concepts—such as the recognition that children are more susceptible to coercion,<sup>166</sup> have greater difficulty appreciating the

158 See HUMAN RIGHTS WATCH, RAISED ON THE REGISTRY: THE IRREPARABLE HARM OF PLACING CHILDREN ON SEX OFFENDER REGISTRIES IN THE U.S. 4, 7 (2013) [hereinafter RAISED ON THE REGISTRY].

159 See, e.g., *In re C.P.*, 967 N.E.2d 729 (Ohio 2011) (holding that automatic, lifelong registration and notification requirements for youth on sex offender registries violates the prohibition against cruel and unusual punishment and due process); *In re J.B. et al.*, 107 A.3d 1 (Pa. 2014) (holding that the Sex Offender Registration and Notification Act’s lifetime requirement violated juvenile offenders’ due process rights).

160 See Elizabeth J. Letourneau et al., *Do Sex Offender Registration and Notification Requirements Deter Juvenile Sex Crimes?*, 37 CRIMINAL JUSTICE AND BEHAVIOR 553 (2010); RAISED ON THE REGISTRY, *supra* note 158.

161 *Roper v. Simmons*, 543 U.S. 551 (2005).

162 *Graham v. Florida*, 560 U.S. 48 (2010).

163 *J.D.B. v. North Carolina*, 564 U.S. 261 (2011).

164 *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

165 *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

166 Brief for the Am. Psychological Ass’n et al. as Amici Curiae Supporting Petitioners, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Nos. 10-9646 and 10-9647) at 15-16 [hereinafter APA Brief] (“Difficult family and neighborhood conditions are major risk factors for juvenile crime . . . [y]et, precisely because of their legal minority, juveniles lack the freedom to remove themselves from those negative external influences.”).

consequences of their actions,<sup>167</sup> prefer immediate rewards over long-term gains,<sup>168</sup> and are more vulnerable to peer pressure<sup>169</sup>—have significant implications for reforming policies that allow children to be prosecuted in adult criminal court.

to defend youth and provide adequate training to ensure developmentally appropriate representation and advocacy. These specialized units should also provide continuity of representation when youth are transferred between court systems.

Wherever youth are prosecuted as adults, public defense systems should establish specialized units

## INNOVATION

### PROTECTING CHILDREN CHARGED AS ADULTS

**Creating Specialized Units to Defend Youth in the Adult System:** The Maryland Office of the Public Defender’s Youthful Defendant Unit consists of a group of attorneys, social workers, and staff who represent children charged as adults in Baltimore City and who are cross-trained in both adult and juvenile practice.<sup>170</sup> This specialized unit works as a team to provide quality representation throughout all phases of the criminal case (e.g., arraignment, motions to transfer jurisdiction, trial, etc.). If a client is transferred back to juvenile court, the team follows the client and continues to provide seamless advocacy throughout the juvenile delinquency process, including post-disposition.

**Implementing Guidelines for Representing Youth in the Adult System:** The Campaign for the Fair Sentencing of Youth’s *Trial Defense Guidelines: Representing a Child Client Facing a Possible Life Sentence* set forth a national standard of practice to ensure quality, constitutionally effective representation consistent with the Supreme Court’s ruling in *Miller v. Alabama*.<sup>171</sup> The Guidelines draw from the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* in the capital context and the *National Juvenile Defense Standards* in the juvenile context.

167 *Id.* at 8 (“Adolescents are less able to control their impulses; they weigh the risks and rewards of possible conduct differently; and they are less able to envision the future and apprehend the consequences of their actions.”).

168 *Id.* at 11-12 (“[A]dolescents are particularly attuned to *immediate* rewards . . . [and are] emotionally primed for spur-of-the-moment, reward- and sensation-seeking behavior without offsetting, adult sensitivities to corresponding risks . . .”).

169 *Id.* at 16 (“Juveniles are also especially vulnerable to the negative influence of peer pressure. Research has shown that susceptibility to peer pressure to engage in antisocial behavior increases between childhood and early adolescence . . .”).

170 See *Youthful Defendant Unit*, MARYLAND OFFICE OF THE PUBLIC DEFENDER, <http://www.opd.state.md.us/opd/Districts/Dist1/YDUHome.aspx> (last visited Sept. 23, 2016).

171 HEATHER RENWICK ET AL., THE CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, *TRIAL DEFENSE GUIDELINES: REPRESENTING A CHILD CLIENT FACING A POSSIBLE LIFE SENTENCE* (2015), <http://fairsentencingofyouth.org/wp-content/uploads/2015/03/Trial-Defense-Guidelines-Representing-a-Child-Client-Facing-a-Possible-Life-Sentence.pdf>.

## RECOMMENDATION 7.0

### FUND AND IMPLEMENT MECHANISMS TO COLLECT DATA, CONDUCT ASSESSMENTS AND COURT OBSERVATIONS, AND INITIATE EVALUATION AND RESEARCH

#### 7.1

Develop Juvenile Defense Indicators Targeted to Measure System Performance

#### 7.2

Develop Case Management Systems Specific to Juvenile Defense

#### 7.3

Develop a Comprehensive Juvenile Defense Research Agenda

#### 7.4

Conduct Assessments and Court Observations to Evaluate Access to and Quality of Juvenile Defense Counsel

# 7.0

## **FUND AND IMPLEMENT MECHANISMS TO COLLECT DATA, CONDUCT ASSESSMENTS AND COURT OBSERVATIONS, AND INITIATE EVALUATION AND RESEARCH**

Establishing effective juvenile defense services requires the development of juvenile defense data collection systems and a comprehensive research agenda. Within juvenile courts, stakeholders often perceive juvenile defense as a mere procedural requirement that hinders case processing. Data, assessment, evaluation, and research are necessary to advance juvenile defense and to help jurisdictions successfully meet the constitutional requirement that youth receive a vigorous defense from qualified attorneys.

### **RECOMMENDATION 7.1**

#### **DEVELOP JUVENILE DEFENSE INDICATORS TARGETED TO MEASURE SYSTEM PERFORMANCE**

Government at all levels should provide support and technical assistance to create a uniform set of juvenile defense data indicators, based on shared values, goals, metrics, and terminology. Stakeholders use indicators to describe the state of the field, to measure progress, to help set priorities, and to plan initiatives. Unlike other areas of the justice system, the field of juvenile defense has not finalized and implemented a set of indicators to track progress

or performance of children's access to qualified counsel. In the absence of a nationwide standard set of indicators, the capacity of juvenile defense stakeholders to benchmark progress, identify priorities, and frame public debate is diminished. Juvenile courts must dedicate resources, including technological and human resources, to adopting and implementing a set of standardized juvenile defense indicators.

### **RECOMMENDATION 7.2**

#### **DEVELOP CASE MANAGEMENT SYSTEMS SPECIFIC TO JUVENILE DEFENSE**

Government at all levels should provide support and technical assistance to develop, customize, and implement juvenile defense-specific case management systems. Such systems should allow jurisdictions to collect, analyze, and access data on client outcomes, attorney performance, workload and caseload standards, and system performance.

Data collection and program evaluation are essential to understanding current juvenile defense service delivery and to make progress toward ensuring every child has access to an effective lawyer.

**INNOVATION****BUILDING JUVENILE DEFENSE-SPECIFIC CASE MANAGEMENT SYSTEMS**

In New York, The Legal Aid Society's Juvenile Rights Practice overhauled its case management system to allow for tracking of juvenile defense-specific client data, attorney performance data, and court system performance data to identify needs and make improvements in both individual attorney and system performance.<sup>171</sup>

The Massachusetts-based Youth Advocacy Division (YAD) developed the Transformational Representation Information System (TRIS), a juvenile-specific case management and data collection system.<sup>172</sup> YAD built the system to gather information needed to support quality legal advocacy by lawyers and social workers using a Positive Youth Development approach and to manage individual offices, as well as a statewide division. YAD uses the information in TRIS to improve individual practices, evaluate their overall program, advocate for research-based systemic changes, and seek juvenile defense-specific funding.

**RECOMMENDATION 7.3****DEVELOP A COMPREHENSIVE JUVENILE DEFENSE RESEARCH AGENDA**

National leaders should collaborate to develop a comprehensive research agenda on the impact of the juvenile justice system on children. Federal, state, local, and tribal agencies, as well as the private sector, should develop a research agenda to inform effective judicial, legislative, and internal decision making around juvenile defense.

A juvenile defense research agenda should include a range of issues such as: the effect of juvenile defense

specialization on procedural justice; the long-term costs associated with an absence of counsel in terms of lost education, employment, and the expense of incarceration; the damage resulting from a lack of post-disposition access to school placement and reentry; and the identification of the most essential elements of a holistic juvenile defense practice.

**RECOMMENDATION 7.4****CONDUCT ASSESSMENTS TO EVALUATE ACCESS TO AND QUALITY OF JUVENILE DEFENSE COUNSEL**

Federal, state, local, and tribal governments must support assessments of access to and quality of juvenile defense counsel. Assessments provide a framework to identify gaps in juvenile defense services, amass information, and generate knowledge about the underlying condition of a juvenile defense system. In addition, juvenile courts should establish programs for juvenile defense

experts to conduct court observations that inform a snapshot of children's access to counsel and quality of representation in jurisdictions. Assessments and on-the-ground observations are essential to uncovering how systems function in practice, since practices often don't reflect written policies, statutes, and rules.

<sup>172</sup> Memorandum from the National Juvenile Defender Center et al., to Robert Listenbee, Administrator, Office of Juvenile Justice and Delinquency Prevention (March 13, 2014) (on file with author) (for further information on the case management system developed by The Legal Aid Society, Juvenile Rights Practice, contact the National Juvenile Defender Center).

<sup>173</sup> See *id.* (for further information on the Youth Advocacy Division's TRIS system, contact the National Juvenile Defender Center).



**INNOVATION**

**SUPPORTING STATEWIDE ASSESSMENTS OF ACCESS TO AND QUALITY OF JUVENILE DEFENSE**

NJDC partners with state-based organizations and private foundations to conduct and disseminate assessments of juvenile defense systems.<sup>174</sup> Each of the 22 state assessments conducted thus far has significantly raised awareness of system impediments and necessary improvements and has led to lasting juvenile defense reforms.

<sup>174</sup> See generally NJDC Assessments, *supra* note 31.

**A  
CALL  
TO  
ACTION**

# CONCLUSION

**“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.”**

*In re Gault*, 387 U.S. 1, 36 (1967).

This Blueprint is a call to action. We are overdue on our obligations to uphold and enforce the right to counsel for every child facing prosecution and to adequately fund and support effective systems of juvenile defense. Juvenile defenders are the cornerstone of justice for children whose futures hinge on case outcomes and the constitutional rights guaranteed in juvenile court.

## **The administration of justice requires the full delivery of the right to counsel and equal protection under the law for our children.**

Given the goal of juvenile court to promote positive youth development, stakeholders are often inclined to draw children into the system in the hope of delivering services and interventions. But these interventions have consequences. Juvenile court adjudications result in enduring court records, numerous fees, and developmentally

harmful experiences that create lasting barriers to education, housing, employment, and youth success.<sup>175</sup>

The concepts on which our country’s justice systems are built—the presumption of innocence; proof beyond a reasonable doubt; due process; and constitutional protections against self-incrimination and illegal search and seizure—are crucial to preventing unwarranted and harmful court intervention. Our courts must fulfill the promise of justice for children and only intervene in young people’s lives when absolutely necessary. Juvenile defenders safeguard the due process rights guaranteed to children and ensure that the delinquency system works fairly, appropriately, and effectively. The administration of justice requires the full delivery of the right to counsel and equal protection under the law for our children.<sup>176</sup>

<sup>175</sup> See Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 179-80 (1997); HOLMAN & ZIEDENBERG, *supra* note 49, at 8-10; RAISED ON THE REGISTRY, *supra* note 158, at 64-68.

<sup>176</sup> *In re Gault*, 387 U.S. 1 (1967). 50 years after the *In re Gault* decision affirming a child’s right to counsel, the spirit of this case has not been fully realized. See generally NJDC Assessments, *supra* note 31; Statement of Interest in N.P., *supra* note 45; Mlyniec, *supra* note 47.



The National Juvenile Defender Center (NJDC) is a non-profit, non-partisan organization dedicated to promoting justice for all children by ensuring excellence in juvenile defense. NJDC provides support to public defenders, appointed counsel, private counsel, law school clinical programs, and non-profit law centers to ensure quality representation in urban, suburban, rural, and tribal areas. NJDC also offers a wide range of integrated services to juvenile defenders as well as other decision-makers and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building, and coordination. To learn more about NJDC, please visit [www.njdc.info](http://www.njdc.info).

This project was supported in part by Grant #2013-MU-FX-K004 awarded by the Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, and conclusions or recommendations expressed in this guide are those of the author and do not necessarily reflect those of the Department of Justice.

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