ARTICLES

INTRODUCTION TO THE 2015 ROBERT D' AGOSTINO SYMPOSIUM EDITION OF THE JOHN MARSHALL LAW JOURNAL: DECREASING YOUTH INCARCERATION THROUGH QUALITY JUVENILE DEFENSE

BRIDGETT E. ORTEGA, J.D., M.A., ATLANTA'S JOHN MARSHALL LAW SCHOOL

I. SUBJECT OF THE SYMPOSIUM

The founding principles of the first juvenile courts in the United States were the rehabilitation and treatment of delinquent youth.[1] Unfortunately over the past fifty years

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

juvenile justice policy in the United States has become much more punitive. The strategy for dealing with errant youth has shifted from one of rehabilitation and treatment to one of punishment and incarceration of youth in juvenile and adult correctional institutions.[2] As a result of this strategic shift, the rehabilitative system envisioned to provide protection and redirection to young people has devolved into a system where young people experience harsh sanctions and adult punishments. This has given rise to a juvenile justice system dependent on incarceration. On any given day there are over 61,000 youth in correctional custody.[3] Conditions of confinement for these youth – the majority of whom are non-violent offenders and children of color – are often deplorable and unconstitutional, documented by lawsuits and court-ordered sanctions that demonstrate a pattern of violence, physical and sexual abuse, a systemic failure by facility staff to protect youth from physical and psychological harm, excessive use of isolation or restraints, and failure to provide required services.[4] The United States incarcerates more young people than any other nation in the world.[5] This dubious honor of the sheer numbers of youth being incarcerated, in addition to increased recognition of the appalling conditions of confinement, demonstrated psychological and developmental harms associated with incarceration, and due process issues being raised that conflict with the purpose and mission of juvenile court, have set the stage for a movement in favor of "decarceration." Decarceration, or finding alternative

2. Richard A. Mendel, *No Place for Kids: The Case for Reducing Juvenile Incarceration*, THE ANNIE E. CASEY FOUND. (2011) [hereinafter Mendel, *No Place for Kids*], http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf.

3. The Sentencing Project Interactive Map, http://www.sentencingproject.org/map/map.cfm (last visited Sept. 9, 2015).

4. Mendel, *No Place for Kids*, *supra* note 2, at 5-6 (discussing lawsuits filed by the Department of Justice that resulted in court-sanctioned remedies, and authoritative reports that document maltreatment and abuse in juvenile correction facilities in 32 states plus Washington D.C., and Puerto Rico since 1990).

5. *Id.* at 3.

rehabilitative community settings instead of incarcerating youth, is the ultimate goal of the contributing authors of this issue of the Atlanta's John Marshall Law School's (AJMLS) *Law Journal*.

Recognizing a reform movement advocating for decarceration is underway, there is an urgent need for more creative and outcome-driven responses to youth in the juvenile justice system. The 2015 AJMLS Dean Robert D' Agostino Legal Symposium and this accompanying Symposium issue of the AJMLS *Law Journal* addresses the role of defense counsel in reversing the trend of youth incarceration in the United States. Juvenile defenders must do their part in challenging factors that contribute to the overreliance of incarceration and advocating for dispositional alternatives for young people.

The defense attorney's role in decreasing juvenile incarceration through quality representation is a subject that is gaining prominence. A handful of articles have been written on the topic, a few, by the scholars assembled in this Journal. The authors represented in this issue were brought together to advance the legal scholarship surrounding the subject of youth decarceration by posing and grappling with fundamental and emerging issues surrounding ethical and professional responsibilities of juvenile defense counsel.

Every participating author points out, from multiple perspectives and in different voices, that juvenile defense attorneys can play a strategic role in reducing the mass incarceration of youth who come into contact with the justice system. The participants in the live symposium represented some of the finest practitioners and legal scholars in their respective fields and the resulting articles present a snapshot of the possibilities for: (1) strategic arguments intended to reduce reliance on incarceration as a dispositional option for youth, especially youth of color; (2) the obligation of post-disposition representation in every jurisdiction; and (3) reentry support for incarcerated youth returning to their communities. The AJMLS Dean Robert D'Agostino Legal Symposium marked a watershed moment in reshaping and expanding the role of the juvenile defender. This Symposium issue continues that

conversation and explores innovative defense models that could impact policy and improve resources, systems, and community support for defender services. Each author maintains that quality representation and continued legal advocacy throughout the duration of a young person's involvement in the juvenile justice system would be a significant step towards decarceration.

Juvenile justice professionals, lawyers included, regularly talk about reforming the juvenile justice system. The articles in this issue offer substantive and practical approaches to reform that are rooted in constitutional justification and promote the ideals of juvenile rehabilitation.

II. THE JUVENILE JUSTICE SYSTEM AND RACE

The criminal and juvenile justice systems are characterized by racial disparities that impact young people in profound ways and result in minority youth being overrepresented at every stage of the juvenile justice system.[6] "Disproportionate minority contact refers to the disproportionate number of minority young people who come into contact with the juvenile justice system."[7] "Despite the Federal mandates to reduce 'disproportionate minority contact' juvenile court authorities do not have much guidance on how to interpret the problem or their responsibility to address it."[8] Although there is limited

6. Joshua Rovner, *Disproportionate Minority Contact in the Juvenile Justice System*, THE SENTENCING PROJECT 1 (2014), fhttp://sentencingproject.org/doc/publications/jj_Disproportionate%20Minority%20Contact.pdf; *see also* LEADERSHIP CONFERENCE ON CIVIL RIGHTS, *Race and Juvenile Justice System*, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 37 (2008), http://www.protectcivilrights.org/pdf/reports/justice.pdf.

7. U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, IN FOCUS: DISPROPORTIONATE MINORITY CONTACT (2012), [hereinafter U.S. DEP'T OF JUSTICE, IN FOCUS], http://www.ojjdp.gov/pubs/239457.pdf.

8. Geoff Ward *et al*., *Racial Politics of Juvenile Justice Policy Support: Juvenile Court Worker Orientations Toward Disproportionate Minority Confinement*, 1 RACE & JUST. 154, 154-155 (2011) [hereinafter Ward, *Racial*

research on the causes of this disparity, what little there is suggests that racial bias and lack of diversity of those who work in the justice system may contribute to disproportionate minority contact.[9]

After arrest, the overrepresentation of minority youth in the juvenile justice system increases and their level of involvement intensifies – resulting in deeper entrenchment in the system.[10] According to a report prepared by researchers from the National Council on Crime and Delinquency, minority youth are more likely to be held at intake, be detained prior to adjudication, have petitions filed against them, be transferred to adult court, be adjudicated delinquent, and be held in secured facilities more frequently than their white counterparts.[11] The report concluded that minority youth are substantially overrepresented at all stages of the juvenile justice system and noted that three out of every four children admitted to adult prisons were minorities, despite the fact that the majority of juvenile arrests involved whites.[12]

In "What's Race Got to do with It?" authors, Professor Ellen Marrus with the University of Houston Law Center, and Nadia Seeratan, Senior Attorney and Policy Advocate with the

---

Politics]

9. NAT'L COUNCIL ON CRIME AND DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 4 (2007), http://www.nccdglobal.org/sites/default/files/publication_pdf/justice-for-some.pdf; OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, DISPROPORTIONATE MINORITY CONTACT (DMC) 2 (2014) [hereinafter U.S. DEP'TOF JUSTICE, DISPROPORTIONATE MINORITY CONTACT], http://www.ojjdp.gov/mpg/litreviews/Disproportionate_Minority_Contact.pdf; *see also* JAMES B. RASKIN, MARYAM AHRANJANI, & ANDREW G. FERGUSON, YOUTH JUSTICE IN AMERICA 290-94 (2d ed., 2005).

10. *See* Michael M. Leiber & Nancy Rodriguez, *The Implementation of the Disproportionate Minority Contact (DMC) Mandate: A Failure or Success?*. 1 RACE & JUST. 103, 105 (2011); CHRISTOPHER HARTNEY & LINH VUONG, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE US CRIMINAL JUSTICE SYSTEM 2 (NAT'L COUNCIL ON CRIME AND DELINQ. 2009, http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf.

11. NAT'L COUNCIL ON CRIME AND DELINQUENCY, *supra* note 9, at 4.

12. *Id.*, *see also* Ward, *Racial Politics*, *supra* note 8.

National Juvenile Defender Center, strongly encourage defenders to not only challenge implicit bias amongst juvenile justice stakeholders but to also overcome their own aversion to raising race in the courtroom in order to zealously advocate for their young clients. They argue that race is an issue that should be raised at critical moments in a juvenile justice proceeding. Marrus and Seeratan examine implicit bias and how it influences decision-making and actions of the various actors within the juvenile justice system, including defenders. Studies reveal that race is not only relevant to the differential treatment of youth during the various phases of a youth's interaction with the juvenile justice system, but also to the attitudes of the people charged with administering justice.[13] Prejudice is generally understood as an overt expression against an out-group, but there is a trend towards racial apathy which includes a subtle dynamic of disinterest and lack of care, which in turn contributes to a system of inequality.[14] This apathy makes a strong case for the importance of increasing cultural competency through training or hiring practices.[15] As with other justice system stakeholders, Juvenile defenders also need to be culturally competent and socially sensitive to issues of race and ethnicity.

Defense attorneys are in a unique position when it comes to fighting race bias and apathy, if for no other reason than that they are more inclined to agree with the client when it comes to

13. RASKIN., *supra* note 9; *see, e.g.*, Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009); Besiki Kutateladze, Vanessa Lynn, & Edward Liang, *Do Race and Ethnicity Matter in Prosecution? A Review of Empirical Studies*, VERA INST. OF JUST., DO RACE AND ETHNICITY MATTER IN PROSECUTION? (1st ed. 2012), http://www.vera.org/sites/default/files/resources/downloads/race-and-ethnicity-in-prosecution-first-edition.pdf.

14. *See* LEADERSHIP CONFERENCE ON CIVIL RIGHTS, *supra* note 6.

15. *See* Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. OF EXPERIMENTAL PSYCH. 1267 (2012); *see generally*, Marjorie S. Zatz, *The Convergence of Race, Ethnicity, Gender, and Class on Court Decisions: Looking Towards the 21st Century*, 3 POLICIES, PROCESSES, AND DECISIONS OF THE CRIM. JUST. SYS. 503 (2000), https://www.ncjrs.gov/criminal_justice2000/vol_3/03j.pdf.

their perception of racial injustice. Marrus and Seeratan argue that defense counsel should be aware of personal biases, take notice of bias within the juvenile justice system, and raise the issue of race explicitly. Social science studies suggest that calling attention to race as an issue reduces reliance on stereotypes.[16] According to one study, when race was directly dealt with, individuals tended to treat white and black the same, but when race was not raised; individuals were more likely to favor white defendants over black defendants.[17]

Can racial bias issues in juvenile cases be raised in such a way that youth of color get a fair hearing? It remains to be seen. One thing is for certain, someone must begin the conversation, and it might as well be the defender. Defenders can challenge implicit race bias through a variety of motions invoking due process, pushing for expanded constitutional protections, or merely by telling the client's story.[18] The authors suggest that injecting explicit discussions about race is a prudent litigation strategy for juvenile defenders. Bringing up race during the case can help reduce a judge's implicit bias and for youth who have a strong sense of "fairness," it can help to provide confidence that their attorney is truly their advocate and will stand up for them and challenge injustice.

Although disproportionate minority contact and racial bias are complex issues, they can be combated by culturally competent and racially-sensitive defense counsel committed to eradicating racial injustice. Defenders can do more to reduce racial and ethnic disparity at key points within the juvenile justice system. Marrus & Seeratan assert that because of their

16. Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race And Juries – A Review of Social Science Theory and Research*, 78 CHI.-KENT. L. REV. 997, 1026-27 (2003) (determining that presenting jurors with race based *voir dire* questions in cases involving interracial violence reduced racial bias in white jurors); *see also* Mark Soler, *Reducing Racial and Ethnic Disparities in the Juvenile Justice System*, *in* TRENDS IN STATE COURTS 2014, NAT'L CTR. FOR STATE COURTS 27-30 (2014).

17. Zatz, *supra* note 15, at 533.

18. Robin Walker Sterling, *Defense Attorney Resistance*, 99 IOWA L. REV. 2245, 2250 (2014).

access to the clients and their obligation for expressed interest representation, juvenile defenders can be a powerful weapon in the fight against racial bias in the juvenile justice system.

III. POST-DISPOSITION ADVOCACY

Another strategy that can impact youth decarceration is ensuring that youth have quality defense representation at one of the most critical phases of the delinquency process – post-disposition. In spite of the fact that post-disposition has been recognized as a vital stage in juvenile court proceedings, that requires legal representation,[19] in a majority of jurisdictions defense counsel's involvement in a case ends once sentencing or disposition is imposed. Except in rare occasions, Public Defender offices do not engage in post-disposition advocacy for juveniles.[20] Whether a child is incarcerated or not, "post-disposition advocacy…is critical because it is at this stage that the rehabilitative goals of the juvenile system are either accomplished or squandered."[21] If the goal of the juvenile court is to ensure a child is rehabilitated, there needs to be checks and balances to ensure the post-disposition services provided to a child are appropriately delivered, that the child's rights are respected, and that all parties are held accountable for their role in that rehabilitation. Juvenile defenders who are invested in post-disposition representation help to ensure that courts have the full picture.

---

19. NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 25 (2005) (declaring that delinquency judges should be responsible for providing children with access to counsel at every stage of the proceedings, prior to the initial hearing through post-disposition and reentry hearings).

20. Sandra Simkins, Marty Beyer & Lisa Geis, *The Harmful Use of Isolation in Juvenile Facilities: The Need for Post-Disposition Representation*, 38 WASH. U. J.L. & POL'Y 241, 244-45 (2012).

21. Sandra Simkins, *Out of Sight, Out of Mind: How the Lack of Post Dispositional Advocacy in Juvenile Court Increases the Risk of Recidivism and Institutional Abuse*, 60 RUTGERS L. REV. 207, 210 (2007) [hereinafter Simkins, *Out of Sight*].

Although the United States Supreme Court in *In re Gault*[22] affirmed the right for all children to have counsel in delinquency proceedings, there are many interpretations of what this right entails.[23] It is only recently that juvenile defense standards have been established to provide juvenile defenders with clarity about their many ethical and professional responsibilities as they relate to their young clients.[24] The *National Juvenile Defense Standards* recognize the complex issues facing youth during post-disposition and expressly state "[c]ounsel must represent the client after disposition, including at post-disposition hearings."[25]

In this issue of the *Law Journal*, Clinical Law Professors Laura Cohen and Sandra Simkins of Rutgers University emphasize the critical role of post-disposition representation in addressing the needs of incarcerated youth. Youth confront a number of legal problems during the post-disposition phase of their involvement with the juvenile court system. These issues include: conditions of confinement, parole review, access to education, access to housing, probation compliance, and a host of others.[26] Post-disposition attorneys provide oversight to ensure that the juvenile justice system is working as intended. Without the assistance of counsel, youth often have trouble getting the court's attention to alert it to gaps in services or to the denial of access to educational or social services ordered by

22. 387 U.S. 1, (1967).

23. *Id.* (*Gault* unequivocally held that children in delinquency proceedings have, among other rights, the due process right to counsel, the privilege against self-incrimination, and the right to compel and confront witnesses).

24. NAT'L JUVENILE DEFENDER CTR., JUVENILE DEFENSE STANDARDS: A FRAMEWORK FOR THE SPECIALIZED REPRESENTATION OF YOUTH (2014), http://njdc.info/wp-content/uploads/2014/10/Standards-HR-10.7.14.pdf.

25. NAT'L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS, Part VII: Role of Juvenile Defense Counsel After Disposition (2012) [hereinafter NAT'L JUV. DEF. STDS.], http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf.

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

the court.

The issue of post-disposition advocacy by defense counsel is critical to ensuring the constitutional rights of adjudicated youth as guaranteed by *Gault,* and successful reentry of the young person back to their home and community. Professors Cohen and Simkins assert that such advocacy may entail appellate work, monitoring conditions of confinement and disposition plans, placement advocacy, post-disposition review, educational advocacy, and reentry planning. They argue that post-disposition representation of juvenile clients is not only critical but *mandatory* to restore the juvenile justice system to the constitutional expectations under which it was formed and to hold courts accountable for either delivering on the promise of rehabilitation or releasing child offenders from custody.[27]

As with any call for reform the implementation can be challenging. Some of the ideas put forth by Professors Cohen and Simkins include: (1) mandatory post-disposition review hearings as an accountability tool for ensuring that youth are receiving court-ordered services, confirming that those services are working, and monitoring institutions to prevent abuse of children in such placements; (2) collaboration with law schools to set up or improve existing post-disposition advocacy programs; and (3) specialized dispositional advocacy units that include lawyers, advocates, and social workers who provide for holistic management of a child's dispositional needs.

Since juvenile clients lack a legal voice, their lawyers must serve as that voice. Post-disposition representation also helps to ensure that young clients make a successful transition back to the community.[28] One of the most important times in a juvenile's case is the period beginning from disposition through

27. *See also* Simkins, *Out of Sight*, *supra* note 21 at 211-212.

28. *See* NAT'L JUV. DEF. STDS., *supra* note 25 at § 7.5 REPRESENT THE CLIENT POST-DISPOSITION*; see generally* JUVENILE JUSTICE CTR., AM. BAR ASS'N & JUVENILE LAW CTR., PENNSYLVANIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE DELINQUENCY PROCEEDINGS (2003), http://njdc.info/wp-content/uploads/2013/11/Final-Pennsylvania-Assessment-Report.pdf.

any commitment or termination of probation.[29] Although after disposition, the youth is not necessarily before the court, they remain under the court or commitment facility's jurisdiction. Because of the legal rights implicated during this time, where the youth's liberty interests are at stake as they may face probation revocation or harmful conditions of confinement, it makes sense that an attorney be appointed to the youth client to monitor his or her progress, provide oversight, and prevent abuses. The appointment of a lawyer at this critical phase adds legitimacy to the entire juvenile justice process.[30]

IV. INCREASING THE NUMBER AND QUALITY OF JUVENILE APPEALS

In most states, juveniles do not have the right to a jury trial in delinquency court, which means that their cases are decided by a judge.[31] In spite of the existence of a right to appeal in delinquency cases in all states, there is an alarming absence of juvenile appellate advocacy in most jurisdictions.[32] In practice, the outcome of a juvenile case is nearly always left to a single trial judge.[33] In *Jones v. Barnes*, Justice Brennan noted in his dissent,

> There are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property and the reversal rate of criminal convictions on mandatory appeals in the state courts, while not overwhelming, is certainly high

29. Megan F. Chaney, *Keeping the Promise of Gault: Requiring Post-Adjudicatory Juvenile Defenders*, 19 GEO. J. ON POVERTY L. & POL'Y 351, 383 (2012).

30. *See generally* NAT'L JUV. DEF. STDS., *supra* note 25 at § 7.5: REPRESENT THE CLIENT POST-DISPOSITION.

31. *See generally,* McKeiver v. Pennsylvania, 403 U.S. 528, 547-49 (1971) (the United States Supreme Court held juvenile defendants do not have a right to a jury trial in delinquency proceedings and that the decision to afford one rests with the individual states).

32. Megan Annitto, *Juvenile Justice on Appeal*, 66 U. MIAMI L. REV. 671, 683 (2012).

33. *Id*. at 671.

> enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction.[34]

Justice Brennan's comments affirm that appeals are a vital part of American jurisprudence. However, there is widespread acknowledgment that appeals in the juvenile delinquency context are lacking, and in some cases "nearly non-existent."[35]

One of the principle functions of appellate courts in criminal and juvenile cases is the court's ability to define the scope of criminal law and procedure.[36] Appellate courts in the American justice system protect against error and establish the rights of the accused, which in turn increases accuracy, public accountability, and transparency. The lack of juvenile appeals restricts the ability of appellate courts to perform this function and deprives juveniles of the right to challenge procedural error or the application of the law. In the past decade, the Supreme Court has issued four landmark decisions impacting the status and treatment of children in the justice system. Each of these decisions are rooted in the idea that children are developmentally different from adults and should be treated differently under the law.[37] These decisions, as well as the

34. Jones v. Barnes, 463 U.S. 745, 756 n.1 (1983) (Brennan, J., dissenting).

35. *See, e.g.*, NAT'L JUVENILE DEFENDER CTR., INDIANA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 38 (2006), http://njdc.info/wp-content/uploads/2013/11/Final-Indiana-Assessment.pdf ("Appellate practice by local trial offices is nearly non-existent, and the process by which appeals are handled is unclear.").

36. *See* Annitto, *supra*, note 32 at 671-72; *see* also Raymond T. Elligett, Jr. & John M. Scheb, *The Appellate Decision-Making Process*, 80 FLA. B. J. 45, 45 (2006).

37. Roper v. Simmons, 543 U.S. 551 (2005) (holding that the Eighth and Fourteenth Amendments forbid the execution of offenders who were under the age of 18 when their crimes were committed); Graham *v.* Florida, 560 U.S. 48 (2010) (holding that life without parole sentences for juveniles convicted of non-homicide offenses are unconstitutional); J.D.B. v. North Carolina, 131 S. Ct. 2394, 2404, 2406 (2011) (holding that a child's age is relevant when determining whether a child is in police custody for purposes of *Miranda* warnings); Miller v. Alabama, 132 S. Ct. 2455 (2012) (holding

ability of the judiciary to implement and apply the reasoning supporting these decisions could not have happened without lawyers appealing lower court decisions and initiating the appellate process. If a lawyer fails to seek appellate review, change will not occur.

Appellate opinions help the public to understand how the law works and assist scholars in analyzing the law.[38] Opinions offer insight and uniformity in how the law is developed, which helps to provide guidance and set boundaries for police in their interactions with the public, as well as for prosecutors, judges, and defense attorneys in the courts.[39] As the juvenile court system has become more punitive, juvenile adjudications now also carry more consequences than ever before, rendering appellate review even more important.[40] Juvenile adjudications can result in adult sentencing enhancements, inclusion in DNA databases, sex offender registration, and limitations on the ability to obtain licenses, join the military or get into college.[41] Moreover effective appeals are one way to address discrepancies in juvenile court decision-making and possibly reduce the system's reliance on incarceration. The dearth of appellate practice also intersects with the struggles the juvenile justice system faces in overcoming disparate results for minority children. A recent study revealed that out of 103 juveniles that were exonerated post-appeal, nearly three-quarters of them were minority youth.[42] This study demonstrates the particular risk for

---

that mandatory life sentences without the possibility of parole for juvenile offenders violates the Eighth Amendment of the U.S. Constitution).

38. Michael Heise, *Federal Criminal Appeals: A Brief Empirical Perspective*, 93 MARQ. L. Rev. 1, 825, 826 (2009) (discussing the lack of attention to criminal appeals and why criminal appeals warrant more scholarly attention).

39. Annitto, *supra* note 32, at 680.

40. *See* Matter of Stanley F., 908 N.Y.S.2d 127, 129 (N.Y. App. Div. 2010) ("because there may be collateral consequences resulting from the adjudication of delinquency, the appeal…has not been rendered academic").

41. NAT'L JUVENILE DEFENDER CTR., AVOIDING AND MITIGATING THE COLLATERAL CONSEQUENCES OF A JUVENILE ADJUDICATION (2013), http://www.modelsforchange.net/publications/484.

42. Joshua A. Tepfer, Laura H. Nirider, & Lynda M. Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887, 902

minority youth in the absence of appellate review.

Appellate attorneys and authors, Jacqueline L. Bullard and Kim Dvorchak, make the case for robust juvenile appellate practice as part of post-sentencing representation. Multiple factors contribute to the low rate of appeals in juvenile delinquency cases, including waiver of the right to counsel, excessive plea agreements, and most notably, misguided attitudes in juvenile court about the timeliness, costs, and value of appeals.[43] The authors analyze the effects of the absence of appellate practice on the principle functions of the appellate court: i.e. correcting errors, lawmaking, and uniformity. In addition, the article explores best and promising practices in several states targeted at increasing juvenile appeals and how appellate practice might reduce youth incarceration rates and lengths of stay. Appeals are important in juvenile delinquency court because they provide fidelity to the law and are sometimes the only mechanism for transparency and accountability.[44] "[J]uvenile appellate practice not only protects youths' due process rights but also ensures critical checks on the juvenile court system and the development of law and policy on unique and emerging juvenile issues."[45]

V. DEFENDERS AS ADVOCATES FOR POST-ADJUDICATION SPECIAL EDUCATION AND DISABILITY RIGHTS

It is beyond dispute that school and educational issues are a significant factor that must be addressed in the representation of all juveniles from the time they enter the door of the juvenile

(2010) (also noting that juvenile court participants rarely make use of appeals).

43. NAT'L JUVENILE DEFENDER CTR., APPEALS: A CRITICAL CHECK ON THE JUVENILE DELINQUENCY SYSTEM 1 (2014), (hereinafter NAT'L JUVENILE DEFENDER CTR., APPEALS), http://njdc.info/wp-content/uploads/2014/10/Appeals-HR-10.4.14.pdf.

44. Robert G. Schwartz, Exec. Dir., Juvenile Law Ctr., Testimony before the Pennsylvania InterBranch Commission on Juvenile Justice (Jan. 21, 2010), http://modelsforchange.net/newsroom/322.

45. NAT'L JUVENILE DEFENDER CTR., APPEALS, s*upra* note 43, at 3.

justice system until they successfully reenter their communities and are no longer under the supervision of the court. Because education is critical to rehabilitation, it is considered by many to be the foundation for programming in most juvenile courts and institutions.[46] In recent years, many have come to realize that there are punitive laws, policies, and practices that push young people, particularly African American males, students with disabilities, and poor students, out of school and into the juvenile and criminal justice systems.[47] Many of these children have special education needs.[48]

These students, more often than not, arrive at the door of the juvenile justice system neglected, rejected, and often medicated. Meanwhile, their emotional and behavioral issues which were not addressed in school are now being categorized as criminal behavior. Young people need the assistance of a lawyer that has a working understanding of the fundamental principles of education law, whether a youth is being prosecuted for something that occurred at school or not. [49] This is the case because most pre-trial and probation orders include conditions that require the youth to attend school. However, the youth may need a better educational plan in place to successfully accomplish what the judge has ordered.

IDEA, FAPE, IEP, ADA, and FERPA are acronyms for laws

46. *Juvenile Correctional Educational Programs,* THE NAT'L CTR. ON EDUC., DISABILITY AND JUVENILE JUSTICE, http://www.edjj.org/focus/education/ (last visited Nov. 12, 2015).

47. *What is the School-to-Prison Pipeline?*, AMER. CIVIL LIBERTIES UNION, https://www.aclu.org/fact-sheet/what-school-prison-pipeline (last visited July 17, 2015) [hereinafter ACLU *School-to-Prison*]; Jason B. Langberg & Barbara A. Fedders, *How Juvenile Defenders Can Help Dismantle the School-to-Prison Pipeline: A Primer on Educational Advocacy and Incorporating Clients' Education Histories and Records into Delinquency Representation*, 42 J.L. & Educ. 653, 653, 661 (2013).

48. ACLU *School-to-Prison*, *supra* note 47; *see also* Lisa M. Geis, *An IEP for the Juvenile Justice System: Incorporating Special Education Law Throughout the Delinquency Process*, 44 U. MEM. L. REV. 869, 879 (2014).

49. *See* Geis, *supra* note 48 at 874; *see generally*, *Educational Issues*, NAT'L JUVENILE DEFENDER CTR., http://njdc.info/educational-issues/ (last visited Nov. 12, 2015) (providing a summary of the educational issues juvenile defenders should be knowledgeable of when representing juveniles).

that should be a part of every juvenile defender's vocabulary. The Individuals with Disabilities Education Act (IDEA),[50] provides students with disabilities the right to receive a Free and Appropriate Public Education (FAPE),[51] the right to an Individualized Education Program (IEP) [52] outlining appropriate services for addressing learning or behavioral disabilities, the right to education in the least restrictive environment, and special procedural protections for disabled students and their parents/guardians. The Family Educational Rights and Privacy Act (FERPA)[53] protects the privacy of and limits access to students' education records.

Author Lisa M. Geis, the Director & Supervising Attorney of the Children's Justice & Policy Clinic at the DC Law Students in Court Program, argues that it is a juvenile defender's responsibility to ensure that each youth involved with the juvenile justice system who has a disability or a special education need be provided with the services, protections, and rights guaranteed by the IDEA and the Americans with Disabilities Act (ADA),[54] throughout their contact with the system. Beyond the mandates of these federal laws, Geis argues that securing appropriate services is critical if the court is serious about meeting the rehabilitation needs of the young person. Addressing the needs of adjudicated youth who have educational-related disabilities increases the likelihood that these young people will not return to the juvenile court

50. Individuals with Disabilities Education Act, 20 U.S.C. § 1400-1450 (2004).

51. 34 C.F.R. § 104.33 (2012) (requiring school districts to provide a "free appropriate public education" (FAPE) to each qualified person with a disability who is in the school district's jurisdiction, regardless of the nature or severity of the person's disability).

52. 34 C.F.R. § 300.320 (The IDEA requires that public schools create an IEP for every child receiving special education. The IEP is meant to address each child's unique learning issues and include specific educational goals. The IEP is a legally binding document. The school must provide everything it promises in the IEP).

53. The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2012).

54. Americans with Disabilities Act of 1990 , 42 U.S.C. §§ 12101-12213 (2000).

system.[55]

Post-adjudication there are a number of ways a defender can assist young clients in meeting their educational needs. Using educational records at the time of disposition may help defenders and the court design a plan conducive to the young person's rehabilitation, including the least restrictive conditions available.[56] The public school system must offer a range of services for special education students, and juvenile defenders should advocate for these services to be included as part of the court's probation plan, thus providing community-based alternatives to incarceration and a greater likelihood of the child's successful completion of probation.[57] For youth who are confined to secure facilities, defenders can also advocate for their client's educational rights in order to combat harmful conditions of confinement, such as isolation, and to ensure that any residential or secure facility is providing an appropriate education for each individual client.[58] These are just a few ideas put forth by Professor Geis that will help juvenile defenders to: (1) ensure rehabilitative services for their clients; (2) help dismantle the school-to-prison pipeline; (3) assist the young client in successful completion of court orders; and (4) lower the recidivism rate of youth with special needs in the juvenile justice system.

While there is not an expectation that juvenile defenders in delinquency proceedings become experts in education law, by understanding and asserting their clients' educational rights and incorporating their clients' education histories and records into their representation, juvenile defenders can reduce the young person's further involvement in juvenile and criminal justice systems.[59] Best practice requires that the "public defense

55. Langberg, *supra* note 47 at 653; *see also* Sue Burrell & Loren Warboys, *Special Education and the Juvenile Justice System*, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION (2000), https://www.ncjrs.gov/pdffiles1/ojjdp/179359.pdf.

56. Langberg, *supra* note 47 at 664-665.

57. *Id.* at 664; Geis, *supra* note 48 at 912-913.

58. Geis, *supra* note 48 at 917-918.

59. Langberg, *supra* note 47 at 653; Burrell, *supra* note 55.

delivery system advocates for the educational needs of clients" and "recognizes that access to education and to an appropriate educational curriculum is of paramount importance to juveniles facing delinquency adjudication and disposition."[60]

VI. DEFENDER ADVOCACY FOR REENTRY & EARLY RELEASE POST-DISPOSITION

At disposition, the attorney for a young person in juvenile court is required to advocate for an individualized disposition plan that is least restrictive and best meets the client's expressed needs.[61] The proposed disposition should be tailored and appropriate to the offense, highlight the client's strengths, and establish the circumstances under which the client is most likely to succeed.[62] Post-disposition, the attorney plays a critical role in ensuring the proper execution of the court-ordered plan and in achieving successful long term outcomes for the youth.[63] Whether the youth is on probation or incarcerated, the juvenile defender should maintain contact and continue to represent the client while they are under court or agency's supervision.[64]

60. NAT'L JUVENILE DEFENDER CTR. & NAT'L LEGAL AID & DEFENDER ASSN., TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH PUBLIC DEFENSE DELIVERY SYSTEMS 3 (2d ed. 2008), http://njdc.info/wp-content/uploads/2013/11/10-Core-Principles.pdf; *see generally* NAT'L JUV. DEF. STDS., *supra* note 25 at § 6.8 REVIEW FINAL DISPOSITION PLAN AND COLLATERAL CONSEQUENCES OF DISPOSITION.

61. NAT'L JUV. DEF. STDS., *supra* note 25 at § 6.1 ROLE OF COUNSEL REGARDING DISPOSITION ADVOCACY.

62. *Id.* at § 6.1 ROLE OF COUNSEL REGARDING DISPOSITION ADVOCACY, cmt., § 6.6 PROPOSE INDEPENDENT DISPOSITION PLAN (the defender may obtain a comprehensive evaluation and recommendations based on the child's identified needs to counter any negative evaluation findings that probation or the prosecution intends to use as basis for a more restrictive disposition plan).

63. I*d.* at § 7.1 MAINTAIN REGULAR CONTACT WITH CLIENT FOLLOWING DISPOSITION, cmt., § 7.5: REPRESENT THE CLIENT POST-DISPOSITION, cmt.; NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *supra* note 19 at 25.

64. NAT'L JUV. DEF. STDS., *supra* note 25 at § 7.1 MAINTAIN REGULAR CONTACT WITH CLIENT FOLLOWING DISPOSITION.

Such continued representation provides accountability for the delivery of court-ordered services and ensures that the services ordered are actually appropriate to meet the child's needs. Where the child is ultimately incarcerated, continued representation ensures that the client has an attorney at any statutory review hearings, or an attorney who can request review or modification hearings where they are not mandated by law. At such hearings, the defender can raise concerns if the youth is not receiving the education or treatment and rehabilitative services they are entitled too, challenge harmful or unconstitutional conditions of confinement, monitor and advocate for reentry planning and community based after-care programs that will assist the youth when he or she ultimately returns to the community, and seek early release for a youth who has demonstrated positive development and is no longer in need of services in an institutional setting.

Researchers have concluded that "[b]est practices recognize that reentry planning begins at the time of admission to an out-of-home placement and continues beyond the youth's release and reintegration into the community."[65] If reentry planning is appropriately put in place and monitored during a youth's placement, once the youth has met their treatment goals and is no longer in need of services there is no reason for the youth to languish in an institutional setting. In fact, in many jurisdictions judges retain the power to modify probation and dispositions orders, to grant early release from residential placement, or to close cases early. Early release with community-based aftercare is actually good public policy and provides significant cost-savings to society.[66] This type of advocacy, however, requires a

65. David Altschuler & Shay Bilchik, *Critical Elements of Juvenile Reentry in Research and Practice,* (COUNCIL OF STATE GOV'TS JUSTICE CTR., Apr.2014), http://csgjusticecenter.org/youth/posts/critical-elements-of-juvenile-reentry-in-research-and-practice/.

66. *See* Amanda Petteruti, Marc Schindler & Jason Ziedenberg, *Calculating the Full Price Tag for Youth Incarceration,* JUSTICE POLICY INST., 9, 14 (2014), http://www.justicepolicy.org/uploads/justicepolicy/documents/sticker_shock_final_v2.pdf (providing a comprehensive nation-wide analysis of the costs of juvenile incarceration to taxpayers and findings that demonstrates

young person to get before the court, which in turn requires representation by counsel.

Shamefully, in many jurisdictions around the country children adjudicated delinquent do not receive continued defense representation following the imposition of a disposition order. Without post-disposition representation, there is limited, if any, opportunity for the young person to obtain early release, modify their sentence, or hold anyone accountable for harmful conditions of confinement, or failure to deliver court ordered rehabilitative services. A child may languish in facilities with inadequate conditions for the full duration of their sentences, never receiving appropriate treatment, educational services or after-care planning that could help the youth develop the tools to successfully return to society. This lack of counsel thwarts the goals of reducing recidivism and safely reintegrating young people back into their communities as productive, law-abiding citizens. "[S]uccessful reentry is not defined solely as the ability to avoid renewing criminal behavior; rather, successful reentry is the creation of productive citizens."[67] In an ideal world this would mean returning the young person to his or her community in good mental and physical health, academically on target, and ready to engage in pro-social activities. Unfortunately, "[p]lans

providing youth with services and supports by diverting them from the system is more cost-effective investment than confinement); Mendel, *No Place for Kids*, *supra* note 2, at 19 (noting that a 9-12 month placement in a secure facility costs $66,000 to $88,000); *Re-Examining Juvenile Incarceration*, PEW CHARITABLE TRUSTS 4 (2015), http://www.pewtrusts.org/~/media/assets/2015/04/reexamining_juvenile_incarceration.pdf (highlighting research which demonstrates that out-of-home placements come at a high cost to tax payers and provide a poor return on investment as they do not improve outcomes for most youth or improve public safety).

See, e.g., JUVENILE JUSTICE PROJECT OF LA., NO BETTER OFF: AN UPDATE ON SWANSON CENTER FOR YOUTH 22 (2010), http://caseygrants.org/wp-content/uploads/2012/04/no-better-off.pdf (comparing the significant cost difference of placement of a Louisiana youth into secure care for a year, $50,000, contrasted with the cost for treatment of a youth in the community, which is between $1,300 and $5,000 a year).

67. MICHELLE NEWELL & ANGELICA SALAZAR, JUVENILE REENTRY IN LOS ANGELES COUNTY: AN EXPLORATION OF STRENGTHS, BARRIERS AND POLICY OPTIONS 7 (2010), http://file.lacounty.gov/bos/supdocs/58190.pdf.

are rarely in place to support youth as they exit confinement and reintegrate back into their family, school, and community."[68] Defense attorneys can mitigate barriers to successful reentry and see to it that reentry services and aftercare programs that target youth who will one day exit custody and return to society are delivered properly.[69] Given the rehabilitative aims of juvenile court, and the goal of reducing recidivism and protecting community safety, access to legal representation post-disposition should be a mandatory component of juvenile justice systems. This however, is not the current state of affairs in much of the United States.

Author Jerrod Thompson-Hicks the Second Chances Project Supervising Attorney for the Louisiana Center for Children's Rights (LCCR), writes about Project, which provides a best-practices post-disposition representation model. Thompson-Hicks use the Project's model to illustrate how post-disposition representation for youth who have been sentenced to secure custody can decrease unnecessary youth incarceration through advocacy for early release and reentry supports. He argues that post-disposition representation, such as that provided by the Project, has the potential to reduce recidivism, decrease juvenile justice expenditures, and prevent institutional abuse, and provides for accountability in facilities, keeps children safer, eliminate unnecessary incarceration, and decrease barriers to successful reentry. Without counsel to advocate for their needs, youth are often ill-equipped to face the challenges of successful reintegration into society given the deficiency of educational, mental health, and other developmentally appropriate services typically available in secure custody facilities.[70] Thompson-

68. ASHLEY NELLIS & RICHARD HOOKS WAYMAN, JUVENILE JUSTICE DELINQUENCY AND PREVENTION COALITION, BACK ON TRACK: SUPPORTING YOUTH REENTRY FROM OUT-OF-HOME PLACEMENT TO THE COMMUNITY 5 (2009), http://www.sentencingproject.org/doc/publications/cc_youthreentryfall09report.pdf.

69. *Id.*; *see, e.g.,* Altschuler, *supra* note 65 (also noting that on their own, youth often have trouble expunging their records, reinstating Medicaid, and returning to school).

70. Mendel, *No Place for Kids*, *supra* note 2 at 24-25.

Hicks also discusses the constitutional flaws of state systems that do not provide a right to counsel post-disposition – essentially prohibiting youth from accessing the court once they are in secure confinement. In his article, he documents the experiences and outcomes of youth clients with the Second Chances Project, and makes yet another case for the critical need to address due process deprivations that prejudice the liberty interests of children when they are systemically denied the right to counsel in post-disposition proceedings.

Through the Project, Thompson-Hicks illustrates how post-disposition representation has created a meaningful mechanism for incarcerated youth to achieve early release. He details the advocacy of Project attorneys, who from the moment a youth is placed in a secure-care facility, begins to work with the youth to ensure that they receive services that will support their eventual applications for early release. Project attorneys also work to ensure that appropriate reentry planning is undertaken while the youth is incarcerated, in a way that comprehensively addresses the youth's individualized needs, and maximizes his or her opportunities for successful reintegration into the community. Thompson-Hicks describes the holistic, defense team which includes a social worker and youth advocate, that enable the Project attorneys to engage with service providers and other justice system stakeholders to create community-based aftercare plans; and litigate early release for clients. Moreover, while achieving the successful reentry of juvenile clients is the Project's primary aim, Thompson-Hicks also advocates for juvenile defenders to participate in larger systemic reform to create policy changes necessary to ensure post-disposition counsel and to develop alternatives supports, such as parole and community-based aftercare systems for youth. Based on the positive client life and legal outcomes that the Second Chance Project has achieved, Hicks offers this best practices model of post-disposition representation to juvenile defenders around the country.

VII. CONCLUSION

Successful outcomes for youth following disposition depend on the actual realization of tailored services that address the needs of the individual youth. To that end, access to a juvenile defense attorney who can advocate for appropriate treatment post-disposition and fight for racial justice is critical to ensuring successful outcomes that will decrease youth incarceration. Juvenile defenders must continue to do the heavy lifting by asking the hard questions and maintaining high standards for themselves, their young clients, the courts, and the service delivery systems charged with caring for and serving these youth. Juvenile defense attorneys, especially those providing indigent defense, are under incredible stress; caseloads are high and lawyers are asked to do seemingly impossible feats with limited resources. But as one legal scholar so aptly stated, "The right to counsel is largely defined by a defense attorney's action – or inaction – within the clearly delineated parameters of advocating for the client inside the courthouse doors."[71] In the case of juvenile clients, the need for that advocacy extends far beyond the courthouse doors.

71. Sterling, *supra* note 18 at 2250.