THE CRITICAL ROLE OF POST-DISPOSITION REPRESENTATION IN ADDRESSING THE NEEDS OF INCARCERATED YOUTH

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I. INTRODUCTION

Xavier didn't stand a chance.[3] His father died when he was young and his stepfather was an alcoholic who physically abused both Xavier and his mother. The wreckage of his home life pushed him out onto the streets, and he became easy prey for the gangs that ruled his neighborhood. He was recruited at the age of twelve, joined up, and, by the time he was fifteen, was found guilty of several armed robberies. The Juvenile Court committed him to the New Jersey Juvenile Justice Commission ("JJC") for an indeterminate ten-year term. Ten years is an eternity to a sixteen-year-old, and, like many youth facing long periods of incarceration, Xavier initially lost hope. He spent much of his first year in custody in conflict with facility staff and with other youth and, as a result, was frequently placed in punitive isolation.[4]

Rather than viewing Xavier's behavior within the context of the trauma he had suffered, facility staff treated it purely as a disciplinary issue. Xavier, however, was one of a small but growing minority of incarcerated youth who have legal

3. The names of all youth have been changed in order to preserve confidentiality, with the exception of Troy D., whose case is a matter of public record.

4. Pursuant to JJC regulations, youth may be placed in solitary confinement, or "room restriction," for offenses ranging from graffiti to serious assaults. *See* N.J. ADMIN. CODE § 13:101 (2015).

representation throughout their time in custody. His lawyer recognized that, unless he received therapeutic care to address his history of abuse and concern for his mother, his behavior would not improve and he would penetrate deeper into the criminal justice system. She retained a psychologist to evaluate Xavier and used the evaluation to persuade agency officials to provide intensive psycho-therapy. Xavier embraced the therapeutic process and, within several months, learned to control his anger and his impulsivity. He became a positive leader within the facility and, by the age of nineteen, graduated from high school. The lawyer filed a motion for early release in Juvenile Court and, after a lengthy hearing, the judge granted the request. Xavier returned home with his mother (now divorced from his stepfather) six years earlier than the court originally ordered, affording him a meaningful possibility of redemption.

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Joshua's voice, usually full of swagger and bravado, quivered noticeably even over the phone. "Two COs[5] just took me to the superintendent's office," he said. "They told me that I should pack up my stuff, 'cause they're sending me to the D.O.C.[6] I'm in juvie - - they can't do this to me, can they?" Joshua was at least partially right; eighteen months earlier, he had been adjudicated delinquent in Juvenile Court and, in the name of rehabilitation, committed to the New Jersey Juvenile Justice Commission (JJC) for up to six years. No one told him, either before he pled guilty in order to avoid criminal prosecution or at any time afterward, that he could be transferred to an adult prison. Yet, New Jersey law permitted such transfers of youth who have a history of behavioral problems or whose continued presence in the juvenile facility is deemed to be inappropriate by JJC officials.[7] In addition to Joshua, the agency transferred

5. Corrections officers.

6. The New Jersey Department of Corrections, or the state prison system.

7. New Jersey is one of only a handful of states in the country to permit such administrative transfers. *See* N.J. STAT. ANN. §52:17B–175(e) (West

four other boys that day. Only one, Joshua, eventually was returned to the JJC due to the advocacy of his lawyer; the rest remain in adult prisons. Nevertheless, as a result of the legal challenge to Joshua's transfer, an appellate court invalidated the transfer scheme on due process grounds and ordered the agency to promulgate new regulations with significant procedural protections.[8]

* * * * * *

Seventeen-year-old Nicole was, in many ways, a poster child for the juvenile justice system. Incarcerated for her part in a prank that tragically led to the death of a close friend, she had managed to avoid conflict during her three long years in a secure facility for girls, stay focused on her schoolwork, and graduate from high school on time. She desperately wanted to enter college immediately after her release from custody, but had to take the SAT before she could apply. Yet, the test had never before been administered in the facility and the superintendent and school principal initially were unresponsive to her pleas; a hallmark of incarceration, even in a juvenile setting, is dehumanization, and rather than identifying and nurturing each young person's individual strengths, the system tends toward a deflating homogenization. Nicole's lawyer, however, was determined to help Nicole achieve her goals. She negotiated with the College Board (the proprietor of the SAT) and agency officials to enable Nicole to take the exam while still in custody and advocated successfully to have a teacher tutor Nicole for the test. Left to its own devices, the juvenile

2015); N.J. ADMIN. CODE § 13:91-1 (2015); State in the Interest of Y.C., 91 A.3d 636 (N.J. Super. Ct. App. Div. 2014) (Unlike the juvenile justice system, which in most states continues to have a primarily rehabilitative purpose, adult prisons are principally punitive. As harsh as juvenile facilities can be, once transferred, youth face conditions of confinement that are far harsher: punitive isolation of a year or longer; inadequate medical, mental health and substance abuse services; and an incompetent and ineffective educational system that fails to comply with state or federal law.).

8. State in Interest of Y.C., 91 A.3d at 641-43.

justice system would have categorized Nicole the perpetrator of a violent crime for whom higher education was an impossibility. Instead, Nicole took the exam, did well, and was released. She will begin attending college next fall.

Xavier, Joshua, and Nicole have much in common. They are adolescents, they are youth of color, they grew up in deep poverty, and they are, or were, incarcerated. They also share one less common characteristic: they all had lawyers who maintained regular contact with them while they were in custody and whom they could call when something went wrong. And, they all benefitted from that representation, albeit in different ways.

This Article posits that ongoing, "post-dispositional" legal representation for youth in long-term custody is not merely a good idea but a constitutionally-required necessity. This is true for a number of reasons. First, incarcerated youth are an extraordinarily vulnerable population with complex and substantial needs. The confidentiality laws that were intended to protect youth from exposure of their delinquency histories also have the (perhaps) unintended consequence of shielding juvenile facilities from public view and scrutiny.[9] The lawyers who represent incarcerated youth often are the only outsiders who visit juvenile facilities and speak with young people on a regular basis. The information they gain in the course of these interactions can and should inform not only their advocacy on behalf of their own clients but broader, institutional reform efforts.

This can occur in numerous ways. First, an on-the-ground presence is the *sine qua non* of effective systemic change work; without it, advocates lack legitimacy and essential qualitative

9. This problem is exacerbated in states that do not require regular judicial review hearings for youth in custody and also by the general unavailability of data on the day-to-day operations of juvenile prisons. There is perhaps no other governmental system that spends so many taxpayer dollars and yet is so opaque and free from public monitoring and oversight. *See* Richard A. Mendel, *No Place for Kids: The Case for Reducing Juvenile Incarceration*, THE ANNIE E. CASEY FOUND. (2011), http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf .

and, sometimes, quantitative data about facility operations and the care and treatment of youth. In addition, the informal and institution-based advocacy that is a core of post-dispositional representation brings dangerous conditions and harmful practices to the attention of administrators who may not previously have been aware of or focused on them, sometimes giving rise to voluntary changes in policy and practice. In New Jersey, for example, the families of many of our clients are unable to visit due to the geographic inaccessibility of the facilities and the parents' undocumented immigration status. By encouraging our clients to file grievances and raising the issue in meetings, we convinced juvenile justice officials to institute a remote video visiting system and also to develop a pilot family engagement program that will, for the first time, provide transportation to parents who wish to visit their children.

Although negotiation often is the most efficient and practical way of addressing harmful conditions, litigation sometimes is unavoidable, giving rise to a clear need for lawyers. And, as Joshua's story reflects, litigation on behalf of individual clients can engender systemic impact. In fact, information obtained by juvenile defenders who maintain regular contact with their incarcerated clients frequently[10] has catalyzed improved institutional care for youth. Finally, as reported by the Justice Policy Institute, a focus on improving conditions can lead to a reduction in juvenile incarceration rates.[11]

In order to explore most fully the benefits, challenges, and legal support for a robust system of post-dispositional representation, we draw on our experiences representing incarcerated youth in New Jersey and Pennsylvania and also on those of our colleagues in other states. Part I paints a broad brush-stroke portrait of the nation's incarcerated children and adolescents. Part II explores the many challenges and legal issues that youth in custody confront, requiring ready access to

10. *See infra* Part IV.f.

11. Justice Policy Inst., Common Ground: Lessons Learned From Five States That Reduced Juvenile Confinement By More Than Half (2013), http://www.justicepolicy.org/uploads/justicepolicy/documents/commonground_online.pdf.

legal representation. Part III argues that, taken together, the First, Sixth, and Fourteenth Amendments of the United States Constitution embody a right to counsel for incarcerated youth. Finally, Part IV provides an overview of the post-disposition provisions of the National Juvenile Defense Standards, as well as descriptions of model programs from around the country that demonstrate implementation. Our goal is not merely to trumpet the need for and effectiveness of post-dispositional representation, but to encourage juvenile defense programs, law school clinics, and other public interest organizations to take on this essential work and to take aggressively challenge youth incarceration practices.

II. A SNAPSHOT OF INCARCERATED YOUTH

America's love affair with incarceration begins with the young. Although juvenile arrest rates are down more than a one-third since 2002, over 1.31 million children under the age of eighteen still were arrested in the United States in 2012.[12] Among these young people, 57,190 - a small city - are placed in long-term residential facilities.[13] The United States juvenile arrest rate for violent crimes is only slightly higher than that of most other cohort nations, but we hold exponentially more children in facilities than any other country: 173 per 100,000.[14] More than half of youth in long-term residential facilities are there because of non-violent offenses, including drug and property crimes, technical violations of probation, offenses against the public order (such as disorderly conduct and public

12. Charles Puzzanchera, *Juvenile Arrests 2012*, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (2014), http://www.ojjdp.gov/pubs/248513.pdf.

13. Sarah Hockenberry, Melissa Sickmund & Anthony Sladky, , *Juvenile Residential Facility Census 2012: Selected Findings*, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (2015), http://www.ojjdp.gov/pubs/247207.pdf.

14. *Placement Status by States, 2013: Easy Access to the Census of Juveniles in Residential Placement*, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (2013), http://www.ojjdp.gov/ojstatbb/ezacjrp/asp/State_Adj.asp?state=&topic=State_Adj&year=2013&percent=rate.

intoxication) and, most disturbingly, status offenses (activities that are actionable only due to the young person's minor status, such as truancy).[15]

Youth in custody overwhelmingly are poor, and many have prior histories in the child welfare system; in fact, the federal Office of Juvenile Justice and Delinquency Prevention has identified both poverty and child welfare involvement as leading risk factors for delinquency.[16] Minority children also are grossly over-represented among the incarcerated: Black youth are 5.3 times more likely to be detained than Caucasian youth; Native Americans, 3.5 times as likely; and Latinos, twice as likely.[17] And, like Xavier, Joshua, and Nicole, trauma has marked their short lives. As one study recognized:

> Experts have found that at least 75 percent of youth in the juvenile justice system have experienced "traumatic victimization" and 50 percent have post-traumatic stress disorder (PTSD). Another study found that 93 percent of youth in an urban juvenile detention center had experienced at least one traumatic event in the previous year, with 10 percent meeting criteria for PTSD in the previous year. Studies have also shown that '[y]outh in secure juvenile justice settings are at particularly high risk for histories of complex trauma, including polyvictimization, abuse and family violence, and losses that compromise core attachments with caregivers.'[18]

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15. *Easy Access to the Census of Juveniles in Residential Placement*, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (2013) [hereinafter *Census of Juveniles*], http://www.ojjdp.gov/ojstatbb/ezacjrp.

16. Michael Shader, *Risk Factors for Delinquency: An Overview*, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION 4 (2003), https://www.ncjrs.gov/pdffiles1/ojjdp/frd030127.pdf.

17. Id. See, e.g., Robin Walker Sterling, Fundamental Unfairness: In re Gault and the Road Not Taken, 72 MD. L. REV. 607 (2013); Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383-461 (2013).

18. Jessica Feierman & Lauren Fine, Trauma and Resilience: A New

A disproportionate number of youth in custody also suffer from at least one disability. According to the National Center for Mental Health and Juvenile Justice, approximately 70% of young people in the juvenile justice system suffer from mental illness, with 27% of these deemed severe and 60% having co-occurring substance abuse.[19]

III. NUMEROUS, COMPLEX LEGAL ISSUES REQUIRE POST-DISPOSITION REPRESENTATION

Particularly in light of the often non-violent pathways to incarceration and youth vulnerabilities outlined in Part I, access to post-dispositional representation is critical both because of the broad range of legal issues that children confront after their cases have concluded in juvenile court and the developmental characteristics of youth in custody. The stated goal of juvenile court is "rehabilitation," however, rehabilitation is a vague and often subjective standard;

> Despite the juvenile system's supposed goal of "rehabilitation," after the court steps in as parens patria and doles out indeterminate sentences to children, there is no structure in place to ensure that what the court intended for the child actually occurs. Connected to this void of accountability is the nightmare situation, occurring with alarming regularity, of institutional abuse of children at juvenile treatment facilities.

Look at Legal Advocacy for Children in the Juvenile Justice and Child Welfare Systems, JUVENILE LAW CTR. 4 (2014) (internal citations omitted).

19. Jennie L. Shufelt & Joseph J. Cocozza, *Youth With Mental Health Disorders in the Juvenile Justice System: Results from a Multi-State Prevalence Survey*, NAT'L CTR. FOR MENTAL HEALTH AND JUVENILE JUSTICE 2, 4 (2006), http://www.ncmhjj.com/wp-content/uploads/2015/02/2006_Youth_with_Mental_Health_Disorders_in_the_Juvenile_Justice_System.pdf . The prevalence of disabilities among incarcerated youth is discussed in greater detail in *infra* Part III.

> Whether a placement is 1,000 miles away or in a neighboring county, our critical role as attorneys for children requires that we are able to answer the question of where we are sending our kids. [20]

Determining when, how, or if a child will be released from juvenile court jurisdiction gives tremendous power to the facility or the probation or parole officer. Absent judicial oversight, review hearings, or access to counsel, children fall through the cracks of complex child-serving agencies that rarely publish data. This section will first articulate the wide range of legal issues youth face post disposition, and then focus on one of the most compelling issues - conditions of confinement. In the conditions of confinement section, we will first define the duty of the juvenile defender to address conditions of confinement issues, then provide an overview of documented problems. This section will next describe why conditions of confinement issues continue to persist despite extensive documentation and finally explain why the pre-existing trauma and special education needs of this population make youth particularly vulnerable to conditions issue.

A. Range of Post Disposition Issues

National Juvenile Defense Standards 7.1- 7.7 detail the number and range of legal issues facing youth once they receive their disposition and leave the courtroom.[21] Each of these issues requires the "guiding hand of counsel[22]" to protect the

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20. Sandra Simkins, *Out of Sight, Out of Mind: How the Lack of Post-Dispositional Advocacy Increases the Risk of Recidivism and Institutional Abuse*, 60 RUTGERS L. REV. 207, 208-09 (2007); Fare v. Michael C., 442 U.S. 707, 722 (1979) ("It is [the] pivotal role of legal counsel . . . A probation officer simply is not necessary, in the way an attorney is, for the protection of the legal rights of the accused, juvenile or adult.").

21. NAT'L JUVENILE DEFENDER CTR., NAT'L JUVENILE DEF. STANDARDS §§ 7.1-7.7 (2013) [hereinafter STANDARDS], http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf.

22. In *Powell v. Alabama,* the United States Supreme Court stated that , "[a defendant] requires the guiding hand of counsel at every step in the

well-being and due process rights of youth. Post disposition legal needs include the following:[23]

1. Assist with the right to appeal

Representing youth in juvenile court requires specialized training and skills.[24] Appellate practice is also a specialized skill that is challenging for many lawyers and well beyond the grasp of most adolescents. Without the assistance of counsel, youth in juvenile court will not be able to test juvenile court findings and push the juvenile jurisprudence forward. The inability to raise legal issues not only impacts the individual youth but the entire field of juvenile law. The lack of juvenile appellate practice and dearth of juvenile appeals has been well documented.[25] The presence of a skilled juvenile appellate lawyer can have a dramatic impact, leading to breaking new ground on behalf of youth,[26] educating the judiciary, and creating an impetus for systemic reform.[27]

2. Probation and parole review and revocation hearings

Many of the youth who fill residential facilities are there as a result of violations of probation and parole.[28] Lengthy

proceedings against him." 287 U.S. 45, 68-69 (1932).

23. This list is based on the author's experience in addition to the duties referenced in the National Juvenile Defense Standards.

24. *See generally* Ten Core Principles for Providing Quality Delinquency Representation Through Public Defense Delivery Systems, Nat'l Juvenile Defender Ctr. & Nat'l Legal Aid & Defender Ass'n (July 2008) [hereinafter Ten Core Principles], http://njdc.info/wp-content/uploads/2013/11/10-Core-Principles.pdf; Standards, *supra* note 21, at 8.

25. Megan Annitto, *Juvenile Justice On Appeal*, 66 U. MIAMI L. REV. 671 (2012).

26. *See, e.g.*, J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403 (2011).

27. In New Jersey, the appellate cases of In re Y.C., 91 A.3d 636 (N.J. Super. Ct. App. Div. 2014), State ex rel. J.J., 49 A.3d 877 (N.J. Super. Ct. App. Div. 2012), and New Jersey *ex rel.* O.S. No. A-536609T1, 2011 N.J. Super.Unpub. LEXIS 955 (N.J. Super. Ct. App. Div. 2011), have raised a variety of statewide juvenile justice issues that have galvanized a coalition to address system reform on behalf of youth.

28. *Census of Juveniles*, *supra* note 15 (showing at least 14% of youth in

conditions that are exceedingly difficult to meet create a Catch-22 for youth and can frequently lead them to failure. Quality counsel at these hearings is critical and can literally change the trajectory of the life of a young person. Frequently the violations of probation or parole are a result of failure to attend school, violating home rules, or failure to report to probation. An advocate can put the youth in context; describe how difficult it was to obtain bus fare to get to probation after they were evicted, or how since the birth of a child a young girl has had difficulty remaining in school. The investment in counsel at these critical hearings can save states hundreds of thousands of dollars. The publication, *Sticker Shock* by the Juvenile Policy Institute details the astronomical cost of incarceration, not only by the daily cost of the facility by also by the opportunities lost for youth.[29]

3. Administrative or court review hearings

It is self-evident why counsel for youth at court hearings is important. However thirty seven (37) states do not have court review hearings[30] for all dispositions but rather have informal administrative hearings within facilities. These administrative hearings can have an enormous impact on a youth's conditions of confinement and the length of time they are incarcerated. For example, in New Jersey, there have been many youths who have "court line" or administrative hearings within secure facilities. These hearings can determine whether or not to place a youth in isolation or a behavior modification unit. Placement in these units can impact future parole reviews, access to education and programming and cause deterioration of mental health. In addition, in New Jersey there have been clients who have faced transfer to an adult prison based on an administrative hearing.

residential placements are there for technical violations).

29. JUSTICE POLICY INST. STICKER SHOCK: CALCULATING THE FULL PRICE TAG FOR YOUTH INCARCERATION [hereinafter STICKER SHOCK] (2014), http://www.justicepolicy.org/uploads/justicepolicy/documents/sticker_shock_final_v2.pdf.

30. *See infra* Appendix A chart.

4. Motions to terminate probation

Assistance of counsel to file motions to terminate probation is important in a variety of contexts. For example, a motion to terminate probation can be essential if the youth is going to the armed forces or planning to move to another state to attend college. Filing the motion to terminate can officially end juvenile court jurisdiction and free the youth to begin adulthood unencumbered and without the risk of accruing a violation of probation for failing to manage the range of court ordered interventions. Motions to terminate probation after success are also an opportunity for the court to congratulate the youth on a job well done.

5. Modification of disposition order

A detailed disposition order can be a powerful tool for juvenile defenders. The disposition can set forth the services a youth should receive and give direction to the facility providing the service. If a youth is on probation and there is a change of circumstances, a modified disposition order is important to ensure that the youth is not violating probation. If the youth is in a facility and there is a change in circumstances a modification of the disposition order can facilitate an earlier release.

6. Monitoring safety and well-being of youth while confined

The conditions section in Part B below discusses the critical importance of monitoring the safety of incarcerated youth.

7. Assisting with change of placement if problems arise

Maintaining contact with clients post disposition allows attorneys to be aware when a significant change occurs. For

example, perhaps a facility has discontinued trauma treatment or there are very long waiting lists for drug treatment. Perhaps your client is constantly threatened by another resident or a medical condition makes continued placement problematic. In New Jersey there was a youth whose medical condition necessitated that the youth remain in the infirmary of a facility for a long time, precluding the opportunity for education or programming. Whatever the situation, post disposition representation can position the lawyer to assist the youth in achieving rehabilitation by advocating for them if problems arise in placement.

8. Representing or assisting youth with internal facility disciplinary hearings

As mentioned above in the section describing administrative hearings, internal disciplinary hearings can result in a significant change in the conditions and length of confinement for youth. In the context of representing youth in New Jersey clients have been placed in "behavioral modification units" or administrative segregation for long periods of time as a result of internal disciplinary hearings. Access to counsel can help the youth advocate for themselves, maintain contact with family and ensure access to education.

9. Assist youth in filing grievances

In theory, the internal grievance procedure should address youth problems. However, youth frequently need counsel to effectively advocate for themselves. A client was given three days of isolation for filing a PREA (Prison Rape Elimination Act)[31] complaint. As a result, the client (with the help of a lawyer) filed a grievance with the superintendent of the facility. Grievances can be filed for a wide range of issues.

31. Passed in 2003, the Prison Rape Elimination Act (PREA) is the first federal civil statute focused specifically on addressing sexual violence in juvenile facilities. *See Prison Rape Elimination Act (PREA)*, CENT. FOR CHILDREN'S LAW AND POLICY, *http://www.cclp.org/prea.php*.

The filing of grievances is also frequently the first step towards an appeal. The exhaustion of facility administrative remedies is often required prior to an appeal to an outside court.

10. Ensuring access to special education and protecting Special Education rights

Incarcerated children enjoy the same educational rights as their non-incarcerated peers.[32] Under federal law, for example, children who have been classified as special education are entitled to additional protections, including an Individualized Education Plan (IEP), even if they are placed in a secure facility.[33] Unfortunately, children's educational needs in juvenile facilities are frequently not met and special education youth who engage in disruptive behavior are placed in solitary confinement. For example, a 2014 case in Contra Costa County, California alleging prolonged solitary confinement for special education youth, resulted in a DOJ Statement of Interest. According to the DOJ and the Department of Education, a juvenile detention facility is not excused from providing educational services under the Individuals with Disability Education Act and the Americans with Disabilities Act.[34]

11. Ensuring access to mental health and psychological services

Many judges commit youth to make sure they receive mental health and psychological services. Without access to an attorney, youth are left to find their way through facility programs and have no one to advocate for their specified needs. Post Disposition representation ensures that what the judge intended actually occurs. If there are circumstances at the

32. *See* U.S. Dep't of Education & U.S. Dep't of Justice, Five Principles for Providing High-Quality Education in Juvenile Justice Secure Care Settings (2014), http://www2.ed.gov/policy/gen/guid/correctional-education/guiding-principles.pdf.

33. *See* Letter from U.S. Dep't of Education to Correctional and Educational Administrators (December 5, 2014), http://www2.ed.gov/policy/gen/guid/correctional-education/idea-letter.pdf.

34. G. F. v. Contra Costa Cnty., No. 13-CV-03667-MEJ, 2015 WL 4606078 (N.D. Cal. July 30, 2015).

facility that inhibit or prevent access to the needed mental health services, the attorney is in the best position to advocate for release and to secure access to appropriate services in the community. The attorney can make phone calls, write letters or file motions to bring the case back in front of the judge to address the situation.

12. Ensuring adequate medical care

Like ensuring access to mental health services, attorneys are ideally situated to ensure that youth have access to medical care. Youth receive sentences that can last for years. During that time many medical situations can occur. If specialized medical treatment is needed for a confined youth the facility may not be willing, without pressure from the outside, to obtain specialized services. Violence and dangerousness of youth facilities has been well documented.[35] Youth can be hurt in facilities and it is critical that they have access to lawyers to ensure access to medical treatment.

13. Ensuring access to family while in custody

A 2013 Vera Institute of Justice study examined the effects of family visitation on incarcerated juveniles.[36] The study provides evidence that youth receiving visitation performed better,

35. *See infra* Part II B.

36. Sandra Villalobos Agudelo, *The Impact of Family Visitation On Incarcerated Youth's Behavior And School Performance,* VERA INST. OF JUSTICE(2013), http://www.vera.org/sites/default/files/resources/downloads/*impact*-of-family-visitation-on-incarcerated-youth-brief.pdf; s*ee, e.g.*, Damien J. Martinez, *Family Connections and Prisoner Reentry,* (2009), http://ccj.asu.edu/downloads/paper-martinez; OHIO DEP'T OF REHAB. AND CORR., BEST PRACTICES TOOL-KIT: FAMILY INVOLVEMENT DURING INCARCERATION AND REENTRY (2008), http://drc.ohio.gov/web/iej_files/Tool%20Kit%20Involving%20Family%20During%20Incarceration%20and%20Reentry.pdf; Kathryn C. Monahan, Asha Goldwebber & Elizabeth Cauffman, *The Effects of Visitation On Incarcerated Juvenile Offenders: How Contact With the Outside Impacts Adjustments On the Inside,* 35 LAW & HUM. BEHAV. 143 (2011).

academically and behaviorally. The existing social science evidence confirms that it is critical for an incarcerated juvenile to maintain his or her family connections. The results of a 2010 study show that family visitation also has a significant impact on the mental health of incarcerated children—youth who received parental visits were less likely to experience depressive symptoms. Lack of access to family can impact rehabilitation and re-entry and attorneys can be the bridge to connect youth and families who struggle with the visitation process and transportation issues.

14. Advocating for early release once goals of disposition have been achieved

Once youth have achieved rehabilitation goals, an attorney is well positioned to advocate for early release. Youth should be returned to the community as soon as possible because the longer the disruption to relationships and school the more difficult eventual re-entry will become. If the educational and counseling goals of the youth have been met, an attorney can file a motion and ask the court to consider early release.

15. Expunge, purge or seal juvenile records to minimize lifelong consequences

As described in more detail in part IV below, there can be lifetime collateral consequences to juvenile court adjudications of delinquency. Adjudications can inhibit youth from joining the military or obtaining financial aid. Attorneys should attempt to minimize collateral consequences by limiting the public availability of juvenile records by working with youth to expunge and seal their juvenile records.

16. Assist in removing youth from sex offender registry

One of the more debilitating collateral consequences of juvenile adjudications is sex offender registry. Despite the documented low recidivism rate of youth who offend sexually, many states require registration. Before a youth admits to a sex

offense the attorney should fully understand the registration requirements and then seek to remove the youth from the registry as soon as possible.[37]

17. Assist in re-entry particularly reintegration into school

Upon release, youth often face numerous barriers to a smooth transition home. It can be hard to connect with community-based services (such as mental health and other services) in order to facilitate youth success. In addition, barriers exist for youth seeking to get back into their local school. Challenges regarding the transfer of credits for graduation and the transfer of documents from the facility to the school can create hurdles for youth that require the assistance of an attorney.

B. Conditions of Confinement

Among the wide range of legal issues that persist during post disposition, among the most compelling reasons for access to counsel is prevention of further trauma and abuse to youth while they are confined to a juvenile facility. Evidence continues to mount that long term juvenile justice system involvement can be harmful to youth. Dangerous conditions are the norm in some facilities and reflect the inherent problems that exist when kids lack access to counsel:

> At worst, involvement in the juvenile justice system does additional harm to children. In one study, more than a third of young people in juvenile placement were found to fear attacks from staff or other youth. Elsewhere, an analysis of data from state agencies responsible for overseeing juvenile detention facilities found that between 2004 and 2007 there were roughly 12,000 documented reports of physical, sexual, or emotional abuse by staff members — nearly 10 assaults a day, on average. And because children are often

37. *See infra* Part IV.

> afraid to report abuse by staff, and as facilities may not consistently document the reports they do receive, the actual number of assaults is undoubtedly higher.[38]

1. State-Sanctioned Child abuse: Widespread Physical and Sexual Abuse

a. Physical Abuse

Lost eyesight, fractured jaws,[39] fractured orbital bones, and restraints resulting in death [40] are a few kinds of physical abuse our post-disposition youth clients have sustained. Unfortunately, the physical abuse sustained by our clients in Pennsylvania and New Jersey is typical. A systemic culture of violence and abuse within juvenile facilities has been well documented, and in state-run juvenile facilities the abuse has been described as "rampant and extreme." [41]

Two national reports, one from 2010 and the other from 2011, and numerous Department of Justice investigations confirm the widespread violence within facilities. The first report, a 2010 national survey done by the Office of Juvenile

38. Robert L. Listenbee et al., *Report of the Attorney General's National Task Force on Children Exposed to Violence,* U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION 175 (2012), http://www.justice.gov/defendingchildhood/cev-rpt-full.pdf.

39. In New Jersey, O'Neil Santiago was attacked in his cell, leaving him with a broken jaw. In order to "keep him safe" he was placed in solitary confinement for weeks. *See* Sandra Simkins, Marty Beyer & Lisa M. Geis, *The Harmful Use of Isolation in Juvenile Facilities: The Need for Post-Disposition Representation*, 38 WASH. U. J.L. & POL'Y 241, 272-75 (2012), for a discussion of the O'Neil Santiago case.

40. In Pennsylvania, Walter Brown died in 2005 as a result of a lengthy four-point restraint. Doron Taussig, *Restraining Disorder*, PHILADELPHIA CITYPAPER, May 19, 2005, at 1, http://www.citypaper.net/articles/2005-05-19/cover.shtml; Jacqueline Soteropoulos & Mark Fazlollah, *At Youth Facility, Restraints Turn Fatal*, PHILADELPHIA INQUIRER, Apr. 24, 2005, http://articles.philly.com/2005-04-24/news/25426143_1_physical-restraints-time-juveniles-detention.

41. Nell Bernstein, Burning Down the House: The End of Juvenile Prison 82 (The New Press, 2014).

Justice and Delinquency Prevention, found that 38% of all youth who are confined fear being attacked and 22% of youth fear being attacked by staff. [42] The number is higher (42%) for youth who are in secure facilities. According to this report, a third of confined youth believe that staff use excessive force and nearly half of confined youth receive "group discipline" (and believe that staff give punishment without cause).[43] While it may be tempting to dismiss these reports from youth as exaggerations, given that these youth are incarcerated and fear risk of further violence for reporting, it is very plausible that their fears are under-reported.

The second national report, completed in 2011 by the Annie E. Casey Foundation, reported similar widespread violence. The foundation's report, *No Place for Kids, the Case for Reducing Juvenile Incarceration,* is a comprehensive look at juvenile facilities.[44] In reviewing all fifty states, the report found forty two states where there was conclusive evidence of system wide mistreatment.[45] *No Place for Kids* sums up the findings in one word chapter headings declaring that juvenile facilities are dangerous, ineffective, unnecessary, obsolete, wasteful, and inadequate.[46] It is important to note that it was the Annie E. Casey Foundation's focus on the front end of the system in their wildly successful Juvenile Detention Alternatives Initiative that decreased the number of youth detained in many jurisdictions by nearly 50%.[47] Yet, even with these front end reductions, the foundation characterizes juvenile corrections facilities as dangerous and ineffective. *No Place for*

42. Andrea J. Sedlak & Karla S. McPherson, *Conditions of Confinement: Findings From the Survey of Youth in Residential Placement,* U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION 7 Table 5 (MAY 2012), https://www.ncjrs.gov/pdffiles1/ojjdp/227729.pdf.

43. *Id.*

44. Mendel, *supra* note 9.

45. *Id.* at 5, 7 Figure 2.

46. *Id.*

47. Elizabeth Seigle et al., *Core Principles for Reducing Recidivism and Improving Other Outcomes for Youth in the Juvenile Justice System,* NAT'L REENTRY RES. CTR.1 (2014), http://csgjusticecenter.org/wp-content/uploads/2014/07/Core-Principles-for-Reducing-Recidivism-and-Improving-Other-Outcomes-for-Youth-in-the-Juvenile-Justice-System.pdf.

Kids states:

> [T]hat so many states have experienced these problems since 2000 suggests that few lessons have been learned from past maltreatment, or that large juvenile corrections facilities are exceedingly difficult to operate in a consistently safe and humane fashion.[48]

In addition to the above national reports of the Office of Juvenile Justice and Delinquency Prevention and the Annie E. Casey Foundation, investigations by the Department of Justice continue to report egregious conditions in juvenile facilities.[49] [50]

In her book, *Burning Down the House: The End of Juvenile*

48. Mendel, *supra* note 9, at 6.

49. BERNSTEIN, *supra* note 41, at 83 (citing Sedlak & McPherson, *supra* note 42). Below are examples of physical abuse found in the DOJ investigation reports of New York, Ohio, and California. In New York, children were restrained with such force that they wound up with concussions, missing teeth, spiral fractures, and other injuries. While physical restraint is intended only for situations where a young person poses a danger, these harsh examples were sometimes the result of affronts as minor as taking an extra cookie or laughing against orders. "Workers forced one boy, who had glared at a staff member, into a sitting position and secured his arms behind his back with such force that his collarbone was broken. In Ohio, guards have been indicted on charges of sexually or physically abusing inmates at the Scioto Juvenile Correctional Facility as investigators work to crack a code of silence among employees. After charging five male guards last month, the grand jury indicted five additional guards on felony counts, including sexual battery and endangering children. Girls interviewed by…attorneys said they had been hit slapped and shoved by guards, put in straitjackets, touched sexually and discouraged or threatened if they filed grievances." *Id.* In California, groups of correctional officers slammed handcuffed boys face-first into walls or set attack dogs on them, often in full view of security cameras. *Id.* In Mississippi, guards ripped the clothing from suicidal girls, then hog-tied them, naked, and tossed them into solitary. They also shackled girls to poles and forced them to run in hot weather carrying logs. Those who threw up from the heat and the strain were forced to eat their own vomit. *Id.*

50. Dana Wilson, Delaware County Juvenile Facility; Five More Guards Indicted In Probe of Prison Abuse, COLUMBUS DISPATCH, Jan. 14, 2005, at 1A; see also Carrie Spencer, Abuses Alleged at Prison for Girls, COLUMBUS DISPATCH, July 30, 2004.

Prison, author Nell Bernstein states, "[O]ur nation's juvenile facilities do not even meet their bottom-line responsibility to keep their charges safe. Physical and Sexual abuse are rampant, as are solitary confinement and other practices that erode young people's mental and physical health….we are hurting kids and hurting ourselves in the process, exposing far too many young people to inhumane conditions with the sole measurable result of *increasing the odds* that they will be drawn ever more deeply into delinquency." [51]

b. "Epidemic"[52] of Sexual Abuse:

In addition to fostering a culture of physical violence, sexual abuse within juvenile facilities is pervasive. A 2010 Department of Justice study on sexual victimization in juvenile corrections facilities released its results from a survey of 195 facilities across the country.[53] The study includes reports from more than 26,000 youth and found that more than 3,000 (nearly 12%) had been sexually abused at least once in the previous year.[54] In some facilities, as high as 30% of the population reported sexual abuse.[55] *The New York Review of Books* summed up the survey: "[T]he survey shows that thousands of children are raped and molested every year while in the government's care—most often by the very corrections officials charged with their rehabilitation and protection."[56] What is particularly troubling is that all research indicates that a high percentage of girls in the juvenile justice system have been

51. BERNSTEIN, *supra* note 41, at 8.

52. Mendel, *supra* note 9, at 6.

53. Allen J. Beck et al., *Sexual Victimization in Juvenile Facilities Reported by Youth, 2008-09*, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS (2010), http://bjs.gov/content/pub/pdf/svjfry09.pdf.

54. Id.

55. Id.

56. David Kaiser & Lovisa Stannow, *The Crisis of Juvenile Prison Rape: A New Report*, NYRBLOG (Jan. 7, 2010, 10:21 AM), http://www.nybooks.com/blogs/nyrblog/2010/jan/07/the-crisis-of-juvenile-prison-rape-a-new-report/.

sexually assaulted prior to their confinement and suffer from post-traumatic stress disorder (PTSD).[57] It is unconscionable to think about girls with prior sexual trauma being assaulted again while in a juvenile facility.

In 2007, the Texas Youth Authority scandal broke, revealing 750 complaints of sexual abuse over the course of *seven* years.[58] In attempting to answer the question, why it persisted for so long, The *New York Review of Books* says:

> Even when the kids did file complaints, they knew it wouldn't do them much good. Staff covered for each other, grievance processes were sabotaged, and evidence was frequently destroyed. Officials in Austin ignored what they heard, and in the very rare instances when staff were fired and their cases referred to local prosecutors those prosecutors usually refused to act. Not one employee of the Texas youth Commission during that six-year period was sent to prison for raping children in his or her care.[59]

In fact, despite the 750 complaints, the incidents were thought to be underreported and "were generally thought to under-represent the true extent of such abuse because most children were too afraid to report it: staff commonly instructed their favorite inmate to beat up kids who complained"[60]

These examples in New York and Texas indicate not only that sexual abuse occurs but that there is a culture of "impunity" that allows the abuse to continue for long periods of time. In

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57. Sandra Simkins & Sarah Katz, *Criminalizing Abused Girls*, 8 Violence Against Women 1474 (2002).

58. BERNSTEIN, *supra* note 41, at 121-22 (citing Nate Blakeslee, *Hidden in Plain Sight: How Did Alleged Abuse at a Youth Facility in West Texas Evade Detection for So Long*, TEXAS OBSERVER (Feb. 23, 2007, 12:00 PM), http://www.texasobserver.org/hidden-in-plain-sight/). Abuse included staff performing oral sex on youth, watching youth masturbate, talking to youth about sex toys, and touching them inappropriately. *Id.*

59. Kaiser & Stannow, *supra* note 56.

60. BERNSTEIN, *supra* note 41, at 122 (citing Kaiser & Stannow, *supra* note 56).

both New York and Texas the abuse was reported for *years*. A culture that allows this type of abuse to continue unchecked adds ballast to the notion that abuse in facilities is underreported. It makes sense that children would choose not to report, given their vulnerability and the tremendous power staff have over youths' lives.[61]

2. The Use of Solitary Confinement

> Moreover, detention facilities and the justice system, through their routine practices, can bring additional harm to already traumatized youth. For example, the use of solitary confinement, isolation, and improper restraints can have devastating effects on these youth. [Facilities] must maintain safety without relying on practices that are dangerous and that compromise the mental and physical well-being of the youth in their care.[62]

In many juvenile facilities, there is an excessive reliance on isolation (or solitary confinement), which is harmful to youth.[63] Isolation is defined as keeping youth separate, in a small,

61. Describing this power, Lovisa Stannow, Executive Director of Just Detention International writes: These are teenagers and children we are talking about . . . and corrections staff have immense power over their lives. They can influence when juvenile detainees are released, they can put them in solitary confinement, they can house vulnerable youth with inmates who are known to be violent or sexual predators, and they can even deny these kids basic hygiene items. The very notion that any sort of consensual sexual relationship between juveniles and adults exists in such circumstances is grotesque. *Id.* at 118-19 (quoting Lovisa Stannow).

62. Listenbee, et al., *supra* note 38, at 175. This section focuses on the use of solitary confinement, however other chemical restraints, extraction teams and restraint chairs are also routine practices that harm youth. *See, e.g.*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE SHELBY COUNTY JUVENILE COURT (2012) [hereinafter JUVENILE COURT INVESTIGATION],

http://www.justice.gov/sites/default/files/crt/legacy/2012/04/26/shelbycountyjuv_findingsrpt_4-26-12.pdf.

63. Mendel, *supra* note 9, at 5; *see generally* Simkins, Beyer, & Geis, *supra* note 36, at 202.

unfurnished cell (usually 7 x 7 feet) for twenty two to twenty four hours per day. Despite the United Nation's declaration that isolation is "torture,"[64] youth in America spend days, weeks and months in isolation.[65] While purportedly for safety reasons, isolation is in fact often the "go- to response" for minor disciplinary infractions such as cursing, interfering with count, or writing on a wall with a pencil. [66]

Unlike the latest adolescent development research relied on by a quartet of United States Supreme Court cases,[67] the harmful effects of isolation have been known for centuries.[68] Courts have consistently found that isolation is not only unconstitutional but is detrimental to the rehabilitation of juveniles.[69]

Research on juvenile isolation is extremely limited, but the harmful effects on adults are well known. It has been documented that isolation or solitary leads to the following: self-mutilation, emotional breakdown, overall deterioration of mental and physical health, increased aggression and rage, psychological trauma and depression.[70] Because youth are

64. Special Rapporteur of the Human Rights Council, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Accordance with General Assembly Resolution 62/148, transmitted by Note of the Secretary General, 18, 23, U.N. Doc. A/63/175 (July 28, 2008) (by Manfred Nowak).

65. MENDEL, *supra* note 9, at 8.

66. BERNSTEIN, *supra* note 41, at 132-35; *see also* Simkins, Beyer & Geis, *supra* note 39, at 272-75.

67. *See* Miller v. Alabama, 132 S.Ct. 2455 (2012); J.D.B. v. North Carolina, 131 S.Ct. 2394 (2011); Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005); *see also* Marsha Levick, *From a Trilogy to a Quadrilogy:* Miller v. Alabama *Makes It Four in a Row for U.S. Supreme Court Cases that Support Differential Treatment of Youth*, 91 CRIM. L. REP. 748 (2012).

68. In 1787, a study of Philadelphia prisoners held in solitary confinement found that "a considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane, others, still committed suicide." Relying on this study, the Supreme Court in 1890 discharged a prisoner on the basis of wrongful imprisonment due to solitary confinement. *In re Medley*, 134 U.S. 160, 168 (1890).

69. *Id.*; Berch v. Stahl, 373 F. Supp. 412, 420 (W.D.N.C. 1974).

70. Simkins, Beyer, & Geis, *supra* 39, at 254.

much more vulnerable than adults and are developing mentally, emotionally, and physically, isolating children is even more damaging than isolating adults. Solitary confinement can harm youth by exacerbating mental illness,[71] increasing suicide rates,[72] decreasing opportunities to benefit from education,[73] programming,[74] and stunting development due to lack of exercise and stimulation.[75] Indeed, the American Academy of Child and Adolescent Psychiatry opposes the use of isolation for youth, stating that "the potential psychiatric consequences of prolonged solitary confinement are well recognized and include depression, anxiety and psychosis. Due to their developmental vulnerability, juvenile offenders are at particular risk of such adverse reactions."[76]

Guidelines from the Annie E. Casey Foundation and the Department of Justice state that isolation should not be more than twenty four hours and that it should not be punitive.[77] Despite these standards, juvenile facilities continue to use isolation excessively.[78] Although the use of isolation is prevalent in juvenile facilities, it is frequently "hidden" by using terms other than "isolation" or "solitary confinement." For example in New Jersey, which settled a lawsuit after holding a mentally ill sixteen year old in isolation for over six and one-half months, the term "isolation" never appears in the facilities' regulations or New Jersey Administrative Code. Rather, New Jersey uses words like "segregation," "pre hearing room restriction," "medical custody," "protective custody,"

71. Am. Civil Liberties Union, Advocacy Toolkit: Ending the Solitary Confinement of Youth in Juvenile Detention and Correctional Facilities (2014).

72. *Id.*

73. *Id.*

74. *Id.*

75. Id.

76. BERNSTEIN, *supra* note 41, at 131.

77. Mendel, *supra* note 9; Simkins, Beyer & Geis, *supra* note 36, at 269; *see also* Council of Juvenile Correctional Administrators, *Goals, Standards, Outcome Measures, Expected Practices and Processes*, PBS STANDARDS 9, 37 (2010), http://www.rcselpa.org/common/pages/DisplayFile.aspx?itemId=4687086.

78. Mendel, *supra* note 9, at 5; *see also* BERNSTEIN, *supra* note 41, at 130.

"behavior modification unit," and "close watch." Regardless of the terms the result was the same: children were kept in a 7 x 7 foot cell for twenty two to twenty four hours a day, without school, without programming, and frequently without exercise or a visit from mental health staff.

Without post-disposition advocacy, the use of isolation in juvenile facilities can remain undetected. Post-disposition representation and visiting clients in facilities is particularly important in jurisdictions that do not have mandatory review hearings or where there is no independent oversight of juvenile facilities.

C. Why Do Dangerous Conditions Persist? Contributing Factors

The evidence is clear that juvenile facilities often cause further harm to youth. In nearly every state the problems of physical and sexual abuse persist. And yet, regardless of what new atrocities make the headlines, judges continue to send children to dangerous places. Below is a list of some of the many reasons why this reality continues.[79]

1. Lack of Transparency and Accountability

It is very difficult to find reliable information about juvenile facilities. Even in this age of technology where a Google search is all it takes to get data, basic information about juvenile facilities is not available. Information such as average length of stay, average class size, staff to child ratio, education level of staff—none of this basic information is provided to parents, children or lawyers. Rather, most juvenile courts send children to placements, sometimes for years, without knowing anything about the program. Even when reports are made, the information is not cataloged in a way that is easy to find, so

79. A majority of these factors are taken from Sandra Simkins, *Road Trip! A Simple Solution for Protecting Girls from Institutional Abuse*, *in* WOMEN AND GIRLS IN THE CRIMINAL JUSTICE SYSTEM, Ch. 30 (Russ Immarigeon ed., 2011).

those responsible for placing the children in facilities are unaware of the problems.

2. The Administrative Exhaustion Doctrine

Some juvenile facilities are run by state agencies that have complex administrative regulations. If a youth is harmed and wants to seek relief from the judicial system, she first must exhaust her administrative remedies.[80] Given the developmental immaturity and special education needs of many of the youth in juvenile facilities, they often cannot navigate agency regulations and successfully exhaust administrative remedies. As a result, unconstitutional and dangerous conditions continue unabated.

In many juvenile facilities, furthermore, in order for youth to pursue administrative grievances, they must go through correctional staff to obtain and submit the necessary forms - often the same staff members who are the subject of the complaints. Clients have reported that, even when they attempt to file a complaint, they are harassed by and suffer serious retaliation from correctional officers and, even when they succeed, the grievance is reviewed and determined by another member of the correctional staff. Youth thus understand that complaints could lead to physical abuse, solitary, or increased time in the facility and are unlikely to result in amelioration of the harm at issue.[81]

Finally, even when reports of abuse are made, the charges are not always prosecuted because the youth themselves are seen as incredible. Because these young people have been found guilty

80. *See* Prison Litigation Reform Act, 42 U.S.C. 1997(e)(a) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."); N.J. ADMIN. CODE § 10A:1-4.4(d) (2015) ("The comprehensive Inmate Remedy System to include a 'Routine Inmate Request' and/or 'Interview Request,' and an 'Administrative Appeal' must be utilized and fully exhausted prior to an inmate filing any legal action regarding information requests, issues, concerns, complaints, or problems.").

81. *See supra* Part II, B. 1. 1.

of committing a crime, correctional administrators and officers assume that they are likely to lie or manipulate facts to their own advantage. The fact that they are incarcerated, in other words, is reason in and of itself not to trust them, rendering any facility-level complaint mechanism a probable sham. [82]

3. Inaccessibility of Facilities and Lack of Family Engagement

Although most system-involved children reside in urban areas, long-term juvenile facilities tend to be located in far-flung rural counties. As discussed in Part I, *supra*, incarcerated youth often come from poor families who do not own cars, and the facilities often are not accessible by public transportation. As a result, youth are sent far from home, often for lengthy periods of time, and their families are unable to visit them or engage in the essential therapeutic work that must be undertaken if young people are to return home successfully. Thus, critical connections in the community are destroyed.[83]

Furthermore, few have family members who are able to effectively access legal resources or navigate bureaucratic hierarchies. Many youth also have family members who have limited education themselves or have spent time incarcerated. As a result, families often lack the advocacy skills necessary to

82. Barbara White Stack, *In Harm's Way: Who's Telling the Truth?*, PITTSBURGH POST-GAZETTE, Sept. 19, 2005, http://www.post-gazette.com/frontpage/2005/09/19/In-Harm-s-Way-Who-s-telling-the-truth/stories/200509190177. The propensity to find girls who report abuse incredible is parallel in the adult criminal justice system where women who complain of abuse are often not believed. *See* Nancy Philips & Craig R. McCoy, *Police Turned Predators, Extorting Sex with a Badge*, PHILADELPHIA INQUIRER, Aug. 13, 2006, http://www.philly.com/philly/news/special_packages/inquirer/Extorting_sex_with_a_badge.html.

83. Sandra Villalobos Agudelo, *The Impact of Family Visitation on Incarcerated Youth's Behavior and School Performance*, VERA INST. OF JUSTICE(2013), http://www.vera.org/sites/default/files/resources/downloads/impact-of-family-visitation-on-incarcerated-youth-brief.pdf.; *see also Juvenile Justice*, LOWENSTEIN CTR, FOR THE PUBLIC INTEREST, http://www.lowensteinprobono.com/reports (last visited October 29, 2015).

address problems on behalf of their children.

4. Judges Lack Authority over Facilities (or Choose Not To Exercise It)

Although juvenile court judges are charged with protecting the safety and best interests of the young people who come before them, state juvenile codes often do not expressly authorize them to issue conditions-related orders against the agencies that run long-term facilities.[84] Even if they are not expressly prohibited from entering such orders, deference to the Executive Branch often makes judges reluctant to challenge the way a facility is run. Thus, unless the law mandates regular review hearings for all children in custody, a judge may never learn of problems within the facilities to which she regularly commits young people. Even if review hearings do occur, unless the child is represented by counsel, any evidence presented at the hearing will be offered by the agency, not the child. In addition, because juvenile court is often used as a training ground for new judges, many judges hope to be there for only a short time. They may not receive specialized training in or fully understand adolescent development or the labyrinthine juvenile system and, so, are ill-equipped to tackle harmful conditions of confinement even if they are made aware of them.

5. An Adult- Style Prison Structure

Some states model juvenile facilities after the adult corrections system, mirroring both the physical structure of prisons (for example, locked pods that contain a number of steel-door cells and a central, sparsely-furnished common area; barbed wire-surrounded grounds and recreation yards; jumpsuit-clad inmates; and controlled movements within the facilities), the grievance system, and the parole process. In some states, like New Jersey, guards at the juvenile facilities belong to the

84. *See, e.g.*, State *ex rel.* O.S., 2011 N.J. Super. Unpub. LEXIS 955.

same correction officers' union as those in adult facilities, which encourages a similar mindset in running juvenile facilities. Similarly, staff often do not receive specialized training in working with adolescents, and, in order to save costs, some private for profit facilities may save money by hiring uneducated or unqualified staff.[85]

6. Indeterminate Sentencing

The indeterminate sentencing structure of most juvenile codes gives tremendous power to juvenile justice agency staff and Parole Board members. Because a juvenile does not receive a specific sentence, but, instead, must remain in custody until he is determined to have been "rehabilitated," there is a built-in disincentive for juveniles to avoid making waves by making complaints.

IV. IS THERE A CONSTITUTIONAL RIGHT TO POST-DISPOSITIONAL REPRESENTATION?

That youth in long-term custody need and benefit from legal representation to combat these violations of their rights is clear. It also is clear that the ongoing presence of attorneys in juvenile facilities could impel systemic reform, even when those lawyers are representing individual young people rather than a class. Nevertheless, few incarcerated youth have access to lawyers. We turn now to the reasons for this gap and legal arguments in

85. There may also be a lack of screening in the hiring: in some states, the law does not prevent persons with convictions from working with abused and neglected kids. Chris Gray, *More Pa. Inspections at Montco Facility, the Unannounced Spot Checks at Progressions Resulted from Patients' Allegations and State Inspectors' Concerns*, PHILADELPHIA INQUIRER, May 10, 2003, http://articles.philly.com/2003-05-10/news/25459088_1_progressions-spot-checks-technicians; Barbara White Stack, *In Harm's Way: Drug Convictions No Bar to Working with Abused and Neglected Kids*, PITTSBURGH POST-GAZETTE, Sept. 18, 2005, http://www.post-gazette.com/frontpage/2005/09/18/In-Harm-s-Way-Drug-convictions-no-bar-to-working-with-abused-and-neglected-kids/stories/200509180265.

support of a right to post-dispositional representation.

A. Gault's Still-Unfulfilled Promise

In *In re Gault*, the bedrock of the modern juvenile court, the United States Supreme Court held that the Fourteenth Amendment's Due Process Clause accords children charged with delinquency a constitutional right to counsel.[86] Although *Gault* addressed only "proceedings to determine delinquency,"[87] or adjudicatory hearings, subsequent federal appellate court decisions have assumed that the more expansive guarantee of the Sixth Amendment applies with full force to youth charged with delinquency. Thus, youth have been found to have a constitutional right to counsel in interrogations, waiver proceedings, and direct appeals.[88] In fact, the Seventh Circuit, in a case decided just two years after *Gault*, determined that "*Gault* must be construed as incorporating in juvenile court procedures, which may lead to deprivation of liberty, all of the constitutional safeguards of the Fifth and Sixth Amendments to the Constitution of the United States which apply, by operation of the Fourteenth Amendment, in criminal proceedings."[89] National juvenile justice standards and legal scholars uniformly embrace this more expansive view, stressing that youth must be

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

87. *Id.* at 474.

88. *See, e.g.*, Murray v. Earle, 334 F. Appx 602 (5th Cir. 2009) (unpublished opinion applying Sixth Amendment analysis to juvenile case); Machacek v. Hofbauer, 213 F.3d 947 (6th Cir. 2000) (applying Sixth Amendment analysis to juvenile interrogation); Deshawn E. by Charlotte E. v. Safir, 156 F.3d 340, 349 (2d Cir. 1998) (assuming that Sixth Amendment protections apply in delinquency proceedings); Bills by Bills v. Homer Consol. Sch. Dist. No. 33-C, 959 F. Supp. 507, 514 (N.D. Ill. 1997) (impliedly acknowledging Sixth Amendment application to juvenile proceedings); United States v. Myers, 66 F.3d 1364, 1370 (4th Cir. 1995) (applying Sixth Amendment protections to waiver proceedings); John L. v. Adams, 969 F.2d 228, 237 (6th Cir. 1992) ("[T]here is an independent constitutional right to counsel for juvenile appeals that is grounded in the Sixth Amendment's right to counsel."); United States v. M.I.M., 932 F.2d 1016, 1018 (1st Cir. 1991) (juvenile right to counsel on first direct appeal located in Sixth Amendment).

89. Reed v. Duter, 416 F.2d 744, 749 (7th Cir. 1969).

afforded counsel at all stages of the delinquency process, from pre-petition to post-disposition.[90]

Despite this near-unanimity, the overwhelming majority of youth in long-term state custody have no access to lawyers, except in direct appeals as of right and probation or parole violation proceedings.[91] In fact, with the exception of those states that provide for post-dispositional judicial review hearings,[92] and notwithstanding the substantial, very real threats to health, safety, and well-being that young people confront while in custody, no state juvenile code explicitly mandates legal representation for all incarcerated children throughout the duration of their custodial terms.[93]

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90. *See, e.g.*, Ten Core Principles, *supra* note 24; Standards, *supra* note 21; Nat'l Council of Juvenile and Family Court Judges, Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases 25 (2005); Inst. of Judicial Admin.-Am. Bar Ass'n Standards for Juvenile Justice, Standards for Counsel for Private Parties 10.1[hereinafter IJA-ABA]; Laura Cohen, *Extend the Guiding Hand: Incarcerated Youth, Law School Clinics, and Expanding Access to Counsel* 17 U. Pa. J. L. & Soc. Change 401 (2014); Sue Burrell, *Contracts for Appointed Counsel in Juvenile Delinquency Cases: Defining Expectations,* 16 U.C. Davis J. Juv. L. & Pol'y 313 (2012); 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 (2007); Katayoon Majd & Patricia Puritz, *The Cost of Justice: How Low-Income Youth Continue to pay the Price of Failing Indigent Defense Systems,* 16 Geo. J. on Poverty L. & Policy 543 (2009). National standards are discussed in greater detail in *infra* Part IV.

91. *See* Majd & Puritz, *supra* note 86, at 567 ("[D]uring this critical stage of the proceedings, countless youth remain unrepresented, in violation of national standards.")*; State Profiles,* NAT'L JUVENILE DEFENDER CTR., www.njdc.info/practice-policy-resources/state-profiles. In *Mempa v. Rhay,* 389 U.S. 128 (1967), the Supreme Court held that the Sixth Amendment accords a right to counsel in probation revocation proceedings that give rise to re-sentencing. Six years later, the Court announced a presumptive right to counsel in revocation proceedings where (1) a parolee or probationer challenges the factual violation allegations, or (2) even if the underlying allegations are uncontested, "substantial reasons" that are complex or difficult to present mitigate the violation and render revocation inappropriate. Gagnon v. Scarpelli, 411 U.S. 778 (1973).

92. *See* 42 PA. STAT. ANN. § 6353 (West 2000).

93. *See State Profiles, supra* 91; Tori J. Caeti et al., *Juvenile Right to Counsel: A National Comparison of State Legal Codes,* 23 AM. J. CRIM. L.

These statutory shortcomings, however, beg the question of whether a constitutional right to counsel attaches to youth in custody. In general, courts have been reluctant to extend a right to counsel to adult inmates, except on direct appeal,[94] in parole revocation proceedings,[95] and in limited situations when they are illiterate or otherwise unable to access the courts.[96] Adolescents' developmental immaturity, coupled with the rehabilitative purpose and indeterminate sentencing structure of most juvenile codes, create a unique context and a need for legal advocacy for incarcerated young people. As a result, the constitutional loci of the right to legal representation - - specifically, the Sixth Amendment, the First Amendment's guarantee of access to courts, and the Due Process Clause of the Fourteenth Amendment - give rise to more expansive protections when applied to youth than adults.[97]

611, 622-30 (1996). A handful of states provide access to counsel for incarcerated youth outside of the context of review or parole revocation hearings, with some limitations. *See, e.g.*, KY. REV. STAT. ANN. § 31.110(3) (West 2015) (according youth the right "to be represented in any … post-disposition proceeding that the attorney and the [youth] considers appropriate. However, if the counsel appointed …, with the court involved, determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense, there shall be no further right to be represented by counsel under the provisions of this chapter."). Similarly, youth in residential custody in Kentucky are entitled to representation on legal claims related to their confinement and "involving violations of federal or state statutory rights or constitutional rights." KY. REV. STAT. ANN. § 31.110(5) (West 2015). As described in Part IV, furthermore, public defender offices and law school clinics in a small number of jurisdictions voluntarily provide ongoing post-dispositional representation outside of the contexts of parole revocation or review hearings.

94. *See* Evitts v. Lucey, 469 U.S. 387 (1985); Douglas v. California, 372 U.S. 353 (1963).

95. Gagnon v. Scarpelli, 411 U.S. 778 (1973).

96. Bounds v. Smith, 430 U.S. 817 (1977).

97. The Supreme Court has long recognized that young people's immaturity and vulnerability to governmental overreaching demand heightened protections. *See, e.g.*, Haley v. Ohio, 332 U.S. 596 (1948). In the last decade, the developmental distinctions between youth and adults have become embedded in the Court's jurisprudence around sentencing and police interrogations. *See* Roper, 543 U.S. 551 (juvenile death penalty violates Eighth Amendment); Graham, 560 U.S. 48 (juvenile life without parole

B. The Unique Characteristics of Incarcerated Youth Require a Robust Interpretation of the Right to Counsel.

Incarcerated adolescents share a number of characteristics that render them particularly vulnerable to institutional maltreatment and unable to assert their own legal rights. First, as has been explored extensively elsewhere, normative adolescent development involves a lengthy period of maturation, during which young people's judgment and decision-making capabilities are significantly affected.[98] Social scientists have determined that cognitive as well as emotional development continues throughout the teenage years and well into one's twenties, leaving young people less able to understand or exercise their legal rights than adults and more likely to acquiesce to institutional authority figures.[99] As discussed in Part I, furthermore, a grossly disproportionate number of youth in custody suffer from cognitive or emotional disabilities, or both. One national study, which surveyed fifty-two state juvenile corrections agencies, determined that 33.4% of incarcerated youth have diagnosed special education needs,

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sentences in non-homicides violates Eighth Amendment); J.D.B., 131 S. Ct. 2394 (age is a significant factor in evaluating youth's comprehension of *Miranda* rights and voluntariness of *Miranda* waivers); Miller, 132 S. Ct. 2455 (mandatory juvenile life without parole violates Eighth Amendment).

98. See, e.g., Elizabeth Scott & Thomas Grisso, The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform, 88 J. CRIM. L. & CRIMINOLOGY 137 (1997); Dustin Albert & Laurence Steinberg, Judgment and Decision-Making in Adolescence, 21 *J. RES. ON ADOLESCENCE* 211 (2011); Laurence Steinberg & Elizabeth Scott, Less Guilty by Reason of Adolescence, 58 AM. PSYCHOL. 1009 (2003); see also Levick & Desai, supra note 90, at 191-92; Laura Cohen, Freedom's Road: Youth, Parole, and the Promise of Graham v. Florida and Miller v. Alabama, 35 CARDOZO L. REV. 1031, 1043-48 (2014).

99. Thomas Grisso et al., Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants, 27 LAW & HUM. BEHAVIOR 333 (2003); Thomas Grisso, Juvenile's Capacities to Waive Miranda Rights: An Empirical Analysis, 68 CAL. L. REV. 1134, 1152 (1980) (only 20.9% of juveniles, compared with 42.3% of adults, understood all four Miranda warnings; similarly, 55.3% of juveniles, compared with 23.1% of adults, did not comprehend any of the warnings.); see Levick & Desai, supra note 90, at 192-93.

compared to approximately 10% of the general population.[100] Among confined young people, 47.7% have emotional disturbance, 38.6% have specific learning disabilities, and 9.7% have mental retardation.[101] Strikingly, the same study hypothesized that the actual prevalence of disabilities among children in custody is substantially higher, but that juvenile corrections officials under-identify special needs for financial and other reasons.[102] At least one report indicates that, "in juvenile correctional facilities, the number of youth with special education needs is four times the national average of all school age children identified as having a disability." [103]

In addition, according to a multi-state study performed by the National Center for Mental Health and Juvenile Justice, approximately 70% of young people in the juvenile justice system suffer from mental illness, with 27% of these cases deemed severe.[104] To some extent, these numbers coincide with data concerning high rates of childhood exposure to trauma across the country, and the impact of such exposure.[105]

100. Mary Magee Quinn et al., *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 EXCEPTIONAL CHILD. 339, 342 (2005).

101. *Id.*

102. *Id.*

103. Lisa M. Geis, An IEP for the Juvenile Justice System: Incorporating Special Education Law Throughout the Delinquency Process, 44 U. MEM. L. REV. 869, 873 (2014).

104. Jennie L. Shufelt & Joseph J. Cocozza, , Research and Program Brief: Youth with Mental Health Disorders in the Juvenile Justice System: Results From A Multi-State Prevalence Study, NAT'L CTR. FOR MENTAL HEALTH & JUVENILE JUSTICE 2-4 (2006), http://www.unicef.org/tdad/usmentalhealthprevalence06(3).pdf.

105. This awareness about trauma has led to an effort to educate judges and attorneys about the effects of childhood trauma. *See, e.g.*, *Judges and Child Trauma: Findings from the National Child Traumatic Services Network*, Nat'l Child Traumatic Stress Network (2008) (reporting the results of focus groups conducted to understand how knowledgeable juvenile and family court judges are about child trauma and to identify ways to work to promote education on the issue); Kristine Buffington et al., *Ten Things Every Juvenile Court Judge Should Know about Trauma and Delinquency*, NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES (2010), http://www.ncjfcj.org/sites/default/files/trauma%20bulletin.pdf (The National Council of Juvenile and Family Court Judges published "Ten Things Every Juvenile Court Judge Should Know About Trauma and

Exacerbating matters, the harmful practices described in Part II, above - including the use of isolation or solitary confinement,[106] restraint chairs,[107] pressure point tactics,[108] chemical restraints,[109] sexual abuse,[110] lack of training and staff education regarding suicide prevention[111] and the needs of special populations such as LGBT youth[112] - can and do further traumatize youth.[113]

Delinquency" to empower judges to be able to "best assist traumatized youth who enter the juvenile justice system."); *Child Law Practice Online*, 31 Am. Bar Ass'n 7, http://www.americanbar.org/publications/child_law_practice/vol-33/sample_issue/addressing_childtraumabyworkingtogether.html. (Similarly, NCTSN has established other projects that are more child-focused, and promote peer-to-peer support and empower youth and their families to share and reflect on their own stories and experiences, and the American Bar Association Center on Children and the Law has launched a project on Polyvictimization and Trauma-Informed Advocacy and published a trauma assessment tool for lawyers.). The Attorney General of the United States and the Justice Department have also devoted significant resources to better understand childhood exposure to trauma across the country, and have begun to address it through the Defending Childhood Initiative. *See infra* Part IV.

106. *See generally* AM. CIVIL LIBERTIES UNION & HUMAN RIGHTS WATCH, GROWING UP LOCKED DOWN (2012), https://www.aclu.org/files/assets/us1012webwcover.pdf.

107. Juvenile Court Investigation, *supra* note 62, at 57.

108. *Id.* at 58.

109. See generally Ashley A. Norton, Note, The Captive Mind: Antipsychotics as Chemical Restraint in Juvenile Detention, 29 J. CONTEMP. HEALTH L. & POL'Y 152 (2013).

110. *See generally* Andrea J. Sedlak et al., *Nature and Risk of Victimization: Findings from the Survey of Youth in Residential Placement*, U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention (2013), http://www.ojjdp.gov/pubs/240703.pdf.

111. JUVENILE COURT INVESTIGATION, *supra* note 62, at 57.

112. *See generally* Katayoon Maid et al., H*idden Injustice: Lesbian, Gay Bisexual and Transgender Youth in Juvenile Courts*, EQUITY PROJECT, http://www.equityproject.org/pdfs/hidden_injustice.pdf.

113. Listenbee et al., *supra* note 38, at 175; *see also* Letter from Assistant Attorney Gen., U.S. Dep't of Justice, to Governor Ted Strickland (May 9, 2007), http://www.justice.gov/crt/about/spl/documents/scioto_findlet_5-9-07.pdf (discussing an investigation of the Scioto Juvenile Correctional Facility in Delaware, Ohio); Letter from Assistant Attorney Gen., U.S. Dep't of Justice, to Michel Claudet, President Terrebonne Parish, Louisiana, (Jan. 18, 2011), http://www.justice.gov/crt/about/spl/documents/TerrebonneJDC_findlet_01-

Taken together, these traits profoundly and negatively affect the ability of incarcerated young people to understand their rights, recognize when those rights have been violated, and advocate for themselves. The cumbersome procedures that govern institutional grievance and disciplinary systems, and the labyrinthine process for seeking judicial review, leave youth unable to protect themselves from harm or obtain redress for violations of their rights. In order for incarcerated youth to pursue institutional remedies, they typically must utilize a grievance system that closely resembles those governing adult prison systems. In New Jersey, for example, young people must complete and submit a written remedy form in order to register any type of complaint or seek any type of relief.[114] Although these forms are required to be easily accessible, many clients have told us that they must ask a correctional officer for a form and give it back to the officer upon completing it, with an obvious attendant chilling effect. All grievances are reviewed by the facility superintendent, who in turn is required to render a written decision. If a young person makes a complaint of institutional abuse or neglect, or alleges criminal activity within the facility, the superintendent is required to refer the matter to the agency Office of Institutional Investigations.[115] If, as is usually the case, the superintendent denies the grievance, the young person may appeal to the Executive Director of the agency.[116] It is only after such appeals have been made and denied that young people are deemed to have exhausted their administrative remedies and, so, are able to pursue judicial

18-11.pdf (discussing an investigation of Terrebonne Parish Juvenile Detention Center in Houma, Louisiana); Letter from Assistant Attorney Gen., U.S. Dep't of Justice, to Governor David A. Peterson (Aug. 14, 2009), http://www.justice.gov/crt/about/spl/documents/NY_juvenile_facilities_findlet_08-14-2009.pdf (discussing an investigation of various juvenile detention facilities in New York state); Letter from Assistant Attorney Gen., U.S. Dep't of Justice, to Governor Mitch Daniels (Jan. 29, 2010), http://www.justice.gov/crt/about/spl/documents/Indianapolis_findlet_01-29-10.pdf (discussing investigation of Indianapolis Juvenile Correctional Facility in Indianapolis, Indiana).

114. *See* N.J. ADMIN. CODE § 13:90-1A.1 (West 2015).

115. N.J. ADMIN. CODE § 13:90-1A.6(b)(2) (West 2015).

116. N.J. ADMIN. CODE § 13:90-1A.7 (West 2015).

remedies.[117] Even if they satisfy the exhaustion rules, incarcerated juveniles do not have access to the skilled "jailhouse lawyers" who are available to many adult inmates; as a result, they generally are unaware of and lack the knowledge necessary to seek relief in the courts.

It is no wonder, then, that the abuses described in Part II, *supra*, go largely unchecked.[118] Similarly, it is no surprise that young people who do not have access to lawyers are unable to seek early release from custody or successfully challenge parole denials and revocations; they simply are not developmentally able to pursue legal remedies. They thus remain in or return to custody unnecessarily, often with deleterious or even disastrous consequences.[119]

C. Constitutional Loci of the Right to Counsel

Given the indisputable need for and benefits of legal advocacy for incarcerated youth, the right to counsel must be interpreted broadly to include the post-dispositional phase of delinquency proceedings. The constitutional grounds for asserting that right, however, vary according to the legal context of the representation; a young person's right to counsel at a parole revocation hearing, for example, may be rooted in a different provision from her right to be represented in a motion for early release from custody.

117. N.J. Ct. R. 2:2-3(a)(2); *see also* Prison Litigation Reform Act, 42 U.S.C. § 1997(e)(a).

118. As an example, prior to the inception of the Rutgers Juvenile Post-Disposition Advocacy Project in 2009, the New Jersey Juvenile Justice Commission had not been the subject of a lawsuit in recent memory and scores of young people had been involuntarily transferred to adult prisons without challenging the flagrantly unconstitutional transfer procedures. Since 2009, we have successfully appealed two such transfers, leading to judicial invalidation of those procedures. *See* State *ex rel.* J.J., 49 A.3d 877*;* State in Interest of Y.C., 436 N.J. Super. 29, 91 A.3d 636.

119. Mendel, *supra* note 9, at 10.

1. The Sixth Amendment

The Sixth Amendment guarantees to all criminal defendants the right to "[a]ssistance of counsel for his defence."[120] The right to counsel is, in many ways, the cornerstone of procedural fairness. As the Supreme Court recognized in *U.S. v. Cronic*, "[l]awyers in criminal cases 'are necessities, not luxuries.' Their presence is essential because they are the means through which the other rights of the person on trial are secured . . . . Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."[121] Consistent with this recognition, the Court has interpreted the Sixth Amendment guarantee as applying to all "critical stages" of a criminal case.[122] As the Court explained in *U.S. v. Wade*, in which it found the Sixth Amendment to apply to post-arraignment identification procedures, "[i]t is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State *at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.*"[123]

A more specific definition of "critical stage" is found in *Menefield v. Borg*, where the Ninth Circuit wrote: "First, if failure to pursue strategies or remedies results in a loss of significant rights, then Sixth Amendment protections attach. Second, where skilled counsel would be useful in helping the accused understand the legal confrontation, we find that a critical stage exists. Third, the right to counsel applies if the

120. U.S. CONST. amend. VI.

121. United States v. Cronic, 466 U.S. 648, 653-54 (1984) (internal citations omitted).

122. Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (arraignment is a "critical stage," giving rise to right to counsel); United States v. Wade, 388 U.S. 218, 226-27 (1967).

123. *Wade*, 388 U.S. at 226 (emphasis added). *Cf. United States v. Ash, 413 U.S. 300 (1973)* (no right to counsel at photographic arrays).

proceeding tests the merits of the accused's case."[124] In keeping with this expansive interpretation, the Supreme Court also has found psychiatric interviews to determine competency to stand trial,[125] guilty pleas and sentencing proceedings, [126] preliminary hearings,[127] any post-indictment interrogations, whether custodial or not,[128] and any trial that poses a possibility of incarceration to be "critical stages," requiring legal representation unless the accused has knowingly and voluntarily waived that right.[129] Each of these decision-making points has a corollary in juvenile court, and, as was discussed above, a number of federal appeals courts have held that the Sixth Amendment affords youth the right to counsel at those stages.

The Supreme Court has not yet deemed any post-sentencing decision to be a "critical stage."[130] But, as Marsha Levick and Neha Desai have argued persuasively elsewhere, fundamental distinctions between juvenile and adult court sentencing schemes and practices, together with the young people's developmental immaturity, render the post-dispositional phase of juvenile delinquency proceedings a "critical stage," triggering Sixth Amendment protections.[131] Because the overwhelming majority of juvenile commitments are indeterminate, and because most juvenile codes continue to assert a purpose that is at least in part rehabilitative, the actual length of a young person's incarceration is not fixed at the time of sentencing. Instead, in many jurisdictions, projected release, or "max out," dates fluctuate significantly throughout their terms and according to their behavior, progress in school and

124. Menefield v. Borg, 881 F.2d 696, 698-99 (9th Cir. 1989), *quoted in* Levick & Desai, *supra* note 90, at 185.

125. Estelle v. Smith, 451 U.S. 454 (1981).

126. Mempa, 389 U.S. 128.

127. White v. Maryland, 373 U.S. 59 (1963) (when defendant entered guilty plea at preliminary hearing, hearing was "critical stage"); Coleman v. Alabama, 399 U.S. 1 (1970).

128. Massiah v. United States, 377 U.S. 201 (1964). *Miranda v. Arizona*, 384 U.S. 436 (1966), of course, held that the right to counsel attaches in pre-indictment, custodial interrogations, as well.

129. Argersinger v. Hamlin, 407 U.S. 25 (1972).

130. For a discussion of the right to counsel on appeal, *see infra* Part III.

131. *See* Levick & Desai, *supra* note 90, at 188-90.

treatment programs, and post-release plans. In essence, then, the actual sentencing determination is made not at the dispositional hearing but repeatedly throughout course of a commitment. Since a sentencing hearing is, without question, a critical phase, so, too, is the entire course of an indeterminate commitment.

The release decision, moreover, often is vested in the head of the juvenile justice agency, the parole board, or (in the case of post-dispositional review hearings) the juvenile court judge, all of whom have broad discretion to do what they believe to be in the best interests of the child and the safety of the community.[132] It is precisely in such discretionary contexts that effective advocacy is most essential, for it can be and often is outcome-determinative. In addition, the decision to release or continue to hold a young person is not discrete but, instead, the quantum of many decisions that have been made throughout the commitment term. If the youth has not received essential therapeutic services, education, or vocational training, or if the facility staff have not engaged his or her family and helped the client prepare for re-entry to the community, he or she in all likelihood will not have demonstrated the level of "rehabilitation" that release decision-makers expect and demand. Compelling the system to do its job requires effective advocacy. Yet, for the reasons discussed in Part II, *supra*, youth in custody are not developmentally mature enough and frequently lack the cognitive capacity to advocate effectively for themselves. They need the "guiding hand 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

132. In New Jersey, most early release decisions are made by the Parole Board, which must review every committed juvenile at least quarterly. N.J.S.A. § 30:4-123.57. In addition, young people can seek "recall," or modifications of their sentences, from the Juvenile Court. N.J. Ct. R. 5:24-5(a). New York's sentencing scheme, in contrast, is indeterminate, with release authority vested in the placement agency. N.Y. F.C.A. § 353.3(5). If agency officials wish to retain custody of a child beyond the initial placement term, they must seek an extension of placement in the Family Court. N.Y. F.C.A. § 355.3. Children have a right to appear and right to representation of counsel at extension of placement hearings. *Id.*

whether [they have] a defense and to prepare and submit it." [133]

Advocacy aimed at shortening the length of commitment, then, falls squarely within the framework set forth in *Menefield.* Failure to engage in effective advocacy and pursue available remedies does, indeed, result in the loss of a substantial right: the possibility of early release from custody. Without question, young people's developmental immaturity demands "skilled counsel" to help them "understand the legal confrontation"[134] of post-dispositional proceedings. Thus, at least with regard to advocacy contexts that affect the length of a young person's commitment, the Sixth Amendment right to counsel attaches.

2. The Due Process Clause

Conspicuously absent from the list of "critical stages" are appeals. There is, in fact, an unambiguous right to counsel in appeals as of right.[135] Although at least two federal appellate courts have held that the Sixth Amendment affords juveniles the right to counsel on their first direct appeals,[136] in the adult context the Supreme Court has anchored the protection in an intertwining of the Due Process clause of the Fourteenth Amendment and the Sixth Amendment.[137] In *Douglas v. California,* the Court held that due process demands that criminal defendants be afforded counsel on a first appeal as of right, and that it was a violation of the Equal Protection clause

133. *In re* Gault, 387 U.S. at 37.

134. Menefield, 881 F.2d at 699.

135. Evitts, 469 U.S. 387.

136. *See* John L., 969 F.2d at 237 (6th Cir. 1992) ("[T]here is an independent constitutional right to counsel for juvenile appeals that is grounded in the Sixth Amendment's right to counsel."); M.I.M., 932 F.2d at 1018 (1st Cir. 1991) (juvenile right to counsel on first direct appeal located in Sixth Amendment).

137. *See* Douglas, 372 U.S. 353 ; Evitts v. Lucey, 469 U.S. 387 (1985). In neither of these cases did the Court explicitly reject the Sixth Amendment as a source of the right to counsel on appeal, but, instead, turned to the Equal Protection (*Douglas)* and Due Process (*Evitts*) clauses without discussion. Notably, *Douglas* preceded *Wade*and the other seminal "critical stage" cases, leaving open the question of whether the right to counsel on appeal may also be embodied in the Sixth Amendment.

to deny counsel to the indigent.[138] In *Evitts v. Lucey*, the Court again relied on the Fourteenth Amendment in re-affirming that, once a state has determined to create a system of appellate review in criminal cases, defendants must be afforded the "services of counsel."[139] *Evitts*, however, also invoked the Sixth Amendment, holding that, when due process gives rise to the right to counsel, *Strickland v. Washington*'s mandate of effective assistance of counsel applies with full force at the appellate as well as at the trial stage of a criminal case.[140]

There are other contexts in which the Court has looked to the Fourteenth rather than the Sixth Amendment as a source of counsel rights. Most notably for our purposes, the right to legal representation in juvenile adjudicatory hearings[141] and in proceedings to waive a child to adult court is rooted in the Due Process Clause.[142] In addition, the Court has relied on a due process, rather than "critical stage," analysis in extending the right to counsel to non-judicial proceedings. While this gives rise to broader access to counsel than the Court has accorded under the Sixth Amendment, it also permits a less robust framing of the right. In *Gagnon v. Scarpetti*, for example, the Court, rather than extending a blanket right to counsel in probation or parole revocation proceeding, held that the need for legal representation may be determined on a case-by-case basis. Presumptively, however:

> Counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and

138. *Douglas*, 372 U.S. at 816-17.
139. *Evitts*, 469 U.S. at 393.
140. Strickland v. Washington, 466 U.S. 668 (1984).
141. *In re* Gault, 387 U.S. 1 (1967).
142. Kent v. United States, 383 U.S. 541 (1966).

> make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, *the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself.*[143]

Unlike the Sixth Amendment, then, the Due Process clause does not embody an absolute right to counsel. On the other hand, it extends this essential procedural protection, albeit conditionally, to contexts beyond those traditionally deemed to be "critical stages" of criminal proceedings. Again, due to their developmental immaturity, cognitive limitations, mental health status and special education needs, most incarcerated youth are not "capable of speaking effectively" for themselves and must be afforded counsel in probation and parole revocation proceedings.[144] The same reasoning, furthermore, may apply to other juvenile post-dispositional contexts, such as hearings to determine parole eligibility.[145]

143. Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

144. Many states have created a statutory right to counsel in parole and probation revocation matters. *See, e.g.*, D.C. SUP. CT. JUV. R. 32(h)(3); N.Y. Fam. Ct. Act § 360.3(4)(1983); Juvenile Justice Act of 1977, Wash Rev. Code Ann § 13.40.210(4)(a)(2014). If the case involves an administrative rather than judicial hearing, however, representation generally is not provided to indigent youth, in violation of *Douglas. See, e.g.*, N.J.S.A. § 30:4-123.63 (1995).

145. It is true, of course, that the Court has refused to extend the right to counsel to habeas proceedings. *See* Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); *see also* Murray v. Giarratano, 492 U.S. 1, 3-4 (1989).Court has also refused to extend the right to counsel to discretionary appeals. *See* Ross v. Moffitt, 94 S.Ct. 2437 (1974). Similarly, it has been reluctant to accord an absolute right to counsel to civil litigants, even when a substantial liberty or property interest is at stake. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981) (refusing to find absolute right to counsel in proceedings to terminate parental rights; such applications can be decided on a case-by-case basis). On the other hand, state courts have been more willing to extend the right in termination proceedings, and people facing civil mental health and sex offender commitments generally are afforded counsel as well.

3. The First Amendment Right of Access to Courts

As described above, youth often experience egregious harms when in custody. They are exposed to inhumane conditions, dangerous levels of violence, widespread physical and sexual abuse, and dangerous disciplinary practices, including solitary confinement.[146] They are mis-classified and assigned to inappropriate housing units, sometimes with grave risks to their physical safety. They also frequently are denied essential medical and mental health care, substance abuse treatment, educational programs, regular contact with their families, and adequate post-release planning assistance.[147] Such conditions may well violate federal or state law, giving rise to viable legal claims and the possibility of individual and systemic relief. The First Amendment's guarantee of access to courts offers what is perhaps the strongest foundation for a right to post-dispositional representation that would permit youth to challenge such unlawful conditions of confinement.

The right of court access for adult inmates is deeply embedded in Supreme Court jurisprudence. As early as 1941, in *Ex Parte Hull,* the Court invalidated a Michigan regulation that required inmates to seek review and approval from prison officials before they were permitted to seek habeas relief in court.[148] The Court held that "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus. Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine."[149] In subsequent decisions, the Court fleshed out the contours of the right of "meaningful access" to the courts.[150]

Thus, indigent inmates pursuing appeals must be provided with free transcripts,[151] and court fees must be waived for those

146. *See, e.g.*,Mendel, *supra* note 9.
147. *Id.*
148. *Ex parte* Hull, 312 U.S. 546 (1941).
149. *Id.* at 549.
150. Bounds, 430 U.S. at 824 (1977).
151. *See* Griffin v. Illinois, 351 U.S. 12, 20 (1956).

seeking appellate or habeas relief.[152] Similarly, regulations prohibiting "jailhouse lawyers" from providing writ-writing and other legal assistance to their fellow inmates were struck down on the ground that they impermissibly infringed on access to courts.[153] And, in *Bounds v. Smith*, the Court held that the "fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or *adequate assistance from persons trained in the law*."[154] Importantly, although the *Bounds* majority accorded discretion to prison officials to develop individualized strategies for ensuring legal access, it made clear that illiterate inmates must be afforded assistance beyond the mere provision of a law library.[155] In addition to law libraries and inmate paralegals, the Court noted that prison officials might utilize specialized prisoner legal services offices, pro bono attorneys, or law students to ensure adequate access to the courts.

Nearly two decades later, in *Lewis v. Casey*, the Court sharply curtailed the availability of relief under *Bounds*.[156] The *Lewis* plaintiffs, twenty-two Arizona inmates, alleged widespread deficiencies in the law libraries throughout the state's correctional system. The Ninth Circuit upheld the District Court's detailed, system-wide injunction pursuant to *Bounds*, but the Supreme Court reversed on what were, essentially, standing grounds. For the first time, the Court imposed a strict "actual injury" limitation on court access claims, holding that inmates must prove "actual prejudice with respect to contemplated or existing litigation, such as the

152. *See* Burns v. Ohio, 360 U.S. 252, 257 (1959); Smith v. Bennett, 365 U.S. 708 (1961).

153. *See* Johnson v. Avery, 393 U.S. 483 (1969) (assistance with writs and appeals); Wolff v. McDonnell, 418 U.S. 539, 577-80 (1974) (civil rights actions).

154. Bounds, 430 U.S. at 828 (1977) (emphasis added).

155. *Id.* at 823 (citing Johnson v. Avery, 393 U.S. 483, 502 (1969)). The Court suggested that, in addition to law libraries and inmate paralegals, specialized prisoner legal services offices, pro bono attorneys, or law students might be utilized to ensure adequate access to the courts.

156. Lewis v. Casey, 518 U.S. 343 (1996).

inability to meet a filing deadline or to present a claim" as a result of inadequate legal resources or assistance.[157] In other words, inmates must wait until they have forfeited a legal right before they may challenge the constitutional violation that caused the forfeiture. In addition, the Court limited the right of legal access to challenges to criminal convictions and civil rights violations.[158] Finally, the Court held proof of actual injury to only certain members of the class could not give rise to system-wide relief.[159]

In short, *Lewis* traps inmates, even those whose convictions are illegal or who have suffered significant civil rights violations, in a vicious cycle. If they are incarcerated in a system that fails to provide adequate facilities or assistance to research and assert their legal claims, they may fail to comply with statutes of limitations, filing rules, and other requirements and, so, forfeit the ability to raise legitimate challenges to their convictions or conditions of confinement. At that point, although they have suffered the "actual injury" that *Lewis* demands, a lawsuit asserting a First Amendment violation may lead to injunctive relief or an award of monetary damages but not necessarily remedy the illegalities for which they originally sought access to the courts.

As limiting as *Lewis*'s strictures are for adult inmates, they are even more so for youth. As discussed in Part I, *supra*, incarcerated adolescents are far more likely to suffer from mental illness and intellectual disabilities and to be in need of special education than their non-incarcerated peers. These disabilities, together with their developmental immaturity, render them less able to understand and exercise their legal rights than adults. Even if a law library is available, few young people have the reading and writing skills necessary to undertake legal research or draft legal documents. For similar reasons, the system of "jailhouse lawyers" upon which adult prisons relay is untenable in a juvenile setting, where the inmate

157. *Id.* at 348.
158. *Id.* at 355.
159. *Id.* at 359.

paralegals also are youth. Thus, although they routinely suffer substantial injuries in custody (and, so, would satisfy the demands of *Lewis*), they lack the capacity to seek judicial intervention. Simply put, they are denied meaningful access to the courts. As a result, they remain incarcerated longer than necessary or even unlawfully, and unconstitutional conditions of confinement go unchecked.

How, then, can incarcerated young people exercise their fundamental right of access to the courts in the wake of *Lewis*? The answer lies in part in *John L. v. Adams*, [160] a Sixth Circuit case decided after *Bounds* but before *Lewis.* The plaintiff class in *John L.*, which included all young people incarcerated in juvenile facilities operated by the Tennessee Department of Youth Development (TDYD), alleged that the state failed to afford youth in custody meaningful access to the courts.[161] The District Court issued a remedial order requiring the TDYD to employ contract attorneys to speak with youth who requested meetings, to perform the factual and legal research, and "either to advise the juvenile that he or she does not have a meritorious claim or to prepare appropriate pleadings to be filed *pro se* with a motion for appointment of counsel."[162] The contract attorneys were encouraged but not required to utilize the institutional grievance system prior to seeking judicial intervention.[163] Attorney assistance was made available in a wide range of matters, including appeals, challenges to conditions of confinement, departmental transfers, and due process, equal protection, and civil rights claims, among others.[164] The state appealed and the Sixth Circuit upheld the injunction, except to the extent that it provided for legal representation in matters that were not of a constitutional nature or arose under state law.[165] In doing so, it made clear that the definition of "meaningful access" is dependent on the abilities and limitations of the

160. 969 F.2d 228 (6th Cir. 1992).
161. *Id.* at 230.
162. *Id.* at 231.
163. Id.
164. *Id.* at 232.
165. *Id.* at 234-35.

inmates who seek it, and that neither a law library nor a cadre of "jailhouse lawyers" would provide adequate access for incarcerated youth:

> The remedy for a constitutional deficiency in access could not be the same for juveniles as it is for adult prisoners . . . . '[W]ithout assistance, the students could not make effective use of legal materials. Furthermore, the students' ages, their lack of experience with the criminal system, and their relatively short confinement means that there cannot be a system of writ writers for students who need them.'[166]

John L., then, recognized the inherent developmental and experiential differences that distinguish adolescents from adults and interpreted "meaningful access" accordingly. But does the case remain good law in the wake of *Lewis*?

Marsha Levick and Neha Desai argue convincingly that it does, for several reasons. First, the Supreme Court has long recognized the unique vulnerabilities associated with developmental immaturity and carved out special protections for young people. *Haley,*[167] *Roper,*[168] *Graham,*[169] *JDB,*[170] and *Miller* [171] all are rooted in this recognition and together create a specialized jurisprudence of youth. If the Eighth, Fifth, and Sixth Amendments must be interpreted more generously when adolescents are involved, so, too, must the right of access to the courts.[172] Thus, the strict standing and class relief requirements

166. John L., 969 F.2d 228 (quoting Morgan v. Sproat, 432 F.Supp. 1130, 1158 (S.D. Miss. 1977)). The *John L.* injunction remains in place today, and Ohio provides for access to counsel for incarcerated youth. *See* Ohio Rev. Code Ann. § 120.06(A)(5), 120.06(G)-(I) (West 2014).

167. Haley, 332 U.S. 596.

168. Roper , 543 U.S. 551.

169. Graham, 560 U.S. 48.

170. J.D.B.,131 S. Ct. 2394, 2403.

171. Miller, 132 S.Ct. 2455, 2468.

172. This is in keeping with a long line of pre-*Lewis* federal appellate cases, which (as the *John L.* court pointed out) afforded counsel to disadvantaged or disabled inmates on the ground that legal materials alone

of *Lewis* should be relaxed when applied to incarcerated youth.

In addition, even in *Lewis*, the Court acknowledged that two members of the inmate class - one who was illiterate, the other who did not read or write English - had been denied legal access as a result of their linguistic challenges. Although the Court refused to grant system-wide relief on the basis of two isolated cases, it nonetheless recognized that heightened protections, including counsel, may be required in such cases.[173] According to Levick and Desai, this acknowledgement reflects "the Court's concern with the 'fit' of the remedy to the injury, not with the propriety of affording any relief at all."[174]

Finally, the rehabilitative purpose of the juvenile justice system is fundamentally different from the punitive focus of adult prisons. When young people are denied lawyers - and, so, meaningful access to the courts - not only do unconstitutional conditions persist but the very goals of incarceration are undermined. This critical distinction, too, compels a more expansive interpretation of the First Amendment for youth.

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were insufficient to assure meaningful access to the courts. *See Ward v. Kort,* 762 F.2d 856, 858 (10th Cir.1985) (committed mental patients); *Cruz v. Hauck,* 627 F.2d 710, 721 n.21 (5th Cir. 1980) (non-English speaking or illiterate inmates); *Hadix v. Johnson,* 694 F.Supp. 259, 288 (E.D. Mich. 1988) (illiterate and segregated prisoners); *United States ex rel. Para–Prof'l Law Clinic v. Kane,* 656 F.Supp. 1099, 1105 (E.D.Pa.) (illiterate inmates and those in administrative or disciplinary custody), *aff'd without opinion,* 835 F.2d 285 (3d Cir.1987), *cert. denied,* 485 U.S. 993 (1988); *Smith v. Bounds,* 610 F.Supp. 597 (E.D. N.C. 1985) (illiterate inmates and those in administrative confinement), *subsequent order entered,* 657 F.Supp. 1322 (E.D.N.C.1986), *aff'd,* 813 F.2d 1299 (4th Cir.1987), *aff'd on reh'g,* 841 F.2d 77 (4th Cir.) *(en banc), cert. denied,* 488 U.S. 869 (1988); *Canterino v. Wilson,* 562 F.Supp. 106, 110 (W.D.Ky.1983) (low level of education among inmates was a relevant factor in determining that the state must provide more than a law library to ensure meaningful access to the courts), *aff'd,* 875 F.2d 862 (6th Cir.) (table), *cert. denied,* 493 U.S. 991 (1989); *Glover v. Johnson,* 478 F.Supp. 1075 (E.D.Mich.1979) (female prison where there were no writ writers); *Stevenson v. Reed,* 391 F.Supp. 1375, 1380–82 (N.D.Miss.1975) (illiterate inmates), *aff'd,* 530 F.2d 1207 (5th Cir.), *cert. denied,* 429 U.S. 944 (1976). It should be noted that none of these cases has been overruled or explicitly rejected post *Lewis.*

173. Lewis, 518 U.S. at 387 (1996).

174. Levick & Desai, *supra* note 90, at 199.

IV. NATIONAL JUVENILE DEFENSE STANDARDS SET FORTH THE ROLE OF POST-DISPOSITIONAL COUNSEL AND JUVENILE DEFENDERS ARE INNOVATING TO MEET THE NEEDS OF YOUTH

The critical role of counsel for youth generally has been recognized for over forty years. In terms of counsel for youth at the post-disposition stage, juvenile law developments in the United States Supreme Court combined with the release of National Juvenile Defense Standards and the Department of Justice's Defending Childhood report provides even greater impetus to represent youth at this stage. The National Juvenile Defense Standards, in particular, take an expansive view of the defender's role and create a duty for attorneys to report and address harmful conditions of confinement:

> 10.8 Report and Address Harmful Conditions of Confinement
>
> Counsel is in a unique position to identify and address any harmful or unlawful conditions of confinement and to address system-wide abuses.
>
> a. Counsel should be aware of applicable local, state, and federal laws regarding treatment of youth in police custody, detention centers, jails, training schools, and other custodial facilities;
>
> b. Counsel has a duty to investigate and act upon any claims by the individual client of unlawful conditions of confinement and to document and ascertain the frequency with which such conditions have been noted by others; and
>
> c. Counsel has an obligation to move the court to stop placement of clients in facilities that engage in practices that put clients' safety and well-being at risk.

In imposing this ongoing obligation on juvenile defenders, the standard recognizes that the child's attorney is the only person in the juvenile court system who, upon identifying a conditions issue, is in a position to address it. Parents, who may be concerned about a child after a facility visit, can be perceived as inherently biased and are unlikely to have the skill to get the issue to the appropriate individual. Social workers or treatment providers in facilities may have a conflict between addressing a conditions issue and maintaining employment. For instance, if a psychologist who is contracted with a facility brings up an isolation issue (which she knows is damaging to the youth) will the facility continue to contract with her?

Before an attorney seeks to address any issue, the client must be informed and confidences maintained. Usually the youth is required to remain in the harmful facility until the issue is addressed, making that youth extremely vulnerable to angry facility administrators.

This part first articulates the duty and role of juvenile defenders at the post-disposition stage according to national standards and the Department of Justice. Next, it describes an array of actions juvenile defenders can take, as individuals or as partners with other organizations to address legal problems that persist in the post-disposition phase. It then explores an array of legal responses to harmful conditions of confinement, education issues, representing youth in discipline hearings, assisting youth with early release, assisting with re-entry, expunging and sealing juvenile records, removing youth from the sex offender registry and representing youth at parole and parole revocation hearings. Each sub-section highlights examples of successful post- disposition actions taken by juvenile defenders across the country in response to their clients' needs and goals.

A. Overview of National Standards

National standards have repeatedly recognized that post-disposition is a critical stage in the juvenile court process where

the child needs zealous advocacy.[175] In the spring of 2005, the National Council of Juvenile and Family Court Judges released the Juvenile Delinquency Guidelines, Improving Court Practice in Juvenile Delinquency Cases (the "*Juvenile Delinquency Guidelines*").[176] Key principle #13 of these guidelines states:

> Juvenile delinquency court judges should ensure effective post-disposition review is provided to each delinquent youth as long as the youth is involved in any component of the juvenile justice system.[177]

The importance of post-disposition representation has been recognized by the Counsel for Children[178], and the American Council of Chief Defenders & National Juvenile Defender Center.[179] The critical role attorneys play in representing youth once placed in facilities also was addressed in the 2012 Department of Justice report Defending Childhood. This important publication reveals the level of trauma most children in the juvenile justice system have experienced and the report recognizes the critical role of juvenile defenders and post-disposition representation in ensuring trauma informed care. As stated in Defending Childhood*:*

> One of the most vital roles of counsel is to protect

175. *See* TEN CORE PRINCIPLES, *supra* note 24. (urging juvenile defense attorneys to "provide independent post-conviction monitoring of each child's treatment, placement or program to ensure that rehabilitative needs are met" and if their needs are not, to "interven[e] and advoca[te] before the appropriate authority"); IJA-ABA, *supra* note 90, at 15.

176. *See* Nat'l Council of Juvenile and Family Court Judges, *supra* note 90.

177. The guidelines go into great detail regarding the importance of post-disposition review whether the child is at home or in an out of home placement.

178. NAT'L ASS'N OF COUNS. FOR CHILD., NACC POLICY AGENDA: JUVENILE JUSTICE POLICY, www.naccchildlaw.org/ policy/policy_agenda.html (last visited Jan. 15, 2015) (recommending that juveniles accused of offenses should be represented by competent counsel in all court proceedings, including post-disposition proceedings).

179. *See* TEN CORE PRINCIPLES, *supra* note 24.

> children against unjustified placement and incarceration and to guard against abuses within facilities . . . . The presence of counsel could help ensure successful placements and aftercare programming. When exposure to violence is discovered, defense counsel would have the ability to file legal motions to stop abuse and to remove the child from the facility where it is occurring. Children who do not have these protections have no recourse when they are mistreated in facilities where they are cut off from their families and other caring adults.[180]

In 2013 National Juvenile Defense Standards were released, making the post-disposition role of counsel crystal clear.[181] Part VII: Role of Juvenile Defense Counsel After Disposition has the following seven categories of duties for juvenile defenders. Standard 7.1 describes maintaining regular contact with client following disposition; standards 7.2 through 7.4 describe counsel's duty regarding appellate rights and obligations to the appellate attorney;[182] standard 7.5 specifically describes how to represent a client post-disposition; standard 7.6 involves the sealing and expunging of records; and standard 7.7 describes representation at probation and parole review and violation hearings.[183] These standards detail the many responsibilities of juvenile defenders once the child leaves the courtroom.

In the following section, we set forth each standard, identify key roles and responsibilities of juvenile defenders and then cite to specific juvenile defense organizations across the country that are successfully meeting the identified aspect of post-

180. Listenbee et al., *supra* note 38 at 187.

181. STANDARDS, *supra* note 21.

182. Note, while extremely important, this article will not address the appellate duties of juvenile defenders. Appellate practice is a very specialized area of law. The National Juvenile Defense Standards delineate general requirements. *See* NAT'L JUVENILE DEFENDER CTR., APPEALS: A CRITICAL CHECK ON THE JUVENILE DELINQUENCY SYSTEM (2014), http://njdc.info/wp-content/uploads/2014/10/Appeals-HR-10.4.14.pdf.

183. STANDARDS, *supra* note 21, at 119-30.

disposition representation.

1. National Juvenile Defense Standards 7.1 and 7.5: Overarching Duty to Monitor Youth Post-Disposition and Address Issues that Arise

> 7.1 Maintain Regular Contact with Client Following Disposition
>
> "Counsel should stay in contact with the client and continue representing him or her while under court or agency jurisdiction. Counsel must reassure the client that counsel will continue to advocate on the client's behalf regarding post-disposition hearings, conditions of confinement, and other legal issues. Continued contact is especially important when the client is incarcerated."[184]

184. *Id.* at 122.

7.5 Represent the Client Post-Disposition

Counsel must represent the client after disposition, including at post-disposition hearings.

a. Counsel should be versed in relevant case law, statutes, court rules, and administrative procedures regarding the enforcement of disposition orders, as well as the methods of filing motions for post-disposition and post-adjudicatory relief, for excusal from registration requirements, and/or to review, reopen, or modify adjudicative and disposition orders;

b. Counsel has a duty to independently collect information on the client's progress and monitor whether service providers and/or facilities are adhering to the terms of the disposition order;

c. If it is in line with the client's expressed wishes, counsel must advocate for the client to receive the services contemplated by the court and affirmatively raise the need for modification of previous court orders. Counsel must ensure that the state is meeting its obligation to provide access to social, medical, and psychological services.

d. For clients whose circumstances have changed; clients whose health, safety, and welfare is at risk; or clients not receiving services as directed by the court, counsel must file motions for early discharge or dismissal of probation or commitment, early release from detention, or modification

	of the court order; and
e.	Where commitment authorities have discretion over whether to extend detention or commitment, counsel must advocate against such extensions, if that is in line with the client's wishes.[185]

The above two standards identify the role and responsibilities of juvenile defenders once their young client has been given a disposition. Standard 7.1 creates the overarching duty to maintain contact and to continue to represent. This is likely the most critical aspect of all the post-disposition standards. If a defender does not make it a priority to maintain contact, without court ordered mandatory review hearings, it is unlikely the lawyer will be aware that any issues exist. As stated above, a juvenile facility has enormous power over a young person's life and frequently youth are placed far from home and have little access to family. A critical starting point is for an attorney to maintain contact to assess the conditions and progress of a client.

Several specific subsets of duties are defined in these standards as well. For example, a defender must specifically monitor the safety, education and mental health needs of clients. The goal of the juvenile court system is rehabilitation and the judge created a disposition to achieve certain rehabilitative goals. It is the duty of the lawyer to ensure that the goals of the disposition are met. The standards also discuss the duty to assist in the administrative and disciplinary hearings of confined youth and advocate for their early release. Finally, if a youth is placed out of home, a successful re-entry plan is an important component of post-disposition representation.

185. *Id.* at 124-25.

a. Post-Disposition Monitoring: Outstanding Defense Practices

i. Maryland Office of the Public Defender: Juvenile Protection Division

In January 2007, the statewide office of the Maryland Public Defender created the Juvenile Protection Division, a specialized statewide division, to monitor the conditions of confinement of all juvenile clients committed to the care and custody of the Department of Juvenile Services (DJS). The Juvenile Protection Division protects the individual rights of juveniles who are committed to DJS facilities, ensures the safety and appropriateness of their placements and the timely implementation of juvenile court orders. Maryland's JPD is comprised of three attorneys, one social worker, and one paralegal, who work collaboratively with the trial attorneys.[186]

In Maryland, children are not entitled to mandatory review hearings, however, every thirty days, lawyers are required to visit with youth in facilities.[187] After lawyers visit with clients in facilities, they bring any issues back before the juvenile court judge. The judge can then modify a disposition or allow early release. The constant contact between the clients, lawyers and court results in a balanced, transparent system that promotes accountability.

ii. Defender Association of Philadelphia: Juvenile Unit

The Pennsylvania juvenile code requires mandatory six-month review hearings. These review hearings are extraordinarily beneficial, for child and for the entire system, serving as an accountability tool to ensure program

186. *Juvenile Protection Division*, MD. OFFICE OF PUB. DEFENDER, http://www.opd.state.md.us/Divisions/JuvenileProtection.aspx (last visited Jan. 13, 2015).

187. Md. Code Ann., Cts & Jud. Proc. § 3-8A-24(b).

effectiveness.[188] It is only through post-dispositional review hearings that important issues relating to juvenile treatment come to light such as which programs had a frequent turnover of staff; which programs were quick to negatively discharge a child they had originally accepted; and which programs routinely denied children medical attention, lacked a grievance procedure, or insisted that staff read all incoming and outgoing mail.

In order to take advantage of the mandatory review hearings, the Defender Association Juvenile Unit created a tele-conference program for youth in placement. Despite geographical separation, Defender Association lawyers and social workers monitor the treatment of clients placed in out-of-home facilities. According to the 2003 Pennsylvania Assessment:

> The Philadelphia Department of Human Services, the county's children and youth agency, pays the Defender Association $50,000 per year for Juvenile Unit attorneys and social workers to visit and counsel clients in secure private and public placements four to six times a year throughout Pennsylvania—and in Virginia and Texas. Defenders use disposition review hearings as opportunities to bring numerous matters to the attention of juvenile court, including: grounds for release from confinement; evidence that clients are not

188. *See* 42 PA. CONS. STAT. ANN. § 6353 (West 2000). The statute states, in relevant part:

No child shall initially be committed to an institution for a period longer than four years or a period longer than he could have been sentenced by the court if he had been convicted of the same offense as an adult, whichever is less. The initial commitment may be extended for a similar period of time, or modified, if the court finds after hearing that the extension or modification will effectuate the original purpose for which the order was entered. The child shall have notice of the extension or modification hearing and shall be given an opportunity to be heard. The committing court shall review each commitment every six months and shall hold a disposition review hearing at least every nine months.

*Id.*at § 6353(a).

> receiving services such as drug treatment or special education; information that clients are in jeopardy due to lack of security or other dangerous conditions in placements; changes in home conditions; and, openings in community-based programs. On several occasions the Defender Association has successfully filed *habeas* petitions challenging dangerous conditions on behalf of classes of juvenile clients in placements inside and outside of Pennsylvania.[189]

iii. New York Legal Aid Society Juvenile Rights Practice

In the summer of 2014, the New York Legal Aid Juvenile Rights Practice initiated a post-disposition client representation project. The project began on the heels of the successful Closer to the Home reforms that brought New York City committed youth facilities closer to the city. The Juvenile Rights Practice established "post-disposition attorney practice expectations" to delineate attorney duties to clients who are in facilities as well as to clients who are on probation. The "expectations" include visitation timeframes for attorneys to see clients who are placed outside their home and a model interview form to ensure the attorneys inquire about health, education, and facility conditions. The "expectations" also specify post-disposition court and educational advocacy to be provided on behalf of clients as well monitoring and assisting with overall client success.

b. Assisting Confined Youth with Administrative & Disciplinary Hearings

The comment to standard 7.5 explicitly articulates the

189. Am. Bar Assoc. Juvenile Justice Ctr. & Juvenile Law Ctr., Pennsylvania: An Assessment of Access to Counsel and Quality Representation in Delinquency Proceedings 64-65 (2003), http://njdc.info/wp-content/uploads/2013/11/Final-Pennsylvania-Assessment-Report.pdf.

duty to assist with institutional disciplinary hearings.[190] In many juvenile facilities a grievance procedure exists. Youth must first file a grievance and "exhaust administrative remedies" before they have access to court. Given the well-established research regarding adolescent development it is often challenging for youth to navigate the administrative process. In addition to filing grievances, confined youth face disciplinary hearings that can impact their length of stay and the conditions of their stay. In New Jersey, there are numerous complex administrative regulations which govern disciplinary hearings for youth.[191] In New Jersey, a disciplinary violation can result in adjustments by the parole board and placement in solitary confinement. The following two offices have attempted to address these issues by having lawyers placed *inside* the facilities to assist youth.

i. The Public Defender Service for the District of Columbia: Juvenile Services Program

This program was established to provide advocacy and monitoring for Washington D.C's incarcerated youth. This program is staffed by two full-time attorneys and a group of law clerks and is housed in secure youth facilities. They work to "ensure that the due process rights of detained and incarcerated youth are protected at disciplinary hearing and other administrative proceedings; help youth understand and navigate the juvenile delinquency process and the internal workings of facilities; facilitate communication between youth and their families, case workers and attorneys."[192] In addition, this program assists with re-entry planning.

ii. Ohio Office of the Public Defender: JP v. Taft

190. STANDARDS, *supra* note 21, at 125-26.

191. *See* N.J. ADMIN. CODE §§ 13:101-6.1—6.24 (West 2015).

192. 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.

As a result of litigation, in 2007 a case was settled that alleged juvenile clients were not receiving access to courts. Part of the settlement provided that attorneys would be housed in the facilities. The attorneys provide legal assistance to youth who were committed to the Ohio Department of Youth Services. Legal assistance includes helping youth navigate the internal workings of the facilities, monitor the conditions of the facility and making sure youth maintain contact with family.

c. Advocating for Early Release

As attorneys for children know, the first question a child will ask once she is placed is, "how long do I have to be there?" The answer to that question is frequently, "it depends." The length of time will depend on a number of factors, including whether or not there are review hearings, or a parole system and whether or not a juvenile court retains jurisdiction over the case once a child is placed. Regardless of the state's juvenile system, assisting a child with release from the facility is a critical function of defense counsel. Lengthy periods in treatment facilities do not yield positive outcomes for youth.[193] Lengthy periods of incarceration are also extremely expensive. As noted in *Sticker Shock,* Justice Policy Institute reports that thirty three states spend $100,000 or more annually to incarcerate a young person, and this incarceration leads to outcomes that result in even greater costs.[194] Many states spend well over $100,000 per year per child. For example, in New Jersey, it costs $196,133 per year to incarcerate one youth at the Juvenile Justice Commission secure facility in Jamesburg.[195]

193. Justice Policy Inst., The Costs of Confinement: Why Good Juvenile Justice Policies Make Good Fiscal Sense 1 (2009), http://www.justicepolicy.org/images/upload/09_05_rep_costsofconfinement_jj_ps.pdf.

194. STICKER SHOCK, *supra* note 29, at 12.

195. *Id.* at 11, 46.

i. Louisiana Center for Children's Rights: Second Chances Project[196]

In Louisiana, youth in custody are committed to the state's Office of Juvenile Justice (OJJ), but there is no executive-branch or administrative mechanism for early release – that is, no administrative parole system.[197] Instead, trial judges retain jurisdiction over committed youth. Those judges have the power to modify a child's disposition, granting early release and even closing cases early.[198] In Louisiana, the only way for an imprisoned child to gain early release is through litigation before the sentencing judge – and in most instances, that litigation cannot happen without counsel.[199] Children in

196. *Second Chances Project*, LA. CENTER FOR CHILD. RTS., http://www.laccr.org/what-we-do/defending-children/second-chances-project/ (last visited Jan. 13, 2015).

197. It appears that twenty two states and the District of Columbia have adopted some form of administrative parole system for imprisoned juveniles. *See, e.g.*, N.J. STAT. ANN. § 30:4-123.48 (West 2015); *see also New Jersey State Parole Board: Juvenile Unit*, STATE OF N.J., http://www.state.nj.us/parole/juvenile.html (last visited Jan. 15, 2015).

198. *See* LSA-CH.C. ART. 909 *et seq*. (modification jurisdiction); LSA-CH.C. ART. 897.1 (requiring non-modifiable sentences for youth who are at least 14 years old and who are adjudicated delinquent for murder, aggravated rape, aggravated kidnapping, and armed robbery). A Louisiana's judge's power to modify dispositions is broader than the power granted to judges in some other states where post-disposition representation has been enshrined as a constitutional imperative. In Tennessee, for example, the 6th Circuit Federal Court of Appeals has declared that children are entitled to lawyers to represent them for certain purposes after they have been sentenced. *See* John L.,969 F.2d 228. But incarcerated children in Louisiana stand to gain even more from post-disposition representation because in Tennessee sentences of commitment are not reviewable. TN. R. JUV. P. R. 34.

199. Louisiana's Office of Juvenile Justice (OJJ) can move for early release before the sentencing judge, but that is no substitute for the effective assistance of engaged counsel. OJJ only makes motions to release based on certain limited criteria that are far narrower than the breadth of discretion that the judge has to grant early release. Of the 13 St. Tammany and Jefferson Parish youth for whom LCCR won early release in the first seven months of 2014–all of whom were in prison for at least 5 months before LCCR took their cases pro bono, and all of whom were without counsel for that entire period–OJJ had moved to release only two youth prior to LCCR's enrolling as counsel. Those boilerplate motions–which are usually about 2

custody are often held hundreds of miles from home. Since these youth do not have access to counsel, more than half of all imprisoned youth in Louisiana serve out their full terms.[200]

In the fall of 2013, the Louisiana Center for Children's Rights (LCCR) began accepting clients into its Second Chances Project. The small, privately-funded pilot project responds to the crisis in post-disposition representation by enrolling counsel for youth from the parishes of Jefferson, St. Tammany, and Washington – in the greater New Orleans metropolitan area – who are serving time in secure custody. Lawyers file motions in court demonstrating that the youth has met his rehabilitation goals and outlining a viable re-entry plan. These motions for early release save the state hundreds of thousands of dollars.

ii. Office of the Ohio Public Defender: Juvenile Division

The Juvenile Division of the Ohio Public Defender continues to represent youth post- disposition after they have been

pages in length, are not backed by exhibits, do not demonstrate any independent investigation or collateral interviewing, and do not articulate reentry plans–were denied without a hearing. Moreover relying on OJJ to regulate itself by determining when children should have their sentences modified sets up an inherent conflict of interest wherein OJJ would have to report its own failures to provide proper services, challenge the credibility and capability of its own employees, and make motions to modify for reasons outside of the limited criteria which it has deemed appropriate for such motions.

200. *See* Inst. for Pub. Health & Justice, Sustaining Juvenile Justice Reform: A Report to the Louisiana Juvenile Justice Implementation Commission 92 (2013), http://sph.lsuhsc.edu/Websites/lsupublichealth/images/pdf/iphj/Report_FINAL_11February2013.pdf. It is perhaps relevant to note, as the vignettes at the beginning of this letter suggested, that half of the children in Louisiana's secure custody facilities were adjudicated delinquent for nonviolent offenses. *See* Families & Friends of La.'s Incarcerated Children & Juvenile Justice Project of La., What's Really Up, Doc? A Call for Reform of the Office of Juvenile Justice34 (2012), http://www.fflic.org/wp-content/uploads/2012/05/Whats-Really-Up-Doc.pdf. In one large jurisdiction where LCCR practices, 69.5% of youth in secure custody were adjudicated of neither a crime of violence nor a crime involving the use or possession of a firearm.

committed to the Ohio Division of Youth Services. One of the functions of post-disposition representation is to advocate for early release. As a result of the *Ohio Assessment of Quality of Delinquency Counsel*,[201] the Ohio legislature codified a youth's right to counsel post-disposition to ensure that youth have reasonable access to counsel if placed in an Ohio juvenile facility. [202]

d. Assisting with Re-Entry

Youth face many challenges when they attempt to re-enter the community after being placed in a juvenile facility. Depending of the length of the commitment, community ties and relationships may be completely severed and the child may have difficulty finding his way back into a conventional life. Access to housing is a common problem, particularly for children who come from the dependent system and may not have family. As a juvenile ages, housing opportunities within the delinquent and dependent system decrease. Without family, juveniles who have been released from facilities may have no other option than to take refuge in a shelter. Re-enrollment and the transfer of educational credits is also a common re-entry issue. Schools may want to avoid enrolling youth who have been incarcerated.[203] And even if they are re-enrolled, if curriculums don't match, youth may face extra years in school in order to graduate. Below are two jurisdictions taking on re-entry challenges.

201. Am. Bar Ass'n & Central Juvenile Defender Ctr., Justice Cut Short: An Assessment of Access to Counsel and Quality Representation in Delinquency Proceedings in Ohio (Kim Brooks & Darlene Kamine eds., 2003), http://njdc.info/wp-content/uploads/2013/11/Final-Ohio-Assessment-Report.pdf.

202. *See* OHIO REV. CODE ANN. §§ 120.06(A)(5), (G)-(I) (West 2014).

203. *See, e.g.*, Lynda Cohen, *Atlantic City Native, Rutgers Law Grad to Help Juvenile Offenders Return to Classroom*, Press of Atlantic City (Mar. 13, 2013), http://www.pressofatlanticcity.com/communities/atlantic-city_pleasantville_brigantine/atlantic-city-native-rutgers-law-grad-to-help-juvenile-offenders/article_b545fbdc-8b76-11e2-a6f8-0019bb2963f4.html.

i. San Francisco Juvenile Re-entry Court[204]

The San Francisco Juvenile Re-Entry court is collaboration between many organizations including juvenile court, juvenile probation, the public defender and the Center on Juvenile and Criminal Justice. In addition to these organizations, the youth and their family are valued members of the collaboration. The goal of this collaboration is provide comprehensive case planning to assist youth as they return from out-of-home placements. Re-Entry court works through a "Juvenile Collaborative Reentry Team" (JCRT). JCRT has developed a wide range of community partnerships with educational programs and employment programs to facilitate successful re-entry.

ii. Louisiana Center for Children's Rights Reentry Project

Louisiana Center for Children's Rights (LCCR) uses a cross disciplinary focus and the expertise of a social worker to assist youth in returning to the community. The social worker performs a "comprehensive psychosocial assessment prior to the youth's release that enables the advocacy team to craft a detailed, individualized reintegration plan addressing the following domains: housing, family, and benefits; educational and vocational opportunity; mental and physical health; supportive adults; and civic engagement and structured activities."[205]

e. Removing Youth from Sex Offender Registries

The lifetime ramifications of sex offender registration were well documented in 2013 report, "Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender

204. *Juvenile Reentry Court*, THE SUPERIOR COURT OF CAL. CNTY OF S.F., http://www.sfsuperiorcourt.org/divisions/collaborative/jrc (last visited Jan. 16, 2015).

205. Nat'l Juvenile Defender Ctr., *supra* note 192, at 2.

Registries in the US." [206] According to the report, sex offender registration laws can apply for decades or even a lifetime and are layered on top of time in prison or juvenile detention. The registries require placing offenders' personal information online, which can lead to harassment, humiliation, and even violence.

i. Philadelphia's Specialized Juvenile Sex Offender Attorney

One defender organization, the Philadelphia Defender Association Juvenile Unit, has created a specialized subunit within the juvenile unit to specialize in juvenile sex offenses. This juvenile sex offender specialist works to prevent youth from being put in the registry.

ii. Project off the Record: Northwestern Children and Family Justice Center

This project, founded in 2009, helps to get youth off registries and terminate their requirement to register as a juvenile sex offender. The Children and Family Justice Center lawyers and students have represented over twenty five youth and have also developed a manual and sample pleadings to assist other pro bono advocates. [207]

f. Addressing Harmful Conditions of Confinement

This section will focus on the array of responses juvenile defenders, as individuals and as an office, can use to address harmful condition of confinement. Beginning with the sexiest approach, supporting federal and class actions litigation, this

206. Human Rights Watch, Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US (2013), http://www.hrw.org/reports/2013/05/01/raised-registry-0.

207. *Project Off the Record,* BLUHM LEGAL CLINIC, CHILDREN AND FAMILY JUSTICE CTR, NORTHWESTERN LAW, http://www.law.northwestern.edu/legalclinic/cfjc/projects/offrecord/index.html (last visited Jan. 15, 2015).

section will then move through varied options that have been employed across the country providing examples of successful juvenile defense outcomes.

i. Lawsuits and DOJ Investigations: Juvenile Defenders Contribute Critical Client Stories

When defenders visit youth in facilities they get a front row seat to the conditions that their clients experience. Once an attorney arrives from the outside and hears the stories first hand, the lawyer is in an extraordinary position to address harmful conditions. It is the stories, from individual clients, that form the foundation of damning reports[208] and lawsuits. Client stories told to defenders has resulted in lawsuits or Department of Justice investigations in Hawaii, New Jersey, Ohio, and New York.

In Hawaii, the 2006 ground breaking case of *R.G. v. Koller* was the result of petitions for writ of habeas corpus filed by a youth's public defender. *R.G.* exposed the harmful conditions suffered by LGBT youth at a secure detention facility. Three youth filed a lawsuit in federal district court challenging the failure of detention center staff to protect the youth from physical, emotional, and sexual abuse by other youth.[209] The court found that the youths' rights were violated.

208. Reports from girls in New York lead to publications by the ACLU and Human Rights watch. Eventually leading to a Department of Justice Investigation. Nicholas Confessore, *4 Youth Prisons in New York Used Excessive Force*, N.Y. TIMES, Aug. 24, 2009, http://www.nytimes.com/2009/08/25/nyregion/25juvenile.html?_r=0.

209. In this case, three teen residents, a gay girl, a boy perceived to be gay, and a transgender girl, testified to the routine practice of staff and other residents verbally abusing children who were perceived as LGBT. Again, the supervisors of the Hawaii Youth Correctional Facility were aware and did nothing to prevent the behavior. When the staff did document incidents, disciplinary measures were either non-existent or were ineffective in stopping further harassment of these teens. The remedy chosen by the Hawaii Youth Correctional Facility was isolation of the victimized teens. While in isolation, the children were prevented from making phone calls or writing letters. They were allowed one hour of solo recreation and one

Specifically, the court found that Hawaii Youth Correctional Facility (1) failed to protect the plaintiffs from physical and psychological abuse, (2) used isolation as a means to protect LGBT youth from abuse, (3) failed to provide policies and training necessary to protect LGBT youth, (4) did not have adequate staffing and supervision or a functioning grievance system, and (5) failed to use a classification system that protects vulnerable youth.[210]

In Ohio, based on reports of abuse made by public defenders, a federal class action lawsuit was filed in 2004 on behalf of girls at the Scioto Juvenile Correctional Facility.[211] The suit alleged system-wide failure regarding conditions of confinement that endangered youth's health, safety, and well-being and denied them due process. The lawsuit was expanded in 2007 to include all facilities operated by or under contract with the Ohio Department of Youth Services. State and youth attorneys worked collectively to create a comprehensive settlement that was approved by the court in May 2008.[212]

In New York, attorneys for youth received complaints about abuse in girls facilities. Attorneys relayed the complaints to various allies which resulted in a report by Human Rights Watch and the ACLU, *Custody and Control: Conditions of Confinement in New York Juvenile Prisons for Girls*[213]. These reports were followed by an investigation by the Department of Justice and a settlement agreement between the State of New

shower per day.

210. R.G. v. Koller, 415 F. Supp. 2d 1129 (D. Haw. 2006); *see also* Katayoon Majd, *Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts*, EQUITY PROJECT 101 (2013), http://www.equityproject.org/wp-content/uploads/2014/08/hidden_injustice.pdf.

211. S.H. v. Stickrath, 251 F.R.D. 293 (S.D. Ohio 2008); *S.H. v. Stickrath, Case No. 2:04-cv-1206 (S.D. Ohio)*, CHILDREN'S LAW CENTER, INC. (June 12, 2013), http://www.childrenslawky.org/s-h-v-stickrath-case-no-204-cv-1206-s-d-ohio/.

212. Id.

213. Human Rights Watch, Custody and Control: Conditions of Confinement in New York's Juvenile Prisons for Girls (2006), http://www.hrw.org/reports/2006/09/24/custody-and-control.

York and the United States.[214] It was the detailed reports that began with defenders listening to clients that resulted in significant reform efforts across the state.[215]

In New Jersey, a random interview with one client led to a federal conditions lawsuit over the issue of isolation. In 2008 a sixteen year old named Troy D. revealed to an attorney that he had been in isolation for over six months.[216] Denied education, exercise, and mental health treatment he was kept locked in a 7 X 7 cell despite his deteriorating mental health.

214. Joint Motion to Enter Settlement Agreement, United States v. New York, No. 1:10-cv-00858-FJS-DRH, 2010 WL 10900167 (N.D.N.Y.), http://www.justice.gov/crt/about/spl/documents/nyjuv_complaint_7-14-10.pdf.

215. The report documents that Lansing and Tryon staff frequently restrain girls violently, seizing them from behind and pushing them to the floor, then pulling their arms up behind them to hold or handcuff. Although such a restraint procedure may be appropriate in an emergency, the indications are that the staff sometimes use it to punish girls for minor acts such as improperly making their beds or not raising their hands before speaking. Using such violent restraints for minor infractions constitutes a disproportionate and excessive use of force. Girls who have been restrained typically end up with "rug burns"–abrasions on their faces–as well as cuts, bruises, and in rare cases a concussion or a broken limb. HUMAN RIGHTS WATCH , U.S.: GIRLS ABUSED IN NEW YORK'S JUVENILE PRISONS, (2006), http://www.hrw.org/news/2006/09/24/us-girls-abused-new-york-s-juvenile-prisons. Incarcerated girls may also be at risk of sexual abuse. Human Rights Watch and the ACLU documented three cases in the past five years of staff having intercourse with their wards. The report also reveals that staff have touched girls in sexual ways and made sexual comments to them. Staff members at Tryon and Lansing have also humiliated girls by publicly commenting on their past sexual history, sexual abuse, or infection with sexually transmitted diseases. Human Rights Watch and the ACLU are also concerned by the practice of staff handcuffing and shackling the girls at Tryon and Lansing every time they leave the facilities, a clear violation of OCFS's own regulations. Girls are frequently and unnecessarily subjected to strip searches, verbal abuse and threats as well.

216. Star-Ledger Editorial Board, *State Should Ban Solitary Confinement for Juvenile Offenders*, NJ.COM (July 18, 2013), http://www.nj.com/politics/index.ssf/2014/01/400k_awarded_to_settle_lawsuit_over_solitary_confinement_of_2_nj_boys.html; *see also* Ryan Hutchins, *$400K Awarded to Settle Lawsuit over Solitary Confinement of 2 N.J. Boys*, NJ. (Jan. 3, 2014), http://blog.nj.com/njv_editorial_page/2013/07/state_should_ban_solitary_conf.html.

Notwithstanding the egregious conditions Troy experienced, it was all perfectly legal under the existing regulations of the state's juvenile justice agency. The lawsuit resulted not only in a settlement, but also the creation of an advocates group that has continued to pressure New Jersey to eliminate the use of punitive isolation for juveniles.

ii. Beyond Lawsuits: Defender Advocacy on Behalf of Incarcerated Youth.

Supporting litigation by providing stories from clients in facilities is only one way in which juvenile defenders can address conditions of confinement. There are many ways in which a juvenile defender can have a powerful impact on conditions.

Motions: Filing a motion to modify the disposition or to get the child released is an option available to every defender. For example in the Troy D. case mentioned above, before the lawsuit was filed, the attorney immediately filed a motion to remove Troy from secure confinement and into an appropriate psychiatric facility. Since the goal of juvenile court is rehabilitation, if there are conditions that are harmful to rehabilitation (e.g. the child is getting beat up, or a medical condition is not being addressed) an attorney can bring this issue to the attention of the committing judge.[217] Another example of this strategy occurred in Pennsylvania when clients had reported to their lawyers that they were being held in long term restraints. The Juvenile Unit of the Defender Association of Philadelphia filed motions on behalf of *all children* held in the secure facility in front of the supervising judge of juvenile court. After two days of hearings the judge found that there was credible evidence of abuse and removed all Philadelphia children from the facility.[218] Given the strong relationships

217. Note, in some jurisdictions, juvenile court judges may not be able to intervene despite substantial evidence of abuse. *Ex.rel.* O.S., No. a-5366-09T1, 2011 N.J. Super. Unpub. LEXIS 955.

218. *See also* Doron Taussig, *Restraining Disorder*, PHILADELPHIA CITYPAPER (May 19, 2005), http://www.citypaper.net/articles/2005-05-

many juvenile defenders have with judges, sometimes a motion will not be necessary. If a defender hears of abuse and reports it to the juvenile court judge informally, the judge may investigate herself using probation officers and make a determination that the facility is unsafe. This strategy is particularly effective when judges have control over where a child is placed.

Working with Prosecutors and Media: Juvenile prosecutors have a duty to justice and to enforce the law. If a child has been harmed by someone in a facility, consider asking the prosecutor to investigate and potentially file charges. This was a successful strategy in Montgomery County, Pennsylvania; when a juvenile defender reached out to the local prosecutor after a sixteen year old girl was coerced into having sex with the guard of the facility.[219]

If the evidence is strong and there is a particularly bad incident or many children complain of abuse, the media can be an effective tool to create systemic change. In Pennsylvania and New Jersey, juvenile defenders worked with the media to get out stories of harmful conditions.

Rulemaking Petitions: An Avenue to Change Harmful Regulations: If there are regulations that create harmful conditions to youth, consider filing a rule making petition. Under the Administrative Procedures Act, proposed rule changes must be submitted and then be commented on. This was done in New Jersey to challenge the use of solitary confinement for punitive purposes.

Finding Allies: Creating an Advocates Group to Address Harmful Conditions: The challenges faced by individual juvenile defenders are well documented. Given the high

19/cover.shtml; Jacqueline Soteropoulos & Mark Fazlollah, *At Youth Facility, Restraints Turn Fatal*, PHILADELPHIA INQUIRER (Apr. 24, 2005), http://articles.philly.com/2005-04-24/news/25426143_1_physical-restraints-time-juveniles-detention.

219. Authors used this strategy while working at the Defender Association of Philadelphia. Unfortunately, there is evidence of little prosecution of facility staff, and even when there is, the punishment is generally light. *See* BERNSTEIN, *supra* note 41, section on abuse with "impunity."

volume of cases and lack of resources, many defenders will not have time to address conditions alone. However, in every state there are potential allies that could be gathered to address these issues, including law schools, public advocate offices, child welfare organizations, parents' organizations, the ACLU, NAACP, and large law firms with a strong commitment to public interest. In states where there is a state-wide public defender system, the chief defender may have tremendous relationships and connections to those in positions of power. Ideally, the leadership of the state's public defender system will support systemic reform and support the individual defender attempting to address conditions issues.

Such a group was formed in New Jersey. The New Jersey Juvenile Justice Reform Coalition grew out of the work that our clinics, the Rutgers-Camden Children's Justice Clinic and the Rutgers-Newark Criminal and Youth Justice Clinic, have undertaken on behalf of individual youth incarcerated in JJC facilities. The coalition includes the pro bono center of one of the State's most influential law firms, the ACLU of New Jersey, the New Jersey Institute of Social Justice, and a number of well-established and grassroots advocacy and parents' organizations. In the two years since it was formed, the coalition has, as discussed above, filed a petition for rulemaking to prohibit punitive solitary confinement; submitted draft comments opposing proposed regulations governing the administrative transfers of youth from juvenile to adult facilities; filed a judicial appeal of those regulations; worked with legislative staff on a comprehensive juvenile justice reform bill; and raised public and legislative awareness of juvenile justice issues.

2. Miscellaneous: Simple Ways an Individual Defender Can Address Conditions Issues

Finally, there are many other ways an individual juvenile defender can address harmful conditions. Sue Burrell, from the Youth Law center in California, has developed the following tips. Different strategies can be used depending on the

seriousness of the situation.[220] With each of these strategies, defenders must *always make sure to discuss the plan with the child and make sure he or she wants to proceed*:

a. Make a Phone Call to the Facility Administrator. Using the telephone is a good strategy when there is something specific you want to accomplish, such as getting the facility to take your client to a doctor, or arrange a personal visit with someone not on the visiting list. Keep a record of the person(s) you speak with, the date and what was said. Also ask for a return phone call or written response when any requested action is carried out.

b. Send a Fax to the Facility Administrator. If the request is one with some urgency, such as a situation where you need to have a mental health clinician check into a child's mental health status, you may want to fax a written request asking the administrator to investigate and take prompt appropriate action to address the situation. Faxing has the added advantage of giving you a written record of the request. Keep copies of the successful fax. You could also use e-mail, but because administrators get a huge number of e-mails, faxes stand out better as communications calling for a response.

c. Contact the Ombudsperson or Grievance Coordinator. If the request has to do with some sort of relationship issue (for example, trouble with a particular staff

220. Sue Burrell, Esq., Youth Law Center, Workshop: Solving Conditions of Confinement Problems for Youth in the Delinquency System: Self-Help for the Practitioners at the Beyond the Bench XIX conference (Dec. 11, 2007).

member) or incident in the facility, you may want to call the Ombudsperson, or if there isn't one, contact the grievance coordinator for advice.

d. Notify the Licensing or Regulatory Agency. If the facility or placement is licensed, or there is a regulatory agency, there may be a complaint process for investigation and action in individual cases. For example, group homes in California are licensed by the California Department of Social Services. Children may file complaints through the Foster Care Ombudsman (http://www.dss.cahwnet.gov/pdf/pub37 9.pdf), and any person may file complaints directly with the agency. Typically, state law requires investigation and response in a specified period of time, and complaints are retained in the licensing file.

e. Make a Child Abuse Report. Most states have provisions for the filing of complaints in relation to physical or sexual abuse of children, and this includes abuse by staff in facilities or law enforcement officers. These reports may be confidentially filed, and the child welfare agency in the jurisdiction must respond to them.

f. Involve Specialty Advocates for Assistance. A disproportionate number of youth in juvenile justice have disabilities qualifying them for special education services, or calling for services for developmental disabilities or mental health conditions. Accordingly, in the individual cases where you need help, contact your

local Protection and Advocacy (P & A) office, or other agencies that provide educational, developmental disabilities and mental health advocacy services.

g. Contact the Civil Rights Division of the U.S. Department of Justice. The Civil Rights of Institutionalized Persons Act (CRIPA) gives the Civil Rights Division of the U.S. Department of Justice (DOJ) power to bring action against the state if civil rights are violated in publicly operated facilities. If information is received that indicates abuse, contact the Special Litigation Section, Civil Rights Division, U.S. Department of Justice, http://www.ojjdp.gov/pubs/walls/sect-01.html

3. Addressing Education Issues

Educational failure, including multiple suspensions, expulsions, and being sent to alternative schools, is a common pathway bringing young people into the juvenile justice system. Unfortunately, the quality of education in juvenile facilities is inconsistent. While in some juvenile detention centers the educational system is excellent, for example the Maya Angelou School in Washington D.C's detention center, and youth are able to get individualized attention from caring staff and begin to engage after years of educational failure, that is often not the case. In addition to the challenges youth face in obtaining adequate education in juvenile facilities, there are numerous educational issues that arise after a youth is released from a facility and attempts to re-enroll in public school.[221]

221. Geis, *supra* note 103; Ronald D. Stephens & June Lane Arnette, *From the Courthouse to the Schoolhouse: Making Successful Transitions*, U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention (2000) ,https://www.ncjrs.gov/pdffiles1/ojjdp/178900.pdf.

Understanding education law is daunting for many juvenile defenders and creating alliances can decrease the burden on individual defenders. For example, defenders can work with the state's Public Advocate, law school clinics, education law centers, and lawyers who specialize in education law. Like the conditions list above, there are many ways in which defenders can address education issues, from writing letters and filing motions in juvenile court to filing lawsuits.

a. Using Special Education Laws for Youth in Adult and Juvenile Facilities

Federal special education rights under the Americans with Disabilities Act are a valuable tool for juvenile defenders. Special Education rights extend until the juvenile is twenty one, and can therefore be used even if the client is sent to an adult facility. Filing a Federal special education due process complaint can be a powerful additional tool in post-disposition advocacy**.**

Compensatory Education for Time Spent in Isolation: In the New Jersey case of Troy.D., the boy who spent six and one half months in solitary, it was clear that the juvenile facility had violated many of his educational rights. According to special education law, Troy was entitled to receive educational services consistent with his individualized education plan (IEP). This IEP should be followed and updated regularly and applies regardless of the custodial setting. Because Troy came from the dependent court system and was a ward of the state, his child advocate from the dependent court system or his juvenile defender from the adjudicatory hearing level could have enforced his educational rights had either of them provided post-dispositional advocacy. Even though that did not happen, a compensatory education claim was part of the federal lawsuit demanding compensatory education funding and services for all the time he missed while being held in isolation.[222]

222. Juvenile Law Center Negotiates Final Settlement of Civil Rights Lawsuit Challenging Solitary Confinement of 2 Boys in Custody in NJ

Enforcing Special Education Rights for Youth in Adult Custody: In New Jersey, a 2014 case demonstrates how special education rights can be enforced even after a juvenile was transferred to adult custody. In the case of *State in the Interest of J.J.*, a juvenile, J.J., was sentenced to four years at a juvenile facility when he was seventeen. However, twelve months into his disposition J.J. was administratively transferred to adult prison. Administrative transfer refers to a regulatory mechanism that allows employees at a juvenile facility to transfer youth directly to adult prison, in this case, without any due process. On the morning of November 4, 2011 a juvenile guard walked into J.J's cell and told him to "change his jumpsuit" before he was placed in the back of a van. J.J. did not have access to a lawyer, there was no hearing and there was no right to appeal. J.J. spent the next ten months in adult prison and while there his IEP was not followed. Upon the successful litigation of his case in the New Jersey Appellate division, J.J. was returned to the juvenile facility. His juvenile defenders, who were part of the Rutgers School of Law Children's Justice clinic, worked with the state public advocate for disability rights to secure compensatory education for the time he spent in adult prison.

Juvenile Justice Commission, JUVENILE LAW CTR. (Jan. 21, 2014), http://www.jlc.org/blog/juvenile-law-center-negotiates-final-settlement-civil-rights-lawsuit-challenging-solitary-confi.

B. National Juvenile Defense Standard 7.6: Role of Defender in Sealing and Expunging Records

> 7.6 Sealing and Expunging Records
>
> Counsel must inform the client of available legal processes for sealing and expunging juvenile court records. Counsel should assist the client in obtaining these legal remedies:
>
> a. Counsel must be proficient in state laws governing the process of limiting the client's record from being accessed and distributed, as well as the civil and criminal consequences of wrongful disclosure of the client's records;
> b. Counsel should disclose to the client and the client's parent the entities permitted by statute to access the client's arrest and court records. Counsel should place special emphasis on the collateral impact of arrest and court records; and
> c. Counsel should represent a client seeking to seal or expunge juvenile records or, at the very least, should make a referral to an individual or organization that can do so.

There can be numerous collateral consequences to juvenile court involvement.[223] These consequences can impact

223. Sandra Simkins, When Kids Get Arrested: What Every Adult Should Know (2009); *see generally* Pa. Juvenile Indigent Defense Action Network, The Pennsylvania Juvenile Collateral Consequences Checklist (2d ed. 2013), http://www.pacourts.us/assets/files/setting-1748/file-1538.pdf?cb=4467fc.

employment, immigration status, enlisting in the military, housing, and college financial aid. Understanding the collateral consequences to a juvenile adjudication of delinquency is a critical first step. However, in addition to understanding collateral consequences, counsel should minimize the impact of juvenile court involvement by sealing and expunging records.

National Expungement Resource Created by the Juvenile Law Center: Each state has different requirements for expunging and sealing records. The Juvenile Law Center published a comprehensive resource on Expungement and Sealing records. This interactive web based data includes a fifty state report card, a national review on confidentiality and each state's sealing and expungement laws. *Failed Policies Forfeited Futures: A National Scorecard on Juvenile Records*[224] reports that most states fail to protect sensitive information about juvenile court involvement and this failure harms youth far into the future. A second report, *National Review of State laws on Confidentiality Sealing and Expungement* states as follows:

> The common belief that juvenile records are confidential because of the juvenile justice system's historic goal of protecting children from the traditional consequences of criminal behavior is false. Many states disclose information about youth involvement with the juvenile justice system and fail to provide opportunities for sealing or expungement. Sealing refers to closing records to the public but keeping them accessible to a limited number of court or law enforcement personnel connected to a child's case, while expungement involves the physical destruction and erasure of a juvenile record. A growing number of states no longer limit access to records or prohibit the use of juvenile adjudications in subsequent proceedings. While many states have laws that limit the exposure of a juvenile

224. *A Nationwide Scorecard on Juvenile Records*, JUVENILE LAW CTR., http://juvenilerecords.jlc.org/juvenilerecords/#!/map/expungement (last visited Jan. 16, 2015).

> record through sealing or expungement, they are ineffective if they provide access to juvenile records beyond the time of juvenile court involvement, carve out exceptions or include onerous requirements that hamper the ability of young people to take advantage of their protections.[225]

Internet based Expungement App: Expunge.Io: An Expungement App was developed by a group of high school students[226] and is being adapted for use in several states. Originally designed for use in Illinois, this app is also being used in Maryland and Louisiana. The Application assists users in identifying whether or not they are eligible for expungement, collect relevant paperwork, and then direct them to free local resources in the community.

Philadelphia Defender Association Juvenile Unit: Since 2000, the Defender Association's Juvenile Unit Expungement team has been processing hundreds of expungements annually. Most of these motions are generated internally. Additional requests come from non-PD clients, private counsel, and other stakeholders. The expungement team handles all phases of the expungement, beginning with identifying eligible cases, filing and litigating the expungement motions, and then tracking the cases post-hearing to ensure that the various stakeholders comply with the expungement orders. Owing to various procedural obstacles over the years, the amount of expungements filed varies from year to year, but generally speaking the Expungement team processes 1,000 to 1,500 expungements every year. Additionally, the Expungement team received a generous grant from the Pennsylvania Commission

225. *Juvenile Records a National Review of State Laws on Confidentiality, Sealing and Expungement,* JUVENILE LAW CTR., http://www.jlc.org/resources/publications/juvenile-records-national-review-state-laws-confidentiality-sealing-and-expun (last visited Apr. 25, 2015).

226. Mikva Challenge Juvenile Justice Council teamed up with a developer to launch Expunge.Io. *Policy Development: Educational Campaigns,* NAT'L JUVENILE DEFENDER CTR., http://njdc.info/policy-development-educational-campaigns/ (last visited October 30, 2015).

on Crime and Delinquency which allowed them to target arrest/diversion contacts. Through this grant, the Expungement team has been able to identify and process an additional 5,000+ expungements. To date, the expungement team has processed well in excess of 10,000 expungements.

C. Standard 7.7: Representation at Parole and Probation Hearings

7.7 Provide Representation at Probation and Parole Review and Violation Hearings

Counsel should receive notice and represent the client at probation/parole review or violation hearings.

a. Counsel should be proficient in applicable statutes regarding probation and parole hearings, including the jurisdiction's standard of proof for a violation and the procedural requirements for revocation;

b. Counsel should investigate the client's alleged failure to abide by conditions of the probation or parole order, including whether the probation officer and designated social service providers have met their obligations to the client, and advocate accordingly:

1. Counsel must offer mitigation to explain the client's failure to abide by the probation contract or parole order;
2. When counsel's investigation reveals that the client's probation or parole officer, service providers, or family have not complied with the court's plan, counsel should either request the court enforce its existing order or propose appropriate

changes to the plan;

3. When the basis of a client's probation or parole violation is a new charge, counsel may consider asking the court to delay the hearing pending the outcome of the new case; and

C. Counsel must provide zealous representation at parole and probation violation hearings, with the same duty of care, level of preparation, investigation, and adherence to the principles governing representation as counsel would provide for any other proceeding.

Over twenty states and the District of Columbia have adopted some form of administrative parole system for imprisoned juveniles.[227] Unfortunately, youth are often unrepresented at this hearings. Youth need assistance in preparing packets and testimony to present to the parole board. Youth may not know what to say or how to present mitigating information that would be helpful. Assistance with parole is particularly important given the pervasive conditions of confinement issues. For example, one of our clients received a disciplinary charge (followed by solitary) for filing a PREA grievance. In response to the PREA grievance, the superintendent of the facility charged the youth with "lying." This lying charge showed up as a disciplinary infraction in the quarterly parole review, which resulted in increased time in detention for the youth.[228]

Youth thus need legal representation at revocation hearings. Current statistics on re-arrest rates for youth returning from confinement is as high as 75% within three years of release[229] and 20% of states don't track recidivism data for youth at all.

227. *See, e.g.*, N.J. STAT. ANN. § 30:4-123.48 (West 2015); *see also* New Jersey State Parole Board, *supra* note 197.

228. Confidential documents received from client (on file with author).

229. National Reentry Resource Ctr., Executive Summary: Core Principles for Reducing Recidivism and Improving Outcomes for Youth in the Juvenile Justice System (2014), http://csgjusticecenter.org/wp-content/uploads/2014/07/JJWhitePaperExecSummary.pdf.

Clearly, there are significant re-entry challenges for youth. Post-dispositional assistance at the re-entry stage is critical in addressing the legal issues during re-entry and in preventing technical violations. The following two examples illustrate how this gap in representation can be filled via a statewide initiative and a law school clinical program.

1. Massachusetts: Statewide Juvenile Parole Revocation Panel[230]

In Massachusetts, when youth are committed by a juvenile court judge to the Department of Youth Services, first they complete time in custody and then they are eligible for release into the community. This release is called "Grant of Conditional Liberty" (GCL). If allowed a GCL youth must obey rules such as attend school and stay in contact with a DYS caseworker. However, if rules are violated the caseworker can attempt to return youth to a secure facility via an administrative revocation hearing. Since 2011, Massachusetts Youth Advocacy Division has been available to represent all youth statewide that face revocation of their "conditional liberty" after being committed to the Department of Youth Services. Through the Youth Advocacy Division attorney the youth can contest the alleged violations and argue for a lesser amount of custody.

The statewide Revocation Advocacy Panel consists of trained, certified, and specialized private attorneys across the state who represent youth for their GCL Revocation hearings. The panel is organized by the "revocation coordinator" and since its inception over 1,400 youth have been represented at administrative revocation hearings.[231]

230. *Revocation Panel: Youth Advocacy Division*, PUBLIC COUNSEL, http://www.publiccounsel.net/ya/revocation-panel/ (last visited Jan. 15, 2015).

231. Nat'l Juvenile Defender Ctr., Innovation Brief: Addressing Legal Needs of Youth After Disposition (2013), http://www.modelsforchange.net/publications/504.

2. Northwestern Law School Clinical Program: Parole Revocation Representation Project[232]

Launched in January 2010, Children and Family Justice Center (CFJC) attorneys and students represent incarcerated youth at their parole revocation hearings through the Parole Revocation Representation Project. Prior to CFJC taking on these cases, there were no attorneys provided for these youth. Since the advent of the pilot, CFJC attorneys and students have represented over 150 young people, securing their release 83% of the time.[233]

Similarly, there are a variety legal issues that arise for juveniles who do not go to facilities, but rather get placed on probation. Probation conditions placed on youth can be numerous and difficult to fulfill, particularly without legal assistance. Some conditions seem standard, like "maintain good grades at school" or "abide by the rules of the house." Yet for a child who has special education issues or who has been expelled and needs to be enrolled in a new school, getting credits transferred, or having a school accept a child who is on juvenile court probation and has been expelled from another school, can be a challenge. "Abide by house rules" seems simple, yet many parents will use this as an excuse to call the probation officer on every typical teen behavior that occurs. For example, in my

232. Project Off the Record, supra note 207.

233. One of the women represented was Tasha. She had been on parole for over two years without any significant violations. She was living independently, and caring for her infant son with the aid of nearby family. And she was a hard worker too—supporting herself from jobs at Wendy's and Build-a-Bear, while studying for her associate degree in criminal justice from Lincoln College. But a turnover in parole agents led to a misunderstanding in how frequently she needed to check in with her new agent. Tasha's new agent put her on electronic monitoring (EM), but during the first day, she was unable to get permission for emergency movement to take her infant son to daycare and to go to work. Her agent filed a violation, and she was sent to IYC Warrenville for a parole revocation hearing. With the aid of a lawyer, Tasha resumed her parole.

practice parents have called the probation officer because a child did not make her bed, or allowed a friend to come over, or took ten dollars out of mom's wallet. Parent cooperation with probation is critical, but if the child is at odds with the parent, probation conditions can become a tool that drives children deeper into the system. Recently, a child faced a violation of probation charge for failing to attend a GED program, even though the complaint clearly stated that father refused to take the child to the program. Furthermore, conditions like "attend drug treatment" can become problematic. What if the drug treatment has a long waiting list, or if the child doesn't have transportation to get there, or has to take two buses in winter to attend? When that child is deemed to have violated the probation conditions a skilled attorney is invaluable in being able to explain the circumstances to avoid further criminalization.

V. CONCLUSION

Taken together, these model programs demonstrate that it is both possible and effective to provide the full continuum of legal representation to incarcerated youth. Young people like Xavier, Joshua, and Nicole need, have a right to, and benefit greatly from access to counsel, and the many harmful and expensive failings of the juvenile justice system will not be cured unless and until we ensure that they receive it.

APPENDIX A - COSTS OF CONFINEMENT: FORTY-SIX STATES AND JURISDICTIONS REPORTING

State	Per Day	Per 3 Months	Per 6 Months	Per year
LA 20	$127.84	$11,506	$23,011	$46,662
FL 21	$151.80	$13,662	$27,324	$55,407
AL 22	$159.00	$14,310	$28,620	$58,035
SD 23	$207.43	$18,669	$37,337	$75,712
IN 24	$212.13	$19,092	$38,183	$77,427
ID 25	$213.57	$19,221	$38,443	$77,953
UT 26	$214.12	$19,271	$38,542	$78,154
MO 27	$244.30	$21,987	$43,974	$89,170
GA 28	$249.66	$22,469	$44,939	$91,126

KS 29	$250.50	$22,545	$45,090	$91,433
WY 30	$261.00	$23,490	$46,980	$95,265
WA 31	$262.48	$23,623	$47,246	$95,805
OR 32	$263.00	$23,670	$47,340	$95,995
KY 33	$276.00	$24,840	$49,680	$100,740
MN 34	$287.23	$25,851	$51,701	$104,839
CO 35	$287.63	$25,887	$51,773	$104,985
AZ 36	$290.68	$26,161	$52,322	$106,098
WI 37	$291.00	$26,190	$52,380	$106,215
TN 38	$301.29	$27,116	$54,232	$109,971
IL 39	$304.11	$27,370	$54,740	$111,000
AR 40	$317.08	$28,537	$57,074	$115,734
ND 41	$342.58	$30,832	$61,664	$125,042
NE 42	$347.55	$31,280	$62,559	$126,856
TX 43	$366.88	$33,019	$66,038	$133,911
WV 44	$387.58	$34,882	$69,764	$141,467
MS 45	$420.00	$37,800	$75,600	$153,300
SC 46	$426.00	$38,340	$76,680	$155,490
NC 47	$437.67	$39,390	$78,781	$159,750
MA 48	$473.49	$42,614	$85,228	$172,824
MI 49	$475.22	$42,770	$85,540	$173,455
MT 50	$481.67	$43,350	$86,701	$175,810
NM 51	$487.87	$43,908	$87,817	$178,073
RI 52	$510.63	$45,957	$91,913	$186,380
NV 53	$535.36	$48,182	$96,365	$195,406
NJ 54	$537.35	$48,362	$96,723	$196,133
HI 55	$546.08	$49,147	$98,294	$199,319
OH 56	$554.80	$49,932	$99,864	$202,502
CA 57	$570.79	$51,371	$102,742	$208,338
NH 58	$588.00	$52,920	$105,840	$214,620
CT 59	$607.41	$54,667	$109,334	$221,705
VT 60	$615.00	$55,350	$110,700	$224,475
ME 61	$616.33	$55,470	$110,939	$224,960
VA 62	$712.38	$64,114	$128,228	$260,019
DC 63	$761.00	$68,490	$136,980	$277,765
MD 64	$809.00	$72,810	$145,620	$295,285
NY 65	$966.20	$86,958	$173,916	$352,663
Average	**$407.58**	**$36,682**	**$73,364**	**$148,767**

Note: States reported per-day or annual costs. Three-month and six-month calculations are estimated by multiplying per-day costs by 90 and 180 days or dividing the annual costs by these units. The costs reflect the highest cost confinement option provided to the researchers by states in the summer and fall of 2014, and each endnote in the full report lists other cost options that were provided to researchers as part of the request. This chart will be updated to reflect new information and posted at www.justicepolicy.org.

APPENDIX B – 50 STATE SURVEY: STATE COURT USE OF POST-DISPOSITIONAL REVIEW HEARINGS

#	State	Post-Dispositional Hearings Mandatory?	Authority
1	**Alabama**	No	Ala. Code § 12-15-221(a)
2	**Alaska**	Yes; at least annually, but review is done on the papers unless a hearing is specifically requested	Alaska Stat. Ann. § 47.12.120(d)
3	**Arizona**	Yes; minimum of every 60 days, but only if disposition is for a residential treatment facility. No (all other dispositions)	Ariz. Rev. Stat. Ann. § 8-341.01(C) Matter of Appeal in Pinal Cnty., Juvenile Action No. J-169, 131 Ariz. 187, 189, 639 P.2d 377, 379 (Ct. App. 1981) (acknowledging that court may modify dispositions).
4	**Arkansas**	No	Ark. Code Ann. §§ 9-27-331(a)–(b)
5	**California**	No	Cal. Welf. & Inst. Code § 731.1
6	**Colorado**	Yes; minimum of once every 6 months after sentencing hearing	Colo. Rev. Stat. Ann. §§ 19-2-906.5 (2)–(3)
7	**Connecticut**	Yes; minimum of once every 12 months	Conn. Gen. Stat. Ann. § 46b-141(b)
8	**Delaware**	No	Del. Code Ann. tit. 10, § 925(11)
9	**Florida**	No, but reports must be made at least quarterly to the court by the administrative agency regarding the juvenile's treatment plan progress and adjustment related issues.	Fla. Stat. Ann. §§ 985.433(10), 985.455(3)–(4)
10	**Georgia**	No	Ga. Code Ann. §§ 15-11-607(a)–(c)
11	**Hawaii**	No	Haw. Rev. Stat. § 571-50
12	**Idaho**	No, but reviews of dispositional progress of the offender must be conducted by the administrative agency a minimum of once every year and reported back to the court Yes; within 90 days of	Idaho Code Ann. § 20-530 Idaho Code Ann. § 20-532

		disposition for juveniles committed to secure facilities	
13	**Illinois**	Yes; minimum of once every 18 months (agencies are required to submit petitions for court or administrative agency review every 18 months, and those petitions "shall be set for hearing")	705 Ill. Comp. Stat. Ann. 405/5-745(2)
14	**Indiana**	Yes; minimum of once every 6 months (or more frequently if ordered by the court)	Ind. Code Ann. § 31-37-20-2(c)
15	**Iowa**	No	Iowa Code Ann. § 232.54
16	**Kansas**	No	Kan. Stat. Ann. § 38-2367(a)
17	**Kentucky**	No	Ky. Rev. Stat. Ann. § 610.120(1)
18	**Louisiana**	No	La. Child. Code Ann. arts. 909–10
19	**Maine**	Yes; minimum of once every 12 months	Me. Rev. Stat. tit. 15, § 3315(3)
20	**Maryland**	No	Md. Code Ann., Cts. & Jud. Proc. § 3-8A-24(b)
21	**Massachusetts**	No	Mass. Gen. Laws Ann. ch. 119, §§ 58–68
22	**Michigan**	Yes; minimum of once every 12 months	Mich. Comp. Laws Ann. § 712A.18c(3)
23	**Minnesota**	Yes; informal reviews at least every 6 months (except for commitments transferred to Commissioner of Corrections)	Minn. Juvenile Delinquency Rule 15.06; See also Minn. Stat. Ann. § 260B.198, subd. 5
24	**Mississippi**	Yes; at least annually	Miss. Code. Ann. § 43-21-613(3)(a)
25	**Missouri**	No	Mo. Ann. Stat. § 211.251(1)
26	**Montana**	No	Mont. Code Ann. § 41-5-1422
27	**Nebraska**	No	Neb. Rev. Stat. § 43-2,106.03
28	**Nevada**	No (Generally) Yes; at least semi-annually, but only for children placed in foster home or "other similar facility"	Nev. Rev. Stat. Ann. §§ 62E.020, 63.480 Nev. Rev. Stat. Ann. § 62E.170(1)
29	**New Hampshire**	Yes; at least annually, but only for cases remaining "open" 12 months after date of disposition	N.H. Rev. Stat. Ann. § 169-B:31

30	**New Jersey**	No	N.J. Stat. Ann. § 2A:4A-45(b); N.J. Court Rule 5:24-6
31	**New Mexico**	No	N.M. Stat. Ann. §§ 32A-2-23(G)–(H)
32	**New York**	No	N.Y. Fam. Ct. Act § 355.1(1)
33	**North Carolina**	No	N.C. Gen. Stat. Ann. § 7B-2600(a)
34	**North Dakota**	No, but disposition orders expire automatically at the end of 12 months (excluding time on parole) unless the court conducts a review hearing to extend them	N.D. Cent. Code Ann. §§ 27-20-36(2), (4), & (5)
35	**Ohio**	No	Ohio Rev. Code Ann. § 2152.22
36	**Oklahoma**	Yes; minimum of once every 6 months	Okla. Stat. Ann. tit. 10A, § 2-2-504(A)
37	**Oregon**	No	Or. Rev. Stat. Ann. § 419C.610(1)
38	**Pennsylvania**	Yes; minimum of once every 6 months	237 Pa. Code § 610(A)
39	**Rhode Island**	No (generally) Yes; thirty days prior to the child's eighteenth birthday or thirty days prior to the one-year anniversary of the imposition of the sentence, whichever is greater, but only if the sentence (1) requires transfer of the juvenile to an adult correctional facility at the age of majority and (2) will include at least one year of incarceration at that facility	R.I. Gen. Laws Ann. §§ 14-1-42(a)–(b) R.I. Gen. Laws Ann. § 14-1-42(c)
40	**South Carolina**	No, but reviews must be conducted at least quarterly by Board of Juvenile Parole	S.C. Code Ann. § 63-19-1820(A) See also S.C. Code Ann. § 63-19-1440(D)(authorizing modification by administrative agencies or judges)
41	**South Dakota**	No	S.D. Codified Laws § 26-7A-104
42	**Tennessee**	No	Tenn. Code Ann. §§ 37-1-139(b)–(e)
43	**Texas**	No	Tex. Fam. Code Ann. §§ 54.05(a-1), (d)
44	**Utah**	No	Utah Juvenile Court

			Rule 47(b)
45	**Vermont**	No	Vt. Stat. Ann. tit. 33, § 5113; see also Vt. Stat. Ann. tit. 33, § 5231(e)
46	**Virginia**	No	Va. Code Ann. §§ 16.1-289, 16.1-289.1
47	**Washington**	No	Wash. Juvenile Court Rule 7.14(a)
48	**West Virginia**	No	W. Va. Code Ann. § 49-5-14(b)
49	**Wisconsin**	No	Wis. Stat. Ann. § 938.363(1)(a)
50	**Wyoming**	Yes; minimum of once every 6 months (agency is required to submit reports to court every 3 months)	Wyo. Stat. Ann. §§ 14-6-229 (e)(ii)(A)–(B)