

EDITORIAL INTRODUCTION

JUVENILES' RIGHT TO COUNSEL

Juvenile law reform

Ensuring the right to counsel

Donna M. Bishop, Senior Editor

Northeastern University

Forty-three years ago, in a decision seemingly destined to bring about sweeping improvements in the administration of juvenile justice, the U.S. Supreme Court ruled that youth in delinquency proceedings are entitled to several procedural safeguards, including the right to counsel (*In re Gault*, 1967). Juvenile proceedings at that time were closed, informal, nonadversarial, and dominated by judges who, under the prevailing doctrine of *parens patriae*, had expansive and unregulated authority to act in the “best interests” of the child. In Gerald Gault’s case, the judge exercised that authority in the following ways: He failed to apprise the boy (or his parents) of the charges against him, interrogated the boy at length, proceeded to adjudicate the boy delinquent based on a modicum of evidence and without testimony from the complainant, and committed the boy to a state training school for up to 5.5 years for an offense for which an adult could have received a maximum sentence of 60 days. When questioned about his decision in a later proceeding, the judge could not even identify with certainty which provision of the legal code the boy had violated. The Supreme Court observed:

A proceeding where the issue is whether the child will be found to be “delinquent” and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to

ascertain whether he has a defense and to prepare and submit it. The child “requires the guiding hand of counsel at every step in the proceedings against him.” (*Gault*, 1967: 36)

In the immediate aftermath of *Gault* (1967), all states revised their juvenile codes to provide the right to counsel. One might assume that, by now, all juveniles charged with delinquent acts would be represented by attorneys. That is not the case; research in several states shows that

Direct correspondence to Donna Bishop, 400B Churchill Hall, 360 Huntington Ave, Northeastern University, Boston, MA 02115 (e-mail: d.bishop@neu.edu).

substantial proportions—sometimes a majority—of delinquent youths remain unrepresented, even when dispositions result in incarceration (Puritz, Burrell, Schwartz, Soler, and Warboys, 1995). In most jurisdictions, indigent defense systems are underfunded and attorney caseloads are far too high. Youths frequently feel pressured by judges and by parents to waive the right to counsel and enter a guilty plea, although many are manifestly incompetent to do so. This is the state of affairs at a time when the need for effective legal advocacy is greater than ever before. Today, youth face dispositions in the juvenile court that are explicitly punitive, and the collateral consequences of a delinquency adjudication can be horrific. Delinquency adjudications can be used to enhance adult sentences (e.g., under “three strikes” laws); youths adjudicated for sexual offenses can face lifelong registration requirements and restrictions on housing, employment, and freedom of movement; and juvenile convictions for drug and weapons offenses can disqualify youth and the parents with whom they reside for welfare assistance and public housing.

It is in this context that the bold step of the Minnesota Legislature to mandate the appointment of counsel (or standby counsel) for all juveniles charged with felonies or serious misdemeanors or facing out-of-home placement takes on great significance. The Legislature facilitated the full implementation of this legislation by replacing uneven, county-run legal services with a statewide public defender system. After the Governor signed the legislation but vetoed the appropriations necessary to implement it, the Legislature tried to lift the burden from the overwhelmed public defender system by reducing nonserious misdemeanors to status offenses and by prohibiting out-of-home placement of status offenders, thereby eliminating their right to counsel. Feld and Schaefer (2010, this issue) explained the history of these legal changes and then conducted a pre-post assessment of their impact. They addressed the following three primary questions:

1. How did mandating counsel for felonies and gross misdemeanors and relabeling many misdemeanors as status offenses affect the delivery of legal services?
2. Did the law reduce the prevalence of justice by geography, especially for youths in rural counties?
3. Did judges comply with restrictions on appointment of counsel for status offenders?

They found that four years after the reforms were implemented, the legislative strategy to reduce the numbers of youths eligible for appointment of defense counsel had clearly succeeded. In 1994, two thirds of youths in juvenile court were eligible for representation. By 1999, the number of misdemeanors had plummeted, status offenders had increased three-fold, and the proportion of youths for whom counsel was mandated had been reduced to less than one quarter. Although Feld and Schaefer (2010) did not address the prosecutorial response to the law reforms, the findings suggest that prosecutors were accommodating. They could have subverted the Minnesota Legislature's objectives by up-charging misdemeanors to maintain their eligibility for placement. They did not.

Surprisingly, though, felony offenders did not benefit from the law reforms. Although they should have been the chief beneficiaries of the changes in law, their rates of representation remained unchanged. More than one third remained unrepresented, just as before. For serious

misdemeanants, rates of representation did increase, so much so that by the end of the study period, they were *more likely* to have counsel than were youths charged with felonies. Rates of representation for status offenders were low to begin with but remained unchanged. Although the law prohibited appointment of counsel for this group, judges continued to appoint counsel, just as they had done before.

The legal reforms had a beneficial effect on justice by geography. Before the change in law, representation was much lower in rural counties than in urban and suburban ones. By the study's end, the representation of felons and serious misdemeanants in rural areas increased substantially, which narrowed the gap across counties. However, the closing of the gap was also in no small part a result of a decline in felony representation in urban and suburban areas.

The most disappointing finding was that judges continued to allow one third of felons and misdemeanants to waive the right to counsel, even after appointment of counsel was mandated and legal services were expanded to meet the need. Feld and Schaefer (2010) suggested that these findings reflect judges' resistance to procedural reforms were designed to limit their traditionally expansive autonomy and discretion.

The policy essay by Schwartz and Levick (2010, this issue) is a superb companion to Feld and Schaefer's (2010) research article. Schwartz and Levick—cofounders of the Juvenile Law Center and leading national advocates for juvenile's rights—took Feld and Schaefer's research as a point of departure and used their own investigation of the juvenile court scandal in Luzerne County, PA, to draw lessons about the causes and consequences of the systematic denial of counsel to children.

The Juvenile Law Center undertook an investigation of violations in Luzerne County at the behest of a mother whose 15-year-old daughter unknowingly waived her right to counsel, was adjudicated delinquent for a first-time minor offense, and committed to a juvenile facility—all within the space of a few minutes. The investigation uncovered a massive violation of the right to counsel (nearly 60% of dispositions that resulted in out-of-home placement occurred without counsel) that had been going on for several years. The Juvenile Law Center petitioned the Pennsylvania Supreme Court, which granted relief and eventually vacated more than 6,500 cases.

The conduct of the judges in Luzerne County was especially egregious; for more than 5 years, they systematically denied youths the right to counsel in furtherance of a scheme to commit youth to for-profit facilities in exchange for kickbacks. Although Luzerne County easily might be dismissed as an aberration, Schwartz and Levick (2010) argued that it reflects systemic failures that are not at all unique to that jurisdiction. Pennsylvania is a strong right-to-counsel state; youth are entitled to representation at all stages of any delinquency proceeding; the law requires that the judge conduct a lengthy colloquy to ensure that every waiver is knowing, intelligent, and voluntary; and the law provides for the appointment of standby counsel for juveniles who waive the right to counsel. Yet despite these protections, youth in Luzerne County routinely were pressured to waive their constitutional rights, judges failed to conduct the requisite colloquy, and perhaps worst of all, other court professionals—prosecutors, defense attorneys, probation

officers, and court onlookers—stood silently by and failed to report what they saw, despite having witnessed repeated and egregious violations of youths' constitutional rights.

With Feld and Schaefer's (2010) documentation of the failure to provide youth with counsel in Minnesota as a backdrop, Schwartz and Levick (2010) asked why, despite increasing mandates to provide counsel, so many youth lack counsel, and why judges in so many cases seem reluctant to enforce the mandate. They considered why, despite obvious and egregious violations, court professionals take no action to stop them. They concluded their essay by recommending several mechanisms of transparency and accountability to ensure that the right to counsel is fulfilled. The essay is thoughtful, troubling, and provocative. It is a potent reminder that mandates alone are insufficient to ensure that youth are treated fairly and that judges follow the rule of law.

The second policy essay, written by Kempf-Leonard (2010, this issue), used Feld and Schaefer's (2010) research article as the starting point from which to address a different set of questions. Although acknowledging that children need advocates in juvenile court, she challenged the assumption on which Feld and Schaefer's and others' recommendations to require attorneys rest—that attorneys are effective. She asked us to consider whether the current practice of juvenile defense benefits youth in delinquency proceedings. Before endorsing attorneys as advocates for children, she cautioned that we need assurances that they are skilled in juvenile law and in delinquency proceedings. She pointed out that most law schools offer only a single course in juvenile law and provide “no training in adolescent development or the range and relative effectiveness of various dispositions and treatments.” Moreover, research has shown that, net of controls for other relevant factors, juveniles who are represented by attorneys are more likely to receive harsh and restrictive dispositions than youths who are not represented. The reasons are unclear. It might be a matter of attorney incompetence, of assignment too late in the process to be effective, or of assignment in cases in which the judge already has made the decision to impose a harsh and punitive disposition.

Kempf-Leonard (2010) challenged us to think of the multiple goals that juvenile justice systems are trying to achieve. In that regard, it seems that safeguarding due process and fairness are goals of advocacy during the adjudicatory phase of juvenile proceedings, whereas a different set of goals—meeting the child's needs while protecting public safety—dominate at disposition. Consistent with these observations, it is likely that well-trained attorneys are the best advocates for youth during the adjudicatory phase, whereas at disposition, psychologists and other persons knowledgeable about assessment and treatment might be most effective. Well-funded legal defense services for children include staff social workers and psychologists who can prepare treatment plans that are most likely to be beneficial.

In sum, the research article and the policy essays in this section include a combination of excellent academic scholarship and thoughtful observations from leading academicians and legal practitioners. Much work remains to be done to ensure that juvenile courts treat children fairly, protect them from their own immaturity, and deliver sanctions and services that are effective in promoting healthy adolescent development. The authors of each of these articles have identified

systemic weaknesses that hamper the achievement of these objectives and have pointed to issues that must be addressed if these weaknesses are to be overcome.

References

- Feld, Barry C. and Shelly Schaefer. 2010. Law reform to deliver services and reduce justice by geography. *Criminology & Public Policy*. This issue.
- Kempf-Leonard, Kimberly. 2010. Does having an attorney provide a better outcome? The right to counsel doesn't mean attorneys always help. *Criminology & Public Policy*. This issue.
- Puritz, Patricia, Sue Burrell, Robert Schwartz, Mark Soler, and Lauren Warboys. 1995. *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*. Washington, DC: American Bar Association.
- Schwartz, Robert G. and Marcia Levick. 2010. When a "right" is not enough: Implementation of the right to counsel in an age of ambivalence. *Criminology & Public Policy*. This issue.

Cases Cited

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

Donna M. Bishop is a professor in the College of Criminal Justice at Northeastern University. For more than two decades, her research and scholarship have focused primarily on juvenile justice and youth policy. She is the author of one book, more than 60 articles, and numerous monographs, which include works on racial and gender disparities in juvenile court processing, juvenile detention reform, and juvenile transfer policy and practice. Her current work focuses on the implications of incarceration for adolescent development, the role of organizational factors in justice decision making, the connections between features of juvenile correctional institutions and inmate misconduct, and racial stereotyping in the juvenile justice system.