

## POLICY ESSAY

---

### JUVENILES' RIGHT TO COUNSEL

## Does having an attorney provide a better outcome?

### The right to counsel does not mean attorneys help youths

**Kimberly Kempf-Leonard**

*Southern Illinois University Carbondale*

In considering the role of legal counsel in delinquency proceedings, the long-standing institutionalized view is that attorneys have no place because the hearing is not an adversarial trial but a less formal venue in which court officials reach consensus on a disposition made in the best interests of the specific child. This “best interests” objective, adapted from the doctrine of *parens patriae* found in early English chancery proceedings for orphans, is an explicit directive in state statutes for juvenile courts to intervene with the authority of a good parent or guardian. With all professionals in the public sphere of juvenile and family courts working to provide for the best interests of the child, then a youth should not need his or her own legal advocate. That is the traditional view of delinquency processing, and it actually might benefit some youths.

#### **Due Process and Lawyers**

In addition to providing for their best interests, however, since *In re Gault* (1967), it has been important *also* to safeguard the due process rights of juveniles. Moreover, since *Schall v. Martin* (1984), in which the U.S. Supreme Court allowed for preventive detention as a punitive public safety measure, the added threat of incapacitation underscores the need for due process protections. Because juvenile courts are a legal venue, and attorneys have an institutionalized role to protect the rights of defendants in criminal courts, it is reasonable to expect that legal counsel also should serve that role for youths. This point certainly is recommended by Feld and Schaefer (2010, this issue) following their legal impact study of Minnesota.

Minnesota provides an interesting case study of juvenile justice reform. The state legislature was to be commended for its intent to protect accused youths by extending the statewide public

---

Direct correspondence to Kimberly Kempf-Leonard, Department of Criminal Justice, College of Liberal Arts, 4248 Faner Hall, Southern Illinois University Carbondale, Carbondale, IL 63901 (e-mail: kleonard@siu.edu).

defender system to juveniles. Although many urban courts have institutionalized both public defenders and prosecutors in juvenile courts, making counsel mandatory, which included the many (but far less busy) rural jurisdictions, was a unique commitment to due process. That the Minnesota Governor vetoed funding for the initiative was expected somewhat but still a disappointing reminder that funding for delinquency proceedings is not on par with criminal justice, despite compelling evidence that effective interventions with youths would be the best means to curb crime. The legislative response to the Minnesota Governor and the overwhelmed, underfunded public defenders was creative; reclassifying lesser misdemeanors downward to status offenses is at least bucking current trends of making more behaviors criminal and “bootstrapping” status offenses upward to be law violations. Their restriction against out-of-home placement indicates that restrictive dispositions are not considered as “in the best interests” of youths—at least those who are status offenders.

That setting, as well as data from 1994 and 1999, provided a sufficient foundation for the study of attorneys in juvenile courts that appears in this issue. Most importantly, even after the legal mandate had been implemented, attorneys still did not always represent youths in delinquency hearings. Counsel was more likely to be present in delinquency cases that involved serious misdemeanors, prior records, males, minorities, and suburban courts. Two changes were observed as a result of the new law. First, the level of legal representation did become more equitable across the state. Although attorneys more often were present in cases in suburban courts than in urban and rural courts, the geographic disparities were much less evident by 1999. Second, counsel was most likely to be present for youths with referrals for serious misdemeanor offenses—surprisingly, even more so than for felonies.

### **Juvenile Justice Goals and Procedures**

In thinking about what the findings of the Minnesota study of legal counsel might mean for juvenile justice in this country, it is important first to understand that a considerable ambiguity exists in terms of both purpose and procedures within these legal systems. First, the systems are trying to achieve multiple goals of serving the best interests of the child, safeguarding due process and fairness, and promoting public safety. It is not at all clear what constitutes successful outcomes of these potentially incompatible objectives. It also is uncertain whether each goal should be pursued in every case or whether some objectives merit more priority in certain situations.

Such lack of clarity makes it possible for judges to exercise wide discretion, opting for a punitive sanction in some cases while pursuing benevolent care in the best interest of the child in other cases. For example, research suggests that minority youths, particularly African American males, are more likely than White youths to be viewed as culpable and treated punitively (e.g., Bridges and Steen, 1998; Steen, Bond, Bridges, and Kubrin, 2005). As such, the greater likelihood of attorneys present for minority youths in Minnesota could reflect judicial views that their hearings are more analogous to a criminal trial, and that those youths are more in need of legal counsel.

Somewhat related, the observed gender effect might point toward judicial paternalism that the court independently can determine what is in the best interests of girls, whereas boys more often might be viewed as offenders who merit counsel (Dembo, Williams, and Schmeidler, 1993; Krisberg, Schwartz, Fishman, Eisikovits, and Guttman, 1986). However, the gender effect in the Minnesota findings could be misleading too because the much larger number of boys processed in juvenile courts is likely to mask what actually happened to the far fewer girls. If Feld and Schaefer (2010) had conducted gender-specific analyses, then they might have observed—as elsewhere (Kempf-Leonard and Sample, 2000; Visher, 1983)—a lower threshold of offending and circumstance for which court officials feel compelled to intervene formally with girls but not with boys. Without such analyses, the role of attorneys and gender remains equivocal. Presumably, if legal counsel always were present to assist youths, then their role as advocates could help to encourage juvenile courts to pursue uniform objectives in all delinquency cases, and disparities linked to demographic traits then might disappear.

Besides the lack of explicit objectives, most juvenile courts also have no clear guidelines about how these goals can be achieved through the types of services and interventions available to the court. Thus, officials are left to implement their own individual creative dispositions based on available resources. The type and range of services and treatment also vary considerably by location. Moreover, rarely are adequate information systems available that can relay data back to court officials about how well their dispositions met the objectives they intended and how successful the youths were for whom they made important legal decisions. Without such feedback, these decision makers have no opportunity to learn from experience or to make data-driven adjustments to their procedures. Absent an explicit goal, specific guidelines on how and when to assign interventions and services, or information about when dispositions are successful, each court develops its own way of operating and establishes informal “going rates” for the routine processing of juvenile cases (Gottfredson and Gottfredson, 1987).

In considering how the Minnesota juvenile court officials made decisions, Feld and Schaefer (2010) recognize that informal practices develop to expedite case processing (Feeley, 1983) and that such practices can be resistant to external reforms (Eisenstein and Jacob, 1977). Indeed, evidence of various “going rates” are observed in the Minnesota findings, which show that in 1994, judges in urban, suburban, and rural courts differed in their practices of providing legal counsel to youths in delinquency proceedings. After the legislative mandate for attorneys, the disparity patterns became more equitable, but some evidence was revealed in 1999 of inconsistent judicial compliance based on patterns of “justice by geography” (Krisberg, Litsky, and Schwartz, 1984).

In addition, the greater presence of attorneys for serious misdemeanors than felonies in 1999 is likely to be connected to the revised legal classification of those offenses and to the lack of familiar “going rates” among court officials for the new midlevel classifications. This pattern illustrates the concept known as “criminal justice thermodynamics” in which processing is more varied for midlevel offenses in which a greater range of seriousness and harm is evident and is more standard for homogenous groups of minor and serious offenses (Walker, 2005).

It is important to note that the Minnesota study is the only impact study of legal reform intended to enhance the presence of attorneys in delinquency proceedings. The findings show some success in reducing the regional differences in legal representation of juveniles in the state. It also highlights ways in which the legal initiatives were circumvented by various political officials, which include juvenile court judges—who Feld and Schaefer (2010) clearly find at fault. In contrast, Feld and Schaefer place great value on lawyers in recommending policy initiatives that require counsel in delinquency proceedings and go so far as to suggest that counsel should not be allowed to be waived as a procedural defense against the immaturity of most juveniles. Unfortunately, this recommendation to require attorneys is based more on conventional wisdom of defense counsel in criminal cases than on their findings in the Minnesota study. Before we endorse legal advocates for juveniles, we should have evidence that attorneys actually make an important difference.

### **Present but Not Yet Effective Counselors**

In the many years since the *In re Gault* (1967) decision, it is remarkable that not many studies have been conducted on the effectiveness of legal counsel in delinquency hearings. In those few studies that have been performed, nearly all have been restricted to whether an attorney is present at the hearing—yes or no. As Calvin Burdine (a gay man sentenced to death after a trial in which his court-appointed attorney frequently napped) can attest, mere attorney presence is not enough (*Burdine v. Johnson*, 2001). To endorse attorneys, we should have confidence that they function effectively to assist their young clients.

First, we need assurances that attorneys are skilled in juvenile law, particularly in delinquency proceedings. According to Martin Guggenheim (2005), a New York University law professor and expert on juvenile law, children's rights and the "best interests" objective of juvenile courts are more often secondary considerations to the interests of adults involved in the child's life. Attorneys, perhaps especially private counsel, often consider parents as their true client. Guggenheim provides persuasive arguments that parents do not understand juvenile justice systems adequately to direct attorneys or provide effective advice to their children. Most law schools offer only a single elective course in juvenile law, which often is dominated by adoption and dependency procedures. No training is available in adolescent development or the range and relative effectiveness of various juvenile dispositions and treatments. When surveyed, attorneys identify juvenile law as their least favorite substantive area and the one in which most have the least experience (Burruss and Kempf-Leonard, 2002). Likely, juvenile law also is one of the least prestigious and lowest paid substantive areas of law. Thus, it is easy to speculate that assigning attorneys routinely to juvenile court as public defenders, and even prosecutors, merely might result in more members of working groups co-opted to the "going rate."

In my own coauthored study of three Missouri jurisdictions, we found that out-of-home placement—the most restrictive and punitive disposition available—was the more likely outcome for juveniles who were represented by counsel, even controlling for many other relevant factors (Burruss and Kempf-Leonard, 2002: 60). We concluded that attorneys were not helpful,

although we could not distinguish incompetent counsel from those who were assigned too late to be effective.

Timing is a critical issue in delinquency proceedings. Unlike protracted criminal procedures, in most juvenile venues, the time from the initial screening, referral charge, and detention to the adjudication hearing is short. Prehearing detention is a strong predictor of restrictive dispositions, so effective counsel should be involved at the initial detention decision, but most are not assigned until later. Moreover, often adjudication and disposition decisions occur at a single formal hearing rather than in a truly bifurcated process that allows for additional time and for gathering more evidence. Case preparation in delinquency proceedings cannot compare with criminal court, although attorneys often consider their criminal law training as sufficient for both. Juvenile hearings typically forego transcription; thus documents rarely exist to facilitate appellate review. To complicate matters even more, the informal nature of many juvenile courts makes it likely that some judges assign counsel as a “CYA” measure to cases in which they already have determined the disposition will be harsh.

Although I am not yet persuaded that requiring attorneys in delinquency proceedings is the solution for unequal, haphazard juvenile court discretionary decisions, I do share many of the views expressed by Feld and Schaefer (2010), which include that juveniles accused of crimes currently are in grave need of assistance throughout delinquency proceedings. Recent scientific advances in developmental psychology provide compelling evidence that adolescents are not capable of making the same informed decisions about legal proceedings as adults (Grisso and Schwartz, 2000; Monahan, Steinberg, Cauffman, and Mulvey, 2009; Steinberg, 2009) and that increasingly punitive juvenile court interventions have profound life consequences for juveniles.

Unanswered questions persist regarding who can advocate best on behalf of youths accused of offenses and what interventions best serve their needs. Those who function as advocates for youths in juvenile court must comprehend both the developmental process—elements of juvenile justice that make it a unique system of law—and what services most likely will result in successful outcomes. Lawyers might help protect due process rights, but no evidence exists that they currently can or do assist in securing outcomes in the best interest of youths. Other advocates for youths are available, such as *guardian ad litem*s and court-appointed special advocates, who serve benevolent advisory roles for some cases. Many of these positions are volunteer, however, with related concerns about their level of training and legal accountability. Many social service professionals and psychologists who are well versed in adolescent development and mental capacity work effectively in many capacities to assess, classify, and treat young offenders. However, most of these positions have treatment responsibilities for youths only after dispositional decisions, and these professionals are less familiar with legal issues. Thus, given current operations, none of the existing positions in juvenile justice to assist youths solely is effective counsel.

Of course, the real difficulty is not who should assist youths in delinquency proceedings. The problem for any advocate is how to be effective in a system that does not have much political clout, operates via informal directives and procedures, and is administered by officials

who rarely are held accountable. The solution requires larger reform than that attempted in Minnesota. We first need to elevate the value of youth in our country so that, second, we can implement system-wide reform that provides institutionalized ways to assess the real needs of juveniles and to respond to those needs with effective interventions delivered by compassionate, well-trained professionals. Persuasive evidence supports that such systems do make a substantial difference with juvenile offenders, but motivation is not yet sufficient nor is the political will for the necessary reforms.

## References

- Bridges, George S. and Sara Steen. 1998. Racial disparities in official assessments of juvenile offenders: Attributional stereotypes as mediating mechanisms. *American Sociological Review*, 63: 554–570.
- Burruss, George W., Jr. and Kimberly Kempf-Leonard. 2002. The questionable advantage of defense counsel in juvenile court. *Justice Quarterly*, 19: 37–68.
- Dembo, Richard, Linda Williams, and James Schmeidler. 1993. Gender differences in mental health service needs among youths entering a juvenile detention center. *Journal of Prison and Jail Health*, 12: 73–101.
- Eisenstein, James and Herbert Jacob. 1977. *Felony Justice: An Organizational Analysis of Criminal Courts*. Boston, MA: Little, Brown, and Co.
- Feeley, Malcolm M. 1983. *Court Reform on Trial: Why Simple Solutions Fail*. New York: Basic Books.
- Feld, Barry C. and Shelly Schaefer. The right to counsel in juvenile court: Law reform to deliver legal services and reduce justice by geography. *Criminology & Public Policy*. This issue.
- Gottfredson, Michael R. and Don M. Gottfredson. 1987. *Decisionmaking in Criminal Justice; Toward the Rational Exercise of Discretion*, 2nd Edition. New York: Basic Books.
- Grisso, Thomas and Robert G. Schwartz. 2000. *Youth on Trial: A Developmental Perspective on Juvenile Justice*. Chicago, IL: University of Chicago Press.
- Guggenheim, Martin. 2005. *What's Wrong with Children's Rights?* Cambridge, MA: Harvard University Press.
- Kempf-Leonard, Kimberly and Lisa L. Sample. 2000. Disparity based on sex: Is gender-specific treatment warranted? *Justice Quarterly* 17: 89–128
- Krisberg, Barry, Peter Litsky, and Ira M. Schwartz. 1984. Youth in confinement: Justice by geography. *Journal of Research in Crime and Delinquency* 21: 153–181.
- Krisberg, B., I. M. Schwartz, G. Fishman, Z. Eisikovits, and E. Guttman. 1986. *The Incarceration of Minority Youth*. Minneapolis, MN: Hubert Humphrey Institute of Public Affairs.
- Monahan, Kathryn C., Laurence Steinberg, Elizabeth Cauffman, and Edward P. Mulvey. 2009. Trajectories of antisocial behavior and psychosocial maturity from adolescence to young adulthood. *Developmental Psychology*, 45: 1654–1668.

- Steen, Sara, Christine W.E. Bond, George S. Bridges, and Charis E. Kubrin. 2005. Explaining assessments of future risk: Race and attributions of juvenile offenders in presentencing reports. In (Darnell F. Hawkins and Kimberly Kempf-Leonard, eds.), *Our Children, Their Children: Confronting Racial and Ethnic Differences in American Juvenile Justice*. Chicago, IL: University of Chicago Press.
- Steinberg, Laurence. 2009. Adolescent development and juvenile justice. *Annual Review of Clinical Psychology*, 5: 47–73.
- Visher, Christy V. 1983. Gender, police arrest decisions, and notions of chivalry. *Criminology*, 21: 5–28.
- Walker, Samuel. 2005. *Sense and Nonsense about Crime and Drugs: A Policy Guide*, 6th Edition. New York: Wadsworth.

### Cases Cited

- Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc).
- In re Gault*, 387 U.S. 1 (1967).
- Schall v. Martin*, 467 U.S. 253 (1984).

---

**Kimberly Kempf-Leonard** is a professor of criminology and criminal justice at Southern Illinois University Carbondale. Her research examines offender patterns over the life course and ways in which to make juvenile and criminal justice systems more effective and fair. Recent publications focus on gender, race, and ethnic disparity in juvenile court processing.