

POLICY ESSAY

JUVENILES' RIGHT TO COUNSEL

When a “right” is not enough

Implementation of the right to counsel in an age of ambivalence

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Barry C. Feld and Shelly Schaefer (2010, this issue) have documented the disturbing lack of compliance with Minnesota's 1995 mandate to provide counsel to juveniles appearing in juvenile court. Their article is an important and welcome reminder that constitutional and legislative mandates by themselves cannot ensure the enforcement of our most fundamental rights.

The failure to provide counsel to children charged with delinquent acts has consequences. Last year, in Luzerne County, Pennsylvania, the U.S. Attorney indicted two juvenile court judges for accepting more than \$2.6 million in kickbacks from the owners and the developer of two juvenile correctional facilities as a *quid pro quo* for sending children to those facilities. Critical to their scheme was the systematic denial of counsel to the children who appeared in Luzerne's juvenile court. Luzerne demonstrates the human toll behind Feld and Schaefer's (2010) data; the consequences can be profound and life altering. Although Luzerne County is an extreme—and likely the most extreme—example of what happens when we disregard the constitutional rights of children, its lessons bear heeding.

Forty years after *In re Gault* (1967), Luzerne County high-school sophomore, Hillary Transue, posted a MySpace parody of a school administrator. The posting included Hillary's unrealized hope that the administrator had a sense of humor. The administrator complained to the police, who charged Hillary with “harassment.” Hillary and her mother appeared in the Luzerne County juvenile court before Judge Mark Ciavarella. They signed a document that turned out to be a waiver of Hillary's right to counsel. In a hearing eerily reminiscent of Gerald Gault's—except Hillary's was shorter and lasted only a couple of minutes—Hillary was adjudicated delinquent, shackled, dragged from the courtroom, and sent to a delinquency facility.

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Hillary had no lawyer, and neither the public defender who was in the room nor the district attorney who prosecuted the case uttered a word of protest. The professional silence in Judge Ciavarella's courthouse was troubling, because in the years prior to the scandal, Pennsylvania had taken many steps to guarantee a youth's right to counsel.

In 1980, national standards promulgated by the American Bar Association (ABA) called for juveniles to have an unwaivable right to counsel (Institute for Judicial Administration, 1980). More than 10 years later, Juvenile Law Center staff coauthored *America's Children at Risk*, which urged the organized bar to fulfill children's right to counsel as follows:

Many of the problems that plague the juvenile justice system—including appalling conditions in confinement, inappropriate transfer to adult court, over-representation of children of color, and inadequate health and educational services—could be remedied if every child accused of a crime was well represented by competent counsel, knowledgeable about juvenile justice issues and committed to furthering that child's interests at all points in the juvenile justice process . . . (ABA, 1993: 60).

A Call for Justice (ABA, 1995) was a national assessment of the state of representation. The assessment was discouraging. Although pockets of excellence did exist, “the assessment raised serious concerns that the interests of many young people in juvenile court are significantly compromised, and that many children are literally left defenseless” (ABA, 1995: 6-7).

The national assessment led to the creation of the National Juvenile Defender Center (NJDC), which assumed responsibility for conducting state-based assessments of the right to counsel that the ABA Juvenile Justice Center had begun. The Juvenile Law Center joined the ABA and the NJDC in assessing indigent juvenile defense in Pennsylvania (Juvenile Law Center, 2003). The Pennsylvania assessment found that “a significant percentage of youth pass through the delinquency system without effective advocates or adequate safeguards to protect their interests” (Juvenile Law Center, 2003).

The Pennsylvania Supreme Court responded to the assessment when it promulgated procedural rules, which became effective in the fall of 2005. The new rules expanded on the expectation of Pennsylvania's Juvenile Act that youth would have counsel at every stage of the juvenile court process. The rules make it difficult for counsel to withdraw from a case; require appointment of counsel for youth without financial means; call for counsel to be appointed prior to a detention hearing if the youth is in detention; permit waiver of counsel only with a colloquy that makes clear that the waiver is knowing, intelligent, and voluntary; and permit the appointment of stand-by counsel even if the youth waives his or her right to counsel (Pennsylvania Rules of Juvenile Court Procedure, 2005). Despite these mandates and the momentum in support of a juvenile's right to counsel, Hillary Transue found herself without a lawyer and incarcerated for a first-time minor offense.

Hillary's mother found the Juvenile Law Center, which had encountered the same judge, and the same errant judicial behavior, in 1999. The Juvenile Law Center then had appealed a delinquency adjudication of a 12-year-old with mental health problems who (unrepresented)

had been tried summarily and sent to a detention center by Judge Ciavarella. When he was reversed on appeal, Ciavarella told a local newspaper, “I’ll never do it again. . . . They obviously have a right to a lawyer, and even if they come in and tell me they don’t want a lawyer, they’re going to have one” (McNarney, 2001).

After the Juvenile Law Center’s *habeas corpus* petition brought about Hillary’s release, she told Juvenile Law Center staff that other youth she had met in placement also had been railroaded. The Juvenile Law Center investigated by interviewing additional youth, reviewing Juvenile Court Judges’ Commission (JCJC) data, and observing the Luzerne County juvenile court.

The Juvenile Law Center discovered a massive violation of the right to counsel in Luzerne County, extending back for several years. In 2008, the Juvenile Law Center petitioned the Pennsylvania Supreme Court, asking it to address this systemic denial of children’s rights: The petition asserted the following:

In 2005, juveniles appeared without counsel in *fifty* percent of all delinquency dispositions involving hearings in Luzerne County (*i.e.*, 285 hearings without counsel out of 569 dispositions involving hearings before a judge or master), nearly *ten* times the state average (5.9 percent) reported by JCJC. A significant percentage of the hearings without counsel resulted in adjudication and sanctions. According to JCJC, in 2005 nearly half of the delinquency dispositions in Luzerne County that resulted in probation occurred without counsel (*i.e.*, 92 out of 187 juvenile dispositions resulted in probation without counsel), and nearly sixty percent of delinquency dispositions that resulted in out-of-home placement occurred without counsel (*i.e.*, 126 out of 219 juvenile dispositions resulted in placement without counsel) (Juvenile Law Center, 2008: 9-10).

With Luzerne as a backdrop, three clusters of questions emerge from Feld and Schaefer’s (2010) documentation of the failure to provide youth with counsel in juvenile court. The first set of questions is core to Feld and Schaefer’s analysis of Minnesota data. Too many juvenile courts find ways to avoid providing counsel. In the face of increasing mandates to provide counsel to youth, why do so many youth lack counsel, and why do judges in so many cases seem reluctant to enforce the mandate?

Feld has written often about the tension in juvenile court between social welfare and social control (Feld, 1997). At their best, lawyers limit courts’ exercise of social control by ensuring that jurisdiction is appropriate—by finding ways to divert the youth from a system that has many opportunities for diversion, by ensuring that proof exists beyond a reasonable doubt that the youth committed the crime charged, and by pressuring the court to use the least restrictive alternative to meet its goals.

By fulfilling their obligations to challenge the juvenile court’s exercise of control, lawyers for youth inevitably get in the way of courts’ promotion of what they see as the best interests of youths. Luzerne County was an extreme example of a court intent on exercising control, regardless of either the actual commission of any wrongdoing of the youth or the best interests

of the youth (and regardless of whether any public goal would be served by the juvenile court's abuse of power). But well-meaning judges want to do more than exercise control; they have a romantic view that the coercive power of the court can assist youth, and to some of these judges, lawyers are a nuisance if they remind the court that the rule of law limits when and how judges provide that assistance.

Judges also perform a cost–benefit analysis. At one extreme were the corrupt judges of Luzerne County, who saw lawyers as obstacles to their corrupt scheme. But judges at the other extreme want to help youth and do in their court rooms what the Minnesota Legislature and Governor did when they created new categories of status offenses and eliminated increased funding for lawyers. Some judges want to help youth come to believe that a lawyer is an unnecessary expense at times. In their view, if they have no plans to incarcerate a youth, then a lawyer merely will be a cost without a benefit. This approach, of course, discounts the importance of teaching youth that the rule of law matters. It is also a sign of judges' overconfidence in their ability to know what is best for a youth and how little a lawyer can help them make that determination within the boundaries of the juvenile justice system. It also completely ignores the consequences that might follow youth convicted of any criminal conduct, whether or not they are incarcerated.

Judges also do cost–benefit analysis another way. Many assume that no funds will be allotted for indigent defense and that providing lawyers for all merely will mean increasing caseloads. In 1996, after the publication of *A Call for Justice* (ABA, 1995), two of its authors, Loren Warboys and Bob Schwartz, spoke about it to a national conference of juvenile court judges. Some judges in the audience challenged their call for giving every youth a lawyer. Those judges, like Feld and Schaefer's (2010) public officials in Minnesota, could not imagine *increasing* the pool of lawyers for youth. In their world, youths would be worse off because lawyers with higher caseloads could not give them the attention they deserved. Those judges were perversely prescient. Feld and Schaefer describe how an aspirational Minnesota system of progressive design—created to give every youth a lawyer—sinks to an equilibrium in which new categories of offenses are created that will not require lawyers, funding is cut for lawyers, and judges still decline to appoint lawyers in all cases. Effective, universal representation of youth in juvenile court is beyond what systems left to their own devices are willing to provide.

Waiver of the right to counsel by teens is particularly problematic. The MacArthur Foundation created a research network on adolescent development and juvenile justice that examined youths' capacities. Much of the network's early research found that capacities of youths changed through adolescence (Grisso and Schwartz, 2000), but they still needed far more support than adults to withstand pressure to waive counsel (Feld, 2000). "The problem becomes more acute when judges who advise youths about their right to an attorney seek a predetermined result, waiver of counsel, which influences both the information they convey and their interpretation of the juvenile's response" (Feld, 2000: 125).

Pennsylvania's juvenile court rules were written to avoid that problem. The comment to rule 152 (Pennsylvania Rules of Juvenile Court Procedure, 2005) recommends that courts, at

a minimum, engage the youth in a colloquy before permitting waiver of counsel to elicit the following:

1. Whether the juvenile understands the right to be represented by counsel;
2. Whether the juvenile understands the nature of the allegations and the elements of each of those allegations;
3. Whether the juvenile is aware of the dispositions, community service, or fines that may be imposed by the court;
4. Whether the juvenile understands that if he or she waives the right to counsel, he or she will still be bound by all the normal rules of procedure and that counsel would be familiar with these rules;
5. Whether the juvenile understands that there are possible defenses to these allegations that counsel might be aware of, and if these defenses are not raised at the adjudicatory hearing, they may be lost permanently;
6. Whether the juvenile understands that, in addition to defenses, the juvenile has many rights that, if not timely asserted, may be lost permanently; and if errors occur and are not timely objected to, or otherwise timely raised by the juvenile, these errors may be lost permanently;
7. Whether the juvenile knows the whereabouts of absent guardians and if they understand they should be present; and
8. Whether the juvenile has had the opportunity to consult with his or her guardian about this decision.

Judge Ciavarella never asked Hillary even one of these questions. Nor did he ask them of any of the thousands of youth who appeared before him throughout a 5-year period before 2008, when he stepped down from juvenile court after the filing of the Juvenile Law Center's first application to the Pennsylvania Supreme Court. Ciavarella's conduct was extreme but also necessary—to him—because lawyers might have gotten in the way of the corrupt bargain he and another judge had entered into with a for-profit detention center.

Feld and Schaefer (2010) do not discuss the role of the parent in waiving counsel, perhaps because Minnesota's Rules of Juvenile Procedure (3.06, 2005) require appointment of counsel if the child is unable to afford a lawyer. One implication of the high waiver rates in Minnesota is that parents did not insist that their children be represented. This finding is not surprising. Luzerne County is the poster child for the view that parents cannot be relied on to ensure that their children have lawyers.

Parents do a cost-benefit analysis, too. In most jurisdictions, parents must pay for their child's lawyer if someone in authority determines that the parent has the ability to pay. In

Luzerne County, many parents were told by lawyers, court personnel, or law enforcement that a lawyer would not make a difference, even if the charges suggested risk of placement. Others were told that the charges were so trivial that nothing bad could happen to their son or daughter. Under such circumstances, why waste money on an attorney? Still other parents had brought the petitions that led to the court hearings, and others were angry with their children for being arrested and wanted to teach them a lesson.

A second important question is raised by Luzerne County and implied by Feld and Schaefer (2010): Why do so many juvenile court professionals ignore the processing—or in Luzerne County, the railroading—of so many children without counsel? In Luzerne County and Minnesota, prosecutors, defense attorneys, probation staff, and courthouse onlookers were content with a system in which so many youth lacked counsel, despite the mid-1990s reforms.

Without systems of checks and balances, juvenile courts can be as indifferent to the rights of youth as criminal courts are to adult defendants—or even more so. Luzerne County is an extreme case driven by corruption. But when the public has misguided expectations for poorly funded systems, bad things happen, and injustice can become routine. This issue is not merely a failure of legislatures to fund counsel or of judges to appoint them. It takes a community to hurt a child.

Indeed, it took an unprecedented breadth and depth of indifference by court personnel to allow Luzerne County to occur. Many people have asked us, how could so many professionals on the periphery allow Luzerne County's abuses to continue? It turns out that what happens at the periphery is often the heart of the matter. As Amy Bach wrote, "Ordinary injustice results when a community of legal professionals becomes so accustomed to a pattern of lapses that they can no longer see their role in them" (Bach, 2009: 2).

A third set of questions exist, whose answers—properly implemented—would ensure that every youth has a lawyer and that the rule of law takes root in juvenile courts everywhere. Because mandates are ignored too often and, on their own, are inadequate to ensure that youth have counsel, what mechanisms of transparency and accountability would ensure that juveniles' right to counsel is fulfilled in every case? One obvious method of accountability—appellate review—disappears when youth lack counsel. Swift, meaningful appeals to address adjudications and dispositions are obviously unavailable to youth who lack counsel. Other approaches will be necessary to fulfill the mandate.

The first requirement is that the right to counsel actually be an unwaivable mandate; that is the approach of the ABA Juvenile Justice Standards (Institute for Judicial Administration, 1980). If counsel cannot be waived, then funding must be adequate for the complex roles inherent in juvenile defense (ABA, 1995). Those requirements are necessary, but insufficient prerequisites to changing a culture that prefers, in too many cases, to operate without lawyers.

A second requirement is opening juvenile court to public scrutiny. This condition, too, is a necessary but insufficient remedy. As Bach (2009) showed, injustices occur routinely in courts that are open to the public. An open court room, however, increases the chances that courts will appoint lawyers and that lawyers will do their jobs.

A third reform would not have helped in Minnesota but should be part of system change elsewhere; appointment of counsel should not depend on the income of parents or their willingness to hire a lawyer. The Minnesota Rules of Juvenile Procedure (2005) added the following:

The child has the right to be represented by an attorney. This right attaches no later than when the child first appears in court. The attorney shall initially consult with the child privately, outside of the presence of the child's parent(s), legal guardian or legal custodian. The attorney shall act solely as the counsel for the child.

(The Institute for Judicial Administration Standards [1980] also prohibits consideration of the income of parents.) Despite the stringency of the rules, Feld and Schaefer (2010) found that many Minnesota youth appeared without counsel. Thus, mandating a right to counsel for the child is necessary but insufficient. Indeed, the failure of Minnesota's progressive policies to ensure that every youth actually has a lawyer suggests that it will be hard anywhere to implement *Gault's* (1967) guarantee. As Feld and Schaefer unhappily observed, their "findings suggest continuing judicial resistance to formal legal rational initiatives in a substantively irrational organization."

The most important reform might be requiring data on appointment of counsel generated in real time, with oversight from a state supreme court or designated agency. Feld and Schaefer's (2010) retrospective analysis of Minnesota practice, like the Juvenile Law Center's review of Luzerne County data, is useful. But youth would be served better if red flags rose immediately when youth appeared without counsel.

Minnesota decriminalized many misdemeanors and turned them into status offenses for which lawyers were not required; Luzerne County *de facto* criminalized status offenses as well as a wide range of normative misbehavior—especially school-based behavior—and made sure that lawyers did not appear to object or impede their harsh treatment of youth. We know how many youth were harmed by the latter practice. In October 2009, the Pennsylvania Supreme Court granted relief in the case that began when Hillary Transue's mother first called the Juvenile Law Center. The Pennsylvania Supreme Court adopted the recommendations of its Special Master and vacated more than 4,500 cases. It held that the Special Master's

independent review of the transcripts of individual cases disclosed Ciavarella's systematic failure to determine whether a juvenile's waiver of the right to counsel was knowingly, intelligently and voluntarily tendered; the failure to conduct the requisite waiver colloquy on the record; the failure to advise the juvenile of the elements of the offenses charged; and the failure to determine whether an admission was tendered, and then to apprise the juvenile of the consequences of an admission of guilt. In addition, this Court's review of those same transcripts reveals a systematic failure to explain to the juveniles the consequences of foregoing trial, and the failure to ensure that the juveniles were informed of the factual bases for what amounted to peremptory guilty pleas. The transcripts reveal a disturbing lack of fundamental process, inimical to any system of justice, and made even more

grievous since these matters involved juveniles. . . . Ciavarella's complete disregard for the constitutional rights of the juveniles who appeared before him without counsel, and the dereliction of his responsibilities to ensure that the proceedings were conducted in compliance with due process and rules of procedure promulgated by this Court, fully support [the Special Master's] (Supreme Court Opinion, page 4). The lives of more than 4,500 children were thrown off course by arguably the most egregious judicial corruption scandal in our history. In furtherance of the judges' scheme, as many as half of these children appeared without counsel, and a substantial percentage of these unrepresented youth were sent to juvenile correctional facilities—in most cases, for very minor acts of misconduct. Children are silenced routinely in our legal system; the provision of lawyers is meant to remedy that silence. A culture that remains resistant to the appointment and assistance of counsel for these children—even in the face of mandates—strips a critical barrier between the rule of law and arbitrariness. In the latter case, the children suffer, but we all pay a price.

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