

**OUT OF SIGHT, OUT OF MIND:  
HOW THE LACK OF POSTDISPOSITIONAL ADVOCACY IN  
JUVENILE COURT INCREASES THE RISK OF RECIDIVISM AND  
INSTITUTIONAL ABUSE**

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Make no mistake, the system is built for you to stay in it.

Charles D., former juvenile delinquent

Juvenile delinquency court administrative judges are responsible to ensure that counsel is available to every youth at every hearing, including post-disposition reviews and reentry hearings.

National Council of Juvenile and Family Court Judges<sup>1</sup>

The guard looked in my bag and smiled. She didn't mind. She'd known for months that I had been bringing José<sup>2</sup> candy bars while he waited in detention. José was waiting for the interstate compact to be complete so he could go to a residential treatment facility in Colorado. No one knew how much longer the wait would be, and since he had no family to visit him, I tried to come once a week. José was a former dependent kid,<sup>3</sup> now in the delinquency system, and his case was complicated.<sup>4</sup> His disposition and postdisposition were even more complicated.

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1. NAT'L COUNCIL OF JUV. AND FAM. CT. JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 25 (2005), available at <http://www.ncjfcj.org/content/view/411/411> [hereinafter JUVENILE DELINQUENCY GUIDELINES] (holding delinquency judges responsible for providing children with access to counsel at every stage of the proceedings, from before the initial hearing through postdisposition and reentry).

2. The names of all children referenced in this Essay have been changed to protect their privacy.

3. There is often a strong connection between the dependent and delinquent systems. James Garbarino, *Forward*, in TRAUMA AND JUVENILE DELINQUENCY: THEORY, RESEARCH AND INTERVENTIONS, at xix, xxi (Ricky Greenwald ed., 2002) ("Research indicates that inside virtually every dangerously violent youth is an untreated traumatized child, a child with experiences of violent victimization . . .").

4. José was arrested for three direct sales of narcotics to police officers. When I asked him why, he responded that he had been living in a car in North Philadelphia ever since he and his sister ran away from an abusive uncle. He needed to sell

José is one of the children my own children know all about, particularly after I decided to visit him in Colorado. After traveling by plane to Denver and then enduring a five-hour car ride, I arrived in a small Colorado town where tumbleweeds bounced lazily across fields and the primary industry seemed to be the breeding of pygmy goats. Taking in the remote landscape, I wondered where it is exactly that we are sending our kids, and who is there to make sure everything is okay once they arrive. Why are we shipping them to such remote facilities with little oversight or accountability, not to be thought of again until their release? Driving among the tumbleweeds and goats, I became convinced of the absolutely critical nature of postdispositional advocacy in delinquency court.

Imagine a mother who sends her daughter off to boarding school in order to get help. Sent with her daughter is a letter identifying the girl's needs. For example, the girl is a special education student who has been frustrated by school in the past, she needs grief counseling to get over the murder of her brother, and she has recently been using marijuana. Imagine that this same mother never once attended a parent-teacher conference, read her daughter's report cards, or checked in with the girl to make sure things were going all right, and yet she sent her away for years. In New Jersey, and across the country, this is exactly the situation thousands of children are in after they are adjudicated delinquent.<sup>5</sup>

Despite the juvenile system's supposed goal of "rehabilitation," after the court steps in as *parens patriae* 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. Whether a placement is 1000 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.<sup>6</sup>

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narcotics to support them both. José had been sexually abused by his uncle, who made him perform sex acts on his sister Lisa. José's disposition was complicated because he had suicidal ideations and had set fires.

5. New Jersey has also recognized that children are entitled to an attorney at every critical stage of the delinquency process. N.J. STAT. ANN. § 2A:4A-39(a) (West 2007). Most children by their status are indigent, and most children in the juvenile justice system come from low-income families, and, therefore, they would qualify for court-appointed counsel. See Garbarino, *supra* note 3, at xxi-xxiii. Unfortunately, due to the structure of the indigent defense delivery system, public defenders are not contracted to do post-dispositional work. See N.J. STAT. ANN. § 2A:4A-39(a).

6. *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.")

The lack of mandatory review hearings and of postdispositional representation is a cause for great concern. This Essay argues that review hearings and postdispositional advocacy, which are often the lowest priority for delinquency attorneys and the court system, have the power to reduce recidivism, decrease juvenile justice expenditures, and prevent institutional abuse.

Part I of this Essay reviews the rehabilitative goals of juvenile court and identifies those national standards that recognize the critical role of postdispositional representation. Part II describes how mandatory review hearings drive the existence and quality of postdispositional representation, and argues that, from a systemic and practitioner's point of view, review hearings are a critical tool for all juvenile justice stakeholders to ensure program accountability. Part III describes the connection between postdispositional advocacy and institutional abuse, and explores the connection between institutional abuse, recidivism, and costs. Part IV recommends a collaborative solution, utilizing the resources of law schools and a model from Mississippi to create postdispositional advocacy with minimum cost.

#### I. POSTDISPOSTIONAL ADVOCACY IS ESSENTIAL TO THE REHABILITATIVE GOAL OF JUVENILE COURT

Treating children differently than adults and focusing on rehabilitation rather than punishment is a defining aspect of the American juvenile court system.<sup>7</sup> The goal of individualized justice, which seeks to meet the specific needs of each child, has remained a constant from the 1890s to today.<sup>8</sup>

This individualized justice takes the form of a rehabilitative plan that is designed at the dispositional stage of the juvenile court

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7. New Jersey's Code of Juvenile Justice states the purpose of the juvenile act is:
    - a. To preserve the unity of the family whenever possible and to provide for the care, protection, and wholesome mental and physical development of juveniles coming within the provisions of this act;
    - b. Consistent with the protection of the public interest, to remove from children committing delinquent acts certain statutory consequences of criminal behavior, and to substitute therefore an adequate program of supervision, care and rehabilitation.

N.J. STAT. ANN. § 2A:4A-21. The statute also gives a range of sanctions designed to promote accountability and protect the public. *Id.*

8. JUVENILE DELINQUENCY GUIDELINES, *supra* note 1, at 12. *See also* McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971) ("We are reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young."). Additionally, *McKeiver* explains why children in the juvenile justice system *do not* have a constitutional right to a jury and states that the jury trial could "remake the juvenile proceeding into a fully adversary process [that] will put an effective end to . . . the idealistic prospect of an intimate, informal protective proceeding. *Id.* at 545.

hearing.<sup>9</sup> The rehabilitative plan is analogous to sentencing in the adult criminal justice system, and, like adult sentences, juvenile sentences can last for many years.<sup>10</sup> Most juvenile courts retain jurisdiction over children until they are twenty-one.<sup>11</sup> Juvenile court is a hybrid between criminal and civil court, following the procedures of adult criminal court until its divergence after the trial or “adjudicatory hearing”<sup>12</sup> is complete. Once the trial is complete, the court has broad discretion to design the appropriate services to meet the rehabilitative needs of the child.<sup>13</sup> The disposition stage, however, is not the end. The postdisposition<sup>14</sup> advocacy that follows is critical because it is at this stage that the rehabilitative goals of the juvenile system are either accomplished or squandered. A child’s rehabilitation occurs entirely through the posttrial programs ordered at the disposition hearing.

Most juvenile court judges have a wide array of dispositional options.<sup>15</sup> In New Jersey, the juvenile code lays out many alternatives ranging from probation to incarceration.<sup>16</sup> Dispositional options fall along a continuum of care ranging from the least restrictive, community-based options to secure residential placement.<sup>17</sup>

Judicial rehabilitative disposition options are essential, yet the court’s order is only the first step toward rehabilitating a child. What happens next? Who is responsible for the child postdisposition, after

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9. See JUVENILE DELINQUENCY GUIDELINES, *supra* note 1, at 135-36. A disposition hearing is defined as “the hearing at which the juvenile delinquency court makes orders regarding the consequences an adjudicated youth receives as a result of the law violation. Similar to the term ‘sentencing’ used in the adult criminal justice system.” *Id.* at 228.

10. *Id.*

11. The only states in which juvenile court jurisdiction over dispositions extends after a youth’s twenty-first birthday are California, Colorado, Hawaii, Kansas, Montana, New Jersey, Oregon, and Wisconsin. OFF. OF JUV. JUST. AND DELINQ. PREVENTION, JUVENILE JUSTICE SYSTEM STRUCTURE AND PROCESS, STATISTICAL BRIEFING BOOK (2006), available at [http://ojjdp.ncjrs.org/ojstatbb/structure\\_process/qa04106.asp?qaDate=2004](http://ojjdp.ncjrs.org/ojstatbb/structure_process/qa04106.asp?qaDate=2004).

12. JUVENILE DELINQUENCY GUIDELINES, *supra* note 1, at 227.

13. See *id.* at 135-36.

14. *Id.* at 231 (defining postdisposition review as “hearings held after the juvenile delinquency court has ordered probation, treatment services, or placement, to ensure that the youth, parents, probation, service and placement providers are following through with the court ordered plan”).

15. New Jersey law instructs the juvenile judge to weigh various factors and then order one or more of twenty dispositional options. N.J. STAT. ANN. § 2A:4A-43 (West 2007). See also ELIZABETH CALVIN ET AL., JUVENILE DEFENDER DELINQUENCY NOTEBOOK: ADVOCACY AND TRAINING GUIDE 7 (2d ed. 2006) [hereinafter DELINQUENCY NOTEBOOK].

16. See N.J. STAT. ANN. § 2A:4A-43.

17. *Id.*

the order is signed? While most children would fall loosely under the authority of the Department of Public Welfare (DPW), combined with the local probation department, if the state does not have mandatory review hearings and the indigent defense delivery system is not actively engaging in postdispositional advocacy, the fragmented and overburdened DPW and probation departments are insufficient to enforce a judicial order for a particular child. In many states, including New Jersey because of the systemic structure, the level of postdispositional advocacy by the child's attorney is virtually nonexistent. This failure causes children to be forgotten, abusive facilities to continue operating, and, most importantly, results in the total failure of the juvenile justice system's highest priority, "rehabilitation."<sup>18</sup>

A. *National Standards Relating to Postdispositional Advocacy*

Whenever a child's liberty interests are at stake, she is entitled to the representation of counsel.<sup>19</sup> National standards have repeatedly recognized that the postdisposition period is a critical

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18. See AM. COUNCIL OF CHIEF DEFENDERS & NAT'L JUV. DEFENDER CTR., TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH INDIGENT DEFENSE DELIVERY SYSTEMS (2005), available at [http://www.njdc.info/pdf/10\\_Principles.pdf](http://www.njdc.info/pdf/10_Principles.pdf) [hereinafter TEN CORE PRINCIPLES] (noting assessments of juvenile indigent defense systems reveal a "lack of access to competent counsel").

19. See *id.*; JUSTICE CUT SHORT: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN OHIO (2003), available at [http://www.njdc.info/pdf/Ohio\\_Assessment.pdf](http://www.njdc.info/pdf/Ohio_Assessment.pdf) [hereinafter JUSTICE CUT SHORT] (recommending that the governor and legislature "[s]hould enact and implement an unwaivable right to counsel for all children and youth at every stage of delinquency and unruly proceedings, including probation revocation hearings where loss of liberty is a possible outcome"); IJA-ABA JOINT COMM'N ON JUV. JUST. STANDARDS, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS 89 (1980) [hereinafter STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS] (calling for the "effective assistance of counsel at all stages of the proceeding," advising that the "right to counsel should attach as soon as" possible, and advocating that the juvenile should have the mandatory and unwaivable right to effective assistance of counsel at all stages of the proceedings); PATRICIA PURITZ ET AL., AM. BAR ASS'N JUV. JUST. CTR., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 5-10 (1995) [hereinafter A CALL FOR JUSTICE] (standards of representation should guarantee that every juvenile has counsel, that the right to counsel is not waived, and that the juvenile is represented from the earliest stages of the proceeding through postdisposition stages); NAT'L ASS'N OF COUNSEL FOR CHILD., POLICY AGENDA (1997), available at [www.naccchildlaw.org/policy/policy\\_agenda.html](http://www.naccchildlaw.org/policy/policy_agenda.html) [hereinafter NATIONAL ASS'N OF COUNSEL FOR CHILD.] ("[J]uveniles accused of offenses should be represented by competent counsel in all court proceedings, including post-disposition proceedings."); IJA-ABA JOINT COMM'N ON JUV. JUST. STANDARDS, STANDARDS RELATING TO INTERIM STATUS: THE RELEASE, CONTROL, AND DETENTION OF ACCUSED JUVENILE OFFENDERS BETWEEN ARREST AND DISPOSITION § 7.6c (1980), (advocating for the right to counsel at each stage of formal juvenile justice process); JUVENILE DELINQUENCY GUIDELINES, *supra* note 1.

stage in the juvenile court process, a stage in which the child needs zealous advocacy.<sup>20</sup>

In the spring of 2005, the National Council of Juvenile and Family Court Judges released the *Juvenile Delinquency Guidelines*. Key principal 13 of the *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."<sup>21</sup> The *Juvenile Delinquency Guidelines* go on to state that, "in order for counsel to be effective at this stage of the juvenile delinquency process, counsel must not only rely on the information provided by the probation officer, but should also independently speak with the youth, the youth's parent or legal custodian, and the service provider."<sup>22</sup>

Postdispositional representation is so important, the *Juvenile Delinquency Guidelines* specifically indicate that there should not only be counsel, but that there should be "the same counsel" at every hearing for the child,<sup>23</sup> and that postdispositional reviews should happen not less than every ninety days.<sup>24</sup> The Institute of Judicial Administration and the American Bar Association, in their *Juvenile Justice Standards*, address the relationship between the child and the lawyer postdisposition, stating:

If the client has been found to be within the juvenile court's jurisdiction, the lawyer should maintain contact with both the client and the agency or institution involved in the disposition plan in order to ensure that the client's rights are respected and, where necessary, to counsel the client and the client's family concerning the dispositional plan.<sup>25</sup>

The lawyer who represents a client during initial juvenile court proceedings should ordinarily be prepared to represent

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20. See TEN CORE PRINCIPLES, *supra* note 18, at 25. Principal 8 urges 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 "intervene[] and advoca[te] before the appropriate authority." *Id.* See also IJA-ABA JOINT COMM'N ON JUV. JUST. STANDARDS: STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES § 2.3 (1980) [hereinafter STANDARDS RELATING TO COUNSEL] ("Legal representation should also be provided the juvenile in all proceedings arising from or related to a delinquency [action].").

21. JUVENILE DELINQUENCY GUIDELINES, *supra* note 1, at 177. The *Guidelines* go into great detail regarding the importance of postdispositional review, whether the child is at home or in an out of home placement. *Id.*

22. *Id.* at 177. See also *id.* at 178 ("All parties and key participants who were involved in hearings prior to and including the disposition hearing should be involved in post-disposition review, including the prosecutor and counsel for the youth.").

23. *Id.* at 181.

24. *Id.* at 182.

25. STANDARDS RELATING TO COUNSEL, *supra* note 20, § 10.1 (a) (1980).

the client with respect to proceedings to review or modify adjudicative or dispositional orders made during earlier hearings or to pursue any affirmative remedies that may be available to the client under local juvenile court law.<sup>26</sup>

In addition to the above national standards, the importance of postdispositional representation has been addressed by the American Bar Association,<sup>27</sup> the National Association of Counsel for Children,<sup>28</sup> the American Council of Chief Defenders, and the National Juvenile Defender Center.<sup>29</sup>

While the national standards are clear, the decision to engage in postdispositional advocacy is often determined by contract<sup>30</sup> or by the individual lawyers themselves.<sup>31</sup> Whether postdisposition advocacy occurs is determined by a number of factors: 1) the juvenile code of the state, which either provides for mandatory review hearings or not; 2) the commitment and funding of the indigent defense delivery system to engage in postdispositional work; and 3) the personal motivation of individual attorneys.

## II. MANDATORY REVIEW HEARINGS DRIVE THE EXISTENCE AND QUALITY OF POSTDISPOSITIONAL REPRESENTATION, AND SERVE AS A CRITICAL PROGRAM ACCOUNTABILITY TOOL FOR ALL JUVENILE JUSTICE STAKEHOLDERS

### A. Practitioner's Point of View

Every month while supervising the juvenile unit of the defender association in Philadelphia, I would schedule the most skilled and experienced lawyers to handle the postdisposition review hearings.<sup>32</sup>

26. *Id.* § 10.2.

27. A CALL FOR JUSTICE, *supra* note 19, at 5-10 (arguing standards of representation should guarantee that every juvenile has counsel, that the right to counsel is not waived, and that the juvenile is represented from the earliest stages of the proceeding through postdisposition stages).

28. See NAT'L ASS'N OF COUNSEL FOR CHILD., *supra* note 19.

29. See TEN CORE PRINCIPLES, *supra* note 18, at 2.

30. For example, in New Jersey the juvenile attorneys at the public defender's office are not contracted to do postdisposition advocacy. See Marsha Levick & Laval Miller Wilson, *Justice by Geography: Measuring the Quality of Indigent Juvenile Defense County by County in Pennsylvania*, THE PHILADELPHIA LAWYER, Spring 2004, at 12.

31. In many states there is nothing to prevent a lawyer from doing postdispositional advocacy, except the lack of resources and time. See *id.*

32. From 2001–2006, I served as the assistant chief of the Juvenile Unit of the Defender Association of Pennsylvania. See also AM. BAR ASS'N ET AL., AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 64 (2003), <http://www.jlc.org/File/publications/paassessment.pdf> [hereinafter PENNSYLVANIA ASSESSMENT] (“Also impressive is the Defender Association’s post-disposition advocacy for youth in placement. Despite vast

My office had come to an agreement that the review hearings were arguably the most critical stage of the entire juvenile process. Skilled, senior advocates were essential to understanding the components of the various juvenile justice programs and how to best meet a child's needs given the options. The six-month review hearings mandatory in Pennsylvania<sup>33</sup> not only benefited the child, but benefited the entire system and served as an accountability tool to ensure program effectiveness.

*B. Review Hearing: A Critical Tool for Program Accountability*

It is only through postdispositional review hearings that important issues relating to juvenile treatment come to light. During my career as a juvenile defender in Pennsylvania, many critical issues were revealed at the review hearings. Examples of such issues included which programs: 1) had a frequent turnover of staff; 2) were quick to negatively discharge a child they had originally accepted; and 3) denied children medical attention, lacked a grievance procedure, or insisted that staff read all incoming and outgoing mail. During a review hearing the juvenile's attorney could learn which programs refused to make dietary accommodations for children who are Muslim or Jewish, or which programs had no counselors of color, or offered very limited special education services, or gave sanctions to children in an arbitrary manner.<sup>34</sup> In Pennsylvania, these mandatory review hearings drove the existence and quality of postdispositional representation. Judges insisted that lawyers be appropriately prepared for every review hearing, and took seriously the information they received.<sup>35</sup>

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geographical separation from their clients the Defender Association investigates and monitors the treatment of clients placed in out-of-home facilities.”).

33. 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.* § 6353(a).

34. Based on the author's experience.

35. See Doron Taussig, *Restraining Disorder*, PHILADELPHIA CITY PAPER, May 19, 2005, at 1, available at <http://www.citypaper.net/articles/2005-05-19/cover.shtml> (reporting that Philadelphia Juvenile Court judges removed juveniles from facilities based on reports of abuse).



Review hearings are a critical tool for all juvenile justice stakeholders, both while the child is in placement and when they are released, and these hearings provide an opportunity to address concerns to the court and eliminate obstacles to an effective reentry. At the review hearing the juvenile court judge can inquire about speech therapy, an anger management course, or trauma counseling. Review hearings are also important for the parents, providing them with a forum to express any concerns. Moreover, these hearings provide important opportunities for juvenile court judges to assess the effectiveness of various programs and quickly learn where juveniles make the most progress.<sup>36</sup> Finally, review hearings benefit the probation department, providing probation officers with the opportunity to request changes to the court's disposition order.<sup>37</sup>

### C. Costs

Close monitoring of programs is essential because so many of the agencies that serve youth are for-profit corporations.<sup>38</sup> Review hearings provide information about the inner workings of programs, providing the courts and the Department of Human Services with valuable information with which to make informed contract renewal decisions. Juvenile programs can cost as much as \$300 a day,<sup>39</sup> with some states spending over \$40,000 per year, per juvenile.<sup>40</sup> Outcome data regarding juvenile programs is difficult to find, and it is important that these programs remain accountable to the public that provides the funding.

Review hearings and postdispositional advocacy ensure that juveniles do not become captive victims of profit-seeking programs. I remember conducting a review hearing that went like this:

Juvenile Defender: Your Honor, we request that this child be discharged from the placement. He has been there for ten months, has been a model resident, and he has completed the program. He has his diploma, has completed his drug treatment, and has done his anger management counseling.

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36. See JUVENILE DELINQUENCY GUIDELINES, *supra* note 1, at 165-91.

37. *Id.*

38. See Barbara White Stack, *In Harm's Way: Drug Convictions No Bar to Working with Abused and Neglected Kids*, PITTSBURGH POST GAZETTE, Sept. 18, 2005, at A-16 (reporting that Pennsylvania laws allow former drug offenders and child abusers to work at juvenile centers).

39. See Marty Beyer et al., *A Better Way to spend \$500,000: How the Juvenile Justice System Fails Girls*, 18 WIS. WOMEN'S L.J. 51, 64 (2003).

40. See MICHELE BYRNES ET AL., CTR. ON JUV. AND CRIM. JUST., *AFTERCARE AS AN AFTERTHOUGHT: REENTRY AND THE CALIFORNIA YOUTH AUTHORITY 1* (2002), available at <http://www.cjcf.org/pdf/aftercare.pdf> [hereinafter *AFTERCARE AS AN AFTERTHOUGHT*] (reporting that the recidivism rate of youth parolees after an expenditure of \$48,000 per youth is ninety-two percent within three years).

Treatment Provider: Your Honor, we are not recommending release at this time.

Judge: Why not?

Treatment Provider: Our program lasts for fourteen months.

Needless to say, the judge released the child. This particular program completely disregarded the individual progress and release readiness of the juvenile, and instead focused on keeping the child for the length of the program, obviously profiting the program. At a review hearing the judge may decide to adjust the length of time a child spends in a program, thereby decreasing costs and necessary services.<sup>41</sup>

In the recent Texas Youth Commission scandal, it was discovered that 553 juveniles were due or overdue for release from custody.<sup>42</sup> If each of these children spent an additional ten days in custody, at the cost of \$100 per day, over \$500,000 taxpayer dollars would have been wasted.<sup>43</sup>

### III. POSTDISPOSITIONAL ADVOCACY CAN PREVENT INSTITUTIONAL ABUSE AND REDUCE RECIDIVISM

After a juvenile enters a facility, it becomes difficult to monitor his or her treatment, especially for signs of abuse from staff.<sup>44</sup>

Meetings with visitors were frequently attended by staff members . . . and it was understood that snitches would suffer retribution, either physically or in the form of a bad report. . . . Juvenile sentences are indefinite and go on until a child is said to be ready for release—a determination that is heavily contingent on staff recommendations.<sup>45</sup>

Every year, all over the country, children are committed by juvenile courts to placements where they are abused.<sup>46</sup> In the six

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41. See JUVENILE DELINQUENCY GUIDELINES, *supra* note 1, at 165-91.

42. Ralph Blumenthal, *Young Offenders To Be Freed*, N.Y. TIMES, Apr. 3, 2007, at A19.

43. See Sylvia Moreno, *In Texas, Scandals Rock Juvenile Justice System; Hundreds to be Released as State Looks at Abuse Allegations and Sentencing Policies*, WASH. POST, Apr. 5, 2007, at A3.

44. See generally Taussig, *supra* note 35.

45. See generally *id.*

46. Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability, and Public Safety*, 84 OR. L. REV. 1001 (2005) (researching abuses in juvenile facilities across the country, including the states of South Dakota, Florida, California, Louisiana, Mississippi Georgia, Texas, Indiana, Rhode Island, Puerto Rico, Kentucky, Arkansas, Arizona, Maryland, and Pennsylvania). See also Christine Jordan Sexton, *After Death of a Boy, Florida Moves to Close Its Boot Camps*, N.Y. TIMES, Apr. 27, 2006, at A18 (reporting that Florida lawmakers decided to close their state's juvenile boot camps after the death of a

months spent writing this Essay, the states of Maryland, Texas, New York, and Tennessee made headlines as a result of the deaths and abuses of children in juvenile placement.<sup>47</sup> The sad reality is that many of the children who are abused in juvenile placements are the same children whose childhood was rife with abuse and neglect. This nightmare of abuse occurs for many children with alarming consistency and regularity in all parts of the country.

Sometimes, like in a recent Texas case,<sup>48</sup> the abuse has gone on for years before it is revealed. This is not surprising. If lawyers are not visiting children in placement, and if there are no review hearings or systemic mechanism to ensure the children's safety in placement, abuse can continue unchecked. The less access children have to lawyers while they are institutionalized, the greater the potential for abuse.

Factors contributing to initial and continuing abuse in juvenile facilities not only include the fact that children are often placed far from home,<sup>49</sup> but also that when these children accuse staff of wrongdoing or complain about facility conditions, they are often not

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fourteen-year-old boy who had been beaten by guards at one such camp); Thomas J. Lueck & Cassi Feldman, *Death of Teenager in Custody Stirs Inquiry*, N.Y. TIMES, Nov. 22, 2006, at A2 (reporting on a state agency investigation into the death of a fifteen-year-old boy who had been physically restrained by juvenile detention center employees); *Juvenile Detention Center To Close Following Abuse Cases*, ASSOC. PRESS NEWSWIREs, Sept. 28, 2002 (reporting the closing of a private juvenile detention center—two years after it opened to treat Pennsylvania's worst youth offenders—in the wake of sexual and psychical abuse cases involving staff members); Dana Wilson, *Delaware County Juvenile Facility; Five More Guards Indicted In Probe of Prison Abuse*, COLUMBUS DISPATCH, Jan. 14, 2005, at 1A (reporting that, over the course of two months, ten guards were indicted for sexually and physically abusing inmates); Jennifer Gerriets, *Death, Abuse at S. Dakota Boot Camp Prompt Scrutiny*, REUTERS NEWS, Dec. 4, 1999 (detailing how, following “[a] 14-year-old girl's death at a South Dakota boot camp for juvenile offenders[,] . . . an FBI probe” uncovered harsh methods of discipline and injustice to other girls).

47. See Greg Garland, *NAACP Seeks Inquiry Into Teen's Death, Youth Died in Facility For Juvenile Offenders*, BALT. SUN, Aug. 8, 2007, at 1B; Lueck & Feldman, *supra* note 46, at A2; Craig R. McCoy & John Sullivan, *Center's Abuses Didn't Deter DHS*, PHILA. INQUIRER, Aug. 5, 2007, at A01.

48. Ralph Blumenthal & Stacie Semrad, *Texan Calls For Takeover of State's Juvenile Schools*, N.Y. TIMES, Feb. 28, 2007, at 11. The story revealed:

A long-simmering scandal over sexual abuse of juveniles at schools for youthful offenders broke into the open on Tuesday with an outraged state senator calling for a takeover of the troubled Texas Youth Commission. At a school in West Texas, a youth commission official acknowledged at a hearing of the State Senate Criminal Justice Committee, the school's superintendent was aware that two supervisors routinely awakened boys for late-night encounters behind closed doors in deserted offices.

*Id.*

49. See Nate Blakeslec, *Hidden in Plain Sight*, TEXAS OBSERVER, Feb. 23, 2007, available at <http://www.texas.observerver.org/article.php?aid=2428>.

seen as credible.<sup>50</sup> The facilities themselves are often private, for-profit institutions looking to reduce costs, making them willing to hire unqualified staff, and at the same time unwilling to provide the training and supervision necessary for dealing with troubled children.<sup>51</sup> Those responsible for placing children in these facilities are often unaware of such problems, and even those charged with protecting children by investigating and inspecting such facilities lack the tools that would enable them to track problems and complaints effectively, because even when reports are made, the information is not catalogued, making it virtually impossible to find.<sup>52</sup>

The fact that a child will not be released until the staff deems she has been “rehabilitated” is a built-in disincentive for children who wish to report facility abuse.<sup>53</sup> Further, it may even provide psychological incentive for children who wish to be released to tolerate escalating abuse. With the facility staff serving as the gatekeepers to freedom, children are unlikely to report inappropriate behavior or conditions for fear of not being believed, and having to remain an extended period at a facility to face the discomfort and potential retribution resulting from making such allegations.<sup>54</sup>

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50. See Karen de Sa, *Despite Detailed Accounts of Serious Injuries Cased by Probation Staff, Santa Clara County Defends its Highly Regarded System*, SAN JOSÉ MERCURY NEWS, Apr. 20, 2003, at 1A, available at [http://www.cjcj.org/press/juvenile\\_beatings.html](http://www.cjcj.org/press/juvenile_beatings.html).

51. See Stack, *supra* note 38.

52. These kids, who have often been abused before going into the juvenile justice system, are seen as likely to lie or manipulate facts for their own advantage. The reason these children are in the juvenile justice system is because they have been found guilty of committing a crime, a reason in and of itself not to trust them. In the Ohio case, for example, where sexual abuse was reported in the secure girl's facility, staff reportedly told the girls that “snitches get stitches.” Wilson, *supra* note 46, at 1A.

53. See Jim Motalto, *Hearings and Surveys Move PREA Forward*, CORRECTIONS CONNECTION, Jun. 16, 2006, <http://www.corrections.com/news/article/13290>.

54. On paper, there appear to be sufficient protections for these children. The fact that reports are rarely made is not because there are no problems, but rather because advocates do not know that the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. §§ 1997-1997j (2006), exists or how to use it. When children are cut off from their lawyers, information about abusive situations is not frequently conveyed. Twenty-seven states now have some form of state ombudsman programs. Judith Jones & Alvin W. Cohn, *State Ombudsman Programs*, JUV. JUST. BULL., Feb. 2005, at 2. Such programs provide diverse services, ranging from responsibility for all complaints from children in out of home placements, to the review of specific complaints from delinquent facilities. *Id.* Some ombudsman are embedded within the state DPW and some are completely independent. *Id.*

In addition, 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. See PATRICIA PURITZ & MARY ANN SCALI, AM. BAR ASS'N JUV. JUST. CTR., BEYOND THE WALLS: IMPROVING CONDITIONS OF CONFINEMENT FOR YOUTH IN

A. *Postdispositional Advocacy Prevents Institutional Abuse*

Postdispositional advocacy can decrease institutional abuse. This is not an academic argument—I have lived it and seen it work.

Every month the teleconference program of the Defender Association of Philadelphia’s juvenile unit sends teams of social workers and attorneys out to visit with their juvenile clients placed in residential treatment programs. The goal is to prepare for the child’s upcoming teleconference review hearing. If, however, information is revealed about the culture of the institution during the course of the private conversation with the child, the attorney is in a position to address it.

In 2003, during a teleconference visit to a secure treatment facility, several juveniles told their lawyers of “restraints” and “assists” by staff. An investigation revealed that staff often used a technique to discipline and incapacitate children that involved four staff members, one on each limb, holding a child face down in four point restraints for extended periods of time. These “restraint” or “assist” episodes were so physically painful and psychologically damaging that one child from Arizona wept loudly all night for his mother and became so hysterical that he eventually defecated on himself.

Upon verifying these reports, motions to remove all of the association clients from the facility were brought to the attention of the judge. The judge held a hearing and, based upon the testimony, removed all of the children from that facility until significant changes could be confirmed. Unfortunately, this terrible incident illustrates one of the success stories of postdisposition advocacy. Still more tragic are the undiscovered tales of its failures.

B. *Recidivism*

Research indicates that the recidivism rate among juvenile parolees is high.<sup>55</sup> According to one California report, despite an

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CUSTODY (1998). The DOJ investigates when reports are made, but the DOJ rarely receives complaints from incarcerated girls or their families. *Id.* at 5.

In Pennsylvania, reports of children injured in institutions have tripled since 1991. Stack, *supra* note 38. The continued prevalence of institutional abuse against girls shows clearly that there needs to be more involvement by girls’ advocates for these protections to be sufficient. In order for reports to be made to either the DOJ or an ombudsman, girls need to have access to legal advocates who they can trust. The disincentives to complaining about abuse are often too great to overcome without legal assistance.

55. BUREAU OF DATA AND RES. OF THE FLA. DEP’T OF JUV. JUST., NATIONAL COMPARISONS FROM STATE RECIDIVISM STUDIES, at xx (1999) [hereinafter STATE RECIDIVISM STUDIES]. Rereferral and arrest rates for youth released from state juvenile justice programs in Ohio measured nine months after release is forty-six

average expenditure of \$48,000 per youth, the recidivism rate within three years is ninety-two percent.<sup>56</sup> It is not surprising that kids who are mistreated while in a juvenile placement become more damaged and angry. If our goal is to prepare children to be productive and positive adults in our communities, we must teach them to have and exercise respect for themselves and those around them. Instead, children mistreated in juvenile placements come out damaged, angry, and betrayed by the very system designed to help them. High recidivism is in part a result of the many barriers children encounter when trying to reenter the community after they have been in placement.<sup>57</sup>

Again, the assistance of counsel in the postdisposition phase can have a significant impact in determining whether or not a child makes a successful transition.<sup>58</sup> Over the past fifteen years, the juvenile justice system has become more punitive, and states now have severe collateral consequences to many juvenile court adjudications.<sup>59</sup> These collateral consequences could impact a child's housing, education, employment, and subsequent judicial matters.<sup>60</sup> By making sure kids get the necessary services, postdispositional advocacy can prevent probation violations and decrease recommitments to secure programs.

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percent. *Id.* In Texas, measured twelve months after release, the rereferral and arrest rate is forty-seven percent. *Id.* Recidivism or incarnation rates for youth released from state juvenile justice programs in Texas measured thirty-six months after release is forty-nine percent. *Id.*

56. AFTERCARE AS AFTERTHOUGHT, *supra* note 40, at 1; see STATE RECIDIVISM STUDIES, *supra* note 51.

57. See STATE RECIDIVISM STUDIES, *supra* note 55, at iii.

58. See PENNSYLVANIA ASSESSMENT, *supra* note 32, at 64-65.

59. *Id.* at 20.

60. See Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities be Notified?*, 79 N.Y.U. L. REV. 520 (2004); Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles About the Collateral Consequences of Adjudications*, 6 NEV. L. J. 1111, 1114 (2006); Douglas M. Schneider, *But I Was Just a Kid!: Does Using Juvenile Adjudications to Enhance Adult Sentences Run Afoul of Apprendi v. New Jersey?*, 26 CARDOZO L. REV. 837, 838 (2005). See generally ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK (2005), <http://www.advancementproject.org/reports/FINALEOLrep.pdf> (last visited Nov. 16, 2007).

## IV. SOLUTIONS

A. *Collaboration with Law Schools to Improve Postdispositional Advocacy: A Promising Model from Mississippi*

The problems in the Mississippi training schools for juvenile delinquents were severe.<sup>61</sup> Though a 1977 federal district court order had mandated corrective action by 2002, an inspection by the Department of Justice revealed that the unimaginable conditions had only grown worse.<sup>62</sup> In addition to routine assaults by staff members, children were found to be “hog-tied, pole-shackled [and] locked in mechanical restraints and isolation units.”<sup>63</sup>

The Southern Poverty Law Center created the Mississippi Youth Justice Project (MYJP) to expand the capacity for juvenile justice reform work in Mississippi.<sup>64</sup> The MYJP has a contract with the Department of Protection and Advocacy and, pursuant to its role as class counsel in the lawsuit from the 1970s, to visit all the children in the state’s training schools, enabling the MYJP to provide the postdispositional advocacy necessary to reduce recidivism, decrease expenditures, and prevent institutional abuse.<sup>65</sup>

The MYJP has three attorneys who take responsibility for monitoring four facilities in Mississippi, the two training schools, the facility that houses children tried as adults, and a mental health facility that houses emotionally disabled juvenile delinquents. The project also supervises and trains law students to have weekly visits with these confined children. The Mississippi postdispositional project proceeds as follows:

Upon commitment to the training schools every child receives a letter notifying them that lawyers from the Mississippi Youth Justice Project are available and how to get in touch with them if any issues arise.

If a committed child does not contact the lawyers within 3-6 weeks, the Mississippi Youth Justice Project contacts the child and arranges an individual meeting. The purpose of this meeting is to inform the child of her rights and to provide

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61. Abrams, *supra* note 46. “The Justice Department found that guards sometimes stripped suicidal girls naked and hog-tied them in [the training school’s] ‘dark room,’ where they were held for three days to a week. The room was a locked, windowless isolation cell with nothing but a drain in the floor through which the girls urinated and defecated but which they could not flush.” *Id.* at 1047.

62. *Id.* at 1045.

63. *Id.*

64. See Southern Poverty Law Center, Mississippi Youth Justice Project, <http://www.splcenter.org/legal/myjp.jsp> (last visited Nov. 1, 2007).

65. See generally Mississippi Protection and Advocacy System, <http://www.mspas.com> (last visited Nov. 1, 2007).

direction for how to access the grievance procedure should any future issues arise in the course of their detention.

If a grievance is filed, the Mississippi Youth Justice Project ensures that it is appropriately addressed.<sup>66</sup>

The constant presence of law students in the training schools changes the environment of the facility in a number of significant ways. The children in custody at the facility have a sense of safety, and are reassured they are not abandoned there and that their rights will be protected. The children know they have access to attorneys, and are told how to access them should the need arise. Further, with the law student presence, children may be more likely to receive the services they need and the services the court thinks they are getting. Improved services, conditions, and a reduction in facility abuse will reduce recidivism and remove many of the barriers to reentry that children currently face.

The program provides much needed oversight for these often private, for-profit facilities, holding them accountable for providing services, and discouraging abuse and inappropriate treatment of children. Facilities will be encouraged to employ well-trained, well-mannered, and fair staff. It will also serve to reduce unnecessary confinement through outsider observation of facility discipline and pronouncements of "rehabilitation." The program may also protect facilities and staff from false allegations.

This type of program serves the state by providing extremely cost-effective, postdispositional representation that will reduce expenditures. Most importantly, this type of program will prevent institutional abuse of the children sent to these facilities, while also improving their safety, conditions, and the services provided to them. Such improvements will serve to reduce recidivism, providing the state with effective postdispositional representation, and the law students with real client lawyering experience, while giving the children in the state a greater sense of safety. This is an effective first step to begin to address the lack of postdispositional advocacy.

*B. Statewide, Defender Creates a Specialized Postdispositional Advocacy Unit: A Promising Model from Maryland*

Tired of hearing about Maryland children being hurt in juvenile facilities, Public Defender Nancy Forster created the Juvenile Protection Division of the Office of the Public Defender.<sup>67</sup> After a

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66. *Id.*

67. Office of the Public Defender, New Juvenile Protection Division, <http://www.opd.state.md.us/news/news.htm> (last visited Dec. 4, 2007).



history of problems within Maryland juvenile justice facilities,<sup>68</sup> Ms. Forster recognized that confined children needed strong postdispositional advocates.<sup>69</sup>

The Juvenile Protection Division, created in January 2007, is comprised of lawyers and social workers whose sole purpose is postdispositional advocacy.<sup>70</sup> Prior to the creation of this specialized unit, Maryland juvenile public defenders had attempted to perform postdispositional representation on an ad hoc basis. However, given the demands of trial work and disposition hearings, postdispositional advocacy was infrequent—nothing was formalized and there were no protocols. Today, the Juvenile Protection Division monitors facilities operated by Maryland's Department of Juvenile Services, to ensure the conditions are satisfactory.<sup>71</sup> It also maintains relationships with youths' trial attorneys postdisposition, to guarantee the state's adherence to commitment orders.<sup>72</sup>

## V. CONCLUSION

It is one of the great ironies of the juvenile justice system that although the supposed focus is on rehabilitation, what actually occurs in postdispositional rehabilitation programs is of the lowest priority. If the system were serious about its goal of treatment, it would make sure that every child in its care, in every facility, is safe from abuse. It is no secret that the children of the juvenile justice system are largely poor, mentally ill, of color, and from the dependency system. The role of children's lawyers postdisposition is critical to protect these vulnerable children. Postdispositional advocacy is an effective tool for holding programs accountable, keeping children safe, eliminating unnecessary confinement, and decreasing reentry barriers. The model from Mississippi offers a cost-effective and promising first step to addressing this issue.

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68. See Abrams, *supra* note 46, at 1060 ("At both Cheltenham and Hickey, the Justice Department also found 'unacceptably high levels of youth-on-youth violence' that frequently left youth bloodied, bruised, and nursing broken bones.").

69. Office of the Public Defender, New Juvenile Protection Division, <http://www.opd.state.md.us/news/news.htm> (last visited Dec. 4, 2007).

70. See *id.*

71. Office of the Public Defender, Origins and Functions, Juvenile Protection Division, <http://www.msa.md.gov/msa/mdmanual/25ind/html/61pubdf.html> (last visited Dec. 4, 2007).

72. *Id.*