DEFENSE ACCOUNTABILITY STRUCTURES TO PREVENT WRONGFUL YOUTH CONVICTIONS

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TABLE OF CONTENTS

INTRODUCTION

Most injustice is perpetrated below the waterline. Wrongful convictions of youth often penetrate public consciousness only because of extraordinary—persistent, sometimes brilliant—legal advocacy.[1] Advocates and academics alike have argued that mainstreaming more and better defense advocacy for young people—fewer waivers of counsel, coupled with more and better investigation and litigation when youth

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1. *See, e.g.*, *Huwe Burton*, CTR. ON WRONGFUL CONVICTIONS, https://cwc.law.northwestern.edu/freed-exonerated/huwe-burton/ (last visited Aug. 30, 2023) (describing a decade-long legal collaboration between two law school clinics to exonerate Huwe Burton, who was sixteen when police and prosecutors coerced him into a false confession).

have lawyers—will both forestall and expose more wrongful convictions.[2] Intuitively, that seems not just true but a question-begging truism. Of course better advocacy should lead (on average, over time) to better outcomes. But it's a complicated intuition for at least two reasons.

First: There's no proven method for building better defense systems at scale—where "better" means "less likely to lead to wrongful convictions"—or even for measuring and comparing the quality of existing defense systems.[3]

The mainstream theory, which I embrace, is that there are a set of advocacy steps calculated to protect against wrongful convictions. These include thorough and independent defense investigation to uncover helpful facts and dissect the government's case;[4] pretrial litigation to challenge junk forensics, unreliable identifications, and false confessions;[5] and aggressive trial practice.[6] To make it more likely that defense counsel will take these steps, advocates want lower workloads, more resources, and ideologically committed counsel embedded in a culture of zealous advocacy.[7]

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2. *See, e.g.*, Meredith J. Duncan, *"Lucky" Adnan Syed: Comprehensive Changes to Improve Criminal Defense Lawyering and Better Protect Defendants' Sixth Amendment Rights*, 82 BROOK. L. REV. 1651, 1651 (2017) (suggesting comprehensive changes to the criminal justice system that may "improve the overall quality of criminal defense lawyering" through the case analysis of a wrongly convicted teen); Meghan J. Ryan & John Adams, *Cultivating Judgment on the Tools of Wrongful Conviction*, 68 SMU L. REV. 1073, 1096 (2015) ("With so many potential sources of wrongful conviction, vigilant defense attorneys are vital to avoid wrongful convictions.").

3. Jennifer E. Laurin, Gideon *by the Numbers: The Emergence of Evidence-Based Practice in Indigent Defense*, 12 OHIO ST. J. CRIM. L. 325, 335-36 (2015) ("Imagine a research environment in which criminologists not only disagreed on whether arrests prevented crime, but also on whether crime prevention was a proper quality metric for policing, or one in which not only was the link between incarceration and non-recidivism unknown, but the value of non-recidivism disputed. This approximates the research environment for indigent defense, in that the field lacks any systematic understanding of how system inputs—attorney practices, client characteristics, compensation or hours spent—relate to desired outcomes, as well as any agreed-upon framework for stating and measuring what the desired outcomes *are*.").

4. *See* Giovanna Shay, *What We Can Learn about Appeals from Mr. Tillman's Case: More Lessons from Another DNA Exoneration*, 77 U. CIN. L. REV. 1499, 1550 (2009) (characterizing inadequate defense investigation as one of "the systemic causes of wrongful conviction," and arguing that effective investigation is "critical to reliable and fair results. Commentators studying wrongful convictions have called for improved investigation and more merits litigation.").

5. *See* Ryan & Adams, *supra* note 2, at 1078.

6. *See, e.g.*, Gregory M. Gilchrist, *Plea Bargains, Convictions, and Legitimacy,* 48 AM. CRIM. L. REV. 143, 147 (2011) ("By generating less reliable results than trial, plea bargaining harms those wrongfully convicted.").

7. *See* discussion *infra* Sections II.A, II.B.

Those are essential, if elusive, reforms. But our limited data suggest that even many relatively well-trained, ideologically committed, and well-funded youth defense counsel often don't take the advocacy steps calculated to prevent wrongful convictions.[8] Trial and pretrial evidentiary hearings can't meaningfully check wrongful convictions if they rarely happen even in jurisdictions that care about youth defense.[9]

Second, and more fundamentally, the intuition that more defense lawyering will lead to better outcomes may not always be true—at least pending significant change in defense practice and court culture. Perhaps the most robust finding from the (still badly underexplored) field of indigent defense research is that the mere presence of defense counsel makes it twice as likely that a youth will be sentenced to prison.[10]

Advocates for youth rights, understandably, often insist that systems should protect young people by making it harder for them to waive counsel. But, at least absent massive change in judicial, prosecutorial, and defense systems, insisting on defense counsel also seems likely to cost a lot of young people a lot of time in prison.[11] And it seems possible, given the scale of the lawyer penalty, that other kinds of lawyering reforms could be similarly counterproductive.[12] I assume that many criminal and youth legal systems—including defense structures—are profoundly flawed. But I also assume that what's generally true of bioethics is generally true of legal system reform: first do no harm, however sick the patient.

So the questions I want to ask and try to answer in this Article are: How can we promote fair court process—as opposed to fair police investigation process, which involves a separate set of questions—even if a youth gives up the right to counsel? And where youth do have counsel,

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8. *See* discussion *infra* Part I.

9. *See* Sarah Gibson *et al.*, eds., *CSP Stat Juvenile*, COURT STATISTICS PROJECT, www.courtstatistics.org (last visited Sept. 28, 2023); The national median juvenile bench trial rate in 2021, per the Court Statistics Project, was 0.1934. *Id.* In other words: of every 100 disposed cases, 0.19 go to trial. *See id.* The big caveat here is that only twelve states submitted data. *Id.*; *see also* Laura Cohen, *Righting the Wronged: Causes, Effects, and Remedies of Juvenile Wrongful Conviction: Introduction*, 62 RUTGERS L. REV. 879, 883 (2010) ("Approximately 97%-99% of American criminal cases are resolved via a guilty plea . . . . (In juvenile courts, which continue to suffer from shockingly high rates of waiver of counsel and are shielded from scrutiny by confidentiality laws, the plea rate may well exceed that of the adult system).").

10. George W. Burruss et al., *Fifty Years Post* Gault*: A Meta-Analysis of the Impact of Attorney Representation on Delinquency Outcomes*, 66 J. CRIM. JUST., Jan–Feb. 2020, at 9.

11. *See id.* ("[S]tudies suggest that represented juveniles in the U.S. juvenile justice system are twice as likely to be removed from their home and/or placed in an institution than those not represented.").

12. *See infra* Part II.

how can we increase the odds that the lawyers will take the steps calculated to prevent wrongful convictions?

I offer three preliminary suggestions for further exploration.

First: Preventing wrongful convictions will be easier if defenders do their jobs. But, at least in the near term, that doesn't and can't just mean taking cases to trial because mechanically forcing more trials may do more harm than good.[13] So legal systems should consider instituting adversarial pretrial evidentiary hearings as a structural but waivable default choice. That would position defenders to challenge the government's case, and judges to review it, without conditioning youth rights on the willingness of often-compromised counsel to risk backlash by demanding additional process.

Second: Defense systems should collect, report, and analyze data on defender outputs and outcomes. Right now, we often don't know whether most youth defenders are doing the things that they could and should do to prevent wrongful convictions—so we don't always know what has to change. Defenders are supposed to hold police, prosecutors, and courts accountable. But defenders have to be held accountable, too.

Third: Jurisdictions should consider creating ombuds positions to review juvenile defender casefiles regularly, systematically, and confidentially. These independent evaluators can be empowered in real time to diagnose, and propose fixes for, defense practices that may contribute to wrongful convictions.

I. DEFENSE SHORTCOMINGS LIKELY CONTRIBUTE TO WRONGFUL CONVICTIONS

A scholarly consensus holds that youth are especially vulnerable to wrongful convictions.[14] Among other factors: coercive police interrogations are more likely to extract false confessions from vulnerable, naïve youth.[15] Youthful impatience—and an understandable desire to avoid the misery of the legal process—may be more likely to

13. See discussion *supra* note 10.

14. *See, e.g.*, Joshua A. Tepfer & Laura H. Nirider, *Balancing Fairness with Finality: An Examination of Post-Conviction Review: Adjudicated Juveniles and Collateral Relief*, 64 ME. L. REV. 553, 557 (2012) [hereinafter Tepfer I] ("[T]here is reason to believe that youth may be particularly vulnerable to other types of evidentiary problems and errors that can also lead to wrongful convictions."); Joshua A. Tepfer et al., *Righting the Wronged: Causes Effects, and Remedies of Juvenile Wrongful Convictions: Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887, 892 (2010) [hereinafter Tepfer II] (arguing that "children and adolescents are particularly susceptible to wrongful convictions").

15. Tepfer II, *supra* note 14, at 893–94.

push youth towards unwarranted guilty pleas.[16] Many jurisdictions deny youth the right to trial by jury, which probably makes acquittal less likely and discourages accused youth from putting the government to its proof.[17]

Ineffective assistance of counsel is also often blamed for wrongful youth convictions.[18] A few years ago, in this journal's pages, Tamar Birckhead argued that "culture" conflicts sap the zeal of juvenile defense counsel.[19] Youth defenders are caught between ethical obligations of zealous, client-directed advocacy and the informal, collaborative norms in many juvenile courts.[20] Principal-agent conflicts, conflicts between youth and their parents, and the inherent immaturity of accused youth exacerbate those cultural conflicts.[21] "When the defense attorney is caught in the middle of these competing norms," Birckhead explains, "accurate fact-finding ceases to be a priority [and] the quality of advocacy falters," with wrongful convictions following.[22]

Wrongful conviction *éminence grise* Steve Drizin has echoed Birckhead's argument that institutional obstacles to effective assistance drive wrongful convictions in juvenile court. To cultural conflicts, though, he adds the problems of workload and structural disincentives.[23] Overworked lawyers, on this account, can't adequately investigate cases or litigate the issues—like coercive confessions and withheld discovery—that contribute to wrongful convictions. [24] They don't have time to prepare and try cases. [25] And even if they did, juvenile court incentives and culture often line up to extract guilty pleas even from innocent

16. *Id.*

17. *See* Emily Haney-Caron & Erika Fountain, *Young, Black, and Wrongfully Charged: A Cumulative Disadvantage Framework*, 125 DICK. L. REV. 653, 663 (2021) ("[T]he quality of legal representation in juvenile court may be especially poor or may not focus on zealously advocating for the child's rights, and lack of due process protections related to probable cause and to the right to a jury trial may make youth in juvenile court especially vulnerable.").

18. *Id.* at 703 (citing Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 772-75 (2010)); Tepfer I, *supra* note 14, at 558 ("The apparent prevalence of ineffectiveness in juvenile court, in turn, circles back to an increased risk of wrongful convictions.").

19. Tamar Birckhead, *Culture Clash: The Challenge of Lawyering Across Difference in Juvenile Court*, 62 RUTGERS L. REV. 959, 981–82 (2010).

20. *Id.* at 962–63.

21. *See id.* at 981–82.

22. *Id.* at 963.

23. Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 293 (2007).

24. *Id.* at 315 ("Children cannot fight charges they are innocent of if they are assigned poorly trained, overworked, and disinterested lawyer.").

25. *Id.* at 293.

youth.[26] In sum, for Drizen: "The combination of heavy caseloads, juvenile court culture that frowns upon advocacy and lawyers who only meet their clients on the day of adjudication creates a system of representation ripe for wrongful convictions."[27]

The corollary problems of heavy caseloads and inadequate resources plague indigent defense across the country and are hardly limited to juvenile court.[28] But owing to some combination of anti-adversarial culture and historical devaluing of juvenile defense, among other possible factors, it's certainly plausible that juvenile defense on average is even worse than other kinds of indigent defense.[29] Even if it's not worse, though, it's certainly bad – and nobody will attest to that more forcefully than youth defenders themselves.

Fifty-six years after the United States Supreme Court mandated defense counsel in delinquency proceedings,[30] the scholarly and practitioner consensus is that many, if not most, youth accused of delinquent acts still don't get anything like the legal representation to which they're entitled.[31] Ineffective assistance of counsel for youth seems

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26. *Id.*

27. *Id.*; *see also* Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1127–28 (2005) ("The obvious problem is that defense counsel are underfunded, either because clients cannot afford high fees or because the State dollars to fund criminal defense work are spread too thin. Perhaps defendants are being convicted because defense counsel and their investigators have neither the time nor the resources to uncover the evidence needed to rebut the prosecutor's case or otherwise exculpate the accused.").

28. *See, e.g.*, Geoffrey T. Burkhardt, *How to Leverage Public Defense Workload Studies*, 14 OHIO ST. J. CRIM. L. 403, 404 (2017) ("[C]rushing caseloads are perhaps the most vexing problem facing American public defense.").

29. *See, e.g.*, Anna VanCleave, *Brady and the Juvenile Courts*, 38 N.Y.U. REV. L. & SOC. CHANGE 551, 557 (2014) ("For both the defense and prosecution, juvenile courts are often viewed as a training ground for adult criminal practice. In many offices, there is no permanent set of staff attorneys assigned to juvenile court; instead, these roles are filled by the least experienced attorneys in their respective offices. Juvenile prosecutors and defenders receive fewer investigative resources and less supervision. They are paid less than their counterparts in adult criminal court, but suffer from the same crippling caseloads that plague the adult system."); Patricia Puritz & Katayoon Majd, *Creating a Paradigm for Specialized Juvenile Defense Practice*, 45 FAM. CT. REV. 466, 470 (2007) ("[J]uvenile court, seen as less important than adult court, is viewed by many as a 'training ground.' Many attorneys representing children may lack the necessary qualifications. Delinquency practice lacks prestige, and many attorneys and judges would prefer to be elsewhere.").

30. *In re* Gault, 387 U.S. 1, 36–37 (1967).

31. *Gault* constitutionalized the right to counsel for youth under the Due Process Clause of the Fourteenth Amendment. *See id.* at 41. But scholars seem to agree that, whether the standard is due process or the Sixth Amendment's right to counsel, many or most juvenile defenders come up short. *See, e.g.*, NAT'L COUNCIL OF JUV. AND FAMILY COURT JUDGES, ENHANCED JUV. JUST. GUIDELINES 24 (2018). *Compare* Marsha Levick & Neha

to be the rule, not the exception.[32] And in the absence of effective counsel, juvenile delinquency cases can be both procedurally unfair[33] and substantively inaccurate.[34]

This consensus is based largely on observational data rooted in episodic, qualitative assessments of the performance of counsel in individual jurisdictions. Very little quantitative data support any other kind of assessment. There are apparently no published studies analyzing quantitative data to assess the performance of juvenile defense counsel relative to either program goals or authoritative practice standards in any jurisdiction, much less across jurisdictions.[35] And—with one exception that I'm aware of[36]—there also isn't any research that explores the relationship between indigent defender activities (like interviewing witnesses); outputs (motions filed); and either client perceptual (how does the youth feel about the representation?) or objective case-level (did the youth go to prison?) outcomes.[37]

Desai, Symposium, *The Promise of* In Re Gault*: Promoting and Protection The Right to Counsel in Juvenile Court: Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel at All Stages of the Juvenile Court Process*, 60 RUTGERS L. REV. 175, 182–84 (2007) (arguing that courts should adopt Sixth Amendment framework for juvenile right to counsel, because due process isn't working), *with* Mae C. Quinn, *Giving Kids Their Due: Theorizing a Modern Fourteenth Amendment Framework for Juvenile Defense Representation*, 99 IOWA L. REV. 2185, 2188 (2014) (arguing, in light of widespread ineffectiveness of defense counsel in criminal court, that due process rather than Sixth Amendment framework might serve youth better).

32. *See, e.g.*, NAT'L COUNCIL OF JUV. AND FAMILY COURT JUDGES, ENHANCED JUV. JUST. GUIDELINES 24 (2018) (describing widespread ineffective assistance of counsel for youth in delinquency proceedings); Laura Cohen, *The Still-Elusive Promise of* In re Gault, 32 CRIM. JUST. 57, 57 (2018) ("[E]ven a spot check of the nation's juvenile courts exposes a system that fails to fulfill *Gault*'s promise.").

33. Barry C. Feld & Perry L. Moriearty, *Race, Rights, and the Representation of Children*, 69 AM. U. L. REV. 743, 747 (2020) ("[I]f two of the Court's main objectives in *Gault* were to improve procedural fairness and address systemic racial disproportionality in the juvenile court, it has not succeeded.").

34. Drizin & Luloff, *supra* note 23, at 322 ("[F]orty years after Gault, it is clear that the promise of Gault has not been realized, especially as it relates to valuing accuracy in juvenile court proceedings.").

35. *See, e.g.*, ANDREW WACHTER, NAT'L CTR. FOR JUV. JUST., JJGPS STATESCAN: INDEFENSIBLE: THE LACK OF JUVENILE DEFENSE DATA 3 (2015), http://www.ncjj.org/pdf/JJGPS%20StateScan/JJGPS_Indefensible_The_Lack_of_Juvenile_Defense_Data_2015_5.pdf (finding a widespread absence of even basic descriptive data, like which youth have lawyers).

36. Stephen Phillippi et al., *Holistic Representation in Juvenile Defense: An Evaluation of a Multidisciplinary Children's Defense Team*, 39 BEHAV. SCI. L. 65 (2021). I should disclose that I was the director of the defender office studied at the time the study was conducted.

37. For a discussion of activities, outputs, and outcomes, see generally JOSHUA PERRY, THE INT'L LEGAL FOUND., MEASURING JUSTICE: DEFINING AND EVALUATING QUALITY FOR

Even absent data that would allow for comparisons of indigent defense performance over time and across jurisdictions, though, the consensus of expert and practitioner opinion is too broad and has persisted for too long to be readily dismissed. Much of that opinion is recorded in a set of qualitative assessments performed over the last twenty years by the Gault Center, a Washington, D.C.-based advocacy group that supports youth defense and defenders.[38] Beginning with Texas in 2000 and most recently with Kansas in December 2020, the Gault Center and its partners have looked at the indigent defense systems for youth in twenty-seven states and Washington, D.C. Typically, the Gault Center dispatches teams of experts—veteran defenders, law professors, and youth justice advocates—to observe juvenile court proceedings and interview key stakeholders in a range of settings across a subject state.[39] And, with few exceptions,[40] the assessments have consistently concluded that those systems are failing to adequately protect young people.[41]

Just a glance at the titles of the reports gives a flavor of their content. Texas's 2000 report, the first of its kind, was called *Selling Justice Short: Juvenile Indigent Defense in Texas*.[42] Kansas's report, the most recent, from 2020: *Limited Justice: An Assessment of Access to and Quality of Juvenile Defense Counsel in Kansas*.[43] Past the titles is an even grimmer picture. Georgia's assessment, in 2001, found a range of systemic barriers: high counsel waiver rates and high defender caseloads; court cultures inimical to zealous advocacy, including widespread disdain for the due process rights of youth; and (surely not unrelatedly) significant problems with individual attorney practices, including failures to

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CRIMINAL LEGAL AID PROVIDERS (2016) (proposing framework for evaluations of indigent defense systems based on quantitative data).

38. The reports are archived at *State Assessments*, THE GAULT CTR., https://www.defendyouthrights.org/issues/state-assessments/ (last visited Apr. 19, 2023).

39. *See id.*

40. The major exception, here as in many things indigent defense related, is the federally funded indigent defense system in Washington, D.C. NAT'L JUV. DEF. CTR., THE DISTRICT OF COLUMBIA: AN ASSESSMENT OF ACCESS TO AND QUALITY OF JUVENILE DEFENSE COUNSEL 7 (2018) ("In many ways, the District of Columbia is doing far better than much of the rest of the country. The juvenile defense system in the District is highly functional.").

41. NAT'L JUV. DEF. CTR., ACCESS DENIED: A NATIONAL SNAPSHOT OF STATES' FAILURE TO PROTECT CHILDREN'S RIGHT TO COUNSEL 4 (2017) ("[T]hough every state has a basic structure to provide attorneys for children, few states or territories adequately satisfy access to counsel for young people.").

42. TEXAS APPLESEED ET AL., SELLING JUSTICE SHORT: JUVENILE INDIGENT DEFENSE IN TEXAS (2000).

43. NAT'L JUV. DEF. CTR., LIMITED JUSTICE: AN ASSESSMENT OF ACCESS TO AND QUALITY OF JUVENILE DEFENSE COUNSEL IN KANSAS (2020).

investigate and prepare.[44] Oregon's assessment, in 2020, found a system that "does not ensure quality representation for young people across the state."[45] And so on. Small wonder that, summing up the findings of the state assessments on the fortieth anniversary of the *Gault* decision that constitutionalized the right to counsel in delinquency cases, one scholar concluded that the right to counsel for youth is "a promise unfulfilled."[46]

II. SOME PROPOSED SOLUTIONS FOR FAILED DEFENSE ADVOCACY MAY BE INADEQUATE OR EVEN COUNTERPRODUCTIVE

Twenty years of Gault Center reports suggest the pandemic of ineffective counsel is not abating. So the question is not just reasonable but inescapable, decades later: Do we actually know how to solve the problem in ways that will reduce wrongful convictions, at scale and on anything shorter than a geological timeframe?

Given reformers' consistent condemnation of defense performance over the years, one of the most frequent prescriptions for improving procedural justice (and so innocence protection) in juvenile court may come as a surprise: restricting or eliminating waiver of defense counsel.[47] It's hard to believe that reformers actually want to see more of this purported motley mélange of incompetents, soulless drones, burnouts, and prosecution collaborators. But, sensibly, calls to restrict or end waiver of counsel usually go along with calls for better counsel. And in the meanwhile, the logic seems to be that, however imperfect defense counsel may be, having a lawyer is better than not.

That intuitively reasonable hypothesis looks to be untrue, at least as far as externally verifiable case outcomes are concerned. In fact, studies have repeatedly shown that youth with lawyers are twice as likely to be

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44. THE AM. BAR ASS'N JUV. JUST. CTR. ET AL., GEORGIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 1–3 (2001).

45. NAT'L JUV. DEF. CTR., ADVANCING YOUTH JUSTICE: AN ASSESSMENT OF ACCESS TO AND QUALITY OF JUVENILE DEFENSE COUNSEL IN OREGON 8 (2020).

46. Wallace J. Mlyniec, In re Gault *at 40: The Right to Counsel in Juvenile Court-A Promise Unfulfilled*, 44 CRIM. L. BULL. 371 (2008) (summarizing the results of assessments of juvenile indigent defense systems in sixteen states and finding that the constitutional right to counsel is "unfulfilled").

47. *See, e.g.*, NAT'L JUV. DEF. CTR., DEFEND CHILDREN: A BLUEPRINT FOR EFFECTIVE JUVENILE DEFENDER SERVICES 10 (2016) (arguing for restricting waivers and noting that "countless children accused of crime are prosecuted and convicted without ever seeing a lawyer"); JENNIFER WOOLARD, WAIVER OF COUNSEL IN JUVENILE COURT 3 (2019) (arguing that the constitutional right to juvenile defense counsel acknowledged in *In re Gault* remains "largely unimplemented" in part because "[m]any jurisdictions do not take steps to ensure that juveniles' waivers of counsel are made knowingly, intelligently, and voluntarily.").

sentenced to prison as youth without lawyers—even controlling for geography, race, and charge severity.[48] My point is not that we should go back to pre-*Gault* lawyerlessness, which too often equates to lawlessness, in juvenile court. It's that pushing young people too aggressively to lawyer up, in a well-meaning effort to prevent wrongful convictions, may be counterproductive for many youth—at least under the lawyering status quo and in the current culture of many juvenile courts.

But if we don't even know whether having a lawyer is always a good idea for any given child, maybe we should question our confidence level about our prescriptions for improving defense systems. So what about improving the quality of existing counsel—perhaps prefatory to ending or restricting waiver? What can we safely do to make lawyers take advocacy steps calculated to reduce wrongful convictions?

Resources—and defender caseloads, which usually rise as resources fall—are a prerequisite for effective lawyering, but the limited data available don't suggest that cutting caseloads necessarily drives increases in innocence-protection steps like investigations, pretrial evidentiary litigation, or trial. We can work to change court cultures to value adversarial challenges to state evidence – but that uncertain reform takes time and depends on multiple exogenous factors. And behind all these cavils and caveats of reform is the absence of research and evidence. Some advocates for improved defense can't even agree on how you define good lawyering, much less how you'd measure it, and as a rule there are just not adequate data to know whether any given jurisdiction has effectively adopted the defense practices that can prevent wrongful convictions.

A. Forcing Youth to Accept Subpar Counsel May Be Counterproductive

In 2015, Nadine Frederique, the National Institute of Justice's project lead on indigent defense research, published *What is the State of Empirical Research on Indigent Defense Nationwide?*, summing up the major findings and trends in the nascent field.[49] She identified a single finding in the entire field area of indigent defense research as "robust": "the finding that presence of counsel is an aggravating factor in juvenile adjudication."[50] Reviewing years of research, she explained that "[e]ven in the studies in which offense seriousness and prior criminal history are

48. *See infra* note 52.

49. *See generally* Nadine Frederique et al., *What Is the State of Empirical Research on Indigent Defense Nationwide? A Brief Overview and Suggestions for Future Research*, 78 ALB. L. REV. 1317 (2015).

50. *Id.* at 1322.

controlled for, juveniles appearing with counsel are more likely to receive a harsher sentence."[51]

A few years later, a meta-analysis of seventeen studies from twenty-nine court systems across the country reaffirmed and quantified that lawyer penalty:

> [T]he lawyer penalty was robust over time, across analysis type (bivariate or multivariate when both were included in the final analysis), and whether individual-level or state-level court data were used. Specifically, our findings of studies of 29 courts across the United States showed that having an attorney present throughout juvenile court proceedings increased the odds of a youth being removed from their home by over 200%. Put more succinctly, these studies suggest that represented juveniles in the U.S. juvenile justice system are twice as likely to be removed from their home and/or placed in an institution than those not represented.[52]

The meta-analysis cautioned that the penalty emerged even in studies that controlled for offense seriousness, offense type, and the youth's prior record.[53] In other words: while youth accused of more serious offenses might have been more likely to have lawyers, the penalty came from having the lawyer, not from the nature of the offense.

As best I can tell, the indigent defense field has responded almost not at all to these "robust" findings. The rare (maybe the only) defense-friendly social scientist who actually confronts the lawyer penalty explains the findings as the product of "the accessibility and quality of juvenile legal defense."[54] But that's unsatisfying at best. Remember: the empirical finding is not that youth represented by ineffective (overworked, or unskilled, or uncommitted, or all three and more)

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51. *Id.* at 1339.

52. Burruss et al., *supra* note 10, at 9; *see also* Stuti S. Kokkalera et al., *Contextualizing the Impact of Legal Representation on Juvenile Delinquency Outcomes: A Review of Research and Policy*, 72 JUV. & FAM. CT. J. 47, 64 (2021) ("Empirical studies overwhelmingly found that when a youth is represented by counsel in a delinquency proceeding, they are more likely to receive a harsher disposition than a similarly situated youth without counsel.").

53. Burruss et al., *supra* note 10, at 10 ("[W]hile this may have been a valid criticism of early juvenile court processing studies that failed to control for important legal characteristics such as offense seriousness, offense type, or prior record, later studies included legal control variables and the lawyer penalty still emerged in most of the studies. Thus, even with the inclusion of control variables and multivariate analyses spuriousness has not been confirmed as an explanation.").

54. Kokkalera et al., *supra* note 52, at 64–65.

lawyers are twice as likely to get locked up as youth represented by good lawyers. That would hardly be shocking, since good outcomes are presumably a big part of what defines good lawyering. Instead, the finding here is that so many juvenile defenders are so bad that, in the aggregate—factoring in the good and average and barely-competent-but-still-better-than-nothing lawyers too!—they are worse than having no lawyer at all. If poor lawyering quality were really the main driver here, it would have to be true that, on average, defense lawyers advocate for and obtain much harsher penalties than prosecutors and judges would impose without defense interference.

Whatever the reason for the lawyer penalty, until we're reasonably sure there's been a fix, eliminating or restricting waiver of counsel could well be counterproductive. The solution to the measurable lawyer penalty can't be simply to take away the control group. The evidence suggests that youth are buying something incredibly valuable when they give away their right to counsel: a 50% sentence reduction. We shouldn't imprison them in their rights.

B. Where Is the Reform Dividend?

Scholarly observers of criminal and juvenile systems seem to agree that high caseloads and workloads are a key driver of indigent defense ineffectiveness.[55] That consensus is something like unanimous among defenders themselves. Advocates for improved juvenile defense have consistently explained that effective representation of every youth is impossible when defenders are forced to triage clients and skip essential steps. They voiced the same concerns in 1998, thirty years after *Gault*[56]; in 2008, forty years after *Gault*[57]; and in 2018, fifty years after *Gault*, too.[58]

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55. *See, e.g.*, Eve Brensike Primus, *Defense Counsel and Public Defense*, *in* 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 121 (Erik Luna ed., 2017); Samantha Jaffe, Note, *"It's Not You, It's Your Caseload": Using* Cronic *to Solve Indigent Defense Underfunding*, 116 MICH. L. REV. 1465, 1475–76 (2018).

56. N. Lee Cooper et al., *Fulfilling the Promise of* In re Gault*: Advancing the Role of Lawyers for Children*, 33 WAKE FOREST L. REV. 651, 659 (1998) ("High caseloads were identified by defense attorneys as the single most important barrier to effective representation.").

57. Mlyniec, *supra* note 46 (reviewing sixteen state surveys of juvenile defense and summarizing drivers of ineffective assistance of counsel, noting that "[t]he most commonly mentioned were lack of training, inadequate resources, and heavy caseloads.").

58. NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, ENHANCED JUVENILE JUSTICE GUIDELINES 24 (2018) ("Frequently, even though counsel is assigned to represent youth, crushing caseloads, lack of time to investigate charges or gather critical information, and inadequate training and experience result in ineffective representation.").

I agree that defenders were and remain overworked. But it's odd that nothing seems to have changed about these complaints over the last twenty years of dramatic contractions in juvenile legal systems.

The federal Office of Juvenile Justice and Delinquency Prevention ("OJJDP") estimated 2,157,200 juvenile arrests—that's all arrests of people under eighteen—nationally in 2000,[59] but only 684,230 in 2019,[60] the last pre-COVID year, a decline of more than 68%.[61] OJJDP estimated 930,900 petitioned delinquency cases nationwide in 2000 but only 379,100 in 2019.[62] That's a decline of more than 59% in the number of new juvenile delinquency cases filed.[63]

So juvenile delinquency caseloads fell in the aggregate. And that national trend was reflected in states across the country, including the states that the Gault Center evaluated most recently, in 2020—Kansas, Oregon, and New Hampshire. New Hampshire initiated 2,520 delinquency cases statewide in 2012 and just 1,721 in 2019, a drop of 31.7%.[64] Oregon referred 14,003 youth into the juvenile court system for delinquency offenses in 2010, the earliest year for which data is reported on the state's juvenile justice information website.[65] But in 2019, the state referred only 6,830 youth, a 51% decline over just nine years.[66] Meanwhile, for the twelve months ending June 30, 2002—the oldest available online report—Kansas's courts recorded 15,829 new delinquency filings. For the same period ending June 30, 2019, that was down to 6,708 filings.[67] That's a drop of 57.6%.

So youth justice caseloads fell; caseloads for youth defenders should have fallen, all other things being equal; and, again all other things being

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59. *Juvenile Arrests,* OFF. OF JUV. JUST. & DELINQ. PREVENTION, https://www.ojjdp.gov/ojstatbb/crime/qa05101.asp (last visited July 10, 2023).

60. *Id.*

61. In 2020, the last year for which OJJDP has posted data, the number of juvenile arrests fell even further to 424,300. *Id.*

62. EASY ACCESS TO JUV. CT. STAT.: 1985-2020, NATIONAL ESTIMATES OF JUVENILE COURT PROCESSING FOR DELINQUENCY CASES, ALL CASES, https://www.ojjdp.gov/ojstatbb/ezajcs/asp/process.asp (last visited July 10, 2023).

63. The 2020 COVID year saw a further dramatic decline, to an estimated 276,300 juvenile delinquency petitions. *Id.*

64. *See* Gibson, *supra* note 9.

65. OREGON YOUTH AUTHORITY, JUVENILE JUSTICE INFORMATION SYSTEM, RECIDIVISM 2010 2 (2012).

66. JUVENILE JUSTICE INFORMATION SYSTEM, DATA AND EVALUATION REPORT: YOUTH AND REFERRALS STATEWIDE (2019) 7 (2020).

67. *Compare* KANSAS OFFICE OF JUDICIAL ADMINISTRATION, SUMMARY OF JUVENILE OFFENDER CASELOAD FOR THE STATE YEAR ENDING JUNE 30, 2002, https://tinyurl.com/y24t5rv0 (last visited Aug. 3, 2023), *with* KANSAS OFFICE OF JUDICIAL ADMINISTRATION, SUMMARY OF JUVENILE OFFENDER CASELOAD FOR THE STATE YEAR ENDING JUNE 30, 2019, https://tinyurl.com/cmioqrlf (last visited Aug. 3, 2023).

equal, if it's true that unsustainably high caseloads drive defender ineffectiveness, defender activities and outputs per client should have risen.[68]

Meanwhile, twenty years of caseload reductions in the nation's juvenile courts were accompanied by reforms that should also have led to complementary workload reductions. For example: Defense attorneys know that, on average, it's harder to do a good job for clients who are detained before trial.[69] Communication is more logistically challenging and more time-consuming. Lawyers have to set up appointments, wait at the mercy of guards, and then talk through plexiglass or worse. Stressed and traumatized, incarcerated people often struggle to harness the assistance of counsel to make good decisions. And at least in the juvenile justice system, cases for detained clients usually move very quickly, creating intense time pressure that can consume a lawyer's capacity and force them to skip steps or triage away from other clients.[70]

On average, then, reductions in pretrial detention should reduce defender workload even if caseloads are held steady. And if pretrial detention increases plea pressure—and commentators think that's true—then *ceterus paribus* cutting pretrial detention rates should also increase trials.[71]

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68. Molly J. Walker Wilson, *Defense Attorney Bias and the Rush to the Plea*, 65 U. KAN. L. REV. 271, 272–73 (2016) ("The heavy caseload that results in the wealth of experience for these lawyers also severely limits the amount of attention public defenders can give individual defendants. Not only does the public defender not have the luxury of carefully considering the various options available to her client, she may often not even have the time to gather basic information.").

69. Effective assistance of counsel includes meaningful and private attorney-client consultation. Weatherford v. Bursey, 429 U.S. 545, 554 n.4 (1977); United States v. Tucker, 716 F.2d 576, 581 (9th Cir. 1983) ("Adequate consultation between attorney and client is an essential element of competent representation of a criminal defendant."). Communicating with a jailed client in the often-constrained circumstances of juvenile jails is often difficult and time-consuming. *See* Amber Baylor, *Beyond the Visiting Room: A Defense Counsel Challenge to Conditions in Pretrial Confinement*, 14 CARDOZO PUB. L. POL'Y & ETHICS J. 1 (2015) (describing the logistical and psychological barriers to attorney-client communication when a defendant is held in pretrial detention).

70. *Compare, e.g.*, LA. CH. C. art. 877(A) (setting a default maximum of thirty days between arraignment and trial for a detained juvenile), *with* LA. CODE CRIM. PROC. ANN. Art. 701 (allowing sixty days between arrest and charging for detained adult charged with felony), *and* LA. CODE CRIM. PROC. ANN. art. 578 (allowing two years before trial of an adult felony case, whether or not the defendant is detained).

71. *See, e.g.*, Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 716 (2017) ("Misdemeanor pretrial detention therefore seems especially likely to induce guilty pleas, including wrongful ones."); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2468 (2004) ("Plea bargaining, then, often happens in the shadow not of trial but of bail decisions."); Vanessa A. Edkins & Lucian E. Dervan, *Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences Against Pretrial Detention in*

Happily, the beginning of this century saw a dramatic decrease in detained youth—no doubt partially because fewer youth were being arrested, but also because of reforms focused on decreasing inappropriate pretrial detention of presumptively innocent youth.[72] Nationally, OJJDP's annual one-day snapshot of youth in detention showed a decline from 28,040 youth in detention on the census night in 1997 to 14,344 in 2019.[73] The decline in youth who were detained at any point during their case before sentencing is even sharper—from 402,000 total in 2005, the first year for which that data is available, to 197,800 in 2018.[74]

So caseloads were cut by more than half, and systemic reforms should have eased the workload in the remaining cases. But there's no evidence that indigent defense systems, with more breathing room than in earlier decades, responded with improved advocacy. There's little data to show the inverse, either, because there's just little data. The qualitative assessments by the Gault Center and elsewhere mention nothing about improved representation, whether or not as a result of lower caseloads. And some snippets of quantitative data that we do have cut against a story about lower caseloads contributing to more and better defense efforts.

Consider, for instance, the dramatic decline in juvenile trials in Kansas during the same period that caseloads were falling. In the twelve months ending June 30, 2006, 13,295 new juvenile delinquency petitions were filed statewide.[75] That year, 417 juvenile delinquency cases were resolved by trial.[76] But in the twelve-month period ending June 30,

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Decisions to Plead Guilty, 24 PSYCH. PUB. POL. & L. 204, 205 (2018) ("Detained defendants have incentives to plead.").

72. *See, e.g.*, THE ANNIE E. CASEY FOUNDATION, JDAI at 25 (2017), https://www.aecf.org/resources/jdai-at-25/ (chronicling the Annie E. Casey Foundation's "Juvenile Detention Alternatives Initiative," a data-driven program aimed at reducing overuse of pretrial detention for youth, which contributed to a 43% reduction in average daily detained populations of youth in the hundreds of participating jurisdictions across the country).

73. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, EASY ACCESS TO THE CENSUS OF JUVENILES IN RESIDENTIAL PLACEMENT: 1997-2021, https://www.ojjdp.gov/ojstatbb/ezacjrp/ (last visited Sept. 28, 2023).

74. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, EASY ACCESS TO JUVENILE COURT STATISTICS: 1985-2020, https://www.ojjdp.gov/ojstatbb/ezajcs/asp/demo.asp (last visited Sept. 28, 2023).

75. *Analysis of Formal Juvenile Offender Caseload Activity Year Ending June 30, 2006, By County, By District*, KANSAS OFF. OF JUD. ADMIN., https://www.kscourts.org/KSCourts/media/KsCourts/Case%20Statistics/Annual%20Reports/2019/2019-Juvenile-Offender-Caseload.pdf (last visited Aug. 30, 2023).

76. *Id.*

2019—during which 6,708 new juvenile delinquency cases were started[77]—only forty-six juvenile cases went to trial.[78]

Kansas doesn't seem to be an outlier. Take Connecticut—politically very different than Kansas, and with a statewide juvenile public defender and training regime. Between 2005 and 2019—again, using pre-COVID data—pretrial detention admissions in Connecticut plummeted by 63%.[79] In the same years, total delinquency prosecutions dropped from 15,484 petitioned cases to 4,335—a decline of 72%.[80] For some of that period of successful youth justice reform,[81] the Connecticut Public Defender reported the annual number of trial and pretrial evidentiary hearings litigated by its specialized juvenile defender unit. From 2008 to 2017, as the raw numbers of clients plummeted, the entire state's public defender system conducted an average of 3.44 juvenile trials each year.[82] (Before and after that period, the public defender apparently did not report outputs publicly.)

The Gault Center's reports are consistent with the available hard data: youth defenders, as a rule, don't try many cases, and there's no indication that the situation changed over two decades when the number of prosecuted youth plunged, at least notionally clearing space for defenders and courts to hold more trials.[83]

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77. *Analysis of Formal Juvenile Offender Caseload Activity Year Ending June 30, 2019, By County, By District*, Kansas Off. of Jud. Admin., https://www.kscourts.org/KSCourts/media/KsCourts/Case%20Statistics/Annual%20Reports/2019/2019-Juvenile-Offender-Caseload.pdf (last visited Aug. 30, 2023).

78. *Id.*

79. TOW YOUTH JUSTICE INSTITUTE, 2019 ANNUAL REPORT ON STRATEGIC GOALS 5 (2019) (on file with author).

80. Compare *Connecticut Juvenile Court Case Counts, 2005*, OJJDP, https://www.ojjdp.gov/ojstatbb/ezaco/asp/TableDisplay.asp (last visited Sept. 28, 2023) *with Connecticut Juvenile Court Case Counts*, 2019, OJJPD, https://www.ojjdp.gov/ojstatbb/ezaco/asp/TableDisplay.asp (last visited Sept. 28, 2023).

81. *See* JUST. POL'Y INST., JUVENILE JUSTICE REFORM IN CONNECTICUT: HOW COLLABORATION AND COMMITMENT HAVE IMPROVED PUBLIC SAFETY AND OUTCOMES FOR YOUTH 1 (2013) (describing "Connecticut's striking success in juvenile justice reform").

82. This data is from the annual reports published by the Connecticut Division of Public Defender Services. DIVISION OF PUBLIC DEFENDER SERVICES, ANNUAL REPORT OF THE CHIEF PUBLIC DEFENDER (2009–2017). Those reports are archived at https://portal.ct.gov/OCPD/Publications/Divison-of-Public-Defender-Services-Publications.

83. *See, e.g.*, NAT'L JUV. DEF. CTR., ADVANCING YOUTH JUSTICE: AN ASSESSMENT OF ACCESS TO AND QUALITY OF JUVENILE DEFENSE COUNSEL IN OREGON 39 (2020) ("While the assessment team was unable to obtain statewide data on the number of juvenile pleas versus trials, stakeholders interviewed opined that the vast majority of petitioned cases ended in guilty pleas short of trial."); NAT'L JUV. DEF. CTR., OVERDUE FOR JUSTICE: AN ASSESSMENT OF ACCESS TO AND QUALITY OF JUVENILE DEFENSE COUNSEL IN MICHIGAN 33 (2020) ("Only a small percentage of juvenile delinquency cases go to trial in Michigan, as is the case in many states. Michigan Family Division Courts disposed of 23,928 juvenile

Trial rates, by themselves, aren't dispositive of a system's quality. But one thing that seems likely is that most Kansas and Connecticut and other juvenile defenders weren't spending more time preparing cases for trial and trying cases in 2019 than they were in 2006, when their caseloads were much higher. Whatever dividend resulted from lower caseloads and workloads, it wasn't being reinvested in any innocence-protecting steps that we can count.

That's an important caveat—the part about counting. Virtually no justice systems report countable defender outputs other than trial, which ends up being used as a proxy for a set of activities that can be summed up as "zeal."[84] But the fact of going to trial in any particular case isn't, by itself, an indicator of good lawyering. Sometimes, unprepared lawyers choose the (perhaps more lucrative) path of a doomed trial; or lawyers who haven't built a trusting relationship with their clients go unheeded when they counsel a plea and wind up trying a hopeless case. Meanwhile, a lawyer who aggressively litigates pretrial discovery, or who puts in the time to earn a client's trust, might know enough to recommend, negotiate, and get client buy-in for a plea.

From the perspective of wrongful conviction prevention, it's not really trials themselves that matter, but the defender activities and checks on police and prosecutorial evidence that should go along with trial—investigation, suppression hearings, cross-examination. In the absence of quantitative data on activities and outputs, though, the number of trials is the sort of thing—maybe the only quantitative measure, in many jurisdictions, and not every jurisdiction even counts or reports trials—that you might look at to find some evidence of a system's commitment to the kinds of advocacy calculated to protect innocence. And we don't really know what lever to pull to get more of that kind of advocacy—not, at least, without risking unintended consequences like the lawyer penalty.

One step that systems almost certainly shouldn't take is to mechanically limit plea bargaining. Some people who want to stop plea bargaining profess to be motivated by an admirable zeal for racial justice and ending mass incarceration.[85] They think plea bargaining leads to

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delinquency cases in 2018. . . . [Twelve] jury trials and 134 bench trials were conducted, and 7,991 cases were resolved by guilty plea or admission.").

84. *See, e.g.*, Drizin & Luloff, *supra* note 24, at 293 (pointing in horror to Montana, where "one judge reported that he only had two or three trials a year and defenders stated that cases rarely go to trial.").

85. *See, e.g.*, Chris Kemmitt & Premal Dharia, Opinion, *Plea Bargaining and Mass Incarceration Go Hand in Hand. We Need to End Both.*, USA TODAY (Nov. 3, 2022, 8:00 AM), https://www.usatoday.com/story/opinion/policing/2022/11/03/plea-bargaining-leads-mass-incarceration-little-oversight/9950184002/.

substantively unfair outcomes: the system is so badly broken—or working properly, but to such destructive ends—that it needs to be thrown out.[86] Other opponents of plea bargaining are repulsed by a process that's so far from the classical adversarial ideal for ferreting out truth.[87]

Both diagnose real problems but propose unresponsive solutions. We can't increase liberty by taking away liberties; reduce incarceration by forbidding youth from bargaining for less prison time; or repair a too-often traumatic and harmful legal system by forcing unwilling youth to suffer through an adversarial recreation of the worst day in their lives.[88] That's also why we shouldn't adopt proxies that force just some youth—though not all—to undergo trials they don't want. One scholar, for instance, proposes that legal systems can promote fair process, exposing prosecutorial and police tactics to the light, by instituting lotteries where some shares of cases are randomly chosen for trial.[89] But, even if we can somehow spare the lottery losers from trial taxes, show trials are bad ethics and destructive of any attorney-client relationship. Forcing youth to witness their misdeeds rehearsed in front of them, when they've specifically said they don't want that, is just cruel.

C. Culture Change Is Just One Tool in the Box

Indigent defense systems can suffer from both structural, extrinsically imposed problems and organizational, internally imposed problems. An accused youth might not care exactly why his lawyer is bad—whether the fault is with the legislature (for, say, chronic underfunding),[90] the judicial branch (for, say, meddling with the independence of a public defender system),[91] the indigent defender system itself (for, say, failing to train or supervise its lawyers

86. *See, e.g.*, *id.*

87. *See, e.g.*, Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1039 (1984) ("Putting to one side, then, the possibility of debate over the desirability of bargaining, I assume rather wide agreement that, in an ideal world, plea bargaining would be infrequent or nonexistent.").

88. *See* Erika N. Fountain & Jennifer L. Woolard, *How Defense Attorneys Consult with Juvenile Clients About Plea Bargains*, 24 PSYCH. PUB. POL'Y & L. 192, 198 (2018) (finding that the second most common reason for juvenile pleas is that "youth did not want to see witnesses testify against them").

89. Kiel Brennan-Marquez et al., *The Trial Lottery*, 56 WAKE FOREST L. REV. 1, 6–7 (2021).

90. *See, e.g.*, Erwin Chemerinsky, *Lessons from Gideon*, 122 YALE L.J. 2676, 2680–84 (2013) (discussing the need for more indigent defense funding).

91. David E. Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 CORNELL L. REV. 335, 337 (2017) (emphasizing the need for the defense function to be independent of the judiciary).

meaningfully),[92] or the individual lawyer's lack of skill or motivation. But the cause of the problem matters a lot if we're concerned about developing scalable fixes. Poorly performing lawyers in a high-functioning organization can be trained, coached, supervised, held accountable, and, if necessary, fired. Poorly performing lawyers in a malfunctioning organization get wings of the state prison named after them.

The entrenched culture of ineffectiveness in some indigent defender systems—sometimes characterized as court-centered, go-along-to-get-along, complacent, unzealous—has been widely decried.[93] The Gault Center, among others,[94] has repeatedly criticized the lack of training, professional development, supervision, and oversight functions in indigent defender systems.[95] And on top of the organizational problems common to many aspects of indigent defense systems, there are concerns unique to juvenile defense. Juvenile defense often perceives that it's undervalued by the adult defender system—as, for instance, when defender leadership treats juvenile court "as a training ground" for its most unskilled and inexperienced lawyers.[96]

So if defenders must practice differently to protect youth against wrongful convictions, and lowering caseloads and workloads may not do the trick, culture change is likely an important part of solving the problem.[97] I'll go further and agree that, from my experience, it's indispensable.

But that doesn't mean it's a reliable, efficient, and scalable stand-alone strategy for measurably improving advocacy aimed at preventing

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92. *See, e.g.*, Carol S. Steiker, Gideon *at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2700 (2013) ("[L]ack of adequate organization, training, and oversight . . . and the absence of a robust culture of client-centered, zealous advocacy all prevent the delivery of decent indigent defense services just as surely as the lack of adequate material resources.").

93. *See, e.g.*, Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1769 (2016) ("There is a serious cultural problem in many indigent defense delivery systems nationwide: too many lawyers appointed to represent poor criminal defendants do not perform their intended role in the system, because they have been conditioned not to fight for their clients.").

94. *See, e.g.*, Primus, *supra* note 55, at 121.

95. NAT'L JUV. DEF. CTR., LIMITED JUSTICE: AN ASSESSMENT OF ACCESS TO AND QUALITY OF JUVENILE DEFENSE COUNSEL IN KANSAS 57 (2020) (decrying the lack of juvenile-specific training for Kansas lawyers who handle juvenile delinquency cases); NAT'L JUV. DEF. CTR., OVERDUE FOR JUSTICE: AN ASSESSMENT OF ACCESS TO AND QUALITY OF JUVENILE DEFENSE COUNSEL IN MICHIGAN 56 (2020) (decrying lack of supervision and oversight for some lawyers handling juvenile cases).

96. *See, e.g.*, Paul Holland, *Courts Igniting Change: Introduction*, 13 SEATTLE J. SOC. JUST. 731, 742–43 (2015) (describing shortcomings in juvenile indigent defense systems).

97. *See, e.g.*, Jonathan Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 LOY. J. PUB. INT. L. 177, 181 (2008) (arguing for cultural change to improve indigent defense).

wrongful convictions—at least in the short term. That's not a controversial proposition. Even the strongest proponents of culture change as a critical factor in defense reform—a category that, I hope, includes me—don't appear to aspire to effecting measurable *and actually measured* shifts in attorney outputs and case-level outcomes.[98] It's not intended to be modellable, as such: What exact activities will follow from which inputs? How are those activities projected to increase the outputs that are calculated to decrease wrongful convictions? At what dosage? And what innocence-and-wrongful-conviction-related outcomes will result? Those things might not matter to, for instance, perceptual outcomes—client experiences of representation. And client experience of representation is an essential measure of quality. But here we're chasing a specific goal: Preventing wrongful convictions. So, we need to know how each strategy will get us where we're going.

Like a lot of deeply worthwhile work, culture change even within a single arm of the legal system is hard and takes time.[99] And youth legal systems require change across institutions. It's not enough for a public defender to ramp up its internal commitment to zealous advocacy. To maximize impact, they need also to drive—or other forces must promote—change in the judiciary, the prosecution, the police, and others. Again: that's not impossible. It's necessary. But, to maximize impact, it can't be the only tool in the toolbox.

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98. The best evidence of this is the absence of evidence. I could not find a published study showing that objective case-level outputs or outcomes improve, in ways calculated to reduce wrongful convictions, as culture improves within defender programs. Instead, there seems to be some evidence that culture change brings improved perceptual outcomes—that is, change towards a more zealous, client-directed culture affects clients' own articulation of some measures of satisfaction with representation. So, for instance, a program evaluation of Gideon's Promise, a widely lauded organization aimed at driving public defender culture change, focused on asking whether clients "feel that someone had stood up for them in court." Successful Nonprofits Podcast, *Measuring Impact with Alan Mackie*, SUCCESSFUL NONPROFITS, at 05:13 https://successfulnonprofits.com/portfolio/evaluation_mackie/ (last visited Sept. 28, 2023). This kind of client perceptual outcome, as I've argued elsewhere, is a profoundly important part of assessing public defender performance. JOSHUA PERRY, THE INT'L LEGAL FOUND., MEASURING JUSTICE 9–10 (2016). Nevertheless: a youth who feels heard but who has been wrongfully convicted has still been wrongfully convicted. Perceptual changes are not, by themselves, enough to prevent tragic outcomes in the lives of accused youth.

99. *Cf.* Birckhead, *supra* note 19, at 990 ("There is no magic bullet for resolving this dilemma.").

III. STRUCTURAL REFORMS MAY MORE RELIABLY DRIVE PERFORMANCE IMPROVEMENT

A. Pretrial Evidentiary Hearings

We've seen that adversarial testing of government evidence is considered a critical element in preventing wrongful convictions.[100] But I've also argued that youth shouldn't be forced to trial, and we don't have mechanisms readily at hand that can reliably push defenders to competently try more cases or litigate more issues.[101] We don't even know if that would, on average, get better outcomes. Youth often buy something valuable when they waive their rights.

One solution is to look beyond trial—or before it. Even the rapid progression of many delinquency cases[102] offers multiple pretrial (or pre-plea) opportunities for adversarial (or, at a minimum, inquisitorial) testing.[103] These can include bail or continued custody hearings, at which the government must prove there's reason to believe a crime has been committed; suppression hearings, at which the prosecution must justify—or the defense may contest—admission of evidence assertedly seized in violation of constitutional rules; and pretrial hearings on the reliability of evidence.[104] Mandating pretrial hearings as waivable defaults can promote innocence-protecting checks on police and prosecutorial overreach and misconduct.[105] The problem is that many jurisdictions don't now mandate these hearings—or mandate them, but without key procedural provisions that ensure the hearings are genuinely adversarial, like the right to compulsory process and to cross-examine witnesses. Contrast, for instance, the two states I know best—Louisiana and Connecticut.

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100. *See id.* at 982 (discussing the potential for wrongful conviction where defense counsel cannot prioritize accurate fact finding and oral and written advocacy).

101. *See supra* Section II.A.

102. In Louisiana, for instance, the state must ordinarily bring a detained child to trial within thirty days of his arraignment. LA. CHILD. CODE ANN. art. 877(A) (2012). The arraignment of a detained child, in turn, must happen within ten days of the child's arrest. *Id.* art. 819 (allowing at most three days between arrest and continued custody hearing); art. 843 (permitting at most two days between custody hearing and charging); art. 854 (sanctioning at most five days between charging and arraignment).

103. At least one commentator has suggested that the right to counsel should attach—and counsel should engage and advocate for youth—at administrative steps in the process, too. *See* Tamar R. Birckhead, *Closing the Widening Net: The Rights of Juveniles at Intake*, 46 TEX. TECH. L. REV. 157, 166–71 (2013).

104. *See* Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759, 798 (2013) (proposing a framework for assessing confession evidence pretrial).

105. *See supra* Section II.A.

In Louisiana, the state must ordinarily bring a detained youth to trial within thirty days of arraignment.[106] Arraignment, in turn, must happen within ten days of arrest.[107] At the start of that truncated pretrial period, though, the youth is entitled to an adversarial continued custody evidentiary hearing, at which the state bears the burden of proving probable cause that the youth committed an offense and the youth has the right to compulsory process and to cross-examine their accusers.[108]

Connecticut, meanwhile, despite a significant commitment to reducing pretrial detention over the last twenty years, has no mandatory evidentiary custody hearings for detained youth.[109] Like every constitutionally compliant jurisdiction, Connecticut does guarantee arrested youth a judicial determination of probable cause, but the prosecution can carry its burden "by sworn affidavit" and without producing live witnesses who can be cross-examined.[110] So the rule is that detained youth don't get pretrial evidentiary hearings to test the state's case. In fact, from 2008 to 2017—the only years for which the public defender collected and published data—the statewide public defender conducted only an average of just over twenty-four evidentiary hearings each year in all the system's juvenile cases.[111]

Why is this a distinction with a difference? As other commentators have argued, probable cause hearings can play important screening and discovery functions, helping the state to recognize the weaknesses in cases and giving the accused (and counsel) visibility into the government's case.[112]

But here I'm primarily interested in the effect of pretrial hearings on the way defense counsel practice. It's true that defense counsel won't win many continued custody or other probable cause hearings. After all, as a rule, they won't have much time to prepare, or much discovery in

106. LA. CHILD. CODE ANN. art. 877(A) (2012).

107. *See supra* note 102.

108. LA. CHILD. CODE ANN. arts. 820–21 (2012).

109. *See* NINA SALOMON ET AL., COUNCIL OF STATE GOV'TS. JUST. CTR., IMPROVING OUTCOMES FOR YOUTH IN CONNECTICUT 49 (2020), https://towyouth.newhaven.edu/wp-content/uploads/2020/10/CSG-CT-Third-Task-Force-Presentation-FINAL.pdf (charting rapid decline in Connecticut detentions); CONN. GEN. STAT. § 46b-133 (2022).

110. STATE OF CONN. JUD. BRANCH, OFFICIAL 2023 CONNECTICUT PRACTICE BOOK § 30-5(b) (2023) ("A hearing to determine probable cause and the need for further detention shall be held no later than the next business day following the arrest."); *Id.* § 30-9 ("Probable cause may be proven by sworn affidavit."); CONN. GEN. STAT. § 46b-133 (2022) ("Such probable cause may be shown by sworn affidavit in lieu of testimony.").

111. DIVISION OF PUBLIC DEFENDER SERVICES, ANNUAL REPORT OF THE CHIEF PUBLIC DEFENDER (2009–2017). Those reports are archived at https://portal.ct.gov/OCPD/Publications/Divison-of-Public-Defender-Services-Publications.

112. Drizin & Luloff, *supra* note 24, at 300–02.

advance, and the government can usually carry its burden on a mere showing of probable cause.[113] And many defenders usually won't put on a defense case, or much of one, because they won't want to tip their hand too early.

But even pushing defense counsel to think strategically about litigation early in the case is an important step forward. Pretrial hearings create a structural imperative for defense counsel to meet their clients; get up on their feet in court; and engage with the prosecution's case. Counsel get in the habit of calling and cross-examining witnesses and arguing about proof. If vanishingly rare trials are the only opportunity to build courtroom advocacy skills, lawyers won't develop those skills. The absence of courtroom advocacy creates a doom loop, since lawyers who haven't litigated don't know how to litigate. Ignorance leads to incapacity and from there to disinclination.[114] And defense lawyers who can't try cases won't get good plea offers, because prosecutors negotiate in the shadow of defense counsel's willingness to go to trial and ability to win.[115]

It's true that, even if pretrial evidentiary hearings are a default, some youth will want to waive them—and some lawyers will, too. Why wouldn't they almost always waive pretrial hearings, as they waive trial? First: there's less at stake. Trial penalties, unfortunately, are often quite real, and trials can be painful for youth—and adult accused people, too—even if there is no penalty.[116] But the odds of a dispositional penalty for a pretrial hearing seem lower. Second: pretrial hearings take less out of a lawyer. They don't always require the same volume of preparation. But

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113. *See* Puritz & Majd, *supra* note 29, at 470; *see also* Drizin & Luloff, *supra* note 24, at 300–01.

114. Brennan-Marquez et al., *supra* note 89, at 22 ("At present, we simply lack a 'trial-ready' populace, bench, and bar."); Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone*, 101 JUDICATURE, no. 4, 2017, at 26, 34 ("[T]he more trials disappear, the less likely it is that they will reappear in the future absent some sort of systemic change.") (footnote omitted); Robert P. Burns, *Advocacy in the Era of the Vanishing Trial*, 61 U. KAN. L. REV. 893, 893 (2013) ("[O]ne of the identified causes for the death of the trial . . . is the sharp decline in trial skills among bar members and the resulting aversion to bringing cases to trial.").

115. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2478 (2004) ("If a lawyer is bent on plea bargaining and does so all the time, he cannot credibly threaten to go to trial. Prosecutors will offer fewer concessions to these lawyers' clients because they do not have to offer more."); Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. REV. 833, 861 (1990) ("In settlement negotiations, fear of trial weakens one's bargaining position, since the strength of one's bargaining position is in part a function of one's willingness to try the case.").

116. *See, e.g.*, Tina M. Zottoli et al., *Plea Discounts, Time Pressures, and False-Guilty Pleas in Youth and Adults Who Pleaded Guilty to Felonies in New York City*, 22 PSYCH., PUB. POL'Y, & L. 250, 255 (2016) (reporting a significant plea discount—and, conversely, a trial penalty—in New York delinquency cases).

they do jumpstart preparation, and they generate information that can drive more preparation going forward.

Even if youth don't want lawyers, or the lawyers push their clients to waive their rights to evidentiary hearings, mandatory pretrial hearings still seem likely to help youth negotiate better outcomes. The right to a hearing is another right that can be sold in plea negotiations in exchange for a better dispositional outcome.

B. Data Collection and Publication

In an era where a lot of our private and public systems measure efficiency and effectiveness with big data, indigent defense remains largely a faith-based enterprise. The data we have are mostly descriptive—typically, most jurisdictions tally caseloads, and some rare jurisdictions have rough proxies for workloads.[117] But the data rarely speak to the quality of indigent defense services and the outcomes they have on people's lives.[118]

Instead of that hard data, decisionmakers – from policymakers to line supervisors – fall back on the accumulated expertise of longtime practitioners and scholars (who are often long-ago practitioners), who in turn mostly draw on a store of anecdote, personal experience, and unavoidable but still sometimes misleading biases and heuristics of all kinds.[119] That means, among other things, that legislators don't have data to help them decide what to fund and at what levels; indigent defense administrators go with their guts when structuring service delivery systems; supervisors, like baseball scouts before the Moneyball era, follow their lying eyes in deciding which lawyers and investigators

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117. *See, e.g.*, Laurin, *supra* note 3, at 327 ("[B]eyond those broad-brush characterizations, painfully little is known about the details of indigent defense in the United States. . . . [T]here is still relatively little data, and even less data analysis, that provides insight into how systems operate and the quality of outcomes they achieve."); Michael Tonry, *Evidence, Ideology, and Politics in the Making of American Criminal Justice Policy*, 42 CRIME & JUST. 1, 1 (2013) (characterizing criminal justice policy making systems as operating in an "evidence-free zone"); Cara H. Drinan, *Getting Real About* Gideon*: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309, 1322 (2013) (describing how "defenders operated below the data radar") (internal quotation omitted); Jenny Roberts & Ronald F. Wright, *Training for Bargaining*, 57 WM. & MARY L. REV. 1445, 1489 (2016) (bemoaning the fact that "[i]ndigent defender offices – dealing with high workloads, low staffing, and constant underfunding – collect very little data").

118. *See* Jennifer E. Laurin, *Data and Accountability in Indigent Defense*, 14 OHIO ST. J. CRIM. L. 373, 380–81 (2017) (explaining that we don't have data to know "what . . . are public defenders or assigned lawyers *doing* in their cases?" and that "the data landscape that comes into focus is fairly barren").

119. *See generally* Tonry, *supra* note 117 (discussing the use of specialized research institutes and university departments as a source of evidence retention and policy creation).

are doing a good job and why, indeed, they often don't even have a measurable definition of "good job"; and accused people sometimes aren't given critical information to help them make good decisions.[120]

If the absence of data is the rule in U.S. indigent defense generally, the problem is particularly acute in youth defense.[121] As I discussed above, we have almost no numbers on what youth defenders do and whether it works—except the one damning statistic that youth with lawyers are twice as likely to be committed to custody.[122] And we don't even know enough to really know why and when that penalty is imposed.

So as an initial accountability step, defense systems should count and report key activities and outputs. Trials and pretrial evidentiary hearings are a good start. Even defense systems with limited data infrastructures shouldn't have any difficulty making marks on a tally sheet. Out-of-court activities like motions written and witnesses interviewed can come next, followed by measures like the time between arrest and initial client interview. Here, too, it's just not a big ask. These are things that can be calculated by primitive case management systems and even spreadsheets on smartphones. As they get more comfortable and skilled with data, defender systems can move to tracking short- and long-term outcomes, and can evaluate programs and individual defenders with reference to activities and outcomes.

C. Defense Ombudspeople

If the adversarial process and zealous defense practice can't reliably protect against wrongful convictions, maybe a neutral, inquisitorial body can. But we don't now have a workable model for youth justice ombudspeople.

In the last twenty years, U.S. advocates have begun calling for impartial commissions of inquiry to investigate post-conviction claims of innocence and wrongful conviction.[123] It appears, though, that only one state has actually established an innocence commission: the North Carolina Innocence Inquiry Commission, started in 2006.[124] And North Carolina's effort is limited to factual innocence claims, rather than

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120. *See, e.g.*, Laurin, *supra* note 3, at 335–36 (2015) (arguing that the indigent defense field "lacks any systematic understanding of how system inputs—attorney practices, client characteristics, compensation or hours spent—relate to desired outcomes").

121. *See* WACHTER, *supra* note 35, at 1–4.

122. *See* Burruss, *supra* note 10, at 9.

123. *See generally, e.g.*, JON B. GOULD, THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM (2008).

124. Lissa Griffin & Daisy Mason, *The Prosecutor in the Mirror: Conviction Integrity Units and Brady Claims*, 55 LOY. L.A. L. REV. 1005, 1012 (2022).

wrongful convictions more broadly.[125] By contrast, the conviction integrity unit—a "designated unit of a prosecutor's office that engages in post-conviction, fact-based investigation and review of claims of wrongful convictions"—has gotten more traction.[126] One study counted ninety-three conviction integrity units ("CIUs") in the country as of 2022.[127] But, according to the National Registry of Exonerations, fewer than half of those CIUs have actually generated an exoneration.[128]

Commissions and CIUs, even when they take root and bear fruit, are likely to be less helpful for youth than adults. Many jurisdictions don't clearly offer—or clearly don't offer—post-conviction remedies in juvenile delinquency cases.[129] And even when they can, youth almost never pursue post-conviction claims, in part because their dispositions are often shorter than adult sentences.[130] A CIU taking months or years to sort and review post-conviction cases is likely to triage out delinquency cases, where any help may well come too late and there may not be legal avenues for relief. For some of the same reasons, youth are especially unlikely to benefit from post-conviction ineffective assistance of counsel claims to ferret out and expose inadequate defense counsel.[131]

This is where a defendant's ombuds position could help. Structurally, the function could be filled—as police oversight functions are today—by anything from a single professional (depending on the size of the jurisdiction) to a board including community members.[132] It could also be

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125. *Id.* at 1012–13.

126. *Id.* at 1010.

127. *Id.* at 1012.

128. *See Conviction Integrity Units*, THE NATIONAL REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx (last visited Aug. 30, 2022).

129. *See* Tepfer I, *supra* note 14, at 554 (discussing "the troubling disparities in access to collateral relief between criminal and juvenile court").

130. Anna VanCleave, *Brady and the Juvenile Courts*, 38 N.Y.U. REV. L. & SOC. CHANGE 551, 559 (2014) ("Relatively few juvenile cases are appealed, largely because many juvenile sentences will have been completed before the conclusion of an appeal. While juveniles appeal few cases, they pursue even fewer post-conviction claims. . . . [T]his is due in large part to the lack of counsel for such proceedings, the inability of juveniles to pursue claims pro se, and the reluctance of lawyers to bring post-conviction claims when sentences are relatively short. As a result of all of these factors, very few juveniles challenge their adjudications after they are sentenced.").

131. For critique of existing ineffective-assistance-of-counsel doctrine and practice, see generally David Rudovsky, Gideon *and the Effective Assistance of Counsel: The Rhetoric and the Reality*, 32 L. & INEQ. 371 (2014).

132. *See generally* Udi Ofer, *Getting It Right: Building Effective Civilian Review Boards to Oversee Police*, 46 SETON HALL L. REV. 1033 (2014) (discussing community-driven police review boards and how police oversight functions are structured); Samuel Walker, *Governing the American Police: Wrestling with the Problems of Democracy*, 2016 U. CHI. LEGAL F. 615 (2016) (advocating for auditor/inspector general model of police oversight).

combined with the existing independent oversight mechanisms that some states have built for their youth-serving agencies. For instance: Massachusetts has an independent oversight and ombuds office, the Office of the Child Advocate, statutorily charged with "ensur[ing] that children involved with an executive agency, in particular, children served by the child welfare or juvenile justice systems, receive timely, safe and effective services."[133] But right now, in Massachusetts and elsewhere, it appears that child ombuds focus their inquiries, largely or exclusively, on state agencies that take custody over adjudicated or dependent youth—and not at indigent defense systems.[134]

Institutional design is important, but beyond the scope of this Article. Functionally, the key here is not the power to review convictions long after the fact, which may come too late for youth. Instead, these ombudspeople can promote systemic effectiveness of counsel by auditing processes and random samplings of cases in something like real time, and protect youth by conducting time-sensitive inquiries into specific cases where red flags are raised while direct appeals are still ongoing.

CONCLUSION

Everyone agrees that, in principle, counsel for accused youth could help prevent and uncover more wrongful convictions. But right now, nobody knows what reforms are most likely to help—or how to implement those reforms successfully. Limiting waivers may backfire; so may forcing many cases to trial; and culture change is not itself a program for ensuring that defenders do what they need to do to protect youth from wrongful convictions. So I've proposed in this Article that legal systems should install structural protections that make it more likely counsel will do the right thing—or be held accountable for coming up short.

133. MASS. ANN. LAWS ch. 18C, § 2.

134. *See, e.g.*, MARIA MOSSAIDES, THE COMMONWEALTH OF MASS., MASS. OFF. OF THE CHILD ADVOC., ANN. REPORT FISCAL YEAR 2022 57–62 (April 2023), https://www.mass.gov/doc/oca-annual-report-fiscal-year-2022/download (reviewing state agencies' roles in juvenile system and discussing incidents related to children in state custody but not mentioning juvenile defense systems).