REPORT

ABOLISHING FINANCIAL CONDITIONS OF PRETRIAL RELEASE IN JUVENILE CASES

Introduction

The IJA-ABA Juvenile Justice Standard 4.7 recommends, "The use of bail bonds in any form as an alternative interim status should be prohibited." The rationale for this position is that the practice of imposing financial conditions of release in juvenile cases is that "It could lead to the same abuses and injustices which have come under attack in the adult criminal system.[1]" Standard 10-5.1 of The *ABA Standards for Criminal Justice: Pretrial Release* (3rd ed., 2007), creates a presumption that arrested people will be released on their personal recognizance. The standard provides that if release on personal recognizance would pose "a substantial risk" that a person will not show up for a court appearance there is still a presumption that least restrictive conditions be imposed as an alternative to detention (ABA Standards 10-5.1 (a)-(b), 10-5.2). Adopting a resolution to end cash bail or bond in juvenile cases would be consistent with the Juvenile Justice Standards. Employing verifiable and race neutral instruments to assess the risk of court appearance would be consistent with ensuring that any conditions of release set in lieu of bail be focused on ensuring court appearance, and also comports with professional standards supporting the presumption of personal recognizance and utilization of the least restrictive alternative in lieu of bail.

The Escalating Use of Conditions of Release

The Office of Juvenile Justice Delinquency and Prevention (OJJDP) has emphasized that an effective juvenile justice system does not use detention as a sanction. The juvenile justice system should not be used as a default social services provider. In the last two decades many youth have been referred to juvenile justice from schools, child welfare agencies and the mental health system. In 2000, there were over three million school suspensions and over 97,000 school arrests.[2] Department of Education statistics indicated that in the 2010-2011 school year, African Americans were three to five times more likely to be arrested that white students[3] and Latino students and youth who identify as LGBTQ do not fare much better. The vast majority of youth who are arrested or referred to juvenile courts have not been accused of serious offenses and half of them appear in the system only once.[4] Fifty years after *In Re Gault*[5], about 84% of arrests for youth involving children are for non-violent and drug offenses.[6] Francis Gerald Gault, age fifteen, was arrested in 1964 for allegedly making lewd phone calls to a neighbor, without benefit of trial or counsel, after a hearing in the judge's chambers, he was sentenced to the

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[1] IJA-ABA Juvenile Justice Standard 4.7; Commentary.

[2] NAACP Legal Def. & Edu. Fund, *Dismantling The School-to-Prison Pipeline* 2 (2005).

[3] Donna St. George, *Federal Data*, WASHINGTON POST (Mar. 6, 2012).

[4] Bonnie et al., REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH, National Research Council of The National Academies (National Academies Press 2013) at 3.

[5] 387 U.S. 1 (1967).

[6] Sarah Hockenberry & Charles Puzzanchera, NATIONAL CENTER FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2013 (2015) at 52.

Arizona Industrial Training School for an indeterminate period of time until age twenty-one. The "school" was "in all but name a penitentiary or jail."[7] *Gault* emphasized that this deprivation of liberty was not different from the consequences faced by an adult in a felony prosecution. In many instances, youth are still being for conduct that is similar to the allegations made against Gault. About two-thirds of detention holds and subsequent commitment involve youth accused of non-violent offenses and similar percentages involve youth of color.[8] Over 50% are detained for probation violations, including technical violations and holds for violation of pretrial conditions that might not be related to ensuring court appearance or for not paying fines and fees.[9]

In acknowledging that children are not little adults, the United States Supreme Court has provided renewed vitality to JJ Standard 4.7 and its supporting commentary. As noted in *J.D.B. v. North Carolina*[10], a child's age is far more than a chronological fact. It is a fact that generates commonsense conclusions about perception and behavior. In the aftermath of *Roper*[11], *Graham*[12], *J.D.B.*, *Miller*[13], and *Montgomery*[14], practitioners and jurists are considering the implications of the cases message of proportional accountability[15] in a variety of contexts in and out of the courtroom. However, in the midst of this optimism and in spite of dramatic decreases in juvenile arrest rates, referrals to juvenile justice from schools, child welfare and mental health systems have increased as has the process of the recriminalization of status offense conduct that was decriminalized in the aftermath of *In Re Gault*[16] and the enactment of the Juvenile Justice Delinquency Prevention Act (JJDPA) in 1974.

This process has been abetted by the unintended consequences of wide scale deployment of police in schools without first thinking of their relationship with educators and the scope of their authority and expanded use of zero tolerance. The enactment of the Valid Court Order (VCO) in 1980 has enabled over thirty states to bootstrap or convert status offense orders into delinquency probation violations. In 2010, Judge Brian Huff, from Birmingham, Alabama, informed a congressional committee that almost forty thousand status offenders pass through our detention systems annually with a disparate portion of that number being females. Without the VCO, twelve thousand would not be eligible for such treatment.[17] Increased use of conditions of release that are not related to court appearance have accelerated recriminalization. Setting conditions of release, such as orders to attend to school or obey home rules, are the functional

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[7] *Gault, Id.* at 61 (Black, J. concurring).
[8] NATIONAL CENTER FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS, 175-176 (2015).
[9] OJJDP STATISTICAL DATA (2011).
[10] 564 U.S. 261 (2011).
[11] *Roper v. Simmons*, 543 U.S. 551 (2005).
[12] *Graham v. Florida*, 560 U.S. 48 (2010).
[13] *Miller v. Alabama*, 132 S.Ct. 2455 (2012).
[14] *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).
[15] *See e.g.*, Laurence Steinberg, *"Should the Science of Adolescent Brain Development Affect Juvenile Justice and Practice"?* Keynote Address at the 2014 Models for Change Cross Action Network Meeting, Nat'l. Ctr. For Mental Health & Juvenile Justice (May 2014), http://tinyurl.com/qgxbyww.).
[16] 387 U.S. 1 (1967).
[17] *Meeting The Challenges Faced By Girls in the Juvenile Justice System: Hearing Before the House Subcommittee on Healthy Families and Communities*, 111th Cong. 2 (2010).

equivalent of the VCO.[18] Research indicates that detaining children, even for minimal periods has an enduring traumatic impact, and also increases recidivism.[19] Detention disrupts pro-social development by disrupting the connective tissue of access to family, school and community. Recidivism is also increased by increased rates in school dropout and failure, which fuels the school-to-prison pipeline. Children who do not graduate high school are eight times more likely to later be arrested.[20]

The National Juvenile Defender Center (NJDC) concludes that given the prevalence of youth being brought to court for non-violent property offenses, public order offenses, and drug offenses, that children are often being charged for "adolescent misconduct that is developmentally normative but unequally prosecuted among poor youth and youth of color.[21] In fact, Black youth are nearly five times more likely to be confined than white youth, and Latino and American Indian and Alaska Native youth are two to three more times likely to be confined.'[22] As noted, "The outlawing of adolescence[23]" causes palpable harm, exacerbates public safety concerns, and threatens to return us to the pre-*Gault* era when status offense conduct jurisdiction was created.

The policies that have led to an over reliance on collection of bail monies, and fines and fees to fund criminal justice are paralleled in juvenile justice. The consequences of these practices are exacerbated by a child's dependence on a parent or interested adult regarding indigence determinations as well as ability or willingness to post bond or pay fees and provide transport to court. In March of 2016 the Department of Justice issued recommendations to redress practices that disproportionally affect minority populations and poor communities[24]. Bail orders and imposition of fees that cannot be paid foster class-driven preventive detention. The D.O.J. letter was directed at court systems to ensure "court systems at *every level* (emphasis included) of the justice system operate fairly and effectively.'[25] The D.O.J. letter stresses that all courts must inquire about a defendant's ability to pay in all contexts. Children, or their families, who are not able to post bond or pay fees penetrate more quickly into the juvenile and criminal justice systems, and the evidence suggests that this leads to increases in recidivism.[26]

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[18] *See e.g., Jake J. v. Commonwealth,* 740 N.E. 2d 188 (Mass. 2000) (conditions of release may be imposed at arraignment with consent of the juvenile; in this instance one of the conditions was attend school without incident. Advocates assert that failure to agree with suggested conditions may result in imposition of bail).

[19] DEFEND CHILDREN, National Juvenile Defender Center (November 2016); citing e.g. Barry Holman & Jason Zeidenberg, *The Dangers of Detention: The Impact of Incarcerating Youth In Detention And Other Secure Facilities, 2006;* at 11.

[20] Robin Dahlberg, *Arrested Futures,* ACLU (2012).

[21] DEFENDING CHIDREN, *Id.* at 10.

[22] *Id.*, at 10 (citing ANNIE E. CASEY FOUNDATION: REDUCING YOUTH INCARCERATION IN THE UNITED STATES 2 (2013).

[23] DEFENDING CHILDREN, *Id.*, at 10. *See also,* Blitzman, J. *Are We Criminalizing Adolescence*"? ABA CRIMINAL JUSTICE (May 2015).

[24] U.S. Department of Justice, Civil Right Division, Office for Access to Justice, *Dear Colleague* letter, p. 2 (March 14, 2016).

[25] *Id.* pg. 2.

[26] *Considerations for Compliance with Title VI of the Civil Rights Act* of 1964, *the Omnibus Crime Control and Safe Streets Act of* 1968, *and Related Statutes.* Department of Justice, Office of Civil Rights, Advisory for Recipients of Financial Assistance from the U.S. Department of Justice on Levying Fines and Fees on Juvenile, January 2017.

Moreover, in spite of *Gault's* admonition, that "The child requires the guiding hand of counsel at every stage for the proceedings against him.'[27] "It is an open secret in America's justice system that countless of children accused of crimes are prosecuted and convicted without ever seeing a lawyer.'[28] This is in part due to onerous indigence determinations, excessive waiver, and a culture "that frowns upon zealous advocacy.'[29] *Gault* has not turned out to be the juvenile world's equivalent of *Gideon:*[30] the holding was limited to the scope of due process during the adjudicatory hearing. Four years after *Gault*, a reconstituted Supreme Court viewing the same history through a different lens, ruled that juveniles are not constitutionally entitled to trial by jury. In the aftermath of this case, *McKeiver v. Pennsylvania*[31], each jurisdiction remains free to design the contours of its juvenile system, including the scope of process and access to counsel in all phases of the proceedings, including detention and transfer. Some states apply the criminal rules to juvenile matters, but that is largely by function of rule or statute.[32] The decision not to "constitutionalize" due process at every stage of the proceedings means that juvenile proceedings are deemed quasi-criminal or civil in nature. Ramifications include jeopardizing adequate funding for indigent defense and the juvenile court in times of financial crisis. Access to justice is obviously informed by access to counsel.

The ABA standards have not had their desired effect. The Vera Institute reported recently that "Money, or the lack thereof, is now the most important factor in determining whether someone is held in jail pretrial.[33]" Most people who are detained are poor and are unable to post bail. In the criminal context statistics collected since the adoption of the ABA Standards demonstrate that 90% of the individuals who fail to secure their release while being held on bail are not detained because they were a flight risk. They are detained because they could not gather the necessary resources to secure their release.[34] The tragedy of Kalief Browder provides a cautionary tale.

Use of Risk Assessment Tools

In proposing the use of risk assessment tools in juvenile tools it is critically important to emphasize that the resolution is focused on the use of instruments designed to assess the risk of court appearance. There is a danger in employing tools that address treatment protocols as they compromise the presumption of innocence and create the real possibility of greater systemic

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Jessica Feierman, Juvenile Law Center, *Debtor Prison for Kids? The High Cost of Fines and Fees in the Juvenile Justice System* 7-8 (2016), http://debtorsprison.jlc.org (discussing results of a criminology study "showing that youth of color in Allegheny County, Pennsylvania, were more likely to have costs or fees owed after case closing, which turn, was related to higher recidivism rates, even after controlling for a host of other demographics and case characteristics." citing Alex R. Piquero & Wesley G. Jennings, *Justice System Imposed Financial Penalties Increase Likelihood of Recidivism in a Sample of Adolescent Offenders* (2016).

[27] *Gault, Id.*, at 36.

[28] DEFENDING CHILDREN, *Id.* at 10; citing NJDC report revealing excessive waiver in 62% of states studied.

[29] Steve Drizen & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions*, 34 N. KY. L. REV. 257, 284, 289 (2007).

[30] *Gideon v. Wainwright*, 372 U.S. 335 (1963).

[31] 403 U.S. 528 (1971).

[32] See e.g Mass. R. Crim. Pro. 1(b).

[33] Ram Subramanian et al., Vera Inst. Of Justice, *Incarceration's Front Door: The Misuse of Jails in America* 29 (2015).

[34] *Felony Defendants*, 2009, at 15.

involvement, what is euphemistically known as net widening, by the process of pretrial probation violations. Application of instruments that are not race neutral only serve to amplify systemic racial and ethnic disparities. An example of an empirically verifiable, race neutral instrument that assesses the likelihood of Failure to Appear (FTA) is the Massachusetts Juvenile Probation Arraignment Screening Tool (J-PAST). Nationally, most experts and virtually all professional standards indicate that detention should be used to ensure court appearance and in some instances, to minimize the risk of serious offending while current charges are pending. In Massachusetts, which employs a bail statute that applies to juveniles, the focus is on court appearance. The nature of an offense historically has been considered in the context of considering whether the allegation had an increased penalty range that might factor into court appearance. Beginning in 2008, researchers under the supervision of Tom Grisso, Ph.D., and Gina Vincent, Ph.D., directors of the National Youth Screening and Assessment Project at the University of Massachusetts, Department of Psychiatry, began to develop a screening tool as part of the state's Juvenile Detention Alternative Initiative (JDAI). The process entailed analyzing each of the enumerated factors in the bail statute[35] in an effort to see considerations were race neutral and which could be empirically validated as regards likelihood to appear. The analysis included assessing case data in selected Massachusetts juvenile courts between 2011-2014. The goal of the endeavor was to develop a tool that judges could use in the exercise of their discretion to detain or release an individual. The J-PAST tool is now in the assessment stages, but it is hoped that use of an objective screening tool, if used by judges, can address implicit bias, reduce unnecessary and harmful[36] detention for lower risk youth, and enhance public safety.

Conclusions

The case to implement IJA-ABA Juvenile Justice Standard 4.7 by abolishing case bail is compelling. Detention is often unnecessary, increases recidivism, and is always traumatizing. In addition, the reality is that most youth who enter the juvenile system are accused of low-level offenses. It is axiomatic that in some instances secure detention is appropriate, but only in circumstances where there is a palpable public safety need.[37] In such circumstances, most states provide for dangerousness hearing procedures. The fact is that default rates for youth are low. The Massachusetts J-PAST scores defendants on a three-point scale. A score of three is the highest Failure to Appear (FTA) score. However, even juveniles who receive this score in fact appear in court 75% of the time.[38] Regardless of their level of risk not appear, juveniles are very likely to appear in court. This conclusion reiterates the need to consider the need for bail as well as the need for any conditions of release. If conditions are to be imposed, best practice suggests that they be limited to those that specifically address and are related to court appearance.[39]

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[35] G.L. c. 276, sec. 58.

[36] *Id.*

[37] REFORMING JUVENILE JUSTICE, *Id., Executive Summary.*

[38] *What Every Lawyer Should Know About The Juvenile Probation Arraignment Screening Tool- J-PAST;* http://www.publiccounsel.net/ya/wp-content/uploads/6/2014/ *PDF.*

[39] *See e.g.* Massachusetts Trial Court Committee Conditions of Pretrial Release Report, Massachusetts Trial Court (2016).

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Respectfully submitted,

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