

Indigent Defense for Juveniles

Indigent defense provides juveniles in the justice system with constitutionally mandated access to counsel, even if they cannot afford it. The Sixth Amendment to the U.S. Constitution protects this right to counsel. In 1963, the *Gideon v. Wainwright* Supreme Court decision affirmed the right to counsel to all criminal cases with a threat of imprisonment, including state or federal cases and felony or misdemeanor cases.¹ The Court's decision in *In re Gault* (1967) further extended the right to counsel to juveniles in delinquency cases (Feld and Schaefer, 2010).²

The *In re Gault* case first brought the issue of juvenile indigent defense to the public's attention. Gerald Gault, 15, of Arizona was accused of making an inappropriate phone call to his neighbor. He was arrested and later sentenced to 6 years in confinement. However, neither Gault nor his parents were formally notified of the charges and he did not receive any legal counsel. The Supreme Court ruled that juveniles are entitled to certain procedural safeguards under the Due Process Clause of the Fourteenth Amendment, one of which is appointment of counsel (see *In re Gault* 387 U.S. 1 [1967]). Ultimately, the *Gault* decision protects juveniles' rights in the courtroom, including the constitutional rights to a notice of charges, the presence of counsel, cross-examination of the prosecution's witnesses, and protection from self-incrimination.

Despite the Supreme Court's affirmation of these constitutional protections, studies have shown that youth often do not access the legal resources afforded to them. For example, a study in Ohio found that about 15 percent of youth held in the Ohio Department of Youth Services facilities were unrepresented. Additionally, this rate was even higher for youth in community correctional facilities, with almost one in five individuals having been processed through the system without counsel (Brooks and Kamine, 2003). A similar evaluation conducted in Illinois found that 70 percent of the cases held in Illinois juvenile courts were resolved through an inappropriate use of plea bargaining; namely, that the plea is entered at the first meeting with the judge, prior to any investigation of the case, and without the defendants, their lawyers, and parents having had minimal time to discuss the case (Crawford et al., 2007).

¹ *In re Gideon*, 373 U.S. 335 (1963)

² *In re Gault*, 387 U.S. 1 (1967).

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Determination of Indigence for Juveniles

Similar to other court processing measures (such as determinations of a juvenile's competency to stand trial), the person with the authority to determine a juvenile's indigent status varies by state. Indigent status can be determined by the judge, public defender's office, or the clerk of the court. Factors taken into consideration include federal poverty guidelines³ and the financial status of the juvenile or, in most cases, the financial status of the juvenile's parents.

In North Carolina, for example, a juvenile is presumed indigent only in the absence of hired private counsel. In Texas, youth may qualify for assigned counsel if their parents are incarcerated or if they receive food stamps, among other factors (National Conference of State Legislators, n.d.).

In addition, in some cases, juvenile defendants are expected to pay for their public defender. The National Juvenile Defender Center (NJDC; 2017) reported that 36 states charge for provided counsel, with fees ranging from a \$10 application fee to \$1,000 for attorney services.⁴

Barriers to Receiving Counsel

Research suggests that states' juvenile court systems may not be fully compliant in appointing counsel to youth (Feld and Schafer 2010). The American Bar Association (ABA) in 1993 investigated the state of juvenile defense through an initiative called the Due Process Advocacy Project. Out of this initiative came the first national assessment of the state of representation for youth. The ABA found that "the interest of many young people in juvenile court are significantly compromised, and that many children are literally left defenseless" (Puritz, 1995, p. 7). In partnership with NJDC, ABA conducted 12 statewide investigations, all of which concluded that subpar counsel was often afforded to juveniles in court, if counsel was afforded to them at all (Puritz, 1995; Feld and Schafer, 2010).

The ABA found several barriers to juveniles' receipt of proper counsel, including excessive caseloads of defense lawyers who represent juveniles, inadequate compensation for lawyers, and a lack of juvenile-specific training for lawyers (Puritz, 1995).

Research that followed the ABA report found that these barriers continue to present a challenge for juvenile defendants (VanVleet et al., 2004; Cumming et al., 2003). For example, a 2004 bulletin from the Office of Juvenile Justice and Delinquency Prevention indicated that the average annual caseload of juvenile defense attorneys was 300, despite government recommendations that annual caseloads not exceed 200–250 (Jones 2004). NJDC (2017) recently found that only 11 states provide all juveniles accused of a crime in juvenile court with a defense attorney.

The ABA also found that juvenile representation does not offer a competitive salary compared with other areas of the law, and many jurisdictions enforce a cap on hours billed to a specific case (Puritz, 1995). Other research has shown that 55 percent of juvenile defense attorneys stay in their role for less than 2 years; low compensation has been implicated in this high rate of turnover (Jones, 2004).

Lastly, the ABA noted a lack of juvenile-specific training. Juveniles have unique needs and require a more nuanced approach to counsel than would be employed in adult criminal cases (Puritz, 1995; this issue is discussed further below). Despite this, training on juvenile-relevant topics (such as alternatives to detention, community resources specific to juveniles, and adolescent developmental science) is

³ The U.S. Census Bureau set the poverty threshold in 2016 for a family of four at \$24,339.

⁴ Ibid.

largely absent from public defender curricula (Jones, 2004).

In 2016 and 2017, NJDC issued reports to mark the 50th anniversary of the *In re Gault* decision. The reports contained updated research on access to counsel. Since 2000, NJDC has reviewed access to and quality of juvenile defense in two dozen states, and waiver of counsel was an issue in at least some courts in half the states.⁵

Differences Between Juvenile and Adult Representation

Indigent defense for adults and juveniles differ in various ways. The *Reforming Juvenile Justice* report indicated that developmental differences between juveniles and adults support the importance of juvenile-specific counsel and court processing (Bonnie et al., 2013). Recent youth-specific jurisprudence has relied on research to support the fact that adolescents are developmentally distinct from adults in three key ways:

- They sometimes demonstrate a lack of emotional self-regulation relative to adults;
- They may have increased susceptibility to external social influence, such as peer pressure, relative to adults; and
- They sometimes are less able to properly assess long-term consequences.

Because of these tendencies, juveniles can be susceptible to engaging in risky behaviors and activities, with little understanding of the harm their actions may have on themselves or others. And because youth struggle—more so than adults—at understanding long-term implications of their decisions, the decision to waive their right to an attorney, for example, is common. This phenomenon, paired with limited internal oversight of juvenile indigent defense practices, can leave youth legally unrepresented (Bonnie et al., 2013).

For example, a study of juvenile’s access to counsel in Maryland found that in four counties as many as 58 percent of youth waived their right to counsel (Cumming et al., 2003). As many as 90 percent of those who waive their right to counsel do so because they do not understand what it means to “waive” their right to something (Jones, 2004).

Additionally, juveniles in 43 states can waive their right to counsel without having spoken to an attorney (NJDC, 2017). Juveniles, therefore, must navigate the justice system despite developmental disadvantages, underscoring the importance of a more tailored justice system.

Types of Indigent Defense

The *In re Gault* case did not provide specific guidance on how court systems can guarantee a juvenile’s right to counsel. Therefore, states have different methods to provide counsel to juveniles who do not waive their rights and who cannot afford a private attorney (Majd and Puritz, 2009). Indigent defendants may be appointed counsel through any of four ways:

⁵ National Juvenile Defender Center. 2017. *Access Denied: A National Snapshot of States’ Failure to Protect Children’s Right to Counsel*. Washington, DC: National Juvenile Defender Center. http://njdc.info/wp-content/uploads/2017/05/Snapshot-Final_single-4.pdf;

National Juvenile Defender Center. 2017. *Defend Children*. Washington, DC: National Juvenile Defender Center. <http://njdc.info/wp-content/uploads/2016/11/Defend-Children-A-Blueprint-for-Effective-Juvenile-Defender-Services.pdf>

- *Public defender offices.* Public defender offices employ staff attorneys who practice indigent defense services through either a public or private nonprofit organization or as a government employee.
- *Assigned counsel.* Through assigned counsel, attorneys are appointed by the court, at the state level, from a list of private bar members.
- *Panel attorneys.* Panel attorneys are also private attorneys appointed by the court, but at the federal level, from a list on a case-by-case basis.
- *Contract attorneys.* Contract attorneys are private attorneys appointed to provide indigent defense services through bar associations, law firms, groups of attorneys, and nonprofit corporations in compliance with legal agreements with the state, county, or local government (Harlow, 2000; Majd and Puritz, 2009).

Limitations to Indigent Defense Data

Data on juvenile indigent defense, especially by type of counsel, are limited. What information is available is found in annual reports from state public defender agencies. Only nine state public defender agencies⁶ collect such data, and even this information is limited, in that it reflects caseload activity of the public defender agency. Only four states⁷ report the larger number of youth who either retain private counsel or youth who decide to waive their right to counsel (Wachter, 2015).

In California, for example, 22 percent of juveniles' legal representatives in 2015 were court-appointed, 70 percent were public defenders, and 6 percent were private attorneys. One percent of juveniles went unrepresented. That same year in Pennsylvania, 67 percent of juveniles used a public defender, 11 percent used a private attorney, and 1 percent waived their right to counsel (Juvenile Justice Geography, Policy, Practice & Statistics, 2015).

The data from California and Pennsylvania show that the majority of youth are represented by public defenders. However, the data collected for these reports are not comprehensive. They are used merely to track a work product within the defender's office, not to monitor and improve upon the current state of juvenile indigent defense (Wachter 2015).

Another source of indigent defense data comes from the Bureau of Justice Statistics' 2007 Census of Public Defender Offices, which collected data on 427 public defender offices. Contract and assigned counsel cases were omitted. Again, the same data limitations apply, because these numbers are reflective of the public defender offices. Out of 1,491,420 state public defender cases across 21 states, 208,400 (14 percent) were juvenile cases (Sickmund and Puzzanhera, 2014).

Reports on frequency of requested counsel compared with granted requests for counsel among youth are available through OJJDP's Survey of Youth in Residential Placement. The survey found that in 2003, 42 percent of youth in custody reported having a lawyer, while 20 percent had requested a lawyer, and 13 percent had requested and received contact with a lawyer (Sedlak and McPherson, 2010).

Outcome Evidence

There is mixed evidence about the potential positive or negative impact on case outcomes for juveniles represented by public defenders or appointed counsel.

⁶ Connecticut, Kentucky, Maryland, Missouri, Montana, Ohio, Oklahoma, Washington, and West Virginia.

⁷ California, Indiana, Pennsylvania, and Texas.

Burruss and Kempf-Leonard (2002), in an investigation of delinquency cases in three juvenile courts in Missouri, found that appointed counsel had an adverse effect on juveniles. For those youth who opted for public counsel, out-of-home placement was more common, after controlling for other characteristic and legal variables.

Though no formal explanation was presented, Burruss and Kempf-Leonard (2002) posited a few explanations, one of which was counsel competency due to lack of specific legal training. Another explanation presented by the study authors included co-opted counsel, wherein the attorney favors the position held by the court over that of the juvenile they represent. A third explanation was that courts punish youth for having an attorney, because it represents a denial of culpability and perhaps resistance to treatment on behalf of the adjudicated juvenile. The final explanation was predetermined case outcomes, meaning that attorneys were purposefully assigned to cases likely to have an out-of-home placement.

Guevara and colleagues (2004) found that youth without representation in one Midwestern state were more likely to have charges dropped and were less likely to be placed in secure confinement, compared with youth who were represented during disposition. They also found that the type of representation (indigent versus private defender) is an important variable to consider; findings suggested private attorneys produced worse outcomes for youth than public defenders. In fact, youth with a private attorney were least likely to have their case dismissed and most likely to be placed in secure confinement following adjudication, while representation by a public defender increased the likelihood of case dismissal and reduced the likelihood of secure confinement.

Guevara and colleagues (2004) presented several explanations for their findings. Courts may assume a paternalistic role with youth in the absence of counsel and are, therefore, more lenient. Second, private attorneys are more likely to be involved if there is a serious charge against a youth; the outcomes of these cases, therefore, are inherently disadvantaged when compared with outcomes from public defender cases. Lastly, public defenders often possess insider knowledge of the court and of other court actors, which could benefit case outcomes, while private attorneys are viewed as outsiders.

Armstrong and Kim (2011) examined the effect of counsel as well as the type of counsel (public versus private) when controlling for a range of individual and contextual variables that could also impact juvenile case outcomes. Consistent with prior studies, they found that juveniles represented by counsel were more likely to receive out-of-home placements, compared with juveniles who waived their right to counsel. In addition, juveniles represented by public defenders were slightly more likely to receive an out-of-home placement compared with juveniles represented by private attorneys (a finding inconsistent with the Guevara, Spohn, and Hertz, 2004). Armstrong and Kim (2011) noted that other legal and extralegal factors also significantly impacted case disposition decisions, including the number of prior offenses, detention status, and family income level.

Armstrong and Kim (2011) provided possible explanations for the adverse effects of counsel. In cases where juveniles waive their right to counsel and are not represented, juvenile court judges may be less certain that due process is achieved and, therefore, may not sentence juveniles harshly (i.e., to out-of-home placements). However, judges may go back to normal sentencing behavior if juveniles are represented by counsel, whether public or private.

A recent study examining an indigent defense program in Philadelphia found promising results for adult defendants in homicide cases. Through a randomized controlled trial, Anderson and Heaton (2013) found that defendants with indigent defense were less likely to be convicted of murder, had

shorter sentences, and spent fewer years in prison than defendants represented by private counsel. However, further research is needed to determine how these findings would compare in a juvenile justice setting.⁸

One study showed that public defenders help safeguard clients against procedural biases that may be inherent in the juvenile justice system. Kupchik and Harvey (2007) found that juveniles experienced more discretion in decision making by juvenile court judges and broader consideration for factors that determine their case outcomes; yet, they have fewer procedural protections when compared with adults in the larger criminal justice system. The authors argued that this unique disposition of the juvenile justice system may lead to increased instances of subjective decision making within the courts. The authors cited competent and aggressive public defenders as a necessary protection to counter a discretionary juvenile justice system.

Conclusion

Juveniles who cannot afford legal representation in court because of indigence are required to be provided with an attorney, in compliance with constitutional law. However, many youth are left either unrepresented or not effectively represented. Recent data on juvenile indigent defense, especially by type of counsel (i.e., counsel from a public defender office, assigned counsel, panel attorney, or contract attorney), are limited and come largely out of public defender agencies.

Research has found mixed results regarding the benefits (or detriments) of counsel on juvenile court outcomes. One study found that for youth with public counsel, out-of-home placement was more common (Burruss and Kempf-Leonard, 2002), while another study found that youth without representation were more likely to have charges dropped and less likely to be placed in secure confinement, compared with youth with legal counsel (Guevara, Spohn, and Herz, 2004). The study also suggested that private attorneys produced worse outcomes for youth than public defenders. Armstrong and Kim (2011) also found that juveniles without representation had better cases outcomes and were less likely to receive out-of-home placements, compared with juveniles who had counsel present. However, Armstrong and Kim (2011) found that juveniles with public defenders were more likely to be placed out of the home than juveniles with private attorneys. Lastly, Kupchik and Harvey (2007) illustrated how public defense is an important safeguard against potential inequities within the juvenile justice system. They argued that extralegal information about defendants is commonly discussed in juvenile court and the presence of a public defender may protect against this subjectivity in sentencing.

Overall, indigent defense for juveniles is understudied, and more research relative to this topic is necessary to better serve the population of juveniles who cannot afford legal counsel.

Additional Resources

Additional information on juvenile indigent defense can be found at the [Juvenile Justice Information Exchange](#) and at the [National Juvenile Defender Center](#).

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⁸ More information on the program is at www.crimesolutions.gov/ProgramDetails.aspx?ID=349.

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