“The idealized vision of a responsive and well-functioning system may serve an especially important function as a polestar to guide a lawyer’s practical decision-making in a dysfunctional system when the swirl of the ‘way we do things around here’ threatens a loss of direction.”

I. INTRODUCTION

Clifford, a seventeen-year-old Hispanic child from an urban environment, is adjudicated delinquent after taking a plea that reduces aggravated battery on a pregnant woman, a second-degree felony, to simple felony battery. In the adult court, his exposure is fifteen years to life in prison. A juvenile court judge orders him to attend anger management classes, to abide by a curfew set by his mother, and to refrain from any violent interaction with the victim—his twenty-year-old sister who is pregnant with her first child and who also resides with Clifford and their mother. Clifford agonized over whether he should go to trial or take the plea because he knew the charges against him were serious. Yet, he also knew what was currently occurring at home was no different than what had been occurring his whole life.

Clifford and his sister fought over possession of an old football jersey his sister’s ex-boyfriend gave Clifford. His sister determined that, because it was her old boyfriend’s jersey, it was her jersey. Jersey tug-of-war gave way to screaming and pushing, until someone within earshot called the police. No matter how it appeared from the outside, it was the same old
situation for Clifford. He remained, even at six feet tall and nearly eighteen years old, the “baby boy” in a female-dominated household where he rarely, if ever, got his way or felt understood. To Clifford, that was unlikely to change with a new baby girl on the way, destined to live in his family home.

Unfortunately for him, and for his juvenile record, this was not the first time Clifford was arrested. However, this was the most serious charge. Thus, at first glance—and at the briefest glance from the state attorney viewing the case—Clifford was the typical juvenile delinquent, exhibiting escalations in violence, who deserved the standard sanctions. The judge felt the same way and indicated that Clifford had better get his act together and stop hitting pregnant women or he would find himself in custody.

Before making the decision to take the plea, Clifford paced in and out of the courtroom. He disappeared completely before the plea colloquy. He took a long walk around the juvenile hall neighborhood. He appeared indecisive, angry, and ambivalent to anyone paying attention. When asked if he was satisfied with the result, Clifford said, “No, because nothin’ was gonna change.” Clifford’s inexperienced public defender, who thought taking a plea to a reduced charge that protected his criminal record and limited his sanctions was “no-brainer,” viewed him as difficult and defiant.

For Clifford, it was a crossroad. He knew when he got home his sister would have all the control. She was not likely to change; the court was not ordering her to change. She was belligerent, selfish, rude, bossy, and unkind. His mother seemed preoccupied by the birth of her first grandchild. Clifford was largely ignored, unless he made his presence known or demanded anything—then he was verbally attacked and usually assaulted. With two years of probation hanging over his head, and the likelihood that both the new baby and his sister would not be leaving his childhood home, he was inevitably going to be arrested again. Since they were little children, every fight between Clifford and his older sister resulted in some form of physical violence, usually initiated by her.

In order to protect his record and to avoid being arrested again, Clifford would need to leave home. However, leaving home would potentially thrust him further into a criminal lifestyle: he had not finished high school; he did not have a job; and the majority of people he knew had at least one foot in the criminal justice system already. To Clifford, being caught in the juvenile justice system placed him in an untenable situation. He reacted poorly, although typically, to this impossible puzzle because of his age and poor problem-solving skills. He was largely uncommunicative because he thought his predicament was obvious—and if no one was acknowledging it, then no one cared. He appeared aggressive and
ungrateful and, therefore, not worth saving by the stakeholders in the system.

Clifford’s juvenile public defender did the job she was entrusted to do. She evaluated the charges against him and determined that overwhelming evidence, coupled with his previous record, would result in stiff sanctions if Clifford proceeded to trial. However, preservation of his juvenile record was not Clifford’s most pressing problem. His juvenile record had, however, become the focus—and rightfully so—for the lawyers who knew that the juvenile sanction could have a lasting and detrimental impact on Clifford’s future. Clifford’s family dynamic was his most pressing problem, and no sanction was going to change that. After Clifford was adjudicated delinquent, his juvenile public defender concluded representation and moved to the next client. She would not see him again unless he violated his probation.

Who advocates for Clifford to help him manage and define the probationary period to which he was committed? Did the defense lawyer visit with Clifford’s family and figure out what they needed in this difficult time preceding a new baby? Will she now that Clifford is adjudicated? This is doubtful, as it is not her role. Should Clifford’s programming include balancing his needs with those of his family? Did the defense attorney order educational tests to determine Clifford’s educational and vocational aspirations or what his behavioral triggers are? What will help Clifford manage a realistic recidivist prevention plan?\(^2\) While this is often the role of a probation officer, or even a guardian ad litem, both of these roles are beholden to the state or to Clifford’s “best interest.” Clifford would be more likely to trust the system, thus respecting its mandates, if he

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\(^2\) One commentator has noted:

To increase offender self-control and to reduce impulsivity, successful relapse prevention programs seek to develop an internal self-management system “designed to interrupt the seemingly inexorable chain of events that lead to an offense.” Once the chain of events culminating in criminal behavior is identified, “two interventions are employed: (a) strategies that help the offender avoid high-risk situations and (b) strategies that minimize the likelihood that high-risk situations, once encountered, will lead to relapse.”

were assigned a postadjudicatory juvenile defender who could ensure his disposition was manageable and tailored to solve the problems that led to his arrest in the first place.

Instead, three weeks after Clifford took the plea to reduced charges to “protect his record,” he and his sister fought over who had eaten the last quart of chocolate ice cream. They screamed. They pushed. Police arrived. Clifford was arrested for aggravated battery on a pregnant woman and was placed in a detention center pending trial and a probation violation hearing. He will not be going home again.³

I first proposed the idea for a mandatory postadjudicatory juvenile defense attorney in my article, Keeping the Promise of Gault: Requiring Post-Adjudicatory Juvenile Defenders, published by the Georgetown Journal on Poverty Law and Policy in 2012.⁴ As a result of its publication, I was invited to speak at the Ninth Annual Wells Conference on Adoption Law at Capital University Law School to expand on these ideas. Observations I made as juvenile public defender in Miami, Florida, and as codirector of a juvenile justice clinic in Las Vegas, Nevada, led me to the conclusion that our juvenile justice system is not achieving the purpose behind its creation: the rehabilitation of children.⁵ In many cases, the system merely warehouses children. For others, the juvenile justice system is a revolving door—arresting the same children, from the same neighborhoods, until they age into the adult system.⁶ Further, the system

³ This story is based on an amalgam of children that my students and I have represented over the many years that I have been a director of a criminal clinic. It is meant to illustrate a typical problem with the juvenile justice system and its relationship to crimes.


⁵ See In re Gault, 387 U.S. 1, 14–16 (1967).

⁶ The measure of “recidivism” can take many forms and varies substantially in each individual state. However, focusing on the most general measurement—rearrest data—a sample of three states (Florida, New York, and Virginia) indicates a staggering 55% rearrest rate by juveniles released from state incarceration within a twelve-month followup period. HOWARD N. SNYDER & MELISSA SICKMUND, NAT’L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 234 (2006), available at http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf. A survey of readjudication rates from an eight-state study (Alaska, Florida, Georgia, Kentucky, Maryland, North Dakota, Oklahoma, and Virginia) shows a 33% recidivism rate within the same twelve-month followup period subsequent to release from state incarceration. Id.
does not allow children to “leave the follies of youth” in their past. In fact, quite the opposite is true: juvenile adjudications follow children into their futures, preventing them from entering certain professions, obtaining professional licenses, and securing loans for education. The records of these arrests and convictions are also available to law enforcement professionals, stigmatizing children in the exact manner the juvenile justice system is designed to prevent. For instance, if Clifford is arrested after his

7 See Gault, 387 U.S. at 24 (noting that courts have the discretion to disclose court records to the FBI, military, government agencies, and private employers).

8 The following makes this readily apparent:

A 1995 National Center for Juvenile Justice survey found that the following organizations and agencies are customarily given access to juvenile court records, whether on a de jure or a de facto basis:

- Institutions or agencies with juvenile custody ([thirty-seven s]tates);
- Prosecutors ([thirty-three s]tates);  
- Juvenile court judges and professional court staff ([thirty-four s]tates);
- Law enforcement ([twenty-six s]tates);
- Probation officers ([twenty-six s]tates); and
- Criminal court staff ([twenty-four s]tates).

In addition, [twenty-nine s]tates allow inspection of records by the juvenile; [thirty s]tates grant access to the juvenile’s parents or guardian; [thirty-six s]tates allow the juvenile’s attorney to look at records; and [twenty-four s]tates grant access to victims of juveniles. Four [s]tates direct that people deemed to be in danger from a juvenile may have access to the juvenile’s record or, at a minimum, allow inspection of the juvenile’s record. Twenty [s]tates now permit school officials at least limited access to information concerning the juvenile’s name and address, as well as disposition of charges.

. . . Twenty-seven [s]tates have adopted statutes that prescribe the inclusion of a juvenile record in a presentence report or, at a minimum, authorize the adult court to consider the defendant’s juvenile record. In [fourteen s]tates, a juvenile record is considered among the factors in the [s]tate sentencing guidelines. As a practical matter, this means that the juvenile record is “counted” in calculating the offender’s criminal history score.

Roughly one-half of the [s]tates expressly authorize prosecutors to obtain access to juvenile records for charging determinations. Some
eighteenth birthday, a state attorney will consider his juvenile arrest for aggravated battery on a pregnant woman, potentially reasoning that he is a violent man with a hatred for women. Initial plea offers will be higher. Consideration for leniency will be lower. The prosecutor will probably never learn the underlying facts of that aggravated battery arrest, which might mitigate assessments of Clifford’s potential dangerousness. All of this would happen implicitly, so a defense attorney may not know to explain away the earlier juvenile charges. Ironically, defense counsel may not even be able to do so because juvenile convictions are supposed to remain sealed—so they will not stigmatize children in their futures.9

I direct the fall semester of the Nova Southeastern University, Shepard Broad Law Center, Criminal Justice Clinic, in which students reflect on their placements at state attorney and public defender offices in South Florida. Several students are placed in juvenile courtrooms, and even the state attorney interns note that not much is done for the children who come through the system. In fact, both the defenders and the prosecutors admit that the difference turns on the personality of presiding judges. If judges believe a child is “save-able,” they will do their best to save those children. Judges may afford leniency, so that those children may join the military, or

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[states also allow access by social welfare agencies, probation and parole agencies, the military, school authorities, the institution to which the juvenile is confined, the victim of the juvenile’s act, researchers, criminal justice agencies to which the juvenile has applied for employment, and “others as the court may determine who have a legitimate interest in the proceedings.”]


9 This is because:

In [twenty-one states], the law calls for the sealing of juvenile court records. In [twenty-four states], the law calls for record expungement. In [forty states], sealing and expungement is discretionary with the court; in [eight states], it is mandatory. . .

. . .

In most [states], access to sealed records is strictly regulated. Only a few [states] do not address the issue. In over [twenty] jurisdictions, consent of the court is required.

Id. at 16 (footnote omitted).
adjudicate them for a minor offense, even when proof is low, just to keep
the children in the system because they “need” services. I ask my students,
“How can your judges tell which children are worth saving?” They
struggle to answer this question. Some children seem contrite and
remorseful, showing respect toward judges, while others are defiant and
rude, exhibiting disrespect for the system. It is the remorseful juveniles
that judges seem to find sympathetic and deserving of attention. I ask my
students to spend the remainder of the semester comparing the children the
judges seem to help the most with the children the judges do not, and I ask
them to note what type of “help” the judges offer.

As the semester progresses, I am interested to learn about the
evolving observations of the students and what they perceive adjudication
and treatment choices are based upon. I know mine. There does not seem
to be an overarching theory of juvenile justice that unifies and informs the
decisions that individual judges make and state treatment facilities and
probation offices carry out. Adjudication and programming seem arbitrary
at best. All children who enter the system and who are subjected to the
will of the state deserve the same type of evaluation and treatment—
dependent only on their risk of recidivism and only in ways that would
ameliorate that risk and aid in the child’s rehabilitation to a law-abiding
citizen.10 The state’s willingness to help a child should not turn on whether
the child demonstrates a desire to be rehabilitated; nor should it turn on the
seriousness of the crime adjudicated—because too often the facts
underlying the crime charged do not rise to the level of seriousness
intended by the statute.11 In other situations, if the facts and circumstances
actually rise to the level of seriousness intended, the child who committed
the act is immature, emotionally underdeveloped, and impulsive—unlike
the adult the legislature envisioned holding responsible for such a crime.12

Why we punish, how we punish, and who we punish in the juvenile
court are amorphous concepts.13 I believe judges’ instincts—determined
by their experiences and cultural understandings—play a significant role in
who is deemed “save-able.” What happens to the rest of the juveniles? If
judges do not believe children are worthy of special attention, what

10 See Gault, 387 U.S. at 15 (quoting Julian Mack, The Juvenile Court, 23 Harv. L.
Rev. 104, 119–20 (1909)).
11 See, e.g., supra notes 1–3 and accompanying text (discussing a fictional youth,
Clifford, and his adjudication for aggravated battery on a pregnant woman).
12 Chaney, supra note 4, at 352 n.11.
13 See Edward Chase, Schemes and Visions: A Suggested Revision of Juvenile
services do they receive? I believe that, in most cases, the services they receive are pro forma and not necessarily designed to individually aid them in leading a more productive life. In fact, empirical studies suggest that incapacitating children—sending children to a detention facility for residential “treatment”—has a positive correlation to increased recidivism.\footnote{\textit{See Donna M. Bishop et al., The Transfer of Juveniles to Criminal Court: Does It Make a Difference?, 42 Crime & Delinq. 171, 183 (1996) ("[T]ransfer actually aggravated short-term recidivism."). But see Mark W. Lipsey & Francis T. Cullen, \textit{The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews}, 3 Ann. Rev. L. & Soc. Sci. 297, 314 (2007) ("[R]ehabilitation treatment is capable of reducing the reoffense rates of convicted offenders . . . .")}. 

If certain children are not as sympathetic, are they then less capable of being rehabilitated? If not, then by definition, do those children belong in the juvenile justice system? If the children do belong in the juvenile justice system, then the purpose of the system is something more than rehabilitation—which was the purpose of its creation.\footnote{\textit{See Julianne P. Sheffer, Note, \textit{Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation Within the Juvenile Justice System}, 48 Vand. L. Rev. 479, 481–82 (1995).}} If the children do remain in the system, are adjudicated delinquent, and are ordered to comply with court mandates—what is the purpose? To punish the children? To protect public safety? 

I am interested in exploring these questions. First, what is that special something that judges provide for children they believe can be saved, and how do we quantify that “thing” and make it available for all children? I also identify with certain children in the courtroom that I want to reach out to, but they are not the ones who many deem sympathetic. I am drawn to withdrawn, defiant children who hate their captors, lawyers, and parents—the children who hate everyone, trust no one, and want to be left alone. The behavior of these children is often ugly and off-putting, making them almost impossible to like—and, I think, this is by design. After a life of disappointment, confusion, and Skinnerian conditioning\footnote{\textit{See Paul Naour, E.O. Wilson and B.F. Skinner: A Dialogue Between Sociobiology and Radical Behaviorism} 7–13 (2009).} by these children’s families and the system, these children often have no one to turn to or have been ignored or misunderstood for so long by their caregivers that much of their behavior is inevitable. 

These children commit crimes impulsively, with their friends, with no regard for the consequences, and with a lack of problem-solving skills.
These children find themselves in a quandary, of their own design, and do not know how to get out of their own way. They do not know how to ask for help. No one has ever really tried to listen; or, perhaps, the people who listened have also offered gang membership and a life of crime. These children have little to say about what happens to them in the juvenile court, so they wait for the usual sentence to be proclaimed, for the usual length of time, and with the usual amount of judicial contemplation. This is so that they can, in their own words, “do their time and go home.” It is these children I represented each day in the juvenile justice system; they were the norm—making the “save-able” ones easy to pick out. If my juvenile clients were the norm, then the system should work for them.

The answer as to how to fix the juvenile justice system requires novel, bold, and daring changes. Several researchers, scientists, and lawyers have offered thoughtful solutions. We need to start implementing these ideas because the definition of insanity is doing the same thing over and over again and expecting different results. It is time to do something different.

Part II of this Article starts where Keeping the Promise left off, briefly discussing the origins and procedure of the juvenile justice system in order to introduce and define the role of the postadjudicatory juvenile defender (PAD). Part III sets out many of the justifications for creating the PAD. Part IV explores some of the potential complications the creation of the PAD will cause in the system, and Part V offers some solutions rooted in therapeutic jurisprudence for those problems. What distinguishes this Article from the previous one on the same subject matter is that, in Keeping the Promise, I introduced the PAD role and explained how the juvenile justice system, by its original design, justifies that the PAD role be

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19 See infra Part II.

20 See infra Part III.

21 See infra Part IV.

22 See infra Part V.
created. Here, I delve deeper into what the role would look like, and continue discussing why it is the best way to effect change in the system.

II. WHAT IS A POSTADJUDICATORY JUVENILE DEFENDER AND WHY IS IT NECESSARY?

Before explaining what a PAD is and how it is a unique lawyering role, a basic discussion of the juvenile justice system is necessary.

A. The Origins of the Juvenile Justice System

The juvenile court originated as a way to remove children from the harshness of the adult criminal justice system in an effort to rehabilitate them into law-abiding, productive members of adult society unfettered by the follies of their youth. The basis of the creation of the system was the belief in the following: (1) children were capable of rehabilitation; and

\[\text{23 See Chaney, supra note 4, at 380–91.}\]


\[\text{25 See Chaney, supra note 4, at 356–57.}\]

As part and parcel of eliminating that stigma, children were to be “protected by the process from disclosure of their deviational behavior . . . [as] it [was] the law’s policy ‘to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past.’”

\[\text{Id. at 366 (alterations in original) (quoting Gault, 387 U.S. at 24). The major emphasis of the emerging juvenile justice policies were on children and youths who might commit crimes in the future. “[G]ood people, the law abiding citizens, should intervene early and aggressively in the lives of youth who were” about to become criminals. Bernard, supra note 24, at 49; see also Jennifer M. Segadelli, Comment, Minding the Gap: Extending Adult Jury Trials to Adolescents While Maintaining a Childhood Commitment to Rehabilitation, 8 Seattle J. For Soc. Just. 683, 689–90 (2010).}\]

\[\text{26 “No recent data provide reason to reconsider the Court’s observations in Roper about the nature of juveniles. . . . [D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.” Graham v. Florida, 560 U.S. 48, 68 (2010).}\]

The Roper Court found that there are three differences between juveniles and adults that diminish juveniles’ culpability. First, youths lack maturity and a sense of responsibility, so when they act
(2) the government owed it to the children to try to rehabilitate them if their parents were not, or could not—a process often referred to as parens patriae. The system served dual purposes because public safety is better

irresponsibly, their conduct is less morally reprehensible than that of an adult. Second, juveniles have greater susceptibility to negative influences and peer pressure, and at the same time lack control over their environment and ability to escape those influences. Third, juveniles have a more transitory character and personality, undermining any conclusion that a juvenile who commits even a heinous crime has an “irretrievably depraved character.”


27 The founders of the juvenile court believed in individualized justice, as they “recognized that children were different from adults [because] [they were . . . young, immature[,] and not fully developed. Thus character and behavior could still be molded and they could be rehabilitated. Rehabilitation became the byword of [j]uvenile [c]ourt.” Eugene Author Moore, Foreword to Robert V. Heckel & David M. Shumaker, Children Who Murder: A Psychological Perspective, at vii, viii (2001); see Barry C. Feld, The Transformation of the Juvenile Court—Part II: Race and the “Crack Down” on Youth Crime, 84 Minn. L. Rev. 327, 331–40 (1999).

28 The doctrine of parens patriae permits the state to intervene when parents are failing to protect the welfare of their minor children and act in their best interests. 47 Am. Jur. 2d Juvenile Courts and Delinquent and Dependent Children § 19 (2006).

The principle of parens patriae . . . was established by an 1838 Philadelphia case known as Ex parte Crouse. Ruling that the government had the authority to remove children “when [the parents were] unequal to the task of education,” the court declared that removal did not require due process.

Steven Mintz, Placing Children’s Rights in Historical Perspective, 44 Crim. L. Bull. 313, 316 (2008) (alteration in original) (quoting Mintz, supra note 24, at 163); see Bernard, supra note 24, at 68–70 (citing Ex Parte Crouse, 4 Whart. 9 (Pa. 1839)); Tanenhaus, supra note 24, at 58.
protected when children in a malleable developmental stage, who have the potential to be rehabilitated, become productive, law-abiding members of society. Therefore, in an effort to reduce recidivism, the creation of the juvenile court was designed to help troubled adolescents and, in the process, shield them from permanent stigma and reputational harm that accompanies a criminal conviction in adult court. Judges and prosecutors are required to take into consideration the individual needs, limited experiences, immaturity, and lack of moral blameworthiness of each child in order to design effective treatment plans because rehabilitation is the focus of the juvenile justice system. Punishment is not the focus of the system; in fact, what “crime” the child commits is supposed to be less important than what can be done to help the child become a law-abiding member of society. “Society’s role [is] not to ascertain whether the child [is] ‘guilty’ or ‘innocent,’ but ‘[w]hat is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.’”

Juvenile proceedings were designed to be nonadversarial and to focus on rehabilitating the child, not punishing the child. For this reason, and because of the notion that children are always “in custody” based on their age and relative immaturity, children were not afforded all of the constitutional procedural protections adults were afforded in the criminal

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29 See Feld, supra note 27, at 337–39.
30 See Gault, 387 U.S. at 15. “Justice Fortas’[s] majority opinion identifies the formation of a juvenile specific justice system as a response to the horrific outcome of children, who are barely able to comprehend mens rea and form culpability, being forced to suffer long prison sentences while housed with the culpable and hardened adult criminals.” Chaney, supra note 4, at 357 n.44. “Hence, [children adjudicated delinquent] should be rehabilitated based on individualized determinations of what is in their best interests, and, upon rehabilitation, these children should leave the system without the scar of a criminal record.” Id. at 366.
32 Gault, 387 U.S. at 14–16.
33 Id. at 15–16.
34 Id. at 15 (quoting Mack, supra note 10, at 119–20).
35 Id. at 15–16.
36 Id. at 17; see Schall v. Martin, 467 U.S. 253, 265 (1984).
justice system, which is a traditional adversarial system primarily focused on punishment. After several cases came before the Supreme Court identifying abuses of the juvenile justice system, the Supreme Court granted certain constitutional safeguards to juveniles accused of a crime through the Fourteenth Amendment’s Due Process Clause. These safeguards are only available during the trial, or adjudicatory, phase of the proceedings, and these safeguards are based on those protected by the Sixth Amendment: the right to counsel, the right to notice of the charges, the right against self-incrimination, and the right to confrontation.

B. Juvenile Court Procedures

Children who break the law may be arrested like adults. Some juveniles are released to the custody of their parents, while others are taken


38 The Court noted these safeguards:

In Kent v. United States, we stated that the [j]uvenile [c]ourt [j]udge’s exercise of the power of the state as parens patriae was not unlimited. We said that “the admonition to function in a ‘parental’ relationship is not an invitation to procedural arbitrariness.” With respect to the waiver by the [j]uvenile [c]ourt to the adult court of jurisdiction over an offense committed by a youth, we said that “there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.” We announced with respect to such waiver proceedings that while “We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.” We reiterate this view, here in connection with a juvenile court adjudication of “delinquency,” as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution.


39 Id. at 55.

into custody at a juvenile detention facility.\textsuperscript{41} Detention is not considered a restraint on children’s liberty because of their young age and the fact that they may be a danger to themselves.\textsuperscript{42} They are not housed with adults.\textsuperscript{43} A hearing is held to determine whether a juvenile must remain detained.\textsuperscript{44} Defense counsel should be present during this hearing to argue effectively for release of the client, when appropriate.\textsuperscript{45} After a period of investigation, the juvenile matter is set for “adjudication,” which is like an

\begin{itemize}
\item[41] Id.
\item[43] Id. at 271.
\item[44] 14 AM. JUR. Trials § 50 (1968).
\item[45] See id. Arguments for release should be based on one of the following arguments:
\begin{itemize}
\item[1.] The client is more conveniently available to discuss the case and to prepare for the adjudicatory hearing.
\item[2.] The juvenile can assist his attorney in locating and interviewing witnesses if he is released at the detention hearing.
\item[3.] The juvenile is offered an opportunity to demonstrate that he can adjust successfully in free society and thus avoid the necessity for further detention.
\end{itemize}
\textbf{Comment:} Satisfactory adjustment during the period between the detention hearing and the adjudicatory hearing can be very persuasive on behalf of granting a release at the adjudicatory hearing, by demonstrating that detention is no longer necessary.
\item[4.] Release at the detention hearing will obviate the necessity of the juvenile mingling with other, perhaps more seriously maladjusted, juveniles in the juvenile detention facility, or similar contamination in jail in the event no juvenile facility is available.
\item[5.] In those jurisdictions wherein the expense of detention becomes an enforceable obligation against the parents or guardians, release at the detention hearing could result in a substantial saving to the juvenile, his parents and guardians, as well as the taxpaying public.
\item[6.] Where the juvenile is suffering from either a physical or an emotional illness, as is often the case, release at the detention hearing makes it possible to use the remaining period before the adjudicatory hearing to good advantage by making arrangements for medical, psychiatric, or psychological examinations and treatment.
\end{itemize}

\textsuperscript{Id.} § 53.
During this hearing, the juvenile court judge decides whether the juvenile committed the act for which the juvenile was arrested beyond a reasonable doubt and, therefore, whether the juvenile should be found delinquent. While the adjudication procedures are supposedly nonadversarial and informal, juveniles have a constitutional right to counsel, to notice of the charges against them, to confront witnesses against them, and to the protection of the privilege against self-incrimination. These constitutional rights are only guaranteed during the adjudicatory phase. These constitutional safeguards mirror those that are available to adult criminal defendants during adult criminal trials, giving this phase of the juvenile justice system the feel of a “miniature adult” court.

After the adjudicatory hearing is complete and a child has been “adjudicated delinquent”—the functional equivalent of being found guilty—the court conducts a disposition, or sentencing, hearing. At this hearing, the prosecution, with help from the probation officer, suggests a treatment program. A judge then orders the child to complete those programs deemed necessary to aid the child. The court should devise an individualized rehabilitation program, which the judge controls. Additionally, “[m]ost states have statutes that require an attorney or

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46 Id. § 56.
47 Id.
48 Id.
49 In re Gault, 387 U.S. 1, 41 (1967).
50 Id. at 32–34.
51 Id. at 56.
52 Id. at 55.
53 Id. at 30–31.
54 See id. at 12–13.
55 14 AM. JUR. Trials § 73 (1968).
56 Id. § 74.
57 Id.
58 Id. § 77.

The court is more or less free to fashion whatever type of rehabilitative plan it feels will most benefit the juvenile. Standard courses of action include placement of the juvenile on probation, sending the juvenile to a detention facility, juvenile hall[,] or foster home, requiring the juvenile to receive counseling, or releasing the minor to his or her parents with restrictions on the minor’s activities.

Chaney, supra note 4, at 368–69.
guardian ad litem to represent the interests of the juvenile during this [dispositional] hearing." After the judge pronounces the disposition, lawyers generally do not have any more contact with their clients, unless the child violates an order to complete a program or is arrested for a separate offense. Sometimes the disposition involves committing the child to the custody of the state.

Usually, attorneys do not know whether the child is completing the court-ordered programs. If a child is committed to a state facility, attorneys generally do not visit the child to see what the facility is requiring the child to do. The right to counsel does not extend to the postadjudicatory phase in juvenile court. Analogizing this phase to adult court—a defendant is sentenced, the sentence is determinate, and no other role exists for the attorney to carry out, except for an appeal, which is often handled by a different attorney who is not focused on the length of the prison term or quality and effectiveness of mandatory treatment programs that a convicted adult is sentenced to complete.

The practical purpose of detention is to send the child to a residential treatment facility designed to rehabilitate or to complete mandatory programming with the same goal. The length of detention is indeterminate because the child is not adjudicated delinquent in order to punish the child. The child will spend whatever time in treatment, on probation, or in a residential facility that is necessary for rehabilitation. In some instances, the child may be detained past the twenty-first, or even twenty-fifth, birthday—depending on the state statute mandating the rules for commitment. The state is responsible for determining when the child

59 Chaney, supra note 4, at 368.
62 Id. at 311–12.
63 In re Gault, 387 U.S. 1, 15 (1967).
64 Marrus, supra note 61, at 292–93.
65 Gault, 387 U.S. at 29; Barbara Kaban & James Orlando, Revitalizing the Infancy Defense in the Contemporary Juvenile Court, 60 RUTGERS L. REV. 33, 52 (2007); see C. LENORE ANDERSON ET AL., CALIFORNIA YOUTH AUTHORITY WAREHOUSES: FAILING KIDS, (continued)
is rehabilitated, as well as how best to accomplish this goal. This task is somewhat amorphous. Meanwhile, the child is torn away from what is familiar—family, friends, schools, and neighborhoods. The question that remains is: Does the child’s placement in the particular residential treatment program have a logical connection to reducing recidivism and rehabilitating the child?

C. Postadjudicatory Juvenile Defense Attorneys: What Do They Do? When Do They Do It?

Juvenile court should not be a miniature adult court. Actually, the postadjudicatory phase of the system was the focus and purpose for creating a separate juvenile court. What is done with children in the postadjudicatory phase should reduce recidivism, protect public safety, and create law-abiding citizens. The theory of punishment advanced in adult court has, at its core, a retributive bent: that a morally blameworthy defendant must pay for his criminal actions—“just deserts.” Juvenile court was not designed with retribution in mind because of the juvenile’s impulsivity, immaturity, and lack of culpability.

Therefore, an attorney must oversee whether this most crucial phase of the juvenile justice process is effectively aiding the attorney’s adjudicated
client. After all, this is a major justification for having an entirely separate system of criminal justice.73

1. The PAD Is an Expert in the Client

A PAD must be an expert in the client. This does not mean the PAD is an expert in what the client tells the PAD, but an expert in the client’s circumstances, experiences, and history. The PAD should be appointed to represent the child after the child has been adjudicated delinquent and committed either to the state for rehabilitation in a treatment facility or to the probationary department to complete mandatory programs. The PAD should be uniquely qualified to deal with the child’s individual treatment needs, and the PAD should facilitate a process ensuring whatever programming choices the child is ordered to complete have a substantial chance of addressing the child’s individual and unique needs, thus leading the client to becoming a law-abiding member of society. Although the PAD is not required to be the lawyer who helped the child through the adjudicatory phase, the PAD should have a strong relationship with the previous lawyer in order to foster trust with the child. The purpose of appointing an independent lawyer is to make the child feel represented—not that the PAD is another agent of the state.

The PAD will be required to independently evaluate each child, meet with the child in detention, and research the child’s home environment. The PAD will order tests and evaluations for psychological, emotional, and educational issues if those tests have not yet been conducted. If the tests and evaluations have been conducted, the PAD will gather those records for a complete account of the child’s physical, educational, and emotional health. An advocate, who has both the child’s stated and best interests in mind, will maintain these records.

In my experience, much of the programming for juveniles across the country is based on individuals’ intuitive sense about what is best for children. The child who ends up in the juvenile justice system may not be the child that the designers of the programming had in mind when they designed the programs.74 Many of these children have very unique,

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73 Id.
74 See Juvenile vs Adult Justice, PBS FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/stats/juvvsadult.html (last visited Apr. 9, 2014) ("The disposition is based on the individual’s offense history and the severity of the offense, and includes a significant rehabilitation component. The disposition can be for an unspecified period of time; the court can send a youth to a certain facility or program until it is determined he is rehabilitated, or until he reaches the age of majority. The disposition may also include a (continued)
specific issues and experiences in their past that are not the typical adolescent experiences of the individuals employed by the juvenile detention facilities or probation departments. The PAD would be aware of the client’s unique experiences, traumas, family situations, and neighborhoods so as to avoid making assumptions and to make programming choices based on solid, empirical research about what works best for a child with those experiences.

2. The PAD Is an Expert in the Juvenile System in Which the Client Is Committed

Does a one-size-fits-all rehabilitation program actually fit all if, as Julian Mack stated in 1901 and as the Supreme Court reinforced in Gault, the juvenile system should be looking at who each child is, why that child did what he did, and how the state can help him to not do it again?76

A postadjudicatory juvenile defender must also be an expert in the unique juvenile justice system in which the PAD works. The PAD must understand and research the available programs in the juvenile justice system in which the child is committed, as well as possible alternative programs. This systemic responsibility of the PAD makes the lawyer uniquely qualified to evaluate whether the programs meet their objectives. The PAD will gather the learning outcomes of each program: their missions, recidivism rates, success rates, treatment goals, and procedures. The PAD will assess what each program is designed to achieve, how each program anticipates reaching those goals, and in what amount of time they are designed to reach those goals. The PAD, then, will be in a position to assess whether and to what extent each program is successful in rehabilitating the child. The PAD will regularly visit the clients in their treatment programs so that the facilities’ employees expect oversight and welcome partnerships between treatment facilitators and the PAD. Better

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75 Chaney, supra note 4, at 381 (“It has been reported by many first-line workers that commitment program employees often have high school degrees, minimal training, and harbor traditional notions of how their brand of discipline should lead to rehabilitation. A common philosophy is what was good for creating discipline in their childhoods should be good enough for the children they supervise regardless of the juvenile’s cultural backgrounds and previous childhood traumas and abuse.” (footnote omitted)).

76 Id. at 370.
communication will increase the success rate of the child, while also boosting the overall effectiveness of a treatment program.

If it becomes apparent that state-run programs are not effectively meeting the goals of reduced recidivism and increased rehabilitation, then those programs are ineffective and, therefore, a waste of taxpayer money. A lawyer uniquely positioned as advocate to the adjudicated juvenile has the ability and power within the system to reveal this type of inadequacy, but, more importantly, that lawyer has the ability to suggest changes. There are a plethora of program choices that involve problem-solving skills and reentry solutions that might better assist adjudicated juveniles.77

Today, many providers argue that offering adequate and specialized programming to juveniles is too expensive.78 Perhaps that is true if that programming is in addition to what is already offered. However, if a PAD is able to establish that current programming is largely ineffective and that other programs would be more successful, the system could have a financial incentive to exchange an ineffective program for an effective one. Most importantly, a PAD would maintain a lawyer-client relationship with the adjudicated juvenile until the juvenile is no longer committed to the state. This ensures that a child’s treatment choices are connected to the child’s needs and that the child is committed to the state only for the time necessary to reach those goals.

3. The PAD Is an Attorney with Standing to Argue Effectively for Child Clients

A PAD must have standing to bring the child’s matter before the sentencing judge to discuss progress in the programs and potential programming conflicts and suggestions. This simple mechanism of oversight—by carving out status conferences—will go a long way in ensuring the child is not lost in the system, or simply serving time.79

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79 Chaney, supra note 4, at 381 (“Clients of the Boyd Juvenile Justice Clinic at the University of Nevada-Las Vegas often confided to student attorneys that they knew they were simply ‘doing time’ with no clear indication of what that meant, how long ‘time’ (continued)
PAD can advocate for a definitive termination of state involvement in the client’s life when effective programming is completed, or the PAD can argue for termination of state involvement when programming is inefficient, inadequate, or unrelated to the client’s needs.

4. Why Does the Juvenile System Need a PAD?

Nothing is easy when trying to make a change. It has become clear, based on the way that juvenile courts operate across the country, that an amalgam of rehabilitation and retribution is the model for juvenile punishment.80 This moves away from the purpose of the juvenile court. If retribution is the goal, there is little purpose for a juvenile court, unless one subscribes to the notion that children are culpable, but not to the same extent as adults. There is still large support for the juvenile court based on the premise that crime can be reduced because children still have the potential to change.81 This support is based on the notion that rehabilitation of children will promote public safety by creating law-abiding citizens through juvenile court intervention.82 A PAD’s role should be seen as assisting this goal. The more successful the PAD is in arguing for effective rehabilitation programs for the child, the more likely the child will, in fact, become a law-abiding member of society.83

would be, or what they would need to accomplish [or endure] in order to be released.” (alteration in original)).

80 Slobogin & Fondacaro, supra note 17, at 3 (indicating that this blend of the two models is practiced in a number of jurisdictions and may represent the academic consensus).

81 See Christopher Slobogin & Mark R. Fondacaro, Juveniles at Risk: A Plea for Preventive Justice 128 (2011) (noting that juveniles are “more malleable than adults” and are more responsive to rehabilitative interventions); see also Slobogin & Fondacaro, supra note 17, at 38 (arguing a prevention-based juvenile system can be effective because children have the potential to change).

82 See Slobogin & Fondacaro, supra note 17, at 5 (noting that the goal of the intervention-prevention approach is public safety).

83 See Chaney, supra note 4, at 381.

If the purpose of the juvenile justice system is to rehabilitate children in ways that are specific and unique to their care and their circumstances, then there must be greater oversight of these goals within the system. Structures should be put into place to make sure that proper, neutral, unbiased, and thorough evaluations are taking place. Programmatic audits of juvenile detention facilities should be regularly completed to make sure that actual programs are in place to rehabilitate (continued)
III. JUSTIFICATIONS FOR THE POSTADJUDICATORY JUVENILE DEFENDER

This Part of the Article defines therapeutic jurisprudence and explains how the juvenile court is inherently a program-solving court and, therefore, can (and should) benefit from therapeutic values and interdisciplinary work.\textsuperscript{84} This Part further extrapolates from \textit{Keeping the Promise} about why it is important that a PAD be an attorney.\textsuperscript{85} Attorneys are uniquely positioned in society to affect the kind of change that the PAD role is designed to engender. They have power to advocate simultaneously for the greater good of both their clients and the programs in which their clients are required to participate.

A. Therapeutic Jurisprudence

Therapeutic jurisprudence is the interdisciplinary study of law as a therapeutic agent\textsuperscript{86}—that law can act as a therapist to the stakeholders in the system.\textsuperscript{87} Instead of viewing the law as an adversarial agent, or an antagonistic process, therapeutic jurisprudence envisions that the law and the processes of the law can be designed to help people and, in fact, should be redesigned with therapeutic consequences as the goal.\textsuperscript{88} Therapeutic jurisprudence, an interdisciplinary movement cofounded by David Wexler and Bruce Winnick, grew from the work of mental health advocates who witnessed long civil commitments of mentally ill clients that seemed

\begin{quote}
...kids and to ensure that staff are properly trained. Monitoring must be in place to determine when rehabilitation is complete for a particular child. Oversight should be provided to make sure juveniles return home to safe environments. Guidelines should be in place to make sure programs’ missions and methods have been empirically tested and have yielded success in rehabilitation. More questions must be asked from the point of view of the juveniles who are incarcerated.
\end{quote}

\textit{Id.; see} Witkin, \textit{supra} note 17, at 127–28 (‘The country’s dissatisfaction with the juvenile justice system stems largely from a lack of clarity about the proper role for the [s]tate.’).

\textsuperscript{84} See infra Part III.A.

\textsuperscript{85} See infra Part III.B.

\textsuperscript{86} \textsc{David B. Wexler & Bruce J. Winnick}, \textsc{Essays in Therapeutic Jurisprudence} 8 (1991); \textsc{David B. Wexler}, \textsc{Therapeutic Jurisprudence: The Law as a Therapeutic Agent} 4 (1990).

\textsuperscript{87} See Wexler, \textit{supra} note 86, at 14 (arguing that the legal system itself should be examined and, if necessary, restructured to maximize its therapeutic aspects).

\textsuperscript{88} David B. Wexler, \textit{Therapeutic Jurisprudence and the Criminal Courts}, 35 \textsc{Wm. & Mary L. Rev.} 279, 280 (1993).
contrary to the principles of liberty. In the same way those mental health professionals recognized something was wrong with their system and worked to change it, advocates in the juvenile justice system can work to create an environment that promotes therapeutic values. Advocates must ask the right questions first: What is the purpose of this system and how can that purpose best be achieved? Further, identifying what is antitherapeutic in the current system will promote positive legal changes.

Answering these questions in other justice systems led to the creation of problem-solving courts—courts that provide an alternative approach to justice. Instead of pleading guilty to an offense and receiving a short jail sentence, fine, or nondescript probationary period, problem-solving courts tackle the core question of why the defendant was arrested in the first place and treat that problem. For instance, in a drug court, an arrest for possession of cocaine generally indicates that the offender is a substance abuser. A problem-solving drug court determines that this defendant would be a more productive, law-abiding person if the defendant were not addicted to cocaine, so the court invites the defendant, in exchange for a reduction or dismissal of the charge, an opportunity to overcome the addiction. Overcoming an addiction generally takes longer than the customary “credit for time served” plea that may be offered in criminal drug possession cases. Thus, when defendants choose drug court, they often know they will be at the mercy of the court for a much longer period of time, but they submit to that in order to solve their underlying drug problems. The stakeholders in the system—judges, prosecutors, probation

89 Id. at 282.
90 See David B. Wexler, Reflections on the Scope of Therapeutic Jurisprudence, 1 PSYCHOL. PUB. POL’Y & L. 220, 224 (1995); see also WEXLER, supra note 86, at 14 (stating that restructuring the law may be necessary to minimize its “anti-therapeutic aspects”).
92 Other problem-solving courts involve mental health issues and prostitution. Id. at 30.
94 Id. at 726.
95 Id. at 789.
officers, treatment providers, and defense attorneys—are united in the defendant’s stated goal to overcome the defendant’s drug addiction.96

1. How Juvenile Court Is a Problem-Solving Court

Juvenile court is inherently a problem-solving court because the severity of the crime a juvenile commits is not what triggers the level of the juvenile’s “sentence;” instead, a child is mandated to complete programming that is commensurate with the child’s risk for recidivism. The problem being solved is how better to protect society by making sure this child becomes a rehabilitated, law-abiding citizen. If problem solving were not at the heart of the juvenile justice system, there would be little justification for a separate court for juvenile offenders.

Therefore, all the stakeholders in the system—the judges, probation officers, state-run facility operators, and prosecutors—should be united in the goal of making sure the child does not reoffend. Who brings these stakeholders to the table to discuss what works and what does not? Without someone advocating for the client and discussing the unique process with the client, the stakeholders do not know what is working or whether the child is likely to reoffend.

2. How Therapeutic Jurisprudence Justifies Creating a PAD

Therapeutic jurisprudence relies on collaboration with mental health professionals, community members, and family members to inform the systems of law how to be more therapeutic and effective for the adjudicated juvenile.97 Without a coordinated effort, and someone driving this effort on behalf of the child, it is unlikely that successful, novel, and empirically tested solutions will be employed. The PAD is in the best position to coordinate these collaborations because the PAD is specifically appointed to make sure that the child’s treatment plan makes sense for the child’s rehabilitation, which also serves the benefit of increasing public safety when the child does not reoffend.

“Therapeutic jurisprudence leads us to raise questions, the answers to which are empirical and normative.”98 This means that therapeutic jurisprudence encourages and invites interdisciplinary collaboration with other professionals who can better understand and assist the stakeholders in

96 See, e.g., id. at 726–27; see Peggy Fulton Hora et al., Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America, 74 NOTRE DAME L. REV. 439, 452 (1999).

97 Hora & Stalcup, supra note 93, at 784.

98 Wexler, supra note 88, at 280.
the legal system. In juvenile court, it is important to understand better the children that are adjudicated delinquent, the families they came from, the communities that shaped them, and the communities they are accused of victimizing. Behavioral science, research about neurological developments of children, and sociology all have a great deal to offer the world of juvenile justice. Working in tandem with principles of law, a more therapeutic environment can be created that all stakeholders may come to appreciate—both advocates of public safety and advocates of rehabilitation. There is also a better chance of creating successful programs if the programs are based on the empirically sound research of collaborators. In creating a more therapeutic environment, a PAD spearheads this collaboration as the goal of the representation.

B. Social Justice Lawyering and Lawyers as Agents of Change

1. Why Should the Representative of an Adjudicated Juvenile in the Postadjudicatory Phase Be a Lawyer?

When I speak about creating a PAD—like at the Ninth Annual Wells Conference on Adoption Law, which inspired this symposium piece—people often ask why the person assigned to the child after the child is adjudicated must be a lawyer. In fact, do probation officers not do this exact job and is there no oversight to make sure they are doing a good job? Critics familiar with a guardian ad litem—a person entrusted with the duty to make sure the child’s voice is heard and to advocate for the child’s best interests—often suggest that these guardians can fill the void just as well as any lawyer could and, in fact, they should because they advocate for the best interests of the child. Nonlawyers can be guardians ad litem. However, a lawyer is the person in society who seeks justice

99 Id. at 294–96.
100 See Marty Beyer, Developmentally-Sound Practice in Family and Juvenile Court, 6 NEV. L.J. 1215, 1215 (2006).
101 See, e.g., CAL. WELF. & INST. CODE § 280 (West 2008) (“It shall be the duty of the probation officer to prepare for every hearing on the disposition of a case as provided by [§] 356, 358, 358.1, 361.5, 364, 366, 366.2, or 366.21 as is appropriate for the specific hearing, or, for a hearing as provided by [§] 702, a social study of the minor, containing such matters as may be relevant to a proper disposition of the case. The social study shall include a recommendation for the disposition of the case.”).
103 Id. at 44.
104 Id. at 43–44.
for the minority and seeks power for the powerless. Lawyers know how to use the justice system to illuminate the conditions and experiences of their clients. Lawyers are trained to garner attention and communicate in effective, persuasive ways for social change. Make no mistake, the PAD must work with members of the community to better understand the needs of the client, as well as the purposes of each juvenile rehabilitation facility and program, and the PAD must work within the confines of the role to which the PAD is assigned, which is to be an advocate for a child after the child has been adjudicated delinquent. However, the attorney should serve as the leader of that team in order to force change, not merely suggest it. This is a role unique to attorneys. Other stakeholders in the system do not have as much power.

2. Lawyers Are Agents of Change

Lawyers in society occupy different roles. Some lawyers serve the function of bringing law to nonlawyers, while others are called upon to inform lawmakers about the effect of current laws. Lawyers’ obligations differ depending upon whether they represent a government entity, a defendant accused of a crime, or a corporate client. Lawyers act as politicians, judges, and law professors—and each role requires different and competing professional obligations. What all lawyers do have in common is their obligation to the rule of law and the betterment of society. “[T]he lawyer is the guardian of the rule of law, the ideal that all people stand equally before the law . . . .”

105 “Given these challenges, the best way for juveniles to maintain voices in juvenile proceedings is through the guiding hand of an attorney.” Chaney, supra note 4, at 382; see also Powell v. Alabama, 287 U.S. 45, 68–69 (1932); Amy D. Ronner, Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles, 71 U. CIN. L. REV. 89, 95 (2002).
106 See Boumil et al., supra note 102, at 45 (“Unlike the child’s attorney whose role is generally to represent the stated wishes of the child, the [guardian ad litem] is generally expected to advocate for the best interests of the child, whether or not the child is in agreement.”).
108 JAMES E. MOLITERNO & GEORGE HARRIS, GLOBAL ISSUES IN LEGAL ETHICS 2 (2007); see MODEL RULES OF PROF’L CONDUCT Preamble (2008).
Lawyers are most often thought of as agents of change in an adversarial system in which an advocate represents each side of a controversy and fights exclusively for the interests of the advocate’s client.\textsuperscript{109} While the adversarial system is thought of as the greatest vehicle to ascertain the truth,\textsuperscript{110} lawyers in society have other ways of getting to the truth outside of the litigation arena. Lawyers are trained to understand systems and how those systems can function more efficiently or better serve their clients and society.\textsuperscript{111} Lawyers are trained to offer solutions and brainstorm legal mechanisms that help protect their clients.\textsuperscript{112} They have the ability to improve society by investigating systems of law and punishment because they are familiar with how law works and how it should work.\textsuperscript{113} Lawyers have the ability to evaluate the strengths and weaknesses of the justice system and offer changes based on those evaluations.\textsuperscript{114} In fact, lawyers have the duty to do so as officers of the court—yet another role lawyers occupy in society.\textsuperscript{115} Often, a lawyer’s


\textsuperscript{111} See Moliterno & Harris, supra note 108, at 5.

\textsuperscript{112} Moliterno, supra note 109, at 1561–62.

\textsuperscript{113} See Moliterno & Harris, supra note 108, at 2.


\textsuperscript{115} MODEL RULES OF PROF’L CONDUCT Preamble (2008).
observations will uncover injustices that are the product of government power or tyranny—depending on one’s viewpoint. It is the lawyer’s role as an agent of change and protector of the rule of law to expose the power differentials that lead to injustice. For this very reason, it is a lawyer who must stand next to the child who has been adjudicated delinquent and committed to the care of the state. It is the lawyer’s job to make sure the legal system in the postadjudicatory phase is treating the juvenile fairly and comporting with its stated goal. “[T]he entire persuasive power of the legal profession is required to assure achievement of these goals.”

Based on lawyers’ unique training and comfort with occupying various lawyering roles, the PAD is in the best position to advocate for better programs for the client and better programming choices based on the principles that justified extending constitutional rights to juveniles in the first place: fundamental fairness and due process. A lawyer is a “big picture” thinker who can bring all the stakeholders together to advocate effectively for changing juvenile justice to better serve children and the communities from which they come.

In particular, the PAD has a dual role: (1) representation of the child and (2) oversight of the entire system of postadjudication. Balancing these interests is broader than just advocating for the juvenile within the current system of punishment. The PAD has an obligation to the child, but also an overarching goal to make juvenile punishment more accurately reflective of rehabilitation.

IV. COMPLICATIONS OF DEFINING THE POSTADJUDICATORY JUVENILE DEFENDER’S LAWYERING ROLE

The dual role of representing a client and evaluating an entire system of punishment will create tensions in a PAD’s responsibilities and obligations to the PAD’s client. This is a role that has not yet been defined, and traditional criminal defense attorneys may find themselves uncomfortable and in unfamiliar territory.


117 Levinson, supra note 114, at 801.

A. What Is the Role of a Child’s Lawyer?

Distancing oneself from a client, or over-identifying with a client, on the other hand, are challenges that a children’s lawyer faces. \(^{119}\) Ironically, according to Kim Taylor-Thompson, both serve to silence the voice of an attorney’s client. \(^{120}\) Over-identification of the client’s position replaces the child’s voice with the lawyer’s voice. \(^{121}\) The child’s voice must be heard in a process uniquely designed for children, and it is in the postadjudicatory phase of the process—the most important phase, and the phase at the heart of the purpose of juvenile courts—in which the child’s voice is the most quiet. \(^{122}\) Perhaps there is a sense that the child is guilty, is being punished, or is in a veritable “timeout.” However, this is the kind of thinking that leads to the child being ignored—dropped off into the system to languish.

In December 1995, Fordham Law School hosted a conference entitled Ethical Issues in the Legal Representation of Children. \(^{123}\) Among the many issues discussed and debated about the complexities of child representation was “whether children’s lawyers should follow their clients’ direction or substitute their own judgment for that of their clients.” \(^{124}\) The participants at the conference came to a “strong consensus that children are best served when their lawyers comport with the traditional, ethically-dictated expectations for an attorney-client relationship, and not when [their] lawyers serve as guardians ad litem or otherwise substitute their ideas of what is best for the child.” \(^{125}\) The lawyering role preferred by participants at the conference was in line with that of a client-centered,

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120 Id. at 1164.
121 See id.; see also Miriam Aromi Krinksy & Jennifer Rodriguez, Giving Voice to the Voiceless—Enhancing Youth Participation in Court Proceedings, 6 Nev. L.J. 1302, 1304 (2006).
122 See Taylor-Thompson, supra note 119, at 1157–58; see also Krinksy & Rodriguez, supra note 121, at 1303.
123 Bruce A. Green & Bernardine Dohrn, Foreward: Children and the Ethical Practice of Law, 64 Fordham L. Rev. 1281, 1283 (1996).
125 Id. at 572 (emphasis omitted) (citing Green & Dohrn, supra note 123, at 1294–95); see also Recommendations of the Conference on Ethical Issues in the Legal Representation of Children, 64 Fordham L. Rev. 1301, 1301–02 (1996) [hereinafter Recommendations of the Conference].
zealous advocate who defends clients in a trial-like setting, as opposed to a
guardian ad litem appointed to represent the child’s best interests, even
when those interests are at odds with the child’s express, stated interests.126
In juvenile court, it is difficult to be an attorney advocating for the stated
interests of individuals who may not understand what is best for them and
who do not have good problem-solving skills. Therefore, the development
of a PAD will continue to blur the lines between stated and best interests
precisely because of when the attorney is appointed. By the time the PAD
is appointed, the adjudication—or truth-seeking, trial-like—phase of the
juvenile proceeding is complete. The trial phase is a time to be client-
centered, but after the juvenile is adjudicated, the child is somewhat at the
mercy of the state. Thus, the child’s attorney cannot advocate solely for
the child’s stated interest—which is usually to go home as soon as
possible. This tension wears at the trusting bonds between client and PAD.

A guardian ad litem in the abuse-and-neglect setting has many of the
same responsibilities as a PAD: the guardian ad litem investigates the
child’s case, monitors the child’s psychosocial and legal needs, meets and
consults with the child’s family, and seeks to mediate the best possible
result for the child within system in which the child is placed.127
Therefore, it seems like a PAD would be advocating for the best interests
of the client—over the child’s express wishes. This cannot work because
the client would see the PAD as an extension of the state and not as an
advocate for the child. If there is no trust between the PAD and the client,
the child will not cooperate with representation; therefore, no useful
collaboration will result. This returns to the first complication that the
PAD will encounter—What is the PAD’s role: to represent the child’s best
interests or the child’s stated interests, even though the child has already
been adjudicated delinquent and committed to the state?

B. Stated Interest? Best Interest? System Interesting: Hybrid
Representation

The recommendations of the Fordham children’s conference were that
children’s lawyers should keep their clients’ confidences, serve them with

126 Barbara Ann Atwood, Representing Children: The Ongoing Search for Clear and
127 Barbara Ann Atwood, The Uniform Representation of Children in Abuse, Neglect,
and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism, 42
FAM. L.Q. 63, 76 (2008); Tara Lea Muhlhauser, From “Best” to “Better”: The Interests of
undivided loyalty, and follow their lawful directives.\textsuperscript{128} The traditional juvenile delinquency attorney, at least in the adjudicatory phase, already functioned with the child at the center of directing representation—at least the attorney should have.

There is an inherent conflict in the role of a PAD—the PAD’s allegiance to represent the client’s stated interest and the PAD’s role as systemic attorney advocating for what would be in the client’s best interest to assist in making the child a law-abiding citizen. Lawyers are no stranger to conflicts and tensions in representation. The Professional Rules of Responsibility are rife with conflicts: attorney-client privilege often conflicts with candor to the tribunal; lawyers who represent an entity have conflicts when individual employees from that entity have interests that run afoul of the corporation’s goals.\textsuperscript{129} Conflict is nothing new.\textsuperscript{130} The challenge will be resolving the conflict in a therapeutic way that gives the PAD role sustainability.

There is a place for hybrid representation. The one thing that each of the clients will have in common is they have already been adjudicated delinquent; therefore, each child is required to submit to the will of the state in sentencing regardless of whether the child wants to do so. The PAD would not be the attorney responsible for any appeals. That role

\begin{quote}
\textsuperscript{128} See Recommendations of the Conference, supra note 125, at 1301 (“The lawyer should assume the obligations of a lawyer, regardless of how the lawyer’s role is labelled . . . .”).
\textsuperscript{129} See generally Levinson, supra note 114 (discussing how conflicts of interest frequently arise in practice).
\textsuperscript{130} See id. at 790.
\end{quote}

Each new set of standards attempts in its own way to tell us how to deal with the conflicting duties that recur in the practice of law, such as conflicts between our duties to one client and to another client, and conflicts between our duties as zealous advocates for the client and as officers of the court. Conflicts are unavoidable because we owe duties to numerous constituencies—duties to clients, to professional peers, to directly affected third parties, and to society in general (personified by the courts when we litigate). The lawyer who is a partner or employee of a law firm, or who is employed by a corporation, governmental agency, or other entity, owes duties to the firm or entity. The dictates of our own consciences inject further complications when we attempt to accommodate our conflicting duties.

\textit{Id.}
would remain squarely with the client-centered trial attorney who tried the case, or another attorney hired for that role.

One question that was not addressed at the Fordham children’s conference was how best to represent a child client by understanding the child in context with the child's family, culture, community, class, and ethnicity. It was suggested, but not resolved, that better lawyering would occur if the child’s lawyer better understood the child and the child’s environment and collaborated with professionals in order to do this.131 These questions were taken up in 2006 at Representing Children in Families: Children’s Advocacy and Justice Ten Years After Fordham, which was held at the William S. Boyd School of Law at the University of Nevada, Las Vegas.132 Recommendations from that conference centered around seven themes: “[C]hildren’s voices must be heard; children’s individuality must be respected; children must be understood in context; children’s families are vitally important; children still need lawyers to serve as lawyers; children’s lawyers need to expand their horizons; and children’s lawyers must pursue justice for children.”133 The recommendations from both conferences underscore the importance of both a robust discussion about how lawyers represent children and how these lawyers must be multicultural and interdisciplinary to do their jobs with excellence. The recommendations help justify why a new lawyering role is necessary in the juvenile postadjudicatory arena. The recommendations from these conferences are the underpinning for a PAD hybrid representation model.

131 See Green & Appell, supra note 124, at 574.

Participants at the Fordham Conference themselves had flagged further issues requiring study, including such crucial ones as how children’s lawyers should take account of children’s race, ethnicity, culture, and class. And while alluding to the need for children’s lawyers to get to know the child client and the child’s environment, and to draw on the expertise of other professionals, their clients’ family members, and other interested persons in doing so, the Fordham Recommendations made no attempt to elaborate on these imperatives or generally on what it means to represent children adequately and all that must be learned and done to do so.

Id. (footnotes omitted) (citing Recommendations of the Conference, supra note 125, at 1302–06).

132 Id. at 571.

133 Id. at 578.
V. MORE ON THERAPEUTIC JURISPRUDENCE-INSPIRED SOLUTIONS

Therapeutic jurisprudence, as an interdisciplinary approach, provides fodder for more solutions on how and why to implement the PAD role in juvenile court. David Wexler, a cofounder of the therapeutic jurisprudence movement, noted the importance of integrating problem-solving skills development into juvenile court rehabilitation programs. Wexler relies on the work of British psychologist James McGuire in his book *What Works: Reducing Reoffending*, which describes rehabilitation programs with a high degree of success in reducing recidivism because of their “concrete behavioural or skills-oriented character.” The reason why this is particularly salient is that psychology and law do not often meet successfully in the courtroom. These professionals should work in tandem—and there is no better place to do this than in the juvenile court setting, which has therapeutic origins and professes therapeutic goals.

In fact, while codirecting the Juvenile Justice Clinic at the William S. Boyd School of Law at the University of Nevada, Las Vegas (UNLV), student interns from the UNLV School of Social Work were teamed with law clinic students working on juvenile concerns. Discussions about client interviewing and client needs were transformed from merely fact-finding investigations into holistic forays into the child’s unique needs, values, family systems, and concerns. This holistic and collaborative approach to adjudication allowed the client to trust the process and the child’s lawyers, which, in turn, gave the process more integrity, increasing the possibility that time spent in the juvenile system might lead to productive change in the client’s life. This collaboration is exactly the type of lawyering envisioned by the therapeutic jurisprudence movement. What is even more advantageous about collaboration is that studies within the psychological and social work settings involve painstaking empirical work.

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135 *Id.* at 94 (citing *WHAT WORKS: REDUCING REOFFENDING*, supra note 2, at 74).
that is backed by substantial data. Therefore, collaborations have a good chance of leading to effective solutions.

However, it is not the job of the social worker or psychologist to advocate in a criminal court setting for more productive treatment programs. Extensive research and heavily documented studies should be the most persuasive form of argument for what works best in any given setting, but it is a lawyer’s job to make sure those exhaustive studies see the light of day. It is the job of the lawyer, advocating for her client, to demonstrate how programming can be narrowly tailored to lead to better results for the client and, therefore, better results for public safety. More effective programming cuts down on costs—as well as waste—and leads to a reduction in recidivism, which in turn cuts down on costs in the community.

A. Ideas from Other Places—Mobilizing Therapeutic Jurisprudence

David Wexler has written several articles suggesting alternative programs and preventive treatments for adult offenders. His ideas can inspire programming choices for juveniles. Wexler cited studies in which extensive research has shown:

[A] central problem that is linked to . . . offending behaviour is [a] lack of, or failure to apply, a number of problem-solving skills[, such as] the ability to identify when [offenders] have a problem, to think of alternative courses of action, to plan the steps toward solution of a problem, to anticipate consequences[,] and to consider the effects of their actions upon others.

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141 See, e.g., Wexler, supra note 88, at 288; Wexler, supra note 2, at 1028.
143 Wexler, supra note 2, at 1029 (footnote omitted) (quoting What Works: Reducing Reoffending, supra note 2, at 117).
These are precisely the types of findings that a PAD would reply upon when proposing adequate treatment programs or a change in existing programs. For instance, if empirical data exist to back up a cognitive-behavior problem-solving skills program, more juvenile court judges may require problem-solving management classes instead of anger management classes. If the PAD effectively argues that this will lead to rehabilitation, it will be ordered. Once it is required, it will be built. Once built, if tested, assessed, and overseen, it will work.

In contrast, many juvenile programs in place today were created from individual instincts about what would best aid a child’s departure from a wayward path. For instance, I recall attending a class at the Las Vegas medical examiner’s office with several of my juvenile clients and law students. We took a tour of the morgue, smelling actual decomposing bodies—dead from all manners of violence, from knife wounds to gun shots and blunt force trauma, and several simply from natural causes. It seems unlikely that this process would scare a child straight—because it drives home the point that everyone dies of something eventually. I am not entirely sure what the point was, but the most puzzling experience was that the newly adjudicated juveniles were also forced to listen to a domestic violence 911 call gone awry. In the roughly two-minute call, we listened as a woman called to report that her husband was beating her again, that she was locked in a bedroom, and that she wanted help. We continued to listen as her husband crashed into the bedroom and stabbed her repeatedly with a knife until she died—all before police were able to rescue her. Her entire death was recorded on that phone call. I sat there horrified, looking around at my fourteen- and fifteen-year-old clients—all charged with minor offenses—and wondering how completely scarred they were from listening to a woman die on the phone. Again, the point was unclear. I recall the instructor stating that a situation can quickly deteriorate—a noble lesson, but was it the lesson my clients were taking from this phone call?

I thought about the number of children in the room who came from homes in which domestic abuse was common and how traumatized they must have been to listen to an approximation of their mother being killed in their safe space by their father. I wondered how many had heard fights they had no power to control and how frightened and helpless they would feel the next time their primary caregivers fought in the house. I thought about how many of these children would need to debrief that experience afterward, and how ill-equipped I was to do so. Who knows what issues

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the traumatic 911 call elicited in these adolescents—were they scared straight, or were they just plain scared?

That program was the byproduct of someone’s instincts about what eliminates recidivism. Did the program cause children not to reoffend? Or, rather, was it the fact that only the most minor first-time offenders were sent to that program? To my knowledge, there was no direct link between recidivism and the effectiveness of that program, and there was certainly no study on what effect the program really had on the children who viscerally experienced death and murder. Programs based on instinct may work. However, a PAD will find out whether a program actually works—bolstering and promoting effective programming and eliminating dangerous and ill-advised programs. PADs will sifter out all the time-wasters, money-wasters, and destructive programming choices that drain the already-meager resources of the juvenile court. Therapeutic jurisprudence principles and collaborations aid in this process.145

B. Inventing Legal Justifications: More Problems for Postadjudicatory Juvenile Defenders to Fix

The PAD will be required to engage in interdisciplinary conversations and conduct research that will help shine a light on the programming choices and success rates of the current juvenile justice systems in many different locales. The difficulties will be figuring out how to get a judge to appoint a PAD in each case, what mechanism in law could require that to occur, from which office that lawyer would be appointed, and how a PAD’s unique work and skill set should be compensated.

The adversarial system is predicated on a “three-legged stool” model where prosecutors and defense counsel work equally to advocate for their respective positions, while a neutral judge referees the process to achieve a just outcome.146 It follows that defense counsel is necessary for the adversarial system to work effectively; after all, a two-legged stool lacks

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145 An example of effective programming includes perspective-taking exercises in which juveniles are asked to consider the crime from the victim’s viewpoint by reenacting the crime in the role of the victim. David B. Wexler, Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer, 17 ST. THOMAS L. REV. 743, 755 (2005). Additionally, successful programs help offenders develop self-management systems “designed to interrupt the seemingly inexorable chain of events that lead to an offense.” Wexler, supra note 2, at 1029 (quoting WHAT WORKS: REDUCING REOFFENDING, supra note 2, at 166). For instance, Vermont has a cognitive self-change program. Id.

the balance to stand. In fact, it is inherent in the description of what makes defense counsel ineffective: “the Supreme Court has held that so long as counsel is sufficiently competent to ensure that the process was adversarial in nature, the constitutional standard of providing counsel has been met.”147 In contrast, the juvenile justice system is by definition nonadversarial, which may be one of the reasons why the right to counsel has not been extended to all phases of the process.

Then, why was the right to counsel extended to juveniles in the first place? Defense counsel in an adversarial, trial-like process operates two crucial roles. “The first is the role of quality fact-finder.”148 Investigations by both parties—prosecution and defense—should yield all of the information, supporting both guilt and innocence. Skillful cross-examination of prosecution’s fact witnesses should reveal the relative weight of their testimony. This is said to be the greatest engine of truth.149 The second role of defense counsel is to check power by guarding against injustice.150 Defense counsel is there to ensure that the client receives a fair trial, regardless of the outcome.151 Therefore, defense counsel tests the prosecutorial and investigative processes to ensure that the defendant’s rights were not violated. Defense counsel should “speak out against injustice and highlight the unfairness that can arise when the state applies a sanction to an individual, even in a system that is operating within the rules that it has set for itself.”152

Fundamental fairness is a component of due process required by the Fourteenth Amendment.153 It is considered fundamentally unfair for a defendant requesting counsel to process through the criminal justice system without effective counsel when the defendant’s liberty is at risk.154 What are the reasons for requiring a right to counsel in juvenile court? In the adjudicatory stage, one could argue that the purpose for requiring

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148 Id. at 414.
152 Myers, supra note 147, at 414.
153 Gideon, 372 U.S. at 344.
154 Id.
counsel is the same as in adult criminal court. What would be the justification for extending this right to the disposition phase and through the conclusion of the matter? Fundamental fairness? Due process? What does that mean in the postadjudicatory arena?

Remembering that rehabilitation is the stated focus of the juvenile justice system, the purpose of a PAD would be (1) quality fact-finding and (2) ensuring justice. The fact-finding requires investigation into the child's unique issues, family life, physical and emotional history, and circumstances of the offense. Investigation also includes researching which available psychological and educational treatment programs would best benefit the child and which would definitely not. Without counsel, the only person required to make these investigations is the state-operated probation department. Two competing sides should be investigating these programs. If two competing sides advocate for programs and services—from two different perspectives—a better truth will inevitably evolve.

Second, a PAD must “speak out against injustice and highlight the unfairness that can arise when the state applies a sanction to an individual.” This is doubly important in the juvenile justice system, in which a child, by the child’s very nature and age, cannot effectively evaluate the governmental processes or make a determination about their fairness. Everything feels unfair to the child when the child is in the system. Therefore, the lawyer must keep a watchful eye and shine a bright light on where the children go after they are adjudicated delinquent and by which probationary requirements they must abide. This ensures justice. Without the appointment of a PAD to ensure fundamental fairness, how can it be ensured that someone is keeping a watchful eye over the entire process of effective rehabilitation?

Thus, for the exact same reasons that defense counsel is a requirement for adults in the criminal justice system—and for children in the adjudicatory phase of juvenile court—a PAD should be appointed in the postadjudicatory phase to ensure fundamental fairness in the process of rehabilitation.

157 Myers, supra note 147, at 414.
158 See Slobogin & Fondacaro, supra note 81, at 14.
VI. Conclusion

Inquiries at the Ninth Annual Wells Conference on Adoption Law raised more questions and yielded more brainstorming on how effectively to implement the PAD in an actual juvenile court setting. More remains to be researched and implemented. An educational system requires oversight and testing to determine the success of its programs—requiring learning outcomes and assessments to determine whether program objectives are met, and met efficiently. \(^{159}\) Juvenile treatment programs are educational programs. \(^{160}\) They are a means to an end. The means must be tested to determine if the means lead to the desired end or—even worse—produce something else altogether unexpected and undesired. \(^{161}\)

It may be difficult to convince a court to extend positive rights to individuals, such as the right to counsel, in the postadjudicatory phase. During a trial, defense attorneys engage “situational ethics.” \(^{162}\) At times, the attorney’s job is to cross-examine witnesses in an effort to test the credibility of their testimony, without regard to whether they are telling the truth. \(^{163}\) This apparent or perceived obfuscation of the truth leads to suspicion of defense counsel in mainstream culture, especially among many that do not understand defense counsel’s dual role to test the evidence and reveal unfairness in the system. \(^{164}\) Public perception of defense counsel’s role in the court is often confounded with counsel’s personal ethics—meaning that mainstream culture often equates criminal defense attorneys with perceived unethical clients. \(^{165}\) Studies reveal that how the right to defense counsel is framed determines whether the right


\(^{160}\) See, e.g., Juvenile Treatment Programs, Division Youth Services, http://www.in.gov/idoc/dys/2374.htm (last visited Apr. 9, 2014).


\(^{162}\) Myers, supra note 147, at 434; see also Carla Messikomer, Ambivalence, Contradiction, and Ambiguity: The Everyday Ethics of Defense Litigators, 67 Fordham L. Rev. 739, 746–47 (1998).


will be viewed favorably. 166 For instance, “[s]upport for defense counsel rises when people are told that counsel are for the purpose of ensuring that everyone has access to justice and ensuring that the innocent do not go to jail.” 167

A similar argument must be crafted to promote the requirement of the postadjudicatory public defender. The PAD role promotes public good and increases public safety, while saving taxpayer money. The extension of the right to counsel in postadjudicatory juvenile proceedings is not in a phase in which truth would be obfuscated, nor would evidence be tested. In fact, the PAD’s purpose would be to make a state-funded program more efficient, and potentially more successful. A strong advocate with a trusting lawyer-client relationship can propose more effective treatment programs. More effective programs lead to less recidivism, which means less crime, more law-abiding citizens who believe in the system, and, therefore, safer and more productive communities. Voters should welcome a role that plays watchdog to the institutions their taxes fund. Meanwhile, and more importantly, the juvenile justice system will potentially have a renewed integrity. The juvenile justice system can be restored to its origin as a place in which children can leave the follies of their youth, experience rehabilitation, and not be branded as wayward individuals with no hope of changing. If the juvenile justice system does not lead to effective rehabilitation for the majority of its participants, what is the point of having a separate system of justice?

166 Myers, supra note 147, at 434. “In the United States, aggressively adversarial defense counsel is viewed by the ordinary citizen in many cases not as an aid to just outcomes, but rather as an impediment.” Id. at 430.

167 Id. at 434 (citing Michael W. Smith, Making the Innocent Guilty: Plea Bargaining and the False Plea Conviction of the Innocent, 46 CRIM. L. BULL. 965, 972–73 (2010)) (“[A]fter giving such information to voters, they were more likely to support higher levels of funding.” Id. at 434 n.156).