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In Re Gault and the Promise of Systemic Reform

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IN RE GAULT AND THE PROMISE OF SYSTEMIC REFORM

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Systemic reform begins when an observer perceives a gap between the ideals upon which a system was founded and that system's actual mode of operation. Such was the situation when the United States Supreme Court observed the Arizona juvenile justice system's treatment of Gerald Gault, a fifteen-year-old who was committed to the State Industrial School for up to six years as punishment for making a lewd telephone call to a neighbor lady.[1] The state's extreme and needless intervention in Gerald Gault's life was anathema to the Supreme Court.[2] But, it signaled more than the mere inattention of an individual judge in the case of a single boy. For the Court, Gault's treatment revealed a gap between the juvenile court's founding ideals of "careful, compassionate, individualized treatment"[3] and its operation, which was characterized by inadequate fact-finding[4] and systemic inattention to the individualized needs of children.[5] As the Court famously noted, "Under our Constitution, the condition of being a boy does not justify a kangaroo court."[6]

Gault represents an effort at systemic reform—a purposeful alteration of the structure, procedure, or resources of a law-administering system that aims to better align the system's operation with the principles or ideals on which it is based.[7] Because the Court diagnosed the systemic problem as excessive

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1. *In re* Gault, 387 U.S. 1, 4, 7 (1967).
2. *Id.* at 28–29.
3. *Id.* at 18.
4. *Id.* at 5, 25, 32 & n.21.
5. *See id.* at 51 (noting mounting evidence that the system's practice of encouraging juveniles to confess without informing them of their right to remain silent did not contribute to individualized treatment).
6. *Id.* at 8.
7. *Cf.* RAYMOND T. NIMMER, THE NATURE OF SYSTEM CHANGE: REFORM IMPACT IN THE CRIMINAL COURTS 4 (1978) (defining reform as "any planned change in the structure, rules, or resources of the judicial process" and describing reform as "a stimulus intended to produce in various individuals, groups, or organizations a particular behavioral change that is regarded as desirable").

informality in juvenile court proceedings, it introduced a host of procedural due process rights as a remedy.[8] Importantly, the Court maintained that procedural formality was not intended to transform the juvenile justice system into something new, but to return it to its founding ideals.[9] It critically examined the "claimed benefits" of the informal processes in juvenile court and concluded that recent studies showed "with surprising unanimity" that "the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned."[10]

Like most top-down law reform efforts, *Gault*'s attempt at systemic reform was problematic because it was not self-executing. For a reform effort to be effective, the individuals responsible for implementing changed policy at lower levels—in this case, prosecutors, probation officers, and juvenile court judges and masters—must buy into the reform enough to change their behavior.[11] Moreover, the realization of *Gault*'s promised systemic reform depends largely on action by the legal profession. While the right to counsel was just one of the Court's constitutionally-mandated procedural reforms, its overall reform scheme placed faith in the provision of counsel to assure the implementation of the other constitutional rights it imposed.

The Court articulated the benefits of counsel for juveniles in terms of individual representation.[12] Counsel, the Court wrote, is required in juvenile cases "to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of proceedings, and to ascertain whether [the client] has a defense and to prepare and submit it."[13] However, juvenile defenders are increasingly called upon to expand their role to include broader forms of advocacy aimed at reforming juvenile justice system practice and procedure.[14] This expansion of the juvenile defender's role occurs within the context of

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8. *In re Gault*, 387 U.S. at 31–57. These include the right to notice of charges, the right to counsel, the right to confront and cross-examine prosecution witnesses, and the right to invoke the privilege against self-incrimination. *Id.*

9. *See id.* at 27–28.

10. *Id.* at 21, 26. Moreover, the Court viewed the introduction of procedural formality as a direct response to the misguided result in Gault's case. *See id.* at 21. In the Court's view, the procedural rules fashioned from the due process standard "are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present" and "enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data." *Id.*

11. *See* Heidi M. Hsai & Marty Beyer, *System Change Through State Challenge Activities: Approaches and Products*, JUV. JUST. BULL. (U.S. Dep't of Justice/Office of Juvenile Justice and Delinquency Programs, Wash., D.C.), Mar. 2003, at 3, *available at* http://www.ncjrs. gov/pdffiles1/ojjdp/177625.pdf.

12. *In re Gault*, 387 U.S. at 36.

13. *Id.*

14. *See, e.g.*, ELIZABETH CALVIN, NAT'L JUVENILE DEFENDER CTR., LEGAL STRATEGIES TO REDUCE THE UNNECESSARY DETENTION OF CHILDREN 49–54 (2004), *available at* http://www.njdc.info/pdf/detention_guide.pdf.

juvenile justice reform programs and initiatives, which offer grant money and technical assistance to local jurisdictions for the purpose of addressing systemic problems.[15]

When a local juvenile court engages in a systemic reform program, juvenile defenders have the opportunity to expand their advocacy beyond the representation of juveniles in individual proceedings. Although the predominant systemic reform model of collaboration among juvenile justice stakeholders is seemingly counter to adversarial defense advocacy in individual representation, I argue that the stakeholder model is actually more strategic than it is made to appear. Hence, it provides opportunities for defense advocacy at the systemic level. However, to ensure that the promise of *Gault* is fulfilled through such advocacy, juvenile defenders must become conversant in the process of systemic reform and properly define their role within these initiatives.

In Part I of this essay, I argue that participation in a stakeholder collaboration reform is not necessarily antithetical to a defense role; rather, systemic reform advocacy is consistent with the juvenile defender's role as delineated in *Gault*. Part II suggests three basic "building blocks" of systemic reform advocacy that will facilitate juvenile defenders' reform efforts: (1) the ability to act as a spokesperson for the client's perspective, (2) the cultivation of an acute awareness of the underlying interests and incentives that shape the status quo, and (3) the capacity to frame proposed changes in ways that allow system participants to legitimate change. I argue that these "building blocks" are continuous with the juvenile defender's advocacy in individual cases, and that engaging as a stakeholder in systemic reform efforts can enhance individual advocacy. Finally, Part III shares strategies for use in clinical teaching to help students draw connections between advocacy in individual cases and advocacy for broader systemic reform.

I. SYSTEMIC REFORM ADVOCACY IN THE STAKEHOLDER COLLABORATION MODEL

The prevailing model according to which many current systemic reform initiatives proceed is what I will call the "stakeholder collaboration model."[16]

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15. *See generally, e.g.*, DAVID STEINHART, THE ANNIE E. CASEY FOUND., PLANNING FOR JUVENILE DETENTION REFORMS: A STRUCTURED APPROACH (1999), *available at* http://www.aecf.org/upload/publicationfiles/planning%20for%20detention%20reforms.pdf (describing the Annie E. Casey Foundation's Juvenile Detention Alternative Initiative); Hsai & Beyer, *supra* note 11 (describing the initiatives of the Office of Juvenile Justice and Delinquency Prevention).

16. *See generally, e.g.*, STEINHART, *supra* note 15; Hsai & Beyer, *supra* note 11 (discussing the use of this model in juvenile justice system reform). The basic components of this model are gaining prevalence in settings beyond juvenile justice reform. *See generally, e.g.*, Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004) (describing a trend in the administration of consent

The stakeholder collaboration model promotes inter-agency collaboration and data-driven, research-based reforms to juvenile justice system practice and procedure.[17]

Taken at face value, the stakeholder collaboration model appears to be a value-neutral, consensus-based process that may threaten or undermine a juvenile defender's commitment to adversarial client advocacy in individual cases. Upon closer examination, however, the stakeholder collaboration model is most often employed strategically, not to gain consensus among stakeholders, but to influence system officials and line workers in favor of reforms with pre-determined values and goals that are typically consistent with those of juvenile defenders. As such, participation in a stakeholder collaboration allows juvenile defenders to utilize many of the same tools they use for advocacy in individual cases to shape policies and procedures on the systemic level.

This Part explores the process and methods of the collaborative stakeholder model by examining the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative (JDAI). The JDAI is a multijurisdictional reform network that began in 1992 by issuing planning grants to five sites that were interested in experimenting with systemic changes to reduce their juvenile detention populations.[18] As of October 2007, the JDAI has grown to encompass eighty-seven sites in twenty-one states and the District of Columbia.[19] In addition to being one of the most extensive juvenile justice systemic reform networks, it is also one of the best documented.[20] The Annie E. Casey Foundation has published a series entitled *Pathways to Juvenile Detention Reform*, which consists of fourteen separately authored reports that describe and analyze its approach to systemic reform, drawing lessons from the challenges and successes of the JDAI's participants.[21]

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decrees in many areas of public law litigation that relies on stakeholder deliberation and experimental implementation of reform strategies whose success is measured in outcomes). I have previously examined the process of criminal justice reform in response to wrongful convictions, which also relies on inter-agency collaboration and scientifically-tested best practices. *See generally* Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WIS. L. REV. 645 (2006).

17. *See, e.g.*, STEINHART, *supra* note 15, at 13–14; Hsai & Beyer, *supra* note 11, at 3–4.

18. Bart Lubow, *Series Preface* to STEINHART, *supra* note 15, at 4, 8 [hereinafter Lubow, *Series Preface*]. The same preface appears at the beginning of each of the fourteen reports in the Annie E. Casey Foundation's *Pathways to Juvenile Detention Reform* series.

19. *Announcing New JDAI Sites*, JDAI NEWS (Annie E. Casey Found./Juvenile Det. Alternatives Initiative, Balt., Md.), Oct. 2007, at 5, *available at* http://69.18.145.86/upload/PublicationFiles/JDAI%20News%20October%202007.pdf.

20. Bart Lubow, *Preface Update* to RICHARD A. MENDEL, THE ANNIE E. CASEY FOUND., BEYOND DETENTION: SYSTEM TRANSFORMATION THROUGH JUVENILE DETENTION REFORM 15 (2007), *available at* http://www.aecf.org/upload/PublicationFiles/JDAI_Pathways14.pdf [hereinafter Lubow, *Preface Update*].

21. This entire series can be found on the Annie E. Casey Foundation's website. *See* The Annie E. Casey Foundation, Pathways to Juvenile Detention Reform, http://www.aecf.org/KnowledgeCenter/PublicationsSeries/JDAIPathways.aspx (last visited Jan. 17, 2008).

A. The Stakeholder Collaboration Model

The starting assumption of stakeholder collaboration, as articulated in the *Pathways to Juvenile Detention Reform* series, is that the term "juvenile justice system" is something of a misnomer.[22] To call it a system suggests that it is a "complex whole" consisting of interacting, interdependent constituent parts.[23] More often, the juvenile justice system is characterized by a variety of agencies—police, prosecution, detention, probation, judges, and the defense bar—each of which are separately administered and act independently, with little understanding of the policies, procedures, or assumptions under which the other agencies proceed.[24] The stakeholder collaboration model is designed to facilitate understanding and coordination among the agencies that will deal with a juvenile defendant as a case unfolds.[25] The key components to reform are inter-agency collaboration, the rigorous collection and analysis of data from one's own jurisdiction, and the experimental implementation of innovative practices that have been successful in other jurisdictions.[26]

The keystone of the JDAI reform model is the process of collaboration, described as "the coming together of disparate juvenile justice system stakeholders and other potential partners (like schools, community groups, the mental health system) to confer, share information, develop system-wide policies, and to promote accountability."[27] Juvenile justice system agencies often have disparate cultures, as well as differing perspectives and attitudes about the treatment of juveniles.[28] The JDAI stakeholder collaboration model seeks to foster initial consensus among stakeholders that the "limited purposes of secure detention" are "to ensure that alleged delinquents appear in court at the proper times and to protect the community by minimizing serious delinquent acts while their cases are being processed."[29] It encourages stakeholders to agree on a specific plan for reform based on "an accurate description of the current system;" a description of the principles and values of the proposed reformed system; and "an action plan [with] carefully delineated .

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22. KATHLEEN FEELY, THE ANNIE E. CASEY FOUND., COLLABORATION AND LEADERSHIP IN JUVENILE DETENTION REFORM 10 (1999), *available at* http://www.aecf.org/upload/PublicationFiles/collaboration%20and%20leadership.pdf.

23. *Id.*

24. *Id.*

25. *See* STEINHART, *supra* note 15, at 15–19; Hsia & Beyer, *supra* note 11, at 2–3, 6.

26. *See* STEINHART, *supra* note 15, at 13–14. The first two components of collaboration and data collection run throughout the JDAI series and are described in detail in separate reports. *See generally* DEBORAH BUSCH, THE ANNIE E. CASEY FOUND., BY THE NUMBERS: THE ROLE OF DATA AND INFORMATION IN DETENTION REFORM (1997) (discussing the use of data); FEELY, *supra* note 22 (discussing collaboration). The third is implicit in the Pathways series itself, which seeks to share the "innovations and lessons" of the initial program sites. Lubow, *Series Preface*, *supra* note 18, at 9.

27. Lubow, *Series Preface*, *supra* note 18, at 7.

28. FEELY, *supra* note 22, at 15.

29. *Id.* at 7.

. . time frames, budgets," and allocations of responsibility.[30] In order for the plan to be successful, the stakeholders involved must include policymakers from each of the primary agencies: "the judiciary, prosecution, defense, probation, detention, and related service providers."[31]

The second key to reform under the JDAI stakeholder collaboration model is data-driven decisionmaking. Each agency's approach toward the treatment of juveniles may be based on assumptions or rationalizations about juveniles, their families, or changing crime or arrest patterns that are founded in anecdote or impression rather than fact.[32] JDAI promotes a juvenile justice system's rigorous collection and analysis of information about its actual operation.[33] The collection of information includes quantitative data about arrests, as well as demographic information about who is detained, the types of charges upon which they are detained, daily bed counts, and the number of days spent in detention for various types of children and cases.[34] Data analysis then becomes integral to identifying the issues that should be addressed by targeted reforms.[35] For example, in Cook County, Illinois, data analysis showed that children accused only of violating the conditions of their probation were being held for an average stay of 28 days in detention; thus, reform efforts focused on the handling of these violations.[36] Furthermore, before a reform is initiated, data can be used to project the anticipated effects of a changed policy or procedure.[37] After a reform is initiated, data can be used to test the impact of policy or procedural changes.[38] JDAI jurisdictions break down all data by race and sex to help identify the disproportionate effects of juvenile detention policy on ethnic minorities and girls.[39]

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30. *Id.* at 31.

31. *Id.* at 22.

32. BUSCH, *supra* note 26, at 10–11; FEELY, *supra* note 22, at 17 ("In the past, anecdote and 'fingertip knowledge' have guided change in juvenile justice systems").

33. *See* STEINHART, supra note 15, at 20–28.

34. *Id.* The collection additionally contains a "systems analysis" of flow charts to map out the way juveniles move through various agencies in the system, *id.* at 28–32, a "conditions analysis" of the legal regulations that govern decision-making at different stages, *id.* at 32–35, and a "cost analysis" of secure detention beds and community-based alternatives, *id.* at 35–36.

35. *Id.* at 41–42; *see also* BUSCH, *supra* note 26, at 14 (discussing the effects of "the power of data.")

36. STEINHART, *supra* note 15, at 42.

37. *See id.* at 54–56 (describing JDAI sites' use of a methodology developed by the National Council on Crime and Delinquency for projecting the use of detention bed space under one or more reform scenarios).

38. *See* FRANK ORLANDO, THE ANNIE E. CASEY FOUND., CONTROLLING THE FRONT GATES: EFFECTIVE ADMISSIONS POLICIES AND PRACTICES 36–38 (1999), *available at* http://www.aecf.org/upload/PublicationFiles/controlling%20front%20gates.pdf (describing the use of data to validate risk assessment instruments used in making initial detention decisions).

39. *See generally* ELEANOR HINTON HOYTT ET AL., THE ANNIE E. CASEY FOUND., REDUCING RACIAL DISPARITIES IN JUVENILE DETENTION (2001), *available at* http://www.aecf.org/upload/PublicationFiles/reducing%20racial%20disparities.pdf (discussing

Finally, JDAI provides technical assistance by fostering communication among the jurisdictions that have undergone JDAI reform. The desire to share strategies for success was the initial impetus for JDAI, which began as an effort to replicate detention reforms funded by the Annie E. Casey Foundation in Broward County, Florida.[40] In 1993, JDAI launched five sites with three-year planning grants.[41] By 1998, three of these sites—Cook County, Illinois; Multnomah County, Oregon; and Sacramento County, California—had engaged in "fundamental, system-wide changes" and "absorbed the JDAI innovations into their regular juvenile justice budgets and procedures."[42] These three sites became JDAI model sites and were willing to be "nagged, measured, scrutinized and endlessly visited" by sites seeking to replicate their successful detention reform innovations.[43] As it has grown in size and scope, JDAI has spawned an elaborate network of information-sharing. This network hosts national all-site conferences, produces JDAI newsletters with articles detailing projects at various JDAI sites, and maintains a web-based Help Desk on which jurisdictions can post their policies, procedures, or other innovations as examples for other sites undertaking reform.[44]

More than a means to reform, proponents of the JDAI model view stakeholder collaboration itself as a reform. The JDAI model assumes that the habits of inter-agency collaboration and data-driven decisionmaking will take hold in juvenile justice systems and continue to thrive even after grant funding has ceased. Small victories will build confidence in the process of collaborative, data-driven decisionmaking; this confidence will generate collaborative efforts that go beyond detention reform to transform juvenile justice systems more broadly.[45]

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the problem of racial disparities in juvenile detention and the efforts to reduce such disparities); FRANCINE T. SHERMAN, ANNIE E. CASEY FOUND., DETENTION REFORM AND GIRLS: CHALLENGES AND SOLUTIONS (2005), *available at* http://www.aecf.org/upload/PublicationFiles/jdai_pathways_girls.pdf (examining the upward trend in the juvenile detention system's female population and the social problems related to this trend).

40. ROCHELLE STANFIELD, THE ANNIE E. CASEY FOUND., THE JDAI STORY: BUILDING A BETTER JUVENILE DETENTION SYSTEM 8 (1999), *available at* http://www.aecf.org/upload/PublicationFiles/jdai%20story.pdf.

41. *Id.*

42. *Id.*

43. Douglas W. Nelson, President of The Annie E. Casey Found., Remarks at the Juvenile Detention Alternatives Initiative Inter-Site Conference (April 10, 2003), *in* JDAI NEWSL. (The Annie E. Casey Found./Juvenile Det. Alternatives Initiative, Balt., Md.), Nov. 2003, at 10, 11, *available at* http://www.aecf.org/upload/PublicationFiles/november2003.pdf. Bernalillo County, New Mexico was added as a fourth model site in 2005. Bart Lubow, *From the Foundation*, JDAI NEWS (The Annie E. Casey Found./Juvenile Det. Alternatives Initiative, Balt., Md.), Winter 2005, at 2, *available at* http://www.aecf.org/upload/PublicationFiles/march2005.pdf.

44. Lubow, *Preface Update*, *supra* note 20, at 10–11.

45. *See generally* MENDEL, *supra* note 20 (discussing the JDAI's widespread work to effect systemic changes).

B. The Role of the Juvenile Defender in Stakeholder Collaboration

The stakeholder collaboration model is attractive in principle. It resonates with theories of good governance and deliberative democracy. It suggests that well-intentioned public officials can come together, agree on the goals of the system, use empirical methods to identify problems with the system's operation, and implement comprehensive changes to policy and procedure based on that data.

However, reform under the stakeholder collaboration model is not as simple as it sounds. Stakeholder collaboration in initiatives like the JDAI seek advocacy to reform a local juvenile justice system according to pre-determined values, rather than to reach a true consensus among stakeholders about the values upon which the system ought to be based. Despite the stated focus on collaboration, efforts such as the JDAI's are not value neutral. For example, although the JDAI recognizes that various jurisdictions may articulate the goals of their juvenile detention systems differently, the JDAI literature does not suggest that stakeholders deliberate about the underlying values served by juvenile detention reform.[46] Nor does the JDAI literature entertain the possibility that stakeholders might reach consensus on goals that run counter to JDAI values—for example, that detention can be legitimately used to "teach children a lesson" or that a jurisdiction should hold children in secure detention for their own protection.[47] Rather, the discussions of stakeholder consensus focus on ways to advocate and persuade system officials and line workers with different ideologies to buy into the JDAI values.[48] These values include limiting the use of detention to children who need to be in secure custody to protect the public and promoting community-based alternatives for children who do not fit that description.[49]

Juvenile defenders are awkwardly situated for participation in the stakeholder collaboration model. As the JDAI literature demonstrates, reform efforts can easily be stymied by resistance from agency officials or employee unions, or hindered by mutual distrust among agencies.[50] When it comes to specific reform proposals, juvenile defenders can quickly find themselves

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46. *See, e.g.*, STEINHART, *supra* note 15, at 37–38. On the one hand, "values and attitudes" will differ from one local jurisdiction to another. *Id.* at 37. However, on the other hand, the "goal-setting process should include discussion and self-education by planners on the legal and constitutional purposes of secure juvenile detention" and "the use of secure detention for purposes beyond protection of the public or prevention of flight is highly suspicious." *Id.*

47. *See* ORLANDO, *supra* note 38, at 10–12. In fact, such goals are considered illegitimate from the JDAI perspective. *Id.*

48. *See generally* ROBERT G. SCHWARTZ, THE ANNIE E. CASEY FOUND., PROMOTING AND SUSTAINING DETENTION REFORMS (2001), *available at* http://www.aecf.org/upload/PublicationFiles/promoting%20sustaining%20reforms.pdf (discussing JDAI sites' promotion of reforms).

49. Lubow, *Series Preface*, *supra* note 18, at 7.

50. STEINHART, *supra* note 15, at 59–62 (discussing barriers to reform).

resistant to collaboration, because defense sensibilities about matters such as procedural formality and expedient case processing are likely to differ from the perspectives of rival agencies.[51] Additionally, collaboration with prosecutors and probation departments over new programs and procedures may threaten juvenile defenders' more traditionally adversarial role in individual cases. For example, defenders' agreement to target particular diversion programs or services toward a special population of youth may restrain their ability to advocate for those services in exceptional cases falling outside that group.[52]

However, the values that the JDAI assumes as its starting point—centering on the idea that juvenile detention should be used sparingly, in cases where detention is necessary to protect the public while juvenile cases proceed—coincide with the values and perspectives of juvenile defenders. The JDAI's suggested reforms have also met resistance since their inception from political forces intent on being tough on juvenile crime.[53] Through participation in stakeholder collaboration, juvenile defenders can support systemic changes designed to facilitate the kind of treatment they often advocate in individual cases: carefully tailored interventions in the lives of children and families that favor community placement over institutional custody. If successful, JDAI reforms are likely to create a system more hospitable to the clients that juvenile defenders represent.

To navigate the waters of systemic reform while retaining their role as advocates, juvenile defenders need to view participation in collaborative stakeholder ventures as a form of advocacy on the systemic level. Furthermore, to become sophisticated advocates on the systemic level, juvenile defenders must develop a vocabulary for discussing strategic engagement in stakeholder collaboration reform efforts, just as they have developed ways of discussing what it means to be effective advocates for individual clients. While the project of fully developing the advocacy role and strategies for effective advocacy within collaborative reform efforts is beyond the scope of this essay, the following Part describes three building blocks of systemic reform advocacy for juvenile defenders.

II. BUILDING BLOCKS OF SYSTEMIC REFORM ADVOCACY

This Part describes three principles of advocacy that juvenile defenders can employ in systemic reform efforts under a stakeholder collaboration model. These principles are: (1) understanding the system from the perspective of the client, (2) analyzing the status quo as an accommodation of competing interests, and (3) listening for the narratives of system officials that legitimate their

51. *See infra* Part II.A. (discussing case processing reforms).

52. FEELY, *supra* note 22, at 38.

53. *See* STANFIELD, *supra* note 40, at 6–8 ("The JDAI effort to reduce the numbers of confined youth went against a popular tide of mounting arrests and skyrocketing detentions."); Lubow, *Series Preface*, *supra* note 18, at 8 (noting the shift toward stricter juvenile justice policies that occurred after a string of high-profile cases in the 1990s).

behavior and place blame for systemic problems elsewhere. Rather than being incongruent with individual advocacy, these building blocks are extensions of the same advocacy tools that defenders already employ in their representation of individual clients.

A. Developing a View of the System From the Client's Perspective

One of the defining features of juvenile defender advocacy at the systemic level is an extension of the traditional role of juvenile defenders to provide a voice for their clients. In their traditional role as individual client advocates, juvenile defenders act as spokespersons for children, whose voices would otherwise go unheard.[54] If the juvenile justice system is indeed an uncoordinated "non-system" of separately governed and administered agencies, the one place where these agencies converge is the clients into whose lives the juvenile justice system intervenes. Clients bear the burdens of the lack of coordination between agencies—burdens that may negatively affect their education, their family and community relationships, and their receipt of services.

Participation in the stakeholder collaboration process gives juvenile defenders the opportunity to observe and articulate the burdens that the system places on their clients. As the JDAI literature notes, more than other stakeholders, juvenile defenders are concerned with whether a proposed reform will be best for the children, rather than with the savings in time or dollars that specified reforms may achieve.[55] As JDAI proponents acknowledge, when juvenile defenders are marginalized in stakeholder collaboration, debates over changes to juvenile systems and policies can lose the perspectives of the children accused.[56]

One of the most important areas in which juvenile defenders need to be heard is in discussions about case processing reforms. JDAI reform focuses on ways to "streamline the processing of cases" and "recommend changes in case processing that can accelerate the movement of cases and reduce stays in detention."[57] Although admirable, the goal of efficient case processing can run counter to the values promoted by adversary adjudication.[58] If juvenile

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54. *See generally* Annette R. Appell, *Children's Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 NEV. L.J. 692 (2006) (analyzing the various ways in which legal advocates give voice to children).

55. D. ALAN HENRY, THE ANNIE E. CASEY FOUND., REDUCING UNNECESSARY DELAY: INNOVATIONS IN CASE PROCESSING 37 (1999), *available at* http://www.aecf.org/upload/PublicationFiles/reducing%20unnecessary%20delay.pdf. JDAI sites' experience suggests that the defense perspective is critical to success in case processing reform. *Id.* ("Although other system participants may focus on time and dollar savings, the defense is ambivalent about the first and has little interest in the second.").

56. FEELY, *supra* note 22, at 37.

57. STEINHART, *supra* note 15, at 13–14.

58. *See* HENRY, *supra* note 55, at 14 (noting the "pitfall of speeding up case processing as

defenders are to carry out the role specified for them in *Gault*—"to make skilled inquiry into the facts . . . [and] to ascertain whether [the client] has a defense and to prepare and submit it"[59]—then they need time to investigate. They also need time to develop relationships with their clients that allow the clients to make informed decisions about whether to take a case to trial or accept a plea.[60] As the stakeholders aim to reach consensus on ways to expedite case processing for children in detention, the procedural formality required by *Gault* may be perceived as an impediment, rather than an aid, to the JDAI's goals. Defenders can help to bring the voice of children back into these discussions, explaining the difficulties of attempting to effectively counsel an adolescent client at a juvenile detention hall who "just wants to go home" about the benefits and detriments of accepting a plea offer.

Yet, to effectively play the role of client spokesperson in systemic reform efforts, juvenile defenders must understand their clients' lives more broadly than required by traditional representation.[61] The burdens of heavy caseloads often limit juvenile defenders' ability to understand their clients within the broader context of their neighborhoods, schools and families. Moreover, if representation ends with disposition, juvenile defenders do not get a chance to evaluate how or whether the system is delivering on its promise of effective, well-tailored, individualized treatment, rather than punishment. Participation in collaborative reform efforts may draw juvenile defenders' attention to the impact of the system on their clients in ways that individual advocacy does not reveal; in turn, this more contextual conception of individual clients may enhance juvenile defenders' ability to voice clients' perspectives on a broader range of systemic issues.

B. Analyzing the Status Quo as an Accommodation of Competing Interests

As advocates for individual clients, juvenile defenders are often in the position of insisting on procedural regularity—holding system officials to statutory and constitutional requirements in the face of their competing desires to protect the public and act in the perceived best interests of children. To effectively insist on procedural regularity in individual cases, juvenile defenders must understand what the rules require and what the decisionmaker will be inclined to do in a particular case, and must strategically decide when to demand and when to cajole.

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an end in itself" without attention to improving the justice of proceedings).

59. *In re* Gault, 387 U.S. 1, 36 (1966).

60. *See generally* Abbe Smith, *Defending and Despairing: The Agony of Juvenile Defense*, 6 NEV. L.J. 1127 (2006) (describing the complex relationship between a particular juvenile defender and her client).

61. *See generally Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After* Fordham, 6 NEV. L.J. 592 (2006) (recommending and describing broader, more holistic views of juvenile defense representation).

Despite the veneer of consensus that cloaks stakeholder collaboration reform, similar strategic processes govern juvenile defender advocacy at the systemic level. Writing nearly thirty years ago, Raymond Nimmer analyzed the process of systemic change and noted that reformers too often approach reform with the naïve assumption that system participants desire change.[62] The efforts of such reformers, he observed, are often "characterized by a failure to distinguish between the substance and the tactics of reform."[63] Reformers focus on removing obstacles to the ideal operation of a system, overlooking the fact that the status quo reflects an accommodation of competing interests and incentives that may have little to do with the ideals on which the system is based.[64] Unless the reformer can understand and address the underlying interests that shape the status quo, Nimmer argued, the reform effort is likely to flounder in the face of systemic resistance to change.[65]

In the JDAI process, the importance of addressing underlying interests and incentives is reflected in the creation of objective "risk assessment instruments" (RAIs), which are used in making initial detention decisions. A core strategy of the JDAI is to replace subjective discretionary decisionmaking concerning juvenile detention with objective criteria.[66] Systems applying RAIs make initial detention decisions by assigning points to various objective criteria, including the seriousness of the offense for which a child is arrested, the child's prior history of arrest or adjudication, and any history of failure to appear in court.[67] Children with a low point score are presumptively released, children with a mid-range score are considered for detention alternatives, and only children with a high score are presumptively detained pending further proceedings.[68]

To effectuate change, an RAI must be respected by system officials and implemented by line workers. Yet, if Nimmer is correct, the behavior of these parties is often influenced by underlying interests and incentives that may run counter to the limited goals of detention. For example, police agencies and actors in the child welfare, mental health, or school systems may use detention facilities as a dumping ground of last resort for children who are either too difficult to manage or who have nowhere else to go.[69] Detention officials or

62. NIMMER, *supra* note 7, at 1–2.

63. *Id.* at 2.

64. *See id.* at 176–77. Professor Nimmer argues that the "basic fallacy" of reform planning is that it assumes the incentive for change exists and focuses only on removing barriers to the desired behavior, rather than viewing the status quo as an accommodation of competing interests in which each system participant derives a benefit. *Id.*

65. *Id.* at 177.

66. The Annie E. Casey Foundation, Juvenile Detention Alternatives Initiative: Core Strategies, http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative/CoreStrategies.aspx (last visited Jan. 17, 2008) (listing the core strategies).

67. ORLANDO, *supra* note 38, at 24–27.

68. *Id.* at 27.

69. *Id.* at 11; *see also id.* at 20–22 (discussing the dilemma of police using detention as a holding place for children with no other place to go).

line staff who accept children under such circumstances may prescribe detention to "teach [children] a lesson,"[70] to provide access to services, or protect children from themselves—goals that contradict the values of limited detention endorsed by the JDAI. Furthermore, long-standing relationships between detention staff members and law enforcement or field probation agents may be disrupted when detention staff members are asked to turn children away because the children fail to meet objective criteria.[71]

Moreover, juvenile court personnel may have their own interests and incentives to keep children detained when the limited purposes of detention do not apply. For example, judges, as publicly accountable officials, may seek to avoid releasing individuals who will make the headlines; thus, their detention and release decisions may reflect risk-averseness, rather than adherence to objective detention criteria.[72] Although ostensibly adversarial, prosecutors and defense attorneys may subtly collude in a system in which offenders are routinely overcharged and then charges are reduced through plea bargaining, because such a system portrays the prosecutor as tough on crime while allowing defense attorneys to claim that they have secured a benefit for their clients through negotiation.

As evidenced by the JDAI's experience with RAIs, in order to effectuate meaningful changes, reforms must appeal not only to logic and good public policy, but also to the existing incentives and interests of system participants. Logic and good public policy dictate that the objective criteria institutionalized in the RAI should closely track the limited purposes of detention endorsed by the JDAI: "(1) to ensure the alleged delinquents appear in court and (2) to minimize the risk of serious reoffending while current charges are being adjudicated."[73] In New York, an independent professional nonprofit agency was consulted to prepare an RAI that scored arrested youths based on objective factors that were known to bear a statistically significant relationship to the risk of re-offense or failure to appear in court.[74] However, the research-based criteria were so far removed from established practice that the criteria were simply ignored by the line staff, who implemented the RAI, and judges, who decided whether to release detained children pending further proceedings.[75]

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70. *Id.* at 11.

71. *See id.* at 18 (discussing difficulties in implementing statutory criteria in Florida that unsettled common practice by limiting detention). In one incident, "a very frustrated sheriff's deputy tried to arrest an intake supervisor for obstruction of justice after the supervisor refused to allow the deputy to leave a particular youth (charged only with a traffic offense) at the detention center." *Id.*

72. *See id.* at 23–24 (noting the political vulnerability of detention criteria in light of elections and highly publicized cases); STANFIELD, *supra* note 40, at 18 (quoting a judge regarding his awareness of the potential for public reaction to his decision-making).

73. ORLANDO, *supra* note 38, at 10.

74. *Id.* at 29.

75. SCHWARTZ, *supra* note 48, at 20–21 (contrasting the resistance of line staff to the New York instrument with the acceptance of an RAI in Multnomah County, Oregon, where members

Moreover, the RAI is not meant to be inflexible; to this end, the RAIs of many jurisdictions allow line staff within the detention center to override the presumptive determination based on the listed criteria.[76] If an RAI's objective criteria do not reflect the detention officials' subjective understanding about which children ought to be detained, the use of such overrides is likely to become prevalent.[77] This was the experience in Multnomah County, Oregon, where the RAI was carefully structured to prevent the detention of certain targeted populations based on data about who was being incarcerated; in that case, "the initial reliance on data perhaps helped obscure some lack of consensus" among system officials about who should be detained.[78]

Most JDAI jurisdictions opt for the much less rigorous "normative" method of developing their RAIs, which involves looking to the RAIs used in other jurisdictions and adjusting them to local conditions through the work of a committee comprised of representative stakeholders.[79] Rather than changing common practice, this normative method may simply codify the attitudes and preconceived notions of probation agents, judges, and prosecutors about which children may pose a risk to the public or themselves pending court proceedings. Moreover, if the RAI is designed to include as many perspectives as possible, it may produce more risk-averse detention decisions than occurred prior to the RAI. For example, after Cook County, Illinois, developed an RAI according to the normative method, its rate of detention increased markedly.[80] The RAI was revised by projecting the effects of various criteria changes on re-arrests and failures to appear in court; Cook County then conducted a three-month test of the revised criteria in a sample group of cases while the original RAI remained in effect.[81] Though it met with some political resistance, the process of testing the original RAI against the new one helped move Cook County's RAI toward the JDAI's limited goals of detention.[82]

As the JDAI experience developing and implementing RAIs demonstrates, the goal of producing an RAI is in some ways less important than a commitment to the process of continual revision and testing.[83] Furthermore, this continual revision is not just a matter of fine-tuning. Rather, it is a process of education, persuasion, and accommodation that aims to identify and address the systemic obstacles to realization of the identified objectives.

The role of juvenile defenders in this process of evaluation and revision is consistent with their role in individual case representation: to ensure that the

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of the line staff involved in creating the detention criteria).

76. ORLANDO, *supra* note 38, at 27.

77. *See id.* at 14, 27 (noting the need to monitor use of overrides in an RAI system).

78. BUSCH, *supra* note 26, at 15.

79. ORLANDO, *supra* note 38, at 29.

80. *Id.* at 31.

81. *Id.* at 37.

82. *See generally id.* (describing the sometimes unwelcome process of field testing draft RAIs).

83. *Id.* at 32.

system follows legal mandates, even when those mandates are unpopular. As the JDAI literature notes, there is no natural constituency to advocate for changing or limiting the purposes of pre-adjudication detention.[84] Although an effective RAI must reflect the attitudes and assumptions of system workers and officials, there must also be stakeholders who are willing to challenge the comfort levels of these workers and officials (who often have interests in maintaining the status quo)[85] and insist on compliance with the limited purposes of detention. In individual cases, particularly those involving suppression motions, defenders regularly challenge the comfort levels of criminal justice agents and officials in order to enforce the system's compliance with constitutional requirements. The role of the stakeholder who questions the RAI's compliance with the limited legal purposes of pre-adjudication detention is the systemic reform analogue to the juvenile defender's advocacy role.

Juvenile defenders' engagement and familiarity with the process of RAI development can also enhance their advocacy for release of clients in individual cases. When detention decisions are made on the basis of objective factors that must be scored in each case, the ostensible justification for detaining a particular client is apparent. Yet, this process also opens detention decisions to challenge where the analysis was based on erroneous information or assumptions. For example, a probable cause affidavit stating that a crime was committed by the accused may be unassailable as a basis for arrest. However, a client might receive a high point score because the facts alleged in the affidavit were stretched in an attempt to overcharge the conduct—for example, where the affidavit states that a robbery occurred, but the factual allegations more properly indicate the occurrence of a petty larceny. In that case, a juvenile defender can argue that the client should be released because, if not for the overcharging, the client would not have been detained under the RAI in the first place.[86]

C. Interpreting the Narratives of Legitimation and Blame

People usually like to believe that they are engaged in meaningful work, especially when that work affects the lives of children. As a result, most juvenile justice system participants believe that their behavior reflects the values of the system—that they are helping children and protecting the public. To the extent that participants acknowledge problems in the system, they tend to attribute those problems to other agencies. Thus, a "circle of blame" is

84. *Id.* at 40.

85. *See supra* notes 69–72 and accompanying text.

86. In some JDAI jurisdictions, an "expediter" may be charged with monitoring compliance in individual cases and changing the RAI score when new facts come to light or when charges are reduced. ORLANDO, *supra* note 38, at 34–35. If no expediter position exists, however, it falls naturally to the juvenile defender to monitor and raise compliance issues on a case-by-case basis.

created, in which each agency acknowledges the same systemic problems but acquits itself and indicts others for causing the problems.[87]

Collaboration and data-driven decisionmaking can help system participants tackle the circle of blame; however, these tactics alone may not provide sufficient motivation to break out of it. To break out of the circle of blame, system officials must realize that there exists a manageable solution that they can take a heroic role in implementing. Once such a solution is in hand, it becomes acceptable to define the problem differently. Rather than having to bear the blame for a seemingly insoluble problem, publicly accountable system officials can position themselves as the solution to the problem.[88]

To work effectively within a systemic reform effort, reformers must understand these dynamics of system change and develop advocacy tools and strategies based on narratives that deflect blame and embrace changed policies and behavior. The deployment of such narratives that depict decisionmakers such as juries as heroes is often the essence of effective defense advocacy.[89] When the stakeholder collaboration model is understood to be an elaborate arena of persuasion and advocacy, the tools of persuasion can be usefully integrated into systemic reform advocacy.

III. TEACHING WITH AN EYE TOWARD SYSTEMIC REFORM

As I continue to educate myself about systems and systemic reform, I have begun to incorporate some of this information into my Juvenile Justice Clinic teaching. This section describes two such efforts.

A. Embedding Students Within the System

Experiential learning is often divided between a live-client clinic model, in which students take a low caseload and work on individual cases, and an externship model, in which students are placed within an existing legal structure such as a governmental office or a court and are guided in their work

87. *See generally* Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors That Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 FORDHAM L. REV. 773 (1998) (analyzing this phenomenon with respect to civil discovery abuse).

88. I owe this insight to Michael Smith, who utilized this theory in his work as Director of the Vera Institute of Justice. *See generally* VERA INSTITUTE OF JUSTICE, TWENTY-FIVE YEAR REPORT FROM THE VERA INSTITUTE OF JUSTICE, 1961–1986 (1986) (describing Smith's work).

89. *See, e.g.*, Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55, 64–67, 97 (1992) (describing a defense attorney's use of "classic heroic verbs with the jury as the subject" in his closing argument); Philip N. Meyer, *Making the Narrative Move: Observations Based Upon Reading Gerry Spence's Closing Argument in* The Estate of Karen Silkwood v. Kerr-McGee, Inc., 9 CLINICAL L. REV. 229, 242 (2002) (expressing agreement with Amsterdam and Hertz's interpretation of the same argument).

in that setting. About three years ago, the Juvenile Justice Clinic at the William S. Boyd School of Law, University of Nevada, began to blend these models by incorporating a Juvenile Public Defender shadowing component into our live-client clinic. The JPD shadowing was necessitated in part by our clinic structure; it was a new clinic, from a new law school, in a jurisdiction with a strong local culture of unwritten rules.[90] Shadowing the juvenile public defenders introduced the clinic students to practice in the juvenile court environment in ways that individual case representation could not and gave them ready access to a knowledge bank of unwritten rules that the clinic did not possess.

When the clinic first incorporated Juvenile Public Defender shadowing, I was skeptical because I feared that students would learn to simply replicate the less-than-optimal practices they observed. However, I found the opposite to be true in practice. Students were able to learn valuable lessons from their Juvenile Public Defender mentors, who also aspire to higher standards of practice than the norm in our juvenile court, while maintaining a critical perspective on what they observed in the system itself.[91] Students are required to write reflective memos about what they see in their shadowing, and we discuss these memos in weekly supervision meetings and in seminar classes. As my own awareness of the dynamics of systems as a whole has grown, I have been able to draw attention to the interests and incentives of system participants into these discussions.

B. Case Debriefing and Analysis

It is always difficult to comprehensively evaluate students' work on a case that was ultimately unsuccessful. Because students feel the weight of personal responsibility for their clients, my initial tendency is to emphasize their strengths and reassure them that they did the best that they could. After the initial discussion, however, I conduct a more focused supervision session to ascertain what the student wishes he or she had done differently.[92]

Last semester, when a student lost a contested hearing, I tried something different, which incorporated both individual feedback and systemic analysis. In the seminar class following the contested hearing, we made a chart on the

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90. *See generally* Katherine R. Kruse, *Standing in Babylon, Looking Toward Zion*, 6 NEV. L.J. 1315 (2006) (providing an in-depth description the clinic's introduction to the legal culture of Clark County, Nevada).

91. The Clark County juvenile defender office recently underwent a massive change in response to a 2003 audit by the National Legal Aid and Defender Association and a threatened lawsuit. *Id.* at 1324–31. Nonetheless, despite their commitment to professionalism, the juvenile public defenders confront a strong local culture of informality that stems from years of low trial rates and almost nonexistent motion practice throughout the adult and juvenile systems. *Id.*

92. *See generally* Beryl Blaustone, *Teaching Law Students to Self-Critique and to Develop Critical Clinical Self-Awareness in Performance*, 13 CLINICAL L. REV. 143 (2006) (describing an extremely effective model for delivering feedback).

whiteboard with the following five headings: (1) "What went right?" (2) "What went wrong?" (3) "Why?" (4) "What could we have done differently in individual advocacy?" (5) "What requires systemic reform?" The clinic students in the class—many of whom had either attended the contested hearing or been intimately involved in helping to moot and prepare it—brainstormed about the information that fit into each column, effectively covering all of the individual feedback I wanted the student to receive. By basing the discussion of individual representation within the context of systemic change, the analysis reinforced that one must keep in mind the limits of what is possible to achieve through individual advocacy when attempting to learn from one's mistakes. The discussion also helped students to spot the systemic reform issues that need attention in our jurisdiction.

I am still just beginning to understand the dynamics of systems and the process of systemic reform. But the more I have seen of it, the more convinced I have become that a rich understanding of system dynamics is a necessary component both for juvenile defender advocacy and for clinical education, as we consider how to move forward in fulfilling the promise of *Gault*.