

## 2010 INSIGHTS

In the remaining weeks of this year, the Daily Journal will be featuring columns written by select contributors touching upon this year's legal developments, lessons learned and what's to come.

# Shifting Values in Juvenile Justice?

By Sue Burrell

It wasn't a bad year for juvenile justice in California. In fact, it has been a remarkably good decade considering the disasters faced by other public systems. Recent developments reflect an incipient national shift toward child-centered values. We are (at last) seeing a withering away of the get tough, lock 'em up philosophy that for two decades has fueled construction of prison-like facilities; initiatives to try more kids as adults; and a move away from the rehabilitative fundamentals of juvenile justice. The punitive intentions behind such efforts grew out of a 1980s spike in crime, but juvenile crime has dramatically decreased and is no longer a front burner issue.

The current paradigm shift has been informed by modern medical science and developmental psychology. Juvenile system professionals have become more knowledgeable about immature brains, impulsive behavior, and adolescent risk-taking.



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This knowledge has been applied to juvenile adjudicative competence — resulting in changed practice with respect to competence to stand trial, determinations of capacity for rehabilitation, and even evidentiary issues such as voluntariness of confessions.

This work has impacted Supreme Court thinking about the treatment of juveniles. Beginning with *Roper v. Simmons* (2007), the High Court struck down the death penalty for juveniles. The Court reasoned that juveniles are less mature and more susceptible to negative influences than adults, and that because their character is not yet fully formed, it can be changed. It also held that the deterrence and retribution justifications for capital punishment simply do not apply in juvenile cases. These themes were extended in this year's *Graham v. Florida* opinion, in which the Court held that a life without the possibility of parole sentence may not be imposed on juveniles who commit non-homicide offenses.

During the past decade, there has also been an increased focus nationally on the need to spend public money wisely. The Annie E. Casey's Juvenile Detention Alternatives Initiative has taught juvenile justice professionals how to use data to assess current practice and then change policy to bring practice into alignment with system values and effective practice. Such efforts have highlighted the fact that incarcerating young people is the most expensive and least effective intervention for addressing juvenile delinquency. They have also revealed that seemingly intractable problems such as the gross overrepresentation of youth of color in many juvenile systems, are not really intractable once you more closely examine what happens at distinct decision points in the system.

A growing community of juvenile public defenders and advocates has helped to frame these changes at the national level. Under the tutelage of the National Juvenile Defender Center, advocates from every state have developed a voice and a presence that enables them to weigh in on juvenile justice policy in an unprecedented way. Their work has been augmented over the past several years through the MacArthur Foundation's Juvenile Indigent Defense Action Network (JIDAN), aimed at increasing the capacity of juvenile defense counsel to provide quality representation to young people in the system.

These national trends have been mirrored in California. Beginning

in the 1980s our state experienced years of rampant facility construction; budgets that slashed community programs; legislation increasing penalties; and initiatives aimed at sending kids to the adult system. But shortly after 2000, our own paradigm began to shift.

By then, the most draconian juvenile initiative had been passed (Proposition 21, effective January 2000), and the wind had left the sails of the "get tough" rhetoric. Juvenile crime had been steadily decreasing for a period of years. The California Youth Authority (now called the Division of Juvenile Facilities), designed to house the state's most serious juvenile offenders, was out of control with crowding and violence. The *Farrell v. Cate* litigation had been filed, challenging every aspect of institutional operation as inadequate. Media stories revealed institutions in which kids were caged, beaten, and pepper sprayed, as well as suicides by youth locked in their cells for weeks at a time. The horrors of that system had an impact on local juvenile systems and state policy makers.

Local juvenile court judges and probation departments became more reluctant to send "their" kids to state level facilities. The Judicial Council promulgated a court rule clarifying the duty of counsel to represent their clients in the post-dispositional (post-sentencing) period. Using the record in the *Farrell* litigation, juvenile attorneys were more aggressive in their advocacy to keep clients out or to bring them back early. Commitments to state facilities dropped significantly.

Shortly after 2000, a discernible shift was also occurring in Sacramento. Legislators were increasingly unwilling to spend huge sums of money on such a horrible system. By then it cost some \$100,000 per year to keep a youth in state facilities (cost per ward later exceeded \$200,000 a year). Legislation was passed that gave courts the power to impose shorter term commitments and took power away from the Youthful Offender Parole Board, which had long been responsible for extending commitment time for less than well-founded reasons (SB459, effective 2003).

The biggest shift occurred in 2007, when the Legislature approved budget bill language "reallocating" substantial funding away from the state level facilities and directing it to county probation departments. Through SB81 (effective 2007), the counties could no longer send lower level offenders to the state system. To assist them in serving this population locally, substantial funding was re-directed based on a formula incorporating past commitments. The state also provided construction money to assist counties in developing new kinds of facilities and programs to serve this population. As a consequence of the shifts in funding and policy, California has gone from a high of more than 10,000 youth in state facilities in 1996, to slightly more than 1,300 as this article is being written. Youth are now to be served closer to their families and communities, for the most part in smaller facilities or in non-custodial settings.

Getting back to 2010, a number of developments continue California's trend toward a more county-based and child-centered approach to juvenile justice. First, the budget process took the additional step of "reallocating" parole from state level facilities to the counties. This followed several years of landmark litigation in *L.H. v. Schwarzenegger* recognizing and addressing the due process rights of juvenile parolees. From now on, when youths are released from state facilities, the county will

assume responsibility for supervising them, and the legislation provides money to assist them in doing this. Also, the state announced plans to close another Division of Juvenile Facilities Institution, bringing us down to four institutions statewide, down from 11 in the year 2000.

Also, in the 2010 session, California took the important step of extending foster care benefits to kids "aging out" of the foster care system (AB12). This means that instead of expecting foster children to magically turn into adults at the age of 18, California will extend housing, health care, and educational support up to age 21. Because the legislation applies to youth in the juvenile justice system that have been placed in foster care, it provides additional support in helping delinquent youth to successfully transition to adulthood.

In 2010, California also had notable achievements with respect to recognizing the developmental differences between juveniles and adults. The Legislature came within two votes of passing AB399, which would have allowed some youth serving life without the possibility of parole for crimes committed when they were juveniles, to have a resentencing hearing after serving a substantial period of time. Also, the 2nd District Court of Appeal held in *People v. Mendez*, that an 84-year sentence for crimes committed when the youth was 16 years-old was tantamount to life without the possibility of parole and constituted Cruel and Unusual Punishment. Finally, this year, California enacted legislation addressing juvenile incompetence to stand trial (AB2212, effective January 2011). The legislation specifically recognizes that developmental immaturity may impact a child's capacity to understand the nature of the proceedings or to assist counsel in defense of the case. This, too, demonstrates an evolving recognition that juveniles must not be treated as though they are adults.

In California, as in the national arena, much of the recent work has been fueled by the enhanced juvenile defense capacity. Through the MacArthur Foundation's JIDAN initiative, the Pacific Juvenile Defender Center has tripled in size to a membership of more than 400 defense counsel and advocates. Members of the group have been actively engaged in each of the policy-shifting endeavors in juvenile justice. The Center is also working to improve practice in individual delinquency cases, especially reaching out to juvenile defenders and advocates in areas of the state where counsel practice with little access to institutional support.

It is too soon to say that the evolution away from a harsh and overly punitive juvenile system is complete. The much-needed realignment of responsibility to local authorities will be a hollow victory if the promised funding does not follow. There is also the danger of unintended consequences. If the reduction in state juvenile facilities results in substantially more youth being handled in the adult criminal justice system (with its sole purpose of punishment), that is cause for concern.

We also need to pay attention to what is happening at the county level. With a long under-funded state oversight system, and no agency responsible for promoting enlightened juvenile justice policy, the "good" counties may do great things, while the "not so good" produce the kinds of ineffective or punitive systems we had hoped to replace. Many of the abuses that have occurred over time in terms of wrongful conviction, over-incarceration, and problems during confinement could have been prevented or mitigated through better oversight and advocacy. To protect the new paradigm, counties must provide adequate resources to assure competent legal representation in individual cases, and the state must develop better oversight for the system as a whole.

