

TESTIMONY OF MEAGAN SWAY

**LD 320 – Ought To Pass**

**An Act To Provide the Right to Counsel for Juveniles and  
Improve Due Process for Juveniles**

Joint Standing Committee on Judiciary

February 24, 2021

Senator Carney, Representative Harnett and distinguished members of the Joint Standing Committee on Judiciary, greetings. My name is Meagan Sway, and I am Policy Director of the American Civil Liberties Union of Maine, a statewide organization committed to advancing and preserving civil liberties guaranteed by the Maine and U.S. Constitutions. On behalf of our members, I urge you to support LD 320, legislation that would codify protections for youth caught in the juvenile legal system.

The harms of juvenile incarceration have been well-documented. They include “damaged social networks, decreased educational opportunities, severe functional limitations, and worsened health and mental health outcomes.”<sup>1</sup> These effects compound over time. Studies have shown that, while “any length of incarceration [is] associated with higher odds of having worse adult health... cumulative duration of incarceration (one to twelve months) as a juvenile predicted worse health and mental health outcomes as an adult.”<sup>2</sup>

The ACLU of Maine supports all of the provisions of LD 320. However, today I wish to focus on the constitutional dimensions of changing Maine law so that we no longer charge children 11 years old and younger with crimes but do provide access to counsel for young people throughout their time in the system.

**This Committee Should Set a Minimum Age for Juvenile Court  
Jurisdiction**

The United States Supreme Court has recognized that “children are constitutionally different from adults... Because juveniles have diminished culpability and greater

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<sup>1</sup> Thalia Gonzalez, Youth Incarceration, Health, and Length of Stay, *Fordham Urban L. Journal*, Vol. 45, No. 1 Article 2, at pp. 45-46, available at <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2719&context=ulj>.

<sup>2</sup> *Id.* at p. 66.

prospects for reform... ‘they are less deserving of the most severe punishments.’”<sup>3</sup> That court has also noted that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds—for example, in parts of the brain involved in behavior control. [It] reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child’s moral culpability and enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed.”<sup>4</sup>

Layered onto this issue is how race, and our perceptions of race, affect children. The Children’s Center on Law and Policy found that 23 percent of kids who were detained at Long Creek in a year were Black or African American.<sup>5</sup> This is likely, in part, because of how society views Black and white children differently. Studies show that Black boys as young as 10 years old are perceived as “responsible for their actions at an age when white boys still benefit from the assumption that children are essentially innocent.”<sup>6</sup>

The constitutional requirement that youth are necessarily different from adults empowers this committee to make categorical rules establishing which young children are so young, so underdeveloped, that criminal charges and imprisonment are inappropriate responses when they do harm.

### **This Committee Should Provide Counsel to Children Throughout Their Time in the Criminal Legal System**

Both the federal constitution and Article I Section 6-A of the Maine Constitution guarantee people accused of crimes the right to an attorney. “The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not ‘still be done.’”<sup>7</sup> This right extends to young people in the juvenile court system.<sup>8</sup> If anything, the right to counsel is even more important for

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<sup>3</sup> *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (quoting *Graham v. Florida*, 560 U.S. 48 at 68 (2010)).

<sup>4</sup> *Id.* at 472 (quotations omitted).

<sup>5</sup> Children’s Center on Law and Policy, et al., *Maine Juvenile Justice System Assessment*, February 2020, at p. 33, available at <https://irp-cdn.multiscreensite.com/de726780/files/uploaded/Maine%20Juvenile%20Justice%20System%20Assessment%20FINAL%20REPORT%202-25-20.pdf>.

<sup>6</sup> See American Psychological Association, *Black Boys Viewed as Older, Less Innocent Than Whites, Study Shows*, Mar. 6, 2014, available at <https://www.apa.org/news/press/releases/2014/03/black-boys-older>.

<sup>7</sup> *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938)).

<sup>8</sup> See *In re Gault*, 387 U.S. 1, 13 (1967).

children than adults, because children generally cannot advocate for their own legal rights or make decisions about what is in their best interest without guidance.<sup>9</sup>

However, under current Maine law, young people lose their right to counsel as soon as they are adjudicated of a juvenile crime. They are then sent to Long Creek without an attorney to look out for their interests. Not only that, but the law gives the state the right to ask the court to extend the amount of time a young person is committed to Long Creek, without giving the young person a right to an attorney to defend them from the government's request.<sup>10</sup>

A court hearing in which a young person's imprisonment could be extended, but at which they are not afforded counsel, is not a fair fight. It violates the long-established constitutional principle that where a child's physical liberty is threatened by the government, they have the right to an attorney.<sup>11</sup> It also offends concepts of fundamental fairness and implicates young peoples' due process rights, which are still significant even in juvenile court,<sup>12</sup> and in essence leaves a young person's fate almost entirely to the Department of Corrections. This committee has the power to put guardrails on that authority. "Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."<sup>13</sup>

This committee has the power to reaffirm young peoples' constitutional rights, and provide protections needed as they navigate a complicated juvenile legal system. The stakes for those who are ensnared in the system are exceedingly high. In order

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<sup>9</sup> See, e.g., *J.D.B. v. N. Carolina*, 564 U.S. 261, 272 (2011), *In re Gault*, 387 U.S. at 37; see also Megan F. Chaney, *Keeping the Promise of Gault: Requiring Post-Adjudicatory Juvenile Defenders*, 19 *Geo. J. on Poverty L. & Pol'y* 351, 387 (2012) ("Without an advocate specifically appointed to represent the child's continuing interest in due process, one cannot be entirely sure if 1) the child is being rehabilitated, 2) the time he is spending in juvenile custody is achieving rehabilitation, 3) that the specific programs designed to make him a law-abiding citizen are in fact working, and 4) that the time he is spending under state control and custody is meaningful and rationally related to his transformation to a law-abiding citizen.")

<sup>10</sup> 15 M.R.S.A. §3317.

<sup>11</sup> The rights to which young people are entitled in juvenile court include notice of the charges against them, counsel, confrontation and cross-examination, privilege against self-incrimination, a transcript of the proceedings, and appellate review. See, generally, *In re Gault*, 387 U.S. 1.

<sup>12</sup> See *State v. Gleason*, 404 A.2d 573, 584 (Me. 1979) ("This provision of the Code [directing that in all respects other than the right to a jury juvenile proceedings shall be the same as adult criminal proceedings] represents their effort to abide by the due process requirements of the Maine Constitution and the Federal Constitution, even as they adhered to those traditional goals [of rehabilitation and protection]").

<sup>13</sup> *In re Gault* at 18.

to secure better lives for them now and in the future, we urge you to vote *ought to pass* on LD 320.