Welcome to Our American States, a podcast of meaningful conversations that tell the story of America’s state legislatures, the people in them, the politics that compel them, and the important work of democracy. For the National Conference of State Legislatures, I’m your host, Gene Rose.

Our topic today on this edition of Our American States is juvenile justice. There’s a great deal of legal, legislative and research being done on the topic today that affects a critical population in our society. We’re going to discuss several aspects of juvenile justice with two distinguished people who are on the front lines.

We will be joined later by Kentucky State Senator Whitney Westerfield to learn about some innovative steps his state is taking in this arena, and our first guest is Marsha Leavitt, a Deputy Director and Chief Consul for the Juvenile Law Center in Philadelphia. She is a graduate of the University of Pennsylvania and Temple University Law School. Thank you for joining us today, Marsha.

Marsha: Thank you.

Gene: So, you’ve been at the forefront of several important cases in this country including ones before the United States Supreme Court regarding, among other issues, death penalties and life-without-parole cases. There was a spectacular case in Pennsylvania and, forgive me if I’m over-characterizing this, where judges were sentencing juveniles without representation and receiving kickbacks from for-profit juvenile facilities.
So as someone who has spent a considerable time preparing for court cases and representing young people, what do you believe is the biggest legal threat to juveniles today?

Marsha: Well, I think that, you know, in thinking about the United States Supreme Court cases that you mentioned – those cases, of course, really are a byproduct and the outcomes in those cases were very much driven by the research: the developmental research as well as the more recent, but now very widely accepted neuroscience about the very specific ways in which kids are different from adults; in particular, juvenile offenders are different from adult offenders with respect to culpability issues, competency.

By the court striking the most extreme sentences for youth in the criminal justice system, their rulings have really reverberated, I think, throughout not just the justice system, but throughout the juvenile justice system as well. And I think it is forcing almost a kind of rethink about how we want to manage juvenile offending, both within the juvenile and the criminal justice systems. And it’s an incredibly exciting time I think for the advocacy community and, of course, for the kids who will be a part of that system.

Gene: And can you give us an estimate or kind of a ballpark of how many youths are affected in this system today?

Marsha: We have about 60,000 youth who are incarcerated in the juvenile justice system. That is actually down about 50 percent from probably about five or six years ago. And, of course, incarceration is dropping across the country. The numbers of kids who are arrested every year, that number used to be around two-and-a-half million; I’m sure that number has dropped dramatically. I know here in Philadelphia, the number of delinquency petitions that have been filed this year versus five years ago, again, is actually down about almost 60 percent, 60-70 percent.

So the involvement with the system is dropping considerably. That is driven in part by reductions in arrests in crime. Crime has remained static, certainly for the last year or two and, of course, for many years moving forward from 1994, crime is consistently dropping. So when crime is low, that is being reflected in both the numbers of arrests and numbers of formal processing of kids in the justice system, and the numbers of kids that are incarcerated.

I think the other driver of the kinds of reductions that we’re seeing across the system is a greater interest in diversion. I think that there is now a recognition that we need to effectively right-size the juvenile justice system, to figure out who really needs the kinds of out-of-home interventions that were much too frequently used from the 90s forward, looking for ways in which we can cut the school-to-prison pipeline to the extent that kids are misbehaving in school. Can that behavior be managed in school, or can it be managed in the community rather than placing these kids or pulling these kids into the juvenile justice system?

So these three kind of phenomena right now that I think are allowing us to see shrinkage in the juvenile justice system are: the research that is really underscoring how kids are different and how they need to be treated in developmental ways; just simply the drop in
crime which allows us the space, the breathing room, to think more creatively and innovatively about how we manage juvenile offending; and this increasing interest in diversion and keeping kids in their communities.

Gene: So can you explain to me as a lay person the kind of evaluation that is taking place in order to make sure that juveniles are getting the type of services and evaluation that they need?

Marsha: That’s a really great question, whether you’re a lay person or someone in the system. This is something that we’re always worrying about. And I think stakeholders in the system and, by that I mean judges, certainly criminal defense lawyers, public defenders, prosecutors, probation officers, all have a stake in ensuring that the system functions effectively.

I think that public defenders or lawyers who are representing kids in these proceedings have a particular responsibility to hold the system accountable, to make sure that when their clients are driven into the system, taken into the system, taken out of their homes, that they are getting the kinds of services that they are entitled to, to justify that loss of liberty.

Courts obviously have an important role, and appellate courts have an important role in holding systems accountable, and legislators have an important role in holding systems accountable. When they break down, if the system is not serving children effectively, it’s not inappropriate for the legislative process to take a look at the system they’ve created and see where changes can be made.

So I think it’s an across-the-board obligation that all of us have working in this system to figure out how, given the hat that we are each wearing, what is our role and holding the system accountable.

Gene: So I know you do spend considerable time talking to legislators across the country. What’s your message to them and what are you hearing from them as they address juvenile justice issues and reform?

Marsha: The legislative responses and the legislative interest in criminal justice and juvenile justice reform are varied across the country. It is not moving forward at one pace or with one voice. There has been a significant amount of push for legislative reform of the justice system. There has been a very effective bipartisan coalition from both conservatives on the right, Right on Crime specifically, with Democratic and more progressive legislators who have attempted to come together to minimize costs of our justice system and enhance the effectiveness of the responses of the justice system.

There had been very effective leadership at the national level where we had bipartisan legislation introduced in Congress, legislation sponsored, for example, by both Senator Cory Booker and Senator Rand Paul. That legislation is still out there; it is still up for consideration in Congress; it’s very hard to predict obviously in the current circumstances where that legislation will go. But where there are areas of agreement generally are certainly in reducing the contours of the system, reducing the expense, reducing the footprint, reducing the population that comes into both the juvenile and the criminal justice system.
I think specifically with respect to juveniles, there is certainly in some states interest in thinking about how we prosecute youth as adults: Can we shrink that population? Can we roll back either some of the prosecutorial discretion where prosecutors alone were able to make that decision, or direct file where youth of a certain age who were charged with certain particular serious felonies would automatically be tried as adults without the opportunity for any judicial review or judicial discretion in making that decision? There has been some movement in the last five or ten years to pull back from some of those more expansive pieces of legislation, pushing kids into the adult system.

I think those conversations are continuing. I think that, again, as crime remains low, as the research continues to take hold and kind of seep into the halls of legislatures about the distinctive developmental characteristics of kids, that these conversations will continue.

Gene: I’m sure something that legislators have to deal with and something that you hear from time to time is there are certain people out there who believe that they should be protected from juveniles that commit serious crimes and have little sympathy for their situation. How do you respond to people who have that perception?

Marsha: I think that we know a lot more today than we knew even 15/20/25 years ago about what works, and increasingly research is telling us that incarceration is not the most effective means for reducing criminal offending, or even preventing criminal offending. We know that kids generally are not persuaded by deterrents because of their impetuosity and impulsiveness, but we also know from research that has been done by the MacArthur Foundation and research that is ongoing, that most kids, the vast majority of kids, will desist naturally from criminal offending by their mid-20s.

So if we know that, then I think certainly legislators need to be thinking about: What purposes are they trying to achieve, and what objectives are they trying to fulfill when they pass criminal legislation or legislation involving juvenile offenders? There is certainly some degree of retribution; we understand that children need to be held accountable for the conduct that they engage in and for the criminal offending that they do.

But ultimately the concern is public safety and if we know that we can be smarter in achieving public safety by less incarceration, more effective programming and different kinds of supports – mentoring and other kinds of treatment opportunities – then that’s where we need to be investing our money.

Gene: We started out talking about your involvement with Supreme Court cases. What is the biggest one that guides your philosophy and what you’re trying to approach and do for juveniles today?

Marsha: Well, I think the Supreme Court has, really over the decades, it has intervened at times to, I would almost say bring the system back from the edge. You know, 50 years ago the Supreme Court decided in Gault, the juvenile Gideon vs. Wainwright, the case in which the United States Supreme Court held that children in delinquency proceedings have a constitutional right to counsel.
That case was an effort to save the juvenile court from its own excesses, its own secrecy, and to impose enough due process into the juvenile court to ensure that it would be fair in the way that it addressed juvenile offending behavior.

I think, fast-forward to what’s happened in the last 12 years beginning in 2005, it’s really now not just one case, but it’s a combination; it’s this collection of five cases that the U.S. Supreme Court has decided between 2005 and 2016, four of them sentencing cases, and one of them, again, J.D.B. vs. North Carolina, which was an interrogation case – have all really reframed how we think about juvenile offenders and required legislatures unequivocally to revisit statutes and practices that have been in place for, in many instances, many decades, and try to conform the laws that are shaping the juvenile justice system in the country today to what the Supreme Court has now mandated in terms of how we treat children.

Gene: Let me get you out of here on this question, Martha: If you had the ability to change one thing about juvenile justice today, what would it be?

Marsha: I think I would change our rush to try children as adults. What happens when we push kids into the adult criminal justice system is that they are also subject to the sanctions in that system. We are a very harsh country when it comes to punishing individuals who violate the law. We obviously have the largest prison population in the world. We’re a country with 5% percent of the world’s population and we have 25 percent of the incarcerated population. So we’ve thrust kids into that same system.

I think that given what research is now teaching us about what it is that works to both achieve a reduction in offending by youth, to reduce drastically recidivism rates, which is really keeping kids in their communities, shorter periods of incarceration, providing the kinds of treatment, educational and other kinds of programming opportunities, that I think we can address most juvenile offending, even the most serious juvenile offending, by keeping kids in the juvenile justice system, possibly allowing for a very, very, very small opening when kids hit 21 if they have not demonstrated that the rehabilitation we are seeking has occurred, to consider at that point whether any extended period of confinement is necessary.

But I think it’s time to retreat from this notion that kids are just small adults and to, once again, treat kids as kids.

Gene: We’re delighted to have on the line with us Kentucky State Senator Whitney Westerfield. Thank you for joining us today, Senator.

Senator: Glad to be here Gene. Thanks for having me.

Gene: You have a lot of responsibilities with the state legislature in Kentucky. A couple of items I want to point out to our audience is that you’re the Chairman of the Senate Judiciary Committee and Co-chair of the Juvenile Justice Oversight Counsel. You’ve won awards on preventing child abuse and other legal recognitions. You’ve served more than five years as an Assistant Commonwealth attorney. Tell us what sparked your interest in juvenile justice.
Senator: As a prosecutor, I had dealt with children that were treated as youthful offenders, which in Kentucky means a child that’s tried as an adult. I had also had time in my private practice where I dealt with dependency neglect and abuse cases in our family court system here in Kentucky where children that were in homes where they weren’t being taking care of as well as they should have ended up having problem behaviors in a number of cases and ending up in the justice system in some way.

And then when I got the job in the Senate, I learned that in the year just preceding my election to the Senate, there had been a taskforce put together to study it and it sort of fizzled. I took the reins in 2013 and recreated that taskforce, had help from Pew Charitable Trusts which came in midsummer that year, and we really hit the ground running and had a very ambitious goal and came up with a solid bill.

Gene: And that I’m guessing was Senate Bill 200 that you got passed in 2014?

Senator: That’s right. Yes sir.

Gene: I noticed that the conservative group, Right on Crime, has held this up as a model bill for the country. Why don’t you walk us through some of the key parts of that legislation and how it’s working now?

Senator: The main thrust of the bill was to prevent kids from getting into court and being placed in out-of-home placements. In Kentucky we were spending over half of our Department of Juvenile Justice funding; it’s a $102 million budget; over half that was being spent on detention. Six-million dollars with our Child Protective Services Department here in Kentucky was being spent on placing children out-of-home. A healthy number of the kids that were being detained out-of-home were status offenders.

We created a pre-court process and a multidisciplinary team at the local level, or as close to local as we could get, where a group of people got together that knew about this child, knew about the child’s case. They didn’t meet the child individually, or as a group they didn’t meet with the child, like a hearing or a panel or something. They got together in an informal meeting and said: Well, how’s little Billy doing? We’ve got him plugged into this. He had a truancy issue. We’ve talked to mom and dad; we’ve brought them in; we’ve provided this wrap around service here or this behavioral health or substance use disorder treatment there. And they keep a bead on that kid and try to divert them.

You asked about its success. So far it has seen remarkably good success. We’ve cut juvenile court dockets in half. We have sent almost 50 percent of cases that would have ended up in court by way of diversion, never having seen the inside of a courtroom, never having ended up on a court docket anywhere. We haven’t seen any sort of resulting explosion in juvenile delinquency or misconduct. Public safety has been improved. And not only have we saved the resources that we spent there, but we have made an enormous difference in the lives of those children.

There’s a quote Gene that I want to share with the listeners of this podcast, and I hope it encourages them the way it has me. It’s from Frederick Douglass: “It’s easier to build strong children than to repair broken men.” If ever we had a chance as legislators across the
country to do something good for our young constituents, it’s when they’re young; it’s when they have the chance to change the trajectory of their lives, and even make a generational positive impact on their families for generations to come because of the difference that can be made.

Gene: It seems to me that a lot of this is balancing the child taking responsibility for actions versus what the long-term needs of the state are.

Senator: That’s right. In Kentucky we’ve found that the system wasn’t performing in even a sensible way. It was doing damage to these children and it worked backwards from the way it should. We had juveniles who committed low-level public offenses, misdemeanors, or even Class D felonies, our lowest class of felony in Kentucky; we had children serving more time on whatever offense they were facing than their adult counterparts for doing the exact same thing.

We had children who did something stupid when they were 13 or 14 and the system required that they be kept on a docket somehow or another, and they were kept under the thumb of the court of the commonwealth of the state through the prosecution or law enforcement in some way, which led to them being revoked at some time, because guess what – kids are kids! They do dumb things! All of us did dumb things when we were kids. You learn.

But because the child was already on paper somewhere or being supervised, instead of it being a learning exercise and experience for that child, a mistake or a bad decision here or there, it’s treated as a revocation or a revocable offense, or a violation of their conditions of release or commitment, and they’re put back on the docket with even more scrutiny!

In Kentucky, we were holding kids that committed technical violations in their release; we were holding those kids who violate on technical violations and misdemeanors within less than 30 days of the same amount of time we were holding kids that commit felonies. At a fundamental level, that’s a failure of the system. Felonies are more serious than misdemeanors. Misdemeanors are more serious than violations. And the system should reflect that. And the bill made changes in that regard as well.

For any state that’s looking at doing any justice policy, whether it’s juvenile or adult, you’ve got to make sure you have, or that you start collecting the right data, and that it’s used to inform your policy decisions, so that you’re making decisions based on objective science.

Gene: So Senator, you’re co-chairing the National Conference of State Legislatures’ Juvenile Principles Workgroup and recently held your first meeting. As I understand, it’s made up of 15 state legislators in juvenile justice from across the country. What happened in that first meeting and what do you hope the group will accomplish?

Senator: The beauty of this justice reform work that’s going on and that people are looking at doing is that it has nothing to do with Republican or Democrat. It’s just: do what’s best for the children in your state. And that’s what these folks have done. And so we sat around the table and we discussed at length a number of policies, a number of things that each of our
states have done, what we think should be included in this principles document that we are going to create at the end of our work this year.

And so other states can look and see what they’ve done, what works, what should at least be on the table and considered in terms of reform for youth.

Gene: So you mentioned earlier that you have an interest in data and research in this field. What types of information are you paying attention to these days?

Senator: Recidivism is a big one. Kentucky couldn’t identify juvenile recidivism rates when we first started this project either, but we’re able to identify that. Another big one is watching youth as they age and even age out of being a youth – we want to track any youth that had some exposure to the juvenile justice system that end up in the adult justice system at some point, so we can identify whether or not, over the long term, we’re actually being successful in changing these lives.

One of the beautiful parts of the bill is the Oversight Counsel; you mentioned that I co-chair that with my House counterpart. This Oversight Counsel is a brilliant part of the bill. It has a two-fold function: it watches the implementation of the bill, but also studies new policy areas that the bill didn’t cover. And the best part is that it has all the agency chiefs, the agency heads, in the room. And they’ve been able to problem solve and troubleshoot issues that weren’t even on our agenda just because they’re in the room and talking with one another on a regular basis and addressing the implementation of this bill and talking about new policies informed by the data that we’re collecting.

And if I can encourage you to do one thing that Kentucky did not do in its big reform bill and Senate Bill 200: examine disproportionality. As good as Senate Bill 200 is, it brings into very sharp relief the disproportionate minority contact that exists throughout Kentucky’s juvenile justice system.

In Jefferson County, in Louisville there, you’ve got demographically about 80 percent of the population of students, juveniles... 80 percent is white, about maybe 13 percent is black. In the 2015/16 school year, there were 1,500 complaints that originated in schools in Jefferson County. Out of those 1,500 complaints, 1,200 of them were on young black kids. That’s biased. It is clear. It is obvious. It is horrific that that level of disproportionality exists.

And if I can encourage states to do one thing – make sure you’re collecting that data; make sure the various agencies involved are all collecting the data; make sure that they can share it, that they can communicate and talk to one another and know the population of kids they’re looking at, at any given time because they’re using the same terminology, they’re using the same tools to measure and track the students, the youth across their states – because that’s a problem that needs to be eradicated.

However a kid gets in the system, bias is there. I can’t stress the importance of data enough. Frankly it helps sell the case. You’ve got Democrats that are accused of being warm and fuzzy and you’ve got Republicans that are accused of being tough on crime and really, really harsh. Both perspectives can be right and wrong at different times for different circumstances.
Look at the numbers. Go where the data points you to.

Gene: And on that note, Senator, we thank you so much for your time today and wish you all the best in your continuing efforts.

Senator: It’s my pleasure. I’d just encourage listeners, if I can, Gene: watch this NCSL Juvenile Justice Principals Workgroup. Look for that work product at the end of the year or the first of next year as NCSL gets that published, and use it. Look at everything that we’ve put in there and see if there’s something that just kind of peaks your interest and triggers a motivation in you to look at what your state is doing, and do what’s right for these children. If nothing else, remember that Frederick Douglass quote: “It’s easier to build strong children than to repair broken men.” Thanks Gene.

Gene: And that concludes this edition of Our American States. We invite you to subscribe to this podcast on iTunes and Google Play. Until our next episode, this is Gene Rose for the National Conference of State Legislatures. Thanks for listening.