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BEST INTERESTS EQUALS ZEALOUS ADVOCACY: A NOT SO RADICAL VIEW OF HOLISTIC REPRESENTATION FOR CHILDREN ACCUSED OF CRIME

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INTRODUCTION

A lawyer in adult criminal court represents an eighteen-year-old client charged with burglary who does not want to plead guilty, even though he is guilty.¹ The lawyer explains that quantitatively and quali-

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1. In every state, eighteen-year-olds are treated as adults for purposes of criminal liability. See, e.g., ARiz. REV. STAT. ANN. § 8-201(3), (6) (West 1999 & Supp. 2001) (stating that an "'[a]dult' means a person who is eighteen years of age or older"); see also CAL. WELF. & INST. CODE § 603(a) (West 1998) (stating that a petition must be filed in juvenile court first if the person is under the age of eighteen when the alleged criminal act was committed); D.C. CODE ANN. § 16-2301(3) (2001 & Supp. 2002) (defining the word "child" to mean "an individual who is under 18 years of age"). In some states, persons younger than eighteen years old may be charged as adults. See N.Y. SOC. SERV. LAW § 371(5) (McKinney 1992) (stating that a "'[j]uvenile delinquent' means a person over seven and less than sixteen years of age" who commits an adult criminal act); TEX. FAM. CODE ANN. § 51.02(2)(A) (Vernon 2002) (defining a delinquent child as a person who is "ten years of age or older and under seventeen years of age"). The jurisdictional age factor depends on the age of the child when the act was committed rather than the age at the time the petition is filed. See, e.g., CAL. WELF. & INST. CODE § 603(a).

Moreover, all states have waiver provisions which permit children as young as ten in some states to be transferred to adult criminal court. See, e.g., VT. STAT. ANN. tit. 33, § 5506(a) (2001) (describing the criminal offenses under which a juvenile court may transfer a child between ten and fourteen to criminal court); see also GA. CODE ANN. § 15-11-28(b)(2)(A) (Supp. 2002) (giving exclusive jurisdiction to the superior court for the trial of a person between thirteen and seventeen years of age alleged of committing any one of seven enumerated offenses); IND. CODE ANN. § 31-30-5-4 (Michie 1997) (stating that a juvenile court can waive its jurisdiction upon meeting certain criteria set forth within the state); WIS. STAT. ANN. § 938.183(1) (West 2000) (providing original jurisdiction to the criminal courts over a juvenile between the age of ten and fourteen).
tatively there is more than sufficient evidence to convict. Furthermore, counsel advises the accused of the unpleasant facts that over ninety percent of defendants in state criminal courts plead guilty, and that sentences after trial tend to be higher than those obtained by plea. Under these circumstances, the attorney advises her client to plead guilty. If, however, the client persists, defense counsel will put on her advocate hat and use all her professional skills to gain an acquittal. If that fails, she will try to prevent incarceration or limit the


2. See *Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics-2000*, at 457 (Kathleen Maquire & Ann L. Pastore eds., 2001) (indicating that ninety-one percent of all felony convictions in state court in 1996 were obtained by guilty pleas).

3. See *David J. Levin et al., Bureau of Justice Statistics, State Court Sentencing of Convicted Felons, 1996*, at 30-40 (2000) (stating that sentences for the same type of offense were longest for those felons convicted in a jury trial (twelve and one-half years) as compared with sentences given after a bench trial (five years and ten months), or a guilty plea (four and one-half years). Presumably, the reason for the higher sentences after trial is to demonstrate to defendants the risk of insisting on a trial. See Michael E. Tigar, 1969 Term—Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel, 84 HARV. L. REV. 1, 19-25 (1970) (discussing reasons why a defendant may enter a guilty plea even though his procedural rights may have been violated).

4. An attorney has a duty to be a zealous advocate for his or her client. See *Model Rules of Prof'l Conduct R. 1.3 cmt. (2003)*; *Model Code of Prof'l Responsibility Canon 7* (2000). Thus, a defendant has the right to test the prosecution's evidence to be sure that guilt is proven beyond a reasonable doubt. Moreover, during the trial, the defense attorney may cross-examine prosecution witnesses who are telling the truth in an attempt to discredit their testimony. See Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1474-75 (1966) [hereinafter *Professional Responsibility*] (arguing that one of the three hardest questions for a defense attorney can be whether it is "proper to cross-examine for the purpose of discrediting the reliability or the credibility of a witness whom you know to be telling the truth" and concluding that "the attorney is obligated to attack, if he can, the reliability or credibility of an opposing witness whom he knows to be truthful"); see also *Monroe H. Freedman, Lawyers' Ethics in an Adversary System 43-49* (1975) [hereinafter *Lawyers' Ethics*] (discussing the cross-examination of a truthful witness in an attempt to discredit her). Obviously, an attorney cannot use perjured testimony, bribe witnesses or jurors, or commit any criminal act to win an acquittal. See *Model Rules of Prof'l Conduct R. 3.3(a)* (setting forth rules governing the truthfulness of a lawyer's communications to a tribunal); *Model Code of Prof'l Responsibility EC 7-5, 7-26, 7-28* (prohibiting a lawyer from aiding the criminal conduct of a client); *Model Code of Prof'l Responsibility DR 7-102 (A)(4), (6), (7)*
prison term by presenting mitigating evidence at sentencing, such as: the client’s mother is a junkie, there is no food at home, and the client grew up in a chaotic household. The probation department recommends a two-year prison sentence. Although the defendant’s record demonstrates that he will undoubtedly need the lawyer’s services again in the very near future, the attorney succeeds in getting probation for her client. Nobody blinks an eye.

Transport that lawyer to a delinquency proceeding in juvenile court. This time she represents a sixteen-year-old client accused of burglary who does not want to plead guilty, even though he is, and even though there is more than sufficient evidence to establish his guilt. Almost all children in juvenile court plead guilty. But they do so, at least in large part, because the “best interests of the child” is the accepted mantra, and any “bargaining” that might hinder the child’s rehabilitation would theoretically conflict with that notion. The attorney pressures her client to admit his complicity. After the plea and (stating that a lawyer shall not “[k]nowingly use perjured testimony,” “[p]articipate in the creation or preservation” of false evidence, or “[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent”). Therefore, in this instance, the attorney, knowing her client is guilty, cannot allow him to take the stand and give perjurious testimony even if the client so desires.

Furthermore, an attorney who tells her client she will report his perjury to the court is not guilty of providing ineffective assistance of counsel. See Nix v. Whiteside, 475 U.S. 157, 168 (1986) (agreeing with ethical rules that require a lawyer to disclose his client’s perjury to the court). But see Freedman, Lawyers’ Ethics, supra, at 31-41 (discussing how criminal defense attorneys have a professional responsibility to examine a perjurious client); Freedman, Professional Responsibility, supra, at 1477 (describing strategies for a lawyer to ethically examine a client who intends to commit perjury).

5. If the length of the sentence is statutorily mandated, mitigating factors will be irrelevant. See Harmelin v. Michigan, 501 U.S. 957, 995 (1991) (refusing to extend “required mitigation” claims in capital cases to non-capital cases).


considering the youth's past record, the lawyer simply accepts the "expert" recommendation of probation and that the boy needs a "structured environment." The child is sentenced to two years in a state prison for juveniles, euphemistically called a training school. The fact that his mother is a junkie, there is no food at home, and he lives in a chaotic environment are what primarily motivates the probation department to recommend commitment. Nobody blinks an eye.

What happened to the advocate hat that the lawyer wore in criminal court? She left it there, because, after all, the juvenile court system is benign, the records are sealed, the proceedings are confidential, there is no punishment, just treatment, and last, but not least, her client needs "help."

10. These code words are often used by probation officials to designate that the child is to be committed to a locked or secure facility. Indeed, many juvenile facilities confine their residents. See Ind. Code Ann. § 31-31-8-2 (Michie 1997) (defining "[a] juvenile detention facility [as] a secure facility . . . used for the . . . treatment of juveniles"); N.Y. Exec. Law § 508(1) (McKinney 1996) (describing New York's juvenile offender institutions as "secure facilities for the care and confinement of juvenile offenders"); Okla. Stat. Ann. tit. 10, § 7501-1.3(30) (West Supp. 2003) (defining a "[t]raining school" or "secure facility" [in which a juvenile is placed as] a facility, maintained by the state exclusively for the care, education, training, treatment, and rehabilitation of delinquent juveniles or youthful offenders which relies on locked rooms and buildings, and fences for physical restraint in order to control behavior of its residents).


13. Trimble v. State, 478 A.2d 1143, 1163 (Md. 1984) (referring to the "benign goals of the juvenile system"); Julian W. Mack, The Juvenile Court, 23 Harv. L. Rev. 104, 117, 120 (1910) (asserting that "the aim of the [juvenile] court . . . is to have the child and the parents feel, not so much the power, as the friendly interest of the state . . . . The child . . . should . . . be made to feel that he is the object of its care and solicitude.").


15. See Cal. Penal Code § 686.5(b) (West Supp. 2002); see also D.C. Code Ann. § 16-2332(b) (Supp. 2002); Colo. Rev. Stat. Ann. § 24-4.1-303(6)(a) (West 2001); Idaho Code § 20-525(2). However, a statutory guarantee of confidentiality does not necessarily mean that the court will be closed. See United States v. Three Juveniles, 61 F.3d 86, 92 (1st Cir.
Although they are becoming increasingly punitive, the juvenile courts still try to obfuscate the similarities between criminal court and juvenile court by using a different vocabulary. The child is a respondent, not a defendant; a child is not indicted for the commission of a crime, a petition for delinquency is filed, there is no bail hear-

1995) (holding that the Federal Juvenile Delinquency Act grants district courts the discretionary authority to close juvenile proceedings on a case-by-case basis); see also McKeiver v. Pennsylvania, 403 U.S. 528, 554-55 (1971) (Brennan, J., concurring in part and dissenting in part) (arguing that a jury trial is not constitutionally required at an adjudicatory hearing in a juvenile court delinquency proceeding because “a similar protection [of the Sixth Amendment right to a jury trial] may be obtained when an accused may in essence appeal to the community at large”). Yet, most states limit public access to juvenile proceedings. See ALA. CODE § 12-15-65(a) (Supp. 2002) (excluding the general public from juvenile proceedings); CAL. WELF. & INST. CODE § 676 (West Supp. 2003) (stating that juvenile proceedings are closed to the public subject to statutory exceptions); N.Y. Jud. Ct. Acts § 341.1 (McKinney 1999) (prohibiting the general public from attending juvenile proceedings).

16. Originally juvenile statutes did not speak of punishment, but in recent years, punishment has been added as an appropriate goal of the juvenile justice system. For example, the earlier Texas statute provided that the purpose of the juvenile justice system was “to provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions.” See TEX. FAM. CODE ANN. § 51.01(1) (Vernon 1995) (amended 1995). In 1995 this section was amended so as to “provide for the protection of the public and public safety [as well as] to promote the concept of punishment for criminal acts.” TEX. FAM. CODE ANN. § 51.01(1), (2)(a) (Vernon 2002).

17. See Barry C. Feld, The Transformation of the Juvenile Court—Part II: Race and the “Crack Down” on Youth Crime, 84 MINN. L. REV. 327, 328 (1999) (arguing that we are seeing more juvenile offenders being tried as adults as well as “jurisprudential changes that de-emphasize rehabilitation and escalate punitive sanctions for ordinary delinquents”); Julianne P. Sheffer, Note, Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation Within the Juvenile Justice System, 48 VAND. L. REV. 479, 483-84 (1995) (stating that evidence indicates that “the juvenile court is becoming more punitive”).

18. Feld, supra note 17, at 338.

19. Many states refer to the child in juvenile court as the “respondent.” See, e.g., N.Y. FAM. CT. ACT § 301.2(2) (McKinney Supp. 2002).

20. The Fifth Amendment right to indictment in criminal cases is not considered fundamental, and, thus, does not apply in state cases. See Hurtado v. California, 110 U.S. 516, 538 (1884) (upholding state law which permitted initiation of criminal cases by information rather than grand jury indictment). However, many jurisdictions, as a matter of state law, require indictments, at least for serious felonies. See MISS. CONST. art. III, § 27; State v. Holloway, 130 A.2d 562, 565 (Conn. 1957) (requiring an indictment in all cases where there is a possibility of life imprisonment). That being the case, the denial of grand jury indictments in juvenile cases would also not violate due process. Of course, an equal protection claim might be asserted if a state used indictments for adults and not juveniles. See In re Gault, 387 U.S. 1, 61 (1967) (Black, J., concurring) (arguing that it violates equal protection under the Fourteenth Amendment for a state to deny children, who can be tried as adults, the same constitutional safeguards as afforded adults). However, the Court has never upheld an equal protection claim in a juvenile delinquency case.

21. See ALASKA STAT. § 47.12.250(b) (Michie Supp. 2001) (stating that a peace officer, after detaining a minor, may file a delinquency petition within twelve hours alleging the delinquency of the minor); CAL. WELF. & INST. CODE § 631(a) (West 1998) (stating that
ing, rather a detention hearing, there is no trial, only an adjudicatory hearing; there is no guilty plea, the child either admits or stipulates to the allegations of the petition; there is no criminal conviction, merely a finding of fact or an adjudication that the child engaged in delinquent conduct; there is no sentence, just a dispositional hearing; and the child is not sentenced to prison, but rather committed to a treatment facility or training school.

The nomenclature in juvenile court may be different from that in criminal court, but the essentials are much the same. Persons are charged with penal offenses, and, if found guilty, are restrained in their liberty. For adults, these possible consequences mean entitle-

forty-eight hours is the maximum time of detention for a minor without criminal complaint; COLO. REV. STAT. ANN. § 19-2-512 (West 1999) (granting the district attorney the discretion to file a delinquency petition within seventy-two hours if he believes additional action is needed against a juvenile); N.Y. FAM. CT. ACT § 310.1(1) (McKinney 1999) (stating "[a] proceeding to adjudicate a person a juvenile delinquent is originated by the filing of a petition" within thirty days or the agency will inform the complainant in writing of its failure to meet this deadline).

22. See, e.g., Doe v. State, 487 P.2d 47, 52 (Alaska 1971) (finding that the adult bail system is inappropriate for juveniles).

23. See CAL. WELF. & INST. CODE § 635 (West Supp. 2003) (listing the factors a court considers during a detention hearing); COLO. REV. STAT. ANN. § 19-2-508(3)(a)(II) (West 1999) (noting that the primary purpose of the detention hearing is to determine prior to the hearing whether and under what conditions a juvenile may be released).

24. See, e.g., ARIZ. REV. STAT. ANN. 8-202(c)(2) (West Supp. 2002) (stating that a minor has an adjudicatory hearing to determine if he or she has committed a delinquent act). Some states, however, retain the term "trial" for juvenile proceedings. See, e.g., 705 ILL. COMP. STAT. ANN. 405/5-105 (West Supp. 2002) (replacing the term "adjudicatory hearing" with the term "trial").

25. See IND. CODE ANN. § 31-37-12-8 (Michie 1997) (referring to a juvenile admitting to allegations); ME. REV. STAT. ANN. tit. 15, § 3305 (West Supp. 2001) (allowing a juvenile to admit to the allegations of a petition); N.Y. FAM. CT. ACT § 321.2(1) (McKinney 1999) (providing a juvenile the right to admit allegations); WIS. STAT. ANN. § 938.30(4)(a)-(b) (West 2000) (stating that in a plea hearing a juvenile may admit or plead no contest to the allegations in the petition).

26. Most states enter a finding that the child committed a delinquent act at the close of the adjudicatory hearing. See, e.g., CAL. WELF. & INST. CODE § 702 (West 1998) (stating that "[a]fter hearing the evidence, the court [may] make a finding" of delinquency).

27. See ALA. CODE § 12-15-72 (1995) (specifying that a disposition is not a conviction nor does it impede any civil rights of the child); CAL. WELF. & INST. CODE § 706 (West 1998) (stating that the court will hear evidence as to the correct disposition of the youth); N.Y. FAM. CT. ACT § 345.1 (McKinney 2002) (providing the court "shall . . . schedule a dispositional hearing").

28. See IND. CODE ANN. § 31-31-8-2 (Michie 1997) (describing similar characteristics between a juvenile detention facility and prison, yet explicitly distinguishing between the two); N.Y. EXEC. LAW § 508 (McKinney 1996) (establishing special confinement facilities for juveniles); OKLA. STAT. ANN. tit. 10, § 7301-1.3(30) (West Supp. 2003) (describing a state facility that can be likened to prison, but is specifically not considered as such).

29. See LEVIN ET AL., supra note 3, at 1 (explaining that offenses classified as felonies typically call for incarceration of one year or more in prison); see also The Real War on
ment to counsel. But, in the past, courts treated children differently. In fact, it was not until its 1967 decision, *In re Gault,* that the United States Supreme Court recognized that due process also provides juveniles the right to counsel. However, making this promise a reality requires more than an assignment of an attorney to "kiddie court." Providing effective assistance of counsel to children accused of delinquency requires lawyers to evaluate realistically what is going on in these courts and to protect their clients just as they would in a typical adult criminal court. The attorney needs to understand her role. She is not a guardian ad litem, appointed by the court to seek the "best interests of the child." She is an advocate. Instead of pandering to the supposed benevolence of the kiddie court—telling the child-client what to do, betraying confidential information, spending insufficient time on the case and with the client—she should protect her client by embracing a model, which I call "holistic lawyering."

Holistic lawyering, in part, is based on my experience as a public defender representing children accused of crime in Solano County, California. I also base this model on my many years as a public school teacher and administrator. Holistic lawyering embodies the quality of legal representation that is necessary to assure that alleged delinquents receive the true right to counsel that the Court in *Gault* intended to grant.

At one extreme of the effective assistance of counsel for children spectrum, there exists an aspirational and concededly idealistic approach to holistic lawyering that requires high levels of funding and

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30. U.S. Const. amend. VI (providing that "[i]n all criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his defence").


32. *Id.* at 30-31. In 1966, one year before its decision in *In re Gault,* the Court, in *Kent v. United States,* held that children subject to waiver proceedings are entitled to the assistance of counsel, access to probation files, as well as a right to a hearing and statement of reasons for the waiver order. *Kent,* 383 U.S. 541, 561 (1966).

33. Prior to *Gault,* juvenile court judges did not welcome lawyers in their courtrooms. See Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make,* 79 J. CRIM. L. & CRIMINOLOGY 1185, 1192 (1989) (noting that juvenile court judges were hostile to lawyers in juvenile proceedings because they "regarded lawyers as both irrelevant and an impediment to their 'child-saving' mission").

34. I worked in the conflict office in Solano County. It had two public defender offices: the primary one, which took all indigent children accused of crime, and a separate conflict office. The latter would be appointed in all cases in which the primary public defender office declared a conflict, typically arising from children acting in concert.

35. *See In re Gault,* 387 U.S. at 34-42 (describing a juvenile's right to counsel).
resources, cooperation with non-legal experts, and perhaps even most importantly, new attitudes regarding zealous advocacy in the juvenile justice system. At the other end of the spectrum is the kind of paternalistic lawyering that tends to be the norm in juvenile court, where the attorney acts more as a guardian ad litem than as a zealous advocate. The latter approach is all too prevalent, it reveals a fundamental ignorance of the juvenile justice system, and it ignores the consequences imposed upon the children enmeshed within this system. Lawyering in juvenile courts is a fine art—one that is in tension with the myth of beneficence and the shibboleth "best interests of the child," at least as these terms are commonly interpreted.

In this Article, I explain the importance of high quality, zealous advocacy for children accused of crime in juvenile court, and what it takes to provide such professional services. In Part I, I explore the right to counsel granted by the Gault Court, the various stages of juvenile delinquency proceedings to which the right to counsel could theoretically apply, and how determinations of indigency and waiver along with the interference of parents can effectively undermine the due process right to counsel afforded in Gault. In Part II, I analyze the different views of counsel's function in juvenile court—usually expressed in the mutually exclusive terms of zealous advocacy versus best interests. In this section, I conclude that that dichotomy is false or at least misleading in-as-much as zealous advocacy is in the child's best interests. In Part III, I develop my model of holistic lawyering, and describe how it plays out in the ideal and real worlds. Finally, I offer suggestions for attorneys who represent offenders in juvenile court.

36. New York was a leader in providing defense counsel for children in juvenile court. However, the statute denominates defense attorneys merely as law guardians, see N.Y. Fam. Ct. Act § 320.2(2) (McKinney 1999) (requiring the court to appoint a law guardian to represent the juveniles at the initial appearance), and misses the true role of appointed counsel for juveniles as envisioned by the Gault Court, see In re Gault, 387 U.S. at 34-42 (describing a juvenile's right to counsel).

37. See JOSPEH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 65-67 (1979) (discussing the many conflicting pressures, approaches, and goals that relate to the representation of child-clients); see also Kent, 383 U.S. at 554-57 (describing a number of peculiarities in the juvenile justice system devised to assist children, which nevertheless in many ways deprive children of constitutional rights and increasingly complicate their representation).

38. See GOLDSTEIN ET AL., supra note 37, at 66 (arguing that state child welfare agencies, parents, relatives, and the like may declare benevolent intentions, yet do not and cannot "have a conflict-free interest in representing [a] child").
I. THE PROMISE AND THE REALITY OF IN RE GAULT'S RIGHT TO COUNSEL

A. In re Gault's Promise: The Due Process Right to Counsel

It was not until 1967 that the United States Supreme Court granted children accused of committing criminal acts the right to counsel in the adjudicatory guilt-innocence stage of delinquency proceedings.\textsuperscript{39} \textit{Gault} was a major conceptual breakthrough.\textsuperscript{40} Previously, states denied constitutional protections to children in juvenile court through the \textit{parens patriae} doctrine and the civil labeling of delinquency proceedings, which the Supreme Court finally rejected in \textit{Gault}.\textsuperscript{41}

The Court, although viewing the delinquency adjudication as "comparable in seriousness to a felony prosecution,"\textsuperscript{42} granted the right to counsel as a matter of due process rather than as the explicit Sixth Amendment guarantee of assistance of counsel.\textsuperscript{43} Indeed, the only Bill of Rights guarantee specifically applied to delinquency hearings was the privilege against self-incrimination.\textsuperscript{44} The other constitutional protections granted by \textit{Gault}'s holding—notice,\textsuperscript{45} counsel,\textsuperscript{46}

\begin{itemize}
  \item[\textsuperscript{39}] \textit{In re Gault}, 387 U.S. at 30-31. However, the Court carefully limited the scope of its holding. \textit{See id.} at 31 n.48 (stating that "what we hold in this opinion with regard to the procedural requirements at the adjudicatory stage has no necessary applicability to other steps of the juvenile process").
  \item[\textsuperscript{40}] In addition to the majority opinion authored by Justice Fortas, four other justices issued opinions. Justice White, addressing the breadth of \textit{Gault}, argued that the Court should not have resolved either the Fifth Amendment issue, or the cross-examination and confrontation claims. \textit{Id.} at 65 (White, J., concurring). Justice Harlan argued that due process only required the right to notice, counsel, and a written record that would permit adequate appellate or collateral review. \textit{Id.} at 72 (Harlan, J., concurring in part and dissenting in part). He did not believe that the privilege against self-incrimination or the rights to confrontation and cross-examination were constitutionally necessary in such proceedings. \textit{Id.} at 74. Justice Black argued that either a child or adult charged with violating a criminal law and committed for six years, should be afforded all the guarantees of the Bill of Rights. \textit{Id.} at 61 (Black, J., concurring). In addition, Justice Black viewed the denial of the constitutional safeguards provided by the Bill of Rights to children as violating equal protection of the law. \textit{Id.} Finally, Justice Stewart argued that the constitutionalization of juvenile courts might cause states to abandon special forums created to benefit children. \textit{Id.} at 79-80 (Stewart, J., dissenting).
  \item[\textsuperscript{41}] \textit{In re Gault}, 387 U.S. at 16-18, 49-50. The Court noted that "[t]he absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness." \textit{Id.} at 18-19.
  \item[\textsuperscript{42}] \textit{Id.} at 36.
  \item[\textsuperscript{43}] \textit{Id.} at 41. \textit{But see id.} at 64 (Black, J., concurring) (contending that the Arizona law should not be invalidated because it is "unfair," but rather because "it violates the Fifth and Sixth Amendments").
  \item[\textsuperscript{44}] \textit{In re Gault}, 307 U.S. at 55.
  \item[\textsuperscript{45}] \textit{Id.} at 33-34.
\end{itemize}
cross-examination, and confrontation—rest on Fourteenth Amendment due process notions of fundamental fairness rather than on the specific provisions relating to those rights in the Sixth Amendment.

The way the Court formerly differentiated between the appointment of counsel for adults charged with crimes in state court and in federal court exemplifies the distinction between the due process and the Sixth Amendment rights to counsel. Prior to incorporation of the Sixth Amendment's attorney provision in 1963, an indigent defendant's right to appointed counsel in state court derived solely from the concepts of due process and fundamental fairness. These concepts were limited, unfortunately, and meant such defendants were only entitled to an appointed counsel if there were special circumstances. The undiluted Sixth Amendment right to counsel governed indigent defendants in federal court, automatically assigning an attorney in every felony case. Following Gideon v. Wainwright, however, indigent defendants charged with felonies in state court were also automatically entitled to the appointment of counsel. Thus, incorpo-

46. Id. at 41.
47. Id. at 57.
48. Id. at 56.
50. See Gideon v. Wainwright, 372 U.S. 335, 342-43 (1963) (incorporating the Sixth Amendment right to counsel into the Fourteenth Amendment).
51. See Betts v. Brady, 316 U.S. 455, 473 (1942) (finding that the Due Process Clause of the "Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right"), overruled by Gideon, 372 U.S. at 339.
52. See id. at 472-73 (discussing the reasons for not declaring a blanket right to counsel rule). The Court looked to such factors as the possible length of sentence, the complexity of the charges, and the defendant's ability to represent himself. Id. at 473. In death penalty cases, however, many states gave an absolute right to counsel, since death itself was viewed as an exceptional circumstance. Id. at 469-70; see also Hamilton v. Alabama, 368 U.S. 52, 54-55 (1961) (holding that capital defendants were absolutely entitled to counsel at arraignment hearings); Powell v. Alabama, 287 U.S. 45, 58 (1932) (holding that defendants in a capital case were entitled to receive substantive assistance of counsel).
53. Betts, 316 U.S. at 461. In Betts, the Court rejected the defendant's argument that due process requires the state to supply counsel in all state criminal prosecutions. Id. at 464, 473.
54. 372 U.S. 335.
55. Id. at 339, 342-43 (overruling Betts by incorporating the Sixth Amendment right to counsel into the Fourteenth Amendment).
ration of the Sixth Amendment into the Fourteenth Amendment made the right to counsel in state and federal courts coextensive.\textsuperscript{56}

One may, however, take the position that a delinquent’s due process right to counsel is not coterminous with an adult defendant’s Sixth Amendment right to counsel in criminal proceedings.\textsuperscript{57} Such a position supports the view that counsel in juvenile court functions as a guardian ad litem as opposed to a zealous advocate. The argument that the due process right to counsel in delinquency proceedings is of a lesser potency than the Sixth Amendment right to counsel in criminal cases may also be supported by the assertion that minority status justifies diminished constitutional protection.\textsuperscript{58} For example, the Court takes an analogous approach when it uses strict scrutiny for government restrictions on the privacy rights of adults, but only intermediate scrutiny when the subjects are children.\textsuperscript{59} The Court rationalizes this distinction because of children’s supposed immatur-

56. Furthermore, in \textit{Duncan v. Louisiana}, the Court held that the Sixth Amendment right to a jury trial applied to the states because it was a fundamental right in the Anglo-American system of justice incorporated into the Due Process Clause of the Fourteenth Amendment. 391 U.S. 145, 148-56 (1968).

57. In \textit{Middendorf v. Henry}, the Court held that because summary court-martials were not criminal, there was no constitutional right to counsel, either as a matter of due process or the Sixth Amendment. 425 U.S. 25, 42 (1976). The majority distinguished \textit{Middendorf} from \textit{Gault} on the ground that the right to counsel granted in \textit{Gault} was a due process right, rather than a Sixth Amendment right. \textit{Id.} at 37. Justice Marshall, dissenting, argued there was still a right to counsel in delinquency cases, even if it was a due process right as opposed to a Sixth Amendment right. \textit{Id.} at 60-61 (Marshall, J., dissenting).

Part of the difficulty in applying the Sixth Amendment right to counsel to delinquency proceedings is that such cases are denominated civil in nature, and the Sixth Amendment requires a criminal proceeding. \textit{See U.S. Const.} amend. VI (limiting the right to counsel to criminal cases).

58. \textit{Bellotti v. Baird}, 443 U.S. 622, 634-36 (1979) (plurality) (recognizing that there are “three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing”); \textit{see also Parham v. J.R.}, 442 U.S. 584, 602 (1979) (discussing the historical recognition “that natural bonds of affection lead parents to act in the best interests of their children”).

ity, vulnerability, lack of decision-making ability, and because they "are always in some form of custody."\(^{60}\)

Paradoxically, a strong argument can be made simultaneously that children's immaturity should entitle them to more rather than less constitutional protection.\(^{61}\) The *Gault* Court's use of the Fourteenth Amendment due process analysis, with its emphasis on fundamental fairness, suggests that the right to counsel granted by *Gault* may be read even more expansively than an adult's Sixth Amendment right to counsel.\(^{62}\) Indeed, the reasons the Court gives for restricting children's constitutional rights—their developmental deficits and lack of wisdom—also justify enhanced constitutional protection for minors.\(^{63}\) For example, to assure that courts treat alleged delinquents in a fundamentally fair way, one might conclude that the child's right to counsel in delinquency proceedings must help overcome or compensate for the minor's competency differentials.\(^{64}\) The deficiencies that children present in a criminal context, such as their impulsive decision-making, their inability to fully comprehend the intricacies of the law, their memory perceptions, and their inarticulateness, make it difficult to assure a level of representation that comports with notions of fundamental fairness.\(^{65}\)

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62. *In re Gault*, 387 U.S. 1, 30-31 (1967). Justice Harlan wrote:
   Surely this illustrates that prudence and the principles of the Fourteenth Amend-
   ment alike require that the Court should now impose no more procedural restric-
   tions than are imperative to assure fundamental fairness, and that the States
   should instead be permitted additional opportunities to develop without unneces-
   sary hindrance their systems of juvenile courts.
63. Id. at 76 (Harlan, J., concurring).
64. Justice Brennan has argued that children committed to state mental hospitals by
   their parents may be entitled to greater constitutional protection than adults because:
   The consequences of an erroneous commitment decision are more tragic where
   children are involved. Children, on the average, are confined for longer periods
   than are adults. Moreover, childhood is a particularly vulnerable time of life and
   children erroneously institutionalized during their formative years may bear the
   scars for the rest of their lives.
65. Parham, 442 U.S. at 627-28 (Brennan, J., concurring in part, dissenting in part) (footnotes
   omitted).
   See Rosenberg, *supra* note 49, at 659 (stating that "one might question why, in view
   of age and competency differentials, the child is given less protection rather than more
   [protection]").
66. See Melton, *supra* note 61, at 153-67 (explaining why mental differences between
   children and adults require the state to give children in delinquency proceedings more
   constitutional protection than adults in criminal cases).
In addition to competency differences, children's sense of time is also markedly different from that of adults. Asking a child where he was two weeks ago is like asking an adult where he was two years ago on a Thursday afternoon in March. Similarly, consider explaining the Miranda warnings and their implications to a ten-year-old child and preparing the child to testify at a suppression hearing. Studies show that almost all minors fail to comprehend the Miranda warnings even when they are broken down and explained in simple, child-friendly terms. How then will the child be able to explain to the court what happened at the police station, and his or her lack of understanding of the warnings? Indeed, after Gault, several jurisdictions, using state law, provided enhanced Miranda protection by requiring a parent or attorney to be present when a child waived his or her rights.

However, the question remains as to what kind of lawyering would assure fundamental fairness for the child in a delinquency proceeding. The age range for children accused of crime usually runs from seven to seventeen. A ten-year range is enormous when deal-

66. Goldstein et al., supra note 37, at 41 (finding that a child judges the passage of time by his or her own "subjective feelings of impatience and frustration").

67. See id. at 40 (explaining that adults can cope with intervals of time but children experience them based on "their instinctual and emotional needs").


69. Although Miranda is, of course, a Fifth Amendment rather than a Sixth Amendment case, the decision did create a limited right to counsel to protect the privilege against self-incrimination. Id. at 469. The Court has never explicitly applied Miranda to delinquency cases; however, the Gault opinion spoke of the unreliability of confessions by children and limited its holding regarding the privilege against self-incrimination to in-court admissions. In re Gault, 387 U.S. 1, 56-57 (1967). In Fare v. Michael C., the Court determined that the minor's request to speak with his probation officer did not constitute a per se invocation of Miranda. 442 U.S. 707, 727-28 (1979). The Court observed that it had never "held that Miranda applies with full force to exclude evidence obtained in violation of its proscriptions from consideration in juvenile proceedings." Id. at 717 n.4. The Court went on to "assume without deciding that the Miranda principles were fully applicable to the present proceedings." Id.


71. See Colo. Rev. Stat. Ann. § 19-2-511(1) (West 1999) (requiring a parent to be present when the juvenile is advised of her Miranda rights in order for a statement or admission from a custodial interrogation to be admissible); N.Y. Fam. Cty. Acr § 305.2(7) (McKinney 1999) (asserting that a child may not be questioned unless a parent or guardian is present and both parties are advised of the minor's rights); Tex. Fam. Code Ann. § 51.09 (Vernon 2002) (stating that a child waiving any right must be accompanied by an attorney and the waiver must be informed and voluntary).

72. As noted above, the maximum age for delinquency is generally seventeen. See, e.g., Ariz. Rev. Stat. Ann. § 8-201(10) (West 1999 & Supp. 2001) (defining a "delinquent act" as an act that can only be committed by a person under the age of eighteen). States often
ing with children. The difference between a child of seven and seventeen is far greater than the difference between thirty- and forty-year-olds. Factor in the reality that many children in juvenile court suffer from a host of emotional and physical problems, come from dysfunctional and poor families, and have educational deficits, and one can see how an attorney faces a formidable task.

I have dealt with children in many capacities: as a teacher from pre-school through high school, as an administrator, and as an attorney, and I am skilled at getting children to relate to me. Notwithstanding considerable training and experience, representing children in juvenile court is difficult. Many children do not know what a lawyer

indicate a minimum age a child must be to be charged with delinquency. See, e.g., N.Y. Soc. Serv. Law § 371(5) (McKinney 1992) (stating that a “juvenile delinquent” is a child over the age of seven and under the age of sixteen charged with committing an act that would be considered a crime if committed by an adult). But see Fla. Stat. Ann. § 985.03(6) (West Supp. 2002) (defining a juvenile as a child under the age of eighteen who committed a violation of law and not stating any lower age limits).

At common law, children under the age of seven were irrebutably presumed incapable of entertaining mens rea. See Andrew Walkover, The Infancy Defense in the New Juvenile Court, 31 UCLA L. Rev. 503, 510 (1984) (explaining that at common law “[c]hildren under the age of seven were conclusively presumed to be incapable of taking responsibility for their acts”). Between the ages of seven and fourteen, there was a “rebuttable presumption of incapacity.” Id. at 511. From the age of fourteen upwards, it was presumed that the child was competent to commit a criminal act. Id. at 510-11. See generally A.W.G. Kean, The History of the Criminal Liability of Children, 53 Law Q. Rev. 364 (1937) (discussing the common law presumption of infancy).

Jean Piaget classifies the developmental process into five primary periods. Henry W. Maier, Three Theories of Child Development: The Contributions of Erik H. Erikson, Jean Piaget, and Robert R. Sears, and Their Applications 103 (1969). The first period includes children from birth to one and a half to two years of age. Id. Preconceptual (from ages two to four) is the second period, intuitive thought (from ages four to seven) is the third, concrete operations (from ages seven to eleven) is fourth, and the last period is formal operations covering eleven through fifteen-year-olds. Id. at 118, 125, 136, 146. The breakdown between the age groups is narrow because the developmental process of children varies greatly. Id. at 101-02.

It is generally accepted that the most formative years are childhood and adolescence. See id. at 29 (describing individual development as a series of phases from birth through adolescence).


Poverty can cause children to have many more physical ailments as they grow up since they are not likely to receive proper health care or immunizations. Ira M. Schwartz, (In)Justice for Juveniles: Rethinking the Best Interests of the Child 178 (1989).

More crime occurs in low income neighborhoods and poverty can have a negative impact on family life. The Real War on Crime, supra note 29, at 28.

While children in public schools with learning disabilities only make up 8.6% of the population, one study indicated that 70% of incarcerated youth, have a disabling condition. See Sue Burrell & Loren Warboys, Special Education and the Juvenile Justice System, Juv. Just. Bull., July 2000, at 1.
is or does.\textsuperscript{79} They cannot easily differentiate between the attorney and other officials in the juvenile court system.\textsuperscript{80} They have no sense of how that system works,\textsuperscript{81} and they have enormous difficulty remembering and adhering to instructions. For example, I represented a fourteen-year-old charged with the crime of escape. Although he was going to plead guilty to that charge, I warned him not to talk to anyone about what may have happened after his escape, as it might lead to additional charges. He failed to follow my advice and told one of the guards in the detention facility (it was unclear who initiated the conversation) that he had been involved in the rape and murder of a fifteen-year-old girl after his escape from a residential treatment center. The guard, of course, repeated his inculpatory statement to prosecutors, and it was used as evidence at the child's adjudicatory hearing for the rape and murder. If the child had been an adult, the inculpatory statement would also be admissible since the statement related to an as yet uncharged offense, and therefore, government officials could initiate interrogation about that offense without counsel's presence, as long as \textit{Miranda} warnings were given.\textsuperscript{82} Considering children's developmental, intellectual, and emotional immaturity, one

\textsuperscript{79} Cf. Emily Buss, "You're My What?" The Problem of Children's Misperceptions of Their Lawyers' Roles, 64 FORDHAM L. REV. 1699, 1706-11 (1996) (discussing the misconception children have of their lawyers' role in child dependency proceedings). Professor Buss attributes part of this confusion to the attorney's own view of her role in representing a juvenile in dependency proceedings. \textit{Id.} at 1712. Should the attorney represent the child's wishes or the child's best interests? \textit{Id.} at 1699. Although she likens the role attorneys should take in delinquency proceedings to the traditional role of advocate, she acknowledges that children are still often confused about the attorney's role partially because of the lawyer's actions and partially because of the child's own perception of the proceedings. \textit{Id.} at 1711; see also Ellen Marrus, \textit{Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency}, 11 GEO. J. LEGAL ETHICS 509, 515-20 (1998) (discussing the various roles attorneys take in delinquency proceedings).

\textsuperscript{80} See Buss, \textit{supra} note 79, at 1706-11 (discussing children's limited knowledge of judicial proceedings). Professor Buss does note, however, that extensive age appropriate communication between attorney and client can be useful tools to help the child-client develop an understanding of the legal system. \textit{Id.}

\textsuperscript{81} See \textit{id.} at 1706-07 (offering suggestions to attorneys as to how to meet, interact, and work with a child-client).

\textsuperscript{82} McNeil v. Wisconsin, 501 U.S. 171, 177-79 (1991) (authorizing questioning after \textit{Miranda} warnings were given and waived, without the presence of an attorney, to an uncharged offense). Under Minnich v. Mississippi, once a defendant has invoked his right to counsel, the police cannot initiate interrogation unless defendant's counsel is present. 498 U.S. 146, 153 (1990). In \textit{McNeil}, the Court held that the defendant's invocation of his Sixth Amendment right to counsel by appearing with his attorney at a bail hearing does not also constitute an invocation of the Fifth Amendment right to counsel. 501 U.S. at 178-79. Therefore, the Sixth Amendment prohibits police initiated questioning without counsel for the crime for which he is charged, but the police may still question the defendant about unrelated and uncharged crimes without counsel's presence. \textit{Id.} at 176-77.
might argue, however, that statements taken from a child in custody whose counsel was not present at the time should not be admissible even with respect to an uncharged offense.\footnote{83} Such a rule would assure fundamental fairness and protect the child's right to counsel as well as his privilege against self-incrimination. Concededly, this interpretation is more than what adults receive, but it is necessary to fully protect the child and give him or her the equivalent protection accorded to adults. To illustrate this point, in the case described above, an adult had also been involved in the rape and murder. My client informed me that the adult was the primary actor in the offense, a position that was consistent with his earlier statement to the guard. The adult spoke only with his lawyer, and arranged for a plea bargain based on his assertion that the juvenile was the primary culprit. The adult was sentenced to three years in prison, while my client was committed for the maximum term of ten years.\footnote{84}

B. The Reality: The Stages of Juvenile Delinquency Proceedings and the Right to Counsel

In order to fully understand what holistic lawyering entails, we need to look at the different stages of a delinquency proceeding—intake, detention, adjudication, disposition, revocation, placement review, placement extension and appeal\footnote{85}—and examine how counsel's representation can affect the child. The \textit{Gault} Court spoke only to the adjudicatory hearing, at which guilt or innocence of a penal offense is determined.\footnote{86} Most jurisdictions, however, have as a matter of state

\footnote{83. The \textit{Gault} Court wrote:}

\begin{quote}
If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair. 387 U.S. 1, 55 (1967).
\end{quote}

\footnote{84. In many cases, children in juvenile court are subjected to longer periods of incarceration than adults for committing the same offense. Barry C. Feld, \textit{The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes}, 68 B.U. L. Rev. 821, 837 (1988). For example, in \textit{Gault}, the Court noted that had Gerald been an adult, the maximum punishment would have been a fine of between five to fifty dollars or up to two months imprisonment. \textit{In re Gault}, 387 U.S. at 29. His sentence in juvenile court was a commitment of six years. \textit{Id.}

\footnote{85. I am not discussing waiver hearings, which are governed by \textit{Kent}, see 383 U.S. 541, 543 (1966), even though such cases may start out as delinquency proceedings. A district attorney must elect whether to proceed with a case as a delinquency matter or request a waiver hearing. See \textit{Breed v. Jones}, 421 U.S. 519, 541 (1975) (holding that juveniles who have been subjected to an adjudicatory hearing in juvenile court may not, as a matter of double jeopardy, be tried for that same offense in criminal court).

\footnote{86. \textit{See In re Gault}, 387 U.S. at 31 n.48. Although most commentators view the \textit{Gault} decision as applicable only to children charged with the commission of a criminal act, it is
law, extended the right to counsel to dispositional hearings where the "sentence" is imposed. Representation at the other stages is much less frequent. Nonetheless, the lack of legal representation at these other proceedings has an enormous impact on children in the system.

Intake probation officers often determine whether to refer alleged delinquents to court or to divert them to community based agencies. Whether a child is referred to court depends on a variety of factors.
of factors including: admission of guilt, evidence of guilt, seriousness of the offense, prior record, school attendance, and home environment.\textsuperscript{90} It is in effect a dispositional hearing at the front end, and if one values representation at the latter stage, it would be just as valuable at intake.\textsuperscript{91} Alternatively, the intake process could be viewed as a preliminary hearing, which for criminal defendants is a "critical stage" of the proceedings requiring the appointment of counsel for indigents.\textsuperscript{92} Furthermore, any information gathered at the intake level is often used by probation officers for detention and dispositional recommendations and may be relayed to prosecutors.\textsuperscript{93} These condi-

\textsuperscript{90} See Feld, supra note 84, at 882-83 n.310 (finding that "[r]ecent research indicates that the decision making process is cumulative; decisions made by the initial participants—police or intake—affect the types of decisions made by subsequent participants"); \textit{cf.} Harris v. Procunier, 498 F.2d. 576, 585-86 (9th Cir. 1974) (Hufstedler, J., dissenting) (analyzing the waiver determination as analogous to a sentencing proceeding in criminal court and mandating that Kent's counsel requirement be retroactive).


\textsuperscript{92} See N.Y. Fam. Ct. Act § 734(e) (McKinney 1999) (providing that statements made during an intake conference cannot be used at an adjudicatory hearing but implicitly allowing such information to be used at other hearings). \textit{But see} Tex. Fam. Code Ann. § 53.03(c) (Vernon 2002) (holding that incriminating statements made at the intake conference "may not be used against the declarant in any court hearing"). Even if there are prohibitions against using evidence obtained during an intake conference, such evidence may well play a role in probation recommendations regarding detention and commitment. See Feld, supra note 84, at 882 n.310 (discussing a number of role players in the dispositional decision of a juvenile, all of which possess vast amounts of discretion in what evidence to consider and what decision to make).
tions make the presence of counsel a necessity rather than a luxury. Nonetheless, the right to counsel at intake is a rarity.94 Detention hearings decide whether the child is to be released or remanded to a juvenile facility, and are thus akin to bail hearings at which defendants in criminal court have the right to legal representation.95 Detention affects the ability of the attorney to gather information and can be harmful to the child’s development, even assuming the remand facility is safe.96 Additionally, a child who is detained is more likely to be adjudicated a delinquent than one who is returned home and is more likely to be placed in a locked facility at disposi-

94. See In re Frank H., 337 N.Y.S.2d 118, 124 (N.Y. Fam. Ct. 1972) (holding that because New York law prohibits the use of any statements made during the intake conference at the adjudicatory hearing, there was no necessity for extending the right of counsel to the intake level).

95. Moore v. Illinois, 434 U.S. 220, 231-32 (1977) (finding that a preliminary hearing to set bail was a critical stage in the adversarial process requiring the presence of defendant’s counsel). The Sixth Amendment right to counsel for adult defendants is applicable only after initiation of judicial adversarial proceedings and only at critical stages. Kirby v. Illinois, 406 U.S. 682, 690 (1972).

Most states conclude that juveniles are not entitled to bail, in part because children do not have contractual capacity to enter into bail agreements, and in part because the statutory detention criteria in juvenile statutes favors release of the child to his parents. See Fulwood v. Stone, 394 F.2d 939, 943 (D.C. Cir. 1967) (refusing to reach the question of whether there is a constitutional right to bail in juvenile proceedings because of statutory preference for release of the child); Doe v. State, 487 P.2d 47, 52 (Alaska 1971) (holding bail to be inappropriate for juveniles).

96. One court described a particular New York City juvenile detention facility in the following way:

The building is surrounded by a high wall. Although individual sleeping rooms are left open at night unless the particular child poses a risk to himself or others, the children (boys) are otherwise locked in their dormitories, recreation rooms or classrooms . . . . Each corridor of the building that leads to the dormitories, classrooms, dining halls or offices has metal doors at each end that are locked at all times. An electronically locked metal door controls movement in and out of the buildings. The windows are secured from inside by a screen made of institutional netting.

[Space for receiving children is inadequate so that searching is often conducted in the toilet facilities; there is lack of sufficient area for visitation; the school is divided among three separate floors, creating “traffic problems”; lighting is “generally inadequate”, the rooms are often cold in winter, and the fire alarm system—at least at the date of the report—was in disrepair.

In addition to being locked institutions (internally and externally) whose male “inmates” must wear uniform clothing, there are other characteristics which the centers share with penal institutions . . . . [C]hildren are required to walk in line from place to place without talking, and are “hit” or have a smoking break taken away if they get out of line. Knives are not generally furnished at meals. Homosexuality, both forced and consensual, exists in both girls’ and boys’ centers as what all parties appear to agree is an inevitable concomitant of incarceration.
tion. However, the right to counsel at detention hearings is becoming more widespread, but as of yet, is not universal.

Adjudicatory hearings settle whether a child committed the alleged criminal acts, and is, except for the lack of a jury in most jurisdictions, akin to adult criminal trials. The court considers whether there is proof beyond a reasonable doubt that the person charged committed a violation of the penal law. Of course, Gault makes representation at this stage constitutionally mandatory. As we will see,

At the time of trial [the] Center had available only the per diem (part time) services of one psychiatrist committed to serve a minimum of ten hours weekly. . . . “Psychiatric coverage for the detention centers, based upon the present population (which is not expected to increase) should at a minimum equal two full-time psychiatrists (70 hours per week) with provision for emergency consultation on nights, weekends and holidays (an additional 12-15 hours per month).” Martarella v. Kelley, 349 F. Supp. 575, 580-87 (S.D.N.Y. 1972), enforced, 359 F. Supp. 478 (S.D.N.Y. 1973) (citations omitted). See also Feld, supra note 49, at 200-01 n.197 (finding that “[t]he conditions described at Spofford [detention facility] are endemic to juvenile detention facilities around the nation”).

97. See Feld, supra note 33, at 1337-38 (discussing the “negative effects of pretrial detention on subsequent sentencing”). It should be noted, however, that children who are detained may be more dangerous than other children, and thus may be more likely to receive a harsher sentence.

98. See Arboagast v. R.B.C., 301 S.E.2d 827, 828 (W. Va. 1983) (per curiam) (holding that a juvenile does not have an absolute right to counsel at detention hearings); Tory J. Caeti et al., Juvenile Right to Counsel: A National Comparison of State Legal Codes, 23 AM. J. CRIM. L 611, 616 (1996) (noting that state courts have individually interpreted the right to counsel granted under Gault, and as a result, some states have granted juveniles more procedural safeguards, while others have granted less).

99. In McAfeier v. Pennsylvania, Justice Blackmun noted that there were ten states at that time that granted the right to jury trials in juvenile court as a matter of state law. 403 U.S. 528, 549 (1971) (plurality). Most of those states have continued to grant delinquents the right to a jury trial. See Irene Merker Rosenberg, A Door Left Open: Applicability of the Fourth Amendment Exclusionary Rule to Juvenile Court Delinquency Hearings, 24 AM. J. CRIM. L. 29, 60 (1996) (noting that states have ignored the McAfeier ruling and have maintained or even added a juvenile’s right to a jury trial). How often that right is exercised is another matter. See TEX. APPLESEED FAIR DEF. PROJECT ON INDIGENT DEF. PRACTICES IN TEX.—JUVENILE CHAP-TER, SELLING JUSTICE SHORT: JUVENILE INDIGENT DEFENSE IN TEXAS 21 (2000) [hereinafter SELLING JUSTICE SHORT] (finding that “there is an unwritten rule that you don’t request a jury except in murder or sexual assault cases. Some attorneys won’t ask for juries at all because they are worried that they won’t get appointments.” (internal quotation marks omitted)); see also Barry C. Feld, Will the Juvenile Court System Survive?: The Honest Politician’s Guide to Juvenile Justice in the Twenty-First Century, ANNALS AM. ACAD. POL. & SOC. SCI., July 1999, at 10, 14 (stating that “most states continue to deny juveniles access to jury trials or other rights guaranteed to adults” (citation omitted)).

100. In re Winship, 397 U.S. 358, 368 (1970) (requiring proof beyond a reasonable doubt in delinquency adjudicatory proceedings where guilt or innocence of a penal violation is determined).

however, this right to counsel is generally subject to waiver,\textsuperscript{102} and as a result many children appear without counsel at these critical hearings.\textsuperscript{103} Furthermore, the lack of a jury, the inbred nature of the juvenile court bureaucracy, and the secrecy surrounding juvenile court hearings tend to make trials in juvenile court overly informal and mask the momentous consequences.\textsuperscript{104}

The dispositional hearing is analogous to an adult criminal sentencing proceeding where counsel is constitutionally required.\textsuperscript{105} As noted above, the \textit{Gault} Court did not mandate counsel at this stage in juvenile court, yet, in most jurisdictions, assigned counsel will represent the child at both the adjudicatory and dispositional hearings.\textsuperscript{106} Regardless, counsel's role in juvenile dispositional hearings is both more important and more complicated than in adult sentencing hearings. Even though there are mandatory commitments for some offenses in juvenile court,\textsuperscript{107} there are generally more sentencing op-

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\textsuperscript{102} Id. at 42.
\textsuperscript{103} See Feld, supra note 33, at 1188-89 (noting that "less than fifty percent of juveniles adjudicated delinquent receive the assistance of counsel to which they are constitutionally entitled").
\textsuperscript{104} Justice Douglas described the mental trauma a juvenile may face when the juvenile justice system becomes too informal as follows:

\begin{quote}
The fact is that the procedures which are now followed in juvenile cases are far more traumatic than the potential experience of a jury trial. Who can say that a boy who is arrested and handcuffed, placed in a lineup, transported in vehicles designed to convey dangerous criminals, placed in the same kind of a cell as an adult, deprived of his freedom by lodging him in an institution where he is subject to be transferred to the state's prison and in the "hole" has not undergone a traumatic experience?
\end{quote}

\begin{quote}
The experience of a trial with or without a jury is meant to be impressive and meaningful. The fact that a juvenile realizes that his case will be decided by twelve objective citizens would allow the court to retain its meaningfulness without causing any more trauma than a trial before a judge who perhaps has heard other cases involving the same juvenile in the past and may be influenced by those prior contacts. To agree that a jury trial would expose a juvenile to a traumatic experience is to lose sight of the real traumatic experience of incarceration without due process. The real traumatic experience is the feeling of being deprived of basic rights.
\end{quote}

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\textsuperscript{105} Mempa v. Rhay, 389 U.S. 128, 137 (1967) (requiring counsel at deferred sentencing hearings in criminal court).

\textsuperscript{106} See \textit{CAL. WELF. \\ INST. CODE} § 700 (West 1998) (requiring that a juvenile have counsel at a dispositional hearing); \textit{FLA. STAT. ANN.} § 985.203 (West 2001) (stating that a child is entitled to counsel at all stages of delinquency proceedings); \textit{IOWA CODE ANN.} § 232.11(1)(e) (2000) (requiring that a juvenile have counsel at a dispositional hearing).

\textsuperscript{107} See \textit{FLA. STAT. ANN.} § 985.215(1)(b) (West Supp. 2002) (stating that if a minor is "charged with possessing or discharging a firearm on school property [the minor] shall be
tions than in criminal court. Additionally, the programs used by juvenile probation vary in degree of treatment and structure. 108 Whether the child goes to a prison-like training school, 109 a residential treatment center, 110 is placed in foster care, 111 or remains at home on probation 112 is of great importance to the child’s future development. Indeed, one might argue that it is at this stage that defense counsel’s active participation can be most effective toward protecting his or her client. 113 Unfortunately, it is here that many attorneys defer to the “expert” recommendations of an overworked probation department. 114

Similarly, probation revocation hearings are essentially the same as adult revocation proceedings. The court considers whether the probationer violated the terms of his or her probation and the appro

placed in secure detention care”); Ga. Code Ann. § 15-11-62(a) (2001) (providing that if a juvenile between the ages of thirteen and seventeen is convicted of certain felonies, the minor shall be committed to the Department of Corrections); 705 Ill. Comp. Stat. Ann. 405/5-750(2) (West 1999) (declaring that a minor over the age of thirteen who has been adjudicated a delinquent based on a first-degree murder offense shall be committed to the Department of Corrections, Juvenile Division until his or her twenty-first birthday, without the possibility of parole for at least five years).


109. See Cal. Welf. & Inst. Code § 1251 (West 1998) (allowing for youth who are too mature for the California Youth Authority, but not mature enough for adult prison, to be sent to a more restrictive training school); Colo. Rev. Stat. Ann. § 19-2-909(1)(a) (West Supp. 2001) (stating that any juvenile adjudicated based on an offense that would be a felony or misdemeanor for an adult may be placed in a training school).

110. See, e.g., Ariz. Rev. Stat. Ann. § 8-341.01(B)(1) (West Supp. 2002) (providing that a child adjudicated a delinquent may be sent to a residential treatment facility if it will address the child’s “behavioral, psychological, social or mental health needs”).


112. See, e.g., Minn. Stat. Ann. § 260B.198(b) (West Supp. 2002) (providing that a delinquent child may be placed on probation at home or a foster home).

113. See Hon. Arthur L. Burnett, Sr., What of the Future? Envisioning an Effective Juvenile Court, Crim. Just., Spring 2000, at 7, 9 (arguing that counsel for a juvenile “may make a far greater contribution by assisting in designing a disposition plan that may change a child’s life, rerouting a juvenile’s path from repeat offender to a productive and useful citizen”).

114. See Hon. Patrick R. Tamila, In Search of Juvenile Justice: From Star Chamber to Criminal Court, 29 Akron L. Rev. 509, 515 (1996) (describing the involvement of probation officers in juvenile justice). In many jurisdictions the dispositional hearing is held immediately after the adjudication of guilt, leaving the attorney little time to prepare. See Patricia Puritz et al., A.B.A. Juvenile Justice Center et al., A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings 6 (1995) (discussing the overworked juvenile defenders and the busy and hurried court-houses they work in).
The violations can be the commission of criminal law offenses or of specific terms of probation, such as failure to report to the probation officer or failure to keep away from persons convicted of crime. Furthermore, for children, the violation can even be something as simple as failing to attend school or staying out late at night. For adults, there exists no federal constitutional right under the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment to counsel at a probation revocation hearing. However, the Court in *Gagnon v. Scarpelli* held that in certain circumstances due process would require the availability of an attorney if: there are substantial reasons which "make revocation inappropriate"; the defendant makes a "colorable claim" that he did not violate probation; and the probationer appears to be incapable of speaking for himself. That last factor alone, in the context of juvenile revocation proceedings, could mandate a per se right to counsel for juvenile probationers. Most jurisdictions, however, grant counsel at a juvenile probation revocation proceeding, only under certain circumstances.

Placement reviews and extension of placement requests are also critically important for the child. These actions can result in transfers to harsher and more secure facilities or commitment to longer peri-

115. See *In re B.S.*, 469 N.W.2d 860, 869 (Wis. Ct. App. 1991) (holding that a court must quickly determine whether a juvenile has violated a condition in a dispositional order and what sanctions, if any, have a practical value in each case).

116. See *In re Richard M.*, 993 P.2d 1048, 1049-50 (Ariz. Ct. App. 1999) (finding a violation of the terms of probation when a juvenile failed to report to his probation officer for drug and alcohol testing); *In re Ivan T.*, 90 Cal. Rptr. 2d 588, 589 (Cal. Ct. App. 1999) (stating that the juvenile had violated his terms of probation by committing a criminal act); P.R. v. State, 782 So. 2d 911, 911 (Fla. Dist. Ct. App. 2001) (noting terms of probation that forbade the juvenile contact with the other juvenile offenders involved in his case).

117. See *People v. Pinholster*, 824 P.2d 571, 586 (Cal. 1992) (recounting how a juvenile's probation was violated because of curfew infractions); *In re Kimble*, 682 N.E.2d 1066, 1069-70 (Ohio Ct. App. 1996) (holding that a juvenile can have his parole revoked for habitual truancy if he is given notice that truancy is a parole violation).

118. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (stating that probation is not a critical stage of prosecution which entitles one to counsel).

119. *Id.* at 790.

120. The State of Florida comes close to granting such a per se right. See *Fla. Stat. Ann.* § 985.231(1)(c) (West 2001) (entitling a child to counsel if the child denies the alleged probation violation).

ods of incarceration and supervision. These proceedings are akin to parole decisions, loss of good time determinations, transfers, and disciplinary actions, and as such, require no right to counsel as they are viewed as correctional decisions. However, many of the factors going into these ultimate decisions can be based on disputed facts, yet an attorney is viewed as an intruder rather than as someone who can act as an advocate for the child-client. Furthermore, very few states assign counsel at such proceedings for adults or children.

Adult defendants are entitled to counsel on their first appeal as a matter of Fourteenth Amendment due process and equal protection, even though the Supreme Court has never held that appellate review is of constitutional proportions in criminal cases. The Gault Court declined to determine whether due process requires a tran-

122. Despite the importance of these hearings, some children do not receive them. See The Children Left Behind: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Louisiana 64 (Gabriella Celeste & Patricia Puritz, eds., 2001) (describing a Louisiana study that found eighty-five percent of the youth in the Louisiana Training Institute had not returned to court for a review hearing and ninety percent of the youth had no contact with their attorney after being placed at LTI). A national study conducted by the Juvenile Justice Center of the American Bar Association found that court appointed attorneys that continue to represent the child after the dispositional hearing tend to do more than public defenders at that stage in the proceeding. Puritz et al., supra note 114, at 54. Almost all appointed counsel will interview the child prior to the review hearing and most of them will also interview probation officers and family members. Id. However, less than twenty-five percent of the attorneys will often monitor the implementation of the juvenile’s treatment plan. Id.


124. Id. at 667-68.


126. Douglas v. California, 372 U.S. 353, 357-58 (1963) (vacating the judgment of the lower court based on the fact that defendants’ right to equal protection was violated because the court had denied defendants’ assistance of counsel on appeal). In Ross v. Moffitt, 417 U.S. 600 (1974), the Court held that there was no constitutional right to counsel for discretionary appellate review. 417 U.S. 600, 610-19 (1979).

127. McKane v. Durston, 153 U.S. 684, 688 (1894) (holding that appellate review is not mandated by Fourteenth Amendment); cf. Whitney v. State, 389 U.S. 138, 138 (1967) (per curiam) (dismissing the case because the Court felt it had “improvidently granted” certiorari on the issue of whether the Constitution requires appellate collateral review). A significant number of cases in criminal matters are reversed on appeal. In 1999, fourteen percent of appeals following a criminal trial in federal court ended in a reversal or remand. See John Scalia, Bureau of Justice Statistics, Federal Criminal Appeals, 1999 With Trends 1985-1999, at 6 (2001). Determining the number of juvenile cases reversed on appeal, however, is much more difficult. In addition, many attorneys simply do not believe in filing appeals in juvenile cases, as the sentences are shorter and the courts will not stay incarceration pending the appeal. See Puritz et al., supra note 114, at 38-39.
script and appellate review of juvenile proceedings. Nonetheless, all jurisdictions provide appellate review in both criminal and juvenile cases as a matter of state law. However, many states do not grant juveniles a right to appointed counsel for appeals. Yet, how can a minor navigate the complex and arcane rules of appellate review? Without legal expertise, errors below cannot be rectified; therefore, juvenile trial court decisions are effectively insulated from corrective appellate review. At all stages of juvenile delinquency proceedings (intake, detention, adjudication, disposition, revocation, placement review, placement extension, and appeal) the role of counsel for children is critical, but is often lacking. As the Gault Court notes, "The child 'requires the guiding hand of counsel at every step in the proceedings against him.'"

C. The Reality: Determining Indigency

Like adults, the child's right to appointed counsel is dependent on indigency, which is a flexible criterion. Often this means that

128. In re Gault, 387 U.S. 1, 58 (1967). Justice Harlan argued that "the [juvenile] court must maintain a written record, or its equivalent, adequate to permit effective review on appeal or in collateral proceedings." Id. at 72 (Harlan, J., concurring in part and dissenting in part).

129. See also M.L.B. v. S.L.J. 519 U.S. 102, 110-11 (1996) (offering that the states may afford juveniles the right to appellate review). All states have granted the right to appellate review for adults and juveniles. See, e.g., CAL. WELF. & INST. CODE § 800(a) (West 1998) (providing juveniles with the right to appeal any final judgment). See also Puritz et al., supra note 114, at 38-39 (explaining that although juveniles have the same right to appeal as adults, appeals are rarely taken from juvenile court decisions).

130. Very few states have statutes that specifically grant juveniles the right to an attorney at the appellate stage. See, e.g., KAN. STAT. ANN. § 38-1606(b) (2000) (specifying that a juvenile is entitled to an attorney at appeal). In a 1995 survey, thirty-two percent of juvenile public defenders indicated they were not authorized to handle appeals, and, although seventy-five percent of private appointed attorneys were authorized to handle the appeal, only one out of five attorneys actually took any appeals in the previous year. Puritz et al., supra note 114, at 10.

131. Cf. Kent v. United States, 383 U.S. 541, 561 (1966) (holding that meaningful review in the context of waiver hearings requires, among other things, an opportunity for counsel to advocate on behalf of a client over an important decision).


133. Gideon held that the right to counsel for an indigent defendant in a criminal trial is a fundamental right under the Fourteenth Amendment. 372 U.S. 335, 342-44 (1963). The Court went on to state: [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our . . . laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial
the *Gault* right to counsel is problematic. Theoretically, there are two possible approaches that courts could take. One is a per se presumption that the child, who is the accused, has no source of funds to pay counsel absent a trust fund or movie star status.\textsuperscript{135} The parents' resources would simply not be relevant, either before or after the proceedings. Currently, no state takes that position, although it is one that would serve the best interests of the child. Under such an approach, the minor is assured of appointed counsel without reference to parental resources, which removes a source of tension between par-

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Id. at 344. *In re Gault* extended the right of counsel to children involved in delinquency hearings. *In re Gault*, 387 U.S. at 41. Specifically, the *Gault* Court stated:

We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child. \textit{Id.}

134. Financial guidelines to determine indigency with respect to court appointed counsel are set by the public defender office or the courts. \textit{See Colo. Stat. Ann.} § 21-1-103(3) (West Supp. 2002) (requiring the public defender to make the determination); \textit{Fla. Stat. Ann.} § 27.52(1)(a) (West Supp. 2002) (requiring the Court to make the determination). Furthermore, jurisdictions will make the decisions regarding indigency differently. \textit{See Fla. Stat. Ann.} § 27.52(g) (West Supp. 2002) (stating that if an accused minor is financially supported by a parent, parents, a guardian or continues to be claimed as a dependent for tax purposes, the court will consider the income of the minor's supporter in making the indigency determination). In Texas, each county is responsible for determining indigency. \textit{Tex. Crim. Proc. Code Ann.} § 26.04(a) (Vernon Supp. 2002). In Harris County, the juvenile judges set indigency at 125% of the poverty level for the family size. \textit{Tex. Gov't Code Ann.} § 51.941(g)(2) (Vernon Supp. 2002). In Vermont, the state instituted a sliding scale to determine the amount of attorney fees to be paid by the minor's family. \textit{Vt. Stat. Ann. tit. 13, § 5238(b) (1998)}. If the family income is under 125% of the poverty level for the family's size, there is no charge for attorney services. \textit{Id.} If the family income for the past year falls between 125 and 150%, the parents will pay 25% of the attorney fees. \textit{Id.} At 151 to 175%, the family pays 50%, between 176 and 200% the cost is 75% of the fees, and at 200% the family covers the full cost. \textit{Id.} For further information regarding indigency and representation by counsel see generally Sundeep Kothari, \textit{And Justice For All: The Role Equal Protection and Due Process Principles Have Played in Providing Indigents with Meaningful Access to the Courts}, 72 Tul. L. Rev. 2159 (1998), and Wade R. Habeeb, \textit{Annotation, Determination of Indigency of Accused Entitling Him to Appointment of Counsel}, 51 A.L.R.3d 1108 (1973).

135. Even a child with a trust fund may face obstacles in accessing the fund, because it may be necessary to seek court approval. \textit{See} Franklin v. Newberry, 356 N.Y.S.2d 175, 176 (N.Y. Civ. Ct. 1974) (holding that parents who could not afford to hire an attorney to represent their child in delinquency proceedings could not seek release of their child's trust funds to retain counsel because it was the court's obligation to see that the infant's trust funds were not unnecessarily depleted).
ent and child in this context. Moreover, most children in juvenile court come from poor families. Thus, hearings to ferret out the small minority who are able to retain counsel is inefficient and has serious implications for the question of waiver of counsel.

The second approach, which is used by all states, determines indigency based on the parents' resources. However, jurisdictions, however, use two different methods of ascertaining the parents' ability to pay for counsel. In the first method, the determination of indigency is made at the beginning of the case. If the parents are not deemed indigent, the courts will not appoint an attorney, leaving it to the parents' discretion to retain counsel. In other jurisdictions, courts appoint counsel to represent the child ab initio, and indigency is ascertained after the fact. If the parents are found able to afford counsel, the court will recoup the attorney's fees from them after the delinquency proceedings are concluded. Although it may superficially appear that the answer to the question of indigency is thus largely procedural, in fact, there are enormous substantive ramifications from the way in which indigency is evaluated.

When a court determines indigency based on the parents' income before trial, it makes the ability of the juvenile to obtain representation dependent on a third party's resources over which the child has no control. This means that if a judge determines that the par-

136. See In re Ricky H., 468 P.2d 204, 205-06 (Cal. 1970) (discussing how the child decided to waive his right to counsel when the court told him that his father would have to reimburse the county for the costs).  
137. See supra note 77 and accompanying text.  
138. See In re Ricky H., 468 P.2d at 205-06 (illustrating how financial concerns of a family may actually outweigh a child's interest in retaining counsel).  
139. CONN. GEN. STAT. ANN. § 51-299 (West 1985); FLA. STAT. ANN. § 27.52(1)(g) (West Supp. 2002); TEX. FAM. CODE ANN. § 51.10(f)(2) (Vernon 2002).  
140. MD. CODE ANN. RULES § 11-106(b)(2) (2002); S.D. CODIFIED LAWS § 26-7A-31 (Michie Supp. 2002); TEX. FAM. CODE ANN. § 51.10(d) (Vernon 2002); In re W.B.J., 966 P.2d 295, 298 (Utah Ct. App. 1998) (deciding not to appoint counsel to represent a delinquent child because that child’s family could afford an attorney).  
141. See CAL. WELF. & INST. CODE § 634 (West 1998) (stating that the California courts shall appoint counsel for a delinquent juvenile if he appears at the hearing without counsel, whether he is able to afford counsel or not, in the absence of an intelligent waiver of counsel by the juvenile); In re J.B., 603 A.2d 368, 368 (Vt. 1991) (holding that the court must appoint counsel and seek reimbursement from the parents, to the extent that they are able to pay, if the child is not indigent, and parents are unwilling to provide an attorney).  
142. FLA. STAT. ANN. § 27.52(2)(d); see also MASS. GEN. LAWS ch. 119, § 39F (West 2001) (concluding that after appointment of counsel the court may assess the cost of attorney’s fees against the parent or guardian).  
143. See In re Ricky H., 468 P.2d 204, 205-06 (Cal. 1970) (showing that a family’s financial circumstances may cause a child to waive counsel and face trial without representation).
ents’ income is sufficient to hire an attorney, the court will not appoint one. If the parents do not obtain legal representation for their child, he or she will be unrepresented, unless the court orders the parents to retain counsel under pain of contempt or appoints counsel for the child and orders the parents to reimburse the attorney. In contrast, when the court appoints counsel at the beginning of the case and determines indigency at the end of the proceedings, the child is assured of representation throughout the case.

The substantive issue of what constitutes indigency is also problematic. Many courts will find that parents are not indigent, even when the family has few resources and can barely make ends meet. Thus, the working poor may be left without adequate representation, subjected to contempt proceedings, or faced with reimbursal orders.

Although parents may barely surpass the guidelines for indigency, they may choose not to hire an attorney for various reasons. Parents with limited circumstances, may, for example, decide that hiring a lawyer is not as important as paying rent, buying food, buying a new car needed for work, providing a talented child with music lessons or a sick sibling with special medical treatment. Parents, poor or well-to-do, may have other reasons for not retaining counsel. They may have been experiencing difficulties with their offspring or they may think the child needs to be taught a lesson and that a lawyer would interfere with that end. Also, they may take the position that there is no reason to hire a lawyer because the child is guilty of committing the delinquent act, and they may not be aware of the possible legal defenses and the need for representation at disposition. Alternatively, parents may not hire a lawyer even when the child says he is innocent, on the theory that the juvenile court system is benign and the judge will believe their child’s version of the facts. Finally, parents may choose not to hire an attorney because they want the child removed from their home, thus placing the interests of the parents and child in direct conflict.

Even though it is preferable for courts to appoint counsel at the beginning of the proceedings and determine the parents’ ability to reimburse the state afterwards, there are serious consequences even to

144. See supra note 142 and accompanying text.
145. See supra notes 141-142 and accompanying text (requiring counsel to be provided first, leaving the question of reimbursement for a subsequent determination).
146. Cf. Kothari, supra note 134, at 2161-69 (discussing the development of federal indigency protections for adults, and how wealth is a significant factor in the adequacy of representation).
that approach. Forcing parents to pay for retained counsel when they are unable or unwilling to pay an attorney may exacerbate existing family tensions and result in further acting-out by the child.147 Moreover, as we will see, imposing such a financial obligation on the parents may also affect the issue of waiving counsel.148

**D. The Reality: Waiver of the Right to Counsel**

Per Gault, every jurisdiction provides the right to counsel for juveniles accused of crime, at least at the adjudicatory hearing.149 That right, however, is not to the automatic assignment of counsel, but rather is the right to choose whether to have counsel.150 This, of course, raises the issue of waiver, an issue that is particularly critical when dealing with youthful offenders.

Although states are currently inconsistent in their handling of waivers of counsel by juveniles, there are two main approaches for determining when waiver of counsel by juveniles is appropriate. The first category does not allow a juvenile to waive the right to counsel under *any* circumstances.151 In effect, these states find the adult’s right to self-representation152 and the requirement that the waiver of counsel and guilty pleas be an intentional relinquishment of a known right153 inapplicable to alleged delinquents.154 In other words, a child may neither waive counsel, nor represent herself, even if it is only to plead guilty. Jurisdictions in the second category allow children to waive their right to counsel at any stage, so long as it is knowing, intelligent, and voluntary.155

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147. See In re Ricky H., 468 P.2d at 210 (arguing that forcing a parent to reimburse the state for the cost of a child’s counsel “cast[s] an undesirable chill upon the minor’s free exercise of the right to appointed counsel”).
148. See id. at 205-06 (discussing how the child chose to waive counsel rather than have his indebted father reimburse the county).
149. See In re Gault, 387 U.S. 1, 41 (1967).
150. See id. at 42 (providing that “[i]f [the mother and son] were unable to afford to employ counsel, they were entitled in view of the seriousness of the charge and the potential commitment, to appointed counsel, unless they chose waiver”).
151. See Caeti et al., supra note 98, at 622-23 (listing eight states as having mandatory appointment of counsel in juvenile cases with no waiver option).
152. Faretta v. California, 422 U.S. 806, 821 (1975) (holding that the Sixth Amendment provides for a right to self-representation).
153. See Johnson v. Zerbst, 304 U.S. 458, 468-69 (1938) (holding that the Sixth Amendment right to counsel may be waived explicitly).
154. See Feld, supra note 33, at 1201-02 (explaining the Faretta and Johnson holdings and describing how these principles have never been applied by the Supreme Court with respect to a juvenile).
155. See, e.g., N.M. STAT. ANN. § 32A-2-14(E) (Michie 1999) (stating that the court will consider a variety of factors in determining whether the child waived counsel “knowingly, intelligently and voluntarily”). In some jurisdictions, the law will not permit waiver of
In the first category, the courts or the legislatures have presumably determined that counsel’s participation in the proceedings is necessary to assure due process for the child and at the same time is helpful to the court.\textsuperscript{156} In addition, they may view it as unlikely that any child can make a knowing and intelligent waiver of counsel.\textsuperscript{157} Even if some minors do have the capacity to waive, some courts may believe they are few in number, and a per se rule is more efficient than trying to look at all the circumstances to determine if a child is making a knowing and voluntary waiver.\textsuperscript{158}

In the jurisdictions that permit children to dispense with counsel, courts set different criteria for the acceptability of a waiver. In some instances, courts may permit children to waive the right to counsel on their own,\textsuperscript{159} presumably after the court explains the nature of the proceedings and the possible consequences,\textsuperscript{160} or they may only be able to waive counsel if they first consult with an attorney\textsuperscript{161} or their

counsel for adjudicatory hearings. \textit{See}, e.g., Wis. Stat. Ann. § 938.23(1)(b)(2) (West 2000) (clarifying that if the delinquency petition is contested an attorney must represent the juvenile).

\textsuperscript{156} \textit{See} Bruce J. Winick, \textit{Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model}, 5 Psychol. Pub. Pol’y & L. 1034, 1079 (1999) (claiming that a defense attorney in a juvenile transfer hearing can be helpful by presenting evidence to the court or discussing the matter informally with the prosecution).

\textsuperscript{157} \textit{See} Grisso, supra note 70, at 1137, 1140-43 (arguing that a per se rule requiring an adult to be present when a juvenile waives his or her right to counsel is necessary because “the vast majority of juveniles will not understand their rights when advised of them”).

\textsuperscript{158} The Court’s opinion in \textit{Miranda} provides analogous reasoning: The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact.\textit{Miranda v. Arizona}, 384 U.S. 436, 468-69 (1966) (footnote omitted). For an argument advocating the use of prophylactic rules over discretionary standards, see Kathleen M. Sullivan, \textit{The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards}, 106 Harv. L. Rev. 24, 62-66 (1992).

\textsuperscript{159} \textit{See}, e.g., N.M. Stat. Ann. § 32A-2-14(E) (Michie 1999) (permitting a child to waive the right to counsel if the court determines that the child waived the right “knowingly, intelligently and voluntarily”).

\textsuperscript{160} \textit{See} Johnson v. Zerbst, 304 U.S. 458, 468 (1938) (holding that the Sixth Amendment acts as a bar to a conviction if the defendant did not competently waive the right to counsel).

\textsuperscript{161} \textit{See}, e.g., N.J. Stat. Ann. § 2A:4A-39(b)(1) (West 1987) (stating that a juvenile must, among other things, consult with counsel prior to waiving his or her right to counsel).
parents. There are several difficulties with this approach, even when parents and attorneys must be consulted first. Studies indicate that children may not be able to make knowing or intelligent waivers on their own, at least with respect to the limited right to counsel to protect their Fifth Amendment interests. For example, Dr. Thomas Grisso has shown that fifteen-year-olds cannot fully comprehend their rights under *Miranda*, no matter how simply explained, and therefore cannot make knowing and intelligent waivers. While sixteen- and seventeen-year-olds may have a slightly easier task in understanding the impact of waiving these legal rights, they still do not have the same grasp of the concepts as an adult. Further, although it may be easier for a child to understand why it would be more important to have a lawyer in court proceedings rather than during custodial interrogations, it is doubtful that most children can make that distinction.

Furthermore, it is much easier for an adult in a position of authority, such as a judge or parent, to pressure a child into waiving counsel than it would be to apply this pressure to an adult. For example, judges may inform minors that the court wants to help them and return them home quickly, or that if they want a lawyer, the case would have to be adjourned. Particularly if the child is also under the strain of detention, he or she may feel that involvement by an attorney...
would only exacerbate the problem further. Judges, especially those who must be elected, may have incentives for getting children to waive counsel, such as saving state or county funds, expediting hearings, and imposing harsh punishment to maintain a law and order reputation. Indeed, there are studies indicating that judges impose harsher punishment on children who do not waive their right to counsel.

If a parent does not want to be responsible for the costs involved in retaining an attorney or otherwise does not want counsel representing the child, the parent may encourage the child to waive legal representation. Even an attorney consultation before the child can waive his or her right to counsel may not be sufficient to protect the minor. Since the lawyer is not yet retained or appointed, and has no relationship with the youth, he or she may not spend sufficient time with the child to explain the consequences and to elicit sufficient facts about the case in order to properly advise the child of the benefits an attorney can provide. Moreover, the attorney may have an incentive to get alleged delinquents to waive counsel so that he or she may maintain a good relationship with the judge.

As I later explain, I believe children should be able to make the ultimate decisions in legal proceedings. Therefore, if an attorney represents to the court that he has explained the consequences and ramifications of waiver, and in his opinion, the child understands what he or she is giving up, and the judge inquires of the juvenile to assure that he or she understands the right to counsel and the consequences of waiver, the court should accept the child's waiver. However, based on my experience in the juvenile court system, I ultimately opt for a per se rule prohibiting waiver of counsel by minors. I simply do not believe that the standards-based approach to waiver in this context is one that is sufficiently protective of children, nor do I believe that appellate review will properly ferret out the cases in which the court accepted improper waivers. Mandatory counsel also prevents

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170. Id. at 418-20; see also Feld, supra note 33, at 1322-34.

171. See Feld, supra note 169, at 419 (hypothesizing about reasons for ineffectiveness of juvenile public defenders).

172. Id.

173. In Godinez v. Moran, the Court found that the defendant was competent to give a knowing and intelligent waiver of counsel and represent himself even though he was depressed, had psychological problems, and was on medication. 509 U.S. 389, 394 & n.3, 400-02 (1993). Justice Blackmun, in dissent, stated that although an individual may be
overbearing judges and parents from influencing a child to waive counsel and prevents judges from imposing punishment based on the child’s choice of waiver. Therefore, I believe the per se rule is desirable for the child and the courts.

Nevertheless, this position is fraught with its own dangers. The children are more likely to distrust the attorneys and simply see them as another government official foisted on them. In such cases, it will be difficult for counsel to elicit the necessary information and provide a proper defense. Moreover, the attorney may still cater to overbearing judges by pleading his or her client guilty. On balance, I still conclude that the court must assign counsel to represent children appearing in juvenile court regardless of the child’s wishes. After that point, however, as I will explain later, the accused child should determine how the defense is to be conducted.

E. The Reality: The Role of Parents and the Right to Counsel

An attorney representing adults in criminal court usually has to deal only with her client. In juvenile court there is an added wrinkle—the parents. In Gault, Justice Fortas recognized the parental interest in delinquency cases and required that both the child and parent be notified of the right to counsel. However, he also made clear that counsel was to be appointed to “represent the child.” Many parents find it difficult to believe that the child is the client and, competent to stand trial, he may not be capable of making a decision to defend himself in criminal proceedings. Id. at 416 (Blackmun, J., dissenting). Justice Blackmun also wrote:

To try, convict, and punish one so helpless to defend himself contravenes fundamental principles of fairness and impugns the integrity of our criminal justice system. I cannot condone the decision to accept, without further inquiry, the self-destructive “choice” of a person who was so deeply medicated and who might well have been severely mentally ill.

Id. at 417.

174. See Feld, supra note 169, at 395 (explaining that abuse of the waiver right results in an abundance of unrepresented youths). Of course, such judicial behavior may simply be postponed and redirected at the adjudicatory hearing so that children who go to trial with counsel will be subject to harsher punishment. Id.

175. Buss, supra note 79, at 1710-11.

176. See Feld, supra note 33, at 1331 (arguing that some counsel may be swayed by the prospects of getting into or remaining in a judge’s graces).

177. See infra notes 299-304 and accompanying text.

178. Furthermore, adults’ attorney-client relationships may be influenced by relatives, friends, and spouses, but generally their power to influence the adult defendant is not as great as with a child-client and their parent.

179. See In re Gault, 387 U.S. 1, 41 (1967) (holding that “the child and his parents must be notified of the child’s right to be represented by counsel”).

180. Id. (stating that “if [the parents and child] are unable to afford counsel, that counsel will be appointed to represent the child”).
therefore, the one who makes the ultimate decisions.\textsuperscript{181} They feel entitled to sit in on attorney-client interviews and to determine the direction of the representation. In doing so, parents often clash with the attorney on what should be done. Additionally, parents will often try to subvert their children's decision-making power by telling them they must do what they (the parents) want.\textsuperscript{182} Furthermore, some parents will provide information to the probation department which is then used against the child, and indeed, parental complaints are the basis for many petitions for violation of probation.\textsuperscript{183}

In the criminal courts, relatives and friends are under no illusion as to the consequences of the criminal proceeding. Therefore, they tend to look to the attorney as the expert who can shield the defendant from criminal sanctions. On the other hand, parents do not always understand what can happen to their children in juvenile court, because they may view it as a therapeutic institution.\textsuperscript{184} In such cases, the parents see the attorney as an intruder who may stand in the way of what is beneficial to the child.\textsuperscript{185}

One way to resolve conflicts between parents, children, and attorneys is to make clear to the parents the consequences of different

\begin{itemize}
\item \textsuperscript{181} See Grasso, supra note 163, at 187 (explaining that when parents give advice to their children about waiver of counsel they "almost always urge[ ] their children to waive [their] rights").
\item \textsuperscript{182} See id. at 167. Parents will often exert pressure on the child to "confess" or ask the court to remove the child from the home. Id. Parents can be embarrassed by the proceedings and try to coerce the child to take responsibility for their actions. Id. It may not seem bad for a parent to be involved in the attorney-client relationship and encourage the child to be "truthful," but problems arise when the child's interests are different from the parent's and it may be difficult to determine if the child is being truthful or just reacting to pressure from the parent. Id. at 188-89.
\item \textsuperscript{183} In most jurisdictions there is no parent-child privilege at least with respect to adult offspring, and therefore, parents can be forced to testify against their children. David L. Cheatham, Comment, Kids Say the Darnedest Things: A Call for Adoption of a Statutory Parent-Child Confidential Communications Privilege in Response to Tougher Juvenile Sentencing Guidelines, 8 Tex. Wesleyan L. Rev. 393, 404 (2002) (stating that only New York currently acknowledges the existence of a parent-child privilege at common law, while only Idaho and Minnesota have legislatively granted the privilege); see also Betsy Booth, Comment, Underprivileged Communications: The Rationale for a Parent-Child Testimonial Privilege, 36 Sw. L.J. 1175, 1185-95 (1982) (discussing the recognition of the parent-child privilege).
\item \textsuperscript{184} See Cheatham, supra note 183, at 407 (explaining that a false sense of security exists for parents in juvenile courts because of the informality and lighter sentences but noting that many states are seeking to toughen measures against juvenile offenders).
\item \textsuperscript{185} In Rapoport v. Berman, a juvenile court judge had prohibited the attorney representing a status offender from speaking with the child's parent on the theory it violated the Canons of Ethics for an attorney in a civil proceeding to interview an opposing party. 375 N.Y.S.2d 652, 653 (N.Y. App. Div. 1975). The appellate court reversed on ripeness grounds, but noted that the child's attorney had a right to interview prospective witnesses, including the parents. Id. at 653-54.
\end{itemize}
choices. I represented a child who was accused of larceny. The child came from a poor family where expensive sneakers were a luxury, and he readily admitted to me that he stole a fellow student's Nike shoes. In addition, the boy had problems in school with bouts of absenteeism. After I interviewed him, my client advised me that he did not want to plead guilty and asked if I would meet with his parents to explain his decision to have a trial notwithstanding his guilt. When I initially told the parents that their son committed the crime, but did not want to plead guilty, the parents reacted with anger and wanted to force him to plead guilty. I then explained to them the consequences of their child being adjudicated a delinquent, including, because of his school problems, possible placement in a state facility.\textsuperscript{186} I further advised the parents that I thought there was a good likelihood that the sneakers were inadmissible on the ground that they were obtained as a result of an unlawful search and seizure.\textsuperscript{187} Without this evidence, the child could not be convicted. Albeit reluctantly, the parents eventually agreed with my recommended course of action.

Sometimes it is not so easy. I also represented a juvenile who was being detained because of a probation violation. He wanted to go home, and his mother did not want him; in fact, she had called the probation officer about the violation. She had been in prison, as was the boy's father currently, and she did not want to see her son follow in their footsteps. She was hoping that the juvenile system would be therapeutic and divert him from a life of crime. At my client's request, I discussed the matter with her at length, including the nature of the proceedings and the quality of placement facilities, but she remained adamant. As a result of her testimony, the court removed the child from the home and placed him in a locked facility. I later learned that he had been raped by other inmates of the training school. When he was released, he was involved in several violent crimes for which he was incarcerated in adult prison. I am not claiming that every child who is placed in youth prisons can expect this future, but it is not an improbable scenario.\textsuperscript{188}

\begin{footnotes}
\item[187] Although the Supreme Court has never explicitly held that the exclusionary rule of the Fourth Amendment applies to delinquency proceedings, most states have decided that it does. See Rosenberg, supra note 99, at 58-59.
\item[188] It is not uncommon for violence to occur in juvenile prisons. A recent editorial from Charlotte, North Carolina discussed that violence has been an ongoing problem in the state's juvenile prisons that house one thousand twelve- to eighteen-year-olds. \textit{Legislature Responsible for Diff; Lawmakers Must Find a Way to Fix Problems at Juvenile Prisons}, Char-
Sometimes clients will divulge confidential information that they do not want their parents to know. One of my clients stole clothing from a friend of hers. She told me not to tell her mother she was guilty. The mother kept pressing me as to the content of my discussions with her daughter. I told her that confidential communications between client and attorney did not include parents. She was so angry that she threatened not to appear at trial to show support for her daughter. In effect, the mother saw her daughter as an extension of herself and argued, concededly with some validity, that unless she knew the truth she would not be able to establish a proper parenting approach with her child. The problem was that the mother said if her daughter had committed the theft, she would make her accept responsibility and plead guilty. The client, when advised that she could probably be acquitted at trial, did not share her mother’s view. The girl was ultimately acquitted, and her mother never knew the truth.

Then there are parents who are abusive or neglectful. In that instance, the juvenile court can be a better forum than the criminal court. In criminal court, abuse or neglect would, at best, only be considered a mitigating factor at sentencing, whereas in juvenile court, in some states, the information can be used to remove the stigma of delinquency from the child and bring neglect proceedings against the parent.

I represented a child who stole food from a store. He was charged with larceny, and he was held in detention because his

LOTTE OBSERVER, June 9, 2002, at 11Y. In North Louisiana, the state assumed operation of a juvenile prison from a private company because of all the violence and abuse inflicted by inmates and guards. The Violence Continues, TIMES-PICAYUNE, Dec. 21, 2001 at 6. However, two years later, the violence was continuing and one guard admitted that “fractured jaws are not an unusual occurrence.” Id. (internal quotation marks omitted).

189. See Model Rules of Prof’l Conduct R. 1.6 (2002) (requiring that “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent”); Model Code of Prof’l Responsibility EC 4-1, 4-4 (2000) (describing the limits of the attorney-client privilege); Model Code of Prof’l Responsibility DR 4-101(B) (discussing when a lawyer can and cannot reveal client confidences). Furthermore, the IJA/ABA Juvenile Justice Standards state specifically that an attorney should not reveal confidences of a juvenile client to anyone, including the parent of the minor. Juvenile Justice Standards Annotated § 3.3(b)(i) (1996).

190. See, e.g., Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982) (illustrating that mitigating evidence may be used to decrease a sentence).

191. See Cal. Welf. & Inst. Code § 241.1(a), (d) (West Supp. 2002) (requiring the county probation department to make an initial status determination of a child, as a dependent, delinquent, or status offender). But see In re Blakes, 281 N.E.2d 454, 457 (Ill. App. Ct. 1972) (dismissing and affirming the lower court’s delinquency adjudication and training school commitment for a child that claimed his theft of a bag of potato chips was necessary due to his parents’ neglect as a “specious argument which ha[d] no basis in law”).
mother refused to take him home. During my lengthy interviews with him, he admitted that he stole the food to feed himself and his younger sister. His mother was an abusive alcoholic, and maintained a chaotic household. My client had kept this information secret from the probation officer who interviewed him. Initially, he told me he did not want these facts relayed to the court. After many hours of discussion, he finally agreed to release of the information and to be placed outside the home. The mother was livid and threatened both of us—first, she threatened to have me removed from the case, and second, that her son would later pay for this dearly. I filed a motion asking the court to treat the child as a dependent rather than as a delinquent and the court placed the child and his sister in a foster home as neglected children.

Sometimes the parents' criminal activity is directly responsible for the child's unlawful acts. For example, some parents use their children as mules to buy and sell narcotics. The parents are anxious to conceal this information from the court and insist on sitting in on the attorney-client interviews to discourage their children from talking about their parents' involvement in the criminal activity. Indeed, some parents, to protect themselves, will encourage their children to plead guilty in juvenile court so their own complicity remains secret. The parents justify their behavior on the ground that their child will only get a slap on the wrist, whereas they would go to prison for a long time.

A study of adolescents on death row reported extreme examples of parental abuse and self protection. The children had been convicted in criminal court for capital offenses even though they were

192. CAL. WELF. & INST. CODE § 241.1(a), (d). California law states:
Whenever a minor appears to come within the description of both Section 300 [dependency] and Section 601 [delinquency] or 602 [status offenses], the county probation department and the child protective services department shall ... initially determine which status will serve the best interests of the minor and the protection of society. ... Nothing in this section shall be construed to authorize the filing of a petition ... or the entry of an order by the juvenile court, to make a minor simultaneously both a dependent child and a ward of the court.

Id.

193. I often confronted this situation when I conducted classes for juveniles who had been in trouble with the law. Most of the juveniles were in the class for a drug offense and many times it was the parent who actually dealt or used the drugs. The parents would encourage their own children to "help" the family financially by dealing drugs because the "child" would get a lighter sentence than the parent.

adolescents. A multi-disciplinary team discovered that almost all of them had been "brutally, physically abused" as younger children, suffered major neurological impairment, and displayed psychotic symptoms. Their parents had histories of alcohol and drug abuse and psychiatric hospitalization. These matters were not raised at the trial either because the child or the parents concealed or minimized the abuse. The youths were ashamed and the parents wanted to avoid blame. Some parents, in fact, had urged the judge to impose the death penalty. Perhaps most disturbing was the failure of defense counsel to elicit and use the mitigating evidence at trial and sentencing. In fact, some attorneys had divided loyalties and urged the medical team to conceal or discount the parental abuse, notwithstanding that their clients would be executed.

In sum, parents of children alleged to be delinquents can be an impediment to zealous advocacy by insisting on sitting in on attorney-client interviews, demanding that their children plead guilty, testifying against their children, or trying to hide neglectful behavior including their own complicity in the crime. Not all parents present such problems and it is helpful when parents are on the child's side. The attorney, however, must be aware at all times that the child, not the parent, is the client. If there is a clash between parent and child, the child must come first.

Gaps in representation, the lack of a per se rule for indigency, peculiarities of waiver for children, and conflicts of interest between parent and child mean that the reality of the juvenile's right to coun-

195. Lewis et al., supra note 194, at 585. The Supreme Court has held that the imposition of capital punishment on a person for a crime committed when the defendant was sixteen or older did not violate the cruel and unusual punishment clause of the Eighth Amendment. See Stanford, 492 U.S. at 380. The Court decided otherwise with respect to fifteen-year-olds. Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (plurality) (invalidating a death penalty imposed on a person who committed a capital offense when he was fifteen years old). Justice O'Connor concurred in the Court's judgment and left open the possibility that under certain circumstances it might be constitutional for the state to execute fifteen-year-olds. Id. at 848-49 (O'Connor, J., concurring in judgment).

196. See Lewis et al., supra note 194, at 586-87.
197. Id. at 587.
198. Id. at 587-88.
199. Id. at 588.
200. Id.
201. Id.
202. Id. (describing how these attorneys wanted to "spare the family any embarrassment").
sel does not live up to the promise of *Gault*. For children, the right to counsel remains elusive.

II. THE FALSE DICHOTOMY OF ZEALOUS ADVOCACY VERSUS THE CHILD'S BEST INTERESTS

The deficiencies noted above are often compounded by lawyers' confusion about their proper role when they represent a juvenile. Many attorneys practicing in juvenile court view their role in representing minors in delinquency cases more as guardian ad litems who seek the child's best interests, than as zealous advocates for the child-client. The attorneys who see themselves as guardian ad litems are often passive and somewhat uncomfortable dealing with "criminal matters" in the juvenile court atmosphere. Conflict is seen not only as unnecessary, but harmful. To such attorneys, serving the best interests of the child-client usually means following the disposition recommended by the probation department, even if it is

203. See Melton, *supra* note 61, at 148-49 (explaining how *In re Gault* "promised radical change in juvenile justice" but this promise has not been "followed to its conclusion").

204. Many courts agree with this viewpoint. See, e.g., *In re K.M.B.*, 462 N.E.2d 1271, 1273 (Ill. App. Ct. 1984) (finding that it was entirely appropriate for the child's attorney to express her opinion that the minor's out of home placement would be in her best interests, despite the fact that K.M.B. wanted to remain at home). The court concluded that the "recommendation [of counsel] was based on her professional evaluation . . . and indicate[d] . . . not only that K.M.B. received counsel but that she received [a] very conscientious counsel . . . [who] is to be highly commended." *Id.*

Recently, students taking my Children's Rights course at the University of Houston Law Center informed me that several attorneys had told them that they saw themselves more as guardian ad litems than as an attorney representing a client charged with a criminal offense.

205. The IJA/ABA Juvenile Justice Standards state that an attorney in delinquency proceedings "should ordinarily be bound by the client's definition of his or her interests with respect to admission or denial of the facts or conditions alleged," *Juvenile Justice Standards Annotated* § 3.1(b)(ii)[a] (1996), and that "[t]he active participation of counsel at disposition is often essential to protection of clients' rights and . . . the lawyer's most valuable service to clients will be rendered at this stage of the proceeding," *id.* § 9.1.

206. To some degree it is understandable that attorneys react in this manner. For years, the juvenile court was seen as an institution that was there to help the child and do what was in the child's best interests. This mindset can influence all the actors in juvenile court. See Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. Rev. 1083, 1129-30 (1991) (discussing that the "reason for less than zealous defense advocacy is the ambiguity felt by many juvenile court lawyers concerning their proper role"); David A. Harris, *The Criminal Defense Lawyer in the Juvenile Justice System*, 26 U. TOL. L. Rev. 751, 762-63 (1995) (discussing how an attorney either cooperates with the court and gets to contribute to the decision, or advocates to the hilt, falls in disfavor with the court, and becomes cut out of the loop).

207. See Ainsworth, *supra* note 206, at 1129 (stating that attorneys who exhibit "excessive zeal" in representing their clients are often reminded by the court that such attitudes are "inappropriate and counter-productive").
incarceration, and even though one might argue that the best interests of the child-client would be better served by keeping the child out of prison-like detention facilities.\textsuperscript{208} The term "kiddie court" is a revealing aphorism denoting informality, the absence of traditional lawyering, social work attitudes, and either the dispensing of slaps on the wrist punishment or therapeutic treatment.\textsuperscript{209}

Even some criminal law attorneys are guilty of acquiring a paternalistic attitude when they practice in juvenile court. They are accustomed to adult court and adult sentences; therefore, they often mistake juvenile court dispositions as being of minor consequence.\textsuperscript{210} To them, the juvenile court system is benign and incomparable to the criminal justice system in terms of restraints on personal liberty.\textsuperscript{211} Indeed, the juvenile court is considered more of a child welfare agency than a true court.\textsuperscript{212} What many people fail to appreciate is that the juvenile court has become increasingly punitive. Many juvenile codes now openly speak of the need to punish children for wrongdoing and prescribe mandatory and often lengthy sentences for delinquents.\textsuperscript{213}

\textsuperscript{208} See infra notes 240-266 and accompanying text (discussing the deplorable conditions in some juvenile detention facilities).

\textsuperscript{209} See Ainsworth, supra note 206, at 1130 (describing the general belief that the sentences in juvenile courts are "palliative" and "radically less severe" than those given in adult courts); see also Harris, supra note 206, at 762-63 (explaining the role of attorneys and judges in juvenile courtrooms).

\textsuperscript{210} See Selling Justice Short, supra note 99, at 16 (stating that many judges and attorneys believe that juvenile law is "easy law," not requiring any excessive efforts because, "after all, it's not like these are capital cases or anything"); Ainsworth, supra note 206, at 1127-28 (characterizing many lawyers as "seriously inadequate" when practicing in juvenile courts, because they fail to adequately prepare, make few objections, or call few witnesses).

\textsuperscript{211} Cf. Schall v. Martin, 467 U.S. 253, 255-57 (1984) (upholding a statute authorizing pretrial detention of a child alleged to be a delinquent if there was "a serious risk" he would commit a crime). Indeed, the Supreme Court itself has fostered such a belief. See id. at 265 (arguing that although children have an "interest in freedom from institutional restraints, . . . that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody").

\textsuperscript{212} Professor Harris describes the situation in the following way:

The judge may [be seen as] little more than a super social worker in a robe . . . . doing what was "necessary" to help the child . . . . [and, therefore,] commit[ting] all [individuals]—even defense counsel—to a nonlegal, helping approach. . . . Simply put, no one in the system wants counsel assigned to represent juvenile offenders to act as a "real" lawyer would. See Harris, supra note 206, at 763-64 (footnote omitted).

\textsuperscript{213} Several states have changed their juvenile codes to place a stronger emphasis on punishment and to hold juveniles accountable. See, e.g., Colo. Rev. Stat. Ann. § 19-2-102(1) (West Supp. 2002) (stating that in order to protect the public, the juvenile system "will appropriately sanction juveniles who violate the law"). For a further discussion on the changes of the juvenile justice system from rehabilitation to punishment, see Giardino,
Furthermore, a two- or three-year sentence for a child who is in the midst of rapid development may be more harmful than a ten-year sentence for an adult. To children, even adolescents, time is measured differently from adults and the same two-year sentence may have much more severe consequences. Removing a child from his or her home, school, and community can have devastating effects, including recidivism both as a child and as an adult. Moreover, in some jurisdictions, a sentence rendered in juvenile court can be as long as the sentence imposed for a comparable crime committed by an adult offender. Sentences imposed by juvenile courts may even extend beyond the period when the child offender is legally under the jurisdiction of the juvenile authorities. In California, for example, when the child reaches eighteen, he or she may be transferred to an adult facility, and at twenty-five the prisoner must be transferred.

This blurring of the distinction between juvenile and criminal court is also exemplified by the Texas determinate sentencing law. The statute, as amended in 1995, was designed as a compromise be-

supra note 8, at 228-49 (discussing the increasingly punitive goals of state juvenile justice systems, switching their emphasis from the best interest of the child to public safety).

214. See Goldstein et al., supra note 37, at 40-49. In order to meet the needs of children it is important for the child’s placement to be made quickly and in a way that will cause the least damage to the child’s psychological well-being. Id. at 42-45. It is easy for a child to feel abandonment when removed from his or her home. Id. at 41. Although Goldstein, Freud, and Solnit discuss a child’s placement in dependency proceedings, they also have noted that dependency and delinquency hearings are similar in the sense that they are determining a child’s placement. Id. at 65.

215. See Schwartz, supra note 76, at 51 (stating that children in Maryland committed to Montrose School, a juvenile detention and commitment facility, were “re-adjudicated within two years of their first admission,” and that “three-quarters of the youth released from the Hickey School in 1983 were returned to the facility within two years”). However, when Massachusetts closed their juvenile state training schools and implemented alternative community-based programs with individualized programming, serious juvenile crime and recidivism rates actually decreased. Id. at 52.

216. Id. at 51 (finding that sixty percent of the juveniles released from prison in Florida were rearrested within one year, and in California, that eighty percent of the “juveniles released from selected California Youth Authority institutions were rearrested for having committed serious crimes”). Again, jurisdictions that reformed their juvenile incarceration systems had declining recidivism rates. Id. at 53 (finding “[i]n 1972, [that] 35 percent of the adults committed to the [Massachusetts] state prison system were graduates from the juvenile system. [But] [i]n 1985, only 15 percent had been through the juvenile system”).

217. See, e.g., Cal. Welf. & Inst. Code § 726 (West 1998) (stating that a minor can be confined up to the maximum term of imprisonment that an adult would receive for the same penal offense).

218. See, e.g., id. § 607(b) (declaring that the juvenile court can maintain jurisdiction of a juvenile until the age of twenty-five if the minor has been committed to the California Youth Authority).

219. Id.
tween those who wanted to expand the category of children subject to waiver to criminal court by lowering the age threshold and expanding the class of offenses subject to waiver and those opposed to such expansion of the waiver provisions.\textsuperscript{220} The compromise was a determinate sentencing law which permits children between ten and sixteen years of age who are charged with one of a dozen plus crimes to be tried in juvenile court,\textsuperscript{221} but subjected to imprisonment for longer periods than ordinary delinquents, and to be transferred to adult correctional facilities upon reaching maturity.\textsuperscript{222} Given these recent changes in both the practice and ideology of the juvenile justice system, it is difficult to justify any attorney assuming a guardian role, rather than an advocate role, when practicing in juvenile court.

Many attorneys go along with the probation department’s recommendation that the child remain at home under supervision.\textsuperscript{223} This disposition seems innocuous because the child remains with his family and the probation officer may be able to help the child.\textsuperscript{224} However, the probation officer often has a caseload of one hundred or more cases; he or she triages and spends little time with those that do not seem to be most at risk.\textsuperscript{225} In these circumstances, it is likely that the child will violate probation. This time around, the disposition invariably will be more harsh because the child has demonstrated that he cannot live at home and that probation supervision, which may have been minimal, is insufficient to help the child.\textsuperscript{226}

\textsuperscript{220} Prior to 1995, the waiver provision applied only to fifteen- and sixteen-year-olds who were charged with having committed a felony. In 1995, the age was lowered to fourteen, if the child was alleged to have committed one of three very serious felonies, “a capital felony, an aggravated controlled substance felony, or a felony of the first degree.” \textsc{Tex. Fam. Code Ann.} § 54.02(a)(2)(A) (Vernon 2002).

\textsuperscript{221} \textit{See id.} § 53.045(a)(1)-(16). Originally the determinate sentencing law applied only to six very serious offenses. The amendments include such offenses as, murder, capital murder, manslaughter, aggravated kidnapping, sexual assault or aggravated sexual assault, aggravated assault, aggravated robbery, injury to a child or an elderly or disabled person, felony deadly conduct involving discharging a firearm, aggravated controlled substance felony, criminal solicitation, indecency with a child, criminal solicitation of a minor, attempted murder or capital murder, arson, and intoxication manslaughter. \textit{Id.}

\textsuperscript{222} \textsc{Tex. Hum. Res. Code Ann.} § 61.079 (Vernon 2002) (stating that when the juvenile is between the ages of sixteen and twenty-one, the Texas Youth Commission may seek to transfer the child to the Texas Department of Criminal Justice if “(1) the child has not completed the sentence; and (2) the child’s conduct . . . indicates that the welfare of the community requires the transfer”).

\textsuperscript{223} \textit{Selling Justice Short, supra} note 99, at 14.

\textsuperscript{224} \textit{Id.} at 28-29.

\textsuperscript{225} \textit{See} Ronald P. Corbett, Jr., \textit{Juvenile Probation on the Eve of the Next Millennium}, \textsc{Fed. Probation}, Dec. 1999, at 78, 79 (noting the national average caseload of 41 probationers is generally much higher in urban locations).

\textsuperscript{226} Feld, \textit{supra} note 33, at 1306-07.
In addition to the inadequacies with home supervision recommendations, there are not enough good residential treatment facilities, and there are long waiting lists and strict criteria for acceptance.\textsuperscript{227} The available residential treatment facilities are very expensive, rivaling tuition and board at the nation's most prestigious colleges.\textsuperscript{228} Who pays? If the child is on Medicaid, public facilities will often accept whatever payment Medicaid gives.\textsuperscript{229} Above that line, the parents must pay either from insurance or their own pocket. Thus, parents who are part of the working poor will not be able to afford the tuition.

Boot camps are being touted as an efficacious and less expensive alternative.\textsuperscript{230} These facilities are typically isolated geographically and

\textsuperscript{227} Residential treatment programs for juvenile delinquents are typically some type of mental health program. However, the American Psychological Association stated that forty to seventy percent of incarcerated youth have mental health problems and are not receiving treatment. See W. John Thomas et al., Race, Juvenile Justice, and Mental Health: New Dimensions in Measuring Pervasive Bias, 89 J. Crim. L. & Criminology 615, 627 n.84 (1999) (citing Am. Psychiatric Ass'n, APA Official Actions: The Psychiatrist and the Juvenile Court System, 147 Am. J. Psychiatry 1584, 1584-85 (1990)). In a discussion with juvenile probation officers in Texas, I was told that they believe over ninety percent of the juveniles who have been adjudicated delinquents have mental health problems and should not be in the juvenile justice system.

When the family has health insurance to cover the cost for treatment, the child is more likely to receive the proper care as many of the facilities are privately run by for-profit corporations. See Dennis E. Cichon, The Ignored Population: Children in the Mental Health System, 17 T.M. Cooley L. Rev. 9, 14 (2000) (discussing the increasing number of private facilities for treating juveniles with mental health problems).

\textsuperscript{228} A child in a residential treatment program spends an average of thirteen months in the program at a cost of $28,678. Gary B. Sutnick, "Reasonable Efforts" Revisited: Reforming Federal Financing of Children's Mental Health Services, 68 N.Y.U. L. Rev. 136, 146 (1993). Juvenile justice commissions do not always have the money to cover the costs and will often turn to the parents for reimbursement or medical insurance coverage. See, e.g., Psychiatric Inst. of Washington, D.C., Inc. v. Johnson, 944 F. Supp. 5, 7 (D.D.C. 1996) (stating that pursuant to a Virginia statute "after an investigation and hearing, the court shall order and decree that the parent or other legally obligated person shall pay . . . a reasonable sum commensurate with the ability to pay, that will cover in whole or in part the support and treatment of the juvenile"); In re Carlson, 176 B.R. 890, 892 (Bankr. Minn. 1995) (stating "if the child's resources are insufficient to reimburse the County, [Minnesota statute] provides that the court must order the parents to contribute to the cost of examination, care or treatment of the child").

\textsuperscript{229} Although boot camp advocates claim this is a less expensive way of dealing with juvenile delinquency problems, studies indicate otherwise. The Office of Juvenile Justice and Delinquency stated that "boot camps run an average of 10 times the cost of a juvenile on probation." Jerry Tyler et al., Juvenile Boot Camps: A Descriptive Analysis of Program Diversity and Effectiveness, 38 Soc. Sci. J. 445, 446 (2001). Costs for the administration of these camps run from $65 per day per youth to $188 per day per youth, while probation supervi-
have a military style curriculum. They purportedly provide juveniles with a rigorous, disciplined routine that encourages the youth to accept responsibility, build self-esteem, and develop trust of others. Juveniles are often given group punishments for violations of rules rather than encouragement for behaving correctly. Some are not licensed and thus there is little oversight and their employees are often not sufficiently trained. There have been a number of deaths of children in such facilities, and recently the director of such a boot camp was indicted for murder because a fourteen-year-old died after being required to remain in one-hundred-degree heat without water. Another available, yet objectionable facility, is the state training school. These facilities are lock-ups and resemble prisons. By and large there is little medical care or schooling. The cases reveal cruelty that may be even more extreme than in adult prisons.

During the 1970s a number of class action lawsuits were brought in federal courts to correct the deplorable conditions that existed in juvenile locked facilities. In Rhode Island children were kept in small, dark cement rooms where the only opening was a small barred

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231. Morby, supra note 230.
232. See Tyler et al., supra note 230, at 449, 458.
233. See MARGARET BEVER, JUVENILE BOOT CAMPS DON'T MAKE SENSE, at http://www.abanet.org/crimjust/juvjus/cjbootcamp.html (1996) (discussing how teenagers are especially resistant to "unfair" treatment like group punishment that is widely used in boot camp facilities).
234. Tyler et al., supra note 230, at 449.
236. See supra note 10 (citing state definitions of "training schools"); cf. In re Lavette M., 316 N.E.2d 314, 317 (N.Y. 1974) (stating that a training school, a locked facility, is proper even for a person in need of supervision (PINS) as long as proper treatment is provided).
239. See Nelson v. Heyne, 491 F.2d 352, 354 (7th Cir. 1974) (citing routine beatings administered by staff members); Morales v. Turman, 364 F. Supp. 166, 169-73 (E.D. Tex. 1973) (finding that staff members routinely administered physical beatings, including blows to the face, and used tear gas).
window.\textsuperscript{241} Often the window was boarded up and with no artificial lighting, the room would be totally dark.\textsuperscript{242} In one of the buildings, the children were allowed out of their cells only for a daily shower and to receive their meals which had to be eaten in their cell.\textsuperscript{243} The children were unable to exercise.\textsuperscript{244} Many children would receive nothing to eat for sixteen hours, as the last meal of the day was given at three o’clock in the afternoon, and no other food was provided until seven o’clock the next morning.\textsuperscript{245} Lack of education was another major problem.\textsuperscript{246} The state provided only one and a half to two hours of education a day, which consisted mostly of math problems.\textsuperscript{247} Visitors were also limited, and many children went months without being able to see their parents or other relatives.\textsuperscript{248}

Facilities in Indiana,\textsuperscript{249} Texas,\textsuperscript{250} and New York\textsuperscript{251} were not any better. In Indiana, children were disciplined by being severely beaten with a thick paddle and subjected to intramuscular injections of tranquilizing drugs Sparine and Thorazine, designed for psychotic patients, which were administered to the juveniles, not for psychiatric purposes, but solely to control their behavior.\textsuperscript{252} Proper medical treatment was not provided and the dose of tranquilizer was generally the same for all the inmates, regardless of weight.\textsuperscript{253} Similar conditions existed in Texas.\textsuperscript{254} Children were disciplined by a system called “racking” where a juvenile was forced to stand against the wall with his hands in his pockets, while the guard would beat him on the face and body with a closed fist.\textsuperscript{255} Another form of discipline was to have the juveniles do “make-work tasks,” such as pulling grass without bending their knees for hours on end.\textsuperscript{256} In New York, children were disci-

\textsuperscript{241} See Affleck, 346 F. Supp. at 1359.
\textsuperscript{242} Id.
\textsuperscript{243} Id.
\textsuperscript{244} Id. at 1359, 1361.
\textsuperscript{245} Id. at 1360.
\textsuperscript{246} Id. at 1361.
\textsuperscript{247} Id. at 1359, 1361.
\textsuperscript{248} Id. at 1360-61.
\textsuperscript{249} See Nelson v. Heynes, 491 F.2d 352, 353-54, 356-58 (7th Cir. 1974).
\textsuperscript{252} Nelson, 491 F.2d at 354, 356.
\textsuperscript{253} Id. at 356 n.9 (citing the standard order proscribing 25 milligrams of Sparine for “an emotionally upset boy under 116 pounds,” and 50 milligrams of Sparine for any child over that weight).
\textsuperscript{254} See Morales, 535 F.2d at 867-69.
\textsuperscript{256} Id. at 172.
plained by being held in isolation cells, often for weeks. The cells were bare except for a mattress at night. Have these conditions changed? Recently a suit was filed against the California Youth Authority (CYA) alleging some of these same conditions. Young offenders are forcibly given mind-altering drugs while being denied proper psychiatric care. They are sometimes placed in small “metal cages,” where, the CYA contends, the youths are given educational opportunities and exercise. Children are allegedly raped by other inmates and are not protected by the guards. In 2001, Maryland began to phase out two juvenile detention facilities due to similar conditions. In Louisiana, the state took over the operations of a privately run juvenile facility because of the appalling conditions, which still existed months after the state took control. Juveniles are disciplined with extreme force and sufficient education is still not provided.

Can anyone say that such facilities are in a child’s best interests? It is true that there are dangerous children who must be incarcerated to protect society, but nothing requires that they be abused. Protecting society is the same rationale given for sentencing adult defendants to prison. Prison sentences may protect society, but no one claims that incarceration is in the adult offender’s best interests.

The role of an attorney in juvenile court was perhaps best expressed by Justice Fortas in Kent v. United States, which held that a child being considered for waiver to adult criminal court is entitled to a hearing, an attorney with access to probation files, and a statement

257. See Lollis v. N.Y. State Dep’t of Soc. Servs., 322 F. Supp. 473, 475-76 (S.D.N.Y. 1970) (finding that the child was held in an isolation cell for two weeks, and quite likely would have been held longer if not for the intervention of the judge that found her during a routine visit).
258. Id. at 476.
259. Warren, supra note 238.
260. Id.
261. Id. It is unclear how the authorities actually expect children to exercise in such small quarters.
262. Id.
263. Maureen O’Hagan, Maryland to Phase Out Troubled Youth Center; Most Juveniles to Move to Community Programs, WASH. POST, Dec. 28, 2001, at B04.
264. See Fox Butterfield, Settling Suit, Louisiana Abandons Private Youth Prisons, N.Y. TIMES, Sept. 8, 2000, at A14 (explaining that children were beaten by the guards regularly, denied food and clothing, and were not provided proper medical treatment).
265. See Joe Gyan, Jr., Judge Frees Youth, Blasts Prison, ADVOCATE, Dec. 20, 2001, at 6-B (citing the continued violence in the youth prison, even after the state was running the facility).
266. Id.
267. See Franklin v. Lynaugh, 487 U.S. 164, 189-90 (1988) (Stevens, J., dissenting) (alluding to the fact that sentences can serve to protect society from the violent defendant).
detailing the reasons for the transfer. The circuit court of appeals in the case had justified the denial of access to probation reports on the ground that it was not counsel’s role to “denigrate” probation recommendations. In reversing, the Supreme Court stated, “it is precisely the role of counsel to ‘denigrate’ such matter.” Justice Fortas eloquently noted that “[t]he right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice.” This moving description of counsel’s role is not merely flowery rhetoric. Rather, the provision of adequate counsel is of profound importance to the well-being of children in juvenile court.

III. HOLISTIC LAWYERING

The model of holistic lawyering that I propose permits, and indeed requires the lawyer to act as a lawyer. While zealous advocacy informs the entire model, the attorney also is associated with other professionals in a team. The combined skills of each team member contribute to the kind of advocacy that truly ensures the best interests of the child. This model requires money, access to professionals in other disciplines, a keen appreciation of the dangers of the juvenile court system, attitudinal changes regarding the attorney child-client relationship, the necessity for adversarial representation, and expertise in child development and criminal, juvenile, and civil court law and practice. Even attorneys with limited means can employ aspects of this model. The differences between the ideal and real worlds are more in degree than in kind, and, as with most things, ultimately rest on the extent of available resources.

A. Ideal Holistic Lawyering

1. The Value of a Team Approach.—Simply stated, my proposal of ideal holistic lawyering for minors charged with juvenile delinquency encompasses a team approach. The team should include attorneys who specialize in juvenile law, social workers, educators, therapists, psychologists, psychiatrists, investigators, and criminal and civil law attorneys who work together to provide high quality representation for the child-client.

268. 383 U.S. 541, 561-63 (1966) (stating the child’s “rights are meaningless—an illusion, a mockery—unless counsel is given an opportunity to function”).
270. Kent, 383 U.S. at 563. The Court granted counsel access to probation reports “within reasonable limits having regard to the theory of the Juvenile Court Act.” Id.
271. Id. at 561.
This is not a new concept. For years the medical profession has used a team approach to treat patients, particularly those with cancer. As medicine has become more complex and specialized and our knowledge expands, it is impossible for one doctor to know and do everything. Doctors must rely not only on other doctors, such as radiologists, surgeons, anesthetists, but also nurses, x-ray technicians, nutritionists and social workers. No one thinks twice about the medical team approach, and indeed, a patient would undoubtedly question its absence.

Social service agencies also use a team approach, or as it is more formally termed, vertical case management. This collaborative effort assists clients in getting the maximum benefits. By bringing in various disciplines, such as law and medicine, social workers have found that they are better able to help clients solve their multifaceted problems.

Legal matters present the same kinds of difficulties. Law has become increasingly specialized, reflecting increasingly complex legal issues. A lawyer may specialize not only in one area of the law, but also in only one aspect of the specialized field. A criminal lawyer, for example, may be an expert in Fourth Amendment issues, but know very little about the insanity defense. The lawyer specializing in the insanity defense will, of course, bring in medical experts to develop and present the defense. Corporate attorneys will use certified public accountants (CPAs) to defend clients accused of accounting fraud. Indeed, corporate attorneys have been using a form of holistic lawyering


273. See, e.g., McNair, supra note 272, at 50 (listing some of the many professionals that may participate on a pediatric cancer patient's team).

274. See Rocco A. Cimmarusti, Family Preservation Practice Based Upon A Multisystem Approach, CHILD & ADOLESCENT SOC. WORK J., Aug. 1992, at 277-88; Mark Krueger, Making the Team Approach Work in Residential Group Care, 66 CHILD WELFARE 447, 449-57 (1987) (recommending the structural framework for a team approach); McNair, supra note 272, at 50 (explaining how social workers, as well as doctors, are members of pediatric cancer patients' team).

275. See McNair, supra note 272, at 50-51 (explaining the vital benefits of a team approach).

276. See Annie G. Steinberg et al., Child-Centered, Vertically Structured, and Interdisciplinary: An Integrative Approach to Children's Policy, Practice, and Research, 40 FAM. CT. REV. 116, 117 (2002) (discussing the combination of law, medicine, and social work to help address the various problems faced by children).
for many years—commonly termed Multi-Disciplinary Practices (MDP)—and the American Bar Association’s Commission on Multidisciplinary Practices (CMP) has given its imprimatur of approval to these approaches. Historically, accounting firms expanded the services they offered clients to include estate and financial planning, acquisitions and mergers, and mediation. As the firms were supplying assistance in areas that were traditionally provided by lawyers, these firms recruited attorneys to work within the firm and assist with the provision of these services. On the criminal side, the O.J. Simpson case is a paradigm of holistic lawyering—the “dream team” of attorneys, private detectives, DNA experts, psychologists, and jury consultants. Indeed, the ABA Standards of Criminal Justice state that:

Quality legal representation cannot be rendered either by defenders or by assigned counsel unless the lawyers have available for their use adequate supporting services. These include . . . expert witnesses . . . , personnel skilled in social work and related disciplines to provide assistance at pretrial release hearings and at sentencings, and trained investigators to interview witnesses and to assemble demonstrative evidence. The quality of representation at trial, for example, may be excellent and yet valueless to the defendant if the

277. Janet Stidman Eveleth, Lawyers Practicing Law with Non-Lawyers?, Mo. B. J., Jan./Feb. 2001, at 40, 41-42. In these practices, lawyers and non-lawyers provide various services for clients, such as legal services by the attorneys and accounting services by non-lawyers. Id. at 41.

278. Id. at 42. Although the CMP has supported this concept, the American Bar Association’s House of Delegates, after much debate, passed a resolution to prohibit the sharing of fees and ownership of the firm by lawyers with non-lawyers. Id. at 43. Individual state bar associations are also reviewing this matter and are choosing to support the concept. Id. at 42.

279. Id. at 42.

280. Id. “The concept of MDPs has been hotly debated” and discussed in relation to corporate matters and particularly in regard to “[t]he ‘big five’ accounting firms.” Id. at 41-42. Its application to non-profit legal services agencies or criminal representation has not been a major topic of discussion. There are, however, many advantages for indigent clients to have accessibility to “one-stop shopping” for social and legal services. See Stacy L. Brustin, Legal Services Provision Through Multi-Disciplinary Practice—Encouraging Holistic Advocacy While Protecting Ethical Interests, 73 U. Colo. L. Rev. 787 (2002) (weighing the ethical concerns of MDP against the benefits to clients of legal services corporations).

defense requires the assistance of a psychiatrist or handwriting expert and no such services are available.\textsuperscript{282}

How would this approach play out for attorneys representing children in delinquency matters? As noted above, representation of children charged with crimes is no easy job. Juvenile court procedures are usually termed civil matters,\textsuperscript{283} that requires the attorney to know civil law—how to preserve the record,\textsuperscript{284} motions, discovery, rules of appellate practice, etc.\textsuperscript{285} The reality, however, is that the child is charged with committing a penal offense,\textsuperscript{286} and therefore the attorney must know both substantive criminal law and criminal procedure. But that is not enough. The attorney must also know juvenile law and practice, which may differ from both civil and criminal law. If the child is found guilty, dispositional alternatives become critical.\textsuperscript{287} The attorney cannot rely on an overworked probation officer to explore all possibilities. The attorney needs a social worker who is experienced...

\textsuperscript{282}ABA STANDARDS FOR CRIMINAL JUSTICE § 5-1.4 cmt. (1986).

\textsuperscript{283}See, e.g., TEX. FAM. CODE ANN. § 56.01(a) (Vernon 2002) (stating that a juvenile has a right to appeal an order from a juvenile court in the court of appeals and the Texas Supreme Court according to the requirements for civil appeals).

\textsuperscript{284}Cf. Reasoner v. State, 463 S.W.2d 55, 59-60 (Tex. Civ. App. 1971). In Reasoner, the court stated that the child's counsel waived the right to claim an unlawful search and seizure because the attorney neglected to object to evidence being offered by the state and subsequently argued his motion to suppress. \textit{Id.} The trial court treated the motion to suppress as a motion in limine, which in civil practice, unlike criminal practice, requires an objection when the contested evidence is offered into the record. \textit{Id.}

\textsuperscript{285}Although these are denominated civil proceedings, the courts will often deny the alleged delinquent the benefits of civil rules of procedure because delinquency cases are quasi-criminal in nature. See TEX. FAM. CODE ANN. § 51.17(a)-(b) (Vernon 2002) (providing that although the Texas Rules of Civil Procedure in general apply to delinquency proceedings, Criminal Rules of Procedure, which are not expansive, cover discovery in delinquency cases); S.D.G. v. State, 936 S.W.2d 371, 385 (Tex. App. 1996) (holding the rules of civil discovery are not compatible with the purpose and nature of juvenile proceedings); In re M.A.G., 541 S.W.2d 899, 900-01 (Tex. Civ. App. 1976) (even though delinquency proceedings are generally governed by the Texas Rules of Civil Procedure, adopting a rule of criminal procedure permits appellate courts to dismiss cases of fugitives).

\textsuperscript{286}See CAL. WELF. & INST. CODE § 602(a) (West Supp. 2002) (stating that any person under the age of eighteen who "violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court"); FLA. STAT. ANN. § 984.03(11) (West Supp. 2002) (defining a delinquent as a child who "is found by a court to have committed a violation of law"); 705 ILL. COMP. STAT. ANN. 405/5-105(3) (West Supp. 2002) (describing a delinquent minor as one "who prior to his or her 17th birthday has violated or attempted to violate, . . ., any federal or State law, county or municipal ordinance"); N.Y. FAM. CT. ACT § 311.1(2) (McKinney 1999) (declaring that a juvenile court petition "shall charge at least one crime"); TEX. FAM. CODE ANN. § 51.03(a) (Vernon 2002) (explaining that delinquent conduct is "conduct, other than a traffic offense, that violates a penal law").

\textsuperscript{287}PURITZ ET AL., supra note 114, at 36-38.
in such matters and knows of private treatment facilities that are specially geared for the child’s particular problem and that are less prison-like. Psychiatrists and psychologists will provide necessary information on the particular child’s intelligence and emotional state, the differences in child development, and how to communicate effectively with minor children. Educational specialists can determine why the child hates school and is doing poorly there. While some such services are provided by the juvenile courts, there is often a long waiting period to receive them, and these professionals, paid by the state, are not always sympathetic to the child’s perspective. Furthermore, they are not available on a day to day basis to assist the attorney and child in communicating.

In one case, I represented a young girl whose mother had remarried and the girl, Joan, did not get along with her step-father. In addition, she was required to spend a lot of time babysitting a new sibling. Joan ran away from home and in the process was arrested for joyriding. She was found guilty, and the question at the dispositional hearing was Joan’s placement. Many of the typical teenage-parent problems were present; however, despite the parents’ ambivalence, Joan did want to return home.

I arranged for a local psychologist to interview Joan, and with Joan’s consent, to talk with the mother and step-father. The psychologist discussed a program he had developed in another community that he believed would meet the needs of Joan and her family. He explained to Joan what would be involved and received her input regarding the workability of the program. Joan agreed it was something she wanted to try. At this stage, the parents agreed it was best for Joan to remain with them. The probation department, on the other hand, was recommending placement in a group home. The psychologist testified to the appropriateness of the suggested plan and Joan’s willingness to cooperate. Joan was able to take the stand and intelligently discuss what was involved in the treatment program for her, her mother, and step-father. She also clearly indicated her involvement

288. See Steinberg et al., supra note 276, at 117-18 (discussing the failures of juvenile justice services).
289. “Except for the zealous representation that can be expected of community legal services attorneys, [court-assigned] counsel are frequently ineffective and unskilled, and give their clients less than their full effort.” Martin Guggenheim, The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children, 59 N.Y.U. L. Rev. 76, 140 (1984) (footnote omitted). Given that court-appointed counsel frequently give their clients less than zealous representation, by analogy, court-appointed psychiatrists or psychologists, unless committed to providing community psychiatric or psychological services, may not be inclined to devote their full effort either.
with the development of the plan and her acceptance of it. The judge, who routinely followed the probation department’s recommendation, was impressed with the psychologist’s and Joan’s participation. She permitted Joan to remain at home, and ordered her and the family to engage in the program with this particular psychologist.

Even in cases that do not appear to need the use of experts, the attorney’s lack of knowledge can affect the representation the client receives. Once, a criminal defense lawyer appeared in juvenile court with a sixteen-year-old client charged with driving under the influence. The child told his attorney that he had failed the sobriety test because he had dyslexia. The attorney relayed this information to the prosecutor, who then invited the defense attorney to watch a videotape of the sobriety test. As the tape was played, the district attorney commented that the juvenile had not been asked to read anything and had not reversed any letters or numbers, and therefore, dyslexia had nothing to do with the minor failing the sobriety test. The defense attorney agreed, and stated he did not know what his client was talking about or why he had insisted that dyslexia caused him to fail the test. Based on the tape, the attorney advised the prosecutor that he would convince his client to plead guilty.

There are several indications of poor lawyering in this incident, whether the client is an adult or a child. The attorney did not ask his client how the dyslexia affected his ability to pass the sobriety test, and even if he had, a child is unlikely to be able to explain fully the connection between dyslexia and the sobriety test. Since the attorney had no knowledge of learning disabilities, particularly dyslexia, he was severely disadvantaged in his discussions with the prosecutor. Had the defense attorney consulted with an expert, he would have learned that some types of dyslexia can also affect eye-hand coordination in such a way as to make the person appear intoxicated.290

A common occurrence, especially when representing children accused of crime, is that the client will say that he has an alibi witness, but only knows his first name, or, more frequently, his street name, “Speedy.” An investigator can question the child regarding the streets or stores that Speedy frequents or the kids with whom he associates. I remember vividly several cases in which our investigator, an ex-police

290. NAT’L CTR. FOR LEARNING DISABILITIES, DYSPRAXIA, at http://www.ncld.org/info/indepth/dyspraxia.cfm (last visited Dec. 22, 2002). There are several learning disabilities that people tend to categorize as dyslexia. One of these is dyspraxia which causes coordination problems, confusion about which hand to use for tasks, poor sense of direction, difficulty in sequencing, difficulty with spatial relations, and poor communication skills. Id.
officer, against all odds, had ferreted out the alibi witness that the prosecution had sarcastically called the phantom witness. Another scenario that repeats itself in juvenile court is clients who will only mumble "yes" or "no," or worse, "I don't know" and "I don't remember," or worst of all, total silence. A trained child psychologist can draw the child out, and make it easier for the attorney to get the requisite information.  

Unlike many portraits from the eighteenth century, children are not merely miniature adults. People who, in other contexts recognize and relate to children differently than to adults, when faced with criminal activities by juveniles, suddenly no longer see the child as a child, but rather as a super-predator adult criminal deserving of adult punishment. If the juvenile court system is a recognition that children are different from adults, and that the best interests of the child must govern, lawyers for child-clients must utilize the skills of all professionals who can help to bridge the gap between adult and child.

2. The Dynamics of Ideal Holistic Lawyeing.—To get the full benefits of such a team approach, it must be structured in such a way as to assure that the professional participants freely interact with each other and provide optimal input. Studies show that when professional teams are hierarchically structured with the doctor or lawyer at the top, the other professional team members are more reluctant to speak out, and the patient or client has less control over his treatment or representation. Group members may avoid this problem by voting on the leader, or making decisions based on a majority vote. Ethical problems, however, may result from such practices. The attorney must ultimately rely on his or her own professional judgment in representing a client, regardless of what other team members conclude when, in his or her view, such conclusions may be detrimental to the child’s legal defenses. Indeed, the United States Supreme Court

291. It is difficult for an attorney to know all aspects of child development. A good child psychologist who understands child and adolescent development can help in interviewing the child-client.

292. See PURITZ ET AL., supra note 114, at 34 (noting the legislative trend towards classifying more juvenile crimes as adult crimes).


294. MODEL RULES OF PROF’L CONDUCT R. 5.4(c) (2002); MODEL CODE OF PROF’L RESPONSIBILITY DR 5-107(B) (1999).

has held in *Jones v. Barnes*,\(^\text{296}\) that an attorney need not obey even the client's directive to pursue or raise even non-frivolous claims,\(^\text{297}\) notwithstanding *Faretta*'s ruling permitting defendants to represent themselves in criminal cases.\(^\text{298}\)

The permissibility of such a hierarchical arrangement between attorney and client allowed by *Jones* is perplexing, particularly after the *Faretta* decision.\(^\text{299}\) If the accused may dispense with counsel altogether, surely after being advised of the options, he or she must make the ultimate decisions affecting their representation, as long as it does not involve committing a crime,\(^\text{300}\) providing ineffective assistance of counsel,\(^\text{301}\) or impinging on the lawyer's ability to make instantaneous trial decisions.\(^\text{302}\)

Does the fact that the client is a child change my view? In general, no. Children, when properly informed of all matters by the team, can make good decisions regarding their representation. Unless there are compelling circumstances, the child, if he or she wishes, should be present for team meetings and have access to reports.\(^\text{303}\) The issues must be explained in a way that is child-friendly, and the client should be urged to provide feedback and direction to team


\(^{297}\) *Id.* at 753-54.

\(^{298}\) 422 U.S. 806, 819-20 (1975).

\(^{299}\) *Post-Faretta* law has, however, limited the right to self-representation. See *McKaskle v. Wiggins*, 465 U.S. 168, 173-74 (1984) (holding that *Faretta* does not preclude the appointment of standby counsel even over defendant's objection, and that there is no right to "hybrid" representation). Furthermore, the trial court, in its discretion, may impose separate counsel over a defendant's objection to avoid a conflict of interest. See *Wheat v. United States*, 486 U.S. 153, 163 (1988) (upholding the lower court's decision refusing the petitioner's request to substitute his counsel with the co-defendant's counsel in an effort to protect himself). The defendant, however, is bound by counsel's errors. *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). Of course, if counsel's errors are sufficiently egregious and prejudicial, defendant's Sixth Amendment right to effective assistance of counsel is violated. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Compare my views on this issue with respect to children being able to waive counsel where I take the position that *Faretta* should not apply to children in juvenile court. *Supra* notes 173-174 and accompanying text.

\(^{300}\) *See Model Rules of Prof'l Conduct* R. 1.2(d) (2002) (prohibiting an attorney from engaging or assisting in a client's criminal or fraudulent conduct).

\(^{301}\) *Strickland*, 466 U.S. at 686.

\(^{302}\) *See Wainwright*, 433 U.S. at 94 (Burger, C.J., concurring) (noting that "trial decisions are of necessity entrusted to the accused's attorney").

\(^{303}\) *See supra* notes 173-174 and accompanying text (advocating the mandatory assignment of counsel without the possibility of waiver). Children who are retarded or psychotic might be unable to make these ultimate decisions, but even with respect to such children, individual evaluations should be made. Therefore, any reports that may be psychologically damaging to the child should be discussed individually with the child prior to the team meeting. The discussion should be handled by an expert, a psychologist or other mental health worker, and explained carefully to the child in order to do the least harm possible.
members. Children in juvenile court often do not understand what is happening to them, what the possible consequences are, or how selecting different choices can affect their lives. At the very least, children in juvenile court have to be kept informed. Many children will ultimately ask the lawyer to make the decision, particularly when the juvenile is very young. That is fine, because the child is deciding to let the lawyer decide. What is important is that the child knows he or she has a say in the outcome. Of course, the older the child, the greater the likelihood that the child, after being informed, will elect to make the ultimate decision. Realistically, however, based on my experience, almost all children, even older adolescents, will elect to follow their attorney's recommendation.\textsuperscript{304} That too is fine, because the child is still the decisionmaker.

However, if the attorney agrees with this view of lawyering in the juvenile court, he or she must be careful not to \textit{unduly} influence the client. Children naturally look to authority figures to make decisions for them.\textsuperscript{305} If the attorney under the guise of providing information overwhelms the child, he or she implicitly becomes a guardian rather than a lawyer.\textsuperscript{306} For example, consider an attorney that is representing a child charged with a hate crime. The child sees nothing wrong with his actions since his parents, who are anti-Semitic, supported his decision to paint a swastika on a Jewish classmate's garage. The lawyer is appalled by the child-client's actions and thinks it would be good for the child to be removed from his home environment lest he grows up to be a violent "skinhead." Although the lawyer may want to influence his client and encourage him to take responsibility for his actions, if he believes there is a lack of evidence and that he could get a dismissal, the lawyer needs to present this information to the child in an unbiased fashion and live with the outcome of the trial.

\textsuperscript{304} Cf. Glen Heathers, \textit{Acquiring Dependence and Independence, in Readings in the Psychology of Childhood and Adolescence} 382, 382-83 (William J. Meyer ed., 1967) (explaining that people depend on others for assistance when they are unable to satisfy their needs).

\textsuperscript{305} See \textsc{Erik H. Erikson}, \textit{Childhood and Society} 265-83 (1950) (discussing the psychological development of children with regard to their sense of self, independence, and place in a social community). While adolescents often have a strong desire to be independent, they also want the approval and support of the adult figures around them. This creates confusion for the child, and he or she will be more likely to turn to authority figures for decision making in times of stress. \textit{Id.; see also} Heathers, supra note 304, at 382-93 (describing the emotional dependence of adolescents and their need for affection and approval particularly in situations of conflict and stress).

This viewpoint is not shared by all. Indeed, the high profile aggressive criminal defense attorney Leslie Abramson claims:

With adults, it's ethically appropriate to do whatever your client wants, so long as it's legal. . . . But when it's a kid who's being wrongheaded, you have to recognize that the child doesn't necessarily have the maturity to make wise choices. You overrule him when necessary. And you try to do something that will make his life better, even if he doesn't see the logic.\textsuperscript{307}

In my idealistic model, all members of the team should understand and appreciate the importance of the child-client directing his or her own representation within the proper parameters. The team approach also has to overcome the normative differences within various professional disciplines. For example, the lawyer's role is to provide zealous advocacy.\textsuperscript{308} A mental health worker seeks the client's best interests.\textsuperscript{309} Sometimes the two coincide, but sometimes, they do not, or at least do not appear to. Suppose a child charged with committing a criminal act tells his representational team that he is guilty, but wants to "get off" and remain at home, notwithstanding severe abuse by his parents, information that he wishes to keep secret.\textsuperscript{310} Because of his or her advocacy view of representation, the lawyer's duty may be to keep the information confidential\textsuperscript{311} and to try to get an acquittal, or failing that, probation while the child lives at home. The social worker's professional responsibility is to report the abuse so that the child is moved to a protective environment.\textsuperscript{312} It is not that all social workers believe that removal of the child is necessary in all cases of abuse, and indeed, they know that some alternative placements can


\textsuperscript{308} See Model Rules of Prof'l Conduct R. 1.3 cmt. 1 (2002); Model Code of Prof'l Responsibility EC 7-1 (2000).

\textsuperscript{309} See Code of Ethics of the Nat'l Ass'n of Soc. Workers Standards 1.01-02 (1999), available at http://www.socialworkers.org/pubs/code/code.asp (last visited Dec. 22, 2002) (stating that the "clients' interests are primary," and that "[s]ocial workers may limit clients' right to self-determination when, in the social workers' professional judgment, clients' actions or potential actions pose a serious, foreseeable, and imminent risk to themselves or others").

\textsuperscript{310} This is not an uncommon scenario. Elsewhere, I have argued that such communications must be kept confidential. Marrus, supra note 79, at 538-45.

\textsuperscript{311} See Model Rules of Prof'l Conduct R. 1.6(a) (forbidding disclosure of information without client's consent); see also Model Code of Prof'l Responsibility EC 4-1, DR 4-101(A)-(B) (explaining the ethical obligation of keeping the client's secrets).

\textsuperscript{312} See Code of Ethics of the Nat'l Ass'n of Soc. Workers Standards 1.01-02 (explaining the duty of social workers to protect the well-being of their clients).
be extremely destructive for a child as well. However, their code of ethics requires that the information be relayed to the court. Under some circumstances, some social workers may instinctively urge that the child plead guilty to the alleged offense so that the child will remain within the court's jurisdiction, thus actively opposing a trial that may result in an acquittal or a disposition that results in the child remaining at home.

In my view, the attorney's mandate to protect confidential communications must trump the social worker's code of ethics. Thus, professionals who want to be part of the representational team must also include themselves in the attorney-client confidential relationship. Without that adherence, the child-client may be unwilling to speak freely with all members of the team. In addition, confidentiality by all members of the team would be important for the attorney too and would accomplish the purposes of a team approach. If confidentiality is not preserved, the attorney will not feel comfortable releasing information to the team members. At Legal Services for Children in San Francisco, each child-client is assigned a social worker and an attorney. The confidential relationship exists between the child-client, the attorney and the social worker, and between the social worker and attorney.

This is not an easy approach to representation. It takes time and energy on the part of all individuals involved. The gathering of information, strategic planning, and discussing options with the client will take time in order to ensure that the client has the greatest degree of involvement possible. The team should be viewed as a group of

313. See id. (explaining that social workers' ethical codes allow for them to make a professional judgment as to what is in the client's best interest).

314. Id. Standard 1.01. In most states, social workers and other mental health professionals, differ from attorneys in that they must mandatorily report child abuse. See Marrus, supra note 79, at 515-20 (discussing the state of the law with regard to mandatory reporting); see also Paula Galowitz, Collaboration Between Lawyers and Social Workers: Re-Examining the Nature and Potential of the Relationship, 67 FORDHAM L. REv. 2123, 2135-37 (1999) (comparing the ethical codes of attorneys and social workers with regard to confidentiality, disclosure, and reporting).


316. See Stanger, supra note 295, at 1143 (discussing the codes of conduct for attorneys and social workers). See generally Galowitz, supra note 314, at 2147-53 (explaining ways in which to remove the ethical impediments between team members).

317. See generally Steinberg et al., supra note 276, at 131 (addressing some of the consequences of added communications across differing disciplines). I personally have found that the more time I was able to take to explain the process and options to my child-client, the better he or she could make informed decisions about the case. Often, these decisions coincided with my own views.
professionals with different expertise working together to provide high quality representation to the child-client. If the focus is placed on the child-client and the provision of quality services, the method can be both effective for the client and cost effective in the long run. Although more time will be needed to work up a case and there will be case strategy meetings involving several parties at once, the end result should be better outcomes and more realistic dispositional placements. Perhaps most importantly, the child-client comes to believe in his own value as a person capable of making decisions and directing professionals in their representation of his interests.

Is there a downside to my model of holistic lawyering, particularly if it results in a factually guilty child’s acquittal? While it may be distasteful for some to facilitate such a result, I view it as no worse than doing the same for an adult defendant. Indeed, an argument could be made that “getting children off” in juvenile court is even more important than in adult criminal court. Many children commit criminal acts, even serious ones, and then outgrow their impulsive behavior even without juvenile court intervention. In fact, it is more likely that the child will develop normally without the labeling and incarceration that the juvenile court imposes. Studies show that children adjudicated delinquents are more likely to become recidivists as adults.

318. See Stanger, supra note 295, at 1133-35 (explaining the benefits of social workers and attorneys working together for the alleged juvenile delinquent).

319. See Juvenile Court Centennial Initiative: Fact Sheets, Juvenile Court: Graduates, available at http://ojjdp.ncjrs.org/jcci/grad.html (last visited Dec. 22, 2002) (providing a number of stories of individuals who changed the course of their lives because they were given a second chance). For example, Bob Beamon was recently named one of the top athletes of the twentieth century, having “shattered the world-record in the long jump at the Mexico City Olympics” in 1968. Id. As a sixteen-year-old he had been involved in gangs and had committed several petty criminal acts. He contributes his ability to turn his life around to his grandmother and “a juvenile court judge who gave him a second chance.” Id. Terrence Hallinan has been elected to two terms as district attorney in San Francisco, California. Id. As a teenager he often got into fights, ended up in juvenile hall and expelled from high school. Id. Reggie Walton grew up in a “steel mill town in rural Pennsylvania.” Id. There were often fights, but when he saw a friend stabbed and almost die, he decided to alter his path. He went to law school, became the nation’s first Deputy Drug Czar, a White House Advisor on Crime to President Bush, and is now a federal judge. Id.

320. See id. (illustrating that a child's delinquent behavior, without incarceration, does not necessarily translate to the same type of behavior as an adult).

321. See Schwartz, supra note 76, at 51 (finding that out of 303 youths released from two juvenile facilities in Florida, sixty percent re-offended within one year). Of course, children who are adjudicated delinquent may be more prone to violence, and thus the recidivism may not be due to the juvenile court intervention, but rather to the child himself.
But are we teaching the child that crime is okay as long as you have good lawyers? Furthermore, are trials not simply a waste of time and resources since most children are, in fact, guilty, and there is usually enough evidence to support an adjudication of delinquency? Starting backwards with the “efficiency” and “everyone charged is guilty” arguments, the difficulty is that most adults charged with a crime are also guilty. Yet few argue that they should not have a right to test the government’s proof, even though the lawyer in defense of a “guilty” person may have to cross-examine witnesses who are telling the truth so as to make it appear that they are lying or mistaken. Moreover, there is an even stronger argument that children, even if guilty, should have a trial. A trial brings home to children the realization that they committed criminal acts and are deserving of punishment. A guilty plea may obviate that lesson and children may feel that they are being punished for their confession of guilt rather than their criminal acts. Furthermore, a plea of not guilty necessarily slows down the treadmill dispensing of justice that is prevalent both in adult and juvenile court. The judge is forced to listen and see the child not just as another burglar, but as an individual with unique characteristics. I am not suggesting that there should be a trial in every case. For various strategic and tactical reasons it may be better for the child to plead guilty, such as in cases where the facts are so horrendous it would be better that the judge not hear the gruesome and overwhelming evidence.

With respect to the argument that getting guilty children off can result in future crime because it engenders an attitude of being able to get away with anything as long as you have a good lawyer, it is well to remember that such a belief is grounded in reality. By insisting on proof beyond a reasonable doubt, the child is learning another, perhaps more important lesson; he or she is valued by the system, and

322. See supra note 2 and accompanying text (noting that over ninety percent of adults charged with crime plead guilty). Of course, not every defendant who pleads guilty is in fact guilty. For various reasons, including the possibility of a higher sentence after trial, innocent defendants, to limit exposure, may plead guilty. See North Carolina v. Alford, 400 U.S. 25, 38-39 (1970) (holding that defendants may plead guilty even if they are unwilling or unable to admit culpability if there is a strong factual basis for the plea); cf. Bordenkircher v. Hayes, 434 U.S. 357, 364-65 (1978) (providing an example of a prosecutor’s “retaliatory” charging of a defendant who refused to plead guilty to a lesser offense).

that the system, although imperfect, assures that individuals count and that it is better to free a guilty person than to convict an innocent one. It has also been shown that when people understand how the system works and the rules to be followed, they are more likely to become law-abiding citizens.\textsuperscript{324} Alternatively, children may see the acquittal as getting a second chance, particularly when they are told why they "got off." Children are likely to recognize that the circumstances leading to the acquittal may not occur again in the future and will take this opportunity as a way of staying out of trouble.\textsuperscript{325}

\section*{B. Holistic Lawyering in the Real World}

Why do I offer an approach to legal representation for minors that I acknowledge in its most fulsome form is probably unattainable, at least here and now? The response is that even when we cannot provide the very best approach, it is important to look at its components, to see if there are parts of the very best that we can adapt and use towards the betterment of our current state.

Some of these components can be seen at work in a number of specialized juvenile public defender offices throughout the country.\textsuperscript{326} Attorneys who go to work in these offices are there because they want to be. They are permanently assigned to the juvenile division and are not rotated to the other criminal law units.\textsuperscript{327} Moreover, within the juvenile division, attorneys specialize in particular kinds of proceedings such as waiver, juvenile delinquency, or appeals. Some of these offices come close to the idealistic team approach, but they too suffer from a lack of funds. Their virtues are expertise in juvenile law, training programs for new juvenile law attorneys,\textsuperscript{328} access to sister

\textsuperscript{324}. Kathleen Sylvester, \textit{Attorneys Who Teach 'Street Law'}, NAT'L L.J., June 20, 1983, at 1.

\textsuperscript{325}. Dr. Robert Hunter of Boulder, Colorado's Center for Action Research conducted a study for the Justice Department on the effects of "Street Law" programs—teaching practical law to high school age students—on juvenile delinquency. \textit{Id.} The study stated that "'[w]hen properly taught,' . . . 'the program reduces delinquency' [because the] students become involved . . . ; they understand better how the system works and feel they have more of a stake in it." \textit{Id.}

\textsuperscript{326}. \textsuperscript{325}. See \textit{id.} (explaining that juveniles understand legal consequences and ramifications better when they have even a basic comprehension of the law).


\textsuperscript{328}. The New York Legal Aid, Juvenile Division exemplifies expertise in juvenile law. Attorneys are in the juvenile division because they choose to be; they often specialize in a particular area of juvenile law, and work closely with the adult units, social workers, etc., to coordinate representation for juveniles who are transferred to adult court. \textit{Id.}
criminal defender units for advice, political clout, and some money for hiring outside experts when necessary. There are also stand-alone public defender offices for children. They are not part of a larger public defender system with other units, and thus, do not have access to sister criminal law divisions.

Most of these public defender offices for children, whether part of a larger unit or stand alone, are funded by the state and may have associated investigators, social workers, psychiatrists, and psychologists. Many of these offices are very child advocate oriented and actively seek to assure that children charged with crimes receive quality legal representation. Attorneys in these offices have a special interest in juvenile law, and they share similar beliefs in protecting children from the often brutal vagaries of the juvenile court system. This advocacy orientation is not universally admired, particularly by judges.

In some public defender offices, even those with juvenile divisions, the practice of juvenile law is viewed as “sand box” law whose stated purpose is to assure the best interests of the child, as if that were easy to determine. In these offices, lawyers in the juvenile law division are treated as second-class citizens with lower salaries and fewer promotional opportunities, whose stay in the juvenile rights division is a necessary, but unwanted experience, or worse, a demotion for mistakes in the other divisions. Indeed, the juvenile division is often seen as a place to “mark-time,” until lawyers can elevate to the “grown-up” criminal felony division. Attorneys in these juvenile

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329. See, e.g., TRAVIS COUNTY, TEXAS, JUVENILE PUBLIC DEFENDER, at http://www.co.travis.tx.us/juvenile_public_defender/default.asp (last visited Dec. 23, 2002) (providing representation to juveniles only). In addition, there are local offices often called “child law centers” that are like public defenders in the sense that they represent indigent children. See LEGAL SERVICES FOR CHILDREN, at http://www.lsc-sf.org (last visited Dec. 23, 2002).

330. This was certainly true when I practiced in Solano County, California. Although we had access to the investigators employed by the office, they were often overworked and delinquency cases would be relegated to the bottom of the pile.

331. See supra notes 255-261 and accompanying text (describing juvenile detention facilities).

332. See SELLING JUSTICE SHORT, supra note 99, at 21-23.

333. See Giardino, supra note 8, at 275-76.

334. When I began working at the Solano County Conflict Public Defenders’ Office, I was told that if I remained in the juvenile division I could never get promoted past a certain level, and the only way I could make a top salary would be to transfer to the adult division. Even to become a supervisor for a juvenile division, the attorney would first have to work in the criminal courts.

335. I have talked with many public defenders who had been in the juvenile division for several years as part of their “training.” They were anxious to move on to the felony division in order to begin their real work as a lawyer, representing clients in serious trials.
units cannot always get access to outside experts as readily as those representing adult defendants, they do not get secretarial support, cannot freely use investigators, are encouraged to plead children guilty and acquiesce to probation recommendations. Suffice it to say that the practice of kiddie law in these offices does not bring much prestige.

Many jurisdictions, however, do not have public defender offices with juvenile law divisions; indeed, in many areas, there is no public defender office. Instead, private attorneys are appointed by the court to represent indigent juvenile respondents. They often receive less money than private attorneys appointed to represent indigent adult defendants, thus making it more likely that experienced, competent attorneys will not practice in juvenile court. When these attorneys request outside experts, the applications are subjected to very intense scrutiny and almost routinely rejected except in extraordinary circumstances. Lawyers who are too aggressive in requesting outside expert assistance or who practice zealous advocacy,

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They viewed their time in the juvenile courts as part of their paying dues in order to move up in the system.


337. Even in those jurisdictions with public defender offices, courts use appointed counsel for conflict of interest cases when there are multiple defendants, which in juvenile court occurs frequently.

338. In Texas, juvenile attorneys have typically received a fraction of what attorneys would receive for the same type of case in criminal court. It was not until after the passing of the Fair Defense Act that the judges in Harris County, Texas increased the fees allocated to defense attorneys in juvenile court to be equal to those in criminal court. See Harris County, Tex., Fair Defense Act: Standards and Procedures for Appointment of Counsel for Indigent and Non-Indigent Juvenile Respondents § 10 (2002). This was the first increase for court appointed attorneys in juvenile court for seventeen years. Discussion on Fair Defense Act at Juvenile Section Conference of the Texas State Bar (April 2002).


340. Even for adults, it is very difficult for defense counsel to obtain expert services. See David A. Harris, The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants, 83 J. Crim. L. & Criminology 469, 486-87 (1992) (discussing the unreasonable requirements that must be met before defendants can obtain expert services). The Court in Ake v. Oklahoma held, in the context of a capital case, that the state must provide access to psychiatric evaluation and assistance when the indigent defendant has made a showing that his sanity at the time of the crime will be of significance during the trial. 470 U.S. 68, 86-87 (1985).
refusing to plead their clients guilty and challenging probation recommendations, are very often not reappointed. 341

Because of these constraints, many appointed attorneys plead their clients guilty choosing not to seek alternative placement options to probation recommendations. 342 I am not suggesting that all appointed counsel in juvenile court are not doing their job despite the hurdles. Many are. However, many are not. What then can solo practitioners or individual public defenders, who want to provide quality legal representation for children, do to achieve that goal? 343

1. Training Programs.—There are many training programs that can help independent attorneys who accept juvenile cases. Continuing Legal Education courses are available. 344 There are also joint training programs with professionals from other disciplines. 345 State bar organizations, as well as local bar associations, juvenile courts, public defender and district attorney offices, and nonprofit organizations also provide training on the legal aspects of representing children in juvenile court. 346 In fact, some jurisdictions have courses that attorneys must complete before they can be placed on the court’s appointment list. 347 The quality of these programs vary. The attitudes of the groups providing the training parallels the orientation of the specialized public defender offices, with some practicing zealous advo-

341. See Selling Justice Short, supra note 99, at 22 (citing a judge who stated that he no longer appointed a specific attorney to juvenile cases because of his continual requests for experts).

342. See Puritz et al., supra note 114, at 35-38.

343. There are private attorneys that families retain when their children are charged with committing criminal acts. Depending on the wealth of the parents, the attorney will decide whether to provide zealous advocacy and receive assistance from experts. These cases are decidedly in the minority, since most children charged with delinquencies come from poor families who are unable to afford private attorneys and expensive expert assistance. See The Real War on Crime, supra note 29, at 28.

344. Most programs that offer training for juvenile attorneys provide continuing legal education credit for the programs.


347. For example, in Harris County, Texas, as a result of new legislation, juvenile judges require attorneys to have a certain number of continuing legal education credits prior to being appointed as an attorney for a juvenile in delinquency cases. Harris County, Tex., Fair Defense Act: Standards and Procedures for the Appointment of Counsel for Indigent and Non-Indigent Juvenile Respondents § 5.1.8 (2002).
cacy and some taking a guardian ad litem stance, and those perspectives are reflected in the training courses. Moreover, since many of these programs are presented by prosecutors, probation departments, and judges, the defense point of view is not always fully represented, and defense attorneys do not get the information they need to develop vigorous advocacy skills for their clients.348

Three organizations—the American Bar Association’s Juvenile Justice Center,349 the Youth Law Center,350 and the Juvenile Law Center351—founded the National Juvenile Defender Center (NJDC) in order to upgrade the quality of representation for juveniles.352 The NJDC,353 along with its regional centers,354 provide training for attor-

348. I recently attended a state bar training course on juvenile law and almost all of the presenters were judges or prosecutors, providing little information for defense counsel. When the programs are developed and run by defense attorneys, the courses are more likely to reflect an attorney’s role as zealous advocate.

349. The Juvenile Justice Center, located in Washington, D.C., began as a result of the American Bar Association’s involvement with the Juvenile Justice Standards Project, and the Center provides leadership to judges, lawyers, legislators, and probation officers. A.B.A., JUVENILE JUSTICE CTR., ABOUT Us, at http://www.abanet.org/crimjust/juvjus/aboutus.html (last visited Dec. 23, 2002).

350. The Youth Law Center (YLC) has offices in San Francisco, California and Washington, D.C. YOUTH LAW CTR., WHO WE ARE, at http://www.youthlawcenter.com/htm/ylc-who.htm (last visited Dec. 23, 2002). YLC was founded as a non-profit organization in 1978 “focusing particularly upon the problems of children living apart from their families in child welfare and juvenile justice systems.” Id.

351. The Juvenile Law Center (JLC), in Philadelphia, Pennsylvania “is one of the oldest children’s rights organizations in the United States” having been founded in 1975. JUVENILE LAW CTR., ABOUT Us, at http://www.jlc.org/home/aboutjlc/who.html (last visited Dec. 23, 2002). JLC provides direct representation to children facing delinquency charges in Philadelphia, appellate advocacy in state and federal court, training for professionals within the juvenile justice system, community education, and juvenile justice policy development. Id.

352. NAT’L JUVENILE DEFENDER CTR., at http://www:abanet.org/crimjust/juvjus/jdc.html (last visited Dec. 23, 2002). NJDC “was created to respond to the critical need to build the capacity of the juvenile defense bar and to improve access to counsel and quality of representation for children in delinquency and criminal proceedings throughout the country.” Id.

353. I sit on the national board along with the members of the management team (the directors of the three founding organizations—Patti Puritz, Juvenile Justice Center; Mark Soler, YLC; and Robert Schwartz, JLC) and representatives of each regional center. See infra note 354 (describing the regional centers).

354. NAT’L JUVENILE DEFENDER CTR., supra note 352, at http://www.abanet.org/crimjust/juvjus/jdc.html. In order to reach more juvenile defenders the NJDC started nine regional centers. Id. They are: the Northeast Region (Delaware, New Jersey, New York, and Pennsylvania); New England Region (Connecticut, Maine, Massachusetts, Rhode Island, New Hampshire, and Vermont); Southern Region (Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, and South Carolina); Midwest Region (Illinois, Indiana, Iowa, Michigan, Minnesota, North Dakota, South Dakota, and Wisconsin); Central Region (Arkansas, Kansas, Kentucky, Missouri, Nebraska, Ohio, and Tennessee); Northwest Region (Alaska, Idaho, Montana, Nevada, Oregon, Washington, and Wyoming); Mid-Atlantic
ney appearing in juvenile court on such subjects as zealous advocacy; developmental issues of adolescents; alternative dispositions; scientific evidence; legislative advocacy; special education; school district policy; family dynamics; reading expert reports; and substantive, procedural and evidentiary criminal law issues, as well as civil practice. The NJDC, which is funded by foundations and government sources, developed the MacArthur Training Modules which can be used anywhere in the country to help lawyers improve the representation provided to juveniles. More than one thousand attorneys every year benefit from these training programs that are provided at little or no cost.

2. Certification.—Texas is the only state that currently has a certification process for a specialization in juvenile law. This is a recent

Region (District of Columbia, Maryland, Puerto Rico, Virginia, and West Virginia); Pacific Region (California and Hawaii); and the Southwest Region which is housed at the University of Houston Law Center and which I direct (Arizona, Colorado, New Mexico, Oklahoma, Texas, and Utah). Id.

For example, the NJDC holds a national meeting in which a variety of sessions are presented on such issues as adolescent brain development, DNA evidence, zero tolerance policies of school districts, confinement issues, determining competency of juvenile defendants, and appellate practice. This meeting has been held annually in October in various locations in order to make it easier for defense attorneys to participate. Additionally, local groups have held training sessions covering some of the same topics in order to bring the information to a greater number of defense attorneys.

Funding sources include the Casey Foundation, the Ford Foundation, and the Soros Foundation.

A.B.A. JUVENILE JUSTICE CTR., UNDERSTANDING ADOLESCENTS: A JUVENILE COURT TRAINING CURRICULUM, at http://www.abanet.org/crimjust/junjus/Macarthur.html (last visited Dec. 23, 2002). The MacArthur modules cover a wide range of topics helpful to defense attorneys in juvenile court. There are six modules on the following topics: adolescent development; interviewing adolescent defendants, witnesses and victims; mental health assessments for juveniles; child maltreatment and other risk factors leading to chronically aggressive behavior in children; children in the juvenile justice system with disabilities; and evaluating youth competencies. Id. Each module contains relevant information to the topic, bibliographies, multi-media related materials, and other information helpful in presenting trainings in these areas.

This is made possible by funding provided from foundations and government agencies. See supra note 356.

The Texas Board of Legal Specialization sets the standards for specialization in a variety of areas including juvenile law. See Standards for Att'y Certification of the Tex. Bd. of Legal Specialization, at 1 (2001). There are general requirements for all areas of specialization that includes state bar membership, required periods of practice, good character and reputation, references, continuing legal education, and substantial involvement in a specialty area each year. Id. Part I. In order to qualify as an applicant for the juvenile law specialization, the attorney must practice at a minimum of twenty-five percent of his or her time in juvenile law. Id. Part II, § I(A).
implementation, which began in October 2001. It is still too soon to evaluate this program; however, if it is anything like existing specialization exams in Texas, lawyers will have to spend time learning juvenile law and practice. It will be a rigorous certification and examination process. The exam consists of two parts—three essays and one hundred multiple choice questions. The essays cover a wide range of juvenile law subjects including juvenile arrests, searches, first time offender programs, juvenile confessions, waivers of rights, juvenile detention, pre-trial proceedings, certification as an adult, the adjudication hearing, dispositional procedures, modification of dispositions, mental illness or retardation proceedings, determinate sentencing proceedings, access to juvenile records, and confidentiality of juvenile hearings. The multiple choice section of the exam covers ethics, rules of evidence, civil procedure, appeals, criminal procedure, and adjudication of juveniles in municipal court.

In addition to the exam, the application process requires additional attorney qualifications. The lawyer must provide proof of having participated in every aspect of juvenile court practice from detention hearings, to jury and non-jury adjudicatory proceedings, to appeals and post-adjudicatory remedies in state and federal court. The lawyer must have also been first chair in three of the following four instances—three jury trials, three appeals, five contested non-jury trials and three certification or determinative sentencing hearings. The attorney must have practiced full time for the past five years, three of which have been in Texas, with at least twenty-five percent of his or her caseload being in juvenile court. References are also to be provided with the application and must be from three lawyers who practice in the same geographical location as the applicant.


362. Id. at 2-5.

363. Id. at 5.


365. Id. Part II, § I(B)(3).

366. Id. Part II, § I(C). This qualification may deter talented attorneys applying for certification since fees in juvenile cases tend to be low, and therefore, they may be unable to earn sufficient income if twenty-five percent of their caseload must be in juvenile court. See Puritz et al., supra note 114, at 24-25.

dition, one reference must be from an attorney who has opposed the applicant in a juvenile proceeding, and one from a judge who has personal knowledge of the lawyer's work in juvenile court.\(^3\)

Although the application process and requirements are quite extensive, there are several elements still lacking. One area that is obviously missing is training in the developmental process of juveniles and the physiological, intellectual, and emotional differences between juveniles and adults. A comprehensive knowledge of child development is necessary for a lawyer to be a zealous advocate for youth in juvenile court.\(^3\) Second, there is no evaluation of the attorney's knowledge of the criminal court process, even though an attorney may find that representation of a juvenile would also take him or her to criminal court such as in waiver hearings.\(^3\) Moreover, even if the case is to remain in juvenile court, lawyers must know about criminal law and practice so as to be able to make arguments that these criminal law practices should be required in juvenile court. Third, the emphasis in the certification process is on delinquency proceedings and very little information is required about school disciplinary hearings, special education, the process for the mentally ill child, and dependency proceedings, even though there is often an overlap between the systems.\(^3\) Clearly, however, the certification process is a

\(^{368}\) Id. Part II, § II(B)-(C). While this requirement may strengthen the quality of attorneys in juvenile court, it runs the risk of a buddy system that keeps out those who believe in zealous advocacy for children in juvenile court.

\(^{369}\) YOUTH LAW CTR., 2000 ANNUAL REPORT 13 (2000).\(^{370}\) See Griffin v. State, 765 S.W.2d 422, 430-31 (Tex. Crim. App. 1989) (en banc) (holding that if a juvenile gives a statement prior to a transfer hearing, the Family Code would apply; however, if Miranda warnings had been given to the minor after the transfer, and the minor made a subsequent statement, it could be admissible in criminal court).\(^{371}\) This is particularly important since, oftentimes, acts which trigger such hearings often end up in juvenile court. Eric Blumenson & Eva S. Nilsen, How to Construct an Underclass, or How the War on Drugs Became a War on Education, 6 J. GENDER RACE & JUST. 61, 65 (2002).\(^{372}\) A knowledge of special education law is necessary as many children are not doing well in school because they need special assistance, and when that is denied it can lead to the child committing criminal acts. LEARNING DISABILITIES ASS’N, SPECIAL ED LAW & JUVENILE JUSTICE (Nov. 1995), at http://www.ldanatl.org/bulletins/MH_11_95.html (last visited Oct. 26, 2002).\(^{373}\) See TEX. FAM. CODE ANN. § 55.02-66 (Vernon 2002) (providing a substantial amount of law that juvenile attorneys need to know about when dealing with mentally ill children).\(^{374}\) The California legislature alludes to the fact that the dependency and delinquency systems overlap by enacting the statute as follows:

[w]henever a minor appears to come within the description of both Section 300 and Section 601 [(dependency)] or 602 [(delinquency)], the county probation department and the child protective services department shall, pursuant to a jointly developed written protocol described in subdivision (b), initially deter-
positive step in the right direction, and is likely to lead to an even stronger certification process.

3. *Informal Networking.*—Of course, there is always informal networking with attorneys who are experienced in the field and with other nonlegal professionals in nonprofit organizations. These organizations provide services to children, attorneys, and courts, and one can get expert nonlegal assistance such as psychiatric services, alternatives to training school placements, evaluations of the needs of the juvenile, and programs for at-risk youth, either at minimal or no cost.

Offering to second chair with an established attorney can be of great value to new lawyers, so that the inexperienced attorney does not unduly affect their clients. Another source can be university faculty who are experts in the field and may be willing to offer their knowledge and support, often without a fee. Faculty experts can be either in law or other disciplines such as social work, psychology, education, political science, or foreign languages.

Training manuals have been developed by public defender offices and these are often available at little or no cost to the private attorneys practicing in juvenile court. In fact, the NJDC has a for-

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mine which status will serve the best interests of the minor and the protection of society.

CAL. WELF. & INST. CODE § 241.1(a) (West 2003). Accordingly, whenever a minor appears to be dependent and delinquent because of overlapping definitions, procedures, and other features of the dependency and delinquency systems, the statute requires that the child be placed under one status only—either as a dependent or delinquent.

375. One such organization is Southwest Key. Southwest Key is a non-profit organization that was founded in 1987 and works with at-risk and troubled youth. See SOUTHWEST KEY PROGRAM, THE SOUTHWEST KEY STORY, at http://www.swkey.org/WhoWeAre.asp (last visited Dec. 23, 2002). The mission of the organization is to provide community based treatment programs rather than programs in locked institutional facilities. Id. Southwest Key has programs in Arizona, California, Georgia, Puerto Rico, Texas, Wisconsin, and New Mexico, and serve over 5000 children a day. The program is community-based, offering skills-based treatment with family-centered services which are culturally relevant to the child and family. Id.

376. Again, Southwest Key provides an example of such a program. SOUTHWEST KEY PROGRAM, INC., SOUTHWEST KEY'S PROGRAMS: PROGRAM MODELS, at http://www.swkey.org/programs.asp (last visited Dec. 23, 2002).


378. I have used such experts on numerous occasions all to the benefit of my clients. As previously discussed, I used a psychologist in a case and was able to convince the judge to ignore the probation department's recommendation and allow my client to return home to her family. See supra p. 149 (describing Joan's case).

mat for a general training manual that can be used anywhere in the country with plug-ins from local jurisdictions. Finally, appointed attorneys can turn to law school clinics for assistance with complex cases. This not only helps the child, it exposes law students to the practice of juvenile law who may in turn enter the field themselves with a solid appreciation of what is entailed in representing a child accused of crime.

4. Lawyer's Commitment and Attitude.—The biggest and least expensive change the solo attorney can make is rethinking the role of counsel in juvenile delinquency proceedings. The best way to represent children in juvenile court is to provide zealous advocacy. This requires that the attorney spend numerous hours with the client, treating the client with respect and allowing the child to participate in the process. The lawyer must be committed to providing quality representation to the child, just as he or she would give to an adult, refusing to treat the court and its personnel with velvet gloves unless it inures to the benefit of the child. I am not advocating rudeness or snarling, but the attorney must be willing to buck the paternalism and the “we know what is best” attitude of the juvenile court. Perhaps most importantly, the lawyer must be a creative thinker who will delve beyond the surface issues of guilt and innocence.

Take for example, the case of a young man who had been placed at the California Youth Authority (CYA), a state youth prison. He took advantage of schooling, counseling and work opportunities in his placement. He was released on parole, enrolled in high school to get his diploma, obtained a part-time job, developed a relationship with a very nice young woman, and lived at home, helping his mother and providing emotional support for his younger brother. He had also secured a guarantee of employment upon his graduation from high school. Shortly before graduation he was arrested because of an incident that had occurred prior to his CYA placement. He admitted that he was in the fight and had knifed the other boy. His main concerns,

380. A.B.A. JUVENILE JUSTICE CTR., supra note 357, at http://www.abanet.org/crimjus/ juvju/macarthur.html. These manuals provide information on how to handle a delinquency case from beginning to end and include forms and checklists that may be helpful to defense attorneys. Id. The manual is available on disk and hard copy. It would be easy enough for local jurisdictions to adapt the information and forms to the local practice.

381. See PURITZ ET AL., supra note 114, at 43 (explaining that law school clinical resources are available to juvenile attorneys).

382. For example, at the University of Houston Law Center, students have the opportunity to take an in-house juvenile defense clinic, but also have the opportunity to work with local practicing attorneys on delinquency cases where the attorneys can use some additional assistance.
however, were missing his graduation, losing his part-time job, possibly losing his future employment, and destroying his image as a role model for his younger brother. Because the attorney took the time to talk to him and elicit his concerns, she was able to persuade his teachers, principal, employer, and parole officer to all testify on his behalf. In addition, she was able to get his employer to hold his job and his future employment placement, all in time for him to attend his high school graduation. He was the first member of his family to graduate from high school. The judge recognized what this meant to the family and particularly to his younger sibling. What is important to note is that money is not what made the difference. There was no need to call in outside experts. All that was necessary was that the lawyer listened to her client and used all her professional skills to assure that her client did not go back to CYA.

Another example involves a youth charged with burglary. He also failed to attend school regularly, which ordinarily leads to a harsher disposition for a child. To provide proper representation, the lawyer must not only try to get the child acquitted, but if that fails, to get the best possible disposition. That in turn requires the lawyer to find out why the child is a truant. Merely asking the child if it is true that she does not go to school regularly will not ferret out the whole problem. Does the mother use the child as a translator to deal with welfare officials? Does the child have health problems, physical or mental, that result in irregular attendance? Is the child a victim of school phobia or is she being bullied beyond endurance? Does the child suffer from any form of learning disabilities? Is one of the teachers picking on her and exposing her to ridicule? Is the teacher making sexual advances? Does the child not have enough clean clothes to wear to school? Does the minor have a part-time job that keeps her up late, causing her to oversleep, waking too late to go to school?

Or suppose the juvenile runs away from home. Why? Many court personnel see this behavior on the part of girls as accompanying sexual acting out. Studies show, however, that a large percentage of

384. See PURITZ ET AL., supra note 114, at 51-53 (advocating for the child-client's access to zealous representation at dispositional hearings).
385. See Rosenberg & Rosenberg, supra note 186, at 556 (explaining that an attorney should inquire beyond the child-client for symptoms of school phobia).
girls who leave home are being sexually abused. The information is the most difficult to elicit. The parents will hide it and so will the girl who often feels shame or is afraid she will not be believed.

The need to dig below the surface is necessary even in cases that seem straightforward. Suppose a teenager is charged with committing arson of the family home and readily admits it. The lawyer who accepts that and pleads her guilty, condemns the girl to a locked state facility, because private treatment centers, for insurance and liability reasons, usually do not take arsonists. What the lawyer may not know is that the girl was systematically sexually abused by the father for years with the complicity of the mother. The girl simply saw no other way out.

One final example is the last case I tried as a public defender. My client was a sixteen-year-old charged with assault who had previously been adjudicated a delinquent. The victim was lying on the ground, bleeding, and surrounded by several people, including my client. When the police officer arrived at the scene, he observed blood on my client’s pants. He told me that he had been in the park and his dog had fought another dog, and that is how the blood got on his pants. I requested that the prosecutor do a DNA test. For unknown reasons, he refused. I had promised my client, who was being detained, that I would try his case before I left. I subpoenaed twenty witnesses who had observed the dog fight. On the trial date, the prosecutor took one look at the twenty witnesses, and requested a continuance to do the DNA test. I opposed that request because my client was locked up, the district attorney had had time to do the test, and it was my last week of work. The judge dismissed the case with prejudice.

The type of representation I am describing is necessarily time-consuming. The problem for the lawyer is caseload and money, which are intimately related. The lawyers in solo practice face difficult

387. A.B.A. & Nat’l Bar Ass’n, Justice by Gender: The Lack of Appropriate Prevention, Diversion and Treatment Alternatives for Girls in the Justice System 10 (2001). Fifty-nine percent of all arrests for runaways in 1999 were girls. Id. at 17-18. Delinquent girls usually have several things in common: a history of sexual abuse, fragmented families from death and divorce, serious physical and mental problems, drug-abuse problems, and home lives affected by lack of consistency and conflict. Id. at 6-8.

388. See id. at 10 (explaining that many delinquent girls have been traumatized by sexual abuse and react negatively in an oppositional manner).

389. See id. at 13 (noting that families of delinquent girls have higher instances of general dysfunction, as well as mother-daughter conflict).

390. Paul Schwartzman et al., U.S. Fire Admin., FEMA, Arson and Juveniles: Responding to the Violence (Special Report) 22-23 (undated).

391. See Puritz et al., supra note 114, at 24-25 (explaining that many public defender systems are plagued by low salaries and huge caseloads).
choices—their ethical responsibility for representing their clients in a
competent manner, and the need to pay their rent and provide for
their families. This is very hard. If the lawyer takes fewer cases,
allowing him or her to spend more time with each client, but not pro-
viding enough financial gain to pay the bills, he or she will not be able
to stay in the practice. As a result, the child-client may not have any
source for legal representation. Political clout to increase the fees
paid to appointed attorneys in juvenile court becomes a necessity.

Recently, the Appleseed Foundation, a nonprofit think-tank, con-
ducted a study of the quality of representation received by indigent
defendants in criminal and juvenile court in Texas. The Founda-
tion issued a report detailing the difficulties of representing indigents,
noting the low fees paid to attorneys representing such clients. As a
result of this report, the Texas legislature passed the Fair Defense Act,
which significantly increased the fees that attorneys representing indi-
gents could receive.

While I have focused mainly on defense counsel, it is important
to note that district attorneys in juvenile court also have similar
caseload problems. They, however, usually have greater access to
resources such as investigators and secretarial support. Decreasing
the prosecutorial caseload would also benefit children in juvenile
court because it would facilitate more accurate assessments of the
quality of evidence in individual cases. If the district attorney in my
last case was not besieged with a huge docket, he might well have
agreed to do the DNA test which would have resulted in my client’s
earlier release.

392. See id. at 22-27 (discussing a number of difficult issues that public and private juve-
nile defenders face in this practice); see also Edwards, supra note 336, at 418-24 (giving a
first-hand account of the difficulties facing juvenile defenders).
393. See supra notes 338-339 and accompanying text.
395. Id. at 18-24.
396. Jennifer Shubinski, County Public Defense Gets High Marks, El Paso Times, Apr. 11,
2002, at 1B.
397. See Stacey Gurian-Sherman, Back to the Future: Returning Treatment to Juvenile Justice,
Crim. Just., Spring 2000, at 30 (explaining that dockets and caseloads in the juvenile jus-
tice system are out of control).
398. Selling Justice Short, supra note 99, at 27. In some jurisdictions it is not the
district attorney that handles delinquency cases. For example, in New York, the district
attorney, county attorney, or corporation counsel may file petitions in delinquency mat-
ters. See N.Y. Fam. Ct. Act 310.1 (McKinney 1999) (authorizing a presentment agency to
file a petition which originates a juvenile delinquency proceeding). In New York City the
Corporate counsel files delinquency petitions, and the office may not have access to the
same resources as the district attorneys. Juan C. v. Cortines, 679 N.E.2d 1061, 1068 (N.Y.
1997) (noting the role of corporation counsel).
I have no easy answer to the problem of low fees and large caseloads. To avoid the money issue I worked for the public defenders office. But, it did not, and typically does not, solve the caseload problem. The organization itself, and the lawyers, must put a cap on the number of cases each attorney can take. They must make clear that they are not going to provide ineffective assistance of counsel, and money must be made available to hire additional attorneys. The private attorney must do the same.

One might argue that the funds for increased quality representation should instead be used to improve the actual programs and facilities for children in juvenile court. I might agree with that view if I believed the states would put sufficient resources into these programs and facilities. But even if the states should do that, money for high-quality representation is still necessary to assure that children, whether guilty or innocent, receive due process of law, and that only those children who need treatment receive it.

CONCLUSION

I wrote this Article in the hope of inspiring dialogues and discussions about how to increase the quality of legal representation in juvenile court delinquency proceedings. Some will view my beliefs as naive, idealistic, and unnecessary. My own experience, and that of many colleagues across the country, tells me otherwise. I do agree, however, that my views on the attorney-client relationship are somewhat radical. I have great trust in children and their abilities to solve problems if they are given the necessary tools and information to do so. Treating children as objects to whom things are done, infantilizes them and makes effective treatment less likely to succeed. Dealing with children as persons who have a large stake in the proceedings and whose input is respected is the most likely means of keeping children out of trouble. Thus, when I represent children as respected individuals, I am not just providing effective assistance of counsel, I am also, in some way, helping those children develop the necessary skills and sense of self that will enable them to survive and indeed, to prevail.

399. See Puritz et al., supra note 114, at 24-25 (explaining that high caseloads create barriers to the effective representation of juveniles). The National Advisory Commission on Criminal Justice Standards and Goals has recommended that public defenders, in general, have no more than 200 cases per year. Id. at 25. Yet, most attorneys in juvenile court handle much higher caseloads. Id. at 25. For example, in a study conducted by the Juvenile Justice Center of the American Bar Association, public defenders reported having caseloads ranging from 250 to 550 cases per year. Id.