

# IT TAKES A LAWYER TO RAISE A CHILD?: ALLOCATING RESPONSIBILITIES AMONG PARENTS, CHILDREN, AND LAWYERS IN DELINQUENCY CASES

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In 1999, twelve-year-old Lionel Tate was arrested and charged with killing his six-year-old playmate, Tiffany Eunick. Lionel's case remained at the center of international attention well after December 2003, when the Fourth District Court of Appeal for the State of Florida questioned Lionel's competence to stand trial and reversed Lionel's adult murder conviction and life sentence.<sup>1</sup> Lionel's case was noteworthy for a number of reasons: the extraordinary youth of the offender; the tragic violence that led to the six-year-old's death; questions about Lionel's competence; and the ultimate conviction and sentencing of a twelve-year-old, in adult court, to life in adult prison. However, most noteworthy for the present discussion was the extraordinary role Lionel's mother, Florida Highway Patrol Trooper Kathleen Grossett-Tate, played throughout the case. By virtually all accounts, Lionel relied heavily, if not entirely, on the guidance and direction of his mother at all critical junctures in the proceedings.<sup>2</sup> Most significantly, Lionel's mother was one of the primary driving forces behind Lionel's decision to reject a plea offer that would have removed the possibility of a life-sentence in adult court and guaranteed Lionel a three-year placement in a juvenile facility followed by ten years of probation.<sup>3</sup> As Ms. Gossett-Tate stubbornly told the court before trial, "People say I am a fool not to accept the plea from the state, but how do you accept a

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<sup>1</sup> Tate v. State, 864 So. 2d 44 (Fla. Dist. Ct. App. 2003); see also Noah Bierman, *Appeal Court Grants Lionel Tate a New Trial*, THE MIAMI HERALD, Dec. 11, 2003, at 1A (noting that Lionel's mother was granted audience with Pope John Paul II in 2003).

<sup>2</sup> Interview with Richard Rosenbaum, appellate attorney for Lionel Tate, (May 11, 2004) (Interview on file with author). Rosenbaum reports that Lionel was especially reliant on his mother in making decisions about his case. See also Michael Browning et al., *Boy, 14, Gets Life in TV Wrestling Death: Killing of 6-yr-old Playmate Wasn't Just Horseplay, Florida Judge Says*, CHI. SUN-TIMES, Mar. 10, 2001, at 1; *Teen Serving Life Jubilant over Retrial*, Dec. 11, 2003, <http://www.cnn.com/2003/LAW/12/11/wrestling.death/index.html> (last visited August 5, 2005); see also Tate, 864 So. 2d at 48-49 (discussing evidence that Tate simply followed his mother's instructions regarding key decisions in the case).

<sup>3</sup> Browning, *supra* note 2, at 1.

plea for second-degree murder when your child was just playing?"<sup>4</sup> Lionel's mother, and subsequently his trial lawyer, were criticized throughout the legal community for allowing Lionel to reject the plea offer.<sup>5</sup>

For those of us who represent children and adolescents in juvenile and criminal courts, the scenario above is familiar. Whether we represent the child against charges of petty theft or homicide, parents often remain integrally involved—for better or worse—in many of the child's case-related decisions. Even where the child's competence is not at issue, the child will often look to parents for guidance in navigating the juvenile and criminal justice systems. How should Lionel's lawyer have responded to Ms. Grossett-Tate's insistence on trial? To what extent should any child's lawyer encourage or discourage the child from consulting with parents or other relatives on whom the child clearly depends? To what extent can and should the lawyer advise the parent? What should the lawyer do when the child insists upon following his mother's advice contrary to the lawyer's best efforts to persuade him otherwise? To complicate the circumstances, what if Tiffany Eunick's mother sued or threatened to sue Lionel's mother for gross negligence in the supervision of her son? What if prosecutors sought to charge Ms. Grossett-Tate for criminal negligence or contributing to the delinquency of a minor? How would the risk of civil or criminal liability affect the quality and reliability of the parent's advice or impact the attorney-parent interaction? Unfortunately, these questions arise with frequency but rarely lend themselves to easy answers.

Legal scholars and practitioners have devoted considerable attention to defining the role of the child's lawyer. Scholars have argued about whether lawyers should advocate for the best interests or the expressed interests of the child and have grappled with the allocation of decision-making authority between the child and the lawyer. Scholars have also debated the appropriate role of parents in the attorney-client dyad. In 1996, a group of scholars convened at Fordham Law School to address many of these questions. At the conclusion of the conference, participants issued a series of recommendations clearly recognizing the child's right to independent legal counsel and endorsing a traditional, client-directed model of advocacy on behalf of children in all types of legal proceedings.<sup>6</sup> Today, most scholars have interpreted the child's constitutional right to counsel in delinquency cases to mean that children, not their parents, have the right to make key decisions regarding the course of their legal representation.<sup>7</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> Bierman, *supra*, note 1; Les Kjos, *Analysis: Ruling Heartens Child Advocates*, UNITED PRESS INT'L, D.C., Dec. 11, 2003.

<sup>6</sup> *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301, 1302 (1996).

<sup>7</sup> For a representative sampling, 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); Martin Guggenheim, *The Right to be Represented but not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 86-88 (1984); Kristin N. Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245 (2005); Ellen Marrus, *Best Interests Equals Zealous Advocacy: A not so Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 334 (2003); Wallace J.

Notwithstanding the pervasive endorsement of client-directed advocacy for children at the *Fordham Conference* and elsewhere, Lionel Tate's case suggests that traditional, client-directed advocacy often proves to be more difficult in practice than in theory and exposes the great challenges that lawyers, children, and parents face when children need legal advice. Children must choose between the advice of parents they have known and trusted all of their lives and the advice of an attorney whom they met for the first time in a moment of crisis. Parents must decide if, and to what extent, they will intervene and attempt to influence the direction of the child's case. Further, lawyers must honor the child's constitutional right to loyal, independent counsel and help the child make the best legal decisions without unduly disrupting important relationships within the family. Recognizing the importance of parents and other family members in the lives of children, child advocates and scholars reconvened in 2006 for the *UNLV Conference* to examine the roles and responsibilities of lawyers representing children in the context of family. Participants will consider whether *Fordham Recommendations* have shifted the pendulum too far in favor of children's rights and consider, among other questions: whether the client-directed, individual rights model of advocacy unduly ignores the child's position within the family; whether the potential exclusion of parents from the attorney-child dyad may unintentionally compromise the legal and other interests of the child; and whether children actually desire that parents be excluded from the attorney-client relationship.

This Article considers whether, and to what extent, children do or should look to parents for guidance in matters of juvenile delinquency.<sup>8</sup> To this end, I draw insight from theories of adolescent development, rules of professional ethics, and principles of constitutional law and justice. In Part I, I identify opportunities for support and collaboration between children and parents in the juvenile justice system and then consider the potential for conflict in these families. In Part II, I propose six strategies for effective lawyering on behalf of children and parents in juvenile court. Given the complexities of the issues, I recognize that a single paradigm will not satisfy every attorney-child-parent relationship. Instead, it is my hope to identify core principles that will guide lawyers in counseling children, interacting with parents, and protecting the

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Mylniec, *Who Decides: Decision Making in Juvenile Delinquency Proceedings*, in *ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER* 119 (Rodney J. Uphoff ed., 1995); Robert E. Shepherd & Sharon S. England, *I Know the Child is My Client, But Who Am I?*, 64 *FORDHAM L. REV.* 1917, 1942 (1996); Melinda G. Schmidt et al., *Effectiveness of Participation as a Defendant: The Attorney-Juvenile Client Relationship*, 21 *BEHAV. SCI. & L.* 175, 176 (2003).

<sup>8</sup> For ease of discussion, I use the word "parent" throughout this article. However, given the ever-evolving definition of "family," a more expansive view of "parent" would likely include guardians, grandparents, or other caretakers in the child's extended family. I also use the words "child" and "children" to convey the general idea of children as offspring of their parents. Unless specifically stated, I do not intend to draw the more narrow contrast between children, under the age of thirteen, and adolescents, aged thirteen to seventeen. In fact, as I assert later in the article, evidence suggests that most youth who enter the juvenile justice system enter during the adolescent years. See *infra* note 11 and accompanying text. The issues raised and recommendations offered throughout this Article should apply to children of all ages and vary only according to the cognitive capacity of the child. See discussion *infra*, Part II.F.

legal rights of children charged with crime. In Part III, I propose a few systemic reforms that might alleviate conflict and thereby facilitate a more effective relationship between the attorney, the child, and the parent.

### I. CONTINUITY AND CONFLICT IN THE PARENT-ADOLESCENT DYAD

The juvenile justice system is a rich context in which to explore the intersection of the individual rights of children and the rights and interests of their parents. While children in the juvenile justice system clearly need the support and guidance of parents, the risk of conflict between children and parents in the system is great. Parental involvement is generally indispensable in the rehabilitative mission of the court and is often essential in helping children communicate with lawyers, make critical legal decisions, and achieve stated objectives in the juvenile case. Parental support may also carry significant psychological or therapeutic benefits for an accused child. Unfortunately, not all parental intervention will advance the interests of the child. Because parents themselves may be held formally accountable in juvenile, civil, or criminal courts for the misconduct of their children, there is considerable risk of conflict between the legal interests of the child and those of the parent. When the interests of children and parents conflict and children remain dependent on and subordinate to parents, the rights of children may be repressed. Even where there are no competing legal interests, parents often do not fully understand or appreciate the rights and risks at stake in the juvenile case and generally experience considerable tension in deciding how best to help the child. Unlike the lawyer whose role is fairly resolved in favor of the expressed interests of the child,<sup>9</sup> parents may be forced to choose between protecting their own legal interests and securing the best interests of the child.

Obvious and latent tensions in the parent-child relationship ultimately create complex issues for the child, the parents, and the child's lawyer in a delinquency case. In section A of this Part, I consider the convergence of interests in the parent-child relationship and explore ways in which the parent may be an ally for the child in the exercise of important constitutional rights in a juvenile case. In section B, I recognize the limits of parental allegiance to the child in the delinquency context. Specifically, I explore areas of psychological and legal conflict in the parent-child dyad and evaluate impediments to effective communication and collaboration among attorneys, children, and their parents.

#### A. *Parent as Ally: Continuity in the Parent-Adolescent Dyad*

Although adolescence is marked by the child's quest for independence from parents, the child remains dependent on parents not only for physical and financial support, but also for moral support and guidance in times of crisis and decision. When the interests of parents and children do not conflict, parents may serve as a buffer against the coercive elements of the juvenile justice system, help the child identify, secure, and communicate with counsel, and guide the child in critical decisions regarding plea, trial, and disposition. Evidence also suggests that healthy communication and collaboration between children

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<sup>9</sup> See *supra* note 7.

and their parents is important for the rehabilitation of delinquent children and the stability of the entire family.

In this section, I look, first, at ways in which youth depend on parents even as they approach the final stages of adolescence. Second, I examine normative preferences for open, healthy attachment and communication between parents and children. And third, I consider the ways in which parents may help children exercise their constitutional rights in the juvenile justice system.

### 1. Adolescent Dependence

Children in the juvenile justice system are neither fully independent, nor completely dependent thinkers and actors. Although youth are entering juvenile courts at younger and younger ages,<sup>10</sup> most enter the system as adolescents, ranging from thirteen to seventeen years old.<sup>11</sup> As youth move from childhood to adolescence, the parent-child dyad and other relationships within the family evolve.<sup>12</sup> The parent-child relationship moves from one of unilateral parental control and supervision in childhood to one of co-regulation or cooperative negotiation of behavior in adolescence.<sup>13</sup> Adolescents begin to share in the decision-making process at home and exercise an increasing amount of autonomy over their own behavior.<sup>14</sup> The adolescent eventually begins to view himself as psychologically separate from his parents<sup>15</sup> and develops his own identity, philosophies, and values as he spends less time at home and more time with friends.<sup>16</sup> When adolescents develop views about life that are inconsistent with those of their parents, they may turn to peers, who are more likely to share their views and perspectives, as a source of advice and support.<sup>17</sup>

<sup>10</sup> See, e.g., Will Cruz & Karen Freifeld, *Deadly Child's Play: Police Say Girl, 9, Stabbed her friend, 11 with Steak Knife During Dispute over a Spaldean Ball*, NEWSDAY (N.Y.), May 31, 2005; *First-Grader Accused in Fatal School Shooting; Michigan Boy in Custody over Classmate's Death*, CHI. TRIB., Feb. 29, 2000, at 1; *Police Cuff Girl, 5, for School Tantrum*, WINNIPEG SUN, Mar. 20, 2005, at A2.

<sup>11</sup> Scott W. Henggeler & Ashli J. Sheidow, *Conduct Disorder and Delinquency*, 29 J. OF MARITAL & FAM. THERAPY 505, 506 (2003) (majority of individuals who engage in violence do not do so until adolescence, with sixteen years as average age of first serious offense); Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 593-95 (2000-2001) (delinquency is rare in early adolescence, increases through age sixteen and then decreases beginning at age seventeen).

<sup>12</sup> Barbara N. Allison & Jerelyn B. Schultz, *Parent-Adolescent Conflict in Early Adolescence*, Vol. 39 ADOLESCENCE, No. 153, at 101 (2004); Laurence Steinberg, *Autonomy, Conflict and Harmony in the Family Relationship*, in AT THE THRESHOLD: THE DEVELOPING ADOLESCENT 255 (1990).

<sup>13</sup> Elizabeth G. Menaghan, *On the Brink: Stability and Change in Parent-Child Relations in Adolescence*, in CHILDREN'S INFLUENCE ON FAMILY DYNAMICS: THE NEGLECTED SIDE OF FAMILY RELATIONSHIPS 154 (2003); Steinberg, *supra* note 12, at 265.

<sup>14</sup> Allison & Schultz, *supra* note 12, at 101.

<sup>15</sup> Steinberg, *supra* note 12, at 257.

<sup>16</sup> RALPH GEMELLI, M.D., NORMAL CHILD AND ADOLESCENT DEVELOPMENT 447 (1996); Barry J. Fallon & Terry V.P. Bowles, *Family Functioning and Adolescent Help-Seeking Behavior*, Vol. 50 FAM. REL., No. 3, at 240 (2001) (noting that the more time adolescents spend with peers as opposed to parents, the more opportunity they have to seek guidance and help from those peers); Steinberg, *supra* note 12, at 257-58.

<sup>17</sup> GEMELLI, *supra* note 16, at 447.

Although some conflict is normal and expected as relationships shift within the family,<sup>18</sup> it is important not to overstate the level of tension between parents and adolescents. Modern theories of adolescent development reject the orthodox view that interfamilial storm and rebellion will pervade the adolescent years.<sup>19</sup> Neoanalytic theorists argue that although adolescence does involve a major realignment of roles within the family, adolescence does not always require emotional detachment or distancing.<sup>20</sup> Even as adolescents move toward independence, continuity and connection with family members remains important.<sup>21</sup> The adolescent generally remains in the custody of a parent or guardian, continues to look to adults for basic physical, emotional, and developmental needs, and does not develop a fully emancipated identity until the end of adolescence at age eighteen or nineteen.<sup>22</sup> As one professor of psychiatry noted, "the adolescent is not an island unto himself."<sup>23</sup> The adolescent regularly seeks guidance, acceptance, and approval from parents, teachers, coaches, religious leaders, and other significant adults.<sup>24</sup> Even when adolescents disagree with their parents, they often seek approval by attempting to justify their views.<sup>25</sup> Given the continued reliance of youth on their parents, lawyers should expect that parents will retain considerable influence over the values, perspectives, and even legal interests of youth through late adolescence.

## 2. *Normative Preferences and Family-Focused Juvenile Justice Systems*

Empirical studies support a normative preference for open and healthy communication between parents and children.<sup>26</sup> Open communication and discipline are the means by which parents transmit ideas about morality, instill positive family values, and discourage anti-social behavior by children.<sup>27</sup> Youth develop their own standards of decency by internalizing advice and gui-

<sup>18</sup> Allison & Schultz, *supra* note 12, at 101.

<sup>19</sup> Steinberg, *supra* note 12, at 257-58 (but recognizing that vast majority of studies on the parent-adolescent relationship have been conducted with white, middle-class families).

<sup>20</sup> *Id.*

<sup>21</sup> Margheita Lanz, *From Adolescence to Young Adulthood: A Family Transition*, in THE CHANGING FAMILY AND CHILD DEVELOPMENT 132-133 (2000).

<sup>22</sup> GEMELLI, *supra* note 16, at 467.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Lanz, *supra* note 21, at 134.

<sup>26</sup> Healthy relationships generally involve verbal give and take between the parent and the child, parental respect for the child's decisions, and the use of reason instead of judgment and condemnation to obtain compliance. See Andrea Dawn Dickerson & Sedahlia Jasper Crase, *Parent-Adolescent Relationships: The Influence of Multi-Family Therapy Group on Communication and Closeness*, 33 AM. J. OF FAM. THERAPY 45, 46 (2005) (arguing that adolescents are more likely to respect parents' morals when parents send message they care about the child and respect the child's opinions and feelings); Steinberg, *supra* note 12, at 271 (arguing that adolescent identity development and interpersonal skills are better in families in which there is frequent discourse with problem solving, empathy, and acceptance and relatively little interchange that is devaluing, judgmental or constraining).

<sup>27</sup> Dickerson & Crase, *supra* note 26, at 46; Lanz, *supra* note 21, at 134; Laura M. Padilla-Walker & Gustavo Carlo, "It's not Fair!" *Adolescents' Constructions of Appropriateness of Parental Reactions*, 33 J. OF YOUTH & ADOLESCENTS 389-401 (2004); see also Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977).

dance provided over time by parents. Teenagers who report feeling close to parents tend to be more responsible and have better school performance, healthy self-esteem, and positive psychological development.<sup>28</sup> These adolescents are also less likely than others to engage in delinquency, possibly out of fear of parental disapproval and rejection.<sup>29</sup>

Adolescents in well-adjusted families also view parents as disciplinarians, moral advisors,<sup>30</sup> role models, and confidantes. Many teens report admiration, love, and appreciation by and for their parents and indicate a willingness to turn to parents for advice.<sup>31</sup> Parents may be an especially valuable ally and advisor for the child in a time of crisis and decision. When children enter the legal system, for example, they often confront concepts and choices that are new and potentially frightening. Thus, even while the child is working towards personal independence, the child may need and seek the insight and guidance of a knowledgeable, experienced parent or guardian. The child's request for the parent's help is recognized as a positive and appropriate response to the stressful situation.<sup>32</sup>

By contrast, studies suggest that adolescents from families with high levels of conflict and low levels of democracy will be less likely to see their family as a source of help in resolving problems.<sup>33</sup> Recognizing that many youth engage in delinquent behavior because communication is poor and conflict is high within the home, juvenile court innovators hope that modern responses to juvenile crime will enhance family relations and improve problem-solving, communication, and other interpersonal skills in the parent-child dyad.<sup>34</sup>

Contemporary juvenile justice legislation reflects a clear commitment to parental involvement in all stages of the juvenile justice system.<sup>35</sup> Parents are automatically subject to the jurisdiction of the juvenile court when a child is arrested, and parents are generally required to attend court hearings and monitor the child's progress on probation.<sup>36</sup> In addition, virtually all of the latest

<sup>28</sup> Steinberg, *supra* note 12, at 263 (noting finding as robust across socioeconomic and ethnic groups).

<sup>29</sup> Elizabeth Oddone-Paolucci et al., *A Stepwise Discriminant Analysis of Delinquent and Nondelinquent Youth*, in *THE CHANGING FAMILY AND CHILD DEVELOPMENT* 184 (2000); Inga-Dora Sigfusdottir et al., *The Role of Depressed Mood and Anger in the Relationship Between Family Conflict and Delinquent Behavior*, *J. OF YOUTH & ADOLESCENCE* 510 (2004).

<sup>30</sup> Dickerson & Crase, *supra* note 26.

<sup>31</sup> Steinberg, *supra* note 12, at 260 (but acknowledging that households of delinquent or psychologically disturbed youth may be strained both prior to and during adolescence).

<sup>32</sup> Fallon & Bowles, *supra* note 16, at 239, 244; see also Margaret Kerr & Hakan Stattin, *Parenting of Adolescents: Action or Reaction*, in *CHILDREN'S INFLUENCE ON FAMILY DYNAMICS: THE NEGLECTED SIDE OF FAMILY RELATIONSHIPS* 145 (2003) (finding youths' willingness to tell parents about daily activities as strong indicator of good adjustment).

<sup>33</sup> Fallon & Bowles, *supra* note 16, at 244.

<sup>34</sup> Barbara J. Burns et al., *Comprehensive Community-Based Interventions for Youth with Severe Emotional Disorders: Multisystemic Therapy and the Wraparound Process*, VOL. 9 *J. OF CHILD AND FAM. STUD.*, NO. 3, 285 (2000); Janet Gilbert et al., *Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 *ALA. L. REV.* 1153, 1167, 1179, 1184 (2001); Henggeler & Sheidow, *supra* note 11, at 506-07.

<sup>35</sup> Gilbert et al., *supra* note 34, at 1187-89.

<sup>36</sup> See *infra* notes 123-26 and accompanying text.

programmatic innovations in the juvenile justice system—including juvenile drug courts, Unified Family Courts, Functional Family Therapy (“FFT”), Multi-Systemic Therapy (“MST”), and Multidimensional Treatment Foster Care (“MDTFC”), among others—recognize the role of parents in the onset, prevention, and resolution of adolescent delinquent behavior.<sup>37</sup> Proponents of family-focused juvenile justice strategies believe first, that families are in the best position to rehabilitate children but often lack the skills or resources they need to do so, and second, that comprehensive therapeutic intervention in the family will greatly improve the child’s prospects for successful rehabilitation and thereby reduce delinquency and improve public safety.<sup>38</sup>

Relying on research that identifies parental supervision, consistency of discipline, and attachment to parents as the most important factors in preventing delinquency and reducing recidivism among high-risk youth, family-focused juvenile justice models seek to engage parents and guardians in the child’s treatment and provide resources and support without alienating the family.<sup>39</sup> More specifically, family-focused interventions attempt to build supportive parent-child relationships, encourage parents to engage in active monitoring and supervision of children, teach parents to employ positive discipline methods, and train parents to seek information and advocate on behalf of children in other systems such as schools, neighborhoods, and communities.<sup>40</sup> In some cases, counseling and therapy may be required to stabilize the youth, diffuse immediate problems or crises, and to decrease anxiety, hostility, or depression among family members.<sup>41</sup>

A series of rigorous clinical evaluations have consistently demonstrated the short and long-term efficacy of family-focused and multi-systemic methods in engaging families in the treatment process, reducing recidivism among violent and chronic juvenile offenders, and limiting the number, and therefore the cost, of out-of-home placements.<sup>42</sup> These evaluations have also demonstrated significant improvements in family functioning, decreases in the child’s association with delinquent peers, and greater success in the child’s educational and

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<sup>37</sup> For an overview of clinical procedures, policies and rationale for MST, FFT, and MDTFC, see Burns et al., *supra* note 34; Henggeler & Sheidow, *supra* note 11; Cindy M. Schaeffer & Charles M. Borduin, *Long-Term Follow-Up to a Randomized Clinical Trial of Multisystemic Therapy with Serious and Violent Juvenile Offenders*, J. OF COUNSELING & CLINICAL PSYCHOL. 445 (2005); see also U.S. DEPT. OF JUST., JUVENILE DRUG COURTS: STRATEGIES IN PRACTICE MONOGRAPH 43-45 (2003) (discussing strategies for family engagement in juvenile drug court); Gilbert et al., *supra* note 34, at 1168 (recognizing challenges of juvenile drug courts to include counteracting negative influences within the family).

<sup>38</sup> Gilbert et al., *supra* note 34, at 1155.

<sup>39</sup> *Id.* at 1172, 1174.

<sup>40</sup> Burns et al., *supra* note 34, at 287-88; Gilbert, *supra* note 34, at 1172, 1174; Henggeler & Sheidow, *supra* note 11, at 508, 513.

<sup>41</sup> Gilbert et al., *supra* note 34, at 1180; Henggeler & Sheidow, *supra* note 11, at 508.

<sup>42</sup> Henggeler & Sheidow, *supra* note 11, at 515 (documenting results of rigorous evaluation of MST, FFT, and MDTFC); Schaeffer & Borduin, *supra* note 37, at 449-51 (reporting results of MST 13.7 years after initiation of method); see also Gilbert et al., *supra* note 34, at 1200 (reporting results of a recent study conducted by American Psychological Association that found that of the over 400 recognized therapy models, the most influential factors in change was the client and the family).



occupational activities.<sup>43</sup> Studies have also found family therapy to be significantly more effective than individual therapy in reducing adolescent substance abuse.<sup>44</sup>

Considering the central place of parents in contemporary juvenile justice policy, cooperation among the parent, the child, and the child's lawyer is virtually essential in securing the child's stated objectives in the juvenile case. In most cases, children will seek the least restrictive detention alternatives upon arrest and seek community-based or in-home programming at the time of the child's disposition. By gathering information from parents, the lawyer may better probe the accuracy, thoroughness, and reliability of diagnostic reports prepared in anticipation of disposition.<sup>45</sup> By further collaborating with parents, the child's lawyer may also galvanize the parents' support for the child's release back into the home and encourage the parents to participate in the child's treatment.<sup>46</sup> In some cases, the lawyer may mediate between the parent and the child, convincing the child on the one hand to participate in pretrial counseling or family therapy to appease parents, and convincing parents on the other hand that the child's behavior will improve with wraparound services, mentoring, and therapeutic intervention. Prosecutors and judges who are convinced of family stability and parental involvement are often more willing to divert cases from court and less likely to argue for the child's removal from the home pending trial or at the time of disposition.<sup>47</sup>

### 3. *Exercising the Constitutional Right to Counsel: Building Trust and Communicating Goals and Objectives*

The quality of any attorney-client relationship depends in large part on the client's ability to determine and communicate objectives that will guide the legal representation.<sup>48</sup> Collectively, the Model Rules of Professional Conduct envision an attorney-client relationship in which the attorney keeps the client reasonably informed about circumstances and developments in the case, provides the client with candid advice about various options and alternatives the client may consider, follows the client's direction regarding the objectives of the case, and reasonably consults with the client regarding the means by which those objectives will be achieved.<sup>49</sup> Unfortunately, the representation of chil-

<sup>43</sup> Schaeffer & Borduin, *supra* note 37, at 451.

<sup>44</sup> Dickerson & Crase, *supra* note 26, at 47-48 (reporting that improved communication patterns in family provide support for child and improve effectiveness, retention and outcome of drug treatment).

<sup>45</sup> Lee Teitelbaum, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES IN JUVENILE JUSTICE STANDARDS ANNOTATED, P. 9.4, at 90-91 (Robert Shepherd, Jr. ed., 1996) (discussing standards for effective advocacy on behalf of children at disposition phase of juvenile case).

<sup>46</sup> See Jonathan O. Hafen, *Children's Rights and Legal Representation—The Proper Roles of Children, Parents, and Attorneys*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 423, 427 (1993) (arguing that ensuring participation of deserving parents in the decision-making process of the child's attorney will protect society's interest in familial stability).

<sup>47</sup> See Gilbert et al., *supra* note 34, at 1194.

<sup>48</sup> Schmidt et al., *supra* note 7, at 176.

<sup>49</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2, 1.4, 2.1 (2002). The Model Rules also contemplate that an attorney will maintain a normal attorney-client relationship, as far as reasonably possible, with a minor or other client of potentially diminished capacity. *Id.* at R. 1.14.

dren and adolescents may be compromised by the child's limited cognitive and psychosocial capacities.

Youth often rely on incomplete, albeit evolving, cognitive and linguistic capacities that may compromise their ability to articulate goals, concerns, and desires.<sup>50</sup> Children may experience additional difficulties communicating with attorneys, judges, and other court officials because of emotional strain, frustration, and the lack of familiarity with counsel and the legal process as a whole.<sup>51</sup> Specifically, research suggests that youth often misunderstand concepts of client confidentiality and attorney loyalty, which generally lie at the heart of trust between a client and his lawyer.<sup>52</sup> Some children mistakenly believe that lawyers are responsible for deciding issues of guilt and punishment or fear that the lawyer will not advocate his interests if the child admits involvement in the offense.<sup>53</sup> A child who is unpersuaded by the attorney's loyalty may withhold critical information from the attorney and compromise the lawyer's ability to provide relevant and useful advice.<sup>54</sup> In other instances, the child may omit information simply because he miscalculates its importance to the case or does not understand the legal rights at stake.<sup>55</sup>

In juvenile and criminal cases, the attorney-client relationship embodies a constitutional right for the accused. The constitutional right to counsel, however, may be meaningless if the child does not fully understand the lawyer's role or cannot effectively articulate goals and objectives to the lawyer.<sup>56</sup> In these cases, parents may be the only means by which the child may fairly exercise the right to counsel. The parent may initially explain the lawyer's obligations to the child, encourage the child to be open and honest with the lawyer, and help the child establish initial rapport with the advocate. The parent, who is generally familiar with how the child receives and processes information, may help the lawyer explain concepts in terms the child will understand. Competent parents may also help the lawyer and the child plan meaningful case

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<sup>50</sup> Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 *FORDHAM L. REV.* 1655, 1688 (1996).

<sup>51</sup> Ann Tobey, *Youths' Trial Participation as Seen by Youths and Their Attorneys: An Exploration of Competence-Based Issues*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 232-33 (2000) [hereinafter *YOUTH ON TRIAL*]; see also Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 *CORNELL L. REV.* 895, 927-28 (1999).

<sup>52</sup> Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 *PSYCHOL. PUB. POL'Y & L.* 3, 15-16 (1997) (discussing results of several studies); Schmidt et al., *supra* note 7, at 177-78; Tamera Wong, *Adolescent Minds, Adult Crimes: Assessing a Juvenile's Mental Health and Capacity to Stand Trial*, 6 *U.C. DAVIS J. JUV. L. & POL'Y* 163, 181 (2002) (discussing survey of 112 juveniles in South Carolina system which showed that juveniles generally did not understand the role of defense counsel).

<sup>53</sup> Grisso, *supra* note 52, at 19-20.

<sup>54</sup> Emily Buss, *The Role of Lawyers in Promoting Juveniles' Competence as Defendants*, in *YOUTH ON TRIAL*, *supra* note 51, at 248; Schmidt et al., *supra* note 7, at 177, 186 (discussing study which showed that juveniles were less likely than adults to recommend that clients talk to the attorney and be honest with attorney); Tobey, *supra* note 51, at 225.

<sup>55</sup> See Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 *FLA. L. REV.* 577, 629 (2002) (discussing juveniles' limited understanding of legal rights such as right to counsel and right to remain silent).

<sup>56</sup> Catherine J. Ross, *Implementing Constitutional Rights for Juveniles: The Parent-Child Privilege in Context*, 14 *STAN. L. & POL'Y REV.* 85, 107-08 (2003).

strategies and choose between various options throughout the case.<sup>57</sup> Logistically, children and their lawyers often rely on parents to schedule important meetings and arrange the child's transportation to and from attorney-client appointments.

Parental involvement may also ameliorate the coercive nature of law enforcement or juvenile court proceedings. In the interrogation context, police may be less likely to abuse or coerce the child when the child's parents are present. If the police are coercive, the parent may provide moral support the child needs to withstand assertive police tactics.<sup>58</sup> In dealings with the child's lawyer, the parent may serve as a check on the competence and effectiveness of the legal representation. By following the case closely and asking appropriate questions, the parent may prevent the lawyer from becoming co-opted by the system or succumbing to a mechanical representation of the child. Often parents will be in a better position than the lawyer to understand legal problems in the context of communal, cultural, and familial norms that are relevant to the child.<sup>59</sup> Thus, parental input may ensure that the child's decisions are not shaped by the monolithic views of the lawyer, but by parents having different philosophies and experiences.<sup>60</sup>

Parental input may also help the child make better decisions in connection with the juvenile case. Developmental research suggests that adolescent immaturity and inexperience may limit the child's decision-making capacity and produce poor, shortsighted value judgments.<sup>61</sup> Because children and adolescents tend to focus on immediate gains and often fail to consider the long-term, future consequences of a given choice, adolescent decisions about interrogation, waiver of the right to counsel, plea, and disposition may all be based on a temporary set of beliefs and values that are likely to change over time.<sup>62</sup> Parents may help the child understand the long-term value of rehabilitation and convince the child to follow through on drug-treatment or other rehabilitative

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<sup>57</sup> *Id.* at 107.

<sup>58</sup> See *Haley v. Ohio*, 519 U.S. 1011 (1948) (recognizing that police interrogation is inherently coercive and that child may need ally to held understand and protect due process); Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Jevniles*, 71 U. CIN. L. REV. 89, 102-03 (2002) (discussing police interview tactics designed to make child feel powerless and vulnerable by confining child in isolated setting, away from friends and family). *But see* Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 AM. CRIM. L. REV. 1277 (arguing that parents may intentionally or unwittingly join in coercive police tactics).

<sup>59</sup> Cf. Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 376-78 (1997) (arguing that lawyer's unconscious racial bias affects the attorney-client relationship).

<sup>60</sup> Hafen, *supra* note 46, at 445; see also Ross, *supra* note 56, at 92.

<sup>61</sup> Scott, *supra* note 11, at 555-56, 591; Schmidt et al., *supra* note 7, at 177; Buss, *supra* note 54, at 243.

<sup>62</sup> Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in *YOUTH ON TRIAL*, *supra* note 51, at 88, 91 (youth tend to favor of immediate consequences such as looking "cool" in the eyes of peers); Buss, *supra* note 54, at 249; Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463, 505 (2003-2004); Schmidt et al., *supra* note 7, at 179-180; Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in *YOUTH ON TRIAL*, *supra* note 51, at 26.

programs. Parents may also engage the child in a dialogue about the morality and responsibility of each contemplated decision in the case.<sup>63</sup> The parents, for example, may encourage the child to consider the impact of his choices on his family and urge the child to accept responsibility for his behavior when appropriate.

By consulting with parents, the lawyer may tailor legal advice to meet the special needs and interests of the child.<sup>64</sup> Although the lawyer is bound to follow the expressed wishes of the child and may not coerce the child to take any particular course of action, an effective lawyer wants his client to make the best decisions and choose the best legal alternatives.<sup>65</sup> In the end, effective collaboration between the lawyer, the parent, and the child may empower the child to make a more thoughtful and well-informed choice among alternatives.

As long as parents remain intertwined in the lives of children and adolescents, it is unlikely that lawyers will develop and sustain an independent relationship with youth in the juvenile justice system without the direct or indirect influence of parents. In fact, theories of adolescent development suggest that lawyers should both expect and encourage youth to consult with parents during times of decision and stress.<sup>66</sup> Even as adolescents begin to pull away from parents and transition towards independence, many continue to seek parents for emotional support and guidance and will draw, consciously and subconsciously, upon the values and perspectives of their family. As parents are increasingly integrated into the fabric of the juvenile justice system, lawyers, judges, and other court officials will also look to parents to build healthy interpersonal skills or repair dysfunctional relationships within the home. In some cases, parental support may be legally required to satisfy the child's constitutional right to counsel or strategically necessary to secure the child's stated objectives and improve the quality of the child's legal decisions.

While most would agree that children need the support and advice of parents in the juvenile justice system, many would disagree about how much and in what manner the parent should be allowed to influence or direct the attorney-child relationship. Although collaboration among the attorney, the child, and his parents is useful, it is certainly not without limits. The next section will explore limits and barriers to effective collaboration in the juvenile justice context.

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<sup>63</sup> Farber, *supra* note 58, at 1304-08 (arguing that when lawyer is appointed as legal advocate in the interrogation context, the parent is free to assume role of moral advisor).

<sup>64</sup> See Bruce J. Winick, *Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys can Identify and Deal with A Psycholegal Soft Spot*, 4 PSYCHOL. PUB. POL'Y & L. 901, 914-15 (1998).

<sup>65</sup> Theories of effective lawyering recognize balanced, non-coercive persuasion as an appropriate component of good legal counseling. The lawyer's responsibility is not just to passively or neutrally list alternatives, but to ensure that the client will consider and evaluate all of the available options and persuade the client to make the best choice. ROBERT F. COCHRAN ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* 131-32 (1999); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 517 (1990).

<sup>66</sup> See *supra* notes 21-24 and accompanying text.

*B. Barriers to Effective Collaboration Among the Attorney, the Child, and the Parent*

Successful collaboration among the lawyer, the parent, and the child assumes at least three things: (1) Communication between the parent and the lawyer will not dilute the lawyer's loyalty to the child client; (2) parents will be willing and able to advance the legal interests of the child—sometimes even at the expense of their own; and (3) the lawyer will not intentionally or unintentionally substitute the parents' views for those of the child. Today, many variables complicate the interaction among attorneys, children, and parents in the juvenile justice system. Parents in juvenile court generally lack expertise in issues of criminal and juvenile law, are increasingly concerned about their own potential liability for the conduct of their children, and often have psychological and emotional issues that compromise their ability to provide quality, reliable advice to children in the juvenile justice system. In addition, parents who expect or desire privacy within the family often resent the intrusion of lawyers who challenge their authority within the home and interfere with their right to make decisions on behalf of the child. On the other hand, children who perceive that lawyers are overly deferential to the views of the parent, may resent the loss of autonomy and voice, refuse to cooperate with the attorney, and rebel against the rehabilitative efforts of the court.

In this Part, I look, first, at ways in which heightened conflict may limit collaboration and support in families with delinquent children. In section 2, I consider the risk of misguided advice from parents who tend to be poor legal advisors for children in juvenile court. In section 3, I look at common areas of conflict in the attorney-parent relationship including the parents' resentment of the attorney's interference in private matters of the family and the parents' desire to usurp control over the attorney-child relationship. In section 4, I study the increasing potential for legal conflict between accused children and their parents. Specifically, I consider the parents' exposure to personal liability in juvenile, dependency, criminal, and civil courts when their children are arrested. In the final section of this Part, I consider ways in which the absence of parent-child and attorney-parent privileges limit confidentiality, and thereby hinder collaboration, in the attorney-child-parent relationship.

*1. Conflict and Rejection in Families with Delinquent Children*

As noted earlier, families with delinquent children tend to have higher rates of emotional turmoil and conflict than other families.<sup>67</sup> Domestic violence, parental instability, intra-family conflict, and the lack of parental supervision, monitoring, or discipline have all been identified as significant contributors to delinquency.<sup>68</sup> Delinquency also appears to be associated with

<sup>67</sup> Steinberg, *supra* note 12, at 260.

<sup>68</sup> Gilbert et al., *supra* note 34, at 1153, 1170, 1174; Oddone-Paolucci et al., *supra* note 29, at 185 (noting that high rates of conflict correlate to delinquency); Jennifer S. Parker & Mark J. Benson, *Parent-Adolescent Relations and Adolescent Functioning: Self-Esteem, Substance Abuse, and Delinquency*, Vol. 39 ADOLESCENCE No. 155, 519 (2004) (discussing poor parental supervision and monitoring as predictors of delinquency); Sigfusdottir et al., *supra* note 29, at 511-13, 516-18 (finding that adolescents who live in families with severe argu-

low levels of parental acceptance,<sup>69</sup> weak bonding between the parent and the child,<sup>70</sup> and a history of psychological or mental health problems in the family.<sup>71</sup> Further, research indicates that juvenile court involvement is frequently accompanied by the child's disrespect and defiance in the home, dishonesty and secretiveness with parents, and non-compliance with household chores and schoolwork.<sup>72</sup> Thus, before comprehensive therapeutic interventions are initiated within the family, the child's arrest may exacerbate conflict and tension that already exist between the parent and the child.

Even when family relations are not already strained, the onset of court proceedings often makes communication between parents and children difficult. Children who are ashamed of their actions or who fear censure and disappointment from family and friends may be afraid or embarrassed to disclose their misconduct and arrest to parents.<sup>73</sup> Communication between the child and the parent may also be compromised by the parent's wide range of potentially conflicting emotions—fear, anxiety, frustration, remorse, shame, guilt, and protectiveness.<sup>74</sup> Parents, who sometimes achieve their own status or stigma through the acts, achievements, or misconduct of their children, may be angry and embarrassed upon discovery of the child's arrest.<sup>75</sup> Recognizing that delinquency is still viewed in public opinion as more of a parental failure than a failure of the child or society, parents often fear that everyone else, including lawyers, judges, teachers, police officers, and neighbors, blames them.<sup>76</sup>

Recently, popular culture icon Bill Cosby delivered one of the more public and controversial speeches on the failures of parents in modern society.<sup>77</sup> Dr. Cosby lodged a long list of complaints against contemporary parents, including lack of attention to children's daily whereabouts, complicity in the development of materialistic values, inattention to children's attendance and progress at school, failure to insist on respect from children, and failure to teach proper grammar and equip children with skills they need to succeed.<sup>78</sup> A number of

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ments and violence experience anger which increases their propensity to engage in delinquency).

<sup>69</sup> Oddone-Paolucci et al., *supra* note 29, at 185.

<sup>70</sup> Rick Kosterman et al., *Unique Influence of Mothers and Fathers on Their Children's Antisocial Behavior*, 66 J. OF MARRIAGE & FAM. 762, 763 (2004) (arguing that one of strongest predictors of delinquency is poor bonding to mother and a perception that one's mother is less caring).

<sup>71</sup> Gilbert et al., *supra* note 34, at 1170; Henggeler & Sheidow, *supra* note 11, at 506; Oddone-Paolucci et al., *supra* note 29, at 185.

<sup>72</sup> Kerr, *supra* note 32, at 130-32, 136.

<sup>73</sup> See Judith G. McMullen, *You Can't Make Me! How Expectations of Parental Control over Adolescents Influence the Law*, 35 LOY. U. CHI. L. J. 603, 639-40 (2004) (discussing study that showed both delinquent and high achieving teens concealing conduct such as drug use, theft, vandalism, and driving under the influence from their parents); Ross, *supra* note 56, at 111 (noting that remorse may lead child to deny wrongdoing to parents).

<sup>74</sup> ANNE-MARIE AMBERT, THE EFFECT OF CHILDREN ON PARENTS 98-101 (2000).

<sup>75</sup> Farber, *supra* note 58, at 1277.

<sup>76</sup> AMBERT, *supra* note 74, at 98-101.

<sup>77</sup> Bill Cosby, Speech at the 50th Anniversary Commemoration of the *Brown v. Topeka Board of Education* Decision, Constitution Hall, Washington, D.C. (May 4, 2004), available at <http://www.americanrhetoric.com/speeches/billcosbypoundcakespeech.htm> (last visited August 10, 2005).

<sup>78</sup> *Id.*

recent public opinion polls have affirmed Dr. Cosby's view. In these polls, respondents have overwhelmingly indicated that parents should be legally responsible for crimes committed by their children.<sup>79</sup>

In some instances, parents blame themselves or begin to blame each other, causing marriages to deteriorate at a time when the family needs to remain cohesive.<sup>80</sup> Parents in the juvenile justice system also report being stressed, tired, and unhappy, and sometimes experience a decline in health.<sup>81</sup> Some parents become preoccupied with the child's problems and begin to perform poorly at work, develop unhealthy eating patterns, and withdraw from relatives, friends, and neighbors.<sup>82</sup> Other parents may withdraw support, warmth, and trust from the child,<sup>83</sup> become physically or emotionally abusive,<sup>84</sup> and in some cases may force the child out of the home.<sup>85</sup>

The flood of overwhelming emotions often makes it difficult for the parent to identify goals, establish priorities, and plan effective legal strategies on behalf of the child.<sup>86</sup> Because people often make poor decisions under stress,<sup>87</sup> parents may lack sufficient insight to choose from among competing moral and legal concerns in the juvenile case.<sup>88</sup> Specifically, parents may struggle between teaching the child a moral lesson, advocating for the rehabilitative needs of the child, advancing the legal interests of the child, or maybe even protecting the legal and safety interests of neighbors, friends, or co-workers who might be affected by the child's delinquent conduct.<sup>89</sup> Some parents may become paralyzed by grief or anxiety and be unable or unwilling to acknowledge and address the delinquent behavior of a child they have never suspected

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<sup>79</sup> See, e.g., Peter Applebome, *A Carrot and Stick for Parenthood*, N.Y. TIMES, June 16, 1996, § 4, p. 5 (citing results of 1996 New York Times/CBS News Poll in which seventy-two percent of respondents agreed that parents should be held accountable); Gallup, C.N.N., U.S.A. Today Poll, Roper Center at University of Connecticut Public Opinion Online, Apr. 22, 1999, Lexis Nexis Academic, Question ID USGALLUP.99AP21, R08B (reporting that fifty-one percent of respondents blamed parents a "great deal" for school shootings like the one in Littleton, Colorado while 33% of respondents blamed parents a "moderate amount").

<sup>80</sup> AMBERT, *supra* note 74, at 98.

<sup>81</sup> *Id.* at 98-101. Although Ambert's study sample was limited to a middle-class Caucasian population, Ambert's findings ring true in my own conversations with African-American parents of lower socio-economic backgrounds in the District of Columbia Superior Court.

<sup>82</sup> *Id.* at 98-99.

<sup>83</sup> *Id.* at 99 (noting that parents may no longer trust the child who has lied, disobeyed or betrayed their trust); see also Kerr & Stattin, *supra* note 32, at 130-131 (contradicting most of previous social science literature on causal/reactive interchange between parents and delinquent children and instead suggesting that parents' lack of support and attachment is not the cause of delinquency but the reaction to a delinquent child).

<sup>84</sup> Kerr & Stattin, *supra* note 32, at 136 (noting that parents may express disapproval through bitterness, sarcasm, or ridicule).

<sup>85</sup> Kristin N. Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified*, 79 N.Y.U. L. REV. 520, 573-74 (2004) (discussing exclusion of child from home as way to avoid eviction from public housing).

<sup>86</sup> Pauline H. Tesler, *Collaborative Law: What It Is and Why Lawyers Need to Know About It*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 197 (2000).

<sup>87</sup> COCHRAN ET AL., *supra* note 65, at 242-43.

<sup>88</sup> See *id.* at 243; Tesler, *supra* note 86, at 197.

<sup>89</sup> Farber, *supra* note 58, at 1305.

of any wrongdoing.<sup>90</sup> Parents may even insist on the child's innocence and refuse to support a guilty plea in the face of overwhelming evidence. For others, the guilty plea may feel like a concession that they have been bad or inattentive parents.

## 2. *Parents as Poor Legal Advisors*

Parental advice in the juvenile justice context is compromised not only by psycho-emotional tension within the family, but also by the parents' lack of expertise in the law and practice of juvenile court. Parents are neither trained in advocacy, nor knowledgeable about the rights of an accused child.<sup>91</sup> Parents frequently fail to appreciate the risks associated with the exercise and waiver of the child's constitutional rights<sup>92</sup> and often share a misguided and exaggerated view of what the juvenile justice system can accomplish. Parents may force or encourage the child to plead guilty so the child can get treatment and services without recognizing the label "treatment facility" as a euphemism for juvenile jail.<sup>93</sup> In my own experience as a juvenile defender in the District of Columbia, parents often seek police or court intervention to get mental health services, drug treatment, or general supervision for unruly children, but frequently report general disappointment in their loss of control over treatment, the general lack of services in the system, and the child's negative response to a poorly planned disposition. Similarly, parents often initially view the probation officer as a benevolent ally in their efforts to rehabilitate the child but later come to recognize the officer as an agent of the court with the power to revoke community-based privileges and incarcerate the child.

A study of police interrogation strategies with children exposes both the value and limitations of legal advice from parents. Traditionally, judges, legislators, and child advocates presume that parental guidance will improve the child's decisions regarding interrogation and the waiver of *Miranda* rights.<sup>94</sup> As a result, some states deem juvenile confessions *per se* involuntary and unre-

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<sup>90</sup> Kerr & Stattin, *supra* note 32, at 131; Winick, *supra* note 64, at 904 (discussing denial as a defense mechanism that operates unconsciously to disavow external reality and avoid internal conflict and anxiety about those things that would be consciously intolerable).

<sup>91</sup> Ross, *supra* note 56, at 113.

<sup>92</sup> See, e.g., *In re Christopher T.*, 740 A.2d 69, 71 (Md. Ct. Spec. App. 1999) (reversing adjudication for violation of the child's right to counsel after child's mother initially waived counsel for her child because she "did not realize the gravity of the situation"); Farber, *supra* note 58, at 1291 (discussing adults' limited comprehension of *Miranda* and discussing study in which only 42.3% of adults expressed adequate understanding of each of four warnings when asked to paraphrase them).

<sup>93</sup> Juvenile institutions often expose incarcerated youth to physical and/or mental abuse. For evidence of physical and mental abuse in juvenile facilities, see Colorado, <http://www.hrw.org/reports/1997/usacol/>; Georgia, <http://www.hrw.org/reports/1996/Us.htm>; and Maryland, <http://www.hrw.org/reports/1999/maryland/> (last visited July 26, 2005); see also Amnesty International, *Betraying the Young: Human Rights Violations Against Children in the US Justice System*, <http://web.amnesty.org/library/Index/ENGAMR510571998?open&of=ENG-USA> (last visited July 26, 2005).

<sup>94</sup> Farber, *supra* note 58, at 1286-88 (discussing two common tests to determine validity of *Miranda* waiver to include a *per se* approach in which the child must be allowed to consult with an adult advisor and a totality of the circumstances test in which the parent's presence is viewed as a positive factor in the voluntariness analysis).



liable unless a parent or guardian is present at the time of questioning.<sup>95</sup> In jurisdictions where voluntariness is determined by a judicial evaluation of the totality of the circumstances, judges generally view the parent's presence as a positive factor ameliorating the threat of coercion.<sup>96</sup> Recently, however, scholars have begun to question the presumptive advantage of parental guidance in the interrogation context.<sup>97</sup> Commentators recognize that the potential for conflicts between the interests of children and their parents is significant and worry that adults themselves do not adequately comprehend *Miranda* rights.<sup>98</sup> In many cases, parents have intentionally or unintentionally aligned with law enforcement officers in coercive tactics to force children to confess to criminal conduct.<sup>99</sup> In some cases, parents believe they have a moral obligation to convince their children to confess; in others, parents mistakenly believe that a confession will result in dismissal or reduction of charges against the child.<sup>100</sup>

Limited legal experience not only affects those parents who seek treatment for their children, but it also affects those who believe in their child's innocence. For example, notwithstanding her belief that Lionel was just playing with Tiffany and did not intend to hurt her, it is unlikely that Lionel Tate's mother fully appreciated the likelihood that her son would be convicted and sentenced to an adult prison. In juvenile courts, parents are often surprised by the low rates of acquittal and high rates at which Fourth and Fifth Amendment motions are denied by juvenile judges. The parents' limited experience in the juvenile justice system, thus, compromises their ability to evaluate and choose among options available to the accused child.

The risk of poor legal advice from parents has significant implications for judges, policymakers, and child advocates. The limited competence of parents on issues of juvenile law suggests that judges and legislatures should look to lawyers, not parents, to counsel children on issues of *Miranda*, waiver of the right to counsel, and pleas.<sup>101</sup> The limits of parental wisdom also suggest that the child's lawyer should be cautious in encouraging children to seek the advice of parents and be diligent in educating parents about the law, practice, and procedure of the juvenile justice system. More detailed strategies for moderating parental advice are discussed in Part II.

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<sup>95</sup> See, e.g., COLO. REV. STAT. § 19-2-511 (2002); CONN. GEN. STAT. § 46b-137 (2003); N.D. CENT. CODE § 27-20-26 (1991).

<sup>96</sup> See, e.g., *In re A.M.*, 360 F.3d 787 (7th Cir. 2004) (considering failure to contact child's mother as one of factors important to finding that confession was involuntary); *State v. Presha*, 748 A.2d 1108, 1110 (N.J. 2000) (indicating that court should consider absence of parents as highly significant factor in evaluating whether child's waiver was knowing, voluntary and intelligent).

<sup>97</sup> Farber, *supra* note 58.

<sup>98</sup> *Id.* at 1291-92. For a more detailed discussion of potential legal conflicts in the parent-child dyad, see *infra* Part II.D.

<sup>99</sup> *Id.* at 1289, 1295-96.

<sup>100</sup> *Id.* at 1277.

<sup>101</sup> See *id.* at 1308 (proposing reform that would require presence of counsel for consultation with juveniles in the interrogation context). Some states now prohibit the child from waiving the right to counsel without first consulting with counsel. See, e.g., N.J. REV. STAT. § 2A:4A-39 (1937); S.C. CODE ANN. § 20-7-725 (1976).

### 3. *Tension in the Attorney-Parent Dyad*

Tensions within the attorney-parent relationship further complicate the legal representation of children. Parents often resent the intrusion of lawyers in the decision-making of the family and may attempt to usurp control over the child's legal representation or ignore the attorney altogether. In some cases, the parents' resentment may arise out of the parents' hostility to the lawyer's efforts to "get the child off" or help the child avoid responsibility for his conduct. In other cases, the parents' resentment may arise out of what the parent perceives to be judgment or condemnation by the lawyer.

#### a. *The "Intrusion" of Lawyers*

While some parents welcome what they believe will be help from the juvenile court, many others resent the intrusion of the government into the sanctity of the family. Thus, lawyers for children in the juvenile justice system often find themselves caught between the constitutional rights of children and the constitutional rights of parents to raise children in privacy, without the undue influence of a court-appointed advocate. As late as 2000, the Supreme Court reiterated its respect for the fundamental liberty interests of parents in "the care, custody and control of their children."<sup>102</sup> Although the right of parents to direct and raise children is not absolute,<sup>103</sup> traditionally, parents have been allowed to decide for children in areas of religion, education, medical treatment, finances, and discipline.<sup>104</sup> As the Court said in *Schall v. Martin*:

[U]nlike adults, [children] are always in some form of custody . . . Children, by definition, are not assumed to have the capacity to take care of themselves. They are

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<sup>102</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (striking down visitation statute and noting that "[t]he liberty interest of parents in the care, custody, and control of their children—is perhaps one of the oldest of the fundamental liberty interests recognized by this Court").

<sup>103</sup> The Court has limited parental autonomy in areas of abortion, child labor, "infant marriage," compulsory education, access to necessary medical treatment, and freedom from abuse and severe physical or mental deprivation. See, e.g., *Bellotti v. Baird*, 443 U.S. 622 (1979) (striking down parental consent for abortion); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (holding that state cannot give parents an absolute and possibly arbitrary veto over the decision of the physician and his patient to terminate the patient's pregnancy); *Prince v. Mass.*, 321 U.S. 158 (1944) (upholding conviction of parent under child labor laws for allowing child to sell religious literature in public); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (noting that although state cannot compel attendance at public schools, there is no question that state can require some school).

<sup>104</sup> *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 627 n.13 (1986) (plurality) (invalidating federal regulations requiring medical treatment of handicapped infants without parental consent); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (recognizing "fundamental liberty interest of natural parents in the care, custody and management of their child" and requiring clear and convincing evidence in proceedings to terminate parental rights); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (exempting Amish children from compulsory formal education beyond the eighth grade); *Ginsberg v. New York*, 390 U.S. 629, 639-43 (1968) (upholding ban on sale of sex-related materials to minors); *Pierce*, 268 U.S. at 534-35 (1925) (finding that compulsory public school attendance unreasonably interferes with parental right to direct the upbringing and education of children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down statute prohibiting the teaching of any foreign language to a child before eighth grade).

assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*.<sup>105</sup>

Parents' rights advocates have similarly argued that "deserving" parents are uniquely qualified to make decisions on behalf of their children, especially when the children are involved in a legal proceeding.<sup>106</sup> In the reality of an urban juvenile court, parents often see the assertion of juvenile court jurisdiction as a mark of their own failure or lack of control over their children. Likewise, parents often view the interference of the child's lawyer as a critique on their own competence and success as a parent.

Tensions in the attorney-parent relationship are particularly great in the pre-trial stages of the juvenile case when the lawyer and the parents have not developed a rapport and the parents do not understand of the rights of the child and the obligations of the child's lawyer. The early stages of the case also involve the most uncertainty for the lawyer and the parents. While the parents want definitive advice and quick resolution of the juvenile case, the child's lawyer is obligated to thoroughly investigate factual allegations and explore possible defenses before rendering fair and meaningful guidance to the child.<sup>107</sup> Parents who want immediate rehabilitative services for their children may become frustrated with the child's lawyer, and the juvenile court system as a whole, when significant treatment and rehabilitation are delayed until after an adjudication of guilt. Conflict may arise when the parent refuses or is reluctant to allow the child to remain or return home pending trial and the lawyer has little or nothing to offer the parent by way of services and intervention for the family. In some cases, the lawyer's need to expose shortcomings in the child's family to obtain services for the child or to portray the parents negatively to earn sympathy for an accused child may exacerbate the parents' hostility toward the lawyer.

Parents may also harbor hostility about lawyers based on negative portrayals of lawyers in the media, local stereotypes regarding public defenders, or their own prior unpleasant interactions with attorneys.<sup>108</sup> Many view the child's lawyer less as an ally for the child than as a representative of the juvenile justice system as a whole. In these cases, the parents may encourage the child to waive the right to counsel altogether or, when the lawyer is appointed, sabotage the child's trust in the lawyer by making disparaging comments or neglecting to pass important messages and refusing to arrange for and coordinate meetings between the child and the attorney.

#### *b. Parents Usurp Control Over Attorney-Client Relationship*

In a delinquency case, parents often construe their own constitutional right to raise and control children as a right to control the child's legal representation and make critical decisions for the child in juvenile court. Some parents may view control over the child's juvenile case as minimal compensation for the

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<sup>105</sup> 467 U.S. 253, 265 (1984).

<sup>106</sup> Hafen, *supra* note 46, at 427.

<sup>107</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 5 (2002).

<sup>108</sup> Winick, *supra* note 64, at 911.

time, money, and emotional energy they will spend in juvenile court.<sup>109</sup> Other parents who are not ready to cede authority to an immature adolescent may become angry when the child appears to take the lawyer's advice as permission to disobey parents, keep secrets, or violate the privacy and confidences of the family. Philosophical tensions may also surface between parents and lawyers who have different parenting styles or bring different cultural and religious beliefs to the discussion.<sup>110</sup> Strategic conflicts may emerge when the parent's desire to secure rehabilitative services for the child or teach the child a lesson conflicts with the lawyer's obligation to pursue the client's expressed interest in the least restrictive alternative.<sup>111</sup>

The parent's effort to control the child's legal representation may be even greater when the parent pays for the services of the child's counsel<sup>112</sup> or when the parent learns that he may be required to pay for treatment if the child is adjudicated.<sup>113</sup> Interesting ethical questions arise when the parent voluntarily hires an attorney for the child or when the court orders the parent to compensate the attorney for his services. Parents who pay for the attorney will generally expect to guide key decisions in the case while attorneys, who are bound by rules of professional responsibility, owe continuing loyalty to the client and may not permit interference from a third-party payer.<sup>114</sup> Parents who feel excluded from the attorney-client relationship may threaten to withhold legal fees and refuse to cooperate with either the attorney or the child. At a minimum, most parents expect the child's lawyer to keep them informed about important developments in the case.<sup>115</sup> Parents who do not get adequate information from the child's lawyer may forge alliances with prosecutors and probation officers, often to the detriment of the child.

The parents' effort to control decisions in the child's juvenile case does not always lead to conflict in the attorney-parent dyad. In fact, there are many advocates who believe parents are better suited than children to set goals and objectives for the lawyer.<sup>116</sup> These lawyers willingly look to parents for direction and often fail to consult with their own clients. When the child's attorney is overly deferential to the views of the parent and refuses to advocate for the expressed wishes of the child, the child loses the only opportunity he has to participate in the process and influence the outcome of his case. Research in the psychology of procedural justice suggests that offenders who are denied an

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<sup>109</sup> Cf. Bruce C. Hafén & Jonathan O. Hafén, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT'L L.J. 449, 483-84 (1996) (discussing fear that denial of parental rights may have long term effect of reducing parental commitment to childrearing); Scott, *supra* note 11, at 551 (recognizing that parental rights and authority might be viewed as legal compensation for the burden of responsibility to provide food, shelter, health care, affection and education).

<sup>110</sup> Marrus, *supra* note 7, at 320-21.

<sup>111</sup> See *id.* at 321.

<sup>112</sup> Nancy J. Moore, *Conflicts of Interest in the Representation of Children*, 64 FORDHAM L. REV. 1819, 1844-47 (1996).

<sup>113</sup> See *infra* note 131 and accompanying text.

<sup>114</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.8(f)(3) (2002); Moore, *supra* note 112, at 1845-47.

<sup>115</sup> Moore, *supra* note 112, at 1827.

<sup>116</sup> Hafén, *supra* note 46, at 427.

opportunity to participate effectively in the process of justice are likely to resist treatment, become apathetic, and lose respect for the law.<sup>117</sup> In a delinquency case, meaningful participation not only allows the child to feel like he is a valued member of society whose opinion is worth considering, but it also provides the child with a legitimate opportunity to influence the judge's final decision and gives the child greater confidence in the accuracy of the results.<sup>118</sup> As the Supreme Court recognized in *In re Gault*, the appearance and actuality of fairness, impartiality and orderliness may be just as, if not more, therapeutic than rehabilitative programming.<sup>119</sup> That is, the child's perception as to whether he or she is being listened to and whether his or her opinion is being considered is integral to the child's rehabilitation.<sup>120</sup> Offenders who experience the legal procedure as unfair are less likely to accept judicial outcomes and take responsibility for rehabilitation.<sup>121</sup>

#### 4. *Legal Conflicts in the Parent-Child Dyad*

Delinquency cases are unique in the character and extent of legal conflicts that might surface between children and their parents. Juvenile justice issues have been at the forefront of American policy since the late twentieth century. As policymakers search for new responses to the perceived growth in juvenile crime, victims of juvenile misconduct are finding recourse in an expanding array of fora. Victims may not only seek restitution from children in juvenile court, but they may also seek restitution and accountability from the parents of delinquent children in juvenile, civil, and adult criminal proceedings. In the next four subsections, I examine the parents' exposure to liability through juvenile justice legislation, child protective and dependency actions, criminal liability statutes, and tort or other civil liability provisions.

As the legal terrain becomes more complicated, the potential for conflict between parents and children is substantial. Historical presumptions that parents are the most competent, and most likely, advocates for the best interests of their children are increasingly giving way to the self-interested motives of parents and a growing reluctance among parents to put the needs of one child over those of other family members.<sup>122</sup>

##### a. *Juvenile Court Jurisdiction*

In an effort to hold parents accountable for the behavior of their children, policymakers now require parents to participate in every aspect of the juvenile justice system. Pursuant to modern juvenile justice legislation, parents are

<sup>117</sup> Juan Ramirez, Jr. & Amy D. Ronner, *Voiceless Billy Budd: Melville's Tribute to the Sixth Amendment*, 41 CAL. W. L. REV. 103, 120 (2004).

<sup>118</sup> Allen E. Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. OF PERSONALITY & SOC. PSYCHOL. 952-53 (1990).

<sup>119</sup> *In re Gault*, 387 U.S. 1, 26 (1967).

<sup>120</sup> Ramirez & Ronner, *supra* note 117, at 114; Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCH. PUB. POL. & L. 184, 197 (1997) (discussing medical context in which giving the child voice and choice in whether to participate in or refuse treatment can "increase the therapeutic efficacy of treatment").

<sup>121</sup> Ramirez & Ronner, *supra* note 117, at 93-94, 111, 114.

<sup>122</sup> Farber, *supra* note 58, at 1279.

automatically notified of the child's arrest, generally subject to the jurisdiction of the juvenile court, and are increasingly required to attend court hearings under the threat of contempt.<sup>123</sup> Parents must also remain integrally involved in efforts to rehabilitate the child and may be fined for failing to bring the child to court when promised.<sup>124</sup> In some jurisdictions, parents will be asked to notify court officials when the child violates conditions of release or probation;<sup>125</sup> and in others, parents may be required to post bond to ensure the child's compliance with treatment.<sup>126</sup> Parents are also increasingly required to participate in treatment, either by themselves or with their children. The juvenile court may order parents to participate in family counseling, parenting skills classes, individual therapy, or community service.<sup>127</sup> The court may also order parents to submit to drug testing or undergo psychiatric or psychological evaluations.<sup>128</sup> Parents may also experience more subtle inconveniences from equipment that requires the family to disable phone features and disconnect Internet connections to accommodate GPS tracking systems that monitor the child's movement on probation.

While these provisions may be useful in efforts to enhance the child's rehabilitation and implement family-focused juvenile justice strategies, they are also likely to create conflict and tension within the family. Parents who are required to attend multiple court hearings and related activities miss work, lose pay, incur the costs of transportation to and from appointments, and often need

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<sup>123</sup> See, e.g., ALA. CODE § 12-15-31(5) (1995) (court may make parent party to the juvenile proceeding); D.C. CODE ANN. § 16-2325.01 (2004) (parent may be found in civil contempt for failing to comply with participation orders); KAN. STAT. ANN. § 38-1641 (2000) (duty of parent to appear at all hearings subject to contempt); MICH. COMP. LAWS ANN. § 712A6a (West 1948) (parent who fails to attend may be held in contempt and ordered to pay fines); MINN. STAT. ANN. § 260B.154 (West 1946) (parent who fails to attend may be held in contempt and subject to arrest); PA. CONS. STAT. ANN. § 42-310 (West 1930) (court may hold parent in contempt and issue a bench warrant when the parent fails to participate).

<sup>124</sup> See, e.g., ALASKA STAT. § 47.12.155 (1998) (authority to require parents to attend, participate in treatment); GA. CODE ANN. § 15-11-5 (2005) (authority to require parents to participate in disposition plan for the child); IDAHO CODE § 20-522 (Michie 1947) (jurisdiction to require parents to sign probation contract and comply with conditions of the child's probation); IND. CODE § 31-37-19-24 (1972) (authority to order parents' participation in child's care, treatment, rehabilitation); S.D. CODIFIED LAWS § 26-7A-51 (2004) (parent may be held in civil contempt if he promises to bring child before the court but fails to do so).

<sup>125</sup> See, e.g., ALASKA STAT. § 47.12.155(b)(2) (1998).

<sup>126</sup> See, e.g., KY. REV. STAT. ANN. § 610.180 (1970); OKLA. STAT. ANN. tit. 10 § 7303-5.3 (1910); WYO. STAT. ANN. § 14-6-244 (2005).

<sup>127</sup> See, e.g., ALASKA STAT § 47.12.155 (1998) (parents may be ordered to participate in treatment); ARIZ. REV. STAT. ANN. § 8-234 (1956) (court may order parent to complete community service); ARK. CODE ANN. § 9-27-330 (Michie 1998) (parents may be sentenced to parental training program if juvenile is found delinquent); ARK. CODE ANN. § 9-27-330(a)(9) (Michie 1998) (parent may be ordered to complete community service); COLO. REV. STAT. § 19-2-919 (2005) (guardians of delinquents can be sentenced to attend parental training program); MO. ANN. STAT. § 211.185 (West 1949) (parents may be ordered to complete community service); N.M. STAT. ANN. § 32A-2-28 (Michie Supp. 1995) (parents may be ordered to participate in counseling program).

<sup>128</sup> ARK. CODE ANN. § 9-27-330 (Michie 1998) (permitting court to order child or members of child's family to submit to physical, psychiatric or psychological evaluations); N. C. GEN. STAT. ANN. § 7B-2702 (1999) (permitting court to order medical, surgical, psychiatric, or psychological evaluation or treatment of juvenile or parent).

to arrange childcare for other children.<sup>129</sup> Parents may especially resent court-ordered evaluations that are not only time consuming and intrusive, but that also have the potential to further embarrass and label the parent. To reduce the amount of time the family will have to spend in juvenile court, some parents may encourage the child to plead guilty or prefer to have the child placed in out-of-home, residential placements rather than participate in family counseling or monitor the child on probation. When a mother is compelled to report violations to the court, she essentially becomes a witness for the state against the child and is no longer a safe-haven for open communication and support for the child. Likewise, when a father faces civil contempt for failing to ensure his child's compliance with probation, he may turn against the child and portray the child as unruly and uncontrollable.

Parents also face considerable financial liability in juvenile court. Although every state guarantees an accused child the right to counsel, many states look to parents to reimburse all or part of the child's legal fees depending upon the parents' financial ability.<sup>130</sup> Many jurisdictions also hold the parent jointly or independently liable for restitution to victims of juvenile crime.<sup>131</sup> The court may order restitution to cover lost or damaged property as well as medical, dental, or funeral expenses of the victim.<sup>132</sup> Even where no civilians are injured, the judge may order parents to pay court costs and fines<sup>133</sup> or to reimburse the state for the expense of detention, commitment, evaluations, special schools, counseling, or other treatment necessary for the child.<sup>134</sup> Parents may also be required to pay for their own court-ordered treatment.<sup>135</sup> When parents refuse to pay fees, restitution, and other expenses, the court may enter a civil judgment, hold the parent in criminal contempt, or place a claim or lien on

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<sup>129</sup> Farber, *supra* note 58, at 1297-98.

<sup>130</sup> See, e.g., ALA CODE § 12-15-11 (1995); ARIZ REV. STAT. ANN. § 9-221 (1956); GA. CODE ANN. § 15-11-8 (2005); KY. REV. CODE ANN. § 610.060 (1970); MISS. CODE ANN. § 43-21-619 (1972); MONT. CODE ANN. § 41-5-1525 (2005); N. C. GEN. STAT. ANN. § 7B-2002 (1999); OR. REV. STAT. ANN. § 419C.203 (2003); VA. CODE ANN. § 16.1-267 (1950); WASH. REV. CODE § 13.40.145 (1961).

<sup>131</sup> See, e.g., *D.W.L. v. State*, 821 So. 2d 246 (Ala. 2001) (father ordered to pay \$1000 of the child's \$7000 restitution order for the child's burglary); ALASKA STAT. ANN. § 47.12.155(b)(3) (1998); ARK. CODE ANN. § 9-27-330(a)(7) (Michie 1998); D.C. CODE ANN. § 16- 2320.01 (2005).

<sup>132</sup> See, e.g., *D.W.L. v. State*, 821 So. 2d 246 (Ala. 2001) (father ordered to pay \$1000 of the child's \$7,000 restitution order for the child's burglary); ALASKA STAT. ANN. § 47.12.155(b)(3) (1998); ARK. CODE ANN. § 9-27-330(a)(7) (Michie 1998); D.C. CODE ANN. § 16- 2320.01 (2005).

<sup>133</sup> See, e.g., ALA. CODE ANN. § 12-15-11 (1995); ARK. CODE ANN. § 9-27-330(a)(6), (8) (Michie 1998); S.D. CODIFIED LAWS § 26-7A-4 (2004).

<sup>134</sup> See, e.g., ALA. CODE ANN. § 12-15-11 (1995); ALASKA STAT. ANN. § 47.12.155 (1998); ARIZ. REV. STAT. ANN. § 8-234.D (1956); ARK. CODE ANN. § 9-27-330(a)(13)(A) (Michie 1998); KY. REV. STAT. ANN. § 610.060 (2000); MISS. CODE ANN. § 43-21-619 (1972); MONT. CODE ANN. § 41-5-1525 (2005); NEB. REV. STAT. § 43-290 (Michie 1988); N.C. GEN. STAT. ANN. § 7B-2704 (1999).

<sup>135</sup> See, e.g., ALASKA STAT. § 47.12.155 (Michie 1998).

the parents' property.<sup>136</sup> A parent who is found in criminal contempt may be incarcerated.<sup>137</sup>

In imposing greater accountability on parents and recognizing the parent as a formal party in delinquency proceedings, several states have awarded parents an independent right to counsel in the child's juvenile case.<sup>138</sup> Because rules of professional conduct generally limit the lawyer's ability to communicate with a represented party,<sup>139</sup> the child's lawyer may not be able to communicate directly with the child's parents. In addition, the parents' lawyer, who is rightly concerned about the legal interests of the parent, may develop case strategies that exonerate the parents but ultimately harm the child's position in juvenile court.

### *b. Child Protective and Dependency Actions*

Parents of children who engage in chronic or recurring delinquent behavior may find themselves in child protective or dependency proceedings. In many states, child protective statutes recognize a "neglected child" as one who lacks proper care, control, or supervision from parents or whose lax parental supervision is likely to endanger the child's morals, health, or general welfare.<sup>140</sup> A child who engages in delinquent conduct while he is left unattended or inadequately supervised may fall within the purview of these statutes.<sup>141</sup> A

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<sup>136</sup> See, e.g., ALA. CODE § 12-15-11 (1995); ALASKA STAT. § 47.12.230 (Michie 1998); ARIZ. REV. STAT. ANN. § 8-221 (1956); MISS. CODE ANN. § 43-21-619 (1972); N.D. CENT. CODE § 27-20-31.21 (1943).

<sup>137</sup> See, e.g., ALA. CODE § 12-15-11.1 (1995) (parent who fails to assist child in complying with probation may be held in criminal contempt and fined up to \$300 and imprisoned for up to 30 days).

<sup>138</sup> See, e.g., ARIZ. REV. STAT. § 8-221 (1956); IDAHO CODE § 20-514 (Michie 1947); MASS. GEN. LAWS ch. 119, § 29 (1958); MO. REV. STAT. § 211.211 (1949); NEV. REV. STAT. § 62D.100 (1957); OKLA. STAT. tit. 10, ch. 1 § 24 (1910); S.C. CODE ANN. § 20-7-110 (1976). Notwithstanding these examples, parents are not always entitled to representation of counsel in juvenile court. Juvenile statutes that subject parents to monetary fines, treatment costs, possible incarceration, and mandatory participation in parenting-skills classes and other treatment programs are not always accompanied by a statutory right to counsel for the parents. In the District of Columbia, for example, new restitution and parental participation statutes were not accompanied by a parental right to counsel.

<sup>139</sup> MODEL RULES OF PROF'L CONDUCT R. 4.2 (2002) ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

<sup>140</sup> See, e.g., ALA. CODE § 12-15-1 (1995) (defining child who is neglected to include child who is in a condition or surroundings or who is under improper or insufficient guardianship or control as to endanger the morals, health or general welfare of the child); D.C. CODE ANN. § 16-2301(9) (A)(ii) (2001) (defining child who is neglected to include child who is without proper parental care or control, subsistence, education or other control necessary for his or her physical, mental or emotional health); MASS. GEN. LAWS ANN. ch. 119 § 24 (1958) (defining neglected child to include child who is without proper discipline, growing up in conditions dangerous to his character development or who has a parent who is unwilling, incompetent or unavailable to provide care, discipline or attention the child needs).

<sup>141</sup> The use of neglect statutes in response to juvenile crime is not foreign in the District of Columbia. In one of my own recent cases, a mother was found to be neglectful after her three sons were found to possess significant quantities of drugs in her home without her knowledge.



parent who is found to be neglectful may lose parental rights not only with respect to the delinquent child, but also with respect to other children in the family.<sup>142</sup> The parents may also be subject to in-home supervision or monitoring by government officials and be ordered to complete parenting classes, participate in family counseling, or submit to medical or psychiatric treatment.<sup>143</sup>

As in the juvenile justice context, neglect or dependency proceedings carry a number of collateral consequences for the parents. Parents face stigma in the community, miss additional time and money from work, and resent the intrusion of the government into their homes. When neglect proceedings arise out of the child's misconduct, the allegations have the perverse consequence of pitting the parents against the child. As in the juvenile case, the parents may portray the delinquent child as uncontrollable and even voluntarily relinquish rights over the delinquent child to prevent the removal of other children from the home. The parents may also encourage the child to submit to treatment and take personal responsibility for his conduct in the juvenile case so that neglect proceedings will be closed.

### c. *Criminal Liability for Parents*

The potential for criminal liability for parents creates a third source of legal conflict between parents and children in the juvenile justice system.<sup>144</sup> Criminal parental liability statutes, which were written into state codes years ago, have waxed and waned in popularity.<sup>145</sup> Over the last two decades, policymakers have re-introduced parental liability as a potential response to growing concerns about declining public safety and the ability of parents to rear and control their children.<sup>146</sup> Under these provisions, parents whose children engage in delinquency may be charged with endangering the welfare, or contributing to the delinquency, of a minor.<sup>147</sup>

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<sup>142</sup> See, e.g., ALA. CODE § 12-15-71 (1995); D.C. CODE ANN. §§ 16-2301(A)(v), 16-2320 (2001); MASS. GEN. LAWS ANN. ch. 119 § 24 (1958).

<sup>143</sup> See, e.g., ALA. CODE § 12-15-71 (1995); D.C. CODE ANN. § 16-2320 (2001).

<sup>144</sup> Most obviously, the parent may be investigated as a suspect or co-conspirator in the child's crime. While that investigation would create a clear conflict of interest between the parent and the child, I am more concerned in this section with the criminal liability that parents may face regardless of whether they are a suspect themselves.

<sup>145</sup> Naomi R. Cahn, *Pragmatic Questions About Parental Liability Statutes*, 1996 Wis. L. REV. 399, 406-12 (1996) (tracing trends in parental liability legislation).

<sup>146</sup> *Id.* at 406-12; Peter Applebome, *A Carrot and Stick for Parenthood*, N.Y. TIMES, June 16, 1996, sec. 4, p. 5.

<sup>147</sup> See, e.g., ALA. CODE § 12-15-13 (1995) (parent guilty of misdemeanor for willfully aiding child in becoming delinquent and may be fined not to exceed \$500 or ordered to complete hard labor for county for not more than 12 months); CAL. PENAL CODE § 272 (West 1999) (parent guilty of misdemeanor for any act or omission that contributes to the delinquency of a minor and may be fined not to exceed \$2500 or imprisoned in county jail for not more than one year); KY. REV. STAT. ANN. § 530.60 (LexisNexis Supp. 1996) (parent guilty of misdemeanor when parent fails to exercise reasonable diligence to prevent child from becoming delinquent); LA. REV. STAT. ANN. § 14:92.2 (Supp. 1999) (parent may be fined \$25 - \$250 or incarcerated for 30 days for allowing child to become member of known criminal street gang); N.Y. PENAL LAW § 260.10 (McKinney 1939) (parent guilty of misdemeanor when parent "refuses to exercise reasonable diligence in the control of child to prevent him from becoming a juvenile delinquent"); N.C. GEN. STAT. § 14-316.1 (1999) (parent guilty of misdemeanor when parent knowingly or willfully causes, aids or encourages juve-

Parental liability statutes are designed to satisfy several goals including compensating victims through criminal fines, encouraging parents to exercise greater control over their children, reducing delinquency, and punishing parents for bad parenting.<sup>148</sup> Proponents of these statutes justify parental accountability measures on theories of incentive, deterrence, and retribution.<sup>149</sup> Legislators hope the threat of sanctions will motivate parents to spend more time with children, pay more attention to where children go and with whom, and develop a system of rewards and punishment that will encourage desired behavior or discourage undesired behavior.<sup>150</sup> When parents fail to raise children with good morals or fail to exercise immediate control over the child's conduct, advocates of parental liability believe punishment is warranted.<sup>151</sup> Proponents of criminal liability provisions also hope that the threat of fines and imprisonment for the parent will motivate the child to refrain from delinquent behavior out of love, affection, and attachment to parents.<sup>152</sup>

In their broadest form, criminal liability statutes hold parents responsible for any act, including inadequate supervision that contributes to the child's misconduct or brings the child under the jurisdiction of the juvenile or criminal court.<sup>153</sup> While most offenses within these statutes are misdemeanors,<sup>154</sup> a few states consider it a felony to contribute to the delinquency of a minor.<sup>155</sup> Parents who are found guilty under any of these provisions may be fined, ordered to participate in parenting classes, placed on probation, or incarcerated.<sup>156</sup> In

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nile to commit act that could be adjudicated delinquent); OKLA. STAT. tit. 21 § 856 (Supp. 2000) (parent guilty of misdemeanor punishable by up to year in jail or fine not to exceed \$1000 for encouraging minor to become delinquent or runaway; and parent causing minor to associate with street gang is guilty of felony, punishable by fine not to exceed \$3000); WIS. STAT. § 948.40 (1957) (person responsible for child's welfare guilty of misdemeanor if disregards welfare of child in way that contributes to child's delinquency).

<sup>148</sup> Cahn, *supra* note 145, at 409-10.

<sup>149</sup> See McMullen, *supra* note 73, at 641 (discussing general rationale and policy for various civil and criminal parental liability measures).

<sup>150</sup> See *id.* at 641-44.

<sup>151</sup> Cahn, *supra* note 145, at 409-10 (discussing strong public outcry for statutes that criminalize parents when their children commit crimes); McMullen, *supra* note 73, at 644-46 (but arguing that punishment should be determined by the parents effort or lack of effort to supervise the child and not by the success or failure of those efforts).

<sup>152</sup> McMullen, *supra* note 73, at 643.

<sup>153</sup> See, e.g., IDAHO CODE ANN. § 32-1301 (1947) (granting counties or cities authority to enact ordinances that penalize parents if child engages in conduct that brings him within the jurisdiction of juvenile or adult courts); Hill v. State, 381 So. 2d 91 (Ala. 1979) (criminal conviction for causing delinquency by not providing education to the child); see also Cahn, *supra* note 145, at 409-10 (discussing strong public outcry for statutes that criminalize parents when their children commit crimes); McMullen, *supra* note 73, at 644-46 (but arguing that punishment should be determined by the parents effort or lack of effort to supervise the child and not by the success or failure of those efforts).

<sup>154</sup> See, e.g., ALA. CODE § 12-15-13 (1995); CAL. PENAL CODE § 272 (West 1999); IOWA CODE § 709A.1 (1946); IDAHO CODE § 32-1301 (1947); KY. REV. STAT. ANN. § 530.060 (Michie Supp. 1996); N.Y. PENAL LAW § 260.10 (1939); N.C. GEN. STAT. § 14-316.1 (1999).

<sup>155</sup> See, e.g., OKL. STAT. tit. 21 § 856.1 (Supp. 2000); WIS. STAT. § 948.40 (1957).

<sup>156</sup> See, e.g., IDAHO CODE § 32-1301 (1947) (violators may be fined up to \$1000 or be ordered to complete parenting classes in lieu of fine); see also Cahn, *supra* note 145, at 409-10 (discussing strong public outcry for statutes that criminalize parents when their children

California, for example, a parent who contributes to the delinquency of a minor will be guilty of a misdemeanor and may be fined up to \$2500, imprisoned for a year, or placed on probation for up to five years.<sup>157</sup> In Oklahoma, any parent or other adult who causes, aids, or encourages a minor to participate in a drug crime is guilty of a felony and may be imprisoned for up to twenty years and/or fined up to \$200,000.<sup>158</sup>

Criminal liability provisions arguably create even greater conflict in the parent-child and attorney-parent dyads than parental accountability provisions in juvenile court. A parent who is convicted in criminal court may face additional collateral consequences such as the loss of voting rights, health care benefits, public housing, food stamps, federal education assistance, driving privileges, and employment opportunities.<sup>159</sup> The threat of criminal and related sanctions may also cause the parent to lash out in anger or violence and may further deteriorate already tenuous relationships between delinquent children and their parents.<sup>160</sup> In addition, because many of these statutes, either by plain language or by judicial interpretation, may exonerate the parent who demonstrates that he has made reasonable efforts to control the child,<sup>161</sup> parents have an incentive to dissociate themselves from the child's conduct and again label the child unruly and uncontrollable. The parent may also consent to emancipation proceedings, eject the child from the home, or withhold consent when the juvenile court is inclined to release the child back into the community after the child's arrest.

#### *e. Tort Actions and Civil Parental Liability Statutes*

Parents may also be sued for violations of tort law and civil liability statutes when their children commit crimes that injure the person or property of others.<sup>162</sup> Like the criminal statutes, civil parental liability provisions were

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commit crimes); McMullen, *supra* note 73, at 644-46 (but arguing that punishment should be determined by the parents effort or lack of effort to supervise the child and not by the success or failure of those efforts).

<sup>157</sup> CAL. PENAL CODE § 272 (West 1999).

<sup>158</sup> OKL. STAT. tit. 21 § 856.1 (Supp. 2000).

<sup>159</sup> MARC MAUER & MEDA CHESNEY-LIND, *INVISIBLE PUNISHMENT* 5 (2002).

<sup>160</sup> Cahn, *supra* note 145, at 417.

<sup>161</sup> See, e.g., *Williams v. Garcetti*, 853 P.2d 507 (1993) (holding that parent who makes reasonable efforts to control child but is not actually able to do so is not guilty of contributing to delinquency of minor); see also ALA. CODE § 12-15-13 (1995) (requires showing that parent "willfully" aided the child in becoming delinquent); N.Y. PENAL LAW § 260.10 (McKinney 1939) (requires showing that parent failed or refused to exercise reasonable care); N.C. GEN. STAT. § 14-316.1 (1999) (requires showing that adult "willfully" caused juvenile to become delinquent).

<sup>162</sup> For a representative sample of civil parental liability statutes, see ARIZ. REV. STAT. ANN. § 12-661 (1999) (parents liable for any act or malicious or willful conduct of a minor which results in injury to others); CAL. CIV. CODE § 1714.1 (Deering 1999) (parents/guardians liable for willful misconduct of minors); CONN. GEN. STAT. § 52-572 (2005) (parents jointly and severally liable for damage caused by minor's willful and malicious act); DEL. CODE ANN. tit. 10 § 3922 (1975) (parents liable for willful or reckless destruction of property); ILL. COMP. STAT. ANN. § 740 115/1 (West 1999) (parents responsible for willful or malicious acts of minor that causes injury or damage to property); MASS. GEN. LAWS ch. 231 § 85G (1958) (parental liability for willful act of child that causes death, injury or property damage); N.J. STAT. ANN. § 2A:53A-15 (West 1937) (parents liable for willful destruction of

written many years ago, but have gained renewed popularity among politicians and victims who seek to hold parents responsible for the destructive acts of their children and hope to fill gaps left in the compensation of victims at common law.<sup>163</sup> A typical civil parental liability statute will hold the parent strictly liable for the willful or malicious conduct of a child for whom they have the responsibility of direct supervision.<sup>164</sup> Upon a finding of liability, the statutes generally require parents to reimburse victims for the repair or replacement of property or to pay medical expenses in the case of personal injury.<sup>165</sup> While many civil liability statutes cap parental liability at \$5,000 or less,<sup>166</sup> at least two states allow liability up to \$25,000,<sup>167</sup> and a number of states set no liability limits in the case of property damage.<sup>168</sup>

While civil liability provisions are important for the compensation of victims, they, like other parental accountability measures, create an additional layer of conflict between parents and children in juvenile court. These statutes may cause considerable financial hardship for parents and may diminish, rather than reinforce, parental supervision and care.<sup>169</sup> Because civil parental liability statutes only hold the parent liable when it is clear that the parent is responsible for the care and control of the child,<sup>170</sup> the statutes may create a perverse disincentive for some to continue parenting responsibility. In addition, civil provi-

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property by infant under eighteen); N.M. STAT. ANN. § 32A-2-37 (2005) (parents liable for malicious or willful conduct of child that causes personal or property damage to others); N.Y. GEN. OBLIG. LAW. § 3-112 (McKinney 1999) (parents liable for willful, malicious or unlawful damage to property); OR. REV. STAT. § 30.765 (2003) (parents liable for intentional or reckless tort of children); TEX. FAM. CODE ANN. § 41.001 (Vernon 1999) (parents liable for property damage cause by willful and malicious conduct of child and for child's negligent conduct if negligence is reasonable attributed to parent's negligence); see also Rhonda M. Andrews, *The Justice of Parental Accountability: Hypothetical Disinterested Citizens and Real Victims' Voices in the Debate Over Expanded Parental Liability*, 75 TEMP. L. REV. 375, 398 (2002) (noting that civil parental liability statutes do not typically bar additional liability in tort). Professor Andrews notes that although parents may be liable in tort actions, recovery has been limited under common law standards in which the parent owes a duty of care only to the foreseeable victim and in which the parents' conduct must be the proximate cause of the victim's injury. *Id.* at 389-93. Parents who demonstrate their ignorance of the child's propensity for the type of act which caused the victim's loss or injury will not be held liable in tort for mere lack of supervision. *Id.*

<sup>163</sup> Andrews, *supra* note 162, at 397, 402.

<sup>164</sup> *Id.* at 399, 402.

<sup>165</sup> See MAUER & CHESNEY-LIND, *supra* note 159.

<sup>166</sup> See, e.g., CONN. GEN. STAT. § 52-572 (2005) (\$5000 cap); DEL. CODE ANN. tit. 10 § 3922 (\$5,000 cap); ILL. COMP. STAT. § 740.115 (1993) (\$2500 cap for each act); MASS. GEN. LAWS ch. 231 § 85G (2000) (\$5,000 cap); N.C. GEN. STAT. ANN. § 1-538.1 (West 1999) (\$2000 cap); N.D. CENT. CODE § 32-03-39 (1943) (\$1000 cap).

<sup>167</sup> See CAL. CIV. CODE § 1714.1 (West 1998) (\$25,000 cap for either injury, death or property damage); TEX. FAM. CODE ANN. § 41.001 (Vernon 1999) (up to \$25,000 plus court costs and attorney's fees per act).

<sup>168</sup> See, e.g., HAW. REV. STAT. § 577-3 (1999) (no stated limit); LA. CIV. CODE ANN. Art. 2318 (1997) (no stated limit); N.J. STAT. ANN. § 2A:53A-15 (West 1937) (no stated limit); N.Y. GEN. OBLIG. LAWS § 3-112 (2005) (no stated limit); NEB. REV. STAT. ANN. § 43-801 (Michie 1988) (no limits on property damage).

<sup>169</sup> Andrews, *supra* note 162, at 404 (favoring increased civil parental liability but acknowledging theoretical concerns associated with increased liability for parents).

<sup>170</sup> See, e.g., 740 ILL. COMP. STAT. ANN. 115/2 (1993) (liability for torts of unemancipated minors); MASS. GEN. LAWS ch. 231, § 85G (2000) (liability for willful tort of unemancipated

sions that limit liability to those cases in which the child engages in willful or malicious behavior<sup>171</sup> may also affect the parents' judgment and advice about how the child should proceed in the juvenile case. A parent, for example, may encourage the child to reject a clearly advantageous plea offer in family court to prevent the child from admitting responsibility for any act that may expose the parents to civil liability.

Attorneys who represent children in juvenile court must be cognizant of the growing potential for legal conflict between children and their parents. Conflicting legal interests not only affect the reliability of parental advice, but may also limit direct communication between the child's lawyer and the child's parents and may hinder the lawyer's efforts to win the parents' support for the child's objectives in the juvenile case.

### 5. *Parents as Witness Against the Child*

Normative preferences for open communication between children and their parents are compromised by the absence of evidentiary privileges that shield intra-familial communications from the court. Although court rules and statutes explicitly protect confidential communication between the attorney and the child, few provisions address the parameters of confidentiality between children and parents or between attorneys and the parents of a minor client. Absent these protections, the government may call the parent as a witness against the child in juvenile proceedings; and the child's attorney may use the confidences of the parent to advance the interests of the child. In this section, I will look, first, at the scope and limitations of existing parent-child privileges and, second, at the limitations of common attorney-client privileges when a minor child is involved.

#### a. *Absence of Parent-Child Privilege*

Today, very few states have formally recognized a privilege in the confidential communication between parents and their children. Only three states have enacted statutory parent-child privileges, and only one state has clearly recognized such a privilege at common law.<sup>172</sup> Other states have remained silent on the issue or have declined to establish a privilege in some fact-specific context.<sup>173</sup>

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minors); N.D. CENT. CODE § 32-03-39 (1943) (parental responsibility for child's tort when child lives with them causes damages).

<sup>171</sup> See MAUER & CHESNEY-LIND, *supra* note 159.

<sup>172</sup> CONN. GEN. STAT. § 46b-138a (2003) (parent may elect or refuse to testify for or against the accused child); IDAHO CODE ANN. § 9-203(7) (2003) (with some exceptions parent or legal custodian shall not be forced to disclose any communication made by their minor child to them concerning matters in any civil or criminal action to which child is a party); MINN. STAT. § 595.02(j) (2003) (with some exceptions communications made in confidence by the minor to the minor's parents are protected); *In re Mark G.*, 410 N.Y.S.2d 464-65 (1978); *In re A. & M.*, 403 N.Y.S.2d 375 (1978).

<sup>173</sup> See Ross, *supra* note 56, at 91, 93-99. Professor Ross discusses a collection of federal and state cases in which the court declined to establish a parent-child privilege, but argues that the narrow context in which the child shares confidential information with the parent has rarely been presented to the court.

The absence of a parent-child privilege may impede family-focused juvenile justice interventions that are rooted in open intra-familial communication. Children who fear that their parents will be forced to report criminal conduct to a probation officer or judge will be reluctant to seek the parents' help when they find themselves in trouble with peers, drugs, or a probation violation. The absence of a privilege may also hinder the development of trust between the lawyer, the client, and the client's family. Although evidence suggests that parents are actually rarely called as a witness against their children in court,<sup>174</sup> the theoretical risk that a parent may be called generally requires the lawyer to address it with both the parent and the child.<sup>175</sup> In addition, parents are frequently interviewed by police officers and prosecutors in the investigation of criminal cases; parents are almost always interviewed by probation officers, psychologists, and psychiatrists in the preparation of juvenile diagnostic assessments; and parents can and have been subpoenaed as witnesses against the child in juvenile and criminal proceedings. Considering the risk, that confidential case information may be disclosed, intentionally or unwittingly, by the parent, lawyers may be obligated to advise the child not to discuss the facts and circumstances of an arrest or charge with the parent. Such legal advice is likely to create tension between the lawyer and the parent who resents the lawyer's interference in the parent-child relationship and may create confusion for the child whose loyalty and trust are torn between his parent and the lawyer.

*b. Waiver of Attorney-Client Privilege by Third-Party Presence*

Communication among the attorney, child, and parents may be limited by the failure of state statutes to extend explicitly the attorney-client privilege to include attorney-child communications made in the presence of the child's parents. Traditional interpretations of the attorney-client privilege suggest that the presence of a third party during attorney-client communications will waive confidentiality.<sup>176</sup> Thus, an attorney or child who invites the parent to participate in interviews and consultation may compromise the child's legal interests, including the child's privilege against self-incrimination. However, recent revisions to the Model Rules of Professional Conduct suggest that the attorney-client privilege should not be waived when a client of diminished capacity, such as a minor, invites a family member or guardian to assist the client or facilitate communication with the attorney.<sup>177</sup> In addition, generic language in statutes that codify the attorney-client privilege will often extend the privilege to third parties who are "necessary to further the interests of the client" or

<sup>174</sup> Ross, *supra* note 56, at 86.

<sup>175</sup> Although parents are rarely called as a witness against the child in the District of Columbia, it is not unheard of. As a result, it is regular practice among many juvenile defenders in the District of Columbia to advise the child that conversations with the parent are not protected. See also Ross, *supra* note 56, at 102 (citing EDWARD HUMES, NO MATTER HOW LOUD I SHOUT: A YEAR IN THE LIFE OF JUVENILE COURT 211 (1996)).

<sup>176</sup> See, e.g., State v. Shire, 850 S.W.2d 923 (Mo. 1993) (presence of defendant's daughter in interview with lawyer waived the attorney-client privilege); People v. Doss, 514 N.E.2d 502 (Ill. 1987) (presence of third party who was only present to offer moral support waives privilege).

<sup>177</sup> MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 3 (2002), available at <http://www.abanet.org/cpr/e2k-rule114.html>.

“reasonably necessary for communication with a lawyer.”<sup>178</sup> It is not clear, however, whether inclusion of parents in the attorney-client privilege under these statutes or the Model Rules would be limited to very young or cognitively disabled children who are not able to communicate or make decisions for themselves.

In common law, while a few courts have found that the parents’ presence will not waive the attorney-client privilege when the child looks to the parent as an advisor and clearly intends the communications to remain confidential,<sup>179</sup> not every court has accepted the parent-as-agent view in the attorney-child relationship. There is certainly no indication in the common law that a parent will be a *de facto* natural guardian for the child in the attorney-client context.<sup>180</sup> In cases where the privilege was preserved with the parent, the courts were less concerned with the age and capacity of the child and more concerned with the intent of the parties involved.<sup>181</sup>

In 1997, the legislature in the state of Washington approved a statute that explicitly prohibits the examination of any parent about communications overheard between an attorney and the child arrested on a criminal charge.<sup>182</sup> There appears to be no other state that addresses this issue with such clarity. In most jurisdictions, legislatures have not explicitly addressed the application of privileges to attorney-parent communications or to attorney-client communications when parents are present in the interview. Where the attorney-client privilege does not clearly extend to parents, the lawyer may be forced to exclude parents from attorney-client meetings and limit attorney-parent and parent-child communications to an explanation of basic legal issues, a description of the juvenile court process, and an exploration of disposition alternatives. Ultimately, the absence of a parent-child privilege and the lack of clarity regarding extension of the attorney-client privilege may limit the parent’s involvement in the development of legal strategies in the juvenile case.

### 6. *An Opportunity for Collaboration*

Notions of “good” legal advice certainly vary according to subjective interpretation. Thus, it is unlikely that any two lawyers, and even less likely that parents and lawyers, will always agree on what is “good” for the children they represent. Nonetheless, if we consider ethical mandates that establish minimum standards for the advice of counsel, we should all agree that competent legal advice is well informed, unbiased, and free of personal, emotional,

<sup>178</sup> See, e.g., ARK. R. EVID. § 502(c) (2005); CAL. EVID. R. § 503(c) (1995); DEL. R. EVID. § 502(c) (2006); FLA. STAT. § 90.502 (1941); NEB. REV. STAT. § 27-503 (1995); N.H. REV. STAT. ANN. § 502 (West 1995); N.M. STAT. ANN. § 503 (LexisNexis 2005).

<sup>179</sup> For a representative sample of state and federal cases, see *State v. Sucharew*, 66 P.3d 16 (Ariz. Ct. App. 2003) (noting privilege is generally waived when a third party is present, but finding that parents presence did not waive privilege in that case); see also *Kevlik v. Goldstein*, 724 F.2d 844 (1st Cir. 1984); *United States v. Bigos*, 45 F.2d 639 (1st Cir. 1972).

<sup>180</sup> *Ross*, *supra* note 56, at 109; see also *Deasy-Leas v. Leas*, 693 N.E.2d 90, 94-95 (Ind. 1998) (discussing rejection of notion that privilege may exist upon “natural law” of parent-child relationship).

<sup>181</sup> See *supra* note 179.

<sup>182</sup> WASH. REV. CODE § 5.60.060(2)(b) (1961).

and financial conflict.<sup>183</sup> By analogy, ethical guidelines imposed on lawyers provide useful and interesting insight into the problem of parental advice. Parental advice to children in the juvenile justice system is often complicated by the parents' desire to serve the best interests of the child, conflicting loyalties to other members of the family, personal embarrassment, stress, psychological trauma, and exposure to financial and penal liability. Under these circumstances, it is probably unwise for children to rely solely on the wisdom of parents in the resolution of important decisions in a juvenile case.

At the same time, it is probably unwise for children to rely solely on the advice and wisdom of an attorney who has limited insight into the religious, cultural, political, familial, and ethnic interests of the child. Like their parents, children in juvenile court often struggle with their own conflicting loyalties and competing legal and personal interests. An accused child, for example, may be torn between protecting his own liberty interests and preserving the financial interests of family members who may be affected by the outcome of the juvenile case. The child may also have difficulty exercising newly identified legal rights and independence in juvenile court, especially when the assertion of those rights and independence may engender the hostility of his parents and challenge the child's sense of identity and belonging within the family.

Given the complexities of the decision-making process for children in the juvenile justice system, neither the isolated advice of the lawyer nor of the parent is likely to suffice. Thus, as discussed in the next Part, an effective lawyer will often seek to improve the child's decision-making capacity by encouraging the child to collaborate with others, such as parents, counselors, and teachers, who can offer a perspective the lawyer may not share. By collaborating with parents, the child and his lawyer are likely to make more well-informed choices in the juvenile case. Part II explores ways in which the attorney, the child, and the child's parents may effectively collaborate without compromising the child's right to independent legal representation.

## II. PRELIMINARY RECOMMENDATIONS: EFFECTIVE LAWYERING STRATEGIES

Establishing an appropriate relationship with parents is one of the most difficult tasks the child's lawyer will face. In the juvenile justice system, lawyers must accommodate a myriad of competing public policy, ethical, legal, strategic, and psychosocial considerations. While theories of adolescent development and normative preferences for healthy parent-child communication suggest that parents will and should be involved in the child's decision-making process, principles of constitutional law and the psychology of procedural justice indicate that autonomy and voice are essential features of justice and integral to the child's rehabilitative success. Similarly, while effective collaboration between parents, children, and their lawyers may be useful, and sometimes even necessary, to secure strategic advantage in court, full coopera-

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<sup>183</sup> MODEL RULES OF PROF'L CONDUCT R. 2.1 (2002) (requiring lawyer to provide straightforward advice); *id.* at R. 1.1 (defining competent representation to require legal knowledge, thoroughness and preparation); *id.* at R. 1.7 (noting that lawyer shall not represent a client if there is significant risk that representation will be limited by the lawyer's responsibility to a third-party); *id.* at R. 1.8 (instructing lawyer to avoid financial conflict with a client).



tion between the parties is often limited by conflicting legal interests and rules that do not adequately protect confidential communication.

In this Part, I offer six preliminary recommendations to guide lawyers in deciding when and how parents should participate in the attorney-child consultation or otherwise collaborate in the child's decision-making process. As an initial recommendation, I join the *Fordham Conference* scholars' commitment to the individual legal rights of children and endorse a client-directed model of advocacy for children in delinquency cases. In the second section, I explore ways in which the lawyer may help the child negotiate appropriate boundaries for parents in the attorney-client consultation. In the third section, I encourage lawyers to manage the expectations of parents by clearly identifying the child as the client and educating parents on the rights of the child and the obligations of the child's lawyer. In the fourth section, I offer suggestions for how the lawyer may empower parents to be better advisors for children in juvenile court. In the fifth section, I acknowledge the importance of intra-family loyalty and affiliation and encourage lawyers to respect, and ultimately defer to, the parent-child affiliation after full consultation with both the child and his parents. In the sixth section, I recognize that none of the foregoing strategies may be appropriate when the child is incompetent to engage the lawyer in a reasonable analysis of competing alternatives or fairly identify and communicate his own objectives in the case. Thus, as a final recommendation, I offer guidelines for evaluating the competency of the child, raising competency in court, and consulting with parents of an incompetent child. Because the following recommendations can only begin to address the complexities of the attorney-child-parent triad, Part III will consider systemic reforms that may further enhance effective collaboration.

#### A. *Affirming the Child's Right to Independent Legal Counsel*

In 1979 and 1980, the Office of Juvenile Justice and Delinquency Prevention and the American Bar Association, respectively, published Juvenile Justice Standards that instruct children's counsel to provide zealous advocacy as directed by the child at all stages of the delinquency case.<sup>184</sup> Since then, numerous scholars, including those at the 1996 *Fordham Conference*, have endorsed a traditional, client-directed model of advocacy on behalf of the accused juvenile.<sup>185</sup> Client-directed advocacy has been recognized as the primary means by which an accused child may exercise or waive personal constitutional rights such as the right to confront and cross-examine witnesses, the right to proof of guilt beyond a reasonable doubt, and the right to be free from

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<sup>184</sup> See STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE, REPORT OF THE NATIONAL ADVISORY COMMITTEE FOR THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION (1979); LEE TEITELBAUM, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES IN JUVENILE JUSTICE STANDARDS ANNOTATED 69, 3.1(a) at 75, 9.4(a) at 90 (Robert Shepherd, Jr. ed., 1996) (In 1971, the Juvenile Justice Standards Project was initiated at the Institute of Judicial Administration. The standards were first published as a tentative draft in 1975 and 1976, and final revised drafts were published in 1980.).

<sup>185</sup> See *supra* note 7.

self-incrimination.<sup>186</sup> Client-directed advocacy is also mandated by standards of professional conduct that grant clients authority to establish the objectives of their case and require lawyers to maintain a normal relationship with children as far as reasonably possible.<sup>187</sup> These principles remain as true today as they were in 1996 and must provide an overarching framework for any discussion of an appropriate paradigm for interactions among the attorney, the child, and the child's parents.

To preserve and explain principles of client-directed advocacy, the first substantive meeting between the attorney and the child should be conducted in private, without the parent. Even if initial introductions and perfunctory explanations are made by or with a parent, the lawyer needs time and space to establish the lawyer's role as advocate for the child, separate and distinct from the family. In initial meetings, the lawyer should help the child understand his rights, both as a client and as a respondent in juvenile court. The lawyer may engage the child in a discussion about the right to counsel, the meaning and scope of the attorney-client privilege, the lawyer's duty to provide candid and well-informed advice, the child's right to loyal, independent legal representation, and the child's right to make key decisions and define the objectives of his case. Notwithstanding common cognitive and psychosocial limitations among children and adolescents, the lawyer should presume, unless and until evidence is provided to the contrary, that the child can and will understand relevant legal issues and have an opinion about how the lawyer should proceed on the child's behalf.<sup>188</sup> The lawyer should also make every effort to overcome difficulties in the child's comprehension by speaking in age-appropriate language, providing relevant examples, repeating key concepts over time, and creating a safe and comfortable environment for the child to ask questions and express concerns.<sup>189</sup>

In the decision-making process, the child will control the final decision, but the lawyer should offer advice and structure counseling in a way that is likely to foster good decisions by the child.<sup>190</sup> The lawyer should help the child develop a list of alternatives at each stage of the case, engage the child in

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<sup>186</sup> Guggenheim, *supra* note 7, at 81, 86-87 (arguing that child's constitutional rights would be meaningless if the attorney were allowed to assert and waive those rights in his own discretion); Susan D. Hawkins, *Protecting the Rights and Interests of Competent Minors in Litigated Medical Treatment Disputes*, 64 *FORDHAM L. REV.* 2075, 2076 (1996) (arguing that control over the decision-making process lies at the heart of the American legal system when personal legal rights are at stake); Shannan L. Wilber, *Independent Counsel for Children*, 27 *FAM. L. Q.* 349, 353 (1993) (arguing that our emphasis on individual rights and personal autonomy are furthered by the role of an attorney which enables litigants to pursue and protect their legal rights).

<sup>187</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2 (2002) (client objectives); *id.* at R. 1.14.

<sup>188</sup> Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 *FORDHAM L. REV.* 1505, 1564 (1996) (discussing competency default in the representation of children in the child protective context).

<sup>189</sup> COCHRAN ET AL., *supra* note 65, at 152-53; Dinerstein, *supra* note 65, at 556; Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 *FORDHAM L. REV.* 1873, 1898 (1996).

<sup>190</sup> COCHRAN ET AL., *supra* note 65, at 6, 110; *see also* Robert F. Cochran et al., *Symposium: Client Counseling and Moral Responsibility*, 30 *PEPP. L. REV.* 591, 598 (2003) ("The client makes the ultimate decision, but the lawyer is actively involved in the process.")

a discussion of the advantages and disadvantages of each alternative, and help the child clarify personal goals and objectives.<sup>191</sup> Although the lawyer must always support the child's final, lawful objectives, the lawyer's responsibility is not just to passively or neutrally list alternatives, but to ensure that the child will consider and evaluate all of the available options and choose the best alternative.<sup>192</sup> To facilitate better decision-making by the child, the lawyer should remain objective during the decision-making process and help the child realistically assess all of the legal and non-legal consequences of a contemplated course of action.<sup>193</sup>

In some cases, the lawyer may also fairly advise the child to consider and pursue those options the lawyer believes to be in the child's best interest.<sup>194</sup> In the pretrial phase, for example, the lawyer may encourage the child to comply with conditions of release, such as regular school attendance and abstinence from drugs, not only because such compliance will improve the child's prospect for a desirable disposition, but also because the lawyer believes that such compliance will lead the child to a more productive future. Similarly, in the disposition phase, the lawyer may encourage the child to agree to an out-of-home placement that will remove him from his negative peer environment. However, notwithstanding the lawyer's duty to provide the client with comprehensive, candid advice, the lawyer must always be cautious in rendering this type of "best interest" advice to the child. First, the "best interest of the child" is a difficult standard to assess and apply. Because the needs and interests of children are so often intertwined with the interests of the child's family and community, the child's lawyer may lack the cultural, ethnic, and psychological insight he needs to adequately assess the best interest of the child.<sup>195</sup> Second, when the lawyer offers advice about both the best interest and the expressed interest of the child, the lawyer may confuse the child and the child's parents about the lawyer's role and responsibilities. Thus, even when the lawyer is

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<sup>191</sup> COCHRAN ET AL., *supra* note 65, at 113; Dinerstein, *supra* note 65, at 525 (analogizing collaborative lawyering to the medical doctrine of informed consent).

<sup>192</sup> See COCHRAN ET AL., *supra* note 65, at 131-32. The neutral investigative model of advocacy has also been uniformly rejected by commentators in the juvenile defense community. See, e.g., Mlyniec, *supra* note 7; Guggenheim, *supra* note 7, at 107-09.

<sup>193</sup> COCHRAN ET AL., *supra* note 65, at 135; Joseph Allegretti, *Religious Values and Legal Dilemmas in Bioethics: The Role of a Lawyer's Morals and Religion when Counseling Clients in Bioethics*, 30 FORDHAM URB. L. J. 9, 18-19 (2002).

<sup>194</sup> COCHRAN ET AL., *supra* note 65, at 132, 141 (in collaborative lawyering, the lawyer may advise the client when the lawyer believes the client is making a bad decision); see also Allegretti, *supra* note 193, at 18-19. In rendering candid advice, the lawyer "may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation." MODEL RULES OF PROF'L CONDUCT R. 2.1 (2002).

<sup>195</sup> See Andrew Hoffman, *The Role of Child's Counsel in State Intervention Proceedings: Toward a Rebuttable Presumption In Favor of Family Reunification*, 3 CONN. PUB. INT. L.J. 326, 336 (2004) ("The notion that attorneys can objectively conclude what serves a child's best interests is preposterous. Attorneys are no more inherently objective than anyone else."); Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 376-78 (1997) (arguing that clinical student's unconscious racial bias affects the attorney client relationship); Peters, *supra* note 188, at 1566 (cautioning lawyers to avoid stereotypes and generalizations about children and their background when assessing the best interest of the child).

offering advice to advance the child's expressed legal interest, the child may hear the lawyer's advice as that of a paternalistic, authoritarian adult, and not that of a loyal advocate for the child. The parents may also begin to identify the lawyer as an ally in their efforts to secure rehabilitation for the child and forget the lawyer's duty to give voice to the expressed wishes of the child.

Ultimately, the lawyer must achieve a delicate balance between candid advice and excessive paternalism or coercion. Rather than coercing the child into treatment through paternalism, the lawyer may use a series of probing and directed questions to help the child identify an array of realistic disposition alternatives, lead the child through a reflection on his own strengths and needs, and encourage the child to consider the likely response of the court, victims, parents, and others impacted by the child's conduct.<sup>196</sup> When the lawyer is not overbearing, develops a healthy rapport with his client, and delays advice until guilt is well established, the child retains individual autonomy and is free to reject the lawyer's opinion. When the lawyer helps the child design his own treatment plan, he also gives the child a meaningful and informed voice in the process of justice and motivates the child to comply with the plan.<sup>197</sup>

#### B. *Negotiating the Parents' Role in the Attorney-Client Relationship*

In early exchanges with the child, the lawyer must not only establish his role as advocate, but should also evaluate the child's need and desire for consultation outside of the attorney-client relationship.<sup>198</sup> Because the collaborative lawyer recognizes that effective decision-makers use all of the resources available to them, the lawyer may encourage the child to identify other adults who may provide additional information or offer an alternative perspective to important issues in the case.<sup>199</sup> Initial meetings conducted without parents give the lawyer time to evaluate the child's dependence on family members for advice, explore the child's fear of punishment or conflict with parents, and evaluate the child's likely embarrassment or reluctance to provide an honest account of facts when parents are consulted. Private meetings also provide the child a safe space in which to consider his right to confidentiality and understand the limits of parental control in the delinquency context. In jurisdictions where communications between the child and the parent are privileged or where the attorney-client privilege extends to parents of a minor child, the lawyer should inform the child that he may invite parents to participate in attorney-client interviews and consultations. In jurisdictions where there is uncertainty about the parameters of the attorney-client and parent-child privileges, the lawyer should advise the child not to discuss the facts underlying the delinquency allegations with the parents, but may offer to speak to parents on the child's

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<sup>196</sup> See David Wexler, *Problem Solving and Relapse Prevention in Juvenile Court*, in *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* 197 (2003).

<sup>197</sup> Ronner, *supra* note 58, at 112; Wexler, *supra* note 196, at 192-93.

<sup>198</sup> Allegretti, *supra* note 193, at 17 (effective collaborative lawyering allows parties to negotiate the terms of the relationship and allocate responsibility between them); Dinerstein, *supra* note 65, at 524.

<sup>199</sup> COCHRAN ET AL., *supra* note 65, at 155 (attorney might direct the client by asking "Is there anyone else that you would like to talk to about this choice?").

behalf or encourage the child to talk generally with parents about legal options, disposition alternatives, and general fears and concerns.

Often, the greatest service a lawyer can provide to any client is information and choice. Unfortunately, lawyers frequently take their interaction with parents for granted and deprive the child of choice by consulting with parents without the child's consent, by withholding information about the child's right to include or exclude parents from attorney-client interviews, or by failing to educate the child about his right to direct his own legal representation. In an effective client-centered or collaborative relationship, the lawyer should allow the child to decide not only if a parent will be invited to participate, but also when the parent will be invited and what information will be discussed when the parent is present.

The decision about whether to include a parent in the attorney-client consultation is not an easy one for the child. Together, the child and the lawyer should carefully identify and evaluate all of the benefits and risks of parental participation. Specifically, the lawyer and the child might consider factors such as the child's ability to communicate with counsel and understand important legal issues without the parents' assistance; the potential that parents will provide information or insight not otherwise available to the child or the advocate; and the existence of unique cultural, ethnic, religious, or moral norms that are shared between the parent and the child but not the lawyer. The lawyer might also help the child consider strategic advantages that might be gained by including parents in the attorney-client discussion, such as earning the parents' support for the child's stated preference for in-home, community-based alternatives to detention. In an effort to avoid selfish decision-making, the child might also wish to seek the parents' opinion about the likely effect his choices will have on the parents or other family members.

Ultimately, the lawyer should remain flexible to accommodate the needs of individual children and their families. In families with children who regularly look to parents for help, the child may wish to include parents for both emotional support and substantive advice. In families with high emotional and physical conflict, the child may fear the parents' wrath and ask the lawyer to explain legal issues and factual details separately to the parent. In some cases, the lawyer might conduct a series of early attorney-client meetings without parents but then encourage the child to seek the parents' advice when the child expresses concerns about what will be required of his parents at disposition or begins to speak in terms of religious or familial norms. In other cases, when the child is reticent and appears to distrust the lawyer, the attorney may include parents in early, less-substantive interviews to build rapport but then exclude parents from later fact-gathering sessions.

### *C. Managing the Expectations of Parents*

When the child can and does elect to include parents in the attorney-client interview, the child's lawyer does not relinquish the role of counselor and advocate for the child and may not allow parents to usurp control over the

child's legal representation.<sup>200</sup> In the initial interaction with parents, the lawyer must clearly identify the child as his client and advise the parent that the child will be the ultimate arbiter of all key decisions, including those about whether to plead guilty or have a trial.<sup>201</sup> The parents' presence also does not relieve the attorney of the duty to explain the child's constitutional and statutory rights within the juvenile justice system or of his obligation to help the child identify and evaluate all available options in the case. Because the parents' advice is no substitute for the lawyer's advice, the lawyer must still provide the child with a candid opinion about how the child should proceed in the case.

The attorney-parent interaction often creates a considerable ethical dilemma for the child's attorney, particularly when the parent is not represented by counsel and looks to the child's attorney for advice.<sup>202</sup> Parents who are not represented by counsel often mistakenly assume that the child's lawyer will represent their interests along with the child's. Parents may expect the child's lawyer to fight orders of restitution and oppose evaluations, drug testing, community service, and other rehabilitative programs ordered for the parent. Parents may also look to the child's lawyer to defend their reputation and character when attacked by probation officers, prosecutors, and judges. Similarly, judges, prosecutors, and probation officers often expect the child's lawyer to explain the meaning of parental participation orders to un-represented parents, to encourage parents to attend counseling, community service, and drug testing requirements, and to remind parents of the threat of contempt for failing to participate in the child's treatment. The lawyer might even be in the awkward position of seeking to collect attorney fees, court costs, and fines from the parent whose interests he cannot protect.

In their dealings with parents, lawyers often deprive parents of meaningful guidance by manipulating options, exaggerating negative consequences, withholding information about undesirable alternatives, or failing to correct the parents' apparent misunderstanding about the roles of various players in the system.<sup>203</sup> In some cases, for example, parents who misunderstand the role of the child's lawyer may turn to the lawyer for support and intervention with a child who is violating conditions of pre-trial release or probation. In these cases, the lawyer has little incentive to clarify his role or differentiate his obligations from that of a probation officer. Instead, the lawyer may allow the parent to vent and attempt to resolve intra-family disputes with the hope that the parent will not call the probation officer and report the violation. In other cases, the lawyer may win the parents' support for the child's placement on probation without fully discussing the range of more restrictive alternatives or fully disclosing the parents' responsibilities during the term of disposition. The lawyer may also elicit information from and about parents without advising the parent of how and when the information might be used. Some parents will be surprised and hurt when lawyers use negative family information to the benefit of the child and the detriment of the parents.

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<sup>200</sup> Henning, *supra* note 7, at 151-56 (providing detailed arguments against parent-directed advocacy in which lawyer allows parents to control the child's legal representation).

<sup>201</sup> Moore, *supra* note 112, at 1824-25, 1830.

<sup>202</sup> *Id.* at 1826-27.

<sup>203</sup> COCHRAN ET AL., *supra* note 65, at 11, 14-16, 137.

If the lawyer is to remain within the bounds of relevant ethical obligations, the lawyer should clearly disclose the limits of attorney-parent confidentiality and remind the parent that the child's lawyer has not been appointed to represent or protect the parents' interests.<sup>204</sup> The child's lawyer should also remind the parent that he is obligated to represent the expressed wishes of the child, even if those wishes are contrary to the legal and non-legal interests of other family members. In some cases, with the child's consent, the lawyer may inform parents that they have a right to speak directly to the judge about the child's detention and treatment alternatives and may personally object to court orders that directly effect them. The lawyer should not offer such information if the child does not want the parent to speak in court or if the parent is likely to take a position adverse to the client. Because parents are now integrally involved in the juvenile justice system, the parent will generally be advised by the judge, the prosecutor, or the probation officer that he or she has the right to address the court.

When legal conflicts surface between the parent and the child, the lawyer should explain rules of professional ethics that prohibit the lawyer—absent the consent of both parties—from advising two individuals with conflicting interests.<sup>205</sup> The lawyer's real dilemma often lies in his need to convince parents to sacrifice their own interests to advance the needs and objectives of the child. For example, the lawyer may need the parents to pay restitution and accept responsibility for their child's conduct to improve the child's prospects of a favorable disposition. In some cases, parents who clearly understand the role of child's counsel and who voluntarily place the interests of the child above their own will waive the right to conflict-free advice and knowingly follow the guidance of the child's advocate in the juvenile case.

As recognized in Part I, not every case will lend itself to conflict between the lawyer and the parents. In many cases, the lawyer will empathize with the parents' feelings about peer pressure, popular culture, failing schools, and the general difficulty of raising children in modern America. The child's lawyer will also often have the difficult task of reassuring parents that they are not entirely to blame for the child's involvement in juvenile court without conceding the child's guilt or showing disloyalty to the child. In these cases, the child's lawyer should be supportive and attentive to the emotional needs of the parents without endorsing the parents' position or suggesting that he will represent the parents' interests. Specifically, the lawyer may offer appropriate, but noncommittal, acknowledgements that indicate interest and sympathy<sup>206</sup> and, in some cases, recommend parent support groups or parent therapy.<sup>207</sup>

Finally, unless the parent is represented by counsel in the juvenile justice system,<sup>208</sup> nothing in the rules of professional conduct prevent the lawyer from interviewing and gathering information from the child's parent. In fact, the

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<sup>204</sup> Moore, *supra* note 112, at 1826-27, 1853-54 (recognizing that some attorney-parent communication may be protected as client secrets when such disclosure is expressly prohibited by the child or is detrimental to the interests of the child).

<sup>205</sup> MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002).

<sup>206</sup> Winick, *supra* note 120, at 912.

<sup>207</sup> *Id.* at 908-09.

<sup>208</sup> See *supra* note 136 and accompanying text.

child's constitutional right to effective assistance of counsel may require the attorney to engage in vigilant investigation on the child's behalf.<sup>209</sup> Parents are not only an important source of information about the child, but they may also be a conduit of information from prosecutors and probation officers who have contacted the family. In addition, notwithstanding limits on the authority of parents to direct counsel, children and their lawyers generally need parental support to achieve case objectives and can rarely afford to alienate parents. Thus, even when the parent may not attend attorney-client interviews, the lawyer should be considerate of the parents' time when scheduling meetings with the child, patiently and courteously respond to the parents' concerns about the child and the case, and carefully explain principles of law and ethics that limit parental involvement in the attorney-client relationship.

#### D. Empowering Parents to Be Better Advisors

Because children naturally look to parents for advice and may even value the advice of parents over that of an unfamiliar lawyer, the lawyer serves his client well by educating the parent on the law and practice of juvenile court. While the lawyer should presume that parents have the capacity to understand legal issues that are carefully explained to them, the lawyer should never assume that parents have either an adequate prior knowledge of the juvenile justice system or a fair appreciation of the risks and rights at stake for an accused juvenile.<sup>210</sup> Thus, with consent of the child, the lawyer should make every effort to educate parents on the realities of juvenile court. In pretrial discussions, the lawyer should provide the parents with a realistic assessment of the likelihood of success at trial and help the parents understand all of the legal and non-legal consequences of a plea.<sup>211</sup> At the disposition phase, the lawyer may demystify the promise of treatment in juvenile court by exposing parents to information about the dangers of incarceration and explaining the responsibilities and powers of the probation officer, prosecutor, and judge.

Although legal conflicts are increasingly common between parents and children in the modern juvenile court, the existence of a conflict will rarely prevent the parents from advising the child on how to proceed in the juvenile case. While the judge may prohibit the parent from waiving the child's constitutional rights in court when a conflict is evident,<sup>212</sup> neither the judge nor the lawyer may preclude parents from advising or coercing children in the privacy of their own homes. Nonetheless, by engaging and counseling the parents, the lawyer may help the parents focus some attention away from their own legal and personal concerns and begin to view their interests in conjunction with those of the child. In some cases, the lawyer may convince the parents to with-

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<sup>209</sup> *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

<sup>210</sup> See *supra* notes 90, 91.

<sup>211</sup> Jim Lewis, *The Aftermath of the Lionel Tate Case: A Child and A Choice*, 28 *NOVA L. REV.* 479, 484 (Lionel Tate's trial lawyer recognizing the need for assistance from parents in providing child with realistic view of likely outcomes in a criminal case).

<sup>212</sup> See, e.g., 42 PA. CONS. STAT. § 6337 (2005) ("[P]arent, guardian or custodian may not waive counsel for a child when their interest may be in conflict with the interest or interests of the child."); *In re Manuel R.*, 543 A.2d 719 (Conn. 1988) (parent may not waive child's constitutional right to counsel when parent has interests that conflict with that of the child).



hold or delay advice that is motivated by the parents' self-interest and urge the parents to consult with preachers, friends, or relatives who are more objective, less conflicted, and less emotionally invested in the outcome of the child's case. When parents remain hostile towards the child's legal interests, the lawyer may work to mend relationships within the family and help the child regain the parents' support. When parents are angry, for example, about court fines and missed hours at work, the lawyer may help the child develop a plan to pay parents back, increase household chores, or take greater responsibility for the care and supervision of younger siblings. The lawyer ultimately advances the child's legal interests and improves the parents' role as advisor for the child by attempting to ameliorate conflict within the family and educating the child's parents about key decisions the child must make in the juvenile case.

### *E. Deferring to Parental Affiliation*

Despite the lawyer's best efforts, children will sometimes make patently bad legal decisions, motivated more by parental loyalty and affiliation than by logic and reason. Lawyers face a difficult dilemma when parents, such as Lionel Tate's mother, insist on, and the child agrees to, a course of action that most lawyers would identify as unwise and harmful to the child. This concern requires us to revisit the default paradigm for the role of child's counsel. That is, absent articulable evidence that the child is incompetent to act in his own interests, the lawyer is bound to pursue the client's lawful objectives, regardless of whether the lawyer agrees or disagrees with the child's decision.<sup>213</sup> If the child has identifiable values and goals, understands the consequences of his choices, and can provide reasons for selecting among competing alternatives, then the child is competent and capable of making decisions on his own behalf.<sup>214</sup> Thus, when the child knowingly and intelligently decides to follow the advice of a parent, the lawyer must honor that decision absent any evidence that the parent has unduly coerced the child, such as through the promise of reward or the threat of punishment.<sup>215</sup> When there is evidence of coercion, the lawyer must decide whether the child's deference to the influence of the parent renders the child incompetent or of sufficiently diminished capacity to warrant protective intervention by the lawyer.<sup>216</sup>

When the child relies heavily on the misguided advice of parents, the lawyer should remind the child that he has the right to make his own decisions in

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<sup>213</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2 (2002); Peters, *supra* note 188 at 1565 (discussing "advocacy default").

<sup>214</sup> See Daniel L. Bray & Michael D. Ensley, *Dealing with the Mentally Incapacitated Client: The Ethical Issues Facing the Attorney*, 33 FAM. L.Q. 329, 336 (1999); David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 455-57; Nancy M. Mauer & Patricia W. Johnson, *Ethical Conflicts in Representing People with Questionable Capacity*, 114 PLI/NY 1143, 1158 (January 2002) (stating that attorneys should "use a non-circular method to assess capacity. It is not enough to consider whether the client's decisions are unwise but rather whether the client can give specific reasons for specific decisions and understand the consequences").

<sup>215</sup> William A. Kell, *Ties That Bind?: Children's Attorneys, Children's Agency, and the Dilemma of Parental Affiliation*, 29 LOY. U. CHI. L. J. 353, 358-60 (1998).

<sup>216</sup> See Lewis, *supra* note 211 at 482 (Tate's trial lawyer acknowledging lawyer's responsibility to make sure that client's decisions are voluntary and free from undue pressure).

the juvenile case. The lawyer should also help the child explore the underlying reasons for the deference to parents and then re-direct the child's attention to the strengths and weakness of each contemplated course of action. The lawyer should not assume that parental influence, absent evidence of physical abuse or extreme mental duress, renders the child's decision incompetent.<sup>217</sup> In fact, the child's respect for and ultimate adoption of the parents' views may reflect a perfectly sound decision to defer to a seemingly wise, knowledgeable, and caring adult. The child's voluntary deference to parents may also serve legitimate societal norms such as familial intimacy and stability, selfless consideration of others, and moral responsibility.<sup>218</sup> In discussions with the child, the lawyer may find that the child's decisions are motivated by a well-considered and selfless loyalty to parents, by moral or religious views that require the child to admit fault and take responsibility for his own actions, or by a legitimate and well-thought-out desire to avoid financial or other consequences for his parents.<sup>219</sup> The child, on the other hand, may discover after consultation with a lawyer that his parents' advice is well-intentioned, but simply ill-informed.

In the Tate case, Lionel's mother was an army veteran, employed as a police officer, who was very attentive to her son's case. Lionel's trial attorney perceived her as intelligent, concerned, and fully committed to the best interest of her child.<sup>220</sup> The attorney also had no blatant or overt reason to suspect that Ms. Grossett-Tate was physically or mentally abusive to her son. Thus—competency issues aside for the moment<sup>221</sup>—Lionel's lawyer was probably bound to follow Lionel's decision to reject the plea offer even if that decision was strongly influenced by poor parental judgment. Lionel Tate's case, of course, cannot be studied without attention to issues of competency. As discussed below, when the child is clearly incompetent to engage in the decision-making process, the lawyer must necessarily deviate from the default paradigm and determine whether the parent is an appropriate surrogate decision-maker for the child.

#### F. Raising Competency and Taking Protective Measures

The advocacy default, and the preference for a normal attorney-client relationship, assumes that the child, when properly advised, will have the capacity to make important decisions in the case.<sup>222</sup> When the child lacks such capacity, an alternative paradigm will be warranted. Consistent with the Model Rules of Professional Conduct, the lawyer may deviate from the normal attorney-client relationship if the lawyer reasonably believes "that the client is at risk of substantial physical, financial, or other harm unless action is taken," and that a normal attorney-client relationship cannot be maintained because the client

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<sup>217</sup> Kell, *supra* note 215 at 376. When there is evidence of abuse and the client lacks the capacity to make reasoned decisions on his own behalf, the lawyer may consider appropriate protective measures. *Id.* at 373-74; *see also* notes 215-28 and accompanying text.

<sup>218</sup> Kell, *supra* note 215 at 361, 367, 369-70.

<sup>219</sup> *See id.* at 356.

<sup>220</sup> Lewis, *supra* note 211, at 479.

<sup>221</sup> State v. Tate, 864 So. 2d 44 (Fla. 2003) (reversing conviction for trial court's failure to order pre-trial or post-trial competency evaluation for Tate); *see also infra* notes 238-43.

<sup>222</sup> MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 1 (2002).

“lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation.”<sup>223</sup> In determining whether the child is capable of understanding legal issues and acting in his own interests, the lawyer should look for independent evidence outside of the attorney-client relationship.<sup>224</sup> The lawyer might interview teachers, counselors, and others with knowledge about the child and may consider psychological, psychiatric, and educational records that evaluate the child’s cognitive and psychosocial capacities.<sup>225</sup> While the lawyer might also interview parents in the evaluation of the child’s decision-making capacity, the lawyer should remain acutely aware that legal conflicts and emotional tensions within the family may cloud the parents’ judgment about the child’s capacity to make decisions on his own behalf.

In the delinquency context, a child who is so cognitively limited that he cannot communicate with counsel or make reasoned decisions for himself may not be competent to stand trial. In *Dusky v. United States*, the Supreme Court outlined a two-part legal standard for determining whether a defendant is competent or incompetent to proceed in a criminal case.<sup>226</sup> The accused will be competent only if he has “a rational as well as factual understanding of the proceedings against him” and a “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.”<sup>227</sup> The same competency standard has been applied on behalf of juveniles in many states.<sup>228</sup> In Lionel’s case, there was ample evidence—independent of either the attorney-client or the parent-child relationships—that Lionel was incompetent to proceed.<sup>229</sup> Specifically, at trial, a neuropsychologist testified that Lionel, who was thirteen years old at the time of his criminal trial, had a mental delay of about three to four years, making him the age equivalent of nine or ten years old.<sup>230</sup> A child psychologist testified that Lionel had the social maturity of a six-year old and delays in inferential thinking.<sup>231</sup> Other evidence indicated that Lionel had an IQ of ninety or ninety-one, placing him in the lowest twenty-five percent of all test-takers his age.<sup>232</sup> In addition, Lionel’s appellate lawyer reported at a later hearing that Lionel was drawing pictures, not listening to the court proceedings, not communicating with counsel, and generally did not know what was going on.<sup>233</sup> The Court of Appeals in Florida, ultimately held that pre-trial and post-trial evidence regarding Lionel’s competence warranted reversal of the conviction and remand for a new trial.<sup>234</sup>

<sup>223</sup> *Id.* at R. 1.14 cmt. 5.

<sup>224</sup> Kell, *supra* note 216, at 371; Peters, *supra* note 188, at 1564.

<sup>225</sup> Kell, *supra* note 216, at 371-72; Peters, *supra* note 188, at 1508.

<sup>226</sup> 362 U.S. 402 (1960).

<sup>227</sup> *Id.* at 402.

<sup>228</sup> See, e.g., *Golden v. State*, 21 S.W.3d 801, 803 (Ark. 2000); *In re Carey*, 615 N.W.2d 742, 746-47 (Mich. Ct. App. 2000); *In re Williams*, 687 N.E.2d 507, 510 (Ohio Ct. App. 1997); *In re S.H.*, 469 S.E.2d 810, 811 (Ga. Ct. App. 1996); *In re W.A.F.*, 573 A.2d 1264, 1267 (D.C. App. 1990).

<sup>229</sup> See *State v. Tate*, 864 So. 2d 44, 48-51 (Fla. 2003).

<sup>230</sup> *Id.* at 48.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 50.

<sup>233</sup> *Id.* at 48.

<sup>234</sup> *Id.* at 50-51.

Competency issues are rarely as clear as they appeared to the appellate court in Lionel's case.<sup>235</sup> Thus, the decision to raise competency in juvenile court is often a very complicated one for the child's advocate.<sup>236</sup> In deciding whether to raise competency, the child's lawyer should recognize that decision-making capacity, especially when children and adolescents are involved, is an ever-evolving skill that varies and improves with context, experience, and instruction.<sup>237</sup> There is certainly no definitive age at which all children will be able to consult with counsel and become competent to stand trial in a juvenile case. As commentary to the Model Rules of Professional Conduct reminds us, even a child as young as five or six and certainly those of ten or twelve will often have the ability "to understand, deliberate upon, and reach conclusions about matters affecting" his own well-being."<sup>238</sup> The Model Rules also urge attorneys to intrude on the client's decision-making to the least extent possible even when the client is of a diminished capacity.<sup>239</sup> Thus, before raising competency, the lawyer should make every effort to maximize the child's capacities by communicating with the child in age-appropriate language, using accessible analogies and examples, and potentially seeking the assistance of others who can better engage the child at his cognitive capacity.<sup>240</sup> The lawyer should also make every effort to ensure that his own concerns about the child's competency

<sup>235</sup> In fact, at the trial phase, neither the lawyer nor the judge raised Lionel's competency to stand trial. *Id.* at 48. In addition, expert witnesses for the government testified at the post-trial competency hearing that they believed that Lionel was competent to stand trial. *Id.* at 49.

<sup>236</sup> The decision is complicated not only by the difficulty of assessing the competency of children, but also by the practical implications of raising competency in a criminal context. In some cases, for example, a child who is found incompetent to stand trial in juvenile court, may be subject to more onerous restrictions in a civil commitment than would otherwise be warranted at sentencing in juvenile court. See Lynda E. Frost & Adrienne E. Volenick, *The Ethical Perils of Representing the Juvenile Defendants Who May Be Incompetent*, 14 WASH. U. J.L. & POL'Y 327, 349-50 (2004) (suggesting that consequences of being found incompetent must be weighed against delinquency adjudication including commitment to a juvenile justice agency).

<sup>237</sup> Evidence suggests that decision-making is predicated on the lawyer's ability to create an appropriate environmental context for counseling and to develop a good relationship with the client. Children, for example, appear to demonstrate better cognitive capacity in contexts that are familiar to them and devoid of stress. See Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895, 918-19 (1999); Grisso, *supra* note 52, at 16-18. Research also suggests that certain psychosocial aspects of adolescent decision-making—such as trust for adults, risk perception and risk preference—are likely to improve as the attorney-client relationship improves. Schmidt et al., *supra* note 7, at 178. For additional discussion, see also Kell, *supra* note 215, at 374 (arguing that children can practice and enhance newly acquired decision-making skills with the effective assistance of counsel); cf. COCHRAN ET AL., *supra* note 65, at 8-9 (noting that lawyers acquire good decision-making through "innate ability, habit, age, knowledge, breadth of experience, education and character").

<sup>238</sup> MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 1 (2002).

<sup>239</sup> *Id.* at R. 1.14 cmt. 3, available at <http://www.abanet.org/cpr/e2k-rule114.html> (tracking Ethics 2000 revisions).

<sup>240</sup> *Id.* at R. 1.14 cmt. 5; Peters, *supra* note 188, at 1565 (urging a lawyer to continue communicating with the client at the level of sophistication of which the client is capable). The lawyer must also continue to treat the child with attention and respect, make every effort to communicate with the child, and intrude on the child's decision-making autonomy to the least extent possible. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmts. 2, 5 (2002).

are not motivated, consciously or subconsciously, by the lawyer's belief that the child is making a wrong decision in the case.

When the child's capacity and competence are clearly at issue, the Model Rules allow the lawyer to employ a range of alternatives to assess and protect the client's interests. Specifically, the lawyer may consult with family members who have the ability to protect the child's interests, seek assistance from other professionals, allow time for the child's circumstances to improve, or request appointment of a guardian *ad litem*.<sup>241</sup> Consistent with the Rules' preference for the least restrictive intervention, commentary to the Rules note that the lawyer should refrain from the "extreme measure" of seeking appointment of a *guardian ad litem* unless and until other less restrictive measures have failed.<sup>242</sup>

As recognized in Part I, in many cases, the child's parent will be a natural ally or consultant for the child and his lawyer as the child attempts to understand important legal concepts and make key decisions in the case. Yet, when the lawyer and the child merely seek to consult with the parent, the lawyer should look first to the child, and not to family members, to make decisions on the child's behalf.<sup>243</sup> On the other hand, when the child's capacity is so diminished that he cannot communicate with his lawyer or make decisions on his own behalf, the Model Rules suggest that the lawyer may actually look to the child's family to protect the child's interest and, presumably, make decisions on the child's behalf. Thus, when the child's competence is in question in a juvenile case, the lawyer may look to the child's parents to help make key decisions including whether and when to raise competency to the judge.

Reliance on parents, however, to make decisions for an incompetent children is not without limits. Commentary to the Rules explicitly states that "In matters involving a minor, whether the lawyer should look to the parent as a natural guardian may depend on the type of proceeding or matter in which the lawyer is representing the child."<sup>244</sup> Legislative developments in the modern juvenile justice system clearly limit the extent to which lawyers can and should look to parents as surrogate decision-makers for the child. The lawyer should not defer to parents when the parents' legal, financial, and other interests conflict with those of the child, when the parents are not competent to decide themselves, or when the parents' psycho emotional issues limit the parents' objectivity in evaluating the child's options.<sup>245</sup> Moreover, in the juvenile and criminal justice systems, the lawyer may have an ethical or legal duty to take certain actions, such as challenging the child's competency to stand trial, even if the parent disagrees.

Without knowing more about Ms. Gossett-Tate and her relationship to Lionel, it is not clear how much Lionel's lawyer should have deferred to his mother and what role Lionel's mother should have had in speaking for her son in the criminal case. What is clear, however, at least according to the Court of Appeals in Florida, is that Lionel's competence was sufficiently in doubt to

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<sup>241</sup> *Id.* at R. 1.14 cmt. 5.

<sup>242</sup> *Id.* at R. 1.14 cmts. 5, 7.

<sup>243</sup> *Id.* at R. 1.14 cmt. 3.

<sup>244</sup> *Id.* at R. 1.14 cmt. 4.

<sup>245</sup> See *supra* discussion in Part I.B.

permit his lawyer to deviate from the normal attorney-client paradigm. Lionel's trial lawyer could have—and probably should have—raised competency even without Lionel's consent or his mother's.

### III. SYSTEMIC REFORM

Given the complexities of modern parental accountability measures which often create conflict between parents and children strategies for effective lawyering will be only partly useful in facilitating effective collaboration among attorneys, children, and their parents. In this Part, I explore systemic reforms that may reduce the potential for conflict without compromising public safety, absolving parents of responsibility for the conduct of their children, or excluding parents from the rehabilitative process. First, I encourage policymakers to develop a more centralized approach to parental accountability. Specifically, I propose that parental accountability for the delinquent behavior of children be managed primarily within the juvenile justice system and largely removed from criminal and civil courts. Second, I encourage legislators to create or expand existing measures to protect the confidential communication between children and their parents. To this end, I urge legislators to adopt a narrow parent-child privilege that would shield confidential communication from the child to the parent and that would allow the parent to elect or refuse to testify when the parent observes illegal conduct by the child. I also encourage states to explicitly extend the attorney-client privilege to include parents of a minor child.

#### *A. Restructuring Parental Accountability Measures within Juvenile, Civil, and Criminal Courts*

Criminal parental liability, civil parental liability, and family-focused juvenile justice reforms all share a common agenda—encouraging parents to take greater responsibility for the conduct of their children and reducing juvenile crime. Unfortunately, the uncoordinated and conflicting methodologies within each strategy threaten to undermine both objectives. Compare, for example, the pervasive family-focused reforms in the juvenile justice system with the punitive agenda of the adult criminal court. While the juvenile court seeks to improve communication and reduce conflict within the family, the criminal court adds a layer of conflict and offers little, if any, counseling or mediation for the family. Likewise, while family-focused juvenile models are designed to keep children in the home and engage parents in the rehabilitation of their children, exorbitant civil and criminal penalties create a perverse incentive for parents to relinquish responsibility for the care and supervision of their children.

##### *1. Coordinating Parental Accountability and Victims' Compensation in Juvenile Court*

Given recent legislative reforms, juvenile courts, alone, now provide ample opportunity to hold parents accountable for the acts of their children. As discussed in Part II, parents are now involved in every aspect of the juvenile justice system. Current legislation subjects parents to the jurisdiction of the

court and requires parents to participate in counseling, parenting-skills classes, and other rehabilitative programs for themselves and their children.<sup>246</sup> Family-focused juvenile justice programs also seek to build supportive parent-child relationships, teach positive discipline methods, and encourage more active parental monitoring and supervision. In a more retributive vein, juvenile statutes also require parents to pay attorneys' fees, court costs, fines, and restitution.<sup>247</sup> Parents who fail to comply with such orders may be held in contempt and incarcerated.<sup>248</sup> Ultimately, juvenile courts not only hold the parents accountable, but they also provide comprehensive therapeutic interventions to correct intra-family problems and reduce juvenile crime.

Modern juvenile courts also provide a comprehensive response to the victims' needs. Victims are increasingly involved in juvenile proceedings through restorative justice programs, victim-offender mediation, and new victims' rights legislation that allows victims to attend juvenile hearings, submit victim impact statements, and recover monetary compensation for personal injury, property damage, and lost wages at work.<sup>249</sup> Recognizing that parents are at least partly responsible for the conduct of their children, juvenile statutes hold parents jointly or severally liable for the victim's compensation.<sup>250</sup>

Resolution of disputes between the victim and the parent in juvenile court may have policy advantages over the resolution of those disputes in other fora. Most significantly, juvenile courts, which routinely engage in a comprehensive assessment of relationships within the family and are required to determine the child's guilt beyond a reasonable doubt, may be better equipped to resolve issues of fault and causation in tort law and evaluate the maliciousness and willfulness of the child's conduct as required in civil strict liability statutes. If the child is found not guilty, or if significant mitigating circumstances at trial suggest that the child's conduct was not intentional or malicious, it would be inappropriate to hold parents responsible for damages under the civil statute. It might be appropriate, however, to hold the parent responsible in tort theory if the family assessment revealed a history of inadequate supervision by the parent or documented the parents' failure to respond to prior acts of violence and destruction by their children. Although any parental accountability measure is likely to create conflict between the parent and the child, a more coordinated approach may reduce the overall negative impact on efforts to stabilize families and rehabilitate children. When parents are satisfied with the accuracy of the fact-finding process and are convinced that equitable outcomes have been reached between the victim and the parents, the parents may be less hostile to

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<sup>246</sup> See *supra* notes 121-26 and accompanying text.

<sup>247</sup> See *supra* notes 128-32 and accompanying text.

<sup>248</sup> See *supra* notes 133-34 and accompanying text.

<sup>249</sup> See, e.g., D.C. CODE § 16-2317 (2004) (requiring court to consider victim impact statement in deciding whether to dismiss a juvenile case); D.C. CODE § 16-2320 (2004) (requiring court to consider victim impact statement in determining appropriate disposition for child); D.C. CODE § 16-2320.01 (2004) (allowing court to enter a judgment of restitution for victims to cover cost of damaged or stolen property, personal injury and/or counseling or other mental health services); D.C. CODE § 16-2340 (2004) (detailing general rights of victims in juvenile court).

<sup>250</sup> See *supra* note 129 and accompanying text.

the court order and to the child.<sup>251</sup> Likewise, parents who are fully engaged in the family-focused intervention may accept restitution, community service, and other requirements as a joint venture of the family. At a minimum, coordinating parental accountability within the juvenile justice system allows the court to structure a disposition plan that more appropriately allocates responsibility for the child's conduct among the child, parent, and other systems that contribute to the child's development. Coordinating efforts in the juvenile system also ensures that parents, children, and their lawyers will be fully informed of the breadth of potential parental liability and allows children to make decisions that consider, and potentially accommodate, the interests of parents.

As one of many possible reforms, policymakers may amend civil parental liability statutes to require victims of juvenile crime to pursue all available recourse in pending juvenile justice proceedings before seeking damages in the civil action.<sup>252</sup> Tort actions and civil parental liability statutes might also be limited to those cases in which the victims cannot be compensated because the juvenile case was dismissed for reasons other than acquittal. Given the rise of comprehensive Unified Family Courts, in which a single judge is given jurisdiction over all matters that involve the family,<sup>253</sup> legislators might also consider whether civil parental liability statutes fall appropriately within the purview of family courts. By addressing victims' compensation in the juvenile or Unified Family Court, policymakers would reduce the overall cost of civil litigation and provide a more efficient forum for the just resolution of disputes between parents and victims of juvenile crime.

## 2. *Limiting Exposure to Criminal Liability*

Policymakers should also consider whether and to what extent criminal liability is necessary for parents. While criminal liability may be appropriate for those parents who are co-conspirators in the crimes of their children, criminal liability may not be appropriate for those parents who are less directly involved in the child's delinquent conduct. Because punitive sanctions are arguably only warranted when parents *can*, but refuse to, control their children,<sup>254</sup> juvenile courts are again probably better equipped than criminal courts to determine whether the parent is simply unwilling to exercise appropriate control and discipline or whether the parent has been unable to control the child

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<sup>251</sup> Ronner, *supra* note 58, at 111 (arguing that when individuals experience a legal procedure that they feel is fair, they have more respect for the law and are more likely to accept the outcome).

<sup>252</sup> Cf. D.C. CODE § 16.2320.01 (2004) (juvenile statute indicating that any civil verdict shall be reduced by the amount paid under the judgment of restitution in the juvenile case).

<sup>253</sup> Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469 (1998) (providing comprehensive list of possible areas of subject matter jurisdiction in UFCs); James W. Bozzomo & Gregory Scolieri, *A Survey of Unified Family Courts: An Assessment of Different Jurisdictional Models*, 42 FAM. CT. REV. 12, 15-16 (2004) (documenting survey results of subject matter jurisdiction in unified family courts to include domestic violence, divorce, abuse/neglect, civil commitment, juvenile delinquency, adult family criminal matters, elder abuse among many others).

<sup>254</sup> McMullen, *supra* note 73, at 645-46, 654-55 (discussing injustice of punishing parents when their good faith attempts at child discipline are unsuccessful).



because of psychological or physical disabilities that affect either the child or the parent. When diagnostic evaluations suggest that the child is unable to conform his behavior to expected standards, despite the reasonable efforts of parents, it would be inappropriate to hold the parents criminally responsible. When parents simply refuse to engage in the care and supervision of the child, the juvenile judge, unlike the criminal judge, generally has the power to remove the child from the home.

Juvenile courts also generally have the resources and expertise to assist those parents who are willing and able to engage in the rehabilitative process. Criminal courts, on the other hand, often fail to consider whether criminal penalties will impede parental efforts to comply with the therapeutic plan developed in juvenile court. Criminal courts rarely account for the impact of parental incarceration on the delinquent child and his siblings and generally remain inattentive to collateral consequences, such as loss of housing and employment that will exacerbate, not improve, the child's conduct.<sup>255</sup> Also, unlike modern, multi-systemic responses to juvenile crime, criminal parental liability statutes place disproportionate blame on parents and ignore societal causes of delinquency such as poverty, racism, and poor education policy.<sup>256</sup> While criminal provisions focus entirely on the role of parents in the control of their children, innovative juvenile courts build on empirical research that documents the multidimensional causes of delinquency and seek reform not only in the family, but also in the child's school, neighborhood, community, and peer set.<sup>257</sup>

As a better response to all of the competing policy objectives, policymakers should reevaluate current parental liability strategies with an eye toward reforms that will coordinate parental accountability in one court, reduce exposure to civil and criminal liability for parents, and equip parents with the skills they need to be better parents.<sup>258</sup> Although the proposed reforms may reduce the number and alter the nature of parental liability statutes, the reforms should not leave victims uncompensated or the community at any greater risk of harm.

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<sup>255</sup> See generally MAUER & CHESNEY-LIND, *supra* note 159 (collection of essays critiquing criminal justice system's inattention to collateral consequences of criminal conviction).

<sup>256</sup> Cahn, *supra* note 145, at 415; Gilbert et al., *supra* note 34, at 1156, 1169; McMullen, *supra* note 73, at 640-41.

<sup>257</sup> Gilbert et al., *supra* note 34, at 1169.

<sup>258</sup> Although I advocate for a centralized parental accountability response within the juvenile justice system, I fear that some juvenile justice provisions, such as those that require parents to reimburse the state for the cost of the child's court-ordered counseling, residential treatment, and psychological or psychiatric evaluations may place disproportionate responsibility on the parents and absolve the community at large of any role it may play in the delinquency of minors. Even where local juvenile justice budgets are thin and programs are limited, statistical correlations between poverty and juvenile crime suggest that parents will not be able to afford the quality and individualized treatment their children may need. While policymakers might legitimately require parents to obtain mental health resources through private insurances, Medicare and other public assistance available to their children, other out-of-pocket costs place a tremendous burden on parents and siblings of delinquent children.

## *B. Protecting Communication Between Lawyers, Children, and Their Parents*

Policymakers should consider reforms in the areas of attorney-client privileges and confidential intra-familial communications. Reforms that clearly extend the attorney-client privilege to parents of minor children and that recognize a narrow privilege for communications made by children to their parents will have low costs in the fair resolution of juvenile cases. Such reforms, however, would yield considerable gain in rehabilitating delinquent youth, building capacity and cohesion in families, and improving the quality of relationships between attorneys, children, and their parents.

### *1. Extending the Attorney-Client Privilege*

Because very few states legislatures have explicitly addressed the role of parents in the attorney-client relationship, courts are currently left to resolve issues of privilege on a case-by-case basis. To alleviate uncertainty for the attorney, the child, and the parent and to establish greater uniformity in the application of the privilege to parents of a minor child, I propose that state legislators make every effort to clarify the parameters and exceptions to the attorney-client privilege when children are involved.

In our society, we have clearly recognized the importance of confidential communication between lawyers and their clients.<sup>259</sup> In criminal cases, the attorney-client privilege has constitutional implications because it is necessary to protect the defendant's concurrent rights to counsel and freedom from self-incrimination.<sup>260</sup> When third parties such as language translators, sign interpreters, expert witnesses, or even relatives are necessary to facilitate communication between the defendant and a lawyer, the privilege should extend not only as a matter of logic, but also as a matter of constitutional necessity.<sup>261</sup> While most of us would readily agree that a Spanish-speaking defendant retains the attorney-client privilege when he brings a translator to meet with an English speaking lawyer, some of us might hesitate when asked whether an adolescent, who is old enough to speak and reason, is equally entitled to the assistance of a parent in the attorney-client interview.<sup>262</sup> As explored in Part I, practice and reason suggest that in some cases parents may be the only means by which a child charged with a crime can secure or meaningfully exercise his constitutional right to legal representation.<sup>263</sup> Although the accused child is entitled to traditional, client-directed advocacy in a delinquency case, the child may initially look to parents for help in understanding the role of counsel, building trust in the attorney-child relationship, and articulating questions and concerns to the lawyer. Privileged communication between the parent, the child, and the lawyer may also provide the parents with information they need to effectively

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<sup>259</sup> Ross, *supra* note 56, at 106-07.

<sup>260</sup> Ross, *supra* note 56, at 106.

<sup>261</sup> MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 3 (2002); Ross, *supra* note 56, at 106-07, 86-87.

<sup>262</sup> Cf. *Missouri v. Fingers*, 565 S.W.2d 579 (Mo. 1978) (young adult, age twenty-four, waived attorney-client privilege when father was present when communicating with attorney).

<sup>263</sup> Ross, *supra* note 56, at 86.

advise the child about case alternatives and help the lawyer gather information he or she will need to provide the best advice to the client.<sup>264</sup>

To ensure attorney-client confidentiality for children in juvenile and criminal courts, states may follow the lead of Washington, which now prevents a parent or a guardian of a minor child arrested on a criminal charge from being examined as to a communication between the child and his or her attorney if the communication was made in the presence of the parent or guardian.<sup>265</sup> Although the Washington statute does not provide a blanket parent-child privilege, it does facilitate a more productive relationship among the attorney, the child, and the parent by allowing the attorney and the child to communicate without fear of waiving the child's confidences. Because the statute does not create any right of participation for the parent, the attorney and the child retain the power to exclude the parent from the consultation when necessary. Considering the need to preserve confidentiality and loyalty in the primary attorney-client dyad, I do not endorse a general attorney-parent privilege that would protect communications made by the child's parents to the lawyer outside of the child's presence unless such communications are necessary to advance the child's interests and are intended by the child to remain confidential. As indicated above, the attorney should remind the parent that there are no privileged communications between the parent and the attorney absent the child's consent.

Although any new or extended privilege may result in the exclusion of relevant evidence, policymakers must balance the potential loss of evidence against the benefits of the privilege. Extension of the attorney-client privilege in this context would protect family cohesion, encourage the child to seek the parent's advice when in trouble, and facilitate the parents' involvement in, and commitment to, the child's rehabilitation. On the other hand, statutes like the one proposed here would likely pose minimal danger to the fair administration of justice. Anecdotal evidence and the paucity of appellate litigation on the issue suggests that prosecutors are already reluctant to call parents as witnesses, either because they fear that parents will be less truthful about the crimes of their children or because they recognize the value of confidentiality in the parent-child relationship.<sup>266</sup> Legislatures should codify by statute that which is implicit in practice.

## 2. *Establishing a Parent-Child Privilege*

Extending the attorney-client privilege to parents who attend or participate in meetings between the child and the lawyer will provide only limited protection for the confidential communications of an accused child.<sup>267</sup> Logic would suggest that it is far more common for children to seek the advice of parents in private conversations before an attorney is hired and after attorney-client meetings. To preserve confidential communications by children who seek their par-

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<sup>264</sup> *Id.* at 107.

<sup>265</sup> WASH. REV. CODE § 5.60.060 (2005).

<sup>266</sup> ROSS, *supra* note 56, at 99-100.

<sup>267</sup> WASH. REV. CODE § 5.60.060(1)(b) (explicitly states that privileged communication between the attorney, the child and the parent does not create also privilege communications between the parent and the child before the child's arrest).

ent's advice in the juvenile justice context, I propose that states adopt a narrow parent-child privilege to govern these circumstances.

Parent-child communications readily satisfy standards and criteria established for the recognition of a new privilege. Privileges are generally recognized when (1) confidentiality between the identified parties is important to the relationship; (2) parties within the relationship assume that communications will remain confidential; (3) the relationship itself is worth maintaining because it serves important policy objectives; and (4) benefits of the proposed privilege outweigh any cost to the accurate resolution of cases.<sup>268</sup> Theories of adolescent development suggest that children naturally look to parents for advice and generally believe that parents can be trusted with sensitive information.<sup>269</sup> Preservation of the parent-child relationship also clearly promotes important social policy. Parent-child privileges, such as those in Connecticut, Idaho, and Minnesota, are designed to preserve the sanctity of parent-child relationships, encourage children to seek help from their parents when in trouble, and allow parents to serve as a conduit for children seeking to exercise important constitutional rights or consult with professionals such as attorneys and therapists who are protected by long-standing privileges.<sup>270</sup> In cases where there is a risk that parents will usurp control if invited into the attorney-child meeting, a broader parent-child privilege would allow the child to consult privately with the lawyer and then seek additional help at home from the parent. Parent-child privileges also protect the rights of parents to raise children without undue government interference and preserve diversity and individuality in society.<sup>271</sup>

Parent-child privileges are not without problems. In deciding whether to adopt the privilege, policymakers will need to weigh the likely benefits against any negative impact the proposed privilege may have on the truth-seeking function of the courts and the fair administration of justice—especially when serious juvenile crime is at issue. Professor Catherine Ross provides a useful framework, by drawing an analogy to the spousal privilege, for analyzing how the parent-child privilege might be drafted.<sup>272</sup> There are three basic alternatives. Drafted in the broadest form, the privilege would prohibit the parent from testifying against the child in any criminal or civil proceeding, absent the child's consent. Under this framework, the parent could not testify either about confidential communications of the child or about information the parent personally observed or learned from a source other than the child.<sup>273</sup> A second, more narrow privilege would only protect confidential communications made by the child to the parent, but would allow litigants to compel the parents' testimony about conduct observed by the parent—such as drug use, possession

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<sup>268</sup> Ross, *supra* note 56, at 91-92 (discussing Wigmore's four-part standard for the establishment of new privileges).

<sup>269</sup> Ross, *supra* note 56, at 92.

<sup>270</sup> See *id.* at 86-87, 90 (reviewing arguments and proposing new arguments in favor of parent-child privilege); see also *supra* note 169.

<sup>271</sup> See generally Ross, *supra* 56, at 92.

<sup>272</sup> *Id.* at 90, 116.

<sup>273</sup> *Id.* at 116 (parent could not testify about gang colors, drug use or weapons); cf., e.g., WASH. REV. CODE § 5.60.060(1) (neither husband nor wife can testify against the other without consent).

of weapons, and apparent gang involvement.<sup>274</sup> A third, even more narrow framework would give rights in the privilege to the parent and allow the parent to exercise his or her judgment in electing or refusing to testify against the child.<sup>275</sup> None of these frameworks would protect unrelated communications from the parent to the child as such a privilege would not serve the same policy objectives as the protection of communication from the child to the parent.<sup>276</sup>

Because successful family-focused juvenile justice models are particularly concerned with fostering good communication between parents and their children, all states should at least adopt the narrow privilege that protects confidential communications by the child to the parent. Policymakers, however, will likely reject an absolute privilege that precludes parents from seeking help when children are threatening or abusive to other family members or when the parents need the court's assistance in obtaining treatment and services for the child.<sup>277</sup> To accommodate these concerns, exceptions to the privilege might be appropriate in criminal or delinquency cases in which the parent is the victim of the child's conduct or in civil commitment cases in which the child presents an imminent threat to himself or others.<sup>278</sup> In cases where the child makes no confidential communication to the parent but the parent plainly observes illegal conduct by the child, legislatures should follow the lead of Connecticut and allow the parent to elect or refuse to testify against the child.<sup>279</sup> In deciding whether to testify, the parent might reasonably consider whether the testimony would have a detrimental impact on plans to rehabilitate the child, whether the parent's testimony would irreparably damage the parent's relationship with the child, whether the child poses a serious risk of threat to family, friends, neighbors, or the community at large, and whether the parent may access services for the child without a juvenile court adjudication.

#### IV. CONCLUSION

Although there has been a general consensus among scholars that the child's constitutional right to counsel in a delinquency case belongs to the child and not the parent, there has been little discussion about exactly what role the parents can or should play in the attorney-child relationship. Rules of ethics, principles of constitutional law, and theories of procedural justice all dictate limits on the role of parents in the attorney-child dyad. Stated simply, absent clear evidence that the child is incompetent to engage in the reasoning process, lawyers may not look to parents to set the objectives of the child's juvenile case. Notwithstanding these limits, parents can and do remain integrally involved in the decision-making process with their children. Strategic and logistical considerations often require lawyers and children to collaborate with parents; and theories of adolescent development suggest that children who

<sup>274</sup> Ross, *supra* note 56, at 90, 116.

<sup>275</sup> *Id.* at 116.

<sup>276</sup> *Id.* at 96 (recognizing that parents rarely look to children for advice).

<sup>277</sup> *Id.* at 116.

<sup>278</sup> *Id.* at 117; *see also* CONN. GEN. STAT. § 46b-138a (2005); IDAHO CODE ANN. § 9-203(7) (Michie 2005); MINN. STAT. § 595.02(j) (2005).

<sup>279</sup> CONN. GEN. STAT. § 46b-138a.

engage in healthy, open communication within the home have better prospects for rehabilitation. The child's lawyer who is left to navigate the difficult relationship with parents and children may draw upon the lawyering strategies proposed in this article. The effective advocate will ultimately improve the quality of the child's legal decisions by empowering children to direct the course of their own legal representation, managing the expectations of parents, educating parents to be better advisors for the child, teaching the child to collaborate with parents, and giving the child a voice in the juvenile justice system. Unfortunately, absent a parent-child privilege and clear extension of the attorney-client privilege to protect confidential communications among lawyers, children, and their parents, collaboration in the attorney-child-parent triad will always be strained. As a result, advocates should lobby policymakers to provide clarity in these areas.