

FAMILY-DRIVEN JUSTICE

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This Article reports the results of a qualitative research study identifying best practices for family engagement in the juvenile justice system. The typical system operates from the faulty premise that families cause their children's problems. As a result, decisions about treatments or sanctions for youth routinely fail to incorporate family members' views about how best to address a youth's needs. Instead, system professionals make decisions that expose youth to treatments and environments that increase recidivism and place youth at a high risk of being abused. Victims, youth, families, and system professionals all lose under the current model. The goal of this study was to develop a shared understanding of how to reform justice systems to meet the needs of youth and families without sacrificing the public safety concerns of justice system professionals and victims.

Synthesizing efforts from jurisdictions across the country, this Article proposes a radical transformation of the justice system and introduces a concept called Family-Driven Justice. The foundational values of this transformation are: all families care about their children and can be trusted to make good decisions on their behalf; all families have strengths to build upon; all families want their children to grow up safe and free from justice-system involvement; and all families have dreams for their children and want them to succeed in adult life.

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To put these values into practice, this Article describes the five features of what a transformed justice system will look like when it uses these positive presumptions to guide changes. First, families will be supported before and after challenges arise with their youth. Second, families will have access to peer support from the moment a youth is arrested through exit from the justice system. Third, families will be involved in decision-making processes at the individual, program, and policy levels to hold youth accountable and keep the public safe. Fourth, families will be strengthened through culturally competent treatment options and approaches. Fifth, families will know their children are being prepared for a successful future.

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INTRODUCTION

Legal scholars are at the beginning of a research agenda that examines the relationship between families and the criminal justice system. In *Privilege or Punish: Criminal Justice and the Challenge of Family Ties*, the authors Dan Markel, Jennifer Collins, and Ethan Leib examine state policies that treat criminal defendants better or worse than other defendants on the basis of familial status.¹ In their view, family status should rarely be considered in the criminal justice system.² This Article contributes to this nascent discussion by reporting the results of an empirical study examining the role of families³ in the juvenile justice system.⁴ In contrast to Markel, et al., I come to the opposite conclusion—the justice system should be restructured to provide a significantly greater role for families than is present in the system today, a concept I term “Family-Driven Justice.”⁵

While there are sharp differences between juvenile and adult criminal justice systems, both systems have competing objectives which include retribution and rehabilitation. Family concerns have not been adequately integrated into evaluating either of these competing philosophies. The distinctions between these two systems also artificially mask the fact that the majority of crimes are committed by young people.⁶ Known as the “age-crime curve,” involvement in criminal activity increases from late childhood, peaks in late adolescence, and then declines dramat-

1. DAN MARKEL, JENNIFER M. COLLINS & ETHAN J. LEIB, *PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES* (2009).

2. *Id.* at 154. One of their primary concerns is how “accommodations to families might impede the realization of criminal justice, understood as the effective and accurate prosecution of the guilty and exoneration of the innocent.” *Id.* at xvi.

3. From the very beginning of my research, I approached the topic using a broad definition of family and did not limit the analysis to a child’s parents or guardians. The family members I consulted with during the study settled on the following definition: “Family is broadly defined to include biological, foster, and adoptive parents, including persons in same-sex couples who may be acting as a parent but are not legally related to the child; siblings; grandparents; aunts and uncles; legal guardians and kinship caregivers; and all other persons in the child’s support network who are viewed as part of the family system, such as clergy, neighbors, or close family friends.” This definition is largely consistent with the test defining family used by the Supreme Court. *See Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 843–45 (1977) (defining the concept of family on the basis of: 1) biological relationships; 2) emotional attachments; and 3) whether the relationship exists apart from the power of the state). This definition is also consistent with at least one juvenile justice agency’s definition. *See infra* note 461.

4. The terms “juvenile justice system,” “criminal justice system,” and “justice system” are used throughout this article. When justice system is used, it denotes both juvenile and adult criminal justice systems. If I intend to refer to either the juvenile or adult criminal justice system exclusively, I use those terms.

5. In fairness, the authors did not attempt to address the separate rehabilitative aims of the juvenile justice system and might have come to different conclusions about accommodations had they evaluated family status in that context.

6. The terms “children” and “youth” are used interchangeably throughout this article to refer to persons under the age of 18, but also include persons who may be older who remain under the jurisdiction of the juvenile court. “Young adults” is used to describe persons over the age of 18. “Young people” refers to persons under the age of 25.

ically by the age of 25.⁷ Many of the youth and young adults in both systems are being parented or supported by family members, yet we know little of the impact of justice system processing on these families.

The number of youth who are likely to interact with the justice system is alarming, even if not precise. According to the U.S. Bureau of Justice Statistics, about 1 in 35 adults, nearly 7 million individuals, were under the supervision of adult correctional systems on a single day at the end of 2012.⁸ There are no comparable national daily estimates of the proportion of the youth population under supervision by the juvenile justice system. Annually an estimated 1.37 million youth are processed by juvenile courts,⁹ and an additional 250,000 children are referred to adult courts.¹⁰ The population of youth and young adults impacted by the justice system is marked by racial and ethnic disparities. By the age of 18, Black males have the highest rate of arrest (30%), followed by Latino males (26%), and white males (22%).¹¹ By the age of 23, these disparities continue to widen with Black males having a cumulative arrest rate of 49%, Latino males, 44%, and white males, 38%.¹² Arrest, even without a conviction, will lower the life chances for these young people.¹³

Once in the justice system, Black youth overwhelmingly receive more punitive treatment than their white peers.¹⁴ Black youth only represent 17% of the overall youth population, but are 62% of the youth prosecuted in the adult criminal system, and are 9 times more likely than white youth to receive an adult prison sentence.¹⁵ Black young adults ages 18–19 are 9.3 times more likely than white

7. FROM JUVENILE DELINQUENCY TO ADULT CRIME: CRIMINAL CAREERS, JUSTICE POLICY, AND PREVENTION 5 (Rolf Loeber & David Farrington eds., 2012).

8. LAUREN E. GLAZE & ERINN J. HERBERMAN, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE U.S., 2012 1 (2013), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4843>.

9. OJJDP Statistical Briefing Book (Apr. 17, 2013), available at http://www.ojjdp.gov/ojstatbb/court/JCSCF_Display.asp?ID=qa06601&year=2010&group=1&estimate=2.

10. NEELUM ARYA, CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS: LEGISLATIVE VICTORIES FROM 2005 TO 2010 REMOVING YOUTH FROM THE ADULT CRIMINAL JUSTICE SYSTEM 3 (2011).

11. Robert Brame et al., *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 CRIME & DELINQ. 471, 476 (2014). Note these figures assume that missing cases from the National Longitudinal Survey of Youth, the dataset used in the study, are missing at random.

12. *Id.*

13. See, e.g., Deyah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 942–43 & n.7 (2003); Richard D. Schwartz & Jerome H. Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROBS. 133, 136 (1962).

14. Neelum Arya & Ian Augarten, *Critical Condition: African-American Youth in the Justice System*, 2 CAMPAIGN YOUTH JUST. 1, 23–26 (2005).

15. *Id.* at 1. States vary in whether and how youth are prosecuted as adults. While the perception is that youth who are prosecuted as adults are the “worst of the worst” and therefore deserving of adult court punishment, studies reviewing state-specific data from across the country have found that many youth entering the adult system are first-time offenders who have not had the benefit of the juvenile justice system, many are not charged with serious offenses, and the majority of youth receive a sentence of adult probation in-

young adults of the same age to be imprisoned.¹⁶ Latino youth are also treated harshly.¹⁷ Compared to white youth, Latino youth are 28% more likely to be detained, 41% more likely to be incarcerated or receive an out-of-home placement such as a boot camp or group home, and 40% more likely to be admitted to adult prison.¹⁸ Latino young adults ages 18–19 are 3.5 times more likely than white young adults of the same age to be imprisoned.¹⁹

Juvenile and adult criminal justice systems involve a population of young people still closely connected to and assisted by their families. It is therefore somewhat surprising that scholars have not paid more attention to the families of youth who are arrested and imprisoned. Practitioners and scholars have tended to focus their research on how justice system involvement impedes marriage, and relationships between incarcerated parents and their children.²⁰ There are 2.7 million children of incarcerated parents²¹ and scholarship in this area has been “driven by

stead of adult prison. *See, e.g.*, CAMPAIGN FOR YOUTH JUSTICE & P'SHIP FOR SAFETY AND JUSTICE, MISGUIDED MEASURES: THE OUTCOMES AND IMPACTS OF MEASURE 11 ON OREGON'S YOUTH (2011); CHILDREN'S ACTION ALLIANCE, IMPROVING PUBLIC SAFETY BY KEEPING YOUTH OUT OF THE ADULT CRIMINAL JUSTICE SYSTEM (2010); CHILDREN'S LAW CENTER, INC., FALLING THROUGH THE CRACKS: A NEW LOOK AT OHIO YOUTH IN THE ADULT CRIMINAL JUSTICE SYSTEM (2012); CITIZENS FOR JUVENILE JUSTICE, MINOR TRANSGRESSIONS, MAJOR CONSEQUENCES: A PICTURE OF 17-YEAR-OLDS IN THE MASSACHUSETTS CRIMINAL JUSTICE SYSTEM (2011); COLO. JUVENILE DEFENDER COAL., RE-DIRECTING JUSTICE: THE CONSEQUENCES OF PROSECUTING YOUTH AS ADULTS AND THE NEED TO RESTORE JUDICIAL OVERSIGHT (2012); MICHELLE DEITCH, JUVENILES IN THE ADULT CRIMINAL JUSTICE SYSTEM (2011); JUST CHILDREN, DON'T THROW AWAY THE KEY: REEVALUATING ADULT TIME FOR YOUTH CRIME IN VIRGINIA (2009); JUST KIDS P'SHIP, JUST KIDS: BALTIMORE'S YOUTH IN THE ADULT CRIMINAL JUSTICE SYSTEM (2010); WASH. COAL. FOR THE JUST TREATMENT OF YOUTH, A REEXAMINATION OF YOUTH INVOLVEMENT IN THE ADULT CRIMINAL JUSTICE SYSTEM IN WASHINGTON: IMPLICATIONS OF NEW FINDINGS ABOUT JUVENILE RECIDIVISM AND ADOLESCENT BRAIN DEVELOPMENT (2009).

16. E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011 8 (2012).

17. Neelum Arya et al., *America's Invisible Children: Latino Youth and the Failure of Justice*, 3 CAMPAIGN YOUTH JUST. 1, 6 (2009).

18. *Id.*

19. CARSON & SABOL, *supra* note 16.

20. *See generally* DONALD BRAMAN, DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA (2004); MEGAN COMFORT, DOING TIME TOGETHER: LOVE AND FAMILY IN THE SHADOW OF PRISON (2008); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121 (1999); Joseph Murray & David Farrington, *The Effects of Parental Imprisonment on Children*, 37 CRIME & JUST. 133 (2008); Ofira Schwartz-Soicher, *The Effects of Parental Incarceration on Material Hardship*, 85 SOC. SERVICE REV. 447 (2011); Naomi F. Sugie, *Punishment and Welfare: Paternal Incarceration and Families' Receipt of Public Assistance*, 90 SOC. FORCES 1403 (2012); Christopher Wildeman, Jason Schnittker & Kristin Turney, *Despair by Association? The Mental Health of Mothers with Children by Recently Incarcerated Fathers*, 77 AM. SOC. REV. 216 (2012); Christopher Wildeman & Bruce Western, *Incarceration in Fragile Families*, 20 FUTURE CHILD. & YOUTH SERVS. REV. 181 (2010).

21. BRUCE WESTERN & BECKY PETTIT, PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 4 (2010), *available at*

numbers that portend an uncertain future for too many children to be ignored.”²² Yet an analogous focus on family members of incarcerated young people has not sparked a sustained scholarly inquiry even though “a legal paradigm which delegates the responsibility to assist the juvenile in not reoffending directly to the family should ensure that its rules and procedures do not undermine the parent–child relationship.”²³ In addition to weakening family–youth bonds, the justice system exacerbates the economic vulnerability of families through the use of a variety of court- and incarceration-related fees and costs.²⁴ A recent survey of more than 1,000 parents and family members of youth involved in the justice system found that more than half of these families survive on less than \$25,000 per year, with just 6% reporting incomes over the median household income in America of \$50,000 per year.²⁵ Despite these limited financial resources, nearly two-thirds reported spending more than \$125 per month on system costs, one-third spent more than \$500 per month, and nearly one-fifth had costs over \$1,000 per month.²⁶ Approximately one-third of families reported having to make difficult choices between paying for basic necessities or making court-related payments.²⁷

Many scholars have worked to expose the racial inequities built into the criminal justice system,²⁸ and have proposed a variety of solutions to ending mass incarceration including legalizing drugs, refusing plea bargains, and jury nullification. Paul Butler succinctly states the problems of our current justice system: “What poor people, and black people, need from criminal justice is to be stopped less, arrested less, prosecuted less, incarcerated less.”²⁹ Advocates have worked on

http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/Collateral%20Costs%20FINAL.pdf.

22. Myrna S. Raeder, *Making a Better World for Children of Incarcerated Parents*, 50 FAM. CT. REV. (special issue) 23, 28 (2012).

23. Hillary Farber, *To Testify or Not to Testify: A Comparative Analysis of Australian and American Approaches to a Parent-Child Testimonial Exemption*, 46 TEX. INT’L L.J. 109, 141 (2010).

24. JUSTICE FOR FAMILIES, FAMILIES UNLOCKING FUTURES: SOLUTIONS TO THE CRISIS IN JUVENILE JUSTICE (2012). See also DREW KUKOROWSKI, PETER WAGNER & LEAH SAKALA, PRISON POLICY INITIATIVE, PLEASE DEPOSIT ALL OF YOUR MONEY: KICKBACKS, RATES, AND HIDDEN FEES IN THE JAIL PHONE INDUSTRY (May 8, 2013), available at http://www.prisonpolicy.org/phones/please_deposit.pdf; DREW KUKOROWSKI, THE PRICE TO CALL HOME: STATE-SANCTIONED MONOPOLIZATION IN THE PRISON PHONE INDUSTRY (Sept. 11, 2012), available at http://www.prisonpolicy.org/phones/price_to_call_home.pdf; ACLU, IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTORS’ PRISONS (2010), available at https://www.aclu.org/files/assets/InForAPenny_web.pdf.

25. JUSTICE FOR FAMILIES, *supra* note 24, at 13.

26. *Id.* at 28.

27. *Id.*

28. See, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 271 n.7 (2010); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004); Ian F. Haney Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023 (2010).

29. Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2191 (2013).

a variety of strategies from prison abolition³⁰ to interventions designed to stop discrimination and other collateral consequences that come from criminal convictions.³¹ Further, there are groups working together on insider- or correctional-led strategies known as Justice Reinvestment Initiatives (which have largely failed at reallocating resources from corrections to communities).³² Against the backdrop of these primarily adult-centered criminal justice system reform efforts and recent juvenile-centered Supreme Court decisions declaring that justice policies must be tailored toward children,³³ it is now more important than ever to consider the family perspective in guiding future reform efforts. This Article is one step forward in that direction.

This Article reports the results of a qualitative research study identifying best practices for family engagement in the juvenile justice system and examines how the contemporary justice system undermines families. In 2008, the Center for Juvenile Justice Reform at Georgetown University conducted a survey of juvenile probation and correctional leaders and found not only that family engagement was ranked as one of the three most important operational issues facing their respective departments or agencies, but also that it was the most difficult to address.³⁴ Since that time, numerous organizations and initiatives have developed tools and resources to help agencies reach out to parents and other family members.³⁵ However, there are three critical pieces that have been missing from the efforts to date: 1)

30. See, e.g., CRITICAL RESISTANCE, <http://criticalresistance.org/> (aimed at prison abolition).

31. See, e.g., BAN THE BOX CAMPAIGN, <http://bantheboxcampaign.org/> (aimed at ending discrimination against persons with criminal convictions).

32. See, e.g., JAMES AUSTIN ET AL., ENDING MASS INCARCERATION: CHARTING A NEW JUSTICE REINVESTMENT 1–2, available at https://www.aclu.org/files/assets/charting_a_new_justice_reinvestment_final_0.pdf (“Possible savings in the form of ‘averted costs’ for JRI work have been either returned to the general coffers or used to augment community corrections and law-enforcement government budgets.”). See also URBAN INST., JUSTICE REINVESTMENT INITIATIVE STATE ASSESSMENT REPORT 46 tbl.10 (2014), available at <http://www.urban.org/UploadedPDF/412994-Justice-Reinvestment-Initiative-State-Assessment-Report.pdf> (confirming the characterization that investments have not been returned to community services but have been primarily directed into justice-system programs).

33. See Elizabeth S. Scott, “*Children Are Different*”: Constitutional Values and Justice Policy, 11 OHIO ST. J. CRIM. L. 71 (2013).

34. SHAY BILCHIK ET AL., NATIONAL REENTRY RESOURCE CENTER WEBINAR: FAMILY ENGAGEMENT IN REENTRY FOR JUSTICE-INVOLVED YOUTH (2010), available at http://www.csgjustice-center.org/documents/0000/0775/Oct_4_Webinar_Slides_FINAL.pdf.

35. Family involvement has been a priority for several juvenile justice-related organizations including the Center for Juvenile Justice Reform at Georgetown University; Council of Juvenile Correctional Administrators; Performance-based Standards for Youth Correction and Detention Facilities; MacArthur Foundation’s Models for Change Initiative; National Evaluation and Technical Assistance Center for the Education of Children and Youth Who Are Neglected, Delinquent, or At Risk; Office of Juvenile Justice and Delinquency Prevention’s National Center for Youth in Custody; Vera Institute of Justice’s Family Justice Program; and Annie E. Casey Foundation’s Juvenile Detention Alternatives Initiative.

The justice field is not operating from a shared understanding of the goal or purpose of family engagement; 2) Some practices aimed at involving families are based upon a faulty ideology and stereotypes; and, 3) Family engagement initiatives have largely failed to acknowledge abuses perpetrated by justice agencies.³⁶

First, family engagement or involvement is a nebulous term that is used inconsistently by family members, practitioners, and scholars alike. Juvenile justice professionals³⁷ use the term “family engagement” to refer to practices that are supportive and encouraging as well as strategies that are punitive or coercive. For example, an American Bar Association (“ABA” study on parental participation included ordering parents to appear in court and subjecting parents to sanctions as components of parental involvement.³⁸ Not surprisingly, families do not use the term family engagement this way. Wendy Luckenbill, a nationally recognized expert on family advocacy, explains,

[E]verybody says they want tools to get families more engaged and involved with their children, and when we start presenting our curriculum and start talking about [how] the probation officer is supposed to be listening more to the family and understanding the family perspective more, we usually get somebody that says, “I thought you were going to give me tools to make families do what I think they should do.”³⁹

Families use the term family engagement to refer to how professionals and government services will respond to their concerns and help them meet the needs of their children. As demonstrated in this Article, often what families want or need is outside what justice agencies are able to provide themselves.⁴⁰

36. These are assertions that I have made based upon my practice experience in the field. It was beyond the scope of my study to examine these assumptions empirically, although future researchers are encouraged to do so.

37. The justice system is made up of numerous agencies usually involving law enforcement, corrections and probation departments, and juvenile and adult courts. Other agencies such as the child welfare, mental health, education, and human services agencies also play a role in the functioning of the justice system. In addition, many nonprofit organizations provide direct services to court-involved youth or provide legal or other advocacy services to youth and their families. I use the terms system reformers, stakeholders, practitioners, and professionals interchangeably to refer to people working for government agencies, quasi-government organizations, e.g., nonprofits that provide services to others under government contracts, as well as traditional child and juvenile advocacy organizations.

38. HEATHER J. DAVIES & HOWARD A. DAVIDSON, AMERICAN BAR ASS’N, PARENTAL INVOLVEMENT PRACTICES OF JUVENILE COURT (2001).

39. Wendy Luckenbill, Address to NTTAC 22, *available at* <https://www.nttac.org/media/trainingCenter/85/Transcript%20Famiy%20Comes%20First%20Transforming%20Justice%20System%20by%20Partnering%20with%20Families%2005%2008%2013%20508c%20for%20TC.pdf>.

40. This tension has been recognized by several scholars. Kay Levine has commented that “[b]y placing social problems inside the criminal justice framework without changing the fundamental orientation of the officials charged with addressing these problems, we ensure that the traditional apparatus of the criminal justice system—conviction, punishment, and surveillance—will be the only strategies considered by the problem-solvers.” Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1131

The goal of my study was to develop a shared understanding of how to address the needs of youth and families by identifying areas of common ground between family members and juvenile justice system professionals. For example, Los Angeles County has recently made changes to the way child-serving and justice agencies respond to youth in the foster care and delinquency systems, known as dual-jurisdiction or crossover youth.⁴¹ Los Angeles asserts that they have begun to value “families by radically altering the premise on which social services are based, moving from ‘replacing families’ to supporting and strengthening them.”⁴² My study sought to identify similar practices, currently in use in jurisdictions across the country, which are consistent with the family vision to help reconceptualize the relationship between families and government services.

Second, many of the existing family engagement practices are built upon a faulty ideology.⁴³ The stereotype of the bad, thoughtless, uncaring parent is ubiq-

(2005). See also Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1673 (2012).

41. L.A. CNTY. DEP’T OF PROBATION, PRACTICE PRINCIPLES, PRACTICE MODEL GUIDE AND IMPLEMENTATION THROUGH THE BREAKTHROUGH SERIES COLLABORATIVE MODEL FOR SYSTEM IMPROVEMENT 17 (2009), available at <http://lacdcfs.org/TitleIVE/documents/Attachment%20I%20-probation.pdf>.

42. *Id.*

43. The ideology of the juvenile court is represented in this quote from Judge Edwards: an important purpose of the court is “to preserve and strengthen families, so that they can raise their children without state interference.” Leonard P. Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43 JUV. & FAM. CT. J. 1, 39 (No. 2 1992). Legal scholars have noted how the ideology of familial independence from the state is a myth. See, e.g., CLAIRE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 68–69 (2014) (“One of the most fascinating paradoxes of family law is that despite the breadth and depth of state regulation, a bedrock principle of family law is that families are autonomous, operating apart from the law. Family autonomy is the belief that a clear line divides the family from the state and that legal rights form a protective barrier against state intervention. This could not be farther from the truth, but is a persistent belief nonetheless.”); Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 VA. J. SOC. POL’Y & L. 409, 430 (2005) (“The dominant macrosystem in the United States is characterized by a number of mutually reinforcing values and ideologies, including 1) a belief in individual responsibility; 2) the myth of individual autonomy; 3) a belief in free market efficiency as the measure of good and in consumption as the engine of the free market; 4) deep-seated prejudices dividing people along lines of race, class, gender, and, increasingly, religion; and 5) a success ethic, whether you call it survival of the fittest or ‘meritocracy,’ that rejects as unworthy those who falter in climbing the ladder of success.”); Lois A. Weithorn, *Developmental Neuroscience, Children’s Relationships with Primary Caregivers, and Child Protection Policy Reform*, 63 HASTINGS L.J. 1487, 1504–05 (2012) (“We vacillate between solutions that are polar opposites: Families are either exclusively left to their own devices—to struggle to provide adequate and safe homes and environments against sometimes overwhelming odds—or the state coercively intervenes, often removing children from the family home.”); Maxine Eichner, *Dependency and the Liberal Polity: On Martha Fineman’s The Autonomy Myth*, 93 CAL. L. REV. 1285, 1316 (2005) (“The division of responsibility that I propose posits what might be called both ‘strong families’ and a ‘strong state.’ This division expects that people should seek to meet the dependency needs of their family members, and therefore requires families to take on the difficult task of caring for dependents. Yet it also maintains

uitous. As Sylvia Ann Hewlett and Cornel West note in their book, *The War Against Parents*, “Hollywood’s emphasis on incompetent or abusive parents has become so pervasive that we have been lulled into taking this kind of parent-bashing for granted as a harmless quirk of mass entertainment.”⁴⁴ According to Barbara Bennett Woodhouse, “The culture of rugged individualism has made it difficult for Americans to accept that parents do not have to be bad parents to have children in trouble.”⁴⁵ There is a widespread belief, reflected both in the studies of family engagement and operation of the justice system overall, that families are the cause of their children’s problems⁴⁶ and a corresponding belief that system professionals know better.

These attitudes may have been inadvertently fostered by the 1967 landmark decision establishing the right to counsel for youth, *In re Gault*.⁴⁷ *Gault* sparked the modern children’s rights movement, which “influenced children’s lawyers to regard the law as something oppressing children and unfairly denying them adult-like rights.”⁴⁸ Viewing children as separate rights-holders apart from their parents has meant that legal scholars and advocates have often focused on the concerns of youth apart from their families in ways that have been detrimental to both.⁴⁹ Because many practitioners believe families are the source of their children’s problems, few studies of family engagement have directly asked families what they want from government services, or why they find it difficult to participate in the activities of the current justice system. When the ABA conducted its review of best practices on parental involvement in juvenile court, no parents were consulted.⁵⁰

that such caretaking requires supportive institutional structures, and that it is the state’s responsibility to secure such structures.”).

44. SYLVIA ANN HEWLETT & CORNELL WEST, *THE WAR AGAINST PARENTS: WHAT WE CAN DO FOR AMERICA’S BELEAGUERED MOMS AND DADS* 132 (1998). *See also* KAARYN S. GUSTAFSON, *CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY* 187 (2011) (“The American public has invested heavily in the creation of a new welfare system, as well as in the perpetuation of the symbol of the welfare queen. We have developed a culture that stigmatizes, even criminalizes, the poor. We have instituted public benefits programs that do not lift people out of poverty or even ease the experience of poverty.”).

45. Barbara Bennett Woodhouse, *Keynote*, 81 ST. JOHN’S L. REV. 519, 528 (2007).

46. *See, e.g.*, Eve M. Brank & Victoria Weisz, *Paying for the Crimes of Their Children: Public Support of Parental Responsibility*, 32 J. CRIM. JUST. 465, 469 (2004) (68.7% of respondents answered “parents” when asked “when a teenager commits a crime, which of the following is most responsible, in addition to the teenager?”); Lynn D. Wardle, *The Fall of Marital Family Stability and the Rise of Juvenile Delinquency*, 10 J. L. & FAM. STUD. 83, 88 (2007) (“I wonder whether we are not making children pay for the faults of their parents.”).

47. *In re Gault*, 387 U.S. 1 (1967).

48. Martin Guggenheim, *Graham v. Florida and a Juvenile’s Right to Age-Appropriate Sentencing*, 47 HARV. C.R.–C.L. L. REV. 457, 474 (2012).

49. *See generally* MARTIN GUGGENHEIM, *WHAT’S WRONG WITH CHILDREN’S RIGHTS* (2005); Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573, 578 (2008).

50. *See* DAVIES & DAVIDSON, *supra* note 38.

Family members who do not participate in justice system activities are sometimes viewed as lacking respect for the law. A recent empirical study by Liana Pennington examining parental attitudes toward the juvenile court process exemplifies this approach. Pennington suggests that family members and the community may be “hostile to the legal process.”⁵¹ Pennington claims that the lack of a defined role in the juvenile court process creates or reinforces “parents’ negative perceptions of the legal process”⁵² which they impart to their youth, “creating or reinforcing juveniles’ negative perceptions of the legal process.”⁵³ Further, parents discuss their experiences with family members, neighbors, and others in the community, leading to decreasing “levels of community trust in the court process and legal authorities.”⁵⁴ Pennington’s proposed intervention to address the attributes she ascribes to parents would take the form of a parental narrative: “a time when parents can speak to the court about their child’s home life and their opinion concerning the child’s needs” which the judge will then take into consideration.⁵⁵ Pennington’s parental narrative makes sense. A recent study confirms that more than 80% of family members are never asked by a judge what should happen to their child.⁵⁶ Yet one wonders how the juvenile justice system could operate without even considering the family perspective. Judge Todd A. Hoover has acknowledged:

Our systems play out the belief that total strangers—caseworkers, juvenile probation officers, counselors, or judges—who make decisions for these families will produce the best outcomes. I do not know how that kind of thinking was constructed, but I have seen it in my courtroom numerous times.⁵⁷

I am not opposed to Pennington’s proposal, or the bulk of strategies put forward by others,⁵⁸ but I approached my research with the understanding that the

51. Liana J. Pennington, *Engaging Parents as a Legitimacy-Building Approach in Juvenile Delinquency Court*, 16 U.C. DAVIS J. JUV. L. & POL’Y 481, 523 (2012). *See also id.* at 514 (The juvenile justice system of today “aims to change youth behavior and to better socialize children to *accept dominant norms*. The meaningful involvement of parents can help the justice system to realize these goals and lead to overall better outcomes for children.” (emphasis added)). But note that Pennington’s own research shows that even parents who distrusted the legal system or viewed the system as racist wanted to see changes in their child’s behavior. *Id.* at 528.

52. *Id.* at 488.

53. *Id.*

54. *Id.*

55. *Id.* at 487. Although not explicitly stated, Pennington seems to fall short of arguing for a greater parental role out of concern that doing so would dilute the due process rights of youth.

56. *See* JUSTICE FOR FAMILIES, *supra* note 24, at 21.

57. PA. FAMILY GRP. DECISION MAKING LEADERSHIP TEAM, PENNSYLVANIA FAMILY GROUP DECISION MAKING TOOLKIT: A RESOURCE TO GUIDE AND SUPPORT BEST PRACTICE IMPLEMENTATION 195 (2008), *available at* <http://www.pacwcb.t.pitt.edu/Organizational%20Effectiveness/FGDM%20Evaluation%20PDFs/FGDM%20Toolkit.pdf>.

58. *See, e.g.*, MARGARET DIZEREKA & SANDRA VILLALOBOS AGUDELO, VERA INST. JUSTICE, PILOTING A TOOL FOR REENTRY: A PROMISING APPROACH TO ENGAGING FAMILY MEMBERS (2011), *available at* <http://www.vera.org/sites/default/files/>

scope of existing family engagement efforts are too narrow and limited to have any substantial impact on youth outcomes—or parent, youth, or community perceptions of justice.

In my view, interventions with families in juvenile justice appear to have the same limitations as similar efforts in the child welfare system. Scholars of the child welfare system have been critical of the mismatch between social service interventions and the problems that need to be resolved. Dorothy Roberts has wondered, “How can agencies expect to solve problems arising from any combination of deplorable conditions—chronic poverty, dangerous neighborhoods, shoddy housing, poor health, drug addiction, profound depression, lack of childcare—with a three month parenting course or ephemeral crisis intervention?”⁵⁹ Although Pennington says the parental narrative “would be relatively easy and cost very little,”⁶⁰ it is nonetheless supposed to “create more inclusive courtroom environments for parents, engage parents as coproducers of justice in the case involving their child, and build parental support as a community resource.”⁶¹ Pennington asks too much of the intervention.

Solutions to family engagement in the juvenile justice system are often marketed as minor changes to the system, which nonetheless are meant to have a substantial impact. The Vera Institute of Justice, one of the preeminent consulting organizations to state and local justice organizations, created the Relational Inquiry Tool, a series of eight questions to help correctional staff inquire about family support. The tool is sold as a “simple idea [that] could lead to considerable change.”⁶² If these eight questions are as transformative as Vera claims, one wonders why Vera does not make the questions available for free.

My study started by honoring the perspectives of family members and is rooted in the belief that families and communities impacted by the justice system are not opposed to legal processes or holding their children accountable for crimes they have committed. One only has to look at the public outcry after the acquittal of George Zimmerman in the killing of Trayvon Martin,⁶³ the mistrial of Michael Dunn in the killing of Jordan Davis,⁶⁴ and the protests after the police shooting of

resources/downloads/Piloting-a-Tool-for-Reentry-Updated.pdf; JOAN PENNELL, CAROL SHAPIRO & CAROL SPIGNER, CTR. JUVENILE JUSTICE REFORM, SAFETY, FAIRNESS, AND STABILITY: REPOSITIONING JUVENILE JUSTICE AND CHILD WELFARE TO ENGAGE FAMILIES AND COMMUNITIES (2011), available at <http://cjjr.georgetown.edu/pdfs/famengagement/FamilyEngagementPaper.pdf>.

59. Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 124 (1999).

60. Pennington, *supra* note 51, at 487.

61. *Id.*

62. Margaret diZerega & Carol Shapiro, *Asking About Family Can Enhance Reentry*, 69 CORRECTIONS TODAY 58 (2007), available at <http://www.vera.org/files/corrections-today-asking-about-family-dizerega.pdf>.

63. See, e.g., http://www.pbs.org/newshour/bb/nation-july-dec13-zimmerman2_07-15/.

64. See, e.g., <http://miamiherald.typepad.com/nakedpolitics/2014/03/mothers-of-trayvon-martin-and-jordan-davis-join-sharpton-in-fight-against-syg.html>.

Michael Brown,⁶⁵ as evidence that communities desire an effective and fair justice system. Rather than viewing family members as hostile to legal processes, system professionals should recognize that conflict and hostility are foreseeable results of a system that considers families the primary cause of their children's criminal behavior. A parent in the focus groups conducted as part of this study noted: "When our child entered the system it was clear to my family that we had already been stigmatized as 'bad parents.' That somehow we were responsible for our child getting involved in the system. This label stayed with us through every step of the process."⁶⁶ Another parent noted,

People would say you're not a good parent or you're not doing what you need to be doing. Heck I was a single parent; I worked every day 8 to 5 like most people do. I got off work and took my kid to tutoring, little league, whatever it is that needed to be done after that. I went home prepared a meal. I got him prepared, I did homework. I got him prepared for the next day for school. I did the same routine that every other parent did you know that had two parents in the house. I felt like I was being a good mother.⁶⁷

Families may be uncooperative because justice-related and child-serving agencies are viewed as broken and ineffective. Another family member from the focus groups commented: "I am a foster parent and I was also a child who experienced many systems, including the justice system. I see the issues of poverty, race, lack of income, lack of knowledge as adding to the problem of why our kids are ending up in systems that don't work."⁶⁸

A system professional responding to the survey conducted as part of this study recognized how the system frustrates families: "The court hearing schedule is not friendly to the parents, meaning a parent may sit all day waiting for the hearing to be held costing them a day's pay and therefore it is likely that they are less willing to be cooperative."⁶⁹

Third, existing family engagement initiatives have largely failed to acknowledge that justice system agencies are illegitimate, or perceived to be illegitimate, in many communities.⁷⁰ According to an August 2013 poll by the Pew Research Center, 68% of Blacks believe they are treated less fairly than whites in

65. See, e.g., Kurtis Lee & Tina Susman, *Ferguson Protests Lure Many from Across the U.S.*, L.A. TIMES, Aug. 20, 2014, available at, <http://www.latimes.com/nation/la-na-ferguson-outsiders-20140820-story.html#page=1>.

66. Quote from Parent, Focus Group Transcript, Wash. D.C. (Apr. 27, 2011) (on file with author).

67. *Id.*

68. *Id.*

69. Quote from Juvenile Justice Professional, Survey (Respondent 3-8) (on file with author).

70. Gary Blasi and John Jost have provided evidence that the desire to believe that systems are fair and legitimate leads people to disregard contrary evidence. Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119 (2006).

the courts, and 70% of Blacks believe they are treated less fairly by the police.⁷¹ Yet historic⁷² and recent events call into question whether the juvenile justice system operates as a legitimate and effective institution. Scandals such as the mass grave at the Florida Dozier School for Boys,⁷³ excessive use of solitary confinement on New York City's Rikers Island,⁷⁴ Luzerne County "kids for cash" scandal,⁷⁵ Shelby County's racially discriminatory practices,⁷⁶ or Texas⁷⁷ and Indi-

71. Karlyn Bowman & Jennifer Marsico, *Black and White Opinions About the Justice System In America*, FORBES (Aug. 22, 2014 11:14AM), <http://www.forbes.com/sites/bowmanmarsico/2014/08/22/black-and-white-opinions-about-the-justice-system-in-america/>. See also DAVID B. ROTTMAN & RANDALL M. HANSEN, NAT'L CTR. STATE COURTS, HOW RECENT COURT USERS VIEW THE STATE COURTS: PERCEPTIONS OF WHITES, AFRICAN-AMERICANS, AND LATINOS 1–5 (2001), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctcomm&CISOPTR=18/> (finding that more than one-half of Latinos and two-thirds of Blacks view local courts as out of touch with the community).

72. It is beyond the scope of this Article to explain the development of the juvenile court. See generally ROBERT M. MENNEL, THORNS AND THISTLES: JUVENILE DELINQUENTS IN THE UNITED STATES 1825–1940 (1973); JOHN R. SUTTON, STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES, 1640–1981 (1993); MIROSLAVA CHÁVEZ-GARCIA, STATES OF DELINQUENCY: RACE AND SCIENCE IN THE MAKING OF CALIFORNIA'S JUVENILE JUSTICE SYSTEM (2012); BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT (1999); ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (1977); DAVID ROTHMAN, DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC (2002); STEVEN L. SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF "PROGRESSIVE" JUVENILE JUSTICE, 1825–1920 (2d ed. 1977); DAVID. S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING (2004); Cheryl Nelson Butler, *Blackness as Delinquency*, 90 WASH. U. L. REV. 1335, 1336 (2013).

73. Ben Montgomery & Waveney Ann Moore, *For Their Own Good: A St. Petersburg Times Special Report on Child Abuse at the Florida School for Boys*, TAMPA BAY TIMES, Apr. 17, 2009, <http://www.tampabay.com/specials/2009/reports/marianna/>; Ben Montgomery & Waveney Ann Moore, *Florida Juvenile Justice: 100 Years of Hell at the Dozier School for Boys*, TAMPA BAY TIMES, Oct. 9, 2009, <http://www.tampabay.com/specials/2009/reports/dozier/>; U.S. DEP'T OF JUSTICE, *Investigation of the Arthur G. Dozier School for Boys and the Jackson Juvenile Offender Center Marianna, Florida* (2011), available at http://www.justice.gov/crt/about/spl/documents/dozier_findltr_12-1-11.pdf.

74. Trey Bundy, *For Teens at Rikers Island, Solitary Confinement Pushes Mental Limits*, CENTER FOR INVESTIGATIVE REPORTING (Mar. 4, 2014), <http://cironline.org/reports/teens-rikers-island-solitary-confinement-pushes-mental-limits-6130>.

75. The Luzerne County judicial corruption scandal involved judges receiving kickbacks for sending youth to for-profit juvenile facilities. See JUVENILE LAW CTR., Luzerne "KIDS FOR CASH" Scandal, available at <http://www.jlc.org/current-initiatives/promoting-fairness-courts/luzerne-kids-cash-scandal> (last visited Feb. 11, 2014).

76. The U.S. Department of Justice Civil Rights Division investigated the Juvenile Court of Memphis and Shelby County, Tennessee, and found systemic violations of children's due process and equal protection rights. U.S. DEP'T OF JUSTICE, MEMORANDUM OF AGREEMENT REGARDING THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY (Dec. 17, 2012), available at <http://www.justice.gov/iso/opa/resources/87720121218105948925157.pdf>.

77. MICHELE DEITCH, UNDERSTANDING AND ADDRESSING YOUTH VIOLENCE IN THE TEXAS JUVENILE JUSTICE DEPARTMENT: REPORT TO THE OFFICE OF THE INDEPENDENT

ana's⁷⁸ statewide scandals of rampant sexual and physical abuse in juvenile facilities, are viewed by some practitioners as isolated examples and by others as the status quo in juvenile justice. While individual and isolated instances of abuse are perhaps inevitable in any system, the available evidence suggests that numerous juvenile justice agencies experience system-wide failures, which routinely fall below constitutional minimum standards.⁷⁹ A recent report by the Annie E. Casey Foundation found widespread maltreatment of youth in facilities in nearly half of the states across America.⁸⁰ However, the majority of approaches to family engagement presume that justice system agencies exercise power fairly and effectively.

Regardless of whether one views the juvenile justice system as largely broken or in need of moderate adjustments, there has been a longstanding consensus by justice system professionals over how to address deficiencies in how the existing justice system operates.⁸¹ Yet family engagement efforts have largely been

OMBUDSMAN (2013), *available at* <https://www.utexas.edu/lbj/sites/default/files/file/faculty/DeitchUnderstandingandAddressingYouthViolenceinTJJDMay%202013FINAL.pdf>.

78. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF THE PENDLETON JUVENILE CORRECTIONAL FACILITY (2012), *available at* http://www.justice.gov/crt/about/spl/documents/pendleton_findings_8-22-12.pdf.

79. See RICHARD A. MENDEL, ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION (2011), *available at* http://www.aecf.org/~media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ_NoPlaceForKids_Full.pdf ("Since 1970, systemic violence, abuse, and/or excessive use of isolation or restraints have been documented in the juvenile corrections facilities of 39 states (plus the District of Columbia and Puerto Rico). In 32 of those states (plus the District of Columbia and Puerto Rico), the abusive conditions have been documented since 1990, and in 22 states (plus the District of Columbia), the maltreatment has been documented since 2000."). See also ANNIE E. CASEY FOUND., SYSTEMIC OR RECURRING MALTREATMENT IN JUVENILE CORRECTIONS FACILITIES: STATE-BY-STATE SUMMARY (2011), *available at* <http://www.aecf.org/m/resourcedoc/aecf-noplaceforkids-Maltreatment-2011.pdf>; See also, U.S. DEP'T OF JUSTICE, SPECIAL LITIGATION SECTION CASES AND MATTERS, *available at* <http://www.justice.gov/crt/about/spl/findsettle.php#juv> (last visited Sept. 10, 2014).

80. See MENDEL, *supra* note 79.

81. Compare NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS (1973) (recommending: 1) increase family stability; 2) develop programs for families needing services, including families with children who are truant or who run away, families with children who disregard parental authority, and families with children who use intoxicating beverages or who are under 20 years old and commit delinquent acts; 3) develop programs for children who are neglected or physically abused; 4) develop programs for young people to prevent delinquent behavior before it occurs; 5) develop diversion activities whereby youths are processed out of the juvenile justice system; 6) develop dispositional alternatives so that institutionalization can be used only as a last resort; 7) extend due process to all juveniles; 8) control the violent and chronic delinquent; 9) reduce the proportion of minorities who are victims of delinquent acts and who are clients in the juvenile justice system and increase the proportion of minority policymakers and operators in the juvenile system; 10) increase the coordination among agencies to improve the operation of the juvenile justice system and to increase resources and knowledge about how to deal with juvenile offenders; 11) improve research; and 12) allocate resources, especially to the many states that do not have their own

aimed at getting families to participate in the current system as is,⁸² while neglecting how families participate in and lead larger justice system reform efforts such as combatting the school-to-prison pipeline or mass incarceration generally.

My study fills these three gaps by explaining the key characteristics of what a transformed justice system could look like if it honored youth and families while simultaneously addressing key concerns of juvenile justice professionals, a concept I name “Family-Driven Justice.”⁸³ My findings suggest that system stakeholders have already begun to recognize the need to reexamine juvenile and criminal justice policies and practices across the board, and not to limit family engagement to piecemeal programs tacked onto the existing system. However, prior to this study, the field had no clear directions linking family engagement with these other reform efforts.

This Article proceeds in three parts. Part I explains the methodology of my research study to identify best practices in family engagement in juvenile justice. Part II contrasts the research on how families are thought to contribute to delinquency with characteristics of adolescent offending. I then review the research on evidence-based programs used in juvenile justice. Summarizing these findings, I claim that a family-driven approach not only respects family autonomy, but it is also the approach that most closely reflects the best available evidence in how to reduce adolescent offending.

Part III reports the findings from my original research. I begin by describing one jurisdiction’s experience in changing the default assumptions about families that pervade the juvenile justice system. I then synthesize similar efforts from other jurisdictions, and with family member input, distill the results into key propositions that form the foundational values of Family-Driven Justice: all families care about their children and can be trusted to make good decisions on their behalf,

resources to deal with juvenile programs), *with* YOUTH TRANSITION FUNDERS GRP., JUVENILE JUSTICE REFORM: A BLUEPRINT (2012), *available at* http://www.ytfg.org/documents/Blueprint_JJReform.pdf (proposing that justice systems need to: 1) divert youth from the justice system; 2) reduce institutionalization; 3) eliminate racial and ethnic disparity; 4) ensure access to quality counsel; 5) create a range of effective community-based programs; 6) recognize and serve youth with specialized needs; 7) build small rehabilitative facilities; 8) improve aftercare and reentry; 9) engage youth, family, and community; and 10) keep youth out of adult courts, jails, and prisons). *See also* Mark Soler et al., *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. ON POVERTY L. & POL’Y 483 (2009) (describing challenges and opportunities for juvenile justice reform).

82. *See, e.g.*, VERA INST. OF JUSTICE, SETTING AN AGENDA FOR FAMILY-FOCUSED JUSTICE REFORM (2011), *available at* <http://www.vera.org/files/FJP-advisory-board-report-v6.pdf> (“Since its work began nearly a decade ago, the Family Justice Program at the Vera Institute of Justice has provided training and consultation to help people in the juvenile and criminal justice fields adopt a family-focused approach. In practice, this has meant developing simple tools and techniques that help front-line staff talk with incarcerated people (or those on probation or under parole supervision) about family members who can make a positive difference in their lives. It also means guiding management to create policies and environments that encourage such interactions.”) *Id.* at 4.

83. Gary Blasi has noted that policymakers must be offered “alternative visions” to be able to approach problems in new ways. Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 LOY. L.A. L. REV. 913, 920 (2009).

all families have strengths to build upon, all families want their children to grow up safe and free from justice-system involvement, and all families have dreams for their children and want them to succeed in adult life. To put these values into practice, I then describe in greater detail the five features of a transformed justice system that would give families what they want without sacrificing public safety. Privileging and reorienting our justice system to respect family autonomy, or using a family-driven approach, is both desirable and within reach.

Part IV concludes by suggesting that while my research findings did not identify a single jurisdiction with all five features of a transformed justice system, this vision is possible to achieve even within the context of the American system of limited government. In other words, the justice system can become radically more kind, fair, and effective without waiting to resolve the endemic problems of racism and poverty that plague our nation. I further suggest that adopting Family-Driven Justice would help reduce mass incarceration in America, and also dramatically reduce the racial and ethnic disparities present throughout the justice system.

I. METHODOLOGY

My research study was designed to identify the reasons families are dissatisfied with the operation of the current justice system, uncover what families want instead, and identify existing practices offered by government and nonprofit agencies that conform to the family vision.⁸⁴ I conducted the field research for this study while I was the Research and Policy Director at the Campaign for Youth Justice (“CFYJ”), a national nonprofit organization aimed at reducing the number of youth prosecuted as adults and improving the juvenile justice system.⁸⁵ In total, the research project employed literature reviews, site visits, focus groups, surveys of

84. This study was limited to addressing the juvenile justice system (and the widespread family desire to remove youth from the adult justice system), but otherwise did not address the full range of adult criminal justice issues. Nonetheless many of the features of Family-Driven Justice are applicable to the adult justice system as well, specifically as they relate to young adults under the age of 25. While this study did not specifically examine the perspectives of family members of young adults, I have reason to believe family members of young adults would support many of the ideas presented here. First, many of the family members who participated in this study have children who have entered the criminal justice system either because their children were prosecuted as adults or have committed subsequent crimes after the age of 18. Second, it is logical that there are overlapping concerns, specifically for the under age 21 population because we know that “[t]he period of early adulthood has been traditionally neglected when it comes to educational, vocational, mental health, and social services. Within most systems, individuals aged 17–21 are shifted out of the adolescent services systems, and there is often little to replace those services.” FROM JUVENILE DELINQUENCY TO ADULT CRIME, *supra* note 7, at 176. Third, my review of the literature and existing programmatic approaches on family engagement turned up many of the same practices used in both juvenile and adult systems. For example, both the Relational Inquiry Tool and Family Group Decision Making are used with youth and adult populations.

85. See CAMPAIGN FOR YOUTH JUSTICE, <http://www.campaignforyouthjustice.org/> (last visited Sept. 10, 2014).

juvenile justice officials, and consultations with system and family experts between 2010 and 2013.⁸⁶

I started by conducting an extensive literature review on the relationship between families and crime,⁸⁷ and effective family engagement practices inside⁸⁸ and outside⁸⁹ the field of juvenile justice. Other child-serving systems, specifically the mental health and education fields, have had a longer history of working in partnership with families, and I wanted to draw upon their knowledge of best practices.⁹⁰ In addition, I reviewed compilations of evidence-based juvenile justice programs.⁹¹

I conducted site visits to three jurisdictions in the West, Southwest, and Midwest, perceived by family and system experts as being responsive to the needs of youth and families. I was accompanied on most of these site visits by colleagues from CFYJ, other juvenile justice experts, system professionals, and family members. I observed a day-treatment program, an intensive probation supervision program, two secure residential care facilities, an alternative education program, a GED program, a charter school, and a probation-staffed recreation and community outreach program. I also observed parent support, community, and economic de-

86. I was heavily influenced by the work of Chip and Dan Heath. CHIP HEATH & DAN HEATH, *SWITCH: HOW TO CHANGE THINGS WHEN CHANGE IS HARD* (2010) (describing how to make changes at the individual, organizational, and societal levels). The overarching interdisciplinary methodological approach I used for my study is described in KRISTEN LUKER, *SALSA DANCING INTO THE SOCIAL SCIENCES: RESEARCH IN AN AGE OF INFO-GLUT* (2008). Traditional, canonical, social science often approach research projects looking for “the distribution of individuals (or groups or institutions) across a known number of categories whose boundaries are clear.” *Id.* at 38. Unlike canonical social scientists, my research project was “to discover the relevant categories at work” in the concept of family engagement. *Id.* at 102 (emphasis omitted).

87. *See infra* Part II.

88. Using the Google search engine I used the search terms “juvenile justice family” and “juvenile justice family filetype:pdf.”

89. Using the Google search engine I used the search terms “family engagement filetype:pdf” and “family involvement filetype:pdf.”

90. The works I used to form my primary working hypotheses of the purpose and multiple components involved with family engagement were ANNE T. HENDERSON ET AL., *BEYOND THE BAKE SALE: THE ESSENTIAL GUIDE TO FAMILY-SCHOOL PARTNERSHIPS* (2007), and TRINA OSHER & PAT HUNT, NAT’L CTR. MENTAL HEALTH JUVENILE JUSTICE, *INVOLVING FAMILIES OF YOUTH WHO ARE IN CONTACT WITH THE JUVENILE JUSTICE SYSTEM, RESEARCH AND PROGRAM BRIEFS* (2002), available at www.jjcmn.com/public/2010/04/Involving-Families-of-Youth-with-the-juvenile-justice-system.pdf. My observations of site visits were heavily influenced by these two texts.

91. I reviewed programs listed in the Office of Juvenile Justice and Delinquency Prevention (OJJDP) Model Programs Guide. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *MODEL PROGRAMS GUIDE*, available at <http://www.ojjdp.gov/mpg/> (last visited Sept. 10, 2014). I also reviewed the inventory of evidence-based programs reviewed by the Washington Institute of Public Policy. Steve Aos et al., *Return on Investment: Evidence-Based Options to Improve Statewide Outcomes*, available at http://www.wsipp.wa.gov/ReportFile/1090/Wsipp_Return-on-Investment-Evidence-Based-Options-to-Improve-Statewide-Outcomes-July-2011-Update_Technical-Appendix-I.pdf (last visited Sept. 10, 2014).

velopment activities for youth not involved in the justice system. These site visits gave me an opportunity to observe how direct service providers talk about the issues facing families. Consistent with the literature about family engagement from the mental health and education fields, many of the professionals in juvenile justice also used the word “partnership” to describe how they approached family work and decisions of how to intervene with families, reinforcing the applicability of this related literature to the juvenile justice system.

The aforementioned site visits also gave me an opportunity to experience what good programs look, feel, sound, and smell like. My work experiences in investigating, litigating, and improving conditions of confinement for incarcerated youth might otherwise have artificially set the bar too low. I was able to see firsthand the differences between environments operating below or at the constitutional minimum, and environments conducive to growth and stimulation.⁹² By visiting the physical offices or program locations, I could also observe or take note of evidence to corroborate providers’ comments about how they treat youth and families. For example, I observed physical settings that were decorated for the appropriate holiday season, which reinforced staff anecdotes about how families were specially accommodated during the holidays. Where my observations failed to match, I could ask follow-up questions. While in one residential setting, I observed decorations that appeared too young to be appropriate for the age of youth housed in the facility. I was able to ask an accompanying family member, who also was a high school teacher, for her perceptions. She was able to confirm that the decorations were similar to those found in nonresidential school settings.

Between March and July of 2011, CFYJ convened a series of focus groups in conjunction with the federal Office of Juvenile Justice and Delinquency Prevention (“OJJDP”) and the Education Development Center to identify the challenges families experience within the justice system.⁹³ Families and youth from sixteen states and tribes with direct experience with the justice system participated in these focus groups. The main guiding questions and topic areas for discussion were as follows: (1) What was your first involvement with the system? (2) What was your child’s experience with the system? Were all your needs met? (3) What was your family’s experience with the system? Were your needs met and your rights respected? (4) Was there aftercare, i.e., what happened when your child was no longer in the system? Did he or she receive support?⁹⁴ I also reviewed unpublished focus group transcripts with parents conducted by CFYJ from prior years. I never directly asked families about their preferences for a transformed jus-

92. *Compare* Richard Ross, *Juvenile in Justice*, available at <http://richardross.net/juvenile-in-justice> (last visited Sept. 10, 2014) (depicting photographs of a typical facility in the juvenile justice system), with RICHARD MENDEL, *THE MISSOURI MODEL: REINVENTING THE PRACTICE OF REHABILITATING YOUTHFUL OFFENDERS* (2010) (depicting photographs of facilities run by the Missouri Division of Youth Services).

93. *See* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *FAMILY LISTENING SESSIONS* (2013), available at <http://www.ojjdp.gov/pubs/241379.pdf> [hereinafter OJJDP Focus Groups].

94. *Id.*, at i–ii.

tice system because of the difficulty of knowing about alternative options.⁹⁵ Instead, I convened an informal advisory board of family experts and juvenile justice professionals to identify promising programs to research and who were willing to review my findings throughout the study.

Between April and May of 2012, I conducted surveys of juvenile justice professionals who are part of two networks. The Annie E. Casey Foundation's Juvenile Detention Alternative Initiatives network is made up primarily of juvenile justice professionals working at a variety of county-level agencies.⁹⁶ In contrast, the Council of Juvenile Correctional Administrators network is made up of state-level juvenile justice agency officials.⁹⁷ The survey was administered online and started with a series of closed-ended prompt questions related to the five broad categories of topics I had identified from the literature about family engagement (see the Appendix for a copy of the survey instrument). From the site visits, I knew that the quantitative data gathered directly from the survey would yield unreliable results because I had observed staff describing features of their policies and practices expansively to imply that they were available to all families when in fact they were available to only a small subset of families. This was additionally confirmed by a survey respondent and family member reviewer who contacted me to explain that I should interpret the quantitative results with caution. Nevertheless, the purpose of the prompt questions was to provide survey respondents with the kinds of concepts I was associating with the amorphous family engagement concept. Respondents were then asked to provide the top five benefits, challenges, and barriers to implementing the programs or practices in their jurisdiction. I coded and categorized their original responses in light of my prior research. I then circulated copies of all actual survey responses with redacted identifying information, and a draft of my interpretations of the open-ended questions, to all respondents so that they could provide feedback and correct any mischaracterizations of their responses. I received feedback that my interpretations were correct.

After identifying the major themes of common ground between family members and system stakeholders, I identified specific examples demonstrating the new vision in consultation with system and family experts. For many examples, I provide both a description of the programs and a specific story of how the intervention works with youth and families. The purpose of the stories is to illuminate with clarity the humanity and dignity family members expect from interac-

95. Law and Society scholars have noted that the process of identifying and translating grievances is fraught with challenges. *See, e.g.*, William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980–81).

96. *See* ANNIE E. CASEY FOUND., JUVENILE DETENTION ALTERNATIVES INITIATIVES, <http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative/SitesAndContacts.aspx> (last visited July 17, 2014). *See also* RICHARD A. MENDEL, ANNIE E. CASEY FOUND., TWO DECADES OF JDAI: FROM DEMONSTRATION PROJECT TO NATIONAL STANDARD (2009), *available at* http://www.aecf.org/~media/Pubs/Initiatives/Juvenile%20Detention%20Alternatives%20Initiative/TwoDecadesofJDAIFromDemonstrationProjecttoNatJDAI_National_final_10_07_09.pdf.

97. *See* CJCA Membership Criteria, COUNSEL FOR JUVENILE CORRECTIONAL ADMINS., <http://cjca.net/index.php/aboutus/membership> (last visited Sept. 10, 2014).

tions with system professionals. On a positive note, there were too many examples from jurisdictions to incorporate all of the good work occurring across the country. The specific examples used to demonstrate Family-Driven Justice were selected using the following criteria: the number of children and families affected by the practice, diversity in the racial and ethnic population served, geographic location and size of jurisdiction, written documentation or online access to information about the effort to enable professionals to refer to additional materials if interested in more information, and the ability to obtain confirmation of the description's accuracy by someone in the local jurisdiction. I also made a conscious choice to include practices from agencies that have experienced recent scandals but have made special efforts to address family engagement as part of their reform strategy to demonstrate that agencies at all levels of functioning can commit the necessary resources to family engagement.

A practitioner-oriented version of the study findings was circulated to all experts who had participated in the project for additional feedback.⁹⁸ Family members and system experts were then able to confirm or dispute my characterizations of the evidence. Neither family nor system experts had any major critiques of the findings presented in the draft report.⁹⁹ Some system professionals felt the tone was too laudatory of existing efforts and not critical enough of the system, whereas others expressed the opposite concern. Multiple staff from one state agency provided an extensive critique of the tone or word choice used in the draft, which they viewed as too negative of agency officials. I asked for clarification to ensure that the disagreement was over word choice and not specific policy recommendations, which they subsequently confirmed. In response, the report received a tone overhaul to downplay negative characterizations of the current system players in the hope that justice professionals would be more receptive to the policy changes recommended.

This Article departs from the practitioner-oriented report in both form and substance. This Article makes the argument that respecting family autonomy in the justice system, or Family-Driven Justice, is warranted by the literature. Where possible, this Article also connects the key features of a transformed justice system to interdisciplinary academic literatures in the hope that future scholars will research, evaluate, and further refine the model. However, the biggest difference is that this Article takes an overtly critical view of the current justice system.

Although I attempted to limit the biases in both the data collection and interpretation, there are several limitations to my study. The first limitation is the bias resulting from relying primarily on family and system experts who believe change is needed in the justice system. Almost all of the persons consulted in this

98. The practitioner-oriented report was published by the Campaign for Youth Justice in the Spring of 2013. A complete list of persons consulted in the project can be found in that report. *See* NEELUM ARYA, FAMILY COMES FIRST: TRANSFORMING THE JUSTICE SYSTEM BY PARTNERING WITH FAMILIES (2013).

99. Representative comments were: "The report is very comprehensive and covers all the bases" and "You make great use of examples and stories as well as research." Minor word change or grammatical suggestions were almost uniformly accepted unless disputed by other evidence gathered during the study.

study are part of various reform movements in juvenile justice. I did not perform outreach directly to persons who view the juvenile justice system as largely effectual. Further, my study is biased in favor of consensus-based status quo reform approaches to juvenile justice reform. The family and system experts I relied upon are all invested in their particular view of problems and potential solutions, and readers will see that many of the hardest issues, e.g., changes to stop and frisk policies or juvenile transfer laws, do not have consensus aside from allowing family members to participate in discussions about changes to these laws and policies.¹⁰⁰

The second limitation is that I did not specifically reach out to family members of status offenders involved in Persons in Need of Supervision or Children in Need of Supervision programs. According to the National Center for Juvenile Justice, less than 2% of the referrals to juvenile court for delinquency offenses were from relatives,¹⁰¹ whereas 40% of referrals for ungovernability were from relatives.¹⁰² There are likely to be significant differences between family members who voluntarily seek the assistance of justice agencies when children are committing crimes against others and those families whose children are not obeying parental orders.¹⁰³ There were family members in the focus groups who were part of the former but not the latter group of parents. Future research should explore these differences.

A third limitation is that there is a dearth of literature available on effective programs to meet the specific needs of girls, specifically girls of color, in the justice system.¹⁰⁴ The dominant conversations about juvenile justice reform and research on delinquency presume a male population. While an effort was made to address the needs of girls, it is possible that their specific needs and family concerns are not fully accounted for in this study. It is also possible (and likely) that the literatures I have used to provide the basis for taking a family-driven approach are similarly biased.¹⁰⁵

II. FAMILIES AND CRIME

In this Part, I explore the contradictions between three distinct literatures related to families and the causes of crime. As mentioned briefly in the introduction, juvenile justice professionals often operate from the faulty ideology that chil-

100. See *infra* notes 364–366 and accompanying text.

101. CHARLES PUZZANCHERA & SARAH HOCKENBERRY, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2010, at 31 (2013), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/grants/244080.pdf>.

102. *Id.* at 76.

103. But see *infra* text accompanying notes 253–256 (suggesting that it is possible that families with access to community services would not seek court intervention).

104. See, e.g., Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502, 1522 (2012); Francine T. Sherman, *Justice for Girls: Are We Making Progress?*, 59 UCLA L. REV. 1584, 1624 (2012); MONIQUE W. MORRIS, AFRICAN AM. POLICY FORUM, RACE, GENDER, AND THE SCHOOL-TO-PRISON PIPELINE: EXPANDING OUR DISCUSSION TO INCLUDE BLACK GIRLS 3 (2012), available at <http://aapf.org/wp-content/uploads/2012/08/Morris-Race-Gender-and-the-School-to-Prison-Pipeline.pdf>.

105. See *infra* text accompanying note 166.

dren's delinquent behaviors are caused by their parents. For example, in a conversation with a high-ranking federal agency official about the desirability of keeping youth in residential facilities in close proximity to their home communities, he asked, "Do we really need to keep kids close to home? I mean, do we really want them having contact with their families anyway?"¹⁰⁶ While I approached my study from the stance that the views of family members should be considered and prioritized in future reform efforts, I was nonetheless open to the possibility that the literature would find the opposite.

In this Part, I reconcile several views found in the literature about the causes of crime.¹⁰⁷ First, I review the literature describing why and how families are thought to cause delinquent behavior in their children. Second, I review the literature that explores adolescent offending characteristics, which suggest that delinquent behavior is part of the normal process of growing up. Third, I review the evidence of "what works" in juvenile justice programs. I end this Part with a summary of the key conclusions I use as the basis for taking a family-driven approach in juvenile justice.

A. *The Family–Crime Connection*

Undeniably, the academic literature suggests a link between parenting behaviors and criminal justice involvement.¹⁰⁸ However, none of the extant literature on the connection between families and delinquency "completely explain[s] the relationship between parental behavior and delinquency."¹⁰⁹ The causal mechanisms linking family factors to delinquency "tend to be related not only to each other but also [to] other risk factors for delinquency."¹¹⁰

There are at least three ways scholars believe families are expected to have an impact on delinquency. First, familial characteristics, such as family structure and size, may be linked to criminal behavior.¹¹¹ Studies show that children of

106. Personal conversation between study author and official.

107. There are at least ten broad causes or explanations for the persistence and desistence of offending between adolescence and adulthood including: 1) early individual differences in self-control; 2) brain maturation; 3) cognitive changes; 4) behavioral risk and protective factors; 5) exposure to social risk and protective factors; 6) mental illnesses and substance use/abuse; 7) changing life circumstances (e.g., employment and marriage); 8) situational context of crime places and activities; 9) neighborhood; and 10) justice system response. FROM JUVENILE DELINQUENCY TO ADULT CRIME: CRIMINAL CAREERS, JUSTICE POLICY, AND PREVENTION 323–24 (Rolf Loeber & David Farrington eds., 2012).

108. See, e.g., David P. Farrington, *Families and Crime*, in CRIME AND PUBLIC POLICY (James Q. Wilson & Joan Petersilia eds., 2011).

109. Ronald L. Simons, Leslie G. Simons & Donna Hancock, *Linking Family Processes and Adolescent Delinquency: Issues, Theories, and Research Findings*, in THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 186 (Barry C. Feld & Donna M. Bishop eds., 2012) ("One might speculate that each of the theories possesses an element of truth and that it is the combination of these psychological factors that explains the effect of parenting on delinquency.").

110. Farrington, *supra* note 108, at 143.

111. See also Wardle, *supra* note 46, at 93 (reviewing the literature connecting marital and family structure and juvenile delinquency and acknowledging that "family structure may be a shorthand way of referring to family interaction factors and dynamics

single parents are at a higher risk for delinquency; however, part of this difference can be explained by covariates with single parenthood such as poverty, living in disadvantaged areas, and higher exposure to stressful life events.¹¹² Single-parenthood itself does not appear to cause delinquency, as there is evidence that additional support from other caregivers, such as the nonresidential parent or grandparent, can decrease the risk for delinquency.¹¹³ Other features of families correlating with delinquency include large family size, early childbearing, and teenage pregnancy.¹¹⁴ Overall, family structure appears to have a modest impact on delinquency: there is a 15% difference in delinquency between children living with married, biological parents versus those living in other family structures such as single parent, stepfamily, or cohabitating parents.¹¹⁵

Second, some scholars believe criminal behavior is genetically transmitted.¹¹⁶ The family as a source of “delinquent-DNA” has a long and ugly history in America. In a famous case authored by Justice Oliver Wendell Holmes, the Su-

such as conflict, control, communication, caring and trust, identity support, etc., which other research has shown to correlate with delinquency”).

112. See SARA McLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT* (1994).

113. See Paul Amato & J.G. Gilbreth, *Nonresident Fathers and Children's Well-Being: A Meta-Analysis*, 61 J. MARRIAGE & FAM. 557 (1999); Stephen Demuth & Susan Brown, *Family Structure, Family Processes, and Adolescent Delinquency: The Significance of Parental Absence Versus Parental Gender*, 41 J. RES. CRIME & DELINQ. 58 (2004); Leslie Simons et al., *Parenting Practices and Child Adjustment in Different Types of Households: A Study of African-American Families*, 28 J. Family Issues 212 (1996); Simons et al., *supra* note 109.

114. See Farrington, *supra* note 108.

115. See Robert Apel & Catherine Kaukinen, *On the Relationship Between Family Structure and Antisocial Behavior: Parental Cohabitation and Blended Households*, 46 CRIMINOLOGY 35 (2008).

116. Genetic influence on delinquency is reported to vary from 7% to 85%. See, e.g., Louise Arseneault et al., *Strong Genetic Effects on Cross-Situational Antisocial Behavior Among 5-Year-Old Children According to Mothers, Teachers, Examiner-Observers, and Twins' Self-Reports*, 44 J. CHILD PSYCHOL. & PSYCHIATRY 832 (2003); Kevin Beaver et al., *Gene Environment Interplay and Delinquent Involvement: Evidence of Direct and Indirect, and Interactive Effects*, 24 J. ADOLESCENT RES. 147 (2009); Sara R. Jaffee et al., *Nature × Nurture: Genetic Vulnerabilities Interact with Physical Maltreatment to Promote Conduct Problems*, 17 DEV. AND PSYCHOPATHOLOGY 67 (2005); Michael J. Lyons et al., *Differential Heritability of Adult and Juvenile Traits*, 52 ARCHIVES GEN. PSYCHIATRY 906 (1995); Terrie E. Moffitt, *The New Look of Behavioral Genetics in Developmental Psychopathology: Gene-Environment Interplay in Antisocial Behavior*, 131 PSYCHOL. BULL. 533 (2005); Soo Hyun Rhee & Irving D. Waldman, *Genetic and Environmental Influences on Antisocial Behavior: A Meta-Analysis of Twin and Adoption Studies*, 128 PSYCHOLOGICAL BULLETIN 490 (2002); David C. Rowe, *Genetic and Environmental Components of Antisocial Behavior: A Study of 265 Twin Pairs*, 24 CRIMINOLOGY 513 (1996); Wendy S. Slutske et al., *Modeling Genetic and Environmental Influences in the Etiology of Conduct Disorder: A Study of 2,682 Adult Twin Pairs*, 106 J. ABNORMAL PSYCHOL. 266 (1997). Specific genes appear to have an effect on the development of delinquency and antisocial behavior, but the genes do not account for the variation in offending. David Goldman & Francesca Ducci, *The Genetics of Psychopathic Disorders*, in 1 INTERNATIONAL HANDBOOK ON PSYCHOPATHIC DISORDERS AND THE LAW (Alan R. Felthous & Henning Sass eds., 2007).

preme Court upheld a forced sterilization law because of the perceived intergenerational transmission of crime.¹¹⁷ A recent book by historian Miroslava Chávez-Garcia has explicitly identified the influence of eugenics in the juvenile justice system in California,¹¹⁸ and it is likely that this connection is present in other states as well.¹¹⁹

Contemporary research on the genetic component of crime is more limited. Today, “few trained criminologists undertake biological research” because of “an understandable ideological backlash against the grim history of biological ideas about crime propounded by phrenologists, eugenicists, and other ‘criminal anthropologists.’”¹²⁰ The limited research into the genetic component of crime suggests that even where “[t]here is a heritable component to antisocial behavior, . . . parental behavior exerts an influence beyond any genetic risk transmitted to the child.”¹²¹

117. Buck v. Bell, 274 U.S. 200, 207 (1927) (“It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of Imbeciles are enough.” (internal citation omitted)). This case was later overturned by *Skinner v. Oklahoma* as the Court observed that “[s]terilization of those who have thrice committed grand larceny, with immunity for those who are embezzlers, is a clear, pointed, unmistakable discrimination.” 316 U.S. 535, 541 (1942).

118. CHÁVEZ-GARCIA, *supra* note 72.

119. See, e.g., Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900–1930*, 16 L. & HIST. REV. 63 (1998).

120. Terrie E. Moffit et al., *Crime and Biology*, in CRIME AND PUBLIC POLICY 75 (James Q. Wilson & Joan Petersilia eds., 2011). In my view the biology-crime connection remains a largely silent but present undercurrent to thinking about crime. For example, economists have argued that the U.S. crime decline in the 1990s can be attributed to the increased availability of abortions after the Court’s ruling in *Roe v. Wade*. See John J. Donohue III & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q. J. ECON. 379 (2001). Some criminal justice agencies are also using DNA samples to look for suspects in the family tree. DAVID LAZER, TAUBMAN CTR. POL’Y BRIEFS, SEARCHING THE FAMILY TREE FOR SUSPECTS: ETHICAL AND IMPLEMENTATION ISSUES IN THE FAMILIAL SEARCHING OF DNA DATABASES 1 (2008), available at http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/centers/taubman/policybriefs/lazer_final.pdf. Given the recent Supreme Court rulings limiting the death penalty and life-without-parole sentences for certain categories of offenders, it is common to hear about the biological bases of crime through the lenses of mental health and other cognitive impairments.

121. Simons et al., *supra* note 109, at 192; see also Terrie E. Moffit, Avshalom Caspi & Michael Rutter, *Measured Gene-Environment Interactions in Psychopathology: Concepts, Research Strategies, and Implications for Research, Intervention, and Public Understanding of Genetics*, 1 PERSP. PSYCHOL. SCI. 5 (2006). In theories of child development generally, the role of biology is having an increased importance as well. The child development theories of psychologists Urie Bronfenbrenner and James Garbarino have been expanded as a “biodevelopmental” framework that recognizes that “[h]uman development is shaped by a dynamic and continuous interaction between biology and experience.” NAT’L RES. COUNCIL & INST. OF MED., FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT 23 (Jack P. Shonkoff & Deborah A. Phillips eds., 2000).

Thus, we reach the third and predominant way that families are believed to be linked to crime. There is a significant body of scholarship studying the links between parenting practices and antisocial or delinquent behavior. The theories can roughly be divided into two main mechanisms by which parenting behaviors contribute to delinquency: the absence of parent control and the lack of parental support and nurturance. Two theories, social learning theory¹²² and general theory of crime,¹²³ suggest that “it is the absence of parental control (i.e., lax monitoring and consistent discipline) that fosters child antisocial behavior.”¹²⁴ Alternatively, attachment theory,¹²⁵ hostile attribution bias,¹²⁶ and general strain theory¹²⁷ suggest

122. Social learning theory emphasizes that children learn to be deviant during the process of interacting with family members and peers. See ALBERT BANDURA & RICHARD H. WALTERS, *SOCIAL LEARNING AND PERSONALITY DEVELOPMENT* (1963); ALBERT BANDURA, *PRINCIPLES OF BEHAVIOR MODIFICATION* (1969). There are various stems to this theory, one of which—the coercion model—emphasizes the relationship between parents and children. Developed by Gerald Patterson and colleagues John Reid, Thomas Dishion, Debra Capaldi, and James Snyder, the coercion model postulates that parents often use intimidation and threats to coerce their children into better behavior. This in turn provokes an angry and defiant response from the child. Parents often then give into the child, reinforcing the child’s poor behavior. GERALD PATTERSON, *COERCIVE FAMILY PROCESS* (1982). Over time this results in premature autonomy. Thomas J. Dishion, et al., Francois Poulin & Nani Medici Skaggs, *The Ecology of Premature Adolescent Autonomy: Biological and Social Influences*, in *EXPLAINING ASSOCIATIONS BETWEEN FAMILY AND PEER RELATIONSHIPS* (Kathryn A. Kerns, Josefina M. Contreras & Angelina M. Neal-Barrett eds., 2000); Thomas Dishion, Sarah Nelson & B. Bullock, *Premature Adolescent Autonomy: Parent Disengagement and Deviant Peer Process in the Amplification of Problem Behavior*, 27 J. ADOLESCENCE 515 (2004). According to a review of the literature, “both basic and intervention research provide strong support for the coercion model.” Simons et al., *supra* note 109, at 179.

123. The General Theory of Crime developed by Michael Gottfredson and Travis Hirschi views parental control as the primary cause of delinquent behavior because parents fail to teach their children self-control during the critical developmental window (i.e., before the age of 10). See MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, *A GENERAL THEORY OF CRIME* (1990). The research support for this theory is mixed. Simons et al., *supra* note 109, at 181.

124. Simons et al., *supra* note 109, at 186.

125. Attachment theory, first developed by the developmental psychologist John Bowlby, identified three styles of attachment of youth, which develop through interactions with caregivers. Bowlby argued that youth with an avoidant attachment style (i.e., cynical, distrusting view of relationships) are likely to engage in delinquent behaviors. See JOHN BOWLBY, 1 *ATTACHMENT AND LOSS: ATTACHMENT* (1969); JOHN BOWLBY 3 *ATTACHMENT AND LOSS: LOSS: SADNESS AND DEPRESSION* (1980). Later, other researchers identified a fourth type of attachment, labeled disorganized attachment. See Mary Main & Judith Solomon, *Procedures for Identifying Infants as Disorganized/Disoriented During the Ainsworth Strange Situation*, in *ATTACHMENT IN THE PRESCHOOL YEARS: THEORY, RESEARCH, AND INTERVENTION* (Mark Greenberg, Dante Cicchetti & Mark Cummings eds., 1990).

126. Hostile attribution bias, a theory most associated with Kenneth Dodge, suggests that children and adolescents develop a cognitive bias that makes them believe that they must be on guard. See, e.g., Kenneth Dodge, *The Structure and Function of Reactive and Proactive Aggression*, in *THE DEVELOPMENT AND TREATMENT OF CHILDHOOD AGGRESSION* (Debra Pepler & Kenneth Rubin eds., 1991); Kenneth Dodge et al., *Social Information-Processing Patterns Partially Mediate the Effect of Early Physical Abuse on Later Conduct Problems*, 51 J. ABNORMAL PSYCHOL. 632 (1995). While studies show that only

that “lack of parental support and nurturance (i.e., hostility, neglect)” cause delinquent behavior.¹²⁸ The problem with evaluating these theories is that antisocial or delinquent behaviors “are difficult to measure, and there is some evidence that results differ according to methods of measurement.”¹²⁹ Overall, a recent meta-analysis by James Derzon of family factors as predictors of criminal and violent behavior found that the strongest predictors were parental education, parental supervision, child-rearing skills, parental discord, and family size.¹³⁰ Weak predictors were young parents, broken homes, and socioeconomic status.¹³¹

With respect to children who have been abused or neglected, there is conflicting support for the proposition that abuse and neglect cause later offending behavior.¹³² According to the national Survey of Youth in Residential Placement, most children in the juvenile justice system residing in out-of-home placements such as detention centers, correctional training schools, and group homes have not been abused (70%), although a significant proportion of youth (30%) have been.¹³³ If one takes into account that children in out-of-home placement are the children most likely to be from homes with histories of abuse and neglect, these findings

a portion of delinquent behavior can be attributed to hostile attribution bias, the good news is that interventions are possible to eliminate this behavior. See Kenneth Dodge, *Translational Science in Action: Hostile Attribution Style and the Development of Aggressive Behavior Problems*, 18 DEV. PSYCHOPATHOLOGY 791 (2006).

127. General strain theory posits that exposure to strain, in this case the strain of poor parenting, increases the risk for delinquency. The idea is that harsh or erratic parenting causes a child to feel angry and frustrated, leading to delinquency. See ROBERT AGNEW, *WHY DO CRIMINALS OFFEND?* (2005); ROBERT AGNEW, *PRESSURED INTO CRIME: AN OVERVIEW OF GENERAL STRAIN THEORY* (2006).

128. Simons et al., *supra* note 109, at 186.

129. Farrington, *supra* note 108, at 135.

130. James Derzon, *The Correspondence of Family Features with Problem, Aggressive, Criminal and Violent Behavior: A Meta-Analysis*, 6 J. EXPERIMENTAL CRIMINOLOGY 263, 288 (2010).

131. *Id.* at 286.

132. See, e.g., Cathy Widom, *Childhood Victimization and Adolescent Problem Behaviors*, in *ADOLESCENT PROBLEM BEHAVIORS* (Robert Ketterlinus & Michael Lamb eds., 1994) (explaining possible causal mechanisms linking childhood victimization and later violence); Timothy Brezina, *Adolescent Maltreatment and Delinquency: The Question of Intervening Processes*, 35 J. RES. CRIM. & DELINQ. 71 (1998) (finding limited support for social learning theory, attachment theory, and strain theory with respect to abusive parents); Alan Leschied et al., *Childhood Predictors of Adult Criminality: A Meta-Analysis Drawn from Prospective Longitudinal Literature*, 50 CAN. J. CRIMINOLOGY & CRIM. JUST. 435 (2008) (finding that child maltreatment and witnessing family violence were only modest predictors of adult crime); Terence Thornberry, Timothy Ireland & Carolyn Smith, *The Importance of Timing: The Varying Impact of Childhood and Adolescent Maltreatment on Multiple Problem Outcomes*, 13 DEV. & PSYCHOPATHOLOGY 957 (2001) (finding that maltreatment persisting into adolescence predicts delinquency).

133. ANDREA J. SEDLAK & KARLA S. MCPHERSON, *YOUTH'S NEEDS AND SERVICES*, JUVENILE JUSTICE BULLETIN 2 (APR. 2010).

could be seen as the upper limit of an estimate of the numbers of youth with prior abuse histories.¹³⁴

Gang-involved youth are a particular group of youth who are perceived to come from troubled families. One complication in this characterization is evidence that gang affiliation is a transitory experience with “some studies showing that more than half of gang members remain in the gang for a year or less.”¹³⁵ Reviewing over 20 studies examining risk factors associated with joining a gang, Malcolm Klein and Cheryl Maxson found that a risk factor of low parental supervision in the family domain was mostly supported with gang-joining.¹³⁶ However, family poverty and disadvantage, family structure, and family attachment were not supported by the research.¹³⁷

Finally, pertaining to the concentration of offenders in certain families, a small proportion of families have extensive criminal backgrounds, while the overwhelming majority of families do not. The studies examining this issue suggest that less than 8% of families have extensive intergenerational contact with the justice system.¹³⁸ Further, while co-offending by siblings was common, “[t]here was no evidence that parents directly encouraged their children to commit crimes or taught them criminal techniques; on the contrary, a criminal father usually disapproved of his son’s offending.”¹³⁹ To the extent that offending is concentrated in families, “there may be intergenerational continuities in exposure to multiple risk factors” also correlated with offending.¹⁴⁰

B. Characteristics of Adolescent Offending

The literature examining characteristics of adolescent offending similarly confirms that youth are heavily influenced by the characteristics of their family

134. As discussed in the next Subpart, all youth can be expected to participate in some aspects of delinquency so methodologically it is difficult to determine how much of the criminal behaviors can be attributed to abuse. Further, there are reporting biases in that family violence is more likely than violence perpetrated by non-family members to be reported to police. Matthew Durose, et al., *Family Violence Statistics: Including Statistics on Strangers and Acquaintances*, U.S. BUREAU OF JUSTICE STATISTICS 22 (June 2005).

135. Richard Rosenfeld, Helene White & Finn-Aage Esbensen, *Special Categories of Serious and Violent Offenders*, in FROM JUVENILE DELINQUENCY TO ADULT CRIME: CRIMINAL CAREERS, JUSTICE POLICY, AND PREVENTION 141 (Rolf Loeber & David Farrington eds., 2012).

136. MALCOLM KLEIN & CHERYL MAXSON, STREET GANG PATTERNS AND POLICIES 144–46 (2006).

137. *Id.*

138. Studies conducted as part of the Pittsburgh Youth Study and Cambridge Study in Delinquent Development document that only 6–8% of families have extensive intergenerational contact with the justice system, but these families accounted for up to half of all convictions of family members. Farrington, *supra* note 108, at 132; *see also* David Farrington, Jeremy Coid & Joseph Murray, *Family Factors in the Intergenerational Transmission of Offending*, 19 CRIM. BEHAV. & MENTAL HEALTH 109 (2009); David Farrington et al., *The Concentration of Offenders in Families, and Family Criminality in the Prediction of Boys’ Delinquency*, 24 J. ADOLESCENCE 579 (2001).

139. Farrington, *supra* note 108, at 133.

140. *Id.* at 132.

and neighborhood,¹⁴¹ and that youth are less capable of escaping or avoiding these environmental influences.¹⁴² However, this research also adds the notion that all youth engage in delinquent behaviors.

In sharp contrast to the idea that youth who commit crimes must come from troubled families, research shows that nearly all individuals engage in delinquent activities at some point during their development, with scholars acknowledging that “[s]ome form of delinquency is a normative part of adolescence.”¹⁴³ Official records of arrests and convictions fail to show the true distribution of criminal offending behavior “because most offenders are not caught.”¹⁴⁴ For example, even though white youth are more likely to report using drugs and 30% more likely to report selling drugs, Black youth are twice as likely to be arrested, twice as likely to be detained, and significantly more likely to be prosecuted in the adult court for drug offenses.¹⁴⁵ Several of our national leaders admit to participating in criminal activity as young people, with former Senator Alan Simpson perhaps being one of the most outspoken about his youth. He admits that he “rode aimlessly around town, shot things up, started fires and generally raised hell.”¹⁴⁶

There are several explanations for why adolescence is a time of greater involvement in criminal behavior. Children are more likely to ignore or downplay risks when making decisions,¹⁴⁷ less likely to be affected by deterrence

141. See, e.g., Jeffrey Fagan, *Contexts of Choice by Adolescents in Criminal Events*, in *YOUTH ON TRIAL* 371–94 (Thomas Grisso & Robert G. Schwartz eds., 2000).

142. See, e.g., Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, in *YOUTH ON TRIAL* (Thomas Grisso & Robert G. Schwartz eds., 2000).

143. Jennifer L. Woolard, *Adolescent Development, Delinquency, and Juvenile Justice*, in *THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE* 107 (Barry C. Feld & Donna M. Bishop eds., 2012). See also DELBERT S. ELLIOT, DAVID HUIZINGA & SCOTT MENARD, *MULTIPLE PROBLEM YOUTH: DELINQUENCY, SUBSTANCE USE, AND MENTAL HEALTH PROBLEMS* (1989); John H. Laub and Sarah L. Boonstoppel, *Understanding Distance from Juvenile Offending: Challenges and Opportunities*, in *THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE* 373 (Barry C. Feld & Donna M. Bishop eds., 2012) (“Adolescent involvement in crime is nearly ubiquitous, and it is seen by some as a normative aspect of growing up.”); John H. Laub, Elaine Eggleston Doherty & Robert J. Sampson, *Social Control and Adolescent Development: A View from Life-Course Criminology*, in *APPROACHES TO POSITIVE YOUTH DEVELOPMENT* (Rainer K. Silberseisen & Richard M. Lerner eds., 2007); ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* (2008); David P. Farrington et al., *The Concentration of Offenders in Families, and Family Criminality in the Prediction of Boys’ Delinquency*, 24 *J. ADOLESCENCE* 579 (2001); Terrie E. Moffitt, *Adolescence-Limited and Life-Course Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 *PSYCHOL. REV.* 674 (1993).

144. Alex Piquero, J. David Hawkins & Lila Kazemian, *Criminal Career Patterns*, in *FROM JUVENILE DELINQUENCY TO ADULT CRIME: CRIMINAL CAREERS, JUSTICE POLICY, AND PREVENTION* 17 (Rolf Loeber & David Farrington eds., 2012).

145. Arya & Augarten, *supra* note 14.

146. Alan Simpson, *A Sentence Too Cruel for Children*, *WASH. POST* (Oct. 23, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/22/AR2009102203803.html>.

147. See Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death*

measures,¹⁴⁸ less likely to consider long-term consequences when making decisions,¹⁴⁹ and more susceptible to peer pressure with regard to risky behavior.¹⁵⁰ These four explanations may be rooted in changes occurring in the brain during adolescence. The part of the brain essential for evaluating risk, long-term planning, impulse control, and rationality,¹⁵¹ the prefrontal cortex, is not fully developed by late adolescence and is one of the last parts of the brain to mature.¹⁵² These re-

Penalty, 58 AM. PSYCHOL. 1009, 1012 (2003); Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. APPLIED DEV. PSYCHOL. 257, 261, 264–70 (2001); Susan G. Millstein & Bonnie L. Halpern-Felsher, *Perceptions of Risk and Vulnerability*, in ADOLESCENT RISK AND VULNERABILITY 15, 34–35 (Baruch Fischhoff et al. eds., 2001).

148. See, e.g., Jeffrey Fagan, *Juvenile Crime and Criminal Justice: Resolving Border Disputes*, 18 FUTURE CHILD. 81, 102–03 (2008); Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 CRIME & DELINQ. 96, 96–104 (1994); Richard Redding & Elizabeth Fuller, *What Do Juveniles Know About Being Tried as Adults? Implications for Deterrence*, 55 JUV. & FAM. CT. J. 35 (2004); David Lee & Justin McCrary, *Crime, Punishment, and Myopia* (Nat'l Bureau of Econ. Research, Working Paper, No. W11491, 2005).

149. See, e.g., Steven A. Drizin & Allison McGowan Keegan, *Abolishing the Use of the Felony-Murder Rule when the Defendant is a Teenager*, 28 NOVA L. REV. 507, 527–28 (2004); Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 DEV. REV. 1, 28–29 (1991); Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 30, 35–36 (2009).

150. See, e.g., Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEV. PSYCHOL. 608, 612, 615–16 (1979); Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEV. PSYCHOL. 625, 626–34 (2005); Scott & Steinberg, *supra* note 147; Laurence Steinberg & Susan B. Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 CHILD DEV. 841, 848 (1986).

151. See, e.g., Antonio R. Damasio & Steven W. Anderson, *The Frontal Lobes*, in CLINICAL NEUROPSYCHOLOGY 404, 434 (Kenneth M. Heilman & Edward Valenstein eds., 4th ed. 2003) (one “hallmark of frontal lobe dysfunction is difficulty making decisions that are in the long-term best interests” of the individual); Antoine Bechara et al., *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 BRAIN 2189, 2198–2200 (2000) (patients with lesions in the prefrontal cortex suffered from impairments in the ability to make real-life decisions because of an insensitivity to future consequences, whether reward or punishment); Antoine Bechara et al., *Dissociation of Working Memory from Decision Making Within the Human Prefrontal Cortex*, 18 J. NEUROSCIENCE 428, 428, 434 (1998) (prefrontal cortex is necessary for decision-making in tasks involving evaluation of risk and reward); Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 860 (1999) (frontal lobes are essential for planning and organization).

152. See, e.g., LINDA SPEAR, *THE BEHAVIORAL NEUROSCIENCE OF ADOLESCENCE* 108–11 (2010); B. J. Casey et al., *Structural and Functional Brain Development and its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOL. 241, 243 (2000); Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8177 (2004).

search findings have been highly influential in the recent Supreme Court jurisprudence finding special protections for juveniles.¹⁵³

In light of this brain research, it is not clear whether parents can control their children's behavior at all.¹⁵⁴ As Kristin Henning has noted, "it is plausible that a fifteen-year-old boy would have the cognitive ability to understand—in a conversation with his father—that robbery is wrong, yet impulsively participate in such conduct with a group of friends who snatch a stranger's hat and run away."¹⁵⁵ Developmental research shows that youth are particularly susceptible to the influence of peers¹⁵⁶ and that peer presence makes youth much more likely to engage in risk taking.¹⁵⁷ Scholars have also noted that adolescents often conceal their delinquent peers from their parents, prompting criminologist Mark Warr to call these peers "secret friends."¹⁵⁸

Research also shows that crime rates peak around late adolescence and then steeply decline into adulthood.¹⁵⁹ Most youth will be "adolescent-limited" offenders, in recognition that most will age out of their offending behaviors by their early-20s.¹⁶⁰ In contrast, persons who continue engaging in criminal activity as

153. See *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 130 S. Ct. 2011 (2010); *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011); *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

154. See, e.g., 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 (2004).

155. Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 399 (2013).

156. See Steinberg & Scott, *supra* note 147.

157. See *id.* See also Margo Gardener & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625, 626–34 (2005); Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCHOL. 1531, 1538–39 (2007).

158. Mark Warr, *The Tangled Web: Delinquency, Deception, and Parental Attachment*, 36 J. YOUTH AND ADOLESCENCE 607 (2007).

159. Rolf Loeber et al., *Overview, Conclusions, and Key Recommendations*, in FROM JUVENILE DELINQUENCY TO ADULT CRIME: CRIMINAL CAREERS, JUSTICE POLICY, AND PREVENTION 320–23 (Rolf Loeber & David Farrington eds., 2012) ("[S]tudies show that about 40–60% of juvenile offenders persist into early adulthood, but the percentage of persisters substantially decreases afterwards. . . . Juveniles whose self-reported offending started at ages 7 or 8 tended to be active offenders for a median of 12 years (thus, continued to offend up to ages 19–20), whereas those who began offending between ages 9 and 10 had a delinquency career of a median of 9 years (thus ending around the same age), while those who started offending between ages 11 and 16 had an active delinquency career with a median of 5 to 8 years, thus also ending at ages 16–23. When official records of offending were the criterion, the results were basically replicated but with slightly shorter offending durations than for self-reported delinquency."); see also Moffitt, *supra* note 143; Terrie E. Moffitt, *Natural Histories of Delinquency*, in CROSS-NATIONAL LONGITUDINAL RESEARCH ON HUMAN DEVELOPMENT AND CRIMINAL BEHAVIOR 3–4, 7, 29 (Elmar G.M. Weitekamp & Hans-Jürgen Kerner eds., 1994).

160. See Moffitt, *supra* note 143, at 686; see also JOHN H. LAUB & ROBERT J. SAMPSON, *SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE 70* (2003);

adults are referred to as “life-course persistent” offenders.¹⁶¹ However, at present there is no reliable method for determining which juvenile offenders will become adult offenders.¹⁶² Many systems rely on unstructured assessments or locally developed and nonvalidated instruments to predict offending behaviors.¹⁶³ Judges often rely on these informal procedures¹⁶⁴ even though other research has shown that unstructured assessments by mental health professionals to predict violence by an individual will not be accurate in two-thirds of cases.¹⁶⁵ Better-validated assessments are not necessarily on the horizon. According to a review of youth and adult assessment tools, the bulk of “research is based on samples of American, Canadian, and British males from the majority culture. Our knowledge of the dynamics of early adult crime among females and those from minority ethnic and cultural groups is limited.”¹⁶⁶ Furthermore, some of the risk assessments used may be useful to predict offending or violence, but are not useful in intervention, planning, or monitoring progress.¹⁶⁷

Finally, because delinquency is nearly ubiquitous during adolescence, the reason some children are involved in the justice system, while others are not, has more to do with policing, diversion, and court processing practices rather than the actual troublesome behaviors that youth display or their family situations.¹⁶⁸ Since 1988 there has been formal congressional recognition that racial and ethnic bias

RICHARD A. MENDEL, LESS HYPE, MORE HELP: REDUCING JUVENILE CRIME, WHAT WORKS—AND WHAT DOESN'T 15 (2000) (“the criminal careers of most violent juvenile offenders span only a single year”).

161. *Id.*

162. *See, e.g.*, THOMAS GRISSO, DOUBLE JEOPARDY: ADOLESCENT OFFENDERS WITH MENTAL DISORDERS 64–65 (2005) (discontinuity of disorders in adolescence creates “moving targets” for identification of mental disorders); Edward P. Mulvey & Elizabeth Cauffman, *The Inherent Limits of Predicting School Violence*, 56 AM. PSYCHOLOGIST 797, 799 (2001) (“Assessing adolescents . . . presents the formidable challenge of trying to capture a rapidly changing process with few trustworthy markers.”).

163. Robert D. Hoge, Gina M. Vincent & Laura S. Guy, *Prediction and Risk/Needs Assessments*, in FROM JUVENILE DELINQUENCY TO ADULT CRIME: CRIMINAL CAREERS, JUSTICE POLICY, AND PREVENTION 152 (Rolf Loeber & David Farrington eds., 2012).

164. Edward P. Mulvey & Anne-Marie R. Iselin, *Improving Professional Judgments of Risk and Amenability in Juvenile Justice*, 18 FUTURE CHILD. 35, 35–37 (2008).

165. *See* Thomas Grisso & Alan J. Tomkins, *Communicating Violence Risk Assessments*, 51 AM. PSYCHOLOGIST 928 (1996); John Monahan, *Violence Prediction: The Last 20 Years and the Next 20 Years*, 23 CRIM. JUST. & BEHAV. 107 (1996); Bernard Rubin, *Prediction of Dangerousness in Mentally Ill Criminals*, 27 ARCHIVES OF GEN. PSYCHIATRY 397 (1972).

166. Hoge, Vincent & Guy, *supra* note 163, at 175.

167. Robert D. Hoge & D.A. Andrews, *EVALUATION FOR RISK OF VIOLENCE IN JUVENILES* (2010).

168. *See, e.g.*, Howard Snyder, *Juvenile Delinquents and Juvenile Justice Clientele: Trends and Patterns in Crime and Justice System Response*, in THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 12 (Barry C. Feld & Donna M. Bishop eds., 2012) (“[A]rrest rates and arrest rate trends are not always good indicators of either the relative involvement of juveniles in crime or changes in prevalence/incidence of criminal behavior.”).

are pervasive in the juvenile justice system.¹⁶⁹ Biases based on class, gender, and sexual orientation have also been identified.¹⁷⁰

C. Evidence-Based Practices in Juvenile Justice

Regardless of whether families are perceived as the cause of a child's delinquency, or whether adolescent offending is viewed as part of the normal development process, there is yet a third set of literature involving interventions to address delinquent behavior.

The majority of long-standing evidence-based practices designed to help youth charged with the most serious offenses and youth who have the highest risks of offending are family-based programs.¹⁷¹ The evidence-based programs with rigorous evaluations include Wraparound Services,¹⁷² Multi-systemic Therapy,¹⁷³ Family Integrated Transition,¹⁷⁴ Family Preservation Services,¹⁷⁵ Functional Family

169. NATIONAL RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 211 (2013), available at http://www.nap.edu/openbook.php?record_id=14685&page=211; see also Arya & Augarten, *supra* note 14; Neelum Arya & Addie C. Rolnick, *A Tangled Web of Justice: American Indian and Alaska Native Youth in Federal, State, and Tribal Justice Systems*, 1 CAMPAIGN YOUTH JUST. (2008); Arya et al., *supra* note 17.

170. See, e.g., Angela Irvine, "We've Had Three of Them": Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-Conforming Youths in the Juvenile Justice System, 19 COLUM. J. GENDER & L. 675 (2010).

171. Email correspondence between author and Jason Medina (on file with author).

172. Wraparound Services provide individualized, comprehensive, community-based services and supports to youth with serious emotional or behavioral problems so that they may remain in the community. Resources are created and organized to meet the needs of the youth after identifying the strengths of the youth and family. The goal is to turn what community resources are available into what the youth and family needs.

173. Multi-systemic Therapy (MST) was developed in the late 1970s to meet two goals: provide the youth's caregivers with skills and resources to cope with the difficulties of raising teenagers with behavioral problems; and give youth skills to cope with family, peer, school, and neighborhood problems. MST treatment plans are designed jointly with family members and are family-driven rather than therapist-driven. The typical duration of home-based MST services is approximately four months, with multiple therapist-family contacts occurring each week. See SCOTT W. HENGgeler ET AL., MULTISYSTEMIC TREATMENT OF ANTISOCIAL BEHAVIOR IN CHILDREN AND ADOLESCENTS (1998); Scott W. Henggeler et al., *Four-Year Follow-up of Multisystemic Therapy with Substance Abusing and Substance-Dependent Juvenile Offenders*, 41 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 868 (2002); Cindy M. Schaeffer & Charles M. Bourduin, *Long-Term Follow-up to a Randomized Clinical Trial of Multisystemic Therapy with Serious and Violent Juvenile Offenders*, 73 J. CONSULTING & CLINICAL PSYCHOL. 445 (2005).

174. Family Integrated Transition (FIT) provides services to youth who have mental health and chemical dependency disorders and are returning to the community. The overarching framework of FIT is derived from MST, with additions from Dialectical Behavior Therapy and Motivational Enhancement Therapy. FIT begins two months prior to release from a residential setting and continues for four to six months. FIT uses therapists to coach caregivers in establishing productive partnerships with schools, community supports, parole, and other systems and help caregivers develop skills to be effective advocates for those in their care.

ly Therapy (“FFT”), and Functional Family Probation/Parole Services.¹⁷⁶ In a review of these programs, Peter Greenwood and Susan Turner explain their success: “[P]rograms that emphasize family interactions are the most successful, probably because they focus on providing skills to the adults who are in the best position to supervise and train the child. More traditional interventions that punish or attempt to frighten the individual youth are the least effective.”¹⁷⁷

Although most practitioners have long touted these programs, they have generally not been considered examples of family engagement even though families are an integral component of these programs. Some family members are offended by the trade names of these programs.¹⁷⁸ For example, FFT connotes the idea that the families are dysfunctional. However, FFT practitioners clarified that the term “functional” refers to all behavior having a functional purpose in how the family operates.¹⁷⁹

Although these programs have a strong track record in helping youth, only about 5% of youth in the juvenile justice system have the opportunity to benefit from these programs with proven effectiveness.¹⁸⁰ What do youth get if they do not get one of these programs? The vast majority of programs currently operating in

175. Family Preservation Services are short-term (four to six weeks), family-based services designed to assist families in crisis by improving parenting and family functioning while keeping children and communities safe. Family preservation programs are designed to help families cope with stress, maintain needed services, and obtain other needed services.

176. Functional Family Therapy (FFT) is a home-based prevention and intervention program by clinically-trained therapists. Functional Family Probation or Parole (FFP) is the latest adaptation of FFT for use by trained probation and parole officers. Both FFT and FFP target risk and protective factors for youth and families, and provide concrete techniques for clinical staff and probation and parole staff to use when working with youth and families. The three-phase approach of FFT and FFP work to: 1) increase the entire family’s motivation to participate in services and engage every family member in the process; 2) provide support and encouragement to the family and youth such as referring youth to services or teaching new skills; and 3) link youth and families with relevant providers of services and coach the family and youth to implement what has been learned and maintain the change.

177. Peter W. Greenwood & Susan Turner, *Probation and Other Noninstitutional Treatment: The Evidence is In*, in THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 121 (Barry C. Feld & Donna M. Bishop, eds., 2012). *But see* Dick Mendel, *Analysis: Holes in the Evidence for Evidence-Based*, JUVENILE JUSTICE INFORMATION EXCHANGE (Aug. 18, 2014), <http://jjie.org/analysis-holes-in-the-evidence-for-evidence-based/107453/>; Gary Gately, *Evidence-Based ‘Gold Standard’ Coveted, Yet Controversial*, JUVENILE JUSTICE INFORMATION EXCHANGE (Aug. 13, 2014), <http://jjie.org/evidence-based-gold-standard-coveted-yet-controversial/107409/>.

178. *Family-Focused Practice: A Critical Examination of Functional Family Probation*, JDAI INTER-SITE CONFERENCE (Apr. 25, 2012) (Comment made by family member at a conference workshop).

179. *Id.*

180. Peter Greenwood, *Prevention and Intervention Programs for Juvenile Offenders: The Benefits of Evidence-Based Practice*, FUTURE CHILD. 11 (2008).

the justice system today have either little empirical support to demonstrate efficacy, or are known to exacerbate delinquent behavior.¹⁸¹

Research from a variety of disciplines, including early childhood development, education, mental health, physical health, and child welfare, all point to family-driven care as a key solution to addressing the needs of children.¹⁸² Similar to Greenwood and Turner, leading experts in the family engagement movement offer three primary reasons that involving families makes a difference in addressing the treatment needs of children.

First, “parents have special knowledge that can enhance the design of interventions and treatments.”¹⁸³ Parents typically have more contact with their children than any system professional, and can share cultural knowledge, which is critical to contextualizing interventions to make them effective.¹⁸⁴ In other words, families know what is likely to work best with their children and which approaches probably will not.

Second, “parents can promote healthy development, can prevent problems from developing or exacerbating, and can implement effective treatment protocols and educational interventions.”¹⁸⁵ When families are involved, they can monitor what is happening with their children, keep youth on track, and inform system professionals when things are not working out as expected.

Third, research demonstrates that outcomes improve when family members and youth are active participants in their own treatment,¹⁸⁶ particularly when

181. Scott W. Henggeler & Sonja K. Schoenwald, *Evidence-Based Interventions for Juvenile Offenders and Juvenile Justice Policies that Support Them*, 25 SOC. POL’Y REP. 1, 1, available at http://www.srcd.org/sites/default/files/documents/spr_25_no_1.pdf (“In general, the vast majority of current juvenile justice services has little empirical support or exacerbates antisocial behavior. These include processing by the juvenile justice system (e.g., probation), juvenile transfer laws, surveillance, shock incarceration, and residential placements (e.g., boot camps, group homes, incarceration). On the other hand, several effective treatment programs have been validated in rigorous research. Effective programs address key risk factors (e.g., improving family functioning, decreasing association with deviant peers), are rehabilitative in nature, use behavioral interventions within the youth’s natural environment, are well specified, and include intensive support for intervention fidelity.”); see also David Huizinga & Kimberly Henry, *The Effect of Arrest and Justice System Sanctions on Subsequent Behavior: Findings from Longitudinal and Other Studies*, in THE LONG VIEW OF CRIME: A SYNTHESIS OF LONGITUDINAL RESEARCH 220–54 (Akiva M. Liberman ed., 2008).

182. See Sandra A. Spencer, Gary M. Blau, & Coretta J. Mallery, *Family-Driven Care in America: More Than a Good Idea*, 19 J. CAN. ACAD. CHILD & ADOLESCENT PSYCHIATRY 176 (2010).

183. Trina W. Osher, David Osher & Gary M. Blau, *Families Matter*, in FAMILY INFLUENCES ON CHILDHOOD BEHAVIOR AND DEVELOPMENT EVIDENCE-BASED PREVENTION AND TREATMENT APPROACHES, 47 (Thomas P. Gullotta & Gary M. Blau eds., 2008).

184. American Academy of Pediatrics Committee on Hospital Care, *Family-Centered Care and the Pediatrician’s Role*, 112 PEDIATRICS 691, 691–96 (2003).

185. Osher, et al., *supra* note 183.

186. See, e.g., Erin Morrissey-Kane & Ronald Pinz, *Engagement in Child and Adolescent Treatment: The Role of Parental Cognitions*, 2 CLINICAL CHILD & FAM. REV. 183 (1999); Michael Wehmeyer & Susan Palmer, *Adult Outcomes for Students with Cogni-*

youth and families are given leadership roles in making treatment decisions.¹⁸⁷ The American Academy of Child and Adolescent Psychiatry approved a policy statement in October 2009 explicitly endorsing family and youth participation in clinical decision-making.¹⁸⁸

D. Research Supports Family-Driven Justice

There are several key insights from these three literatures that justify taking a family-driven approach to transform the justice system.

First, the overwhelming majority of families (greater than 90%) who have contact with the justice system do not have extensive histories of criminal justice system involvement.¹⁸⁹ This makes sense given the research that most youth are adolescent-limited offenders and do not become adult offenders.¹⁹⁰ However, families with extensive contacts with the system (under 10%) account for up to half of all cases within the system overall.¹⁹¹ The fact that some families have continuous and repeated exposure to the justice system further confirms that the current justice system approach is not working, and the system needs a new approach to meet these families' needs effectively. I suspect that system stakeholders are regularly exposed to families with chronic issues, which reinforce preexisting stereotypes even though the majority of families who have contact with the system do not conform to those stereotypes. This may account for why jurisdictions that have made the most headway on family engagement also have explicit value statements countering these negative stereotypes.¹⁹²

Second, aside from the few evidence-based programs for serious offenders, there is minimal evidence that juvenile justice agencies reduce offending behaviors beyond what would naturally occur through the normal maturation pro-

tive Disabilities Three Years After High School: The Impact of Self-Determination, 38 EDUC. AND TRAINING IN DEVELOPMENTAL DISABILITIES 131 (2003).

187. Spencer et al., *supra* note 182.

188. AMERICAN ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY, POLICY STATEMENT (Oct. 2009) ("Family and youth involvement is essential at each phase of the treatment process, including assessment, treatment planning, implementation, monitoring, and outcome evaluation. Family and youth partnership also needs to inform decision making at the policy and systems level. Family priorities and resources must be identified and should drive care. Throughout the treatment process families and youth must: have the right to be involved in making decisions regarding providers and others involved in the treatment team; be encouraged to express preferences, needs, priorities, and disagreements; collaborate actively in treatment plan development and in identifying desired goals and outcomes; be given the best knowledge and information to make decisions; make joint decisions with their treatment team; and participate actively in monitoring treatment outcomes and modifying treatment.")

189. See *supra* note 138.

190. A question for future research is to determine whether the group of life-course-persistent offenders comes from families with intergenerational exposure to the justice system. To my knowledge, there is no criminological research that has explored this question.

191. See *supra* note 138.

192. See *infra* notes 200–214 and accompanying text.

cess.¹⁹³ In fact, the evidence points to the opposite conclusion—contact and further penetration into the justice system increases the risk to public safety.¹⁹⁴ Studies of youth released from residential corrections programs find that 70% to 80% of youth are rearrested within two or three years.¹⁹⁵ Youth with the lowest offending levels prior to incarceration end up committing more crimes after being incarcerated.¹⁹⁶ Considering that most youth receive assessments or treatments without proven effectiveness,¹⁹⁷ this means that current justice system professionals have no real informational advantage that should privilege their decisions over families' decisions. By this statement I do not mean to suggest that system stakeholders have no useful information or perspectives to offer, but rather that their level of knowledge of what will work for an individual child does not warrant granting decision-making authority to system professionals. Scholars have noted that the failure to emphasize rehabilitation or the use of evidence-based practices "would be grounds for malpractice in medicine,"¹⁹⁸ but is not in law.

It is likely to be the case that if families had more control over the treatment plans for children, justice agencies would see an increase in efficacy of the existing programs offered by the system because family members could assist with targeting the right services to their children.¹⁹⁹

Third, while some system professionals would probably like more research on the specific links between families and crime before changing the default assumptions of how the justice system operates, in my view waiting for more sophisticated research studies is not warranted. The purpose of having more research is to help identify effective interventions. However, the bulk of evidence-based approaches in juvenile justice known to be successful with the most serious offenders already takes a strengths-based approach to families. The family-driven

193. See *supra* note 143 and accompanying text.

194. See, e.g., ANTHONY PETROSINO, CAROLYN TURPIN-PETROSINO & SARAH GUCKENBURG, CAMPBELL SYSTEMATIC REVIEWS, FORMAL SYSTEM PROCESSING OF JUVENILES: EFFECTS ON DELINQUENCY (2010) (referencing a meta-analysis of 29 controlled studies that found that juvenile court processing tended to increase criminal behavior as compared to diversion to community services); RICHARD E. REDDING, JUVENILE JUSTICE BULLETIN, JUV. TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY? (referencing a meta-analysis of the effect of transfer policies to adult court that found that transfer increased recidivism). Confinement in facilities also is iatrogenic. BARRY HOLMAN & JASON ZIEDENBERG, WASH., D.C.: JUSTICE POL'Y INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES (2006); Uberto Gatti, Richard Tremblay & Frank Vitaro, *Iatrogenic Effect of Juvenile Justice*, 50 J. CHILD PSYCHOL. & PSYCHIATRY 991 (2009); Huizinga & Henry, *supra* note 181, at 220–54.

195. MENDEL, *supra* note 79.

196. EDWARD MULVEY, OJJDP JUV. JUSTICE FACT SHEET, HIGHLIGHTS FROM PATHWAYS TO DESISTANCE: A LONGITUDINAL STUDY OF SERIOUS ADOLESCENT OFFENDERS (2011).

197. See *supra* notes 162–167 and accompanying text.

198. Edward J. Latessa, Francis T. Cullen & Paul Gendreau, *Beyond Correctional Quackery: Professionalism and the Possibility of Effective Treatment*, 66 FED. PROBATION 43 (2002).

199. See *supra* notes 182–188; *infra* notes 382–408 and accompanying text.

approach can really be viewed as implementing the best practices from existing research.

III. KEY FEATURES OF FAMILY-DRIVEN JUSTICE

As mentioned at the outset of this Article, family engagement is a nebulous concept. This study was aimed at identifying philosophies and practices currently in use that are mutually agreeable to both system professionals and family members. Bart Lubow, former director of the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative, highlighted for an audience of juvenile justice professionals his version of what an ideal justice system looks like, which succinctly summarizes my key findings and the family-driven approach:

I want a system that acts upon the belief that youth need families, not facilities, a system that understands that whenever we disrupt a family, we lessen the odds that a youth will succeed as an adult. On the practice level, this means a system that recognizes family strengths and devotes its resources to strengthening families; a system that learns from families, involves them in day-to-day operational decisions regarding their children, and includes them in policy and resource discussions. I want a family-focused system²⁰⁰

From my research, I identified only a handful of jurisdictions across the country that have been intentional about creating comprehensive strategies to address the needs of families, and even fewer that have attempted to implement Lubow's vision. From the examples that do exist, it is useful to see how the jurisdictions evolved over time, and how they have incorporated value statements into their work to help stakeholders counter the system professionals' negative stereotypes of families.²⁰¹

Starting in 1999, DuPage County, Illinois, wanted to address the rising costs of court-ordered residential care.²⁰² They realized that providing services to youth, without addressing family or environmental factors, was ineffective in resolving the youth's delinquent behaviors long-term.²⁰³ They made a series of incremental changes to their justice system, and, in 2006, as part of the Catherine D. and John T. MacArthur Foundation Models for Change Initiative, DuPage County formed a Parent Involvement Workgroup to engage families in the juvenile justice system.²⁰⁴ Even though the DuPage County had been active in system reform efforts for over a decade, those efforts were not accompanied by a fundamental shift in the ideology of the justice system or perceptions about families in particular.

Similar to the dominant view that parents cause their children's behavior discussed in Part II, the Workgroup initially began with the attitude of holding par-

200. Bart Lubow, Director, Juvenile Detention Alternatives Initiative (JDAI), Annie E. Casey Foundation, Remarks at the JDAI National Inter-site Conference (Apr. 25, 2012).

201. See also text accompanying *infra* note 440.

202. SHANNON HARTNETT & STUART BERRY, DUPAGE CNTY. DEP'T OF PROBATION AND COURT SERVICES PARENTAL INV. WORK AREA, A TRANSITION UPDATE.

203. *Id.*

204. *Id.*

ents more accountable for their child's behavior.²⁰⁵ However, the group quickly realized that such an approach would be ineffective.²⁰⁶ Instead they moved to what they described as a "parent involvement philosophy" because they found that "approaches which are strengths-based, culturally competent, and based on the individualized needs of the family are most effective in helping families initiate and maintain positive youth and family outcomes."²⁰⁷

From my research, I found that many efforts that have met the family vision for how parents who want government services to help their children have intentionally started with clear value statements to guide and clarify the purpose of the effort. One of the key elements of the DuPage parental involvement effort states:

It is our belief that the vast majority of parents care about their children, and parent them to the best of their ability. It is also our belief that some parents, due to their life experiences, current circumstances, skill level, socioeconomic status, degree of social support, special needs of their children, and other factors, could benefit from receiving additional information about effective parenting (e.g., child development and the changing role of parents), skill building, resources, and social support from both professionals and other parents²⁰⁸

Changing the ideology of the juvenile justice system overall to respect family autonomy—what some families refer to as "voice and choice"²⁰⁹—also begins by modifying the default rules of the system and approaching families with the following four positive presumptions of Family-Driven Justice:²¹⁰

(1), All families care about their children and can be trusted to make good decisions on their children's behalf.²¹¹

(2), All families have strengths to build upon, including families with mental health or substance abuse issues or prior involvement with the criminal justice and child welfare systems.²¹²

(3), All families want their children to grow up safe and free from entering the justice system: for those children who are already part of the system, families wish for their children to be free from continued justice system involvement.²¹³

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. Comment from a family member at the New Jersey JDAI conference (Oct. 8, 2013).

210. I drafted these presumptions in Spring 2012 after my preliminary literature review and site visit to the Midwest. A draft of these propositions was circulated to family members who participated in monthly organizing calls orchestrated by the Campaign for Youth Justice. The specific language for these four presumptions was determined through email exchanges and phone consultations with family member experts. (On file with author).

211. *Id.*

212. *Id.*

(4), All families have dreams for their children and want them to succeed in all aspects of adult life. Families hold onto these dreams even for children who are part of the justice system and want the justice system to help their children fulfill these dreams.²¹⁴

The first proposition includes a presumption that caregivers “have the capacity and motivation to act in their children’s best interests, with strong bonds of affection and adequate measures of wisdom and good judgment guiding their decisions and actions.”²¹⁵ While “[b]earing or rearing a child is not a guarantee that parents will love their children and look out after their interests; in most instances, it works out that way.”²¹⁶ In *Privilege or Punish*, Markel, et al. found the opposite default presumptions at play in parental responsibility laws in that “they frequently create liability for parents based on their status as a parent and the misconduct of their child alone, leaving the intentionally responsible parent to plead their good parenting skills as an affirmative defense instead of making the prosecution show the absence of good parenting as part of its case-in-chief against the parent.”²¹⁷ This first presumption also incorporates the current constitutional protections for the parent–child relationship, which are similarly premised on assumptions that parents “act in the best interests of their children.”²¹⁸

Although this research project began with the belief that family members act in their child’s best interest, there are special populations of youth and families who will require special outreach and accommodations. Some youth come to the attention of justice agencies without active custodial parents, i.e., having neither a biological or foster parent, nor other relative caregiver, or without a caregiver who is capable of meeting the needs of the child at that particular moment. I interviewed a system expert who raised the specific problem of how to handle a youth adjudicated delinquent for drug use but cared for by parents who are themselves drug users.²¹⁹ He explained that jurisdictions will differ in whether these caregivers are considered appropriate.²²⁰ In some jurisdictions, these parents would be automatically disqualified and the child would be removed from the home. Other states, particularly those states that have decriminalized marijuana use, may ap-

213. *Id.*

214. *Id.*

215. Weithorn, *supra* note 43.

216. Maxine Eichner, *The Family and the Market-Redux*, 13 THEORETICAL INQUIRIES L. 97, 123 (2012) (citing John Eekelaar, *Self-Restraint: Social Norms, Individualism and the Family*, 13 THEORETICAL INQUIRIES L. 75 (2011)).

217. MARKEL ET AL., *supra* note 1, at 69.

218. *See, e.g.*, *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (recognizing a parent’s right to raise children as “perhaps the oldest of the fundamental liberty interests”); *see also* *Troxel v. Granville*, 530 U.S. 57, 65–67 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“[The] primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 514–16 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

219. Telephone Interview with Jason Medina, FFT-FFP National Trainer and Consultant (Sept. 21, 2011).

220. *Id.*

proach the issue differently. For youth in these situations, rather than remove youth to a group home or institutional environment, system experts and family members agree that justice agencies should use Family Finding and other permanency-oriented techniques developed for youth in foster care to identify and recruit family members who will be able to be part of the unconditional, permanent support system for these youth.²²¹

Youth who enter the justice system on domestic violence charges will also require specific and special outreach because of the extremely high levels of family conflict. For example, Francine Sherman has explained that 60% of girls charged with domestic assault offenses committed their violence against a parent which may be attributed to “family chaos or physical and sexual abuse.”²²² Another population of youth requiring special attention is LGBT youth. National data show that 15% of youth in the juvenile justice system are LGBT, questioning, or express their gender in nonconforming ways.²²³ Compared to their heterosexual and gender-conforming peers, family rejection is a common reason for the delinquency, and counseling and support for families is often necessary.²²⁴

The general sentiment among the family members I consulted with during this research project was that, while some parents or guardians of children may be viewed as inappropriate caregivers for the youth in a particular situation, the family members wanted to ensure that their views were still heard and incorporated in decision-making and that children who needed to be removed from the home would go to other relative caregivers.

In this Part, I explain the five features of what a transformed justice system will look like when it uses these positive presumptions to guide changes. First, families will be supported before and after challenges arise with their youth. Second, families will have access to peer support from the moment a youth is arrested through exit from the justice system. Third, families will be involved in decision-making processes at the individual, program, and policy levels to hold youth accountable and keep the public safe. Fourth, families will be strengthened through culturally competent treatment options and approaches. Fifth, families will know their children are being prepared for a successful future.

A. Services Without Justice-System Involvement

The focus groups with families elicited two seemingly contradictory findings. Some families were adamantly opposed to justice system processing, viewing the system primarily through the lenses of race/ethnicity and class bias. One parent noted:

221. Jesse’s story as an example of Family Finding in practice. *See infra* note 308 and accompanying text.

222. Sherman, *supra* note 104, at 1603–04.

223. *See* Irvine, *supra* note 170.

224. *Id.* In my research, I identified two resources to support LGBT youth in the justice system. The Family Acceptance Project at San Francisco State University is developing model services for ethnically diverse families to help increase family support for LGBT children. The Equity Project is an initiative to ensure that LGBT youth in juvenile delinquency courts are treated with dignity, respect, and fairness.

I grew up in Philadelphia and I used to get locked up for the smallest things. As an adult, I moved to what I thought was a “better” community but I quickly learned that it had nothing to do with where I lived. Instead, it had to do with race. In my view, kids of color get arrested more than other kids.²²⁵

Another parent noted:

My son was walking home from school and he was curious about a fight that was going on. He went to where the fight was occurring and when the police arrived my son was arrested and accused of being part of gang activity. It was three hours before we as the parents were notified. Racial disparity in [the County] is unbelievable.²²⁶

For these families, their children’s behavior was typical “kid stuff,” and they were concerned by the way their children were being labeled mad, sad, and bad.²²⁷ As Nancy Dowd has noted, “State intrusion into families is a significant divider of families by race and class: the model of privacy and family protection is more typical for white middle and upper class families, versus intrusion, supervision, and the presence of the state in the lives of the families of people of color and low income families.”²²⁸ Families holding this view were essentially advocating against government intervention in favor of family privacy.

In contrast, other families had experienced significant challenges raising their children or were experiencing new conflicts they were trying to resolve.²²⁹ Rather than wanting to be left alone, they wanted help. One of the most common complaints of families involved in the justice system is that many had attempted to get help for their children but none was forthcoming.²³⁰ “I went [to the justice system] ‘cause I felt like I had no other choice. I thought I had exhausted all my choices, all of my options. I felt like I had nowhere else to go.”²³¹

Many families were turned away by other child-serving systems because they were ineligible for services.²³² They made too much to qualify for services, but not enough to purchase private services for their child, assuming those services even existed in the community.²³³ Families in these situations had taken a proactive approach to find help, but little was available.²³⁴ One parent noted: “We were told that since we lived in a rural area and mental health services were scarce that

225. Focus Group Transcript, Wash. D.C. (Apr. 27, 2011) (quote from a parent).

226. *Id.*

227. OJJDP Focus Groups, *supra* note 93, at 11–12.

228. Nancy E. Dowd, *Essay: (Re)constructing the Framework of Work/family*, 16 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 331, 338 (2010).

229. OJJDP Focus Groups, *supra* note 93, at 2.

230. *Id.*

231. Focus Group Transcript, Wash. D.C. (Apr. 27, 2011) (quote from a parent).

232. OJJDP Focus Groups, *supra* note 93, at 11.

233. *Id.*

234. *Id.* at 2.

it probably would be best for our child to be locked up because she'll get services faster."²³⁵

These families were particularly resentful of being blamed for their child's behavior.²³⁶ Families were also angry that the government would be willing to spend hundreds of thousands of dollars to incarcerate a youth, but not spend much smaller sums to keep the child out of a facility.²³⁷

The survey responses by system stakeholders did not address the issue of race and ethnic bias directly because this was outside the scope of the survey, but respondents generally agreed that families often need a comprehensive array of resources and services, which are lacking in most communities.²³⁸ Others noted that resources may be available but offered by a different agency.²³⁹ In these situations, justice system professionals expressed their own frustrations that their hands were often tied as they had no authority to compel services provided by a different agency.²⁴⁰

The results from the focus groups and surveys suggest that justice system agencies need to reduce the flow of "kid stuff" into the justice system, while simultaneously expanding access to services for youth with more significant needs. One way for local juvenile justice agencies to do this is by conducting supply-chain-like analyses to understand the major feeder systems into the justice system and to close those points of entry indicating racial/ethnic and class biases. Law enforcement and justice agencies should also expand the diversionary pathways to direct youth away from the justice system if there is contact. For example, Native youth living on reservations face extreme challenges, including poverty, and alcohol and substance abuse. Native youth also are disproportionately affected by substance abuse disorders as compared to their peers from other racial groups in the United States.²⁴¹ In collaboration with the Robert Wood Johnson Foundation's Reclaiming Futures Initiative, the Sovereign Tribal Nation of Sicangu Lakota has worked to create a culturally appropriate and family-based response to youth with substance abuse issues.²⁴² In 2003, more than 75% of Rosebud juvenile justice

235. *Id.* See also COMM. ON GOV'T REFORM—MINORITY STAFF SPECIAL INVESTIGATIONS DIV., U.S. HOUSE OF REPRESENTATIVES, INCARCERATION OF YOUTH WHO ARE WAITING FOR COMMUNITY MENTAL HEALTH SERVICES IN THE UNITED STATES ii (2004) (finding that approximately 2,000 youth are incarcerated due to a lack of mental health services).

236. OJJDP Focus Groups, *supra* note 93, at iv.

237. *Id.*

238. Survey results with juvenile justice professionals.

239. *Id.*

240. *Id.*

241. See SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., CTR. FOR BEHAV. HEALTH STAT. AND QUALITY, THE NATIONAL SURVEY ON DRUG USE & HEALTH REPORT: SUBSTANCE USE AMONG AMERICAN INDIAN OR ALASKA NATIVE ADOLESCENTS 4 (Oct. 2011).

242. The Reclaiming Futures Oyate Teca Owicakiya created comprehensive solutions to their specific juvenile crime problem. The solutions they implemented included: screening first-time offenders to assess and refer teens for treatment; using care teams for youth within its Wellness Court; having residential treatment for youth on the reservation;

court cases were related to underage drinking, and youth inpatient treatment services used to be located off the reservation.²⁴³ The Reclaiming Futures Oyate Teca Owicakiya (which means “Helping Young People” in the Lakota language) partnered with the community and more than 15 agencies and programs to increase alcohol and drug treatment and prevention services to young people and their families.²⁴⁴

1. Interventions Before Arrest

The literature suggests three main drivers of conflict leading a substantial proportion of youth to enter the juvenile justice system: family-based concerns, school-based conflicts, and neighborhood conflicts. Each of these drivers requires its own type of interventions.

a. Family-Based Strategies

The findings from the focus groups with families suggest that jurisdictions need to develop new ways to support families parenting adolescents. One parent noted, “Our son got into a situation and was incarcerated. As parents, we had no idea what to do. We needed information. We needed to share information. Parents need guidance.”²⁴⁵

Unlike the plethora of early childhood parenting magazines and other resources to help parents access parenting knowledge about young children, parenting information is largely hidden from view for parents who are struggling with raising older children. Communities can bridge this gap by making available and promoting general parenting resources and support. The Urban Leadership Institute’s Raising Him Alone Campaign (“RHA”) engages and supports single mothers raising boys.²⁴⁶ Initially a two-city initiative, RHA has now expanded to additional cities and created a national online presence.²⁴⁷ RHA now serves as a national clearinghouse for parenting information used by thousands of single mothers across the country.²⁴⁸

using innovative treatment approaches include equine therapy, archery, and a range of Lakota cultural practices; involving members of the Sicangu Lakota Nation to share cultural traditions, spiritual knowledge, and life experiences; promoting indigenous practices such as peacemaking and family group decision-making to repair harm and keep cases out of the court system; sponsoring a youth-run business at the juvenile detention center to teach teens traditional values, work ethics, and home-based business skills; and including families in assessment, treatment, and family recovery programs. *Reclaiming Futures Oyate Teca Owicakiya*, RECLAIMINGFUTURES.ORG, <http://www.reclaimingfutures.org/our-sites/site-directory/sites-southdakota/sites-southdakota-rosebud> (last visited June 19, 2014).

243. *Id.*

244. *Id.*

245. OJJDP Focus Groups, *supra* note 93, at 10.

246. *Raising Him Alone: Providing Resources and Support for Single Mothers Raising Boys*, RAISING HIM ALONE, <http://www.raisinghimalone.com> (last visited Feb. 16, 2013).

247. *Id.*

248. *Id.*

Another necessary step is for communities to find a way to provide direct support to families at high risk for entering the justice system.²⁴⁹ For example, the Grandparents Raising Grandchildren program in St. Joseph, Michigan, assists grandparents and other caregivers who are raising teenagers and children of incarcerated parents.²⁵⁰ Families living in the rural tri-county area are able to build meaningful relationships that allow families to share challenges and solutions to their unique family situation, such as through the “Party Line,” which are conference calls that allow families to share challenges and solutions; the “Breakfast Bunch,” regular get-togethers at a local restaurant; and other family events with good food and special activities for the children.²⁵¹ The program also offers family members respite services, mileage reimbursement for travel to and from events, and informational and referral services through a newsletter.²⁵²

Families also want to be able to access services for their children without getting their children tangled up in court. As one parent noted, “I went [to the justice system] ‘cause I felt like I had no other choice. I thought I had exhausted all my choices, all of my options. I felt like I had nowhere else to go.”²⁵³ One example indicative of this alternative approach is the Florida Network of Youth and Family Services, a consortium of 32 community-based agencies serving youth and families who are not involved in either the child welfare or juvenile justice systems.²⁵⁴ The Network offers a variety of services to youth and families: outreach and public education services for youth, families, and the community; centralized intake available twenty-four hours a day, seven days a week; shelter services that can be used to provide respite during strained family situations; nonresidential services such as crisis intervention and individual, group and/or family counseling; and case management services.²⁵⁵ Florida has seen great success through operating the Network: 90% of the youth never enter the juvenile justice system, and only 6% of families receiving services were petitioned to court as Children In Need of Services cases.²⁵⁶

b. School-Based Strategies

Schools are the major social institution used to socialize children, participation is mandatory, and the majority of public money for youth is spent on education.²⁵⁷ According to one state study, more than one in seven students can be ex-

249. *Id.*

250. NANCY ALDRICH, BROOKDALE FOUNDATION RELATIVES AS PARENTS PROGRAM GUIDEBOOK: PROMISING PRACTICES IN ENCOURAGING & SUPPORTING GRANDPARENTS AND RELATIVES RAISING CHILDREN 12 (2007), *available at* http://www.brookdalefoundation.org/rapp/07-080_n4a_Brookdale_final.pdf.

251. *Id.*

252. *Id.*

253. Focus Group Transcript, Wash. D.C. (Apr. 27, 2011) (quote from a parent).

254. FLORIDA NETWORK OF FAMILY AND YOUTH SERVS., ANNUAL REPORT 3 (2010), *available at* http://www.floridanetwork.org/PDFs/FN_AR_2010_F_Web.pdf.

255. *Id.* at 5–6.

256. *Id.* at 16.

257. A. Baron Holmes IV, Gary D. Gottfredson & Janet Y. Miller, *Resources and Strategies for Funding*, in COMMUNITIES THAT CARE: ACTION FOR DRUG ABUSE PREVENTION (J. David Hawkins & Richard F. Catalano eds., 1992).

pected to have contact with the juvenile justice system between the seventh and twelfth grade.²⁵⁸ For many families, schools are a big part of the problem as well as part of the solution.²⁵⁹ Families note how minor problems in schools escalate into major issues: “It all started with school suspensions, when he had nothing to do.”²⁶⁰ Another parent noted, “[t]he revolving door of punishment—suspensions, expulsions, arrests—puts our children on the streets, and on the road to gangs and prison.”²⁶¹ According to a Justice for Families study of over 1,000 families in the justice system, nearly one in three families reported that their child’s first arrest took place at school.²⁶² The increase in school-based arrests has many causes, including zero tolerance laws,²⁶³ truancy laws, and the growth of school-based policing.²⁶⁴ In a site visit to an alternative school for probation-involved youth, one of the teachers explained that, when children return to their home school, the school is often hostile to the family. Teachers from the alternative school occasionally reach out to assist in helping reintegrate the youth to the appropriate school placement.²⁶⁵

From my research and consultation with system experts, I identified three main strategies to address school-based conflicts to prevent youth from ending up in or returning to the justice system that work with middle- and high-school-age youth populations.²⁶⁶ First, juvenile courts have begun to develop ways to close the

258. TONY FABELO ET AL., COUNCIL OF STATE GOV’TS JUSTICE CTR., *BREAKING SCHOOL RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS’ SUCCESS AND JUVENILE INVOLVEMENT* xii (2011), available at http://csgjusticecenter.org/wpcontent/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf.

259. See generally ADVANCEMENT PROJECT, *EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 7* (2005), available at <http://www.advancementproject.org/sites/default/files/publications/finaleolrep.pdf>.

260. JANE A. WALKER & KAREN FRIEDMAN, *LISTENING AND LEARNING FROM FAMILIES IN JUVENILE JUSTICE* 18 (2001) (quote from a family member).

261. POIR-PAC ELEMENTARY JUSTICE COMM., *PARENT-TO-PARENT GUIDE, RESTORATIVE JUSTICE IN CHICAGO PUBLIC SCHOOLS STOPPING THE SCHOOL-TO-PRISON PIPELINE* (2010) (quote from a parent).

262. JUSTICE FOR FAMILIES, *supra* note 24.

263. The Gun Free Schools Act of 1994, 20 U.S.C. § 7151 (2003), required schools receiving federal funding to expel any student possessing a firearm on school premises. When schools implemented the law, they often expanded the scope of the law to a wide variety of mandatory policies. See Eric Blumenson & Eva S. Nilsen, *One Strike and You’re Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L. Q. 65 (2003); Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067 (2003).

264. Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 281 (2009) (finding that schools with school resource officers (SROs) did have increased arrests compared to schools without SROs, but differences disappeared when economic disadvantage was controlled.) See also Paul Hirschfield, *Preparing for Prison? The Criminalization of School Discipline in the USA*, 12 THEORETICAL CRIMINOLOGY 79, 83 (2008) (claiming the presence of police in schools will criminalize behavior previously handled informally by school officials).

265. Site visit to Southwest jurisdiction, Oct. 2011.

266. I focused on the population most likely to enter the justice system, but additional early school-based prevention programs have also been shown to be effective at re-

door to school-based offenses. For example, Judge Teske in Clayton County, Georgia, helped develop the School Offense Protocol Agreement to prevent minor offenses in schools, like disorderly conduct and fighting, from ending up in juvenile court.²⁶⁷ However, because the door to juvenile court is closed, schools have to find alternative strategies to cope with problem behaviors.²⁶⁸

Second, schools need positive school environments and cultures to improve the behavior of students. Schools can decrease disruptions using a program available nationwide, known as Positive Behavioral Intervention and Supports (“PBIS”).²⁶⁹ PBIS is a school-wide approach to establishing the social culture and behavioral supports to help all children achieve both social and academic success.²⁷⁰ This program has also been used successfully in juvenile justice institutions.²⁷¹ What does PBIS look like in a real school? Jonesboro Middle School, also located in Clayton County, Georgia, has implemented PBIS. The school’s behavioral expectations for youth are: (1) be respectful of self, others, and property; (2) be responsible and prepared at all times; and, (3) be ready to follow directions and procedures. The school then prepared materials to show students and parents how to meet these expectations. For example, the school posted displays of what it looks like to show respect for learning. They showed pictures of students in appropriate versus inappropriate dress and organized versus unorganized backpacks and notebooks. The school also uses a “gotcha” system to provide positive reinforcement for good behavior. Students are rewarded when teachers catch them in the act of doing something positive, such as picking up trash on school property or helping another student. These youth are then entered into a monthly raffle to participate in a pizza party luncheon. By being consistently rewarded for good behavior, disruptive behaviors within the school have been dramatically reduced.²⁷²

ducing delinquency. *See, e.g.,* David B. Wilson, Denise Gottfredson & Stacy Najaka, *School-Based Prevention of Problem Behaviors: A Meta-Analysis*, 17 J. QUANTITATIVE CRIMINOLOGY 247 (2001).

267. STEVE TESKE, USING COLLABORATIVE STRATEGIES TO REDUCE DISPROPORTIONATE MINORITY CONTACT: A CASE STUDY IN SCHOOL REFERRALS & REDUCING THE SCHOOLHOUSE TO JAILHOUSE PIPELINE EFFECT, *available at* <http://www.jdaihelpdesk.org/casemodadmis/Keeping%20Low-Level%20Offenders%20Out%20of%20the%20System.pdf>.

268. As Gary Gottfredson has noted, “[T]he most important reason to prevent delinquency and improve schools is that schools themselves are weakened by problem behavior.” Gary Gottfredson, *Schools and Delinquency*, in THE OXFORD HANDBOOK ON JUVENILE CRIME AND JUVENILE JUSTICE 203, 218 (Barry C. Feld & Donna M. Bishop eds., 2012).

269. OFFICE OF SPECIAL EDUCATION PROGRAMS (OSEP) TECHNICAL ASSISTANCE CENTER ON POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS, *PBIS Frequently Asked Questions*, http://www.pbis.org/pbis_faqs (last visited Feb. 16, 2013).

270. *Id.*

271. *See, e.g.,* Patrick S. Metze, *Plugging the School-to-Prison Pipeline by Improving Behavior and Protecting Core Judicial Functions: A Constitutional Crisis Looms*, 45 ST. MARY’S L.J. 37, 42 (2013) (reporting on the effectiveness of the implementation of PBIS within the schools of the Texas juvenile correctional system).

272. This case example was adapted from the Office of Special Education Programs (OSEP) Technical Assistance Center on Positive Behavioral Interventions & Sup-

Third, schools can develop targeted strategies to work directly with youth and families at risk of justice-system involvement. In a site visit to a jurisdiction in the Southwest, I spoke with a parent of a non-court-involved middle school student and a parent educator. The parent described the benefits she received from attending the parent education classes offered by her child's school. When asked about what was helpful about the classes she described how they clarified the differences between being a friend to a child versus an authority figure, and how she learned appropriate ways to check in on a child compared to ways that inappropriately violate a child's privacy, as well as ways to support homework. The parent educator also described how many families in the area lacked specific knowledge of certain concepts taught in the school, which generated tensions for parents interested in ensuring that their children completed their homework. The curriculum for parents helped translate the concepts their children were learning in school to knowledge the parents possessed so that parents could support their children's learning and maintain parental authority.²⁷³

From my literature review, I identified parent support strategies specific to working with families of youth who were truant, had been suspended, or were at risk of not graduating. As part of the Family Engagement for High School Success Initiative, Lake County, Illinois held focus groups with the families of these students that revealed that many families were unaware of school requirements, were confused about their role, felt intimidated by school personnel, and were unable to assist with homework because their children's academic skills exceeded their own.²⁷⁴ The concerns of parents of truants paralleled the concerns of non-court-involved parents with whom I had met. The comprehensive strategy Lake County developed to address these challenges included: (1) a fall orientation to provide parents with necessary information; (2) a "Soccer on Sundays" program for truant students and their fathers, which incorporated both social events and information; (3) an incentive program whereby parents who learn how to use the online student tracking system receive a refurbished computer to monitor their child's progress; (4) family resource coordinators to help families; (5) parent-teacher conferences and at-home visits; and, (6) an internet-based homework and mentoring support program for youth.²⁷⁵

Fourth, schools can employ restorative justice practices to respond to conflicts in lieu of other disciplinary policies.²⁷⁶ According to the parents who advocated for changes to Chicago Public Schools' disciplinary policies, "The big idea of restorative justice is that students can and should learn to understand why their

ports website, *Case examples*, http://www.pbis.org/school/primary_level/case_examples.aspx (last visited July 21, 2014).

273. Site visit to Southwest jurisdiction, Oct. 2011.

274. HARVARD FAMILY RESEARCH PROJECT & UNITED WAY, THE FAMILY ENGAGEMENT FOR HIGH SCHOOL SUCCESS TOOLKIT: PLANNING AND IMPLEMENTING AN INITIATIVE TO SUPPORT THE PATHWAY TO GRADUATION FOR AT-RISK STUDENTS 74 (2011), available at <http://www.jsri.msu.edu/upload/resources/FEHS.pdf>.

275. *Id.* at 74.

276. See generally Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281, 286 (2012).

misbehavior is wrong and be allowed the opportunity to ‘make it right.’”²⁷⁷ As a result of family advocacy, Chicago Public Schools revised their student discipline policies in 2007.²⁷⁸ The revised Student Code of Conduct allows schools, parents, and communities to use restorative justice programs such as Peace Circles, Peer Juries, and community service as alternatives to suspension, expulsion, or arrest for many offenses.²⁷⁹ Here is an example of a Peace Circle in action:

[A] young man came in late to school one day and exchanged words with the security guard. He yelled and she hollered back, and it escalated from there. Soon, the principal heard the yelling, and asked them to sit in a Peace Circle. At first, the security guard refused, saying the student had threatened her. She thought he should be suspended or arrested for talking that way to her. But, after some convincing, both agreed to participate.

In the Peace Circle, it came out that this young man was having problems at home—his mother had been arrested, and he was caring for his younger siblings. He was late to school because of all that he was dealing with at home, and he was mad and frustrated with himself for letting it all overwhelm him. The security guard was angry too. She felt disrespected. But as she listened, she came to empathize with his situation. She even offered to spend time with the boy to help support him.

By the end of the Peace Circle, the two agreed to speak more respectfully to one another, and to spend time together. The student was not suspended or arrested. Instead, he had found someone to listen to him and to be there for him, and both parties involved had learned a lesson about themselves and about each other.²⁸⁰

c. Neighborhood-Based Strategies

In addition to schools, many youth come to the attention of justice agencies because of youth-adult conflicts within neighborhoods. There is extensive literature documenting the effect of neighborhoods on crime,²⁸¹ and in particular how crime is clustered in certain physical spaces or “hot spots.”²⁸² Adults call the police to deal with youth behaviors that the adults find annoying, disrespectful, or threat-

277. POIR-PAC ELEMENTARY JUSTICE COMMITTEE, *supra* note 261 (quote from a parent member of POIR-PAC).

278. *Id.* at 1.

279. *Id.* at 4-5.

280. *Id.* at 7.

281. See, e.g., Robert Bursik & Harold G. Gamsick, NEIGHBORHOODS AND CRIME: THE DIMENSIONS OF EFFECTIVE COMMUNITY CONTROL (1993); Clifford R. Shaw & Henry D. McKay, JUVENILE DELINQUENCY AND URBAN AREAS (1942); Robert J. Sampson, Steven Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multi-Level Study of Collective Efficacy*, 77 SCI. MAG. 918 (1997).

282. See, e.g., David Weisburd, Nancy A. Morris & Elizabeth R. Groff *Hot Spots of Juvenile Crime: A Longitudinal Study of Arrest Incidents at Street Segments in Seattle, Washington*, 25 J. QUANTITATIVE CRIMINOLOGY 443 (2009).

ening.²⁸³ For example, storeowners may call the police to enforce anti-loitering laws to prevent youth from congregating outside their stores. Neighbors may call the police if youth play their music too loud late at night. Rather than resolve the underlying conflict, police are often called to disperse the youth. The short-term fix of involving the police to resolve these disputes often has long-term negative consequences for the youth and stability of the community overall.²⁸⁴

During a site visit to a jurisdiction in the Southwest, I spoke with the executive director of a nonprofit community agency. I inquired whether they had ever had a problem with a youth that resulted in them calling law enforcement or referring the child to a local justice agency. The director explained that the organization had not needed to involve law enforcement in any dispute. He then proceeded to recount a story of how they had resolved a situation involving a youth who had committed vandalism on a wall of a new building. Instead of calling the police, the director contacted the child's father and they met to work out an appropriate way for the child to repair the damage and do community service.²⁸⁵

This type of informal and pragmatic solution presumably takes place everyday across America. However, I wondered if there was a systematic way or model to address these types of conflicts. Among system experts, there was broad consensus that one of the leading conflict resolution programs in the country is the Community Conferencing Center in Baltimore, Maryland. The Center is a conflict transformation and community justice organization that provides ways for people to resolve conflicts and crime.²⁸⁶ Their work has been recognized nationally and

283. See MICHAEL S. SCOTT, U.S. DEPARTMENT OF JUSTICE OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, *DISORDERLY YOUTH IN PUBLIC PLACES*, 6 PROBLEM-ORIENTED GUIDES FOR POLICE SERIES 3-4, available at http://www.cops.usdoj.gov/html/cd_rom/inaction1/pubs/DisorderlyYouthinPublicPlaces.pdf ("Communities are often divided over what constitutes acceptable youth conduct. This is especially true in areas undergoing substantial demographic change—for example, an influx of youth where older residents predominated, or an influx of a new ethnic or racial group. Some misconduct, even if accepted by the community, might not be tolerable from a legal standpoint. Conversely, some youth conduct may bother some community members, but may be perfectly legal, perhaps even constitutionally protected. You must balance youths' right to congregate in public against others' right to be free from annoyance, harassment and intimidation. Furthermore, the legal grounds for disrupting youth gatherings in public are typically vague. It is easy to get frustrated by demands to control disorderly youth where no clear legal authority to do so exists. Young people often do not fully appreciate their conduct's effect on others. What they believe to be normal and legitimate behavior can sometimes make others apprehensive or afraid. Sometimes the mere presence of large youth groups, or their physical appearance (dress, hairstyles, body piercings, and tattoos), is intimidating regardless of their conduct. People often perceive youth groups congregating in public to be gangs and, therefore, dangerous. The elderly are particularly intimidated by large youth groups. In addition, group size may influence individual behavior—teenagers often behave in front of a group of peers in ways they would not if they were alone or in pairs.").

284. Arrests, even without convictions, have detrimental impact on youth. Pager, *supra* note 13.

285. Site visit to Southwest jurisdiction, October 2011.

286. CMTY. CONFERENCING CTR., <http://www.communityconferencing.org/> (last visited Feb. 16, 2013).

internationally for its use of restorative justice practices.²⁸⁷ The resolution of conflicts will vary based on local conditions, but here is one example of how the Center helped one neighborhood avoid residents calling the police to complain about noise and trash issues attributed to youth.

One neighborhood had a dispute over youth playing basketball in a local alley and the Center was asked to provide a facilitator to convene a meeting between neighborhood residents.²⁸⁸ With support from the facilitator, the residents developed a community contract that established clear guidelines of behavior. Youth were provided clear hours that were appropriate for playing basketball, were prohibited from using profanity, and were required to clean up their trash.²⁸⁹ Adults were required to speak directly with the youth or their parents about any problems before calling the police.²⁹⁰ With a contract in place, the local residents were able to obtain a real long-term resolution to the conflicts that did not involve police unnecessarily.

2. Services and Diversion at Arrest

As explained in Part II.B, the literature suggests that communities should decrease the time that youth are exposed to dangerous detention conditions and re-think how to get youth services they may need without justice-system involvement because children who spend any time in facilities are at extremely high risk of physical, sexual, and emotional abuse.²⁹¹ A parent in the focus groups conducted in this study commented: “I thought that when our son was sent to detention that this might scare him from continuing down the path he was going. Nothing is further from the truth. I saw firsthand the damage that detention did to our son.”²⁹²

The indicator most likely to predict future imprisonment is the amount of time a young person spends in a facility and having contact with the justice system.²⁹³ According to system experts, the two most promising strategies currently in use to prevent unnecessary contact with justice system processing and facility stays are civil citation programs and juvenile assessment or reception centers.

Since 2007, the Civil Citation program in Miami-Dade County, Florida, has lowered the numbers of referrals to the juvenile justice system for minor offenses and addressed youth and family needs without imposing an arrest record on

287. *Id.*

288. *Greenspring Neighborhood Conflict*, CMTY. CONFERENCING CTR., GREENSPRING NEIGHBORHOOD CONFLICT, http://www.communityconferencing.org/index.php/impact/resolving/greenspring_neighborhood_conflict/ (last visited Feb. 16, 2013).

289. *Id.*

290. *Id.*

291. *See supra* note 79 and accompanying text; *see also* BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 2-3 (Nov. 28, 2006), available at http://www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf.

292. Focus Group Transcript, Wash. D.C. (Apr. 27, 2011) (quote from a parent).

293. *See supra* note 194.

youth.²⁹⁴ Rather than arresting a youth for a low-level offense, law enforcement officers give youth civil citations.²⁹⁵ Youth who are formally arrested can also be referred to the program during the regular juvenile intake process as well.²⁹⁶ Youth receive a comprehensive screening and assessment and are then referred to services to meet their needs.²⁹⁷ For example, if a substance abuse problem is identified during the assessment, a youth will be referred to the appropriate service even if the offense was not drug-related. The program also has an accountability component. Youth receive a variety of sanctions, which can include community service, writing essays or letters of apology, or providing restitution to victims.²⁹⁸ Youth who successfully complete both their assigned services and sanctions will leave the program without an arrest record.²⁹⁹

In addition to helping youth and families, the program has helped the system become more effective overall. Police are able to spend more time on the street and less time transporting youth to booking or attending court hearings for low-level offenses.³⁰⁰ Further, with the removal of the low-level youth from the system, prosecutors, public defenders, juvenile probation officers, and judges all have more time to spend on the more serious cases, which require greater attention.³⁰¹ The program has been successful at improving public safety, reducing disproportionate minority contact, and has also produced cost savings for the county.³⁰² In its initial year, the program had a 3% recidivism rate, and reduced juvenile arrests by 30%. Officials have also calculated an immediate \$5,000 cost savings per child by avoiding arrests.³⁰³

In contrast to the Civil Citation program where, generally, the youth have not been taken into custody, other jurisdictions are developing juvenile reception or assessment centers to avoid the negative consequences of juvenile detention when youth are taken into custody.

The New Avenues for Youth Reception Center in Multnomah County, Portland, Oregon, is one example of a police-centered detention alternative.³⁰⁴ Prior to the development of the Center, all youth taken into police custody were

294. Telephone interview with Karen Diazgranados, Civil Citation Referral Reduction Coordinator (Apr. 2012).

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. MIAMI-DADE CNTY. JUVENILE SERVICES DEP'T, CIVIL CITATION INITIATIVE BROCHURE (on file with author).

301. *Id.*

302. *Id.*

303. *Id.*

304. MULTNOMAH CNTY. DEP'T OF COMM. JUS., *Engaging the Police and the Development of an Alternative Reception Center for Non-detainable Youth*, in DETENTION REFORM PROCESS (2006), available at http://web.multco.us/sites/default/files/dcj-juvenile/documents/engaging_the_police.pdf; Juvenile Detention Alternatives Initiative, *JDAI Model Site: Multnomah County, OR*, JDAI HELP DESK, <http://www.jdaihelpdesk.org/SitePages/multnomah.aspx> (last visited July 21, 2014).

brought to the juvenile detention facility. The Center was developed to divert youth who pose no threat to public safety away from the juvenile justice system and toward community resources.³⁰⁵ The Center operates twenty-four hours a day, seven days a week, and primarily serves status offenders and homeless and runaway youth.³⁰⁶ The Center has been very successful at reducing the number of non-detainable incarcerated youth, reducing the time police spend on juvenile intake processes, preventing youth homelessness, and preventing youth from requiring greater services by providing services for high-risk youth and families.³⁰⁷ Here is one story of how young people who are arrested can be accommodated using these principles:

Jesse, a 15-year-old boy, was arrested with some friends after they failed to pay the bill at a local Denny's restaurant. The manager caught them and called the police. While the other kids were picked up by their parents from juvenile hall, Jesse's mom did not want him back. The local runaway and homeless youth shelter was called and took him in. After calling his mom, staff at the shelter learned she had a life-long drug and alcohol problem, and she was now homeless and living with friends. She did not have the ability to care for her son.

With the shelter advocating on Jesse's behalf, the court dropped the charges on Jesse, and the county social services agency agreed to place him with the shelter as an emergency foster care placement. While working with Jesse, staff at the shelter convinced his mom to sign herself into residential treatment and encouraged him to maintain contact with her by visiting with her twice a week.

To come up with a permanent plan for Jesse, the county social service agency convened a team decision-making meeting to bring all Jesse's family and adult friends together to brainstorm where he could live. The Family Finding model was used, and Jesse's "cousin" volunteered to have Jesse live with her. Although not biologically related, the cousin had known Jesse his entire life and he had relationships with her other children. The cousin listed her rules that Jesse had to abide by and he agreed.³⁰⁸

B. Peer Support for System-Involved Families

Once a child does have contact with the justice system, both the focus groups and surveys indicate that families lack basic information about the process of the court system, their legal rights, and the role of the various players in the system. For example, one parent said:

305. MULTNOMAH CNTY. DEP'T OF CMTY. JUST., *supra* note 304.

306. *Id.*

307. *Id.*

308. This anecdote is adapted from Sparky Harlan's blog. Sparky Harlan, *Denny's Grand Slam and N.E.R.F.S – Jesse Goes Home*, WORDPRESS (Jun. 30, 2009), <http://sparkyharlan.wordpress.com/2009/06/30/dennys-grand-slam-and-n-e-r-f-s-jesse-goes-home/>.

When we first got involved in the system, the thing that baffled us was the lack of communication. At no point did anyone in authority tell us what was happening with our child. We were uninformed and didn't know the questions to ask and we didn't know our rights; worse we were meant to feel like we didn't have any. Our child was transferred from one facility to another and no one ever told us where they were taking him.³⁰⁹

Parents are often asked to consent to the questioning of their child without access to an attorney to guide them,³¹⁰ although many times children are questioned without the knowledge of their parents at all. Parents are unprepared for this responsibility: "The officers could not or would not explain anything. My lack of experience and knowledge led me to make mistakes that negatively impacted my child's outcome in the system."³¹¹

Families sometimes receive guidance from police, intake workers, the child's attorney, or others, only to learn later that they were misinformed: "They will manipulate youth. I didn't know the system. A social worker came at me, she asked what kind of help we can get your son. I gave answers and found out she was with the [District Attorney] and using the information against me—against us."³¹²

309. Focus Group Transcript, Wash. D.C. (Apr. 27, 2011) (quote from a parent).

310. See e.g., Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 226–27 (2006) ("About a dozen states require the presence of a parent or other 'interested adult' when police interrogate juveniles as a prerequisite to a valid Miranda waiver. Those states assume that most juveniles require an adult's assistance to effectively exercise Miranda rights. They presume that a parent will enhance a juvenile's understanding of and ability to exercise rights and reduce coercive pressures. Courts recognize that juvenile justice policies have become more punitive and that youths require additional safeguards to achieve functional procedural parity with adults. Commentators generally support parental presence safeguards, even though they recognize the limited utility of such safeguards.") See also, Hillary B. Farber, *The Role of the Parent/guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 AM. CRIM. L. REV. 1277, 1280 (2004) (explaining three inadequacies with the parent/guardian advisor: the standardless approach with which courts assess their appropriateness; the inadequacy with which adults understand Miranda; and conflicts of interest between youth and parents.); Note, *Juvenile Miranda Waiver and Parental Rights*, 126 Harv. L. Rev. 2359, 2359 (2013) (explaining "that juvenile interrogations violate hybrid parental-Miranda rights by threatening to elicit false confessions that remove innocent children from their parents' care. Per se rules offer solutions: either parents should be empowered to guard their interests through truly informed consent, or child suspects should be provided with other risk-reducing protections.").

311. Focus Group Transcript, Wash. D.C. (Apr. 27, 2011) (quote from a parent); see also Ellen Marrus, *Gault, 40 Years Later: Are We There Yet?* 44 CRIM. L. BULL. 413, 428 (2008) ("Parents may encourage their son or daughter to waive counsel because they do not understand the consequences the child may be facing. Parents want their child to tell the truth and take responsibility for his or her actions. Or they may simply be frustrated or embarrassed and not know how to handle the situation, wanting it to end as quickly as possible. Parents may also not want the involvement of a lawyer because of the costs involved in hiring an attorney and may encourage the child to waive counsel for that reason.").

312. Focus Group Transcript, Wash. D.C. (2005) (quote from a parent).

In the surveys, system stakeholders acknowledged how families were impacted by the lack of knowledge and how difficult it is to explain the system to families. System professionals tend to use a lot of jargon in their jobs with which families are unfamiliar.³¹³ A detention specialist noted, “[p]arents often don’t understand how serious the process is.”³¹⁴ One detention alternatives coordinator commented that it is “difficult to convey complex court policy and budget issues that affect services.”³¹⁵

However, system professionals who have already implemented programs to educate family members about the justice system report that these changes have eased family anxiety and improved family engagement. One county probation director noted that “[f]amilies seem relieved to find information about the court and how things are handled.”³¹⁶ Another noted, “[f]amilies are more engaged because they understand the system better.”³¹⁷

While some family member experts were interested in advocating for individual legal representation to represent their interests in juvenile court, from my research, individual legal representation for family members is not a viable policy solution. Parents of children in the justice system often lack the financial resources to pay for attorneys themselves and are unlikely to obtain a constitutional entitlement to legal advice.³¹⁸ A more promising approach to ensuring that families have access to legal knowledge is through providing generalized access to legal information through community-based organizations and existing legal organizations. Two community groups in California, the Asian Law Caucus in San Francisco,³¹⁹ and the Albert Cobarrubias Justice Project in Silicon Valley, are providing innovative ways to support families without the individual representation model.³²⁰

Peer support is not, nor should be, considered a substitute for legal services.³²¹ In addition to legal advice, families clearly want the assistance of a peer—a family member who has gone through the system before and survived the experi-

313. Quote from justice system professionals, survey (Respondent 2-42).

314. Quote from justice system professionals, survey (Respondent 3-1).

315. Quote from justice system professionals, survey (Respondent 2-12).

316. Quote from justice system professionals, survey (Respondent 2-16).

317. Quote from justice system professionals, survey (Respondent 3-11).

318. See *Lassiter v. Dep’t of Social Servs. of Durham Cnty., N.C.*, 452 U.S. 18 (1981) (finding parents in the child welfare system do not have a general right to counsel).

319. *Criminal Justice Reform*, ASIAN AMERICANS ADVANCING JUSTICE: ASIAN LAW CAUCUS, <http://www.advancingjustice-alc.org/what-we-do/criminal-justice-reform> (last visited Aug. 6, 2014).

320. ALBERT COBARRUBIAS JUSTICE PROJECT, <http://acjusticeproject.org/> (last visited Aug. 5, 2014).

321. Whether and how families should be involved in the legal representation of the child is the subject of much debate outside of the scope of this article. See, e.g., Kristin Henning, *It Takes A Lawyer to Raise A Child?: Allocating Responsibilities Among Parents, Children, and Lawyers in Delinquency Cases*, 6 NEV. L.J. 836, 837 (2006); David R. Katner, *Revising Legal Ethics in Delinquency Cases by Consulting with Juveniles’ Parents*, 79 UMKC L. REV. 595, 632 (2011) (arguing the American Bar Association’s Model Rules of Professional Conduct Rule 1.14 should be modified to include a duty to consult with parents or caregivers of youth in the delinquency system); Marrus, *infra* note 311.

ence—to help them navigate the justice system.³²² One parent expressed the following sentiment: “Have a system where somebody actually talks to the parents . . . so they’ll know exactly what to expect, what not to expect, what their rights are I think that would make a big difference.”³²³ Another parent stated:

You really don’t have any guidance from anyone on what the next steps are. So, for us it was a whole lot of unknowns, frustrations, and time delays we didn’t know how to handle. Now we hear things we should have asked, but at the time I didn’t know I could ask.³²⁴

Peer support has demonstrated effectiveness in other child-serving systems and we are beginning to see the benefits in juvenile justice as well. Although the lack of consistency across programs and approaches has made evaluating the impact of peer support programs difficult across all child-serving systems, a recent review of the existing studies found that, “while the empirical base for parent-to-parent support is limited, the results from the studies reviewed are encouraging.”³²⁵ The availability of peer support in juvenile justice is limited at present, but survey responses from system stakeholders suggest that they would support expanding these types of services to help explain the system to families.³²⁶

Although I could not identify a jurisdiction that offers peer support from the moment of arrest or first contact with the system, based on the research from Colorado discussed below, families would likely benefit from continuous access to peer support. Through my research I identified three different types of peer support currently available in the juvenile justice system: peer support services available at the juvenile court, peer support offered to families of youth with mental health needs, and an organizing and advocacy model of peer support.

1. Educating Families at Arrest

Families need access to information and support at the first contact with the justice system when they have the most questions and the anxiety is highest. During one of the site visits, I noticed that the main receptionist of one program had a nameplate on her counter, “Director of First Impressions.”³²⁷ In the justice system, police officers hold this title, and frequently the first impressions they leave with families are negative. In a focus group conducted by the Maryland Coalition of Families for Children’s Mental Health, a family member described how she met the police: “When I came in, he was on the floor and a police officer had his foot on my grandson’s back.”³²⁸ I have observed many families talk about the

322. OJJDP Focus Groups, *supra* note 93, at 10.

323. MARYLAND JUVENILE JUSTICE COAL., PARENTS’ VOICES: DON’T TREAT US LIKE I DID THE CRIME 5 (on file with author).

324. OJJDP Focus Groups, *supra* note 93, at 21.

325. VESTINA ROBBINS, JANICE JOHNSTON, HOLLY BARNETT, WILLIAM HOBSTETTER, KRISTA KUTASH, AL DUCHNOWSKI & SASHA ANNIS, THE LOUIS DE LA PARTE FLA. MENTAL HEALTH INST., DEP’T OF CHILD & FAMILY STUDIES, PARENT TO PARENT: A SYNTHESIS OF THE EMERGING LITERATURE 6 (July 2008), available at http://cfs.cbc.s.usf.edu/_docs/publications/parent_to_parent.pdf.

326. See *supra* text accompanying notes 313–317.

327. Site visit to Southwest jurisdiction, October 2011.

328. WALKER & FRIEDMAN, *supra* note 260 (quote from a family member).

harm they experience witnessing their children in handcuffs and shackles. Law enforcement need to recognize the role they play in establishing the tone of the families' experience throughout the justice system.³²⁹

While I was unable to identify a jurisdiction that provides peer support from the time of arrest, family experts expressed a clear desire for law enforcement to establish protocols for working with families. The protocols would require law enforcement to notify parents immediately, or at regular intervals thereafter if they were not reached, whenever a child is brought into custody. Parents or other family members who come to retrieve the child should then receive an information and resource packet explaining the child's and parents' rights; contact information for legal assistance and peer support organizations; the locations of the courthouses and facilities in the jurisdiction with directions and public transportation information; and basic information about the juvenile justice system and process.³³⁰

The earliest example of peer support I could identify from my research currently in place starts at the courthouse. In King County, Washington, a program known as Juvenile Justice 101 helps families understand the juvenile justice system.³³¹ The central feature of the program is an orientation provided to family members at the courthouse.³³² Family members who have already been through the juvenile system with their own youth, known as "Family Partners," run 30-minute orientation sessions in the courtroom lobby.³³³ Families also receive a resource booklet including information about court programs and community services, and guidance about how to track youth behaviors and other information useful for court staff.³³⁴ Following the court orientation, the Family Partners speak individually with families to offer emotional support, information about court and/or community resources, and provide mentoring and coaching about how to work effectively with court staff.³³⁵ Family Partners also develop and participate in workshops in the community to present information about the juvenile court process.³³⁶

2. Family Advocate Model Throughout Court Involvement

Since the concept of peer support originated out of the mental health field in the 1980s, many jurisdictions across the country have established peer support programs for the subset of the juvenile population that has mental health needs.

329. As this article was going to print, protests over the shooting of unarmed youth, Michael Brown, had erupted in Ferguson, Missouri. The media coverage confirms the pivotal role that policing plays in popular perceptions of justice. Further, perceptions of justice vary widely by race. *See, e.g.*, Noah Gordon, *Americans' Deep Racial Divide on Trusting the Police*, ATLANTIC, Aug. 20, 2014, <http://www.theatlantic.com/politics/archive/2014/08/americans-deep-racial-divide-on-trusting-the-police/378848/>.

330. Consultations with family system experts.

331. SARAH CUSWORTH WALKER, MICHAEL PULLMANN, ERIC TRUPIN, JACQUELYN HANSEN, & STARCIA AGUE, DIV. OF PUB. BEHAVIORAL HEALTH & JUSTICE POLICY, A GUIDEBOOK FOR IMPLEMENTING JUVENILE JUSTICE 101 (2011).

332. *Id.* at 6.

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* at 7.

In 2007, Colorado established the Family Advocacy Demonstration Program to provide peer support for families in three locations.³³⁷ The goal of the program was to ensure that youth and families get access to necessary services to keep youth from reoffending.³³⁸ Pilot sites used funds from the demonstration program to pay for a family advocate—a parent or primary guardian who has raised or cared for a child with a mental health or co-occurring disorder, and a family system navigator—an individual who has the skills, experience, and knowledge to work with these youth.³³⁹ While there were subtle differences between the three jurisdictions, they generally used a wraparound approach to work with the families. In each of the three sites, the family advocate, often with the support of a service coordinator or family systems navigator, developed and implemented an individualized plan for the youth and family. The program was subsequently evaluated with promising findings. During the study period, only 9 of the 90 participating youth (10%) were convicted of additional crimes after enrolling in the family advocacy program.³⁴⁰ Given the high-risk nature of the youth involved, the Colorado Department of Public Safety found the program to be cost-effective, explaining that, if sites were able to avert a *single* conviction for one youth in the program, estimated at a cost of \$57,276, sites could offset nearly 99.7% of the average cost to run the *entire* program in the site.³⁴¹ In other words, the program pays for itself. While currently restricted to youth with mental health needs, the evidence suggests that these programs could be modified and expanded to meet the needs of all families. In fact, this was one of the recommendations from Colorado's pilot study because family members sometimes find the behavioral health label a turn-off. Here is how one youth described his experience with the program:

Family Agency Collaboration and the Family Advocate helped my family by going to court with me and my family. By working with people in the juvenile justice system get me on track with court and legal difficulties. They also helped with finding me a job to keep me out of trouble on the streets. I fell behind in school and I needed to get my credits up so they also help me find summer school options. Once I found a school to go to they help make sure I was doing good in school and checked to see if my grades was on track. I also learned the rights that I have as a citizen which help me because I now know what I can and can't do and know if I will get in trouble for the certain things I do. I am also interested in black history and I received help and assistance with books and information that was very useful to know my history and culture. This program has helped me become a better and more mature person and I will always use the skills I learned in life so that I can be successful.³⁴²

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. KERRY CATALDO & KEVIN FORD, COLO. DIV. OF PUB. SAFETY, OFFICE OF RESEARCH & STATISTICS, EVALUATION OF THE COLORADO INTEGRATED SYSTEM OF CARE FAMILY ADVOCACY DEMONSTRATION PROGRAMS FOR MENTAL HEALTH JUVENILE JUSTICE

Rhode Island has developed a similar peer support program, Project Hope, for youth returning to their homes and communities from the Rhode Island Training School (“RITS”).³⁴³ Youth transitioning out of the RITS are referred to the program 90–120 days prior to the youth’s discharge, allowing Project Hope staff time to get to know the youth and family prior to developing a service plan with them.³⁴⁴ Family Service Coordinators, each of whom is an individual who was or is the principle caregiver of a youth who has had contact with the juvenile justice system, work closely with the Clinical Social Worker at the RITS while the youth is incarcerated, and with the Probation Officer when the youth returns to the community.³⁴⁵

Youth and their families meet with the Family Service Coordinator to participate in a strengths-based assessment and discuss what services they need to keep the youth in the community and avoid reincarceration.³⁴⁶ A plan is then developed as a team with the youth, family, clinical social worker, probation officer, and community officers before the youth is released.³⁴⁷ A case manager is also assigned to ensure implementation of the plan for a period of 9–12 months following discharge.³⁴⁸ Throughout this time, the planning team is brought together to change or modify the youth’s plan when needed.³⁴⁹

3. Peer Support, Organizing, and Advocacy for System Reform

In contrast to peer support mechanisms, which are aimed at helping families understand or access services within the system, a growing number of family advocacy organizations have been forming to provide support to families wanting to reform the justice system overall. Justice for Families³⁵⁰ is one national effort supporting families in the justice system comprising several state and local family advocacy organizations across the country. One of the first of these organizations to develop, Families and Friends of Louisiana’s Incarcerated Children (“FFLIC”),³⁵¹ is a statewide advocacy organization working on behalf of Louisiana youth. FFLIC’s work includes representing youth at disciplinary hearings, developing parent-advocates through training, advocating for policy change, and repre-

POPULATIONS: FINAL REPORT (2010), *available at* <http://cospl.coalliance.org/fedora/repository/co:7890> (quote from a youth).

343. KATHLEEN R. SKOWRA & JOSEPH J. COCOZZA, NAT’L CTR. FOR MENTAL HEALTH AND JUVENILE JUSTICE (NCMHJJ), BLUEPRINT FOR CHANGE: A COMPREHENSIVE MODEL FOR THE IDENTIFICATION AND TREATMENT OF YOUTH WITH MENTAL HEALTH NEEDS IN CONTACT WITH THE JUVENILE JUSTICE SYSTEM 62 (2007), *available at* <http://www.ncmhjj.com/Blueprint/programs/ProjectHope.shtml>.

344. *Id.*

345. *Id.* at 92.

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. JUSTICE FOR FAMILIES, <http://www.justice4families.org/file/Home.html> (last visited Feb. 16, 2013).

351. FAMILIES AND FRIENDS OF LOUISIANA’S INCARCERATED CHILDREN, <http://www.ffclic.org/home> (last visited Feb. 16, 2013).

senting the voices of community and family members in a variety of policy-making arenas.³⁵²

FFLIC started in 2000 when a few parents came together to advocate for reforms to Louisiana's juvenile justice system:

We were tired of the phone calls about broken jaws and trips to the hospital; we were furious at how far we had to travel to see our own children; we were frustrated at the defense attorneys who were too busy to meet with our children before trial; we were sick of being told that we are bad parents and that our children were beyond help!³⁵³

Working in coalition with other advocacy organizations, including the Juvenile Justice Project of Louisiana, among others, FFLIC secured passage of the Juvenile Justice Reform Act of 2003, which closed Tallulah, the state's most notorious juvenile facility.³⁵⁴ FFLIC continues to be a voice in juvenile justice reform efforts in Louisiana.³⁵⁵

C. Family-Driven Cases, Programs, and Policies

Procedural justice scholars have found that people's perceptions about the legitimacy of public institutions shape law-related behavior.³⁵⁶ One of the main reasons the system has failed to work effectively with families is the lack of trust that exists between families and system stakeholders. As mentioned earlier, both Pennington and Justice for Families found the juvenile justice system seriously deficient in integrating the family perspective in the courtroom.³⁵⁷ In addition to modifying courtroom procedures, the survey results explicitly acknowledge that the underlying philosophy and culture of the justice system needs to change to begin viewing families as partners. Stakeholders noted how the roles of professionals will need to change to valuing families. In particular, juvenile judges will have to be "[open] to the notion that families have strengths and sometimes know best what will work to turn their children's lives around."³⁵⁸ Probation staff will also need to change focus from being "enforcers of court orders and brokers of services rather than providers of services."³⁵⁹ System stakeholders explicitly noted the need for change but that many system professionals do not want to "to give up any control or share power."³⁶⁰ For example, one director of a state juvenile corrections agency said we "need to break down thoughts such as 'the family caused the problem so why should they have a say?'"³⁶¹ Even when agencies do make space for

352. *Id.*

353. *Id.* (quote from a family member).

354. *Id.*

355. *Id.*

356. See, e.g., TOM TYLER, WHY PEOPLE OBEY THE LAW (2006); Tom Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006).

357. See Pennington *supra* note 51; JUSTICE FOR FAMILIES *supra* note 24.

358. Quote from juvenile justice professional, Survey (Respondent 2-40).

359. Quote from juvenile justice professional, Survey (Respondent 1-3).

360. Quote from juvenile justice professional, Survey (Respondent 2-13).

361. Quote from juvenile justice professional, Survey (Respondent 1-7).

family members in system decision-making and meetings, one program coordinator noted that “[f]amily members are still the minority. They feel like there is a space to be heard but they are not being listened to as equals.”³⁶²

DuPage County, Illinois, one of the jurisdictions that has made the most progress on family engagement, included these ideas in its “Core Concepts of Family Centered Justice” document:

- Dignity and Respect: Juvenile justice system staff listens to and honors family perspectives and choices. Family knowledge, values, beliefs and cultural backgrounds are incorporated into the planning and delivery of services.
- Information Sharing: Juvenile justice system staff communicates and shares information with families in ways that are affirming and useful. Families receive timely, complete and accurate information in order to effectively participate in decision-making.
- Participation: Families are supported in participating in services and decision-making and are empowered to increase their level of participation.
- Collaboration: Families, juvenile justice system staff, and justice system leaders collaborate in program and policy development, implementation and evaluation, and in professional education, as well as in delivery of services.³⁶³

In this Subpart, I describe ways the justice system can involve families in decision-making processes at three levels: in individual cases; in assisting in program development and training opportunities; and at the broader level of law and policy reform.

1. Families Instigate Program, Training, and Law & Policy Changes

In most jurisdictions, deciding how to hold youth accountable and deciding how to address youths’ needs—the very structure and process of the justice system itself—has been devoid of family input. The offenses youth are charged with often become the primary driver of what happens in cases—choices typically made by an individual police officer, probation officer, or prosecutor.³⁶⁴ When matters are handled formally in court, prosecutors in many states become the ultimate deciders of the offenses youth are charged with, which typically triggers additional laws related to sanctions and sentencing.

Making the justice system more responsive to families means revisiting laws and policies across the board. However, changing these laws does not mean

362. Quote from juvenile justice professional, Survey (Respondent 2-14).

363. See HARTNETT & BERRY, *supra* note 202.

364. *Juvenile Justice System Structure & Process*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, http://www.ojjdp.gov/ojstatbb/structure_process/case.html (last visited Feb. 16, 2013).

that families do not want consequences for their children who have engaged in delinquent or criminal activities. Families recognize that youth need to be held accountable for their actions and want to keep their communities safe. In Pennington's study she found that:

[E]ven parents who distrusted the legal system wanted their child to learn a positive lesson from the court experience. For example, an African American mother who viewed the legal system as racist described her role in the court process as "helping my son understand what his responsibilities are and to help him see how serious the charge is." One Latina mother with very negative views of the police and the courts told me "if he did what they say he did, he should be punished so he can learn."³⁶⁵

The laws and policies that generate the most concern for families involve the availability, quality, and equitable distribution of community-based services and resources; discriminatory policing practices, e.g., stop and frisk; definitions, scope, and application of criminal laws (particularly school-based offenses); court-related policies (including availability and quality of appointed counsel, charging practices and protocols of prosecutors, and court-related fees and fines); the use of incarceration for youth and conditions of confinement; and laws allowing youth to be prosecuted in the adult criminal justice system and held in adult jails and prisons.³⁶⁶

In addition to involving families in decisions about law and policy changes, many agencies are starting to involve family members in designing programs, training staff, and serving on policy-making bodies.³⁶⁷ For example, in response to parents asking for support, Santa Cruz, California has implemented a family strengthening program, *Cora y Corazón*, that honors cultural and family traditions.³⁶⁸ In Pennsylvania, the Family Involvement in Juvenile Justice Curriculum was piloted in 2011, and provides an opportunity to explore the assets and biases that practitioners bring to their relationships with family.³⁶⁹ The results demonstrate a statistically significant shift in participants' attitudes toward family, with nearly 80% of participants agreeing that "the benefits of family involvement in the court process outweigh the drawbacks" after the training, as compared to approximately 50% of participants before the training.³⁷⁰

While involving parents in program development and training seems to be a relatively new innovation occurring infrequently, government agencies at all levels have made more headway in involving family and youth representatives on their oversight or advisory bodies. At the federal level, family and youth represent-

365. Pennington, *supra* note 51, at 528.

366. This list of policies was created in conjunction with family experts.

367. See, e.g., WENDY LUCKENBILL, *MODELS FOR CHANGE: STRENGTHENING THE ROLE OF FAMILIES IN JUVENILE JUSTICE* (Guidi Weiss ed., 2012), available at www.modelsforchange.net/publications/352/Innovation_Brief_Strengthening_the_Role_of_Families_in_Juvenile_Justice.pdf.

368. Personal communications with Santa Cruz juvenile justice professionals.

369. LUCKENBILL, *supra* note 367.

370. *Id.*

atives have been added to serve on advisory bodies such as the Federal Coordinating Council on Juvenile Justice and Delinquency Prevention³⁷¹ and the Working Group for OJJDP's National Center for Youth in Custody.³⁷² States such as New Jersey, New Mexico, Pennsylvania, Virginia, and Washington have also included family members on the State Advisory Groups that administer the Juvenile Justice and Delinquency Prevention Act.³⁷³ Even local governments have appointed family members to serve on policy-making bodies. One example is the Calcasieu Parish's Children and Youth Services Planning Board in Louisiana.³⁷⁴ The Board consists of diverse members of the community, including parent organizations and youth.³⁷⁵ The members serve two-year terms and help to develop and implement a comprehensive plan for youth in the community, which encourages positive youth development, diverts children away from the criminal justice and child welfare systems, reduces the incarceration of youth, and responds to delinquency in the community.³⁷⁶

Incorporating the views of family members into efforts at these three levels can be expected to show promising results. Some system professionals attribute family engagement efforts with having a positive impact on the development of system-wide policies overall.³⁷⁷ System stakeholders believe that a better understanding of the needs of families has led to a higher quality of policy development and changes in protocol.³⁷⁸ One probation director noted that "[f]amily members offer a fresh or unique perspective on issues involving their kids."³⁷⁹ Another case manager noted that "[i]nput by parents and their experience in the Juvenile Justice system enables us to formulate new policies and procedures to make our system more effective."³⁸⁰ Family feedback has also been a useful source of information for quality assurance activities. For example, some agencies conduct quality assurance calls with family members to learn about how probation officers are interacting with clients and about the treatment they are receiving from various service providers.³⁸¹

371. *Member Information*, COORDINATING COUNCIL ON JUVENILE JUSTICE AND DELINQUENCY, <http://www.juvenilecouncil.gov/members.html> (last visited July 20, 2014).

372. THE NATIONAL CENTER FOR YOUTH IN CUSTODY, <http://nc4yc.org/about-us/working-group.html> (last visited July 20, 2014).

373. Author personal communication with Nancy Gannon Hornberger, former Executive Director of the Coalition for Juvenile Justice.

374. CALCASIEU PARISH CHILDREN & YOUTH PLANNING BOARD, BY-LAWS, <http://www.calcyph.org/home> (last visited Feb. 16, 2013).

375. *Id.*

376. *Id.*

377. *See e.g.*, Quote from juvenile justice professional, Survey (Respondent 2-42) ("input by parents in their experience in Juvenile Justice system, enables us to formulate new policies and procedure to make our system more effective.")

378. *Id.*

379. Quote from juvenile justice professional, Survey (Respondent 2-28).

380. Quote from juvenile justice professional, Survey (Respondent 2-42).

381. Conversation with Kim Godfrey, Executive Director, PBS Learning Institute.

2. Families Resolve Individual Cases Themselves

Since early juvenile courts viewed parents as responsible for their child's misconduct, early court reformers paid little attention to parents within the court process. Families often have no formal role in the court process.³⁸² Families are often unaware of their options, are confused about the process, lack access to legal advice, and feel pressure to encourage their children to plead guilty.³⁸³ Assuming a child is guilty of a delinquent or criminal act and families and system professionals agree that justice system involvement is warranted,³⁸⁴ what combination of sanctions, supervision, and services is appropriate to impose on a youth? How should these decisions involve the input of families?

In most jurisdictions, juvenile court judges make these decisions after receiving recommendations from prosecutors, probation officers, and the youth.³⁸⁵ Typically the court relies on a combination of diagnostic evaluations and reports to make the final decision.³⁸⁶ Shockingly, judges rarely consult with parents. According to the Justice for Families survey of more than one thousand family members, more than 80% of family members reported that they were never asked by a judge what should happen to their child.³⁸⁷ As experienced by the family, even the "best" decisions and disposition plans can be alienating. Families report not having a chance to express their views about what they believe will help their child, or an opportunity to explain how they may have difficulty fulfilling certain plan requirements.³⁸⁸ A parent in Pennington's study said, "I'm responsible to shelter her, feed her, clothe her, raise her, water her and watch her grow. Why don't I have a say when I'm in a courtroom? Why am I sitting in the back?"³⁸⁹

Pennington further observed parents who wanted to speak but were silenced: "During one hearing the juvenile's attorney told the judge that family therapy would benefit the client and his mother. The mother tried to interject two times, saying, 'Can I say something?' After the second time, the judge said to the mother, 'Ma'am, please be quiet.'"³⁹⁰

382. Pennington, *supra* note 51, at 483.

383. See *supra* notes 309–23 and accompanying text.

384. Most children in the justice system confess to crimes and plead guilty. See BARRY C. FELD, KIDS, COPS, AND CONFESSIONS 170 (2013) (reporting study of interrogated sixteen- and seventeen-year-olds charged with felonies in which 92.8% waived their Miranda rights and 88.4% confessed or made incriminating statements). My research project did not attempt to address modifications to the criminal justice system to protect wrongful convictions of youth from false confessions. See generally Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 LAW & PSYCHOL. REV. 53, 61 (2007); Joshua A. Tepfer, Laura H. Nirider & Lynda M. Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887, 891 (2010).

385. OJJDP Statistical Briefing Book Juvenile Justice System Structure & Process, *supra* note 363.

386. *Id.*

387. JUSTICE FOR FAMILIES, *supra* note 24.

388. See WALKER & FRIEDMAN, *supra* note 260.

389. Pennington *supra* note 51, at 491.

390. *Id.* at 492.

In the worst instances, families have been publicly scolded and humiliated in front of their children, making it even more difficult to exercise any parental authority over the child when they return home.³⁹¹

System stakeholders had minimal comments on decision-making within the court process, but did speak frequently of the barriers that families face in participating in court processes or other treatment meetings or programs.³⁹² Many family members work multiple jobs, have shift work with odd hours, or have unreliable work schedules. As one detention specialist noted, “[t]he court hearing schedule is not friendly to the parents, meaning a parent may sit all day waiting for the hearing to be held costing them a day’s pay and therefore it is likely that they are less willing to be cooperative.”³⁹³

Jurisdictions are now experimenting with a variety of team decision-making approaches, which include families as valued members and voices in creating disposition plans.³⁹⁴ Team-based approaches may be particularly helpful when families seek out the justice system for assistance. After consulting with system and family experts, the approach families most want when they have not sought out the justice system is one approach known as Family Group Decision Making (FGDM).³⁹⁵

FGDM has been adopted in several jurisdictions across the country, but overall its use is rather limited relative to traditional court practices.³⁹⁶ FGDM is based on the values and beliefs that families have strengths and can change, families are the experts on themselves, options are preferable to advice, empowering

391. See, e.g., WALKER & FRIEDMAN, *supra* note 260.

392. This reflects, in part, how the survey was structured. My prompt questions were not specifically directed at court processes. See *infra* Appendix.

393. Quote from juvenile justice professional, Survey (Respondent 3-8).

394. ANNIE E. CASEY FOUND./CASEY FAMILY SERVS., FAMILY TEAMING: COMPARING APPROACHES (May 31, 2012), available at <http://ncjfcj.org/sites/default/files/teaming-comparing-approaches-2009.pdf>. Juvenile Court Judge Steven Teske created the Finding Alternatives for Safety and Treatment (FAST) panel, in Clayton County, Georgia. Every Monday, Wednesday and Friday mornings the FAST panel, a group of experts from child welfare authorities, school psychologists, mental health counselors, and community volunteers, interviews the child’s parent or guardian to make recommendations to the judge. Teske says that as a result of the FAST panel the court is more efficient about processing cases, and judges make more informed decisions since he follows the panel’s suggestions 95 percent of the time. Chandra Thomas-Whitfield, *‘FAST’ Track to Juvenile Justice*, JUV. JUST. INFO EXCHANGE (Jan. 1 1970), available at <http://jjie.org/‘fast’-track-to-juvenile-justice/2483/>.

395. The practice originates from New Zealand where FGDM is required by law to be used at multiple points in their youth court system. See Farber *supra* note 23, at 137 n. 217.

396. See, e.g., Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667, 677 (2005) (“Estimates in 2001 showed ninety-four active FGC programs in the United States.”). See also Mark Umbreit & Howard Zehr, *Restorative Family Group Conferences: Differing Models and Guidelines for Practice*, 60 FED. PROBATION 24, 27 (1996).

people is preferable to controlling them, and empowering families will lead to families controlling their own lives.³⁹⁷

Pennsylvania has been using the practice since 1999.³⁹⁸ FGDM has been so successful that it has turned into a cross-system practice.³⁹⁹ It has expanded to almost all 67 counties in Pennsylvania and is used in multiple government agencies including child welfare and adoption, mental health and education, and juvenile probation and adult corrections.⁴⁰⁰ Although county implementation of FGDM differs across Pennsylvania, the basic process involves a Family Group Conference, which is a meeting with family members, victims, service providers, the referring worker, and the youth.⁴⁰¹

Dauphin County, Pennsylvania uses FGDM in cases ranging from simple assault and theft to offenses involving guns and drugs.⁴⁰² The juvenile probation office screens the case for eligibility to participate in FGDM and gets victim agreement before seeking agreement from the District Attorney.⁴⁰³ Overall, FGDM appears to engender several positive outcomes. According to Judge Richard Lewis:

[T]hrough [Family Group Conferences] I have seen more parents become involved with their children, more creative plans, stronger ownership of those plans, a significant reduction in recidivism, and a positive shift in the relationship between juvenile probation officers and our community.⁴⁰⁴

The conferences save significant court time and resources. There also appears to be a correlation between the conferences and job satisfaction for staff. The normal staff turnover in the child welfare and juvenile probation department is approximately 15%, but for staff involved with FGDM it is about .05%.⁴⁰⁵ Implementing FGDM also contributes to overall cultural changes because, as staff focus on what families can do, they “critically analyze their agency documents and recognize that, without having intended to do so, they have adopted a condescending attitude rampant with systemic language and acronyms.”⁴⁰⁶

Family members also report satisfaction with FGDM: 97% of family participants indicate that they would recommend the practice to others, 92% agree

397. PENNSYLVANIA FAMILY GROUP DECISION MAKING LEADERSHIP TEAM, PENNSYLVANIA FAMILY GROUP DECISION MAKING TOOLKIT: A RESOURCE TO GUIDE AND SUPPORT BEST PRACTICE IMPLEMENTATION 2 (2009), *available at* <http://www.pacwcbt.pitt.edu/Organizational%20Effectiveness/FGDM%20Evaluation%20PDFs/FGDM%20Toolkit.pdf>.

398. *Id.* at 12.

399. *Id.*

400. *Id.*

401. *See* ALLAN MACRAE & HOWARD ZEHR, THE LITTLE BOOK OF FAMILY GROUP CONFERENCES: NEW ZEALAND STYLE (2004).

402. *See* PENNSYLVANIA FAMILY GROUP DECISION MAKING LEADERSHIP TEAM, *supra* note 396, at 188.

403. *Id.*

404. *Id.*

405. *Id.* at 197.

406. *Id.* at 19-20.

that the process addressed their concerns, and 99.5% say that it provided adequate protection for the child.⁴⁰⁷

Justice system stakeholders and families will have mixed opinions about the best way to prevent offending. Some will believe that punishing or imposing sanctions on a child will “teach him a lesson” to make it less likely a youth will commit a crime again in the future. Others will be more concerned about addressing the “root causes” of a child’s behavior to prevent reoffending. The needs and wishes of victims must also be considered. However, assuming that the plans family members create can meet the public safety goals of the system, the family views of how to respond to their children should be paramount. While allowing families flexibility in determining appropriate sanctions for their child might violate notions of fairness across children, in other contexts, these differences are embraced. As Lois Weithorn has noted, “variation among family approaches to childrearing is, in theory, to be protected—indeed, promoted—in the absence of indications that particular approaches are harmful to children, not only because we believe that parental autonomy is an inviolable component of liberty, but also because its protection benefits us all in producing a more robust citizenry and a stronger society.”⁴⁰⁸

D. Justice-System Services Which Strengthen Families

While juvenile justice systems are different across the country, former Chief Probation Officer for Santa Cruz County, Judith Cox, noted before an audience of juvenile probation officials that:

[D]espite vast geographic distances, varying fiscal climates and significant demographic and political differences, the juvenile justice systems in the United States are strikingly similar. They are built upon vast expenditures on secure detention and commitment facilities—not on communities, kids and families. We are a “one size fits all” service delivery system which still relies on suppression and incapacitation as the predominant operating principles.⁴⁰⁹

Converting to Family-Driven Justice necessarily entails making a dramatic shift in the operating principles of the current system. In the focus groups, the majority of family members were disappointed with the way the justice system handled their youth, but a few had positive experiences. As one parent in the focus groups said: “The staff was very supportive. They took into consideration the burdens that we faced and they gave us an opportunity to determine ways to overcome those burdens. They did include the family in my son’s treatment plan and they followed through with services that helped our son.”⁴¹⁰

If low-level youth are successfully diverted away from the justice system as advocated earlier, this will necessarily mean that youth with more serious crim-

407. *Id.* at 197.

408. *See* Weithorn, *supra* note 43, at 1497.

409. Judith Cox, former Chief Probation Office for Santa Cruz County, Remarks at the JDAI National Inter-site Conference (Sept. 2007) *available at* <http://www.jdaihelpdesk.org/santacruz/Santa%20Cruz%20County%20CA%20Beyond%20Detention%202007.pdf>.

410. OJJDP Focus Groups, *supra* note 93, at 13.

inal histories or offenses will remain in the system. For these medium- to high-risk youth, justice system interventions will typically have three distinct and overlapping purposes—sanctions to hold youth accountable or impose retributive punishment, supervision to keep youth from offending while under the court jurisdiction, and services to prevent offending in the future.

Families should be involved in helping to determine how to hold the youth accountable, keep the public safe, and ensure that youth get the services they need. Families are likely to generate hundreds of creative solutions to accomplish these goals and many of the plans will contain interventions tailored to the specific interests and needs of the youth, e.g., establishing mentors for the child, connecting youth to structured after-school activities or employment, which will require minimal monitoring or oversight by justice agencies. However, medium- to high-risk youth are also likely to require more justice agency supervision. This Subpart profiles what family-friendly interventions look like for these medium- to high-risk youth by profiling intensive, yet community-based approaches, and residential programs known to take a strengths-based approach to families.⁴¹¹

1. Comprehensive Community-Based Services

The most commonly used alternative to incarceration, standard probation, has not been very effective for youth and families, and communities are beginning to rethink their practices. As Dave Mitchell, Chief of the Placement Services Bureau for the Los Angeles County Department of Probation, has said, “Traditionally Probation has been aligned with law enforcement and our ‘treatment’ approach was that if you break your conditions of probation, I will lock you up. As a treatment approach, this was not successful.”⁴¹²

Many jurisdictions have modified the way probation officers work with youth and families. Sacramento, Yolo, and Los Angeles Counties in California; Multnomah County in Oregon; and the states of Utah and Washington are training probation and parole officers to work in a strengths-based manner with youth and families through a program known as FFP, which stands for “Functional Family Probation or Parole.”⁴¹³ Other jurisdictions contract with providers to allow youth to participate in the standardized evidence-based programs.⁴¹⁴

Finally, jurisdictions across the country are also contracting with providers for a range of programs to meet specific community needs. In this Subpart, I profile two large-scale community-based providers, Southwest Key and Youth

411. A recent report by Shaena Fazal, not available during the research period, provides more detail on the characteristics of effective community-based programs. SHAENA FAZAL, *SAFELY HOME*, available at <http://www.safelyhomecampaign.org/Portals/0/Documents/Safely%20Home%20Preview/safelyhome.pdf?ver=2.0>.

412. CASEY FAMILY PROGRAMS, *STORIES OF PRACTICE CHANGE IN JUVENILE PROBATION: USING FLEXIBLE FUNDS IN LOS ANGELES COUNTY TO SUPPORT YOUTH AND THEIR FAMILIES* 6 (July 2010), available at http://latchildrenscommission.org/cmsl_152704.pdf.

413. Telephone Interview with Jason Medina, FFT-FFP National Trainer and Consultant (Sept. 21, 2011).

414. See *supra* notes 171–176 and accompanying text.

Advocate Programs, Inc., which system experts agree provide some of the very best care to youth in the country through contracting with traditional justice agencies. Both providers approach the work from the perspective of community engagement and cultural competence, and work with families, youth, and system stakeholders to craft individual plans to meet the specific needs of youth and public safety.

Southwest Key is a national nonprofit organization founded in 1987 to improve the lives of children and their families.⁴¹⁵ Founded by Dr. Juan Sanchez, Southwest Key provides quality education, safe shelter, and alternatives to incarceration for thousands of youth each day, while helping families become economically self-sufficient.⁴¹⁶ Southwest Key operates more than 50 programs throughout the United States and works with youth and families in Arizona, California, Georgia, New York, Texas, and Wisconsin.⁴¹⁷ The average costs of their programs vary depending upon the number of youth and length within the program, but typically are a fraction of the costs of detention or incarceration.⁴¹⁸ Southwest Key offers programs ranging the entire continuum of care for youth in the juvenile justice system, including empowerment and prevention, diversion, alternative education, alternatives to detention and out-of-home care, specialized treatment, and transitional living and reentry.⁴¹⁹ Staff are on-call twenty-four hours a day, seven days a week to meet the unique needs of youth and families, and individualize their approach to each family by developing flexible service plans in partnership with them.⁴²⁰

Youth Advocate Programs, Inc. (“YAP”) works with child welfare, juvenile justice, behavioral health, and disability and education systems to develop and offer community-based alternatives for the highest-risk children and families.⁴²¹ YAP traces its roots to a 1975 ruling that prohibited young people from being incarcerated with adult inmates at a facility in Pennsylvania.⁴²² Since that time, YAP has grown and operates programs in 25 major U.S. cities as well as dozens of other urban, suburban, and rural communities in 16 states and the District of Columbia.⁴²³ A large percentage of youth served by YAP are at the “deep end” of the juvenile justice system.⁴²⁴ YAP has developed some unique service delivery principles that are the hallmark of their programs. For example, they recruit staff from the neighborhoods where the young people and families live, providing an eco-

415. *About Us*, SOUTHWEST KEY PROGRAMS, PHILOSOPHY & BACKGROUND <http://www.swkey.org/about/philosophy/> (last visited July 21, 2014).

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

421. *Who We Are*, YOUTH ADVOCATE PROGRAMS, INC., <http://www.yapinc.org/WhoWeAre/tabid/479/Default.aspx> (last visited July 21, 2014).

422. *Who We Are > Our History*, YOUTH ADVOCATE PROGRAMS, INC., <http://www.yapinc.org/WhoWeAre/tabid/488/Default.aspx> (last visited July 21, 2014).

423. *Id.*

424. *See id.*

conomic stimulus to the neighborhood.⁴²⁵ They also provide opportunities for young people and their families to give back to others so that youth are not viewed as “needy” clients but are considered resources and contributors to their community overall.⁴²⁶ As a result, YAP strengthens both the family and community in ways that will last beyond the length of time the youth is in contact with the justice system.⁴²⁷ Here is an example of how YAP works with youth:

A juvenile court judge referred Jose, a young arsonist to YAP to see if the program could keep the child out of a residential placement. Jose’s mother was perceived to be non-compliant, resistant, and angry, and social workers felt they had no choice but to remove Jose from her home. YAP quickly identified the problem—Jose’s mother did not speak English. Once she was given an interpreter, she was able to fully participate in discussions about what was happening with her child and her behavior changed.

Jose was assigned an Advocate recruited from the neighborhood where he lives. The Advocate spent 15 hours each week working with Jose and his mother to develop and implement a plan that would get Jose the help he needed. Together they came up with a three-point plan. First, YAP used a wraparound flexible fund to hire an experienced therapist to complete an assessment of Jose and provide a series of treatment sessions to address his firestarting behavior. YAP also arranged for Jose to receive a volunteer mentor from the local firehouse who lived in the neighborhood. YAP both recruited the fireman and trained him to be a big brother to Jose. Second, YAP addressed the need to get more male role models for Jose to address his problem with adult authority figures. Jose identified an uncle as someone he would like to spend more time with. Unfortunately Jose’s uncle had no time for him as he worked several part-time jobs to provide for his family. YAP approached the uncle to see if he would be willing to give up one of his jobs and be hired by YAP instead. Through YAP, the uncle was able to spend 10 hours per week with Jose and they were able to develop a significant relationship. Finally, Jose was encouraged to find activities that he enjoyed participating in. Jose expressed an interest in soccer, and his advocate introduced him to the high school soccer coach who encouraged Jose to join the team.

Through this comprehensive and tailored approach, Jose has been able to stay at home with the loving support of his mother and uncle. He is thriving in the community, has not started any more fires, and has developed several meaningful and positive relationships with adults and other youth who will help him stay on track in the future.⁴²⁸

425. *See id.*

426. *See id.*

427. *See id.*

428. Anecdote provided by Shaena Fazal, National Policy Director, Youth Advocacy Programs, Inc.

2. Safe, Rehabilitative, Residential Options

No experience is more predictive of future adult difficulty than confinement in a secure juvenile facility.⁴²⁹

Families differ in their experiences and opinions about out-of-home care since the quality and safety of facilities varies drastically across the nation. Some families feel that residential placements are a necessary option, particularly as a way to remove the child from a negative environment or peers.⁴³⁰ Families also recognize that some youth may be a risk to themselves or others and need an out-of-home placement for a short period of time.⁴³¹ However, there is widespread agreement among families that the majority of juvenile detention and corrections facilities are geared towards punishment, not treatment, and are inappropriate for their children.⁴³² Families also uniformly oppose housing youth in adult facilities for any length of time.⁴³³ Here is one parent who spoke about the lack of appropriate services for youth in detention:

In eighth grade my son received counseling that worked really well for him. Years later, while locked in a detention facility, my son recognized he needed therapy and requested it. He was told that they could provide him with counseling once a month. We all understand that for therapy to be effective, it needs to occur more than once a month. I believe if my son were given the proper counseling when he asked for it, he would not be struggling with some of the issues he has today.⁴³⁴

Youth feel similarly. Instead of helping them, youth say many facilities only make them worse: “You get better at what you came in for,”⁴³⁵ and “Jail makes you better at the opposite of good.”⁴³⁶

If children must be held in a residential facility, families want them to be housed in facilities that look and feel like facilities operated by the Missouri Division of Youth Services (“DYS”).⁴³⁷ Missouri uses a continuum of programs ranging from day treatment programs to secure care in small, community-based facilities located throughout the state.⁴³⁸ The Missouri facilities are some of the safest

429. Michael Wald & Tia Martinez, *Connected by 25: Improving the Life Chances of the Country's Most Vulnerable 14–24 Year Olds* (working paper) (2003), available at http://betterfutures.fcny.org/betterfutures/connected_by_25.pdf.

430. Information gathered during interviews with professionals during site visits.

431. *Id.*

432. OJJDP Focus Groups, *supra* note 93, at 25.

433. *Id.* at iv–v.

434. *Id.* at 11.

435. JUVENILE JUSTICE PROJECT OF LOUISIANA, NO BETTER OFF: AN UPDATE ON SWANSON CENTER FOR YOUTH 4 (Nov. 2010), available at <http://media.nola.com/politics/other/No-Better-Off-Final-Report-2.pdf>.

436. *Id.*

437. See OJJDP Focus Groups, *supra* note 93, at 3–4.

438. RICHARD MENDEL, THE MISSOURI MODEL: REINVENTING THE PRACTICE OF REHABILITATING YOUTHFUL OFFENDERS 16 (2010), available at http://missouriapproach.org/storage/documents/aecf_mo_fullreport_webfinal.pdf.

and most effective in the nation.⁴³⁹ They create a positive peer culture among youth by using a group treatment model facilitated by youth development specialists instead of a traditional correctional approach that keeps youth in cages.⁴⁴⁰ Not only do youth released from the Missouri system have lower rates of recidivism, but youth and families appear to do better in terms of educational, health, and other indicators of child well-being.⁴⁴¹

There are several key elements of the Missouri approach to families which includes operating on a core philosophy anchored in beliefs and concepts such as “the family is vital to the treatment process” and “families as experts.”⁴⁴² First, all agency leaders and direct-service providers participate in family systems training and are taught to respect the family hierarchy, communicate with families in a supportive and respectful manner, and value family expertise.⁴⁴³ The DYS State Advisory Board also includes two former DYS parents and a former DYS youth.⁴⁴⁴ Second, DYS assigns a single service coordinator to work with each youth and family throughout their time with DYS, and families are engaged in the planning process within the first several days after the court commits a youth.⁴⁴⁵ Service coordinators make home visits to meet families in familiar and comfortable settings, and to minimize the impact of the power imbalance that may intimidate or inhibit family participation.⁴⁴⁶ There are also Regional Family Specialist positions to provide family counseling and support on a voluntary basis to interested families.⁴⁴⁷ Third, most youth are placed in small facilities within a 50-mile radius of their homes and facility visitation policies are flexible to respond to family interests, customs, and convenience.⁴⁴⁸ Transportation is also provided to ensure families have access to regular visits.⁴⁴⁹ Families may also tour any of the DYS facilities to review conditions.⁴⁵⁰

Regardless of the type of out-of-home setting a youth is placed in, families want their children to be safe, receive appropriate rehabilitation services, and have access to strong academic and/or vocational programs to prepare them for careers.⁴⁵¹ And despite their children being in an out-of-home placement, families want to be full participants in the everyday lives of their children, which means having regular opportunities to call and visit with a child, and regular communication with staff. Youth also want contact with family members. According to the

439. *Id.* at 9.

440. *Id.* at 2.

441. *Id.* at 6–7).

442. Email from Tim Decker, former Director of the Missouri Division of Youth Services, to Neelum Arya (June 6, 2012) (on file with author).

443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.*

448. *Id.*

449. *Id.*

450. *Id.*

451. *See supra* notes 428–29 and accompanying text.

national Survey of Youth in Residential Placement, the overwhelming majority (94%) of youth want to maintain contact with their families.⁴⁵²

The survey results demonstrate that detention and correctional officials agree that justice systems achieve better outcomes for the youth in their care when they involve families. Two quotes from directors of state corrections agencies demonstrate why—"Overall the kids are happier whenever we involve their parents"⁴⁵³ and "Students are more likely to engage in treatment when families are involved."⁴⁵⁴ System stakeholders also note that maintaining family contact is essential to ensure a smooth transition back into the community.⁴⁵⁵ Engaging families in the change process means that "[f]amily support [is available] to help provide corrective action to youth when needed."⁴⁵⁶

Involving families when the child is residing in an out-of-home placement is challenging but it can be done. The Texas Juvenile Justice Department has made family engagement a top priority as part of efforts to overhaul the entire system after scandals of rampant sexual abuse.⁴⁵⁷ Texas began implementing a series of reforms including developing the Parents' Bill of Rights⁴⁵⁸ and a family handbook

452. Andrea J. Sedlack & Karla S. McPherson, *Conditions of Confinement: Findings from the Survey of Youth in Residential Placement*, JUV. & JUST. BULL. 1 (May 2010), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/227729.pdf>.

453. Quote from juvenile justice professional, Survey (Respondent 1–5).

454. Quote from juvenile justice professional, Survey (Respondent 1–13).

455. Survey results with juvenile justice professionals.

456. Quote from juvenile justice professional, Survey (Respondent 1–6).

457. Texas Presentation PowerPoint (on file with author).

458. The Texas Department of Juvenile Justice Parents of Incarcerated Children - Bill of Rights, states that:

Parents of children who have been committed to the care, custody, or control of the Texas Juvenile Justice Department have the following rights:

- 1) As a parent, you have the right to know that you and your child will be treated fairly regardless of race, religion, national origin, language, economic status, disability, gender, sexual orientation, or age and that each child will be treated as an individual.
- 2) As a parent, you have the right to expect the agency to provide a safe, secure, and sanitary environment for your child.
- 3) As a parent, you have the right not to be judged, blamed or labeled because of your child's incarceration.
- 4) As a parent, you have the right to be a vocal and active advocate on behalf of your child.
- 5) As a parent, you have the right to be an active participant when decisions are made about your child.
- 6) As a parent, you have the right to be informed about matters related to your child's welfare.
- 7) As a parent, you have the right to access your child's records.
- 8) As a parent, you have the right to meaningful participation in your child's treatment, including medical treatment, behavioral health treatment, and education.
- 9) As a parent, you have the right to communicate with your child, including visitation, telephone, and mail.

explaining key features and policies within the facilities.⁴⁵⁹ Here is one example of how Texas facilities attempt to make families feel welcome in their facilities:

Our youth escort their family members to the school where they are free to wander the halls, introducing their families to their teachers and showing off their classrooms. Staff members hang back and supervise the youth and families from a distance, giving the participants a greater sense of attending the type of open house one might expect at a regular public school.⁴⁶⁰

My research identified several ways to maximize youth—family contact and facilitate family—staff communication, including the following practices: using an expanded definition of family for visitation and mail correspondence;⁴⁶¹ creating a welcoming environment for families through developing special materials to explain their rights and the policies of the facility, hosting special events, soliciting regular feedback from families, and making the physical environment more inviting and comfortable for families; ensuring that visitation hours are convenient for family members, providing low- or no-cost phone services, and assisting with transportation to aid regular communication between youth and families; and providing training and support to staff to facilitate effective staff–family interactions and promote regular communication.⁴⁶²

E. Youth Fully Prepared for Successful Futures

In creating a juvenile justice system that reflects what families want for their children, justice agencies would not only respond to youths' behavior problems, but will make sure that youth are fully prepared for life as adults. James Forman, former public defender and developer of a school for children involved in the justice system in Washington, DC, has noted that:

10) As a parent, you have the right to be assured that all TYC staff are professional, courteous, and respectful.

11) As a parent, you have the right to know that TYC will take immediate corrective action to protect the rights of parents and youth.

12) As a parent, you have the right to meaningful participation in your child's transition-planning — from intake through release, parole, and eventual discharge.

TEXAS DEPARTMENT OF JUVENILE JUSTICE, PARENTS OF INCARCERATED CHILDREN - BILL OF RIGHTS, *available at* http://www.tjjd.texas.gov/programs/parents_bill_of_rights.aspx.

459. Texas Presentation PowerPoint (on file with author).

460. Staff quote, PowerPoint presentation provided by the Texas Youth Commission to the Models for Change network (on file with author).

461. Immediate family members are parents, legal guardians, foster parents, legal wife, children, siblings, and grandparents. Extended family members are any adult related to the youth by blood, adoption, or marriage, and any adult who has an established household or mentoring relationship with the youth. This would include godparents, clergy, teachers, neighbors, and family friends.

O.H. CLOSE YOUTH CORR. FACILITY, VISITOR INFORMATION AND RULES 1 (2008) (on file with author) (detailing how the facility, located in Stockton, California, defines family for visitation purposes).

462. Henderson et al., *supra* note 90; Osher & Hunt *supra* note 90; Texas Presentation PowerPoint (on file with author); Consultation with family experts.

Everything about the juvenile justice system tells young people who have been arrested how little hope we have for them. Consider what happens at a youth's first court hearing after an arrest. As a public defender, I stood next to clients every day and listened to judges tell them the same thing: "I'm going to release you on the condition that you: 1) do not get arrested again, 2) pass your weekly drug tests, and 3) carry an attendance card to school for your teachers to sign." As a public defender, it was my job to get my client the fewest conditions of release possible, so I certainly would never ask for more than that. But I was always amazed by the expectations conveyed in those judicial orders. What parent defines success as going to school, not using drugs, and avoiding arrest? Parents dream of college, of getting good grades, of children making a contribution to their families and communities. But such talk is absent from the juvenile court system, because the system does not think that children who have been arrested have that potential.⁴⁶³

Contrast Foreman's assessment of how the justice system treats youth with the family expectations for Hasan Davis, former Commissioner of the Kentucky Department of Juvenile Justice:

When I was 11, I got arrested, and I remember waiting at the police station for my mom. As I saw the other mothers arrive, I could see the fear, frustration, and embarrassment that comes with having a child get caught up in this system, which came out as anger and threats . . . [W]hen she showed up, she was really calm. I figured she didn't want to show herself in front of the police, and I thought she's going to lose it when we get in the car, but instead there was deafening silence. Halfway home I finally found the courage to look up at her, and she was crying these huge tears. She looked down at me and said, "Baby, if you could see what I see every time I look at you, you would know how great you are." Having family connections has been integral to my success. In the middle of my internal and external chaotic world, my mother and stepfather gave me the support and courage to find a path beyond my worst choices. And no matter what I did my mother refused to let me forget the powerful image she held up as the man I could one day be—it was something to aspire to.⁴⁶⁴

Under Family-Driven Justice, justice systems would move beyond the paradigm of reducing and managing risk, to unleashing the untapped potential within the children they are supervising. In a transformed justice system, agencies would foster the youth's innate potential, take concerted efforts to help remove the stigma and collateral consequences attached to justice system involvement, and also prepare youth to become positive leaders in their community. Many youth who

463. James Forman, Jr., *Education for Liberation*, 2 HARV. L. & POL'Y REV. 75, 79–80 (2008).

464. Interview with Hasan Davis, Acting Commissioner, Kentucky Department of Juvenile Justice, *New Leadership in Kentucky's Department of Juvenile Justice*, VERA INSTITUTE OF JUSTICE, (May 31, 2012), available at <http://www.vera.org/blog/new-leadership-kentucky%E2%80%99s-department-juvenile-justice>.

commit serious offenses are youth with creative and entrepreneurial spirits—talents that, in affluent communities, are recognized, nurtured, and developed, since they know these youth will become the future leaders of their community.⁴⁶⁵ In fact, many youth in the justice system are already natural leaders; their leadership qualities enabled them to lead their peers to participate in destructive activities. As a youth participant from YouthBuild, a program profiled below noted, “I considered myself to have leadership potential, but no outlet to express that potential.”⁴⁶⁶

Families want justice agencies to tap into these strengths and help youth see beyond their current circumstances to help them envision and develop the skills necessary to realize a brighter future for themselves. In this Subpart, I profile a variety of ways to ensure youth are fully prepared for their future.

1. Youth Obtain Skills Needed to Thrive

All youth, whether they have been involved in the justice system, need support from caring adults to make a successful transition to adulthood. Research shows that social and environmental factors such as having a safe place to live, employment, and a social network are more influential in desistance from crime than any psychopathology.⁴⁶⁷ Agencies need to take proactive steps to help youth develop the skills they need to navigate graduation from high school, postsecondary education, employment, and other life milestones. From my research, I identified one tool widely available to help justice agencies prepare youth for adulthood, the Casey Life Skills Assessment (“CLSA”).⁴⁶⁸

The CLSA is a free, online, youth-centered tool that comprehensively assesses the life skills that youth will need in adulthood.⁴⁶⁹ The tool was originally designed for youth ages 14–21, regardless of their living situation, and is as free as possible from gender, ethnic, and cultural biases.⁴⁷⁰ The CLSA is best used as part of collaborative conversations between the youth, family, and other service pro-

465. For example, in my previous interactions with incarcerated youth, several of the youth who were caught selling drugs were youth who could probably be characterized as entrepreneurial. If provided other legitimate avenues of earning money, I suspect many of the young people would have chosen other alternatives. Research also suggests this may be true as “a sizeable fraction of drug dealers report little to no drug use.” Rosenfeld et al., *supra* note 135, at 140.

466. THE CENTER FOR INFORMATION RESEARCH ON CIVIC LEARNING AND ENGAGEMENT, PATHWAYS INTO LEADERSHIP: A STUDY OF YOUTHBUILD GRADUATES (2012) available at <http://www.civicyouth.org/wp-content/uploads/2012/05/YouthBuild.pdf> (quoting former youth member of YouthBuild).

467. *Preventing Crime: What Works, What Doesn't, What's Promising*, RES. IN BRIEF (U.S. Dep't Just./Nat'l Inst. Just.), July 1998, available at <https://www.ncjrs.gov/pdffiles/171676.PDF>.

468. CASEY LIFE SKILLS PRACTICE GUIDE, <http://casey.org-casey-life-skills-resources/> (last visited Feb. 16, 2013).

469. *See id.*

470. Casey Life Skills Privacy Policy 1–7, available at http://www.casey.org/media/CLS_assessments_LifeSkills.pdf.

viders. After conducting the assessment, with support from other adults, youth develop individual learning plans to learn the skills they will need to be successful.⁴⁷¹

In addition to youth-directed individual learning plans, justice agencies should also be reevaluating the educational and programmatic offerings available to youth in residential settings to ensure they are adequately prepared for college or careers. The Pennsylvania Council of Chief Juvenile Probation Officers, in partnership with residential and day-treatment facilities across the state, have formed the Pennsylvania Academic Career/Technical Training Alliance (PACTT).⁴⁷² Participating facilities agree to align their education curricula with state standards issued by the Pennsylvania Department of Education, as well as offering career and technical education programs in high-demand areas, e.g., culinary arts, auto body.⁴⁷³ PACTT also works to ensure that schools in the community cooperate by providing education records in a timely manner and ensuring that credits transfer properly.⁴⁷⁴ Finally, PACTT helps facilities teach youth the “soft skills” they need to succeed in the market through a uniform manual and the development of a “student employability portfolio.”⁴⁷⁵

2. Strengthening Youth Capacities as Parents

As noted in the Introduction, the literature on the needs of children of incarcerated parents has focused predominately on parents in the adult criminal justice system, however, many youth (approximately 30% of teen males) involved in the justice system are parents themselves.⁴⁷⁶ Helping these youth develop and maintain bonds with their children is an emerging concern for juvenile justice agencies. While on one of the site visits to a residential facility I heard a baby cry. The realistic sound was coming from a group of young people learning about parenting behaviors using life-like dolls that mimicked infant behaviors requiring the young parent to change, feed, or soothe the pretend baby.⁴⁷⁷ These young people were learning skills for future parenting. My research also identified promising examples of programs working with young mothers and fathers.⁴⁷⁸

471. See *supra* note 467.

472. See About Us, PACTT ALLIANCE, <http://www.pacttalliance.us/about-us/what-do-we-do/> (last visited Sept. 11, 2013).

473. *Id.*

474. *Id.*

475. Employability/Soft Skills, PACTT ALLIANCE, <http://www.pacttalliance.us/resources/employability>.

476. ANNE M. NURSE, FATHERHOOD ARRESTED: PARENTING FROM WITHIN THE JUVENILE JUSTICE SYSTEM (2002).

477. Site visit to Midwest jurisdiction, October 2010.

478. One of the promising examples my research identified was the Center for Young Women’s Development in San Francisco, a provider of services for young mothers. The organization is currently in transition and is changing the programs and services they offer.

The Baby Elmo Program is a program currently being piloted in a number of jurisdictions across the country.⁴⁷⁹ A project of the Georgetown Early Learning Project and the Youth Law Center, the ten-session program focuses on strengthening family ties between incarcerated teen fathers and their infants using a standardized curriculum presented by facility personnel.⁴⁸⁰ The teen parents are taught how to praise, play, and interact with their children through the use of videos—Sesame Street Beginnings—provided by the Children’s Television Workshop.⁴⁸¹ After viewing a parenting lesson, the fathers play with their own children for an hour practicing what they have learned.⁴⁸² Early results of the program are promising. The teen parents develop an awareness of the role they can play in their child’s development.⁴⁸³ In addition, even in a relatively short time period, the babies appear to develop bonds with their fathers.⁴⁸⁴

3. Leadership Development

Finally, families want to ensure their children are proactively being developed as leaders. Adolescence is a time of identity development⁴⁸⁵ and, rather than developing a positive self-identity, justice-system involvement can instill or reinforce negative identities for youth such as “criminal,” “offender,” or “gang-banger.”

Justice agencies can help to counteract this labeling effect by developing special programs to foster the development of positive identities for youth. For example, the Azteca Soccer Program was formed by an entrepreneurial probation officer in Santa Cruz County, California.⁴⁸⁶ She wanted to help the local youth in her Watsonville community develop identities as soccer players.⁴⁸⁷ Latino youth from rival gangs come together as teammates and play soccer together in an adult recreational league.⁴⁸⁸ Due to high demand, a second team was also formed.⁴⁸⁹

479. Rachel Barr et al., *The Baby Elmo Program: Improving Teen Father–Child Interactions within Juvenile Justice Facilities*, 33 CHILD. & YOUTH SERVICES REV. 1555 (2011).

480. *Id.*

481. *Id.*

482. *Id.*

483. *Id.*

484. *Id.*

485. See, e.g., Alan S. Waterman, *Identity Development from Adolescence to Adulthood*, 18 DEVELOPMENTAL PSYCHOL. 341, 355 (1982) (“The most extensive advances in Identity formation occur during the time spent in college.”).

486. Calvin Men, *Watsonville soccer game benefit Azteca Soccer Academy*, SANTA CRUZ SENTINEL, July 26, 2014, 05:59:05 PM PDT), http://www.santacruzsentinel.com/copsandcourts/ci_26223467/watsonville-soccer-games-benefit-azteca-soccer-academy.

487. *See id.*

488. *Id.*

489. *ESPN Film Chronicles Work of Santa Cruz Probation Officer*, ANNIE E. CASEY FOUND. (Dec. 3, 2012), <http://www.aecf.org/blog/espn-film-chronicles-work-of-santa-cruz-probation-officer/>.

Through practices and games, adult players and coaches mentor youth.⁴⁹⁰ The youth learn sportsmanship, leadership skills, conflict resolution, and anger management, all while learning self-discipline and responsibility.⁴⁹¹ The games also provide an opportunity for families to get together and support their children.⁴⁹² The family members help with fundraising projects to support the team, attend games, and encourage their children to do their best on and off the field.⁴⁹³ This program is just one example of how justice agencies can use creativity to identify opportunities to help their youth develop an identity beyond their criminal activities.⁴⁹⁴

In contrast to this locally-grown program, a nationwide program that has had a substantial impact on developing youth leaders is YouthBuild. YouthBuild began in 1978 as a local, community-based organization in East Harlem.⁴⁹⁵ The program has developed into a nationwide network of 270 organizations with a variety of funders, including the U.S. Department of Labor.⁴⁹⁶ These YouthBuild organizations annually enroll approximately 10,000 highly disadvantaged young people in programs that combine education, job training, service, and leadership development.⁴⁹⁷ YouthBuild provides trade and job skills to youth by giving them opportunities to build or rehabilitate houses while also earning a GED or high school diploma.⁴⁹⁸

A substantial proportion of youth participating in YouthBuild programs have had justice-system involvement.⁴⁹⁹ According to the 2010 survey of entering students to the program, 32% have been adjudicated, and 11% have felony convictions.⁵⁰⁰ The program has documented success with these young people.⁵⁰¹ Every dollar spent on a YouthBuild student with a criminal record will result in a return on investment ranging from a minimum of \$10.30 up to \$43.80.⁵⁰² YouthBuild is proving that youth in the justice system can be developed into successful leaders:

[YouthBuild] is a very rare example of a large-scale leadership program primarily for young people who have dropped out of high school, [and] its philosophy challenges the dominant approach to that group. In general, major institutions, from schools to law enforcement agencies, treat them as threats to themselves and their

490. See *supra* note 489.

491. Santa Cruz Probation Grants and Initiatives, SANTA CRUZ CTY. PROBATION, <http://sccounty01.co.santa-cruz.ca.us/prb/grants.asp> (last visited Sept. 11, 2014).

492. TEDx TALKS, *TedxSantaCruz: Gina Castaneda – United Rival Teen Gang Members Through Soccer*, YOUTUBE (June 11, 2011), <http://www.youtube.com/watch?v=WfuA8tyCbaM#t=682>.

493. *Id.*

494. *Id.*

495. CENTER FOR INFORMATION RESEARCH ON CIVIC LEARNING AND ENGAGEMENT, *supra* note 464.

496. *Id.*

497. *Id.*

498. *Id.*

499. *Id.*

500. *Id.*

501. *Id.*

502. *Id.*

communities, and offer—if they offer anything at all—a combination of surveillance, remediation, discipline, and punishment to try to alter their destructive trajectories. In contrast, YouthBuild treats them as potential civic leaders and invests in their leadership skills.⁵⁰³

YouthBuild is intentional about leadership development for the youth involved in their programs, as well as for alumni.⁵⁰⁴ “I’m not the one that’s fighting—I’m the one that’s helping now.”⁵⁰⁵ In addition to supporting the expansion of YouthBuild programs, child-serving and justice agencies should revisit their current programs to ensure that youth are being cultivated as leaders.

CONCLUSION

The goal of my study was to shift the way the juvenile justice field addresses the needs of families by moving away from the current narrow and limited conceptions of family engagement to develop a broader vision of Family-Driven Justice. My findings suggest that system stakeholders that have done the most work responding to the needs of families have already begun to recognize the need to reexamine all juvenile and criminal justice policies and practices and have started to make this shift. However, overall the juvenile justice field has not developed a systematic way of integrating family engagement efforts into their broader system reform efforts. This Article has started to fill that gap by identifying the key features of what families want in a transformed justice system. Instead of an over-arching ideology that sees families as the cause of their children’s problems, the new transformed justice system would appreciate families as key partners in addressing their children’s needs.

As described in this Article, the current justice system routinely intervenes in the lives of young people and their families. The decisions about treatments or sanctions for youth not only fail to incorporate family members’ views about how best to address youth’s needs, but they are replaced by views of system professionals with little proven knowledge on how to improve the youth’s behavior. Worse, these system professionals routinely make decisions that expose youth to treatments and environments that increase offending and their risk of being abused. Scholars have suggested the treatments provided by the current justice system constitute “medical malpractice”⁵⁰⁶ and families refer to these practices as government-sanctioned or taxpayer-supported child abuse. To address these issues, I have proposed a radical transformation of the justice system using the principles of Family-Driven Justice.

While my research findings suggest that no jurisdiction currently meets these five features of a transformed justice system, there appears to be a consensus emerging within the field about what that approach would look like—beginning with challenging the default assumptions about how the justice system views families. Further, through providing specific examples currently in place in jurisdic-

503. *Id.*

504. *Id.*

505. *Id.*

506. Latessa et al., *supra* note 198, at 43–49.

tions across the country exemplifying this approach, I have also demonstrated that transformation is possible to achieve within the context of our current government structure.

While my study was not designed to identify ways to address mass incarceration, I believe that Family-Driven Justice would also make a significant impact in that endeavor. Paul Butler has explained how mass incarceration can be broken down into a five-step process.⁵⁰⁷ First, poor people, particularly people of color, receive more surveillance including police stops and arrests.⁵⁰⁸ Second, the “criminal law deliberately ignores the social conditions that breed some forms of law breaking.”⁵⁰⁹ The strategies identified in Part III.A, such as providing families with access to services without justice-system involvement, using conflict resolution strategies to address disputes in schools and neighborhoods, and using diversion programs in lieu of arrest, would help to address these two steps. Third, law enforcement, prosecutors, and judges, have both explicit and implicit biases against criminal defendants.⁵¹⁰ Fourth, guilt is assured by a criminal justice system which relies on expansive criminal liability, guilty pleas, and mandatory minimums.⁵¹¹ Family-Driven Justice would address these third and fourth steps by returning decision making back to the communities where crimes occur through the use of Family Group Decision-Making, and involving family members on oversight and policy reform initiatives. While not ridding the system completely of the explicit and implicit biases, FGDM and the inclusion of family members as part of policy reform efforts would likely reduce the level of bias and improve the overall efficacy of the justice system. The fifth and final step in Butler’s articulation of mass incarceration is “Repeat the cycle.”⁵¹² It is here where Family-Driven Justice makes the most significant impact. A family-driven approach recognizes that young people are within a unique stage of development and treating young people in the context of their families will achieve the lowest recidivism rates and therefore stop the flow into and out of jail or prison.

APPENDIX: SURVEY INSTRUMENT

Family Engagement in the Juvenile Justice System

At the request of the Annie E. Casey Foundation, the Campaign for Youth Justice is undertaking a study of how juvenile justice agencies are working to involve and engage with family members. This survey is expected to take approximately 10–20 minutes to complete. Your responses will not be critiqued, but will be aggregated to get a sense of how sites are engaging families. If you don’t feel like you can answer a question definitively, don’t sweat it; it’s acceptable to answer questions to the best of your knowledge. Please also forward this survey to additional persons in the site that might be best positioned to answer these questions.

507. Butler, *supra* note 29 at 2186.

508. *Id.* at 2183.

509. *Id.*

510. *Id.*

511. *Id.* at 2183–84.

512. *Id.* at 2184.

...

	Yes	No	In Progress
I. What tools and resources are available to help families navigate the juvenile justice system?			
Does your jurisdiction have a guide to the juvenile justice system that is available to parents and explains the court process?			
Does your jurisdiction provide a guide/inventory of resources available in the community to families?			
Does your jurisdiction offer a training orientation (e.g., video) that explains the juvenile justice system to families?			
Do family members have opportunities to ask other family members about the process? For example, are there parent liaisons or other family leaders designated to respond to parent questions?			
Is there a dedicated person whose job it is to help staff engage families?			
II. What services are provided to families by your agency, and how are families involved in determining which services they need?			
At the point of diversion, are families a part of a formal process deciding what resources would be helpful to them and their child?			
Are families involved in helping to develop case plans before or after disposition?			
Do families have access to parenting education or skills courses?			
If families are not satisfied with the services they are receiving, is there a way for families to request a different provider or service?			
III. How do the juvenile facilities or residential placements accommodate families?			
Do families have an option to visit their children at hours outside of normal business hours (e.g., evenings and weekends)?			
Do families have an option to visit their children at hours outside of normal visiting hours? In other words, if the family has a conflict with traditional vis-			

	Yes	No	In Progress
iting hours are there opportunities to make special arrangements for an alternate visiting time?			
Is transportation to the facility available for families who would otherwise be unable to access the facility?			
Do families have free or low-cost options to speak with their child over the telephone?			
Are families allowed to tour the juvenile facility?			
IV. How does your agency solicit input from families to inform policy decisions?			
Is there a formal body of family representatives to consult within your jurisdiction? For example, does your jurisdiction have a Family Council?			
Are there family representatives that participate on working groups or policy committees?			
Have you conducted focus groups within the last year to gather input from families?			
Has the jurisdiction solicited feedback from family members through periodic surveys?			
V. Does your agency train staff on how to work with families?			
Does the site provide training to staff on effective strategies to working with and engaging families?			
Do family members play a role in the training of staff?			
VI. Does your agency participate in a “system of care” or “wraparound” initiative with other agencies (e.g., mental health, child welfare, education)?			

In this survey we have asked you to identify some basic ways your agency is working with families. If you answered “Yes” to any question above, please describe in greater detail what your site has been doing. Please also describe any innovative ways your agency has been involving or engaging with families that may not have been asked here.

What are the top five benefits your agency has experienced by being more family-friendly or more intentional about involving families?

...

What have been the most challenging or frustrating aspects of working to engage families?

. . .

If your agency wanted to become more intentional around family involvement and engagement, what do you see as potential barriers to implementing practices and policies that recognize families as partners within your juvenile justice system?

. . .

Thank you for completing this survey. . . .



2006

It Takes a Lawyer to Raise a Child?: Allocating Responsibilities Among Parents, Children, and Lawyers in Delinquency Cases

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

Kristin Henning*

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.¹ 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 Gossett-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.² 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.³ 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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¹ *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).

² 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).

³ Browning, *supra* note 2, at 1.

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

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.⁶ 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.⁷

⁴ *Id.*

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

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

⁷ 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.⁸ 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

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).

⁸ 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,⁹ 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

⁹ 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,¹⁰ most enter the system as adolescents, ranging from thirteen to seventeen years old.¹¹ As youth move from childhood to adolescence, the parent-child dyad and other relationships within the family evolve.¹² 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.¹³ Adolescents begin to share in the decision-making process at home and exercise an increasing amount of autonomy over their own behavior.¹⁴ The adolescent eventually begins to view himself as psychologically separate from his parents¹⁵ and develops his own identity, philosophies, and values as he spends less time at home and more time with friends.¹⁶ 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.¹⁷

¹⁰ 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 Spaldeen 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.

¹¹ 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).

¹² 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).

¹³ 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.

¹⁴ Allison & Schultz, *supra* note 12, at 101.

¹⁵ Steinberg, *supra* note 12, at 257.

¹⁶ 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.

¹⁷ GEMELLI, *supra* note 16, at 447.

Although some conflict is normal and expected as relationships shift within the family,¹⁸ 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.¹⁹ 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.²⁰ Even as adolescents move toward independence, continuity and connection with family members remains important.²¹ 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.²² As one professor of psychiatry noted, "the adolescent is not an island unto himself."²³ The adolescent regularly seeks guidance, acceptance, and approval from parents, teachers, coaches, religious leaders, and other significant adults.²⁴ Even when adolescents disagree with their parents, they often seek approval by attempting to justify their views.²⁵ 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.²⁶ 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.²⁷ Youth develop their own standards of decency by internalizing advice and gui-

¹⁸ Allison & Schultz, *supra* note 12, at 101.

¹⁹ 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).

²⁰ *Id.*

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

²² GEMELLI, *supra* note 16, at 467.

²³ *Id.*

²⁴ *Id.*

²⁵ Lanz, *supra* note 21, at 134.

²⁶ 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).

²⁷ 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.²⁸ These adolescents are also less likely than others to engage in delinquency, possibly out of fear of parental disapproval and rejection.²⁹

Adolescents in well-adjusted families also view parents as disciplinarians, moral advisors,³⁰ 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.³¹ 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.³²

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.³³ 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.³⁴

Contemporary juvenile justice legislation reflects a clear commitment to parental involvement in all stages of the juvenile justice system.³⁵ 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.³⁶ In addition, virtually all of the latest

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

²⁹ 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).

³⁰ Dickerson & Crase, *supra* note 26.

³¹ 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).

³² 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).

³³ Fallon & Bowles, *supra* note 16, at 244.

³⁴ 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.

³⁵ Gilbert et al., *supra* note 34, at 1187-89.

³⁶ *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.³⁷ 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.³⁸

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.³⁹ 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.⁴⁰ 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.⁴¹

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.⁴² 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

³⁷ 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).

³⁸ Gilbert et al., *supra* note 34, at 1155.

³⁹ *Id.* at 1172, 1174.

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

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

⁴² 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.⁴³ Studies have also found family therapy to be significantly more effective than individual therapy in reducing adolescent substance abuse.⁴⁴

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.⁴⁵ 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.⁴⁶ 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.⁴⁷

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.⁴⁸ 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.⁴⁹ Unfortunately, the representation of chil-

⁴³ Schaeffer & Borduin, *supra* note 37, at 451.

⁴⁴ 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).

⁴⁵ 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).

⁴⁶ 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).

⁴⁷ See Gilbert et al., *supra* note 34, at 1194.

⁴⁸ Schmidt et al., *supra* note 7, at 176.

⁴⁹ 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.⁵⁰ 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.⁵¹ 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.⁵² 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.⁵³ 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.⁵⁴ 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.⁵⁵

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.⁵⁶ 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

⁵⁰ 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).

⁵¹ 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).

⁵² 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).

⁵³ Grisso, *supra* note 52, at 19-20.

⁵⁴ 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.

⁵⁵ 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).

⁵⁶ 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.⁵⁷ 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.⁵⁸ 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.⁵⁹ 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.⁶⁰

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.⁶¹ 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.⁶² 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

⁵⁷ *Id.* at 107.

⁵⁸ See *Haley v. Ohio*, 519 U.S. 1011 (1948) (recognizing that police interrogation is inherently coercive and that child may need ally to help understand and protect due process); Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Jevens*, 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).

⁵⁹ 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).

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

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

⁶² 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.⁶³ 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.⁶⁴ 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.⁶⁵ 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.⁶⁶ 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.

⁶³ 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).

⁶⁴ 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).

⁶⁵ 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).

⁶⁶ 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.⁶⁷ 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.⁶⁸ Delinquency also appears to be associated with

⁶⁷ Steinberg, *supra* note 12, at 260.

⁶⁸ 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,⁶⁹ weak bonding between the parent and the child,⁷⁰ and a history of psychological or mental health problems in the family.⁷¹ 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.⁷² 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.⁷³ 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.⁷⁴ 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.⁷⁵ 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.⁷⁶

Recently, popular culture icon Bill Cosby delivered one of the more public and controversial speeches on the failures of parents in modern society.⁷⁷ 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.⁷⁸ A number of

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

⁶⁹ Oddone-Paolucci et al., *supra* note 29, at 185.

⁷⁰ 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).

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

⁷² Kerr, *supra* note 32, at 130-32, 136.

⁷³ 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).

⁷⁴ ANNE-MARIE AMBERT, *THE EFFECT OF CHILDREN ON PARENTS* 98-101 (2000).

⁷⁵ Farber, *supra* note 58, at 1277.

⁷⁶ AMBERT, *supra* note 74, at 98-101.

⁷⁷ 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).

⁷⁸ *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.⁷⁹

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.⁸⁰ Parents in the juvenile justice system also report being stressed, tired, and unhappy, and sometimes experience a decline in health.⁸¹ 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.⁸² Other parents may withdraw support, warmth, and trust from the child,⁸³ become physically or emotionally abusive,⁸⁴ and in some cases may force the child out of the home.⁸⁵

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.⁸⁶ Because people often make poor decisions under stress,⁸⁷ parents may lack sufficient insight to choose from among competing moral and legal concerns in the juvenile case.⁸⁸ 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.⁸⁹ 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

⁷⁹ 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").

⁸⁰ AMBERT, *supra* note 74, at 98.

⁸¹ *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.

⁸² *Id.* at 98-99.

⁸³ *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).

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

⁸⁵ 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).

⁸⁶ 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).

⁸⁷ COCHRAN ET AL., *supra* note 65, at 242-43.

⁸⁸ See *id.* at 243; Tesler, *supra* note 86, at 197.

⁸⁹ Farber, *supra* note 58, at 1305.

of any wrongdoing.⁹⁰ 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.⁹¹ Parents frequently fail to appreciate the risks associated with the exercise and waiver of the child's constitutional rights⁹² 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.⁹³ 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.⁹⁴ As a result, some states deem juvenile confessions *per se* involuntary and unre-

⁹⁰ 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).

⁹¹ Ross, *supra* note 56, at 113.

⁹² 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).

⁹³ 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).

⁹⁴ 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.⁹⁵ 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.⁹⁶ Recently, however, scholars have begun to question the presumptive advantage of parental guidance in the interrogation context.⁹⁷ 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.⁹⁸ In many cases, parents have intentionally or unintentionally aligned with law enforcement officers in coercive tactics to force children to confess to criminal conduct.⁹⁹ 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.¹⁰⁰

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.¹⁰¹ 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.

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

⁹⁶ 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).

⁹⁷ Farber, *supra* note 58.

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

⁹⁹ *Id.* at 1289, 1295-96.

¹⁰⁰ *Id.* at 1277.

¹⁰¹ 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."¹⁰² Although the right of parents to direct and raise children is not absolute,¹⁰³ traditionally, parents have been allowed to decide for children in areas of religion, education, medical treatment, finances, and discipline.¹⁰⁴ 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

¹⁰² *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").

¹⁰³ 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).

¹⁰⁴ *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*.¹⁰⁵

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.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸ 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

¹⁰⁵ 467 U.S. 253, 265 (1984).

¹⁰⁶ Hafen, *supra* note 46, at 427.

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

¹⁰⁸ Winick, *supra* note 64, at 911.

time, money, and emotional energy they will spend in juvenile court.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹

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 counsel¹¹² or when the parent learns that he may be required to pay for treatment if the child is adjudicated.¹¹³ 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.¹¹⁴ 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.¹¹⁵ 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.¹¹⁶ 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

¹⁰⁹ Cf. Bruce C. Hafen & Jonathan O. Hafen, *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).

¹¹⁰ Marrus, *supra* note 7, at 320-21.

¹¹¹ See *id.* at 321.

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

¹¹³ See *infra* note 131 and accompanying text.

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

¹¹⁵ Moore, *supra* note 112, at 1827.

¹¹⁶ Hafen, *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.¹¹⁷ 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.¹¹⁸ 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.¹¹⁹ 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.¹²⁰ Offenders who experience the legal procedure as unfair are less likely to accept judicial outcomes and take responsibility for rehabilitation.¹²¹

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.¹²²

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

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

¹¹⁸ 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).

¹¹⁹ *In re Gault*, 387 U.S. 1, 26 (1967).

¹²⁰ 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").

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

¹²² 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.¹²³ 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.¹²⁴ In some jurisdictions, parents will be asked to notify court officials when the child violates conditions of release or probation;¹²⁵ and in others, parents may be required to post bond to ensure the child's compliance with treatment.¹²⁶ 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.¹²⁷ The court may also order parents to submit to drug testing or undergo psychiatric or psychological evaluations.¹²⁸ 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

¹²³ 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).

¹²⁴ 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).

¹²⁵ See, e.g., ALASKA STAT. § 47.12.155(b)(2) (1998).

¹²⁶ 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).

¹²⁷ 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).

¹²⁸ 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.¹²⁹ 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.¹³⁰ Many jurisdictions also hold the parent jointly or independently liable for restitution to victims of juvenile crime.¹³¹ The court may order restitution to cover lost or damaged property as well as medical, dental, or funeral expenses of the victim.¹³² Even where no civilians are injured, the judge may order parents to pay court costs and fines¹³³ or to reimburse the state for the expense of detention, commitment, evaluations, special schools, counseling, or other treatment necessary for the child.¹³⁴ Parents may also be required to pay for their own court-ordered treatment.¹³⁵ 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

¹²⁹ Farber, *supra* note 58, at 1297-98.

¹³⁰ 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).

¹³¹ 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).

¹³² 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).

¹³³ 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).

¹³⁴ 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).

¹³⁵ See, e.g., ALASKA STAT. § 47.12.155 (Michie 1998).

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

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.¹³⁸ Because rules of professional conduct generally limit the lawyer's ability to communicate with a represented party,¹³⁹ 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.¹⁴⁰ A child who engages in delinquent conduct while he is left unattended or inadequately supervised may fall within the purview of these statutes.¹⁴¹ A

¹³⁶ 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).

¹³⁷ 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).

¹³⁸ 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.

¹³⁹ 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.").

¹⁴⁰ 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).

¹⁴¹ 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.¹⁴² 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.¹⁴³

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.¹⁴⁴ Criminal parental liability statutes, which were written into state codes years ago, have waxed and waned in popularity.¹⁴⁵ 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.¹⁴⁶ Under these provisions, parents whose children engage in delinquency may be charged with endangering the welfare, or contributing to the delinquency, of a minor.¹⁴⁷

¹⁴² 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).

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

¹⁴⁴ 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.

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

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

¹⁴⁷ 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.¹⁴⁸ Proponents of these statutes justify parental accountability measures on theories of incentive, deterrence, and retribution.¹⁴⁹ 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.¹⁵⁰ 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.¹⁵¹ 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.¹⁵²

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.¹⁵³ While most offenses within these statutes are misdemeanors,¹⁵⁴ a few states consider it a felony to contribute to the delinquency of a minor.¹⁵⁵ Parents who are found guilty under any of these provisions may be fined, ordered to participate in parenting classes, placed on probation, or incarcerated.¹⁵⁶ In

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).

¹⁴⁸ Cahn, *supra* note 145, at 409-10.

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

¹⁵⁰ See *id.* at 641-44.

¹⁵¹ 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).

¹⁵² McMullen, *supra* note 73, at 643.

¹⁵³ 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).

¹⁵⁴ 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).

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

¹⁵⁶ 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.¹⁵⁷ 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 \$200,000.¹⁵⁸

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.¹⁵⁹ 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.¹⁶⁰ 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,¹⁶¹ 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.¹⁶² Like the criminal statutes, civil parental liability provisions were

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).

¹⁵⁷ CAL. PENAL CODE § 272 (West 1999).

¹⁵⁸ OKL. STAT. tit. 21 § 856.1 (Supp. 2000).

¹⁵⁹ MARC MAUER & MEDA CHESNEY-LIND, INVISIBLE PUNISHMENT 5 (2002).

¹⁶⁰ Cahn, *supra* note 145, at 417.

¹⁶¹ 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).

¹⁶² 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.¹⁶³ 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.¹⁶⁴ 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.¹⁶⁵ While many civil liability statutes cap parental liability at \$5,000 or less,¹⁶⁶ at least two states allow liability up to \$25,000,¹⁶⁷ and a number of states set no liability limits in the case of property damage.¹⁶⁸

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.¹⁶⁹ 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,¹⁷⁰ the statutes may create a perverse disincentive for some to continue parenting responsibility. In addition, civil provi-

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.*

¹⁶³ Andrews, *supra* note 162, at 397, 402.

¹⁶⁴ *Id.* at 399, 402.

¹⁶⁵ *See* MAUER & CHESNEY-LIND, *supra* note 159.

¹⁶⁶ *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).

¹⁶⁷ *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).

¹⁶⁸ *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).

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

¹⁷⁰ *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 behavior¹⁷¹ 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.¹⁷² Other states have remained silent on the issue or have declined to establish a privilege in some fact-specific context.¹⁷³

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

¹⁷¹ See MAUER & CHESNEY-LIND, *supra* note 159.

¹⁷² 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).

¹⁷³ 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,¹⁷⁴ the theoretical risk that a parent may be called generally requires the lawyer to address it with both the parent and the child.¹⁷⁵ 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.¹⁷⁶ 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.¹⁷⁷ 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

¹⁷⁴ Ross, *supra* note 56, at 86.

¹⁷⁵ 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)).

¹⁷⁶ *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).

¹⁷⁷ 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.”¹⁷⁸ 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,¹⁷⁹ 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.¹⁸⁰ 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.¹⁸¹

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.¹⁸² 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,

¹⁷⁸ 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).

¹⁷⁹ 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).

¹⁸⁰ 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).

¹⁸¹ See *supra* note 179.

¹⁸² WASH. REV. CODE § 5.60.060(2)(b) (1961).

and financial conflict.¹⁸³ 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-

¹⁸³ 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.¹⁸⁴ 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.¹⁸⁵ 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

¹⁸⁴ 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.).

¹⁸⁵ See *supra* note 7.

self-incrimination.¹⁸⁶ 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.¹⁸⁷ 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.¹⁸⁸ 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.¹⁸⁹

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.¹⁹⁰ The lawyer should help the child develop a list of alternatives at each stage of the case, engage the child in

¹⁸⁶ 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).

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

¹⁸⁸ 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).

¹⁸⁹ 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).

¹⁹⁰ 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.¹⁹¹ 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.¹⁹² 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.¹⁹³

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.¹⁹⁴ 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.¹⁹⁵ 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

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

¹⁹² 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.

¹⁹³ 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).

¹⁹⁴ 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).

¹⁹⁵ 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.¹⁹⁶ 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.¹⁹⁷

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.¹⁹⁸ 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.¹⁹⁹ 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

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

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

¹⁹⁸ 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.

¹⁹⁹ 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.²⁰⁰ 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.²⁰¹ 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.²⁰² 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.²⁰³ 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.

²⁰⁰ 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).

²⁰¹ Moore, *supra* note 112, at 1824-25, 1830.

²⁰² *Id.* at 1826-27.

²⁰³ 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.²⁰⁴ 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.²⁰⁵ 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 sympathy²⁰⁶ and, in some cases, recommend parent support groups or parent therapy.²⁰⁷

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

²⁰⁴ 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).

²⁰⁵ MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002).

²⁰⁶ Winick, *supra* note 120, at 912.

²⁰⁷ *Id.* at 908-09.

²⁰⁸ 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.²⁰⁹ 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.²¹⁰ 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.²¹¹ 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,²¹² 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-

²⁰⁹ *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

²¹⁰ See *supra* notes 90, 91.

²¹¹ 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).

²¹² 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.²¹³ 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.²¹⁴ 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.²¹⁵ 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.²¹⁶

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

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

²¹⁴ 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").

²¹⁵ 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).

²¹⁶ 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.²¹⁷ 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.²¹⁸ 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.²¹⁹ 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.²²⁰ 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 moment²²¹—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.²²² 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

²¹⁷ 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.

²¹⁸ Kell, *supra* note 215 at 361, 367, 369-70.

²¹⁹ *See id.* at 356.

²²⁰ Lewis, *supra* note 211, at 479.

²²¹ 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.

²²² 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.”²²³ 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.²²⁴ 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.²²⁵ 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.²²⁶ 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.”²²⁷ The same competency standard has been applied on behalf of juveniles in many states.²²⁸ 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.²²⁹ 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.²³⁰ A child psychologist testified that Lionel had the social maturity of a six-year old and delays in inferential thinking.²³¹ 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.²³² 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.²³³ 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.²³⁴

²²³ *Id.* at R. 1.14 cmt. 5.

²²⁴ Kell, *supra* note 216, at 371; Peters, *supra* note 188, at 1564.

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

²²⁶ 362 U.S. 402 (1960).

²²⁷ *Id.* at 402.

²²⁸ 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).

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

²³⁰ *Id.* at 48.

²³¹ *Id.*

²³² *Id.* at 50.

²³³ *Id.* at 48.

²³⁴ *Id.* at 50-51.

Competency issues are rarely as clear as they appeared to the appellate court in Lionel's case.²³⁵ Thus, the decision to raise competency in juvenile court is often a very complicated one for the child's advocate.²³⁶ 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.²³⁷ 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."²³⁸ 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.²³⁹ 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.²⁴⁰ The lawyer should also make every effort to ensure that his own concerns about the child's competency

²³⁵ 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.

²³⁶ 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).

²³⁷ 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").

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

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

²⁴⁰ *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*.²⁴¹ 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.²⁴²

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.²⁴³ 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."²⁴⁴ 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.²⁴⁵ 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

²⁴¹ *Id.* at R. 1.14 cmt. 5.

²⁴² *Id.* at R. 1.14 cmts. 5, 7.

²⁴³ *Id.* at R. 1.14 cmt. 3.

²⁴⁴ *Id.* at R. 1.14 cmt. 4.

²⁴⁵ 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.²⁴⁶ 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.²⁴⁷ Parents who fail to comply with such orders may be held in contempt and incarcerated.²⁴⁸ 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.²⁴⁹ 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.²⁵⁰

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

²⁴⁶ See *supra* notes 121-26 and accompanying text.

²⁴⁷ See *supra* notes 128-32 and accompanying text.

²⁴⁸ See *supra* notes 133-34 and accompanying text.

²⁴⁹ 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).

²⁵⁰ See *supra* note 129 and accompanying text.

the court order and to the child.²⁵¹ 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.²⁵² 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,²⁵³ 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,²⁵⁴ 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

²⁵¹ 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).

²⁵² 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).

²⁵³ 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).

²⁵⁴ 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.²⁵⁵ 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.²⁵⁶ 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.²⁵⁷

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.²⁵⁸ 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.

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

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

²⁵⁷ Gilbert et al., *supra* note 34, at 1169.

²⁵⁸ 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.²⁵⁹ 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.²⁶⁰ 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.²⁶¹ 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.²⁶² 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.²⁶³ 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

²⁵⁹ Ross, *supra* note 56, at 106-07.

²⁶⁰ Ross, *supra* note 56, at 106.

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

²⁶² 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).

²⁶³ 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.²⁶⁴

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.²⁶⁵ 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.²⁶⁶ 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.²⁶⁷ 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-

²⁶⁴ *Id.* at 107.

²⁶⁵ WASH. REV. CODE § 5.60.060 (2005).

²⁶⁶ ROSS, *supra* note 56, at 99-100.

²⁶⁷ 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.²⁶⁸ Theories of adolescent development suggest that children naturally look to parents for advice and generally believe that parents can be trusted with sensitive information.²⁶⁹ 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.²⁷⁰ 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.²⁷¹

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.²⁷² 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.²⁷³ 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

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

²⁶⁹ Ross, *supra* note 56, at 92.

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

²⁷¹ See generally Ross, *supra* 56, at 92.

²⁷² *Id.* at 90, 116.

²⁷³ *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.²⁷⁴ 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.²⁷⁵ 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.²⁷⁶

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.²⁷⁷ 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.²⁷⁸ 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.²⁷⁹ 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

²⁷⁴ Ross, *supra* note 56, at 90, 116.

²⁷⁵ *Id.* at 116.

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

²⁷⁷ *Id.* at 116.

²⁷⁸ *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).

²⁷⁹ 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.

Juvenile Defense Attorneys and Family Engagement

Same Team, Different Roles

When a child gets arrested, the entire family is implicated and some family members are even brought into the juvenile court process along with that child.

For families, this can be a difficult and confusing experience that leaves them unsure where to turn for answers and guidance. For defenders, there is often a tension between upholding the legal and ethical obligations they owe to their child-client and responding to the needs of their clients' families. This can result in an adversarial relationship between defenders and families that is often unnecessary and which can be damaging to the defense case and the child.

The reality is, however, that in the vast majority of cases when families adequately understand the role and responsibilities of the defense attorney and defenders are sensitive to the family's needs, the two can work together as a team to create the best outcomes for youth accused of crimes. It is important to recognize that there may be times when it may be ethically inappropriate for defenders to engage certain family members, such as when a parent is the alleged victim or family members are insistent that the child be incarcerated. When this is not the case, however, teamwork between families and defenders can benefit a child's case at each stage of the delinquency proceedings, from arrest and intake, to detention, trial preparation, disposition, and into post-disposition.* Families and defenders each have a role to play, and when both understand those respective roles and learn to work together, they can be a formidable force for protecting children.



NATIONAL JUVENILE DEFENDER CENTER

*For more detailed information on the delinquency process, and juvenile defenders' obligations throughout this process, see the *National Juvenile Defense Standards*, available at: <http://www.njdc.info/pdf/NationalJuvenileDefenseStandards2013.pdf>

ROLES IN THE DEFENSE OF THE CHILD

Juvenile Defenders

- To understand what the child wants with regard to outcomes
- To be the child's voice in the system, advocating and negotiating on the child's behalf
- To protect the child's legal and stated interests
- To advise the child on how to best achieve the outcomes he or she wants

Defenders are ethically bound to represent their client's stated interests — *i.e.* what the child says he or she wants. But this does not mean that the lawyer will set aside legal training and common sense at the whim of the child. Instead, the defender has an ethical obligation to advise the child on what the best approaches to achieving his or her ultimate goal may be, and helping the child to make educated decisions about the case. This includes advising the child, not just on the law, but on how particular choices will be supported or challenged by others, such as judges or the child's family.

Defenders are bound by ethical, legal, and professional obligations that affect what they can and cannot share with family members. There will be many things that attorneys will be able to share with families (such as details about the court process, next steps, how to navigate the system, and insight into the other stakeholders), but there will be some things that defenders may not be able to share (such as the substance of private legal consultations with the child, some facts of the case, or details of legal strategy). This will likely be a new experience for many families, and defenders should be sensitive to this while also maintaining their legal and ethical responsibilities of loyalty and confidentiality to their child-client.

Parents, Guardians, or Extended Family

- To provide insight and advice regarding the needs, strengths, and challenges of the child
- To provide support and assistance to the child throughout the court process, and if necessary, after disposition

Family members are often the best source of information regarding a child's social history, and can provide valuable insight into a youth's strengths and challenges. Families can provide critical information about a child's home life, school attendance, academic performance, extracurricular activities, physical and emotional development, and other details that can strengthen a defender's advocacy at multiple stages of the delinquency court process.

Families are also critical in helping the child succeed in any court-ordered program or release plan. Families can not only help the child to keep track of his or her court responsibilities, they can advocate for their child with probation officers or program staff to make sure the child's successes (and not just their challenges) are made clear.

UNDERSTANDING EACH OTHER'S ROLES

Juvenile Defenders

Defenders should try to understand that family members often find the delinquency system to be intimidating, frustrating, and/or confusing. While the family is not the defender's client, helping relatives understand the process and feel comfortable will often benefit the client.

Parents and guardians are used to being the one to make decisions in their child's lives. As such, defenders should do their best to explain to their clients and their clients' families the defender's role, the roles of other court players, the court process, and what to expect next. Defenders should also understand that unilaterally shutting families out of a child's case can be a disservice to the case. Instead of emphasizing what cannot be shared due to the rules of confidentiality, defenders should focus on what information they can share to help parents feel more included in and educated about the legal process.

Parents, Guardians, or Extended Family

Families should try to understand that juvenile defenders are bound by the ethical duty of confidentiality, and the professional obligation to represent and advocate for a child's stated interest (*i.e.* the outcomes the child wants or hopes for).

These duties and obligations impact what the attorneys can and cannot share with relatives, and what arguments the attorney will make on behalf of the young client. However, these rules do not require attorneys to shut family members out, nor do they grant attorneys the power to replace a parent or guardian's role in his or her child's life. To the contrary, family assistance is often crucial in crafting release or disposition (sentencing) plans, and family support will dramatically increase the court's receptivity to the plan and the likelihood that a child will have sufficient support to be able to meet the plan's conditions.

BENEFITS OF COLLABORATION

Juvenile Defenders

To improve the quality of defense services, defenders should try to establish collaborative alliances with the family members of their young clients, where appropriate. Such collaborations can result in more informed and client-centered representation. Studies have shown that youth are less likely to re-enter the justice system when they are able to maintain connections with their community. Appropriately engaging families in a child's defense can help maintain those connections. Additionally, when families appear to be active allies, the likelihood of the court accepting the defender's proposed disposition or probation plan for the client increases.

Defenders should keep in mind that families with a court-involved child are often out of their element and may be frightened or stressed. Defenders should be sensitive to this and patient with families, rather than take things personally. Finding ways to empower families or helping them understand the system can alleviate this stress and anxiety. See the section on Opportunities for Collaboration that follows for ways to engage families.

Parents, Guardians, or Extended Family

Family participation in the delinquency court process creates an inclusive environment where all parties are vested in ensuring better outcomes for the child. Family members can provide valuable insight – that would otherwise be unavailable – into a youth's strength and challenges. With an understanding and acceptance of the defender's duties of confidentiality and obligation to advocate for what the child wants, families can collaborate with defenders – who are equally understanding of and sensitive to the families' needs – to increase the likelihood of achieving a positive outcome in their child's case.

Families should understand that every defense attorney is different. Like all people, some will be easier to talk to than others and some will have a better "bed-side manner." When the family is finding it difficult to work with the defender, look for ways to show that you are an ally. See the section on Opportunities for Collaboration that follows for ways families can engage defenders and get some of the information the families may want.

OPPORTUNITIES FOR COLLABORATION

Juvenile Defenders

At Arrest: Often, defenders are not appointed to a case as early as arrest or intake. However, if appointed, defenders should keep in mind that families with a child who has just been arrested are often frightened and stressed. Defenders should be sensitive to this and patient with families, while also making clear how family involvement can help the child's case at this early stage. Defenders should explain to the family that the likelihood of the child's release after arrest increases when a family member is available and willing to take the child home. If no family member is present at the station house, defenders should make every effort to locate and involve the family in the negotiations for the child's release as early as possible, assuming doing so is in the child's stated interest.

In addition to achieving a child's release, the goal of station house advocacy is to help the child and family understand the child's rights and to prevent the client and family from making statements or engaging in behavior that is against the child's interest. This will often play out as a defender insisting on being present at the interrogation, or asserting a child's right to remain silent. The defender should explain this goal, and the respective rights, to the family and child in a patient and sensitive way, recognizing what an emotional situation this can be for both family and child.

At Intake: Family members are often included in the intake process (whether conducted at the police station or at the courthouse), whereas defenders are not. As such, defenders should empower family members by preparing them for the meeting. Even though intake officers may present themselves as wanting to "help" a child, this is not necessarily the case. It is entirely possible that a parent who wants to see the child return home may unknowingly say things to an intake worker that could trigger a request that the child be detained. Conversely, there is information families can share that can increase the chances of release. Defenders who take the time to prepare parents and explain the goals and concerns associated with an intake interview may be able to get better results for their clients at the detention hearing.

Parents, Guardians, or Extended Family

At Arrest: To increase the likelihood of their child's release following arrest, families should make every effort to be available and present at the stationhouse and prepared to take the child home as soon as they learn of the arrest. If a defender has been appointed to the child's case at this point, family members should engage the defender by explaining their willingness to help, and by heeding any warnings the defender gives regarding conduct and statements made to the police or probation. Families should understand that any warnings defenders give about conduct or statements made to the police or probation are only meant to protect the child's legal interests.

More often, however, defenders will not yet have been appointed to represent the child upon arrest or intake. If this is the case, families can help their child and the defender (when he or she is appointed), by insisting on being present at the child's interrogation, requesting that a defense attorney be appointed for the child, and reminding the child to invoke his or her right to remain silent.

Many parents trust the police and the system to do right by their children, but sadly this is not always the case. Parents should understand that the legal system and its consequences are far different from the discipline that they may hand out at home. Even denials and innocent explanations may be used against a child. Therefore, it is generally better to wait to make any statements until the child's attorney is appointed and can provide advice on the legal consequences that could result.

At Intake: Regardless of whether a defender has been appointed prior to intake, families always have an important role at this stage. Family members will be asked a series of questions about a child's social and academic history and home life. Even though probation officers may present themselves as just wanting to "help" a child, this may not necessarily be the case. It is their job to determine, through the intake process, whether or not to recommend that a child be detained further. Parents — especially those who are angry with their child in the moment — should be aware of the function and objective of intake and understand that if the interview has a negative focus, the child may be detained. Parents who focus on positive aspects of their child, while also appreciating the gravity of the situation and not appearing too lenient, may be able to show an intake officer that the child is well supervised and not a danger to the community, despite the charges he or she is facing.

OPPORTUNITIES FOR COLLABORATION (CONT.)

Juvenile Defenders

At Detention: If release from detention is consistent with a child's stated interests, the defender should explain to the child's family – in plain language – that their support and presence in court at the initial hearing will substantially increase the likelihood of a child's release.

Defenders should empower family members by explaining this critical role they can play and by helping them to prepare what they may say to the judge.

At Investigation: To better advocate for a young client's stated interest, defenders can engage parents to help them obtain information about the child's background that is necessary for the defense case, such as:

- academic performance records;
- school discipline records;
- school attendance records;
- special education needs (including any IEP);
- extracurricular activities;
- mental health evaluations or records;
- medical records;
- prior victimization;
- receipt of community services;
- employment history; and
- general information about family dynamics.

Defenders should empower family members by letting them know that they are the best source for this type of information. In addition, parent or guardian consent may be required before defenders can obtain certain documents like medical or school records without a court order. In these instances, parent or guardian engagement is critical.

Parents, Guardians, or Extended Family

At Detention: To better ensure the release of their child, families should demonstrate their support of the child by being present at the initial hearing and by providing the defender with information about the youth's strengths and documented accomplishments. If the defender is stand-offish, families can best engage the defender through offers of help or to provide information. This will show the defender that the family is an ally and may increase a frantic or uncommunicative defender's chances of sharing some information.

At Investigation: To achieve better outcomes in court for their child, families should demonstrate their willingness to cooperate with defenders by providing any information or consent to obtain records that the defender thinks would be helpful in the case. Often, family members are the best sources of information on a child's background, and they are necessary allies for defenders in the process of obtaining such information through investigation.

Some examples of this type of information include:

- academic performance records;
- school discipline records;
- school attendance records;
- special education needs (including any IEP);
- extracurricular activities;
- mental health evaluations or records;
- medical records;
- prior victimization;
- receipt of community services;
- employment history; and
- general information about family dynamics.

It is important to understand that, even if you give consent for the attorney to retrieve certain records, the rule of legal ethics may require that the lawyer not share everything he or she learns with you; this is not the defender's fault. This does not prevent you from going to get your own copies of the same records, however. It just means the defender may not be able to give them to you.

OPPORTUNITIES FOR COLLABORATION (CONT.)

Juvenile Defenders

At Disposition: Counsel should confer with the client's family to explain the disposition process and inquire about the family's willingness to support the proposed plan. At this phase, defenders should make sure to engage the child and the family in a positive way in order to create an individualized disposition plan that is based on the child's unique interests and needs. The defender must do all she or he can to ensure the family understands the importance of assisting the child in meeting the conditions set forth by the court in the final disposition plan.

After Disposition: After the court issues a final disposition order, the defender should engage the family by explaining the requirements of each obligation or program in the disposition plan. This includes what the child and family need to do in order to be deemed "in compliance" with every order. Further, the defender should explain to the family how valuable they can be in assisting the child with meeting the court-ordered obligations contained within the final disposition plan.

Depending on the court system, some attorneys may be able to continue to represent the child after disposition, some may not. The attorney should explain this to both the child and the family and should provide advice on where they can turn if problems come up.

If the child is placed in a secure facility, the defender should help the family understand visiting procedures and the critical role they play in maintaining contact with the child. Youth who remain connected with their families and feel supported have a greater chance of successfully re-entering the community upon release. Additionally, families are important monitors that can ensure children are being properly cared for while in secure facilities and are the first line of information for defenders if something is wrong.

Parents, Guardians, or Extended Family

At Disposition: If a child is adjudicated delinquent (found guilty), then the next phase of the legal proceedings is the disposition (sentencing) phase. Family support during disposition is critical. Defenders are generally supposed to provide the judge with a plan for disposition that can hopefully keep the child at home, or at a minimum, in the least restrictive environment as possible. These plans may include probation conditions or court-ordered programming.

Family members can assist defenders in assessing the relative strengths and weaknesses of a defender's proposed disposition plan, and identify any barriers to its success or alternatives that the attorney or child may not see. The family's view of the plan can significantly impact the judge's decision, and implementation of the plan often requires family involvement and support. Family members also play a major role in keeping the child on track to successfully fulfill the court's orders and not re-entering the system.

After Disposition: Once the disposition phase is over, the court will issue a final disposition order which typically features some combination of requirements, placements, programs, and/or services. Family support and understanding of each of the components of this plan is critical, as families can be enormously helpful in ensuring a child fulfills all obligations ordered by the court. Families may also have obligations under this order, such as participating in family therapy or meeting with probation officers or counselors. Families can engage the defender by explaining their desire to understand, and help their child comply with, the plan. Similarly, families can engage defenders by demonstrating and expressing their interest in learning more about a child's right to appeal the court's final order.

If the child is placed in a secure facility, then families can support their child by regularly visiting and communicating with him or her. Families can also assist defenders in their post-disposition representation by observing the child's environment and mood, and relaying any issues of concern or promise they detect to the defender.

OPPORTUNITIES FOR COLLABORATION (CONT.)

Juvenile Defenders

If the child is placed on probation or in some community-based program, the defender should ensure that the family understands its obligations with regard to this (such as participation in family therapy or home visits) and how support is necessary to keep the child's probation from being revoked.

Finally, the defender should engage families by explaining any applicable sealing and expungement laws, and the benefits that a clean record will have on a child's future employment and education. Because sealing and expungement proceedings are often years down the line, defenders should provide families with information outlining when their child might be eligible for this step and what role the family can have in initiating sealing or expungement proceedings, with or without the help of a lawyer.

Parents, Guardians, or Extended Family

Finally, because the consequences of juvenile court involvement can affect children for many years to come, getting that record sealed or expunged can be very important. A clean record will make it easier for a child when he or she seeks employment, higher education, or other future endeavors. Every state has different rules for sealing and expungement, but it is a process that typically cannot be started for several years. By then, most children and their families will have lost contact with the defense attorney, so understanding what to do, and when to do it, is important. Families should engage defenders by conveying their desire to help in the sealing or expungement process, and take an active role in learning more about the eligibility criteria and time requirements within their state. In some states, families can help their child file a motion for expungement on their own, or they can engage a defender for assistance in doing so.

The juvenile court system is a very complicated and confusing place for anyone who does not regularly work within it. Court involvement can be a extremely stressful process in which children and their families feel like they are being judged and imposed upon at every turn. For all the reasons outlined in this fact sheet, a good partnership with a child's juvenile defender can often help lead to the best outcomes for youth and families. At a minimum, good partnership should empower them.

Youth need effective counsel to help them navigate the many decisions they will be asked to make, with an understanding and appreciation of the risks and benefits of each decision. Parents too often need an ally who can help them understand the process and better aid their child at all phases of court involvement. When the goal is helping the child, parents and juvenile defenders are players on the same team, they simply have different roles.



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The National Juvenile Defender Center (NJDC) is a non-profit organization that is dedicated to promoting justice for all children by ensuring excellence in juvenile defense. NJDC provides support to public defenders, appointed counsel, law school clinical programs, and non-profit law centers to ensure quality representation in urban, suburban, rural, and tribal areas. NJDC also offers a wide range of integrated services to juvenile defenders, including training, technical assistance, advocacy, networking, collaboration, capacity building, and co-ordination. To learn more about NJDC, please visit www.njdc.info.

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