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 families[3] 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-

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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

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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 parents[21] and scholarship in this area has been "driven by

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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

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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 abolition[30] 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)

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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 professionals[37] 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]

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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-

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(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 problems[46] 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]

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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

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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.pacwcbt.pitt.edu/Organizational%20Effectiveness/FGDM%20Evaluation%20PDFs/FGDM%20Toolkit.pdf.

58. *See, e.g.*, MARGARET DIZEREGA & 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

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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

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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 historic[72] 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 Texas'[77] 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-in/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. Petersberg 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/877201212181059489251 57.pdf.

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

ana's[78] 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

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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,

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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 inside[88] and outside[89] 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-

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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-

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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%20Initiaive/TwoDecadesofJDAIFromDemonstrationProjecttoNat/JDAI_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-

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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

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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-

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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 Arsenault 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]

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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, Avsalom 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 Gabarino 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 theory[122] 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 theory[127] suggest

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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

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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

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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 Aquaintances*, 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

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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 Desistance 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-

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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 Fischoff 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 peers[156] 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

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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 procedures[164] 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

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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 Fami-

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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

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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

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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-

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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

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

194. *See, e.g.*, ANTHONY PETROSINO, CAROLYN TURPIN-PETROSINO & SARAH GUCKENBURG, CAMPBELL SYSTEMATIC REVS., 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 system . . . .[200]

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-

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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 parents . . . .[208]

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]

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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-

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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:

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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

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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

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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]

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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

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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]

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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

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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-

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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. Gramsick, 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

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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 rethink 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

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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

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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:

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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 [Districy Attorney] and using the information against me—against us."[312]

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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-

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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

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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.cbcs.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.

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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]

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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 Families[350] 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-

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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.fflic.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

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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

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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-

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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 Prevention[371] 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]

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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.calcypb.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]

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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

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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

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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-

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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://lachildrenscommission.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-

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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.*

nomic 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]

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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

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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

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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 Rights[458] and a family handbook

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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_billof_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

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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-

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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]

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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 development[485] 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]

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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

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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 overarching 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-

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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.

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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 by 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

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In 1999, twelve-year-old Lionel Tate was arrested and charged with killing his six-year-old playmate, Tiffany Eunick. Lionel's case remained at the center of international attention well after December 2003, when the Fourth District Court of Appeal for the State of Florida questioned Lionel's competence to stand trial and reversed Lionel's adult murder conviction and life sentence.[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 Grossett-Tate, played throughout the case. By virtually all accounts, Lionel relied heavily, if not entirely, on the guidance and direction of his mother at all critical junctures in the proceedings.[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. Grosssett-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]

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[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

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

[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 parents[15] 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]

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[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-

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[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

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[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

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[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-

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[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

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[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

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[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 held understand and protect due process); Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Jeveniles*, 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.

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[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 Partent

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

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[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

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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

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[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 rights[92] 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-

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[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.

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[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

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[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.*, Belloti 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 he 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

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[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 counsel[112] 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

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[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

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[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

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[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 fines[133] 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

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[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

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[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 statues 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 included 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]

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[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

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

[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 behavior[171] 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]

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

[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,

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[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

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[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

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[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

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[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

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[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.

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[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 sympathy[206] 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

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[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-

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[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 articuable 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

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[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 moment[221]—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

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[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]

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[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

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[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

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[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

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[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.

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[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

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[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-

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[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

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[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

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[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.

NJDC
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 the 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.

Why Can't I Just Go Home?

PLACEMENTS, DENIALS, AND ALTERNATIVES

1

BURCU HENSLEY

ASSISTANT JUVENILE DEFENDER

NC OFFICE OF THE JUVENILE DEFENDER

Cindy Porterfield
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Mariamarta Conrad
Cumberland County DSS Attorney

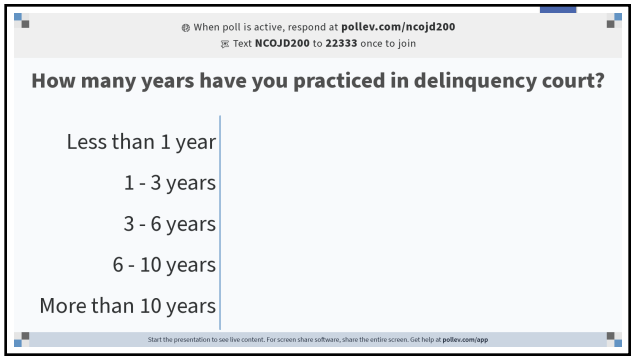
Joonu Coste
Attorney, Disability Rights NC

2

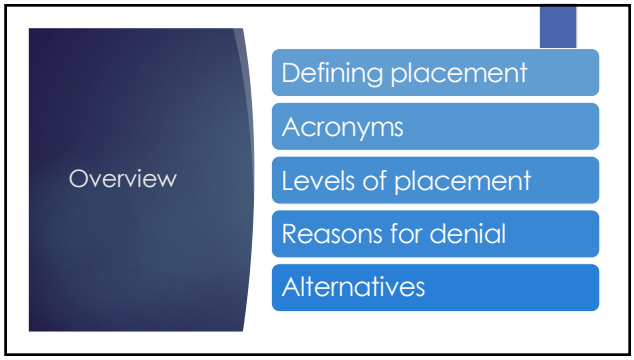
Poll Everywhere Instructions

On the Web	By Text Message	Download the App
Go to **PollEv.com** Enter **NCOJD200**	Send **NCOJD200** to **22333**	Android: Google Play iOS: App Store

3


When poll is active, respond at pollev.com/ncojd200
Text NCOJD200 to 22333 once to join
How many years have you practiced in delinquency court?
Less than 1 year
1 - 3 years
3 - 6 years
6 - 10 years
More than 10 years
Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

4


Overview
Defining placement
Acronyms
Levels of placement
Reasons for denial
Alternatives

5


What do we mean by placement?
Foster Homes
Group Homes
PRTF

6

What do we mean by placement?

- Child is living outside of the home, away from parents/legal guardians
- Support services for the child for mental health, substance use, behavioral, or other needs

7

Acronyms

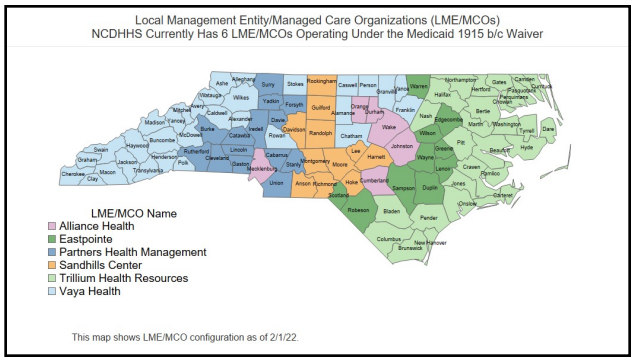
ACEs	Adverse Childhood Experiences
CCA	Comprehensive Clinical Assessment
DMH/DD/SAS	Division of Mental Health, Developmental Disabilities, and Substance Abuse Services
LCAS	Licensed Clinical Addictions Specialist
LCSW	Licensed Clinical Social Worker
LME	Local Management Entity
LOC	Level of Care
LRE	Least Restrictive Environment
MCO	Managed Care Organization
MST	Multisystemic Therapy
PRTF	Psychiatric Residential Treatment Facility

ncdhhs.gov/dmhddsas-frequently-used-acronyms

8

Which stakeholders may be involved in the placement of youth?

9


Local Management Entity/Managed Care Organizations (LME/MCOs)
NCDHHS Currently Has 6 LME/MCOs Operating Under the Medicaid 1915 b/c Waiver
LME/MCO Name
Alliance Health
Eastpointe
Partners Health Management
Sandhills Center
Trillium Health Resources
Vaya Health
This map shows LME/MCO configuration as of 2/1/22.

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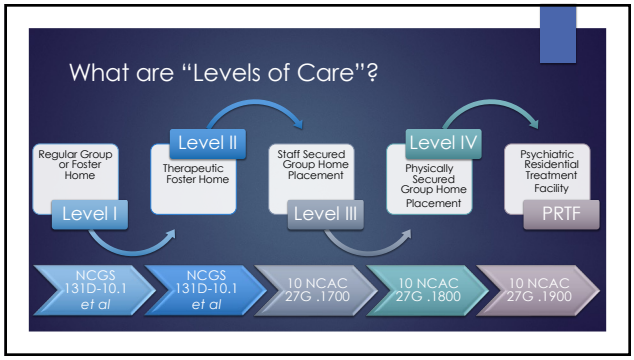
What are "Levels of Care"?
Regular Group or Foster Home
Level I
Level II
Therapeutic Foster Home
Staff Secured Group Home Placement
Level III
Level IV
Physically Secured Group Home Placement
Psychiatric Residential Treatment Facility
PRTF
NCGS 131D-10.1 et al
NCGS 131D-10.1 et al
10 NCAC 27G .1700
10 NCAC 27G .1800
10 NCAC 27G .1900

11


chsnc.org

12


Levels of Care
Placement in a regular family foster home or group home
Children attend outpatient therapy and may participate in in-home based services as needed (intensive in-home, MST, etc.)
Level I

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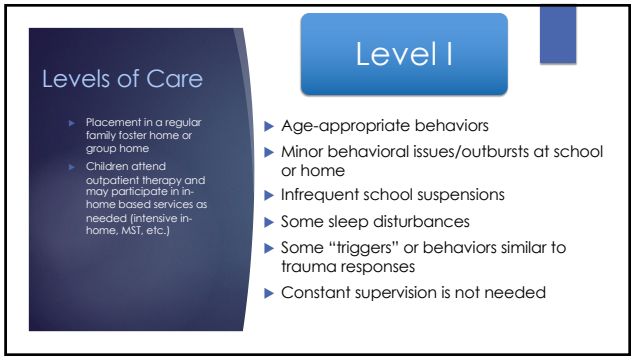
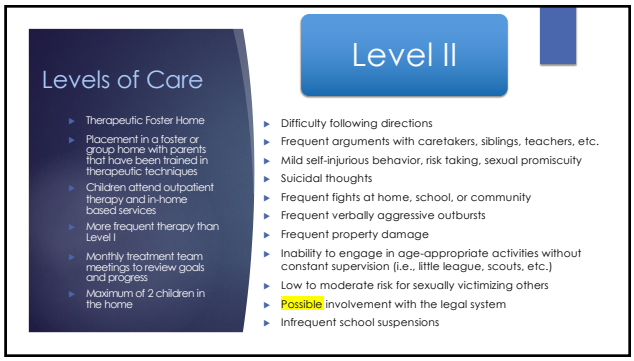

Levels of Care
Placement in a regular family foster home or group home
Children attend outpatient therapy and may participate in in-home based services as needed (intensive in-home, MST, etc.)
Level I
Age-appropriate behaviors
Minor behavioral issues/outbursts at school or home
Infrequent school suspensions
Some sleep disturbances
Some "triggers" or behaviors similar to trauma responses
Constant supervision is not needed

14


Levels of Care
Therapeutic Foster Home
Placement in a foster or group home with parents that have been trained in therapeutic techniques
Children attend outpatient therapy and in-home based services
More frequent therapy than Level I
Monthly treatment team meetings to review goals and progress
Maximum of 2 children in the home
Level II

15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Placement in a foster or group home with parents that have been trained in therapeutic techniques
Children attend outpatient therapy and in-home based services
More frequent therapy than Level I
Monthly treatment team meetings to review goals and progress
Maximum of 2 children in the home
Level II
Difficulty following directions
Frequent arguments with caretakers, siblings, teachers, etc.
Mild self-injurious behavior, risk taking, sexual promiscuity
Suicidal thoughts
Frequent fights at home, school, or community
Frequent verbally aggressive outbursts
Frequent property damage
Inability to engage in age-appropriate activities without constant supervision (i.e., little league, scouts, etc.)
Low to moderate risk for sexually victimizing others
Possible involvement with the legal system
Infrequent school suspensions

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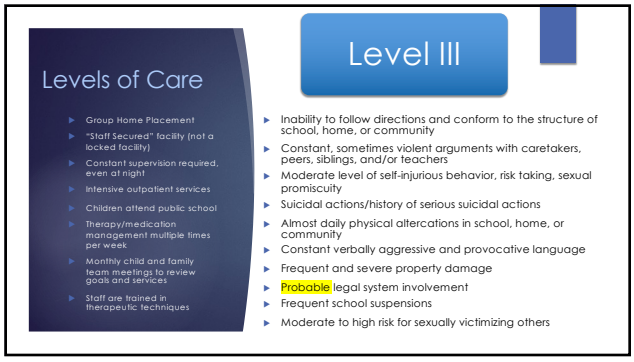
Levels of Care
Group Home Placement
"Staff Secured" facility (not a locked facility)
Constant supervision required, even at night
Intensive outpatient services
Children attend public school
Therapy/medication management multiple times per week
Monthly child and family team meetings to review goals and services
Staff are trained in therapeutic techniques
Level III

17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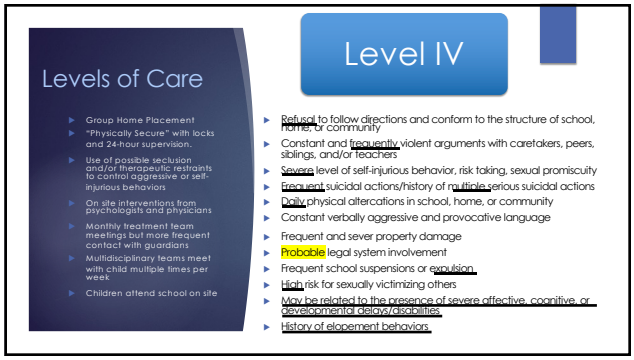
Constant supervision required, even at night
Intensive outpatient services
Children attend public school
Therapy/medication management multiple times per week
Monthly child and family team meetings to review goals and services
Staff are trained in therapeutic techniques
Level III
Inability to follow directions and conform to the structure of school, home, or community
Constant, sometimes violent arguments with caretakers, peers, siblings, and/or teachers
Moderate level of self-injurious behavior, risk taking, sexual promiscuity
Suicidal actions/history of serious suicidal actions
Almost daily physical altercations in school, home, or community
Constant verbally aggressive and provocative language
Frequent and severe property damage
Probable legal system involvement
Frequent school suspensions
Moderate to high risk for sexually victimizing others

18


Levels of Care
Group Home Placement
"Physically Secure" with locks and 24-hour supervision.
Use of possible seclusion and/or therapeutic restraints to control aggressive or self-injurious behaviors
On site interventions from psychologists and physicians
Monthly treatment team meetings but more frequent contact with guardians
Multidisciplinary teams meet with child multiple times per week
Children attend school on site
Level IV

19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Group Home Placement
"Physically Secure" with locks and 24-hour supervision.
Use of possible seclusion and/or therapeutic restraints to control aggressive or self-injurious behaviors
On site interventions from psychologists and physicians
Monthly treatment team meetings but more frequent contact with guardians
Multidisciplinary teams meet with child multiple times per week
Children attend school on site
Level IV
Refusal to follow directions and conform to the structure of school, home, or community
Constant and frequently violent arguments with caretakers, peers, siblings, and/or teachers
Severe level of self-injurious behavior, risk taking, sexual promiscuity
Frequent suicidal actions/history of multiple serious suicidal actions
Daily physical altercations in school, home, or community
Constant verbally aggressive and provocative language
Frequent and sever property damage
Probable legal system involvement
Frequent school suspensions or expulsion
High risk for sexually victimizing others
May be related to the presence of severe affective, cognitive, or developmental delays/disabilities
History of elopement behaviors

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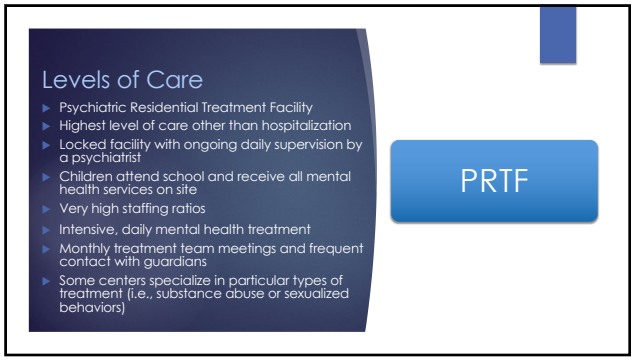
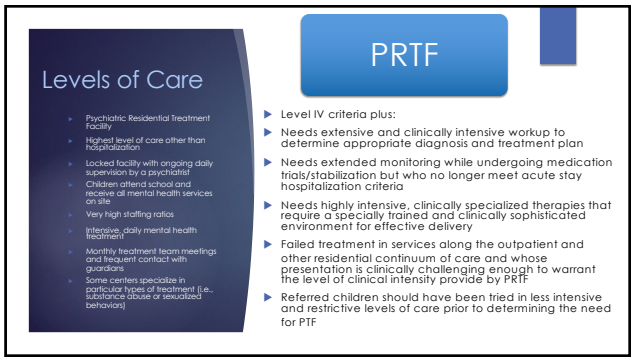

Levels of Care
Psychiatric Residential Treatment Facility
Highest level of care other than hospitalization
Locked facility with ongoing daily supervision by a psychiatrist
Children attend school and receive all mental health services on site
Very high staffing ratios
Intensive, daily mental health treatment
Monthly treatment team meetings and frequent contact with guardians
Some centers specialize in particular types of treatment (i.e., substance abuse or sexualized behaviors)
PRTF

21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Some centers specialize in particular types of treatment (i.e., substance abuse or sexualized behaviors)
PRTF
Level IV criteria plus:
Needs extensive and clinically intensive workup to determine appropriate diagnosis and treatment plan
Needs extended monitoring while undergoing medication trials/stabilization but who no longer meet acute stay hospitalization criteria
Needs highly intensive, clinically specialized therapies that require a specially trained and clinically sophisticated environment for effective delivery
Failed treatment in services along the outpatient and other residential continuum of care and whose presentation is clinically challenging enough to warrant the level of clinical intensity provide by PRTF
Referred children should have been tried in less intensive and restrictive levels of care prior to determining the need for PTF

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Facilities: Level I
Licensed Residential Child Care Facilities in NC
https://files.nc.gov/ncdhhs/documents/files/dss/licensing/rccfacilities.pdf

23


Facilities: Level II
Therapeutic Foster Care or Group Homes
https://www.wral.com/foster-children-living-in-wake-county-office-building/20415289/

24

Facilities: Level II

Level II Group Homes

Provider	City
Eliada Homes	Asheville
Inspriationz	Winston-Salem
Sunrise Pointe	Burlington
The Bruson Group	Knightdale
Youth Enrichment Group	Greensboro

25

Facilities: Level III

Statewide

172 Facilities
115 Providers
690 Beds

39 Facilities with 0 residents means 148 less beds

https://info.ncdhhs.gov/dhsr/mhlcs/facilities.html

26

Facilities: Level IV

Statewide

5 Facilities
3 Providers
51 Beds

1 Facility with 0 residents means 9 less beds

https://info.ncdhhs.gov/dhsr/mhlcs/facilities.html

27

Facilities: PRTF

https://info.ncdhhs.gov/dhsr/mhlcs/facilities.html

Statewide

24 Facilities
7 Providers
249 Beds

3 Facilities with 0 residents means 36 less beds

28

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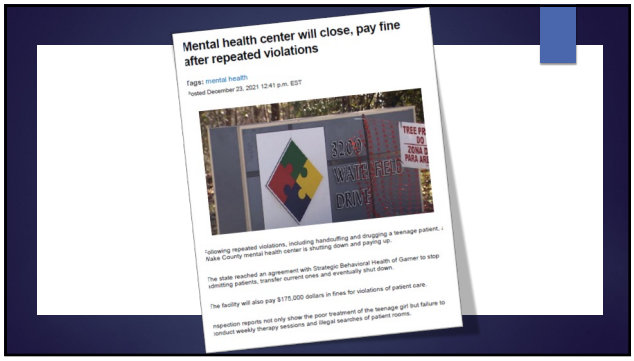


30

Denials & Barriers

31

What placement barriers or reasons for denial have you come across?

32

From DJJDP

- Issues with Follow Through:
  - Assessment completed that makes recommendation but then little to no assistance in making referrals
  - Issues with filling out application for facility: delays in filling out the paperwork, no follow up after submission
- Resource Limitations:
  - Assessments that only list one clinical recommendation which is often the one that is not available
- Individual Needs:
  - By virtue of being involved with JJ, nature of offense, diagnosis of conduct disorder, etc. we find that our youth are not accepted.
    - Aggression
    - Running away
    - Acting out sexually
    - Larceny/Stealing
    - IDD
  - Youth may not look appealing for acceptance on paper and assistance is needed by provider/MCO to advocate for youth to be accepted
  - PRTFs can pick which youth that feel may be easier to work with and see progress with

33

34

35

Alternatives & Strategy

- What does this child *actually* need? Why is placement the proposed solution?
- Olmstead v. L.C., 527 US 581 (1999)
- Community supports are required if there is an intellectual or developmental disability
  - Samantha R., et al., v. North Carolina, et al., 17CVS6357 (Feb 2020)
  - www.disabilityrightsnc.org/general/samanthar/
- Court cannot specifically order a PRTF, that is a medical decision
  - Commitments trigger separate due process rights under Chapter 122C
- Allow and encourage the child to participate and self-advocate in their care: "Why Can't I Just Go Home?"
- Contact DRNC if any suspected disability
- Are there capacity issues implicated by the CCA or recommendations?

36

37

Alternatives & Strategy

- Argue for release of youth if in detention pending placement. "…it appears that the legislature did not intend for a juvenile who has been adjudicated delinquent to experience lengthy periods of detention while awaiting disposition or pending placement." https://civil.sog.unc.edu/legally-permissible-uses-of-juvenile-detention/
- Insist on review hearings every 10 days
- Ask the judge to order facilities that deny admission to put their reason(s) in writing
- Subpoena the LME/MCO, specific provider, or whoever is involved in delaying the process

38

Alternatives & Strategy

- Be involved in the care review team – ask for it to be in the order
- Make objections for the record (enough preservation of the record makes a judge think!)
- If parents are a barrier to the child's success, ask the court to order the parent to comply specifically or provide support to the child – GS § 7B-2704
- Or ask that someone else step in – "In any case when no parent, guardian, or custodian appears in a hearing with the juvenile or when the court finds it would be in the best interests of the juvenile, the court may appoint a guardian of the person for the juvenile." GS § 7B-2001
- What else???

39

1

Adolescent Mental Health

Common disorders:

- Anxiety disorders
- Depression
- ADHD
- https://opa.hhs.gov/adolescent-health/mental-health-adolescents

2

Anxiety Disorders

- Characterized by feelings of excessive uneasiness, worry, and fear
- Examples include generalized anxiety disorder, post-traumatic stress disorder, social anxiety disorder, obsessive-compulsive disorder, and phobias
- Occur in approximately 32 percent of 13- to 18-year-olds
- In 2016, roughly 11 percent of adolescents ages 12-17 and 7 percent of children ages 6-11 had a current anxiety disorder diagnosis".
- Globally, the prevalence of youth experiencing clinically elevated anxiety symptoms—roughly 1 in 5—nearly doubled during the first year of the COVID-19 pandemic
- https://opa.hhs.gov/adolescent-health/mental-health-adolescents.

3

Depression

- Depressed mood that affects thoughts, feelings, and daily activities, including eating, sleeping, and working
- Occurs in approximately 13 percent of 12- to 17-year-olds
- Examples include major depressive disorder and seasonal affective disorder
- https://opa.hhs.gov/adolescent-health/mental-health-adolescents

4

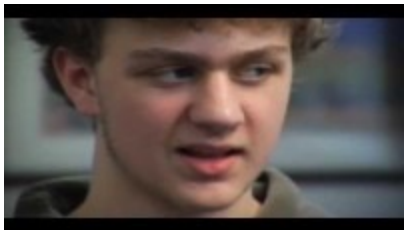
ADHD

- Characterized by continued inattention and/or hyperactivity-impulsivity that interferes with daily functioning or development
- Occurs in approximately nine percent of 13- to 18-year-olds
- https://opa.hhs.gov/adolescent-health/mental-health-adolescents

5

How Might a Mental Health Condition Impact School Behavior?

6



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FIGHT
FLIGHT
FREEZE

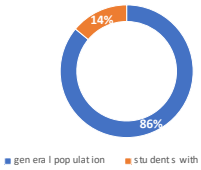
8


Mental Health Needs May be an Explanation

9

What Does the Data Tell Us?

NC students with disabilities

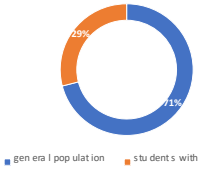


All data obtained from Office of Civil Rights data collection at https://ocrdata.ed.gov/estimations/2017-2018

10

What Does the Data Tell Us?

School-based referral to law enforcement



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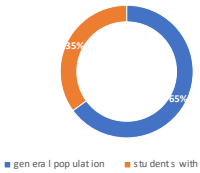
11

What Does the Data Tell Us?

School-based Arrests



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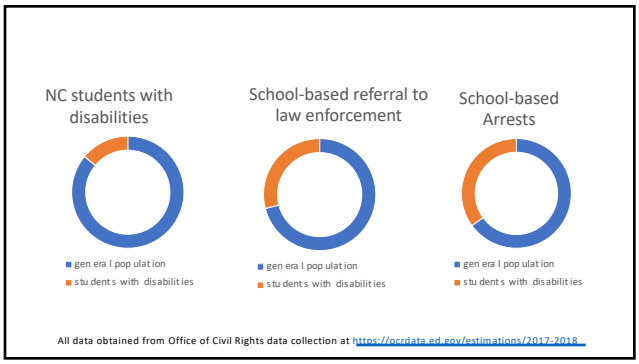
NC students with disabilities
School-based referral to law enforcement
School-based Arrests
general population
students with disabilities
general population
students with disabilities
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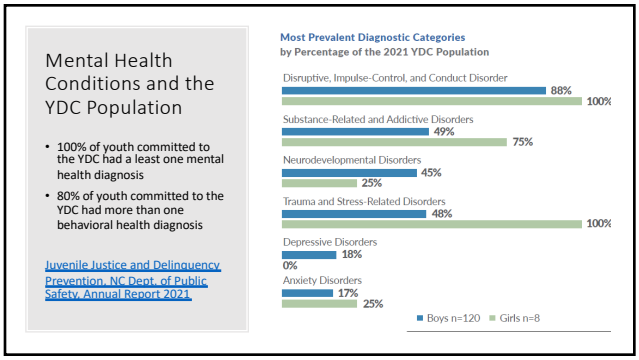
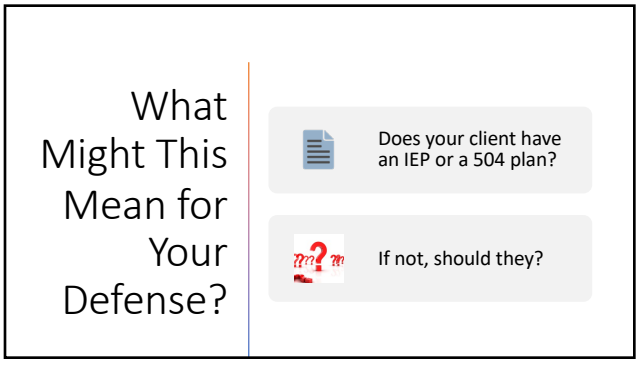

Mental Health Conditions and the YDC Population
• 100% of youth committed to the YDC had a least one mental health diagnosis
• 80% of youth committed to the YDC had more than one behavioral health diagnosis
Juvenile Justice and Delinquency Prevention, NC Dept. of Public Safety, Annual Report 2021
Most Prevalent Diagnostic Categories by Percentage of the 2021 YDC Population
Disruptive, Impulse-Control, and Conduct Disorder
88%
100%
Substance-Related and Addictive Disorders
49%
75%
Neurodevelopmental Disorders
45%
25%
Trauma and Stress-Related Disorders
48%
100%
Depressive Disorders
18%
0%
Anxiety Disorders
17%
25%
Boys n=120
Girls n=8

14


What Might This Mean for Your Defense?
Does your client have an IEP or a 504 plan?
If not, should they?

15

IEP's

Individuals with Disabilities Education Act

(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

16

IDEA Disability Definition (to qualify for an IEP)

1. **A child evaluated as having one of the following disabilities:**

Autism, deafness, deaf-blindness, developmental delay, emotional disturbance, hearing impairment, intellectual disability, multiple disabilities, orthopedic impairment, other health impairment, specific learning disability, speech or language impairment, traumatic brain injury, visual impairment, including blindness

2. By reason thereof, needs special education and related services to enable the child to participate in the general education curriculum

17

Violations of Codes of Conduct and IEPs

Any removal from the school setting for more than 10 days (cumulative in one year) requires:

- Continued special education services
- A functional behavioral assessment and behavioral intervention services and modifications to address the prevent recurrence of the behavior violation
- A manifestation determination:
  - (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
  - (ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

[If the behavior was a manifestation of the disability, the child has to be returned to school]

Special circumstances: weapon possession, use or sale of drugs, serious bodily injury can result in 45-day interim alternative educational setting without regard to manifestation determination

18

504 Plans – Civil Rights Framework

Section 504 of the Rehabilitation Act of 1973

- Prohibits discrimination on the basis of disability in any program or activity receiving Federal financial assistance, including schools
- A recipient that operates a public elementary or secondary education program or activity shall provide a free, appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

Handicapped person:

- Physical or mental impairment which substantially limits one or more major life activities; a record of such impairment; or regarded as having such impairment
  - *Mental impairment:* any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
  - *Major life activities:* functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

19

504 Plans

About accommodations:

i.e. Assistive technology, tests, extra set of books for home, preferred seating, positive reinforcement

- Evaluations are required, although schools do not have to pay for independent evaluations
- Out of school suspensions for more than 10 days require a manifestation determination
- Less required process – timelines, reports, make up of the committee are all less rigid than for IEPs

20

Does the School or Community Have any Restorative Justice Function?

Restoring Youth Coalition NC - https://www.rjnc.us/about/

21

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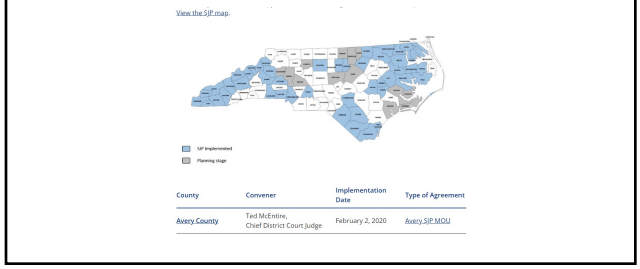
https://www.nccourts.gov/programs/school-justice-partnership/sjps-in-north-carolina



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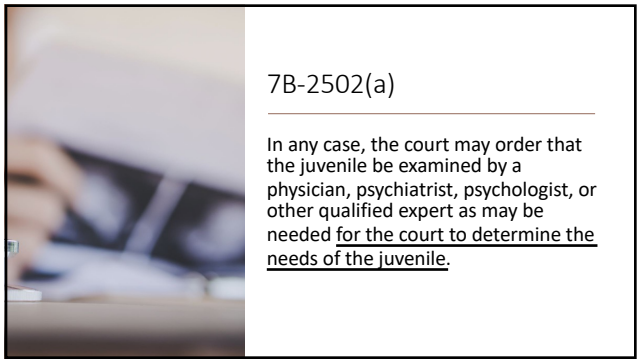

7B-2502(a)

In any case, the court may order that the juvenile be examined by a physician, psychiatrist, psychologist, or other qualified expert as may be needed for the court to determine the needs of the juvenile.

24

G.S. 7B-2501(d)

The court may **dismiss** the case, or **continue the case for no more than six months in order to allow the family an opportunity to meet the needs of the juvenile through** more adequate home supervision, through placement in a private or specialized school or agency, through placement with a relative, or through **some other plan approved by the court.**

25

G.S. 7B-2506(19) (Level 2 dispositional option)

Suspend imposition of a more severe, statutorily permissible disposition with the provision that the juvenile meet **certain conditions agreed to by the juvenile and specified in the dispositional order.** The conditions shall not exceed the allowable dispositions for the level under which disposition is being imposed.

26

G.S. 7B-2510(a)(14) (potential probation condition)

That the juvenile satisfy any other conditions determined appropriate by the court.

27

G.S. 7B-2508(e) (dispositional limits)

However, a court may impose a Level2 disposition rather than a Level 3 disposition if the court submits written findings on the record that substantiate extraordinary needs on the part of the offending juvenile.

28

Contact Information

Jacqui Greene
greene@sog.unc.edu
(919)866-4327

29

THE ANTI-PARENT JUVENILE COURT

By Barbara Fedders

INTRODUCTION

We are in a moment of collective reckoning with the carceral state.[1] Commentators[2] and advocates[3] critique overcriminalization,[4] mass incarceration,[5] state-imposed liberty restrictions on wide swaths of the population,[6] and the imposition of long-term collateral consequences on people arrested[7] and convicted,[8] who are disproportionately poor people

1. "Carceral state" is a phrase that seems to have originated in Marie Gottschalk's CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 1–2 (2015).
2. GOTTSCHALK, *supra* note 1, at 2 (describing that the carceral state "includes not only the country's vast archipelago of jails and prisons, but also the far-reaching and growing range of penal punishments and controls that lies in the never-never land between the prison gate and full citizenship").
3. *See, e.g.*, THE MOVEMENT FOR BLACK LIVES, https://m4bl.org [https://perma.cc/KM99-4PEA] (discussing, among other things, The Breathe Act, a bill that calls for the abandonment of "police, prisons, and all punishment paradigms"); GOTTSCHALK, *supra* note 1, at 1 (describing how the carceral state "includes not only the country's vast archipelago of jails and prisons, but also the far-reaching and growing range of penal punishments and controls that lies in the never-never land between the prison gate and full citizenship").
4. *See, e.g.*, DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 4 (2009) (characterizing the criminal legal system as resting on "too many crimes" and "too much punishment").
5. *See, e.g* , FRANKLIN ZIMRING, THE INSIDIOUS MOMENTUM OF AMERICAN MASS INCARCERATION ix (2020) (noting popular use of "mass incarceration" as a label to describe high rates of imprisonment).
6. *See, e.g.*, Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 UNIV. PA. L. REV. 1789, 1803–1807 (2012) (distinguishing between "mass incarceration" and "mass conviction" and arguing that the latter more accurately captures the scale of "civil death" caused by involvement in the criminal system since most convicted people are sentenced to probation rather than incarceration).
7. *See, e.g.*, Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 826–44 (2015) (documenting the range of negative impacts outside the criminal system that result from arrest alone, including in the areas of immigration enforcement, public housing, employment, child protective services, foster care, and education).
8. *See, e.g.*, Chin, *supra* note 6, at 1806–10 (noting consequences such as electoral disenfranchisement and sex offender registration requirements and documenting how courts impose few restrictions on collateral consequences from convictions as they are generally regarded as non-punitive).

and people of color.[9] They criticize the long reach of the carceral state, arguing that its priorities and practices have infused schools[10] and workplaces.[11]One legal scholar has even turned the mirror inward, arguing that criminal law courses contain many pro-carceral elements.[12]

As policymakers across the country take steps to address the causes and ameliorate the impacts of overcriminalization and mass incarceration,[13] one popular reform has been to move the prosecution of minors[14] from criminal court to juvenile court. Proponents of trying

9. *See, e.g.*, MICHELLE ALEXANDER: THE NEW JIM CROW: MASS INCARCERATION IN AN ERA OF COLORBLINDNESS 2 (2010) (arguing that racial discrimination made unlawful through civil rights laws persists through the current racial inequity in the criminal system and positing that "we have not ended caste in America; we have merely redesigned it").

10. *See, e.g.*, Barbara Fedders, *The End of School Policing*, 109 CALIF. L. REV. 1443, 1506 (2021).

11. *See, e.g.*, JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 207–231 (2007).

12. *See, e.g.*, Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1635-36(2020) (suggesting that "American law schools, through the required course on substantive criminal law, have contributed affirmatively to the collection of phenomena commonly labeled mass incarceration [by] telling a particular story about criminal law as limited in scope, careful in its operation, and uniquely morally necessary" and arguing that "[this] story has always been fiction, but it is presented as fact[;] students educated in this model learn to trust and embrace criminal law, and thus law schools have helped to facilitate a carceral state by supplying it with willing agents, and more specifically, willing lawyers").

13. *See, e.g.*, Jessica Eaglin, *The Categorical Imperative as a Decarceral Agenda*, 104 MINN. L. REV. 2715, 2720–21 (2020) (discussing various reforms to remove people from correctional institutions but noting that these reforms rely on local-actor discretion and thus suggesting they may be ineffective at producing meaningful change); *see also*, Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 264–65 (2018) (mapping the difference between critiques that the criminal system results in overcriminalization and those that focus on mass criminalization, culling the policy implications of each, and arguing that while overcriminalization critiques may have pragmatic appeal for pushing policy reform, arguments sounding only in the appeal to overcriminalization may unintentionally legitimate structural flaws in the criminal system that create and perpetuate racial and class inequities).

14. *See* Daniel P. Mears, Joshua C. Cochran, Brian J. Stults & Sarah J. Greenman, *The "True" Juvenile Offender: Age Effects and Juvenile Court Sanctioning*, 52 CRIMINOLOGY 169 (2014) (using "minor" or "child" to denominate young people as they enter the juvenile court and reserving "juvenile" to refer to the legal conclusion of delinquency or status offense). States define "minors" differently; the minimum stated age for prosecution is six; the maximum, twenty-one. OFF. OF JUV. JUST. & DELINQUENCY PREVENTION, *Statistical Briefing Book: Juvenile Justice System Structure & Process* (2012) https://www.ojjdp.gov/ojstatbb/structure_process/qa04102.asp?qaDate=2012#:~:text=An

minors in juvenile rather than adult court argue that the juvenile court system's commitment to rehabilitation[15] makes it a more equitable and effective forum for adjudicating crime.[16] Among the features proponents cite as key to the juvenile court's efficacy is the statutorily mandated involvement of parents,[17] who by contrast have no legislatively defined role when their children are prosecuted in criminal court.

This Article explores the involvement of parents in juvenile court. It argues that parents' ability to aid in their children's rehabilitation is undermined by the economic costs and dignitary harms that juvenile court imposes on parents.[18] Economic costs consist of fines and fees associated with the court process, as well as lost wages parents may incur as they attend court dates, meet with court officials, and transport their child to required meetings.[19] The infringement of dignity interests include, first, juvenile court judges requiring parents to act as the court's eyes and ears by reporting their child's whereabouts, behavior, suspected substance use, school attendance, and curfew compliance—to name but a few—to probation officers.[20] Probation officers can then use that information to seek orders imposing harsher sentencing consequences on children, including detention.[21] Second, prosecutors can—and often do—override parents' perspectives on whether a case should go forward and what should happen if it does.[22] In addition, defense attorneys—who may be guided by a misapplication of child-centered lawyering—also frequently shut parents out of the process entirely, failing to make space for them even during stages where their participation does not implicate concerns of confidentiality or attorney-

%20upper%20age%20of%2015,child%20when%20they%20turn%2018 [https://perma.cc/4XN2-ZQ75].

15. Subpart I.A.5 explores this alleged commitment in depth.
16. NAT'L CONFERENCE OF STATE LEGISLATURES, RAISING THE AGE OF JUVENILE COURT JURISDICTION (2015).
17. *See, e.g.*, NORTH CAROLINA COMMISSION ON THE ADMINISTRATION OF LAW & JUSTICE, JUVENILE REINVESTMENT 15 (2016). Unless otherwise specified, "parents" in this Article refers to those adults with legal (though not always physical) custody of and caretaking responsibilities for children in the juvenile court and thus includes biological and adoptive parents as well as other legal guardians, whether part of the same legally recognized family or not.
18. *See infra* Part III.
19. *See infra* Part III.A.
20. *See infra* Part III.B.2.a.
21. *Id.*
22. *See infra* Part 0.

client privilege.[23] Third, although children's alleged illegal conduct may arise from trouble with other social systems—frustration in school due to unmet academic needs, trauma from involvement with the child welfare system, or challenges accessing mental health services—judges have limited power to affect those systems' interactions with the child client.[24] Perhaps related to this circumscribed authority over systems, judges can—and do—hold individual parents responsible for their child's misconduct, issuing orders against the parents that often impose burdensome and liberty-infringing requirements.[25]

Collectively, this Article argues that these economic costs and dignitary harms frustrate the court's rehabilitative aspirations. Research suggests that a parent's inability to effectively nurture and appropriately discipline her child is linked to criminal offending of said child.[26] Difficulty in performing caretaking duties is a correlate of living in poverty.[27] Fines and fees that place a financial strain on an already impoverished family are counterproductive and destructive. In addition, when a juvenile court damages the parent-child bond or undermines parental authority—both foreseeable outcomes from the common practices of requiring the parent to report on the child and ignoring or overriding the parent's input about what should happen to the child—family stability is also threatened. This, too, interferes with a child's ability to benefit from court involvement as those who believe in the court's rehabilitative promise envision.[28]

Because juvenile courts are populated overwhelmingly by children of poor people[29] who are disproportionately Black, Latinx, and Indigenous,[30] these harms take on special salience. Throughout U.S. history, key state-sponsored practices have resulted in the destruction of family bonds in poor communities of color. These include child welfare interventions that result in disproportionate, unwarranted removals of children and termination of parental rights in Black families,[31]

23. *Id.*
24. *See infra* Part III.B.2.c.
25. *Id.*
26. *See infra* note 144, and accompanying text.
27. *Id.*
28. *See infra* Part 0.
29. *See* Tamar Birckhead, *Delinquent by Reason of Poverty*, 38 WASH. UNIV. J.L & POL'Y 53, 58–59 (2012).
30. *See infra* Part II.A.
31. *See e.g.*, DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE ix–x (2002) (positing that "[o]ne hundred years from now, today's child welfare system will

immigration actions leading to detention and deportation of undocumented parents,[32] and coercive assimilationist practices of removing Indigenous children from their families and communities in favor of boarding schools and non-Indigenous adoptive homes.[33] This history counsels special care by policymakers in ensuring that any costs and harms to parents of children interacting with the juvenile court—which is ostensibly a rehabilitative institution—are justified.

This Article sits at the intersection of two bodies of legal commentary: scholarship that critiques the juvenile justice system for features that render it racialized, punitive, and insufficiently attentive to the growth, healthy development, and rehabilitation of children,[34] and

surely be condemned as a racist institution—one that compounded the effects of discrimination on Black families by taking children from their parents, allowing them to languish in a damaging foster care system or to be adopted by more privileged people"). *See also* Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 REV. L. & SOC. CHANGE 347, 348 (1996) (noting that "[p]oor families, the only families that receive close supervision from child protective systems, are often disrupted without adequate attention to the harms of family separation"); *see also* Peggy Cooper Davis, *So Tall Within: The Legacy of Sojourner Truth*, 18 CARDOZO L. REV. 451, 452 (1996) (explaining that "[a]brogation of the parental bond was a hallmark of the civil death that United States slavery imposed").

32. *See, e.g.*, Jenny Brooke-Condon, *When Cruelty is the Point: Family Separation as Unconstitutional Torture*, 56 HARV. C.R.-C.L. L. REV. 37, 38 (2021) (discussing the "zero tolerance" separation policy of the Trump administration in 2017–2018, when "[f]ederal officers detained migrants, took their minor children from them, and shuttled the children into a refugee child welfare system as if they were 'unaccompanied' or 'orphaned'" and noting that "[t]hey did so without consistently tracking parent-child relationships, making clear that the government had no intention to one day reunite parents and children"); *see also* Juliet P. Stumpf, *Justifying Family Separation: Constructing the Criminal Alien and the Alien Mother*, 55 WAKE FOREST L. REV. 1037, 1076 (2020) (criticizing the Trump Administration policy of establishing itself as the "protector of separated children against parent-induced harms" and dividing immigrants into "good" and "bad").

33. Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 52–54 (2008). (describing how forced placement of Indigenous children into boarding schools and through adoption into non-Indigenous families were undertaken as part of governmental efforts to wipe out Native American tribal autonomy and culture).

34. *See, e.g.*, Perry L. Moriearty, *Combating the Color-Coded Confinement of Kids: An Equal Protection Remedy*, 32 REV. L. & SOC. CHANGE 285, 288-89 (2008) (citing studies showing that youth of color are more likely to be arrested, detained, formally charged in juvenile court, transferred to adult court, and confined to secure residential facilities than their white counterparts" and that differential offending patterns do not explain these disparities); Paul Holland & Wallace J. Mlyniec, *Whatever Happened to the Right to Treatment?: The Modern Quest for a Historical Promise*, 68 TEMP. L. REV. 1791, 1811 (1995) (decrying the replacement of a rehabilitative focus with a punitive one statutes). *See also*, James Herbie DiFonzo,

scholarship arguing that the child welfare system is racialized, punitive toward parents, and insufficiently attentive to the imperatives of family integrity and preservation.[35] Scholarship on parents in juvenile court has primarily considered the proper role for parents in the attorney-client dyad,[36] the ways in which parental authority over children can thwart children's ability to assert their constitutional rights in the context of police searches[37] and interrogations,[38] and whether and how to hold parents responsible for their children's alleged criminal offenses.[39] Few scholars have examined how the juvenile delinquency court affects

Parental Responsibility for Juvenile Crime, 80 OR. L. REV. 1 (2001) (arguing these features constitute a "juvenile justice counter-revolution").

35. *See, e.g.*, CHILD WELFARE INFO. GATEWAY, CHILDREN'S BUREAU, RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE (2016) (discussing causes of and potential solutions to racial disproportionality in the child welfare system); Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C IRVINE L. REV. 297 (2013) (noting punitive nature of means-tested assistance experienced by low-income women); ROBERTS, SHATTERED BONDS, *supra* note 31, at ix–x ("One hundred years from now, today's child welfare system will surely be condemned as a racist institution—one that compounded the effects of discrimination on Black families by taking children from their parents, allowing them to languish in a damaging foster care system or to be adopted by more privileged people.");

36. *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, 838–39 (identifying the "core principles that will guide lawyers in counseling children, interacting with parents, and protecting the legal rights of children charged with crime"). *Accord* Erika Fountain & Jennifer Woolard, *The Capacity for Effective Relationships Among Attorneys, Juvenile Clients, and Parents*, 14 OHIO ST. J. CRIM. L. 493 (2017).

37. *See, e.g.*, Kristin Henning, *The Fourth Amendment Rights of Children at Home: When Parental Authority Goes Too Far*, 53 WM. & MARY L. REV. 55, 59 (2011) (exploring "the extent to which parental authority should be allowed to override the Fourth Amendment rights of minors to resist State intrusion" and arguing that "the Court's dicta in Georgia v. Randolph oversimplifies, and maybe even mischaracterizes, the Court's own analysis of children's rights in previous cases, and as a result has and will continue to distort the analysis of lower courts called upon to mediate the rights of children in competition with the rights and duties of their parents").

38. *See, e.g.*, Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 AM. CRIM. L. REV. 1277, 1278–79 (2004) (casting doubt on whether parents play a consistently useful role in assisting their children to resist police overreach and arguing that the "most authentic approach to ensuring that a juvenile's waiver is knowing, voluntary and intelligent, would be to require a non-waivable right to an attorney for purposes of consultation regarding the decision to waive Fifth Amendment protections").

39. *See, e.g.*, DiFonzo, *supra* note 34 (situating parental responsibility laws within "juvenile justice counter-revolution" aimed at removing special protections for youthful offenders).

parents and how these effects in turn shape youth outcomes.[40] This Article responds to that omission, unfolding in four parts.

Part 0 briefly analyzes the jurisdiction and doctrinal underpinning of the early[41] juvenile court and discusses how social science regarding childhood, adolescence, and criminology influenced its founders. This Part posits that the rehabilitative impulses of the court were undermined by family-interventionist practices—justified by the common-law doctrine of *parens patriae*—that minimized parents' rights.[42] Part II shifts the temporal focus to the present. After briefly analyzing how racialized poverty renders families vulnerable to juvenile court involvement, this Part juxtaposes the continued statutory commitment to rehabilitation with the troubling persistence of *parens patriae*, manifested most prominently in the judicial use of detention over the objection of parents. Part III explores the economic costs and dignitary harms to parents of their children's juvenile court involvement. It first discusses the nature, extent, and impact of the direct and indirect costs to parents. Then, after laying out the nature of the parental dignity interests at stake in delinquency prosecutions, this Part identifies and analyzes how juvenile court infringes on those interests. Part 0 posits that these costs and harms render the court less effective at promoting rehabilitation.

I. THE EARLY JUVENILE COURT THROUGH A PARENT-FOCUSED LENS

This Part analyzes the early juvenile court with a focus on how it conceptualized parents' rights. While this history has been exhaustively documented,[43] and need not be rehearsed here, a few key elements are

40. A notable counterexample is contained in Neelum Arya, *Family-Driven Justice*, 56 ARIZ. L. REV. 623, 627 (2014), which, after noting that it is "somewhat surprising" that scholars have paid little attention to families of youth arrested and imprisoned given the dependency of youth on families, Arya articulates a theory of family engagement in which juvenile justice system actors respond to the stated needs of families rather than trying only to incorporate families into existing efforts.

41. This Article defines the early juvenile court as that which predated the U.S. Supreme Court decision in *In re Gault*, 387 U.S. 1 (1967) (casting doubt on the efficacy of the early juvenile court and instituting due process protections).

42. *See infra* notes 63-69 and accompanying text.

43. *See, e.g.*, Jonathan Simon, *Power Without Parents: Juvenile Justice in a Postmodern Society*, 16 CARDOZO L. REV. 1363, 1384 (1995) (articulating that "[t]he rise of the juvenile court is one of the most studied episodes in the history of modern law") [hereinafter Simon, *Power*] (1995) and citing germinal juvenile court studies, 1363 n.3 (citing ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (2d ed.

relevant. Subpart A considers the court's jurisdiction, predecessor practices and institutions, underlying legal doctrine of *parens patriae*, social scientific currents of the time regarding young people that influenced the formation of the juvenile court, and the resulting emphasis on rehabilitation. Subpart B discusses how juvenile court judges and probation officers relied on the *parens patriae* doctrine to justify sweeping interventions into the home lives of poor families to the detriment of parents' ability to keep their families together.

Before exploring the history of the early juvenile court, a word on terminology is in order. Commentators then[44] and now[45] refer to the juvenile court architects as "child savers," sometimes with admiration[46] and other times with irony or even disdain.[47] While not attempting to

1977); DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980); STEVEN L. SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF "PROGRESSIVE" JUVENILE JUSTICE, 1825–1920 (1977); JOHN R. SUTTON, STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES , 1640–1981 (1988); Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970); Alexander W. Pisciotta, *Saving the Children: The Promise and Practice of Parens Patriae, 1838–98*, 28 CRIME & DELINQ. 410 (1982); *see also* DAVID TANENHAUS, JUVENILE JUSTICE IN THE MAKING (2004); BARRY FELD, THE EVOLUTION OF THE JUVENILE COURT: RACE, POLITICS, & THE CRIMINALIZING OF JUVENILE JUSTICE (4th ed. 2017) [hereinafter, FELD, EVOLUTION].

44. *See, e.g.*, James Herbie DiFonzo, *Deprived of Fatal Liberty: The Rhetoric of Child Saving and the Reality of Juvenile Incarceration*, 26 UNIV. TOL. L. REV. 855, 858 (1995) (discussing rhetoric of "infant salvation" used by reformers and penologists of the time).

45. *See* Robin Walker Sterling, *Fundamental Unfairness: In re Gault and the Road Not Taken*, 72 MD. L. REV. 607, 616–22 (2013) (noting that "the story of how the Child Savers campaigned for a specialized juvenile court is well known" and citing scholarly sources regarding that history).

46. THE PREVENTION OF PAUPERISM IN THE CITY OF NEW YORK, REPORT ON THE SUBJECT OF ERECTING A HOUSE OF REFUGE FOR VAGRANT AND DEPRAVED YOUNG PEOPLE, *in* THE SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS, DOCUMENTS RELATIVE TO THE HOUSE OF REFUGE 13 (quoting reformers, noting the "ragged and uncleanly appearance, the vile language, and the idle and miserable habits of great numbers of children" and asking whether it was "possible that a Christian community can lend its sanction to such a process without any effort to rescue and to save?").

47. The most prominent work in this vein is ANTHONY PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (1969), which argued, among other things, that the creation of the juvenile court had as much to do with controlling the emergence of an incipient revolutionary class as with helping children. Consider in this regard a comment by Charles Loring Brace, founder of New York's Children's Aid Society, who warned that this "dangerous class," would eventually "vote – they will have the same rights as we ourselves. . . . They will perhaps be embittered at the wealth and luxuries they never share. Then let society beware when the outcast, vicious, reckless multitude of New York boys, swarming now in every foul alley and low street, come to know their power and use it!" MIMI ABRAMOVITZ, REGULATING THE LIVES

resolve the debate, this Article adopts the phrase, using its nuanced interpretations to describe the promise and perils of juvenile court both past and present.

A. The Promise of Child Saving

1. Jurisdiction

A little over a century ago, a loose coalition of reform-minded child advocates and business elites lobbied for the creation of the nation's first juvenile court.[48] In 1899, Illinois passed the first Juvenile Court Act.[49] Within twenty years, all but three states had passed similar legislation.[50] Today, every state has a juvenile court.[51]

The subject-matter jurisdiction of the court encompassed youths accused of conduct that violated the criminal law—which are known as delinquency cases—and youths accused of conduct that but for the age of the child would be legal—today commonly known as status offense cases.[52]

2. Predecessor Practices and Institutions

The child-saving endeavor culminating in the creation of a specialized juvenile court was in fact a continuation of reform efforts undertaken in the earlier part of the century. These efforts were aimed at the increased numbers of young people—principally immigrants—

OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT 140 (1996) (citation omitted).

48. *See generally*, Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 777 (2010).

49. 1899 Ill. Laws 131 (current version at 705 Ill. Comp. Stat. 405/1–2 (West 2009).

50. ELLEN RYERSON, THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT 81 (1978).

51. David B. Mitchell & Sara E. Kropf, *Youth Violence: Response of the Judiciary*, *in* SECURING OUR CHILDREN'S FUTURE: NEW APPROACHES TO JUVENILE JUSTICE AND YOUTH VIOLENCE 118, 122 (Gary S. Katzmann ed., 2002). In addition, juvenile courts exist in the District of Columbia and the U.S. territories of American Samoa, Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. *See* National Juvenile Defender Center, State Profiles, https://njdc.info/practice-policy-resources/state-profiles (last visited June 25, 2022).

52. *See generally*, Peter D. Garlock, *Wayward Children and the Law:1820-1900: The Genesis of the Status Offense Jurisdiction of the Juvenile Court*, 13 GA. L. REV. 341, 342 (1979) (noting that status offense cases today typically are comprised of youth beyond parental control, runaways, and truants).

crowding U.S. cities.[53] Child saving before the creation of the juvenile court took one of two forms: either the removal of children from cities to live with families in other parts of the country[54] or the temporary settlement of urban youth without known family support into Houses of Refuge, which are institutions designed to provide shelter.[55]

These efforts similarly encompassed youths accused of crimes, those who left home, and those whose parents had lost custody of them.[56] Reformers did not typically distinguish among these categories in relief efforts. This was partly because delinquency was thought to be the logical consequence of poverty and homelessness.[57] Moreover, these youths were overwhelmingly poor,[58] and nineteenth-century reformers were acting in accordance with legislation modeled on English poor laws established in the colonies.[59] Such laws established that the state—not the church or private entities—were obliged to help indigent people.[60] The aid, however, was stigmatizing, contingent on means testing, and punitive: poor people were required to work, children were expected to contribute to the effort, and those who accepted aid were often deprived of their right to travel and vote.[61]

3. Legal Doctrine

The underlying legal doctrine for both the juvenile court and its predecessor practices and institutions was the common-law concept of

53. *See, e.g.*, NAT'L CONFERENCE OF CHARITIES & CORRECTION, REPORT OF THE COMMITTEE ON THE HISTORY OF CHILD-SAVING WORK: HISTORY OF CHILD SAVING IN THE UNITED STATES (1893); *see also* Walker Sterling, *supra* note 45.
54. Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 330 (2002).
55. Fox, *supra* note 43, at 1190.
56. Marsha Garrison, *Why Terminate Parental Rights*? 35 STAN. L. REV. 423, 434–35 (1983) (noting that "[u]nder the Colonial American poor laws, indigent parents who could not support their children simply lost custody of them [and that] [i]ndependence did not change these practices; throughout the first half of the nineteenth century, the state removed children from their parents' custody solely because of the parents' poverty").
57. The central provision of the legislation creating New York's House of Refuge is illustrative. It granted the administrators "power . . . to receive and take . . . all such children as shall be taken up or committed as vagrants, or convicted of criminal offenses." Fox, *supra* note 43, at 1190.
58. *Id.* at 1191.
59. William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 UNIV. RICH. L. REV. 111 (1997).
60. *Id.* at 116.
61. *Id.* at 111–12.

parens patriae.[62] Translated as "father of the country,"[63] *parens patriae* developed in the chancery courts of sixteenth-century England to cover the narrow category of cases of children whose parents had died intestate, as well as widows and others deemed incapable of managing their own property.[64]

Fast forward to the nineteenth century, U.S. reformers stretched the doctrine to fit a much broader array of circumstances.[65] They relied on the doctrine to justify the involuntary removal of children and placement in institutions and with other families for a wide range of reasons that were believed to indicate a child was, or might be, a community crime problem.[66] The vocabulary of the new juvenile court reflected this view. Juvenile court architects conceptualized the child not as a defendant but rather as an "object of [the state's] care and solicitude."[67] Acting as *parens patriae,* the state denied a child due process rights based on the assertion that the child has no right to liberty, but instead only to custody.[68]

4. Social Science

The commingling of categories that characterized the people brought into the early juvenile court—houseless, wayward, abandoned, vagrant, delinquent—reflected not only an expansive understanding of *parens patriae* but also the influence of positivist criminology.[69] This field of study held that authorities could recognize, and the law could address, the circumstances of childhood that would lead to crime and that, moreover, interventions such as foster homes, psychiatric institutions, and probation could stop reoffending and even prevent

62. Fox, *supra* note 43, at 1192–93.
63. Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600, 600 n.8 (1982) (internal quotation marks omitted) (quoting BLACK'S LAW DICTIONARY 1003 (5th ed. 1979)).
64. Janet Gilbert, Richard Grimm & John Parnham, *Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1153, 1158 (2001) (noting that the concept referred to the "role of the state as sovereign and guardian of a person under legal disability").
65. Fox, *supra* note 43, at 1193.
66. *Id.*
67. In re Gault, 387 U.S. 1, 15 (1967).
68. *Id.* at 17.
69. Jonathan Simon, *Positively Punitive: How the Inventor of Scientific Criminology who Died at the Beginning of the Twentieth Century Continues to Haunt American Crime Control at the Beginning of the Twenty-first*, 84 TEX. L. REV. 2135, 2136 (2006) [hereinafter Simon, *Positively*].

crime in the first instance.[70] For example, one of the Chicago juvenile court's founders opined she had "no doubt" that youthful criminality "is caused by nervous diseases, subnormality and mental aberration, brought about through heredity or home environment."[71]

In addition to criminology, changing views within psychology about the temporal boundaries and significance of childhood and adolescence helped shape juvenile courts. Prior to the nineteenth century, "childhood" as a unique formal life stage did not exist.[72] At common law, a person could be prosecuted so long as the legal defense of infancy—which operated only for children age seven and under—did not apply.[73] Enlightenment-era declines in infant mortality and increases in literacy, however, laid a foundation for the emergence of childhood as a developmentally distinct phase.[74] Childhood, which was understood to last until age fourteen,. began to be viewed in the United States as a period of plasticity, with the child imagined as uniquely innocent, pure, and malleable.[75] Childhood studies became a reputable field of study in the academy;[76] pediatrics emerged as a medical specialty, and children's hospitals were founded.[77]

Beginning in the twentieth century, the chronological boundaries of childhood were expanded even further to include people older than fourteen.[78] A nineteenth-century sociological study concluded "[this period] when human beings begin to assert themselves is the most trying

70. Fox, *supra* note 43, at 1233.
71. TANENHAUS, *supra* note 43, at 119 (quoting Jane Addams). Positivist criminology in the United States focused on identifying and incapacitating, for lengthy prison sentences or hospital stays, dangerous adult criminals; the aim of this project was to prevent crime and limit the spread of criminal traits in the population. Simon, *Positively, supra* note 69, at 2137.
72. ERICA R. MEINERS, FOR THE CHILDREN?: PROTECTING INNOCENCE IN A CARCERAL STATE 33–34 (2016); *see also* Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1091 (1991).
73. SIR MATTHEW HALE, 1 THE HISTORY OF THE PLEAS OF THE CROWN 16–28 (1680); *see also* Lara A. Bazelon, *Exploding the Superpredator Myth: Why Infancy is the Preadolescent's Best Defense in Juvenile Court*, 754 N.Y.U. L. REV. 159, 159–161 (2000) (noting that the presumption of incapacity that attached to infancy was rebuttable between the ages of seven and fourteen and that children were presumed mature enough to form criminal intent at age fourteen).
74. Ainsworth, *supra* note 72, at 1093–94.
75. TERA EVA AGYEPONG, THE CRIMINALIZATION OF BLACK CHILDREN: RACE, GENDER, AND DELINQUENCY IN CHICAGO'S JUVENILE JUSTICE SYSTEM 1899–1945 13 (2018).
76. Ainsworth, *supra* note 72, at 1094.
77. *Id.* at 1094–95.
78. *Id.* at 1095.

time for every form of government."[79] While previously these individuals were not considered to possess any of the attributes of childhood, academics now viewed them also as vulnerable, more akin to young children than adults.[80] In the early twentieth century, psychologists coined the term "adolescence" to describe this developmental phase.[81]

5. The Rehabilitation Imperative

The child savers' belief in the special significance of childhood and adolescence inspired the development of the juvenile court, as well as its stated emphasis on rehabilitation.[82] They objected to the practice of trying minors in courts that "recognize[ ] no difference between the child offender and the most hardened criminals."[83] These reformers believed that minors accused of violating the criminal law were categorically less culpable than adults in the criminal system.[84] Mixing children with adults offended this core belief; it led, reformers surmised, to victimization at the hands of adults and increased likelihood of reoffending by children as they grew up.[85] While it was the presence of younger children in the nation's police stations and jails that most outraged the child savers, older children—crucially—were also seen as properly falling within their reform efforts.[86]

The court was explicitly rehabilitative.[87] As the first chief probation officer in the nation's inaugural juvenile court explained: "Instead of reformation, the thought and idea in the judge's mind should always be formation. No child should be punished for the purpose of making an example of him, and he certainly cannot be reformed by punishing him."[88] Julian Mack, a Cook County juvenile court judge who wrote a

79. TANENHAUS, *supra* note 43, at 6 (internal citation omitted).
80. *Id.* at 6 (internal citation omitted) (noting study showing that teenagers were "more like infants in their nature and needs" than like adults).
81. *Id.* at 6.
82. *See, e.g.*, PLATT, *supra* note 43.
83. RYERSON, *supra* note 50, at 82.
84. FELD, EVOLUTION, *supra* note 43, at 19.
85. TANENHAUS, *supra* note 43, at 9.
86. *Id.*
87. In re Gault, 387 U.S. 1, 15–16 (1967) (noting that in juvenile court instead of punishment, "[t]he child was to be 'treated' and 'rehabilitated' and the procedures . . . were to be 'clinical' rather than punitive").
88. TANENHAUS, *supra* note 43, at 23; *see also* Garlock, *supra* note 52, at 343; Fox, *supra* note 43, at 1189.

canonical law review article on the court,[89] encapsulated these sentiments when he rhetorically asked:

> Why is it not the duty of the state, instead of asking merely whether a boy or a girl has committed a specific offense, to find out what he is, physically, mentally, morally, and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen[?][90]

The child savers fashioned for the new juvenile court a terminology that reflected this rehabilitative commitment. They denominated juvenile court proceedings as civil rather than criminal.[91] Youths adjudicated of breaking the law were delinquents, not criminals; the institutions to which they were committed were training schools, not prisons. Proceedings were to promote "the welfare of the child."[92] Flexibility was paramount, and the juvenile court thus discarded "[t]he apparent rigidities, technicalities, and harshness . . . observed in . . . procedural criminal law."[93]

The creation of the juvenile court is an apotheosis of the reformist ideals of the Progressive era: an institution committed to the possibility and desirability of determining the roots of crime in order to prevent it, and rehabilitating those who committed it. It was, as Jonathan Simon argues, an "institutional monument to an enlightened society's will to foreswear the ancient urge to hurt and humiliate the criminal and instead to suffocate the roots of crime."[94]

B. Perils of Child Saving

The idealism reflected in the juvenile court's assumption of responsibility for children and commitment to their rehabilitation fell short.[95] Not all youth were equally seen as proper objects for reform; instead, the court tended to look more favorably on those whom it felt

89. Ainsworth, *supra* note 72, at 1097 n.93.
90. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).
91. In re Gault, 387 U.S. at 15–16.
92. *Id.*
93. *Id.* at 15.
94. Simon, *Power, supra* note 43, at 1364.
95. *See generally*, BERNARDINE DOHRN, *Foreword*, in TANENHAUS, *supra* note 43, at viii (describing the juvenile court as "laced with tension and paradox").

could be saved, often poor white and Irish and Italian immigrants.[96] Black children were frequently subject to discriminatory treatment, either excluded outright from various institutions or admitted on a segregated and unequal basis.[97]

Moreover, the broad jurisdiction and expansive interpretation of *parens patriae* facilitated sweeping, unwanted, and long-lasting interventions into the home lives of poor[98] families. Child savers viewed the ability to properly reform children as requiring a concomitant power to regulate parents and family life itself.[99] Put another way, these reformers often saw themselves as needing to save children from their parents.[100] Throughout the first half of the nineteenth century, a family's poverty alone could prompt removals by the state from families of children who were housed in institutions and other private homes across the country.[101] Women without cohabitating, married male partners

96. *See, e.g.*, Walker Sterling, *supra* note 45, at 618 (noting that child-saving reform efforts were confined to poor white and European immigrant youths); *see also* ROBIN BERNSTEIN, RACIAL INNOCENCE: PERFORMING AMERICAN CHILDHOOD FROM SLAVERY TO CIVIL RIGHTS 33 (2011) (noting pervasiveness of historical tropes in which "[w]hite children became constructed as tender angels while black children were labeled as unfeeling, non-innocent nonchildren"); *see generally* NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995) (discussing how Irish immigrants in the nineteenth-century U.S. advanced from a subordinated social class, neither white nor Black, which eventually acquired white privilege through subjugation of Black people).

97. Walker Sterling, *supra* note 45, at 622–25; *see also*, Cheryl Nelson Butler, *Blackness as Delinquency*, 90 WASH. UNIV. L. REV. 1335, 1364–68 (2013); *see generally* GEOFF K. WARD, THE BLACK CHILD SAVERS: RACIAL DEMOCRACY & JUVENILE JUSTICE (2012) (noting that in Chicago, all Black children were sent to the juvenile court's one Black probation officer, who worked without pay).

98. Judge Mack thought the relationship between poverty and delinquency so self-evident that he wrote in his canonical Harvard Law Review article on the juvenile court that "[m]ost of the children who come before the court are, naturally, the children of the poor." Mack, *supra* note 90, at 107; *see also* Marvin Ventrell, *From Cause to Profession: The Development of Children's Law and Practice*, 32 COLO. LAW. 65, 67 (2003) (explaining that the condition of poverty, which brought children into the Refuge system, continued as a de facto prerequisite for juvenile court intervention).

99. NAOMA MAOR, DELINQUENT PARENTS: PUNITIVE WELFARE AND THE CREATION OF JUVENILE JUSTICE, 1899–1927 12 (quoting a 1921 speech from Judge Ben Lindsey of a juvenile court from Denver, Colorado, which asserted: "We, the people, or in our aggregate capacity, the state, permit you, the parents, to retain custody of and the responsibility for your child . . . not so much because we recognize it as yours" . . . but only insofar as it can "safeguard the rights and best interests of the child...(unpublished dissertation on file with author)). [CME: Check with AU to confirm the ellipses and quotation because it currently does not add up]

100. Garrison, *supra* note 56, at 436.

101. For example, the applicable Massachusetts statute provided that:

were viewed with particular suspicion by state authorities.[102] While the capacious category of neglect replaced poverty as the legal basis for removing children from their parents' custody, to authorities, poverty alone often constituted neglect.[103] In some cases, the child's parents were to be substituted with "an improved family home . . . by legal adoption or otherwise."[104] In other cases, a child was committed to a so-called "training school."[105] Such results occurred at the conclusion of both delinquency and status offense cases.[106]

The nineteenth-century understanding of the interaction between due process rights of parents and the *parens patriae* doctrine was that, with respect to the children of the poor, parents' rights lost out.[107] The case of *in re Crouse* exemplifies early courts' views of the meaning and strength of parental rights.[108] In that case, the father of a girl whose mother had her committed to the Philadelphia House of Refuge challenged the constitutionality of the commitment, arguing that his parental rights were improperly abrogated.[109] The Pennsylvania Supreme Court upheld the lower court's rejection of the father's challenge, characterizing the right of parental control as "natural, but not unalienable," finding that the public has a paramount interest in the "virtue and knowledge of its members," and concluding that when

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[T]he Overseers of the Poor in any Town or District where such Officers are chosen, otherwise the Selectmen or the Major part of them, are hereby fully Authorized & Impowered by and with the Assent of two Justices of the Peace, to set to work, or bind out Apprentice, all such Children, whose parents shall in their opinion be unable to maintain them (whether they receive alms, or are chargeable to the Town or District or not) . . . . Male Children until they arrive to the age of twenty-one years, and Females to the age of Eighteen, unless such females are sooner married, which binding shall be as good and effectual in Law to every intent & purpose, as if such Child being of full Age, had by Deed or Indenture bound himself. Garrison, *supra* note 56, at 435 n.55.

102. Hasday, *Parenthood, supra* note 54, at 306 n.14 (noting salience of gender and race along with poverty).
103. Garrison, *supra* note 56, at 434–35.
104. Act of Apr. 21, 1899, § 16, 1899 Ill. Laws 136–37.
105. In re Gault, 387 U.S. 1, 6 (1967).
106. In *Gault*, for example, a fifteen-year-old boy was sent to a training school until his twenty-first birthday for making "lewd telephone calls." *Id.*
107. Douglas Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205, 216 (1971) (discussing how the New York House of Refuge ignored the "rights of the pauper parents to the custody of their children" or "'wrest[ed] the child away from the original parents'").
108. Ex parte Crouse, 4 Whart. 9 (Pa. 1839).
109. *Id.*

parents are "incompetent or corrupt," their rights must give way to "the *parens patriae*, or common guardian of the community."[110]

A case from the early Chicago juvenile court illustrates how the *parens patriae* doctrine worked in combination with positivist criminology to diminish parents' rights. A boy was charged with larceny.[111] Present in court for a nonjuvenile matter, a lawyer asked whether the judge knew what children like this did with what they steal: "It is consumed, ravenously eaten, sometimes without even a pretense of cooking or parching . . . they steal, or they starve. I do not believe this boy is a criminal, only as his environment tends to make him one."[119] The judge's response was to suspend the sentence of commitment to a reform school "if the lawyer would take him and assist him in becoming a self-respecting, honorable citizen."[112] When asked by a reporter what he would do, the lawyer said, "clean him up and get him some clothes and then take him to my mother. She'll know what to do with him."[113]

Noted juvenile court scholar David Tanenhaus argues that such cases as this one from the early Chicago court demonstrate the dramatic potential of the juvenile court to redistribute responsibility for indigent children.[114] At the same time, as was the case here, this redistribution could come at the cost of children's ability to remain with their parents and, moreover, constituted a disregard for the significance of parents' custodial rights.[115]

The juvenile court did not, of course, remove from their homes all or even most children who came before it. Yet it also did not hesitate to extensively intervene in a child's home life, subjecting not only the child but also his parents to monitoring and regulation.[116] A 1910 case study of a juvenile court quoted a probation officer as saying, "[i]n many cases we have to do as great a reform work with the parents as with the children."[117] This reform work often came at the cost of any notion of

110. *Id.* (per curiam).
111. TANENHAUS, *supra* note 43, at 29.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 140 (arguing that "[r]ather than furthering the seemingly benign goal of 'treating the child as a child,' the juvenile court movement was driven by 'an obsessive desire to monitor, regulate, and discipline working-class and immigrant communities in the industrial city'").
117. *Id.* at 35.

privacy as well as the maintenance of parental autonomy.[118] As a condition of keeping their children in the home, parents might be subject to probation-conducted home inspections, interviews of neighbors and employers, and visits to children's teachers.[119] Courts might in turn order parents to change jobs, find a new residence, become better housekeepers, prepare different meals, give up alcohol, and abstain from sex.[120] Failure to comply could result in the child's removal.[121]

The foregoing analysis detailed how child savers, through an expansive interpretation of the *parens patriae* doctrine, emboldened by a vision of childhood and adolescence as a time of unique vulnerability, and mobilized by criminological theories that viewed the causes of crime as ascertainable and thus preventable, structured the early juvenile court. The next Part shifts the temporal focus to the present to trace ruptures and continuity in how the contemporary juvenile court conceptualizes and treats parents.

II. THE CONTEMPORARY JUVENILE COURT: RUPTURES AND CONTINUITY

In re Gault rejected much of the underlying philosophy of the early juvenile court, holding that alleged delinquents would henceforth be entitled to due process.[122] In the contemporary juvenile court,[123] minors are now entitled to timely, written notice of charges, the right to counsel, the right to confront and cross-examine witnesses, and the privilege

118. Solomon J. Greene, *Vicious Streets: The Crisis of the Industrial City and the Invention of Juvenile Justice*, 15 YALE J.L & HUMAN. 135, 139 (2003).
119. *See also* Mack, *supra* note 90, at 116–17 ("In many cases the parents are foreigners, frequently unable to speak English, and without an understanding of American methods and views").
120. TANENHAUS, *supra* note 43, at 35.
121. *Id.*
122. In re Gault, 387 U.S. 1, 37–38 (1967) (rejecting much of the underlying philosophy of the juvenile court and instituting due process protections for children tried in the court).
123. Today, subject matter jurisdiction of the juvenile court typically continues to encompass both status and delinquency offenses. *See generally*, Kathleen Michon, *Juvenile Court: An Overview*, NOLO,https://www.nolo.com/legal-encyclopedia/juvenile-court-overview-32222.html [https://perma.cc/R3VV-BRXH] [last visited June 28, 2022]; NAT'L RSCH. COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 53–54 (Richard J. Bonnie et al. eds., 2013); *see also* OFF OF JUV. JUST. & DELINQ. PREVENTION, *Juvenile Justice System Structure & Process: Related FAQs*, https://www.ojjdp.gov/ojstatbb/structure_process/faqs.asp#. [https://perma.cc/4XN2-ZQ75].

against self-incrimination.[124] Subsequent cases ruled that charges must be proven beyond a reasonable doubt[125] and that the double jeopardy prohibition applied to delinquency proceedings.[126] Moreover, while the U.S. Supreme Court has not ruled that alleged status offenders are entitled to similar rights,[127] federal funding incentives have resulted in states abandoning the practice of incarcerating these offenders.[128]

While minors in juvenile court now enjoy a more robust set of due process protections[129]—and status offenders are almost never incarcerated—three important features of the early juvenile court remain. First, as explored in Subpart A, the court continues to be, overwhelmingly, a court managing poor people, disproportionately children of women of color raising children without a cohabitating partner.[130] Second, as Subpart 0 discusses, nearly all state statutes maintained language supporting the importance of rehabilitation. Third,

124. *Gault*, 387 U.S. 1 at 27 (finding that "[w]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone" and holding that these rights apply to alleged delinquents only at the adjudicatory hearing facing confinement). In practice, many of these due process protections get short shrift; a large literature exists on the inadequacy of the juvenile right to counsel. *See, e.g.*, Fedders, *Losing Hold, supra* note 48, at 54; BARRY C. FELD, JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURTS 46 (1993) (describing a 1993 study of juvenile right to counsel in Minnesota found that more than one half of children against whom delinquency petitions had been filed were not represented by counsel).

125. In re Winship, 397 U.S. 358, 364 (1970).

126. Breed v. Jones, 421 U.S. 519, 528–33, 541 (1975)*; see generally*, Monrad G. Paulsen, *The Constitutional Domestication of the Juvenile Court*, 1967 THE SUP. CT. REV. 233 (1967) (discussing In re Gault as ushering in an era of "constitutional domestication").

127. Julie J. Kim, *Left Behind: The Paternalistic Treatment of Status Offenders Within the Juvenile Justice System*, 87 WASH. UNIV. L. REV. 843, 856 (2010) (articulating that "[s]tatus offenders are denied procedural due process rights and continue to be "subject[ed] to more flexible and informal procedures under the parens patriae notion.'").

128. NAT'L RSCH. COUNCIL, *supra* note 123, at 283 (describing mandate conditioning state receipt of federal funds on adoption of practices ensuring that "[j]uveniles who are charged with or who have committed an offense that would not be a crime if committed by an adult, and juveniles who are not charged with any offenses, are not to be placed in secure detention or secure correctional facilities").

129. Not all protections that criminal defendants enjoy were extended to juveniles. *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) ("[W]e conclude that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement."). A few states provide the right under state statute. *See* Mass. Gen. Laws Ann. ch. 119, § 55A (West); Mont. Code Ann. § 41-5-1502 ; N.M. Stat. Ann. § 32A-2-16; Okla. Stat. Ann. tit.

130. *See infra* notes, and accompanying text.

as Subpart 0 demonstrates, the *parens patriae* justification for diminution of parents' rights persist.

A. Race, Gender, and Poverty in the Contemporary Court

Child poverty is widespread.[131] Children comprise the largest group of impoverished people, with nearly one in seven living in poverty in 2019.[132] In addition, on top of those meeting the federal definition of poverty, approximately four in ten children live in households where caregivers cannot consistently meet basic expenses.[133] Poverty affects Black, Latinx, and Indigenous families particularly hard.[134] Nearly one in three Black and Indigenous children and one in four Latinx children live in poverty, compared with one in eleven white children.[135] Within this group, children living in households without two custodial parents—the majority of which are headed by women[136]—are especially vulnerable.[137]

The COVID-19 pandemic has intensified these disturbing trends.[138] Mothers have left the paid work force in unprecedented numbers to provide caregiving to children.[139] This loss of maternal income has contributed to growing rates of food insecurity experienced by children

131. AREEBA HAIDER, THE BASIC FACTS ABOUT CHILDREN IN POVERTY (Center for American Progress 2021).
132. *See* LAURA WHEATON, SARAH MINTON, LINDA GIANNARELLI & KELLY DWYER, 2021 POVERTY PROJECTIONS: ASSESSING FOUR AMERICAN RESCUE PLAN POLICIES (discussing the 2019 child poverty rate and projecting that the American Rescue Plan is believed to eventually cut the poverty rate from 13.7 to 8.7 percent and by more than half for children).
133. HAIDER, *supra* note 131.
134. *Id.*
135. *See* Paul Jargowsky, *Architecture of Segregation: Civil Unrest, the Concentration of Poverty, and Public Policy*, THE CENTURY FOUNDATION (2015).
136. ROBIN BLEIWEIS, DIANA BOESCH & ALEXANDRA CAWTHORNE GAINES, THE BASIC FACTS ABOUT WOMEN IN POVERTY (Center for American Progress 2020), https://www.americanprogress.org/article/basic-facts-women-poverty [https://perma.cc/4VEM-QXZ4] (noting that across race and ethnicity, women are more likely than men to be in poverty).
137. *Id.*
138. HAIDER, *supra* note 131 (discussing how the COVID-19 pandemic has exacerbated child poverty).
139. *See, e.g.*, Ernie Tedeschi, *The Mystery of How Many Mothers Have Left Work Because of School Closings*, N.Y. TIMES (Oct. 29, 2020), https://www.nytimes.com/2020/10/29/upshot/mothers-leaving-jobs-pandemic.html [https://perma.cc/G79R-MHWV]; Bryce Covert, *The Economy Could Lose a Generation of Working Mothers*, VOX (Oct. 20, 2020), https://www.vox.com/21536100/economy-pandemic-lose-generation-working-mothers [https://perma.cc/4JT9-MHT7].

in 2020.[140] Women raising children alone confront emotionally challenging isolation on top of financial stresses.[141]

Poverty—and racialized, gendered[142] poverty in particular—makes it more likely that a child will enter the juvenile court.[143] Once there, poverty interacts with the juvenile court rights regime in ways that often contribute to worse outcomes.

1. Entry

Consider first how living in poverty makes a child vulnerable to arrest. First, while it is not clear that the relationship is causal,[144] there is evidence that living in poverty is associated with the commission of

140. HAIDER, *supra* note 131.

141. Andrew Van Dam, *We've Been Cooped Up With Our Families for Almost a Year. This is the Result*, WASHINGTON POST (Feb. 16, 2021), https://www.washingtonpost.com/road-to-recovery/2021/02/16/pandemic-togetherness-never-have-so-many-spent-so-much-time-with-so-few [https://perma.cc/2R99-AGT2] (citing Barnard College economist Daniel Hamermesh's research showing that "the decrease in single women's happiness will have been compounded by their increased likelihood of losing work and income during the pandemic lockdowns—especially if they are the only caregiver for a few young children").

142. Poverty itself of course does not have a race or gender. I use the phrase "racialized, gendered poverty" to connote the intersections between race, gender, and socioeconomic status and to suggest the unique ways that children of poor women of color experience harm in the juvenile court.

143. Birckhead, *supra* note 29, at 57–59, 71 (noting that while few courts formally keep track of the income levels of the families the court, those jurisdictions that do confirm that nearly 60 percent were either on public assistance or had annual incomes of less than twenty thousand dollars and that another 20 percent had incomes of less than thirty thousand dollars); *see also* Katherine Hunt Federle, *Child Welfare and the Juvenile Court*, 60 OHIO ST. L.J. 1225, 1236 n.90 (1999) (noting lack of national data sets but commenting that "[f]or those who work in the juvenile court system, this assertion seems indisputable"); Allen Beck et al., *Survey of Youth in Custody, 1987*, U.S. DOJ, BUREAU OF STATISTICS (1988), https://www.bjs.gov/content/pub/pdf/syc87.pdf (stating that "[s]even of every [ten delinquents] primarily grew up in a household without both parents. . . .[a]pproximately 54.0 [percent] lived in single parent households—48.4 [percent] with their mothers and 5.6 [percent] with their fathers."); Gail Wasserman, Kate Keenan, Richard E. Tremblay, John D. Coie, Todd I. Herrenkohl, Rolf Lieberman & David Petechuk, *Risk and Protective Factors of Child Delinquency*, OJJDP (2003); U.S. CENSUS BUREAU, HISTORICAL LIVING ARRANGEMENTS OF CHILDREN (2020).

144. U.S. CENSUS BUREAU, HISTORICAL LIVING ARRANGEMENTS OF CHILDREN (2020) (noting lack of clarity).

criminal activity.[145] To the extent that there is a link between poverty and crime commission[146] by young people, it appears to arise from how poverty can diminish a parent's ability to provide sufficient attachment, supervision, and appropriate discipline consequences—which social scientists refer to as "informal social control."[147]

Moreover, while crime occurs across racial and socioeconomic groups,[148] poor children of color are disproportionately likely to be arrested.[149] This is because they are disproportionately the subject of state surveillance across at least three domains.

First, officers are disproportionately likely to patrol in low-income communities of color—and to view youthful offending in those communities less as the product of simple developmental immaturity[150] than as a result of fully formed criminal intent.[151]

145. Patrick Sharkey, Max Besbris & Michael Friedson, *Poverty and Crime*, *in* THE OXFORD HANDBOOK OF THE SOCIAL SCIENCE OF POVERTY (David Brady & Linda M. Burton, eds. 2016).

146. I use the phrase "crime commission" with reservation, recognizing that the decision to denominate "criminal" a given activity engaged in by a poor person is somewhat tautological. *See generally*, Monica Bell, Stephanie Garlock & Alexander Nabavi Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1476 (2020) (arguing for greater scrutiny toward "what society chooses to criminalize and what structures are put in place to enforce those norms" and suggesting that commentators should focus not only on fines, fees, and costs of court in discussions of criminalization of poverty but should also attend to poverty's substantive and structural elements, with particular attention to laws targeting conduct "engaged in largely by poor individuals, such as selling loose cigarettes," and critiquing the imposition of additional obligations on and surveilling of those who apply for or receive public benefits).

147. Federle, *supra* note 143, at 1239 (citing Robert J. Sampson & John H. Laub, *Urban Poverty and the Family Context of Delinquency: A New Look at Structure and Process in a Classic Study*, 65 CHILD DEV. 523, 525 (1994) (noting that, by contrast, strong social controls within the family "characterized by consistent, loving, and reintegrative punishment, effective supervision, and close emotional ties" were at "low risk for adolescent delinquency")); *see also* Sharkey, et. al., *supra* note 145 (discussing "routine activities theory" for correlation between poverty and crime, which includes as an element the absence of a "capable guardian").

148. AMERICAN CIVIL LIBERTIES UNION & AMERICAN CIVIL LIBERTIES UNION OF CONNECTICUT, HARD LESSONS: SCHOOL RESOURCE OFFICER PROGRAMS AND SCHOOL BASED ARRESTS IN THREE CONNECTICUT TOWNS (2008) (noting crime occurs across race and class).

149. Kenneth Nunn, *The Child as other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, 681–82, 706–07 (2002).

150. Birckhead, *Delinquent, supra* note 29, at 79; *see also* Lisa H. Thurau, *Rethinking How We Police Youth: Incorporating Knowledge of Adolescence into Policing Teens*, 29 CHILD. LEGAL RTS. J. 30, 31–32 (2009) (noting impacts of socioeconomic status and race on police arrests and use of force tendencies against adolescents).

151. Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 419 (2013)

Second, a similar phenomenon exists in schools, from which approximately half of all delinquency complaints originate.[152] While both low- and high-income schools employ permanent, full-time police officers,[153] the race and income levels of the student bodies shape how police view their responsibilities.[154] Schools with high concentrations of low-income students of color tend to see arrest and juvenile court referral as a necessary tool to maintain order.[155] Schools with a comparatively affluent student body, by contrast, are much less likely to rely on the police to resolve problems of disorder and crime.[156]

Third, poor women of color are disproportionately vulnerable to child welfare intervention[157] into their families,[158] which in turn increases the likelihood of juvenile justice involvement for their children.[159] This disproportionate representation arises in part because

(hereinafter, Henning, *Criminalizing*) (noting studies documenting that "many Americans are predisposed to consciously or subconsciously associate [B]lack youth with crime and dangerousness").

152. *See* SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2018 (2020); *see also* CAROLINA JUST. POL'Y CTR., YOUTH & CHILDREN (finding in North Carolina that over half of youth-related referrals to the justice system are from schools).

153. Fedders, *supra* note 10, at 118.

154. *Id.* at 120.

155. Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOW. L.J. 343, 360–61 (2011) (explaining that "[School Resource Officers] are most likely to be found in schools in urban neighborhoods with high poverty, and many schools in low-income communities of color physically resemble prisons, with fortress-like layouts, metal detectors, video surveillance cameras, security check points, and drug-sniffing dogs."); *see also* CHRIS CURRAN, ET. AL., KEEPING STUDENTS SAFE OR HEIGHTENING PERCEIVED RISK? RESEARCH BRIEF #6 15 (2019) (unpublished manuscript on file with author) (discussing influence of race and class on behavior of police).

156. Fedders, *supra* note 10, at 119; *see also* CURRAN, ET. AL. *supra* note 155, at 15 (noting that these schools rely on school police primarily for protection against perceived threats arising outside the school).

157. Following Annette Appell, this Article defines "intervention" to include decisions "to contact the child abuse and neglect hotline, to investigate allegations, to find those allegations to be founded, to coercively provide services, and to remove children from their families"). Annette Ruth Appell, *Virtual Mothers and the Meaning of Motherhood*, 34 UNIV. MICH. J.L REFORM 683, 773 n.382 (2001).

158. Sarah S. Greene, *A Theory of Poverty: Legal Immobility*, 96 WASH. UNIV. L. REV. 753, 778 (2019) (citation omitted) (noting that families with incomes of less than $15,000 per year are forty-five times more likely to be victims of substantiated neglect allegations than children in families with incomes exceeding $30,000 per year); *see also* ROBERTS, *supra* note 31, at 6–9 (tracing overrepresentation of Black women whose children are in foster care to racial injustice and arguing that this overrepresentation threatens individuals and the larger Black community).

159. J.P. Ryan & M.F. Testa, *Child Maltreatment and Juvenile Delinquency: Investigating the Role of Placement and Placement Instability*, 27 CHILD. & YOUTH SERVS. REV. 227

neglect—the overwhelming cause for child welfare involvement[160] is a capacious term. Its indicators—substandard housing, housing insecurity, unreliable and inconsistent childcare—are also correlates of poverty.[161] Indeed, experts estimate that between 40 and 70 percent of children in foster care would not need to be there if supports existed outside the foster care system for poor families.[162] Moreover, racial disproportionality exists in which families are investigated for abuse.[163] Research shows that Black and Latinx pediatric emergency room patients who have minor head trauma are two to four times more likely to be reported to child welfare authorities in comparison to the children of white, non-Hispanic patients.[164]

Finally, poverty means a lack of resources to defend against child welfare intervention. On the rare occasion when a financially stable family attracts the attention of child welfare workers, parents can hire counsel to fight abuse or neglect allegations and investigations.[165] By contrast, poor people are more likely to be subject to the whims of the system,[166] forced to hope that the vagueness of neglect statutes will work in their favor.[167]

(2005) (noting that delinquency rates are approximately 47 percent greater for youth associated with at least one substantiated report of maltreatment).

160. Kele Stewart & Robert Lathan, *COVID-19 Reflections on Resilience and Reform in the Child Welfare System*, 48 FORDHAM URB. L.J. 95, 100 (2020) (noting that more than 70 percent of parents subject to child welfare jurisdiction are there because of neglect).

161. *Id.* at 101; *see also* Michele Estrin Gilman, *The Poverty Defense*, 47 UNIV. RICH. L. REV. 495, 514–15 (2013).

162. MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 193 (2005).

163. Jessica Horan Black, *A Child Bumps Her Head. What Happens Next Depends on Race*, N.Y. TIMES (Aug. 24, 2019) https://www.nytimes.com/2019/08/24/opinion/sunday/child-injuries-race.html [https://perma.cc/NL7C-A6S2]; https://www.sciencedirect.com/science/article/abs/pii/S0022347618301240.

164. Kent P. Hymel, Antoinette L. Laskey, Kathryn R. Crowell, Ming Wang, Veronica Armijo-Garcia, Terra N. Frazier, Kelly S. Tieves, Robin Foster & Kerri Weeks, *Racial and Ethnic Disparities and Bias in the Evaluation and Reporting of Abusive Head Trauma*, 198 J. OF PEDIATRICS 137 (2018); *see generally*, Jessica Horan Black, *A Child Bumps Her Head. What Happens Next Depends on Race*, N.Y. TIMES (Aug. 24, 2019) https://www.nytimes.com/2019/08/24/opinion/sunday/child-injuries-race.html.

165. Greene, *supra* note 158, at 781 (discussing the case of wealthy "free range" parents who allowed their young children to walk alone to the park and thereby caught the attention of Child Protective Services, and contrasting the treatment they received with that of a low-income family).

166. *Supra* note 34.

167. Greene, *supra* note 158, at 779.

Research suggests that children with open child welfare cases are especially vulnerable to juvenile justice involvement.[168] These children are particularly likely to spend longer periods of time in pretrial detention than other youth.[169]

2. Juvenile Court Process and Rights

Once a minor is arrested, or referred to the juvenile court through a civilian complaint,[170] the charge need not become a full-blown delinquency case. Instead, judges, prosecutors, and probation officers have options of dismissing or diverting a case, either through an informal route or pursuant to a formal contract with specific conditions.[171]

The screening criteria for which children are eligible for diversion, however, have the potential to favor the children of the comparatively financially advantaged. In many states, a child's case can be diverted or dismissed only if she attends a meeting with a juvenile court probation officer.[172] Often, these meetings are initiated not through official court process such as a subpoena that requires proof of service but instead

168. *Id.* at 782.

169. VERA INSTITUTE OF JUSTICE, REDUCING THE FOSTER CARE BIAS IN JUVENILE DETENTION DECISIONS: THE IMPACT OF PROJECT CONFIRM (2001) https://www.vera.org/downloads/Publications/reducing-the-foster-care-bias-in-juvenile-detention-decisions-the-impact-of-project-confirm/legacy_downloads/Foster_care_bias.pdf [https://perma.cc/7UHV-3KBZ] (noting impact of foster care on juvenile justice involvement and tracing higher likelihood of detention to the fact that child welfare workers do not appear in court on behalf of the youth); *see also* Miriam Aroni Krinsky, *Disrupting the Pathway from Foster Care to the Justice System: A Former Prosecutor's Perspectives on Reform*, 48 FAM. CT. REV. 322, 325 (2010).

170. NAT'L RSCH. COUNCIL, *supra* note 123, at 54 (noting that "[g]enerally police are the primary referring agents, but, in approximately 20 percent of the arrests, referral will come from a source other than the police").

171. *See, e.g.*, N.C. GEN. STAT. § 7B-1706 (stating that "[u]nless the offense is one in which a petition is required by G.S. 7B-1701," including, among other things, murder, rape, and crimes against nature, "upon a finding of legal sufficiency the juvenile court counselor may divert the juvenile pursuant to a diversion plan"); CAL. RULES OF CT. 5.514; COLO. REV. STAT. § 192-303 (establishing a diversion program and barring Class 1 and 2 felony acts from the program); *see also* YOUTH.GOV, DIVERSION PROGRAMS, https://youth.gov/youthtopics/juvenile-justice/diversion-programs [perma.cc/3V6T-QB76] (last visited Mar. 1, 2021).

172. *See, e.g.*, N.C. GEN. STAT. § 7B-1706 (stating that juvenile and parents must sign a diversion contract); *see also* NEB. REV. STAT. ANN. § 43-260.04 (requiring attendance); WASH. REV. CODE § 13.40.080 (same).

only through a letter.[173] Parents without stable housing,[174] or for whom official documents often portends bad news—threatened cessation of a utility or notices of unpaid medical bills, for example[175]—may be less likely to receive and open such a letter. If they miss the appointment, the petition may automatically issue.[176]

A host of other factors weighs against diversion for children of poor parents. One factor weighing against diversion or dismissal and in favor of prosecution is a determination that a child is in need of "supervision, treatment, or confinement."[177] As was true at the outset of child saving in the nineteenth century, children of poor parents, particularly parents raising children without a cohabitating partner, are particularly likely to be seen as in need in this way.[178] A second factor that militates against the issuance of a petition is the absence of a prior delinquency record.[179] While they may seem purely objective indicia, delinquency records instead reflect and reinforce the class-race biases of policing.[180] A third factor that counsels against prosecution is the ability of a child's family

173. *See, e.g.*, Cheri Panzer, *Reducing Juvenile Recidivism Through Pre-Trial Diversion Programs: A Community's Involvement*, 18 J. JUV. L. 186, 189 (1997) (explaining process).

174. Because those in poverty are forced to move often, see, e.g., Stefanie DeLuca, *Why Families Move (And Where They Go): Reactive Mobility and Residential Decisions*, 18 CITY & CMTY. 556, 559 (2019) (noting "[d]ecades of scholarship document[ing] that low-income and [B]lack families have been more susceptible to involuntary and frequent moves than [white families]"), they may struggle to consistently receive mail, as perhaps best illustrated in the last census when government officials struggled to contact people in poorer, urban areas. *See, e.g.*, Kavahn Mansouri, *Race, Poverty and Distrust make These Census Tracts Hard to Count*, BELLEVILLE NEWS DEMOCRAT (Sept. 16, 2019), https://infoweb-newsbankcom.libproxy.lib.unc.edu/apps/news/openurl?ctx_ver=z39.88- [perma] (finding that those "living in nonpermanent housing, who move often or are homeless have a significantly lower chance of being counted than those with a permanent address").

175. Lee Raine, Scott Keeter & Andrew Perrin, *Trust and Distrust in America*, PEW RSCH. CTR. (July 22, 2019), https://www.pewresearch.org/politics/2019/07/22/trust-and-distrust-in-america [https://perma.cc/3Q3C-J3VG] (finding that impoverished people have more distrust in the government).

176. N.C. GEN. STAT. § 7B-1703.

177. *Id.*

178. Donna M. Bishop, *The Role of Race and Ethnicity in Juvenile Justice Processing*, OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE 23, 63–64 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005).

179. *See, e.g.*, SCREENING UNDISCIPLINED AND DELINQUENCY COMPLAINTS § 4:3 (B) (N.C. JUV. CODE PRAC. & PROC. 2020).

180. *See generally*, JOSH ROVNER, RACIAL DISPARITIES IN YOUTH INCARCERATION PERSIST (2021).

to access community resources.[181] This criterion also disfavors the poor. Community resources are more plentiful when one is not limited only to those that are free or low cost. In addition, the ability to access resources is shaped by the availability of reliable transportation as well as a flexible work schedule. Finally, the constitutional right to counsel afforded alleged delinquents attaches under federal constitutional law only after a petition issues and proceedings commence.[182] The public defenders and state-appointed private counsel who represent the vast majority of alleged delinquents[183] therefore do not know about their future clients, and cannot begin charging for their work, until the pivotal prepetition screening phase has already passed.[184] Yet children could benefit enormously at the screening phase from the guidance of an attorney, who could point out legal weaknesses and marshal mitigating evidence in favor of arguing for dismissal or diversion.[185] Without this assistance, however, poor parents and their children are at a disadvantage as they may not know which aspects of a child's life are most significant to bring to the attention of the prepetition screener. Children of the comparatively well off, by contrast, are more likely to have parents who can afford counsel at this early stage.

181. *See, e.g.*, SCREENING UNDISCIPLINED AND DELINQUENCY COMPLAINTS § 4:3(B) (N.C. JUV. CODE PRAC. & PROC. 2020). In re Gault, 387 U.S. 1, 37 (1967). While states may provide attorneys for the pretrial and sentencing phase, they are not constitutionally mandated to do so. *See* Sandra Simkins & Laura Cohen, *The Critical Role of Post-Disposition Representation in Addressing the Needs of Incarcerated Youth*, 8 J.MARSHALL L.J. 311, 342–43 (2015) (noting that divergence between opinion of courts and commentators who counsel from detention through disposition is necessary to effectuate the mandate of *Gault*, and the reality that most states do not provide counsel at all stages, having failed to build on *Gault*'s holding).

182. *Gault*, 387 U.S. at 37. While states may provide attorneys for the pretrial and sentencing phase, they are not constitutionally mandated to do so. *See* Simkins & Cohen, *supra* note 181, at 342–43.

183. DEVELOPMENT SERVICES GROUP, INC. INDIGENT DEFENSE FOR JUVENILES LITERATURE REVIEW OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (2018), https://www.ojjdp.gov/mpg/litreviews/Indigent-Defense-for-Juveniles.pdf. NAT'L JUVENILE DEFENDER CTR, ACCESS DENIED: A NATIONAL SNAPSHOT OF STATES' FAILURE TO PROTECT CHILDREN'S RIGHT TO COUNSEL 18–19 (2017), https://njdc.info/wp-content/uploads/2017/05/Snapshot-Final_single-4.pdf.

184. NAT'L JUVENILE DEFENDER CTR, ACCESS DENIED: A NATIONAL SNAPSHOT OF STATES' FAILURE TO PROTECT CHILDREN'S RIGHT TO COUNSEL 18–19 (2017), https://njdc.info/wp-content/uploads/2017/05/Snapshot-Final_single-4.pdf.

185. Katayoon Majd & Patricia Puritz, *The Cost of Justice: How Low-Income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 GEO. J. ON POVERTY L. & POL'Y 543, 566–68 (2009).

3. Outcomes

Decades of research suggest that youth of color receive fewer allowances for youthful immaturity at every juncture within the juvenile court process that calls for the exercise of discretion. Being a child of color is predictive of receiving more adult-like consequences.[186] Children of color are more likely to receive longer terms of probation with more onerous conditions than their white and comparatively affluent peers.[187] Moreover, they are also more likely to be incarcerated than to receive probation.[188] If incarcerated, these children of color will spend more time confined than their white peers, even controlling for offense and prior delinquency record.[189] In addition, they are more likely to be tried in the adult system.[190] At every point where a decisionmaker—a prosecutor, probation officer, or judge—can make allowances for youthful immaturity, the race of a juvenile is an influential factor.[191]

B. The Survival of the Rehabilitation Imperative

In extending constitutional protections to alleged delinquents in juvenile court, the U.S. Supreme Court made clear it that it did not intend

186. Henning, *Criminalizing*, *supra* note 151, at 408 (noting that "[a]s documented by the National Council on Crime and Delinquency, while African Americans comprised only 16 [percent] of all youth in the United States from 2002 to 2004, they accounted for 28 [percent] of all juvenile arrests, 30 [percent] of juvenile court referrals, 37 [percent] of detained youth, 34 [percent] of youth formally processed by the juvenile court, 30 [percent] of adjudicated youth, 35 [percent] of youth judicially waived to criminal court, 38 [percent] of youth in residential placements, and 58 [percent] of youth sent to adult state prison"); *see also* BERNSTEIN, *supra* note 96, at 9.

187. Nunn, *supra* note 149, at 680; *see also* Ward, *supra* note 97, at 88–89.

188. Nunn, at 686.

189. *Id.* at 687 (noting dramatically longer custody periods for African American youth as compared with white youth).

190. *Id.* at 685.

191. See Barry Holman & Jason Ziedenberg, *Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilitie*s, JUST. POL'Y INST. 14 (2006) (noting decisions to detain youth consider several extralegal factors such as the youth's family status, race, gender, and neighborhood.); *see generally* Eileen Poe-Yamagata & Michael A. Jones, *And Justice for Some: Differential Treatment of Minority Youth in the Justice System* (Building Blocks for Youth, 2000), reprinted in 8 KY. CHILDREN'S RTS. J. (2000), (noting "[m]inority youth are more likely than [w]hite youth to become involved in the system with their overrepresentation increasing at each stage of the process").

to interfere with the components of the juvenile court believed to aid in rehabilitation.[192] These components include greater availability of and access to therapeutic programs and services;[193] the fact that minors in juvenile court are spared from detention or incarceration in adult facilities, where they are more likely to be assaulted or abused;[194] and the relative confidentiality of juvenile proceedings, such that delinquency records are not as accessible to potential employers, colleges and universities, and agencies administering financial aid.[195] Each of these features, proponents argue, promote rehabilitation and lower recidivism, thus improving public safety.[196] While casting doubt on the efficacy of the juvenile court's programs and services at achieving its stated goal, the Supreme Court nonetheless did not entirely disavow the effort.[197] In describing the difference between criminal and juvenile courts, the Court of Appeals for the Ninth Circuit subsequently noted that "[o]ur punitive system is public; our rehabilitative system for juveniles, quite deliberately, is not."[198]

Starting in earnest in the 1980s, the rehabilitative emphasis of juvenile court came under attack.[199] For at least two decades, a media-fueled and politically expedient tough-on-crime movement, facilitated by racist, now widely discredited theories of juvenile "superpredators,"[200]

192. In re Gault, 387 U.S. 1, 22–24 (1967) (allowing states to preserve confidentiality of delinquency hearings); *see generally*, Kristin Henning, *What's Wrong With Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CALIF. L. REV. 1107, 1121 (2009) (analyzing case law in the wake of In re Gault pertaining to rehabilitation).

193. Tamar Birckhead, *North Carolina, Juvenile Court Jurisdiction, and the Resistance to Reform*, 86 N.C. L. REV. 101, 110 (2008) (hereafter, Birckhead, *North Carolina*).

194. *Id.* at 115.

195. *Id.* at 111–14.

196. *Id.*

197. In re Gault, 387 U.S. 1, 22–24 (1967).

198. U.S. v. Juv. Male, 590 F.3d 924, 932 (9th Cir. 2010) (reversed on other grounds).

199. Simon, *supra* note 43, at 1364.

200. *See generally*, James Forman Jr. & Kayla Vinson, *The Superpredator Myth Did a Lot of Damage. Courts are Beginning to See the Light*, NEW YORK TIMES (4/20/22) (describing racist origins of superpredator myth and noting that theory has been widely discredited, including being disavowed by the sociologist who coined term). *See also.*, Connecticut v. Belcher, 342 Conn. 1, 14 (2021) ruling that trial court abused its discretion in denying the defendant's motion to correct the sixty-year sentence imposed when he was fourteen by a judge who explicitly relied on now discredited superpredator theory and noting that this theory "centered disproportionately on the demonization of Black male teens").

spurred changes in state laws that collectively de-emphasized rehabilitation.[201]

The belief in rehabilitation never entirely disappeared, however. Most state legislatures maintained rehabilitation as a purpose of juvenile court proceedings.[202] Moreover, beginning with the Court's decision in 2005 in *Roper v. Simmons*,[203] the pendulum began to shift back.[204] That case, followed by three more,[205] reaffirmed the importance of rehabilitation as a goal in proceedings involving the adjudication and sentencing of crimes committed by minors.[206] In *Roper*, the Court accepted that "a greater possibility exists that a minor's character deficiencies will be reformed," finding that because the character of a juvenile is less "fixed" than that of an adult, it would be wrong to treat a juvenile as if he were of "irretrievably" depraved character.[207] In addition, states across the country have taken steps to move youth out of the adult and into the system. This shift takes two principal forms[208:] first, through curtailing the circumstances under which people who would otherwise fall under juvenile court jurisdiction may be transferred to the adult system,[209] and, second, by raising the age of juvenile court

201. Henning, *What's Wrong?*, *supra* note 192, at 1113 (noting that these changes included "policies [that made] it easier for prosecutors to transfer juveniles to adult court, create presumptions for detaining youth pending trial, impose mandatory minimum sentences for juveniles, lift the protective veil of confidentiality in juvenile proceedings, and require juveniles to register in sex-offender databases"). These changes also included the introduction of punishment and accountability, along with rehabilitation, into juvenile court purpose clauses.

202. *Id.*

203. 543 U.S. 551 (2005) (abolishing the death penalty for juvenile offenders).

204. Henning, *What's Wrong?*, *supra* note 192.

205. Graham v. Florida, 130 S. Ct. 2011 (2010) (abolishing life without parole sentences for juvenile nonhomicide offenders); J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011) (holding that age is a factor that must be taken into account by police officers and judges in the analysis of whether an individual was in custody for purposes of triggering the warnings required under Miranda v. Arizona, 384 U.S. 436 (1966)); Miller v. Alabama, 132 S. Ct. 2455 (2012) (abolishing statutes mandating life without parole sentences for juvenile offenders).

206. Barbara Fedders & Jason Langberg, *School Discipline Reform: Incorporating the Supreme Court's 'Age Matters' Jurisprudence*, 46 LOY. L.A. L. REV. 933 (2013).

207. *Roper*, 543 U.S. at 553.

208. NAT'L CONF. OF STATE LEGIS., JUVENILE AGE OF JURISDICTION AND TRANSFER TO ADULT COURT LAWS (2021) (showing upper age of juvenile court jurisdiction in each state and each state's mechanism for transferring juveniles to adult court).

209. *See, e.g.*, MARCY MISTRETT, BRINGING MORE TEENS HOME: RAISING THE AGE WITHOUT EXPANDING SECURE CONFINEMENT IN THE YOUTH JUSTICE SYSTEM 4 (2021) (noting that since 2007, eleven states have raised the maximum age of juvenile court jurisdiction to seventeen, that only three states consider all seventeen-year-olds to

jurisdiction so that older adolescents and young adults are presumptively tried in juvenile court.[210]

C. The Vestiges of *Parens Patriae*

Notwithstanding the extension of due process proceedings, the *parens patriae* doctrine has not disappeared. Post-*Gault*, the Court pulled back on extending procedural protections in juvenile proceedings. Perhaps nowhere are the downsides of the *parens patriae* doctrine more acutely experienced by children and their parents than in the judicial imposition of secure custody, without the possibility of bail, for a host of reasons.

The Supreme Court laid the groundwork for the liberal use of detention in *Schall v. Martin*, when it ruled that New York's prevention detention system did not violate juveniles' due process rights.[211] On the one hand, the case was an unremarkable prelude to *U.S. v. Salerno*,[212] wherein the Court rejected substantive due process and Eight Amendment challenges to the use of preventive detention in the federal adult system on the ground that the "[g]overnment's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."[213] On the other hand, the Court's reasoning substantially undermined the *Gault* skepticism about the *parens patriae* rationale of the early court.[214]

The *Schall* majority opinion, while acknowledging that the child has an "interest in freedom," stated that that interest "must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody."[215] The Court thus revitalized a concept about which the *Gault* court had expressed some skepticism[216]—namely, that whether that

be adults for purposes of criminal prosecution, and that Vermont includes eighteen-year-olds in juvenile court).

210. Marcy Mistrett, Campaign for Youth Justice, 15 Years of Impact: How We Won [https://perma.cc/48ZU-37DT] (documenting a 70 percent drop in the number of youths prosecuted as adults between 2005 and 2015 and noting that forty states and Washington, D.C. changed more than one hundred laws to make it more difficult to send youths to adult courts).

211. 467 U.S. 253, 255 (1984).

212. 481 U.S. 739, 740 (1987).

213. *Id*. at 748.

214. Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 168 (1993).

215. 467 U.S. at 265.

216. 387 U.S. at 17.

custody is provided by a child's family or by the state through a detention facility was an issue of no legal consequence.[217] The Court in *Schall* asserts "[i]f parental control falters, the State must play its part as *parens patriae*"[218] and cites with approval "the desirability of protecting the juvenile from his own folly"[219] supposedly manifest in the New York preventive detention scheme. In so doing, the *Schall* Court reinvigorated a *parens patriae* doctrine that might have, after *Gault*, seemed to be on its last legs.

One can see in contemporary statutes regulating the use of detention in juvenile court the persistence of *parens patriae*, which, as we have seen,[220] subordinates parents' rights. Today, nearly every state authorizes secure pretrial detention for juveniles, and judges impose it for a broader array of reasons than would justify detention of adults.[221] Juveniles have fewer procedural protections available to contest detention decisions than their adult counterparts.[222] For example, the discretion available to judges in making detention decisions has led to practices of judges ordering a child detained "for her own good," invoking paternalist rhetoric in deciding that a jail cell is more safe than a community.[223] One such practice is the detention by courts of status offenders for up to seven days after finding that they have violated court orders—a loophole in the federal statute that denies funds to states that incarcerate status offenders.[224] What this means in practice is that a child

217. Jean Koh Peters, *Schall v. Martin and the Distortion of Judicial Precedent*, 31 B.C. L. REV. 641, 665 (1990). The dissent found the characterization of preventive detention as nothing more than a transfer of custody from a parent or guardian to the state "difficult to take seriously." *Id.* at 289 (Marshall, J., dissenting).

218. 467 U.S. at 265.

219. *Id.* (internal citation omitted).

220. *See supra* note 105, and accompanying text.

221. Hillela B. Simpson, *Parents not Parens: Parental Rights Versus the State in the Pre-trial Detention of Youth*, 41 N.Y.U. REV. L. & SOC. CHANGE 477, 488 (2017). *See also* Perry Moriearty, *Combating the Color-Coded Confinement of Kids: An Equal Protection Remedy*, 32 N.Y.U. REV. L. & SOC. CHANGE 285, 304 (2008) (outlining differences between juvenile and adult systems with respect to pretrial detention, noting that adult defendants enjoy procedural safeguards such as the right to bail and a more rigorous burden of proof for prosecutors).

222. *See, e.g.*, Shana Conklin, *Juveniles Locked up in Limbo: Why Pretrial Detention Implicates a Fundamental Right*, 96 MINN. L. REV. 2150, 2151 (2012).

223. *See, e.g.*, Cynthia Godsoe, *Contempt, Status, and the Criminalization of Non-Conforming Girls*, 35 CARDOZO L. REV. 1091, 1107 (2014) (noting protectionist rationale for detaining girls).

224. As described in *supra* note 127, and accompanying text, in 1974 an amendment to the federal statute regulating juvenile justice withheld federal funds for states that use incarceration for status offenders. A 1980 amendment, however, created an

who is under the jurisdiction of the court for a noncriminal offense such as truancy or running away can then be incarcerated for committing another such noncriminal offense.[225] Another is the use of detention for minors with the stated rationale that the child in question—often a girl[226]—is endangered by association with older romantic partners or engaging in survival sex work.[227] The dangers of detention are well known—exposure to prison-like conditions, loss of family connections and support, interruption of education, creation or exacerbation of mental health problems[228]—suggesting a poorly considered weighing of the harm of a hypothetical future danger in the community and the well-documented problems associated with secure custody.

In addition, after adjudication, states may authorize courts to remove children from their homes and place them in a foster placement or group home if the court finds the child needs "more adequate care or supervision," and may order the child detained pending the availability of such a placement.[229] Importantly, the underlying crime need not be serious or violent to support an order for secure custody.[230] The waiting period for the placement can be lengthy, and juveniles often have no right to hearings within a prescribed time period at this stage.[231]

The foregoing analysis has traced ruptures and continuities in the juvenile court. It briefly discussed how *Gault* constituted a "constitutional domestication"[232] of juvenile court proceedings, instituting some due process protections for juveniles. It showed how the juvenile courts, despite a period of increasing levels of punitiveness, have maintained the commitment to rehabilitation envisioned by the

exception for juveniles adjudicated of status offenses who violate a "valid court order." *See* John Sciamanna, *Courts Use of the Valid Court Order*, CHILD WELFARE LEAGUE OF AMERICA (last visited April 5, 2022 4:22 PM) https://www.cwla.org/courts-use-of-the-valid-court-order.

225. *See, e.g.*, Alecia Humphrey, *The Criminalization of Survival Attempts: Locking up Female Runaways and Other Status Offenders*, 15 HASTINGS WOMEN'S L.J. 165, 170 (2004).
226. Godsoe, *supra* note 223, at 1105.
227. *Id.*
228. *See, e.g.*, BARRY HOLMAN & JASON ZEIDENBERG, THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES (2006).
229. *See, e.g.*, N.C. GEN. STAT. § 7B-2506(1)(b) (authorizing courts to remove children from their families after adjudication upon a finding of need of "more adequate care or supervision").
230. Conklin, *supra* note 222, at 2171.
231. *Id.*
232. *Supra* note 125, and accompanying text.

child savers. It then analyzed what has remained the same in the contemporary court—namely, the enhanced vulnerability for justice involvement of youth from marginalized populations, as well as the persistence of the *parens patriae* doctrine and its most troubling manifestation: the broad rationale for the imposition of secure custody orders.

III. ECONOMIC COSTS AND DIGNITARY HARMS

Having established a historical framework and outlined the landscape of the rights regime and demographics of the contemporary courts, this Part takes up the Article's main focus—namely, how juvenile court in many instances inflicts a series of economic costs and dignitary harms upon parents.[233]

Because living in racialized poverty increases the likelihood of delinquency involvement—and compounds the negative impacts of being there—the harms discussed in this Part do not affect all parents equally. Instead, they are particularly salient for, and especially disadvantage, low-income parents of color, particularly when they are parenting without a cohabitating partner.

Subpart A considers economic costs and impacts. Subpart B outlines the nature of the parental dignity interests at stake in delinquency prosecutions and demonstrates how juvenile court infringes on those interests.

A. Economic Costs and Impacts

As discussed above, racialized, gendered poverty renders poor youth of color disproportionately likely to become ensnared in the juvenile court. Once there, parents face a series of economic costs that can exacerbate economic struggles.[234] These include both direct costs levied by the juvenile court and its associated agencies and programs,[235]

233. The impacts of these costs and harms on rehabilitation are discussed in Part 0, *infra.*
234. JUVENILE L. CTR., ECONOMIC JUSTICE, https://jlc.org/issues/economic-justice [https://perma.cc/3GPN-BSWA] (last visited April 22, 2022) (explaining that "[t]he juvenile justice system imposes numerous fines and fees on youth and their families. These fines and fees are widespread across the country").
235. For an analysis of an advocacy campaign to abolish these kinds of costs, see Jeffrey Selbin, J*uvenile Fee Abolition in California: Early Lessons and Challenges for the Debt Free Justice Movement* (October 16, 2019). 98 N.C. L. REV. 401 (2020).

as well as indirect costs in the form of lost economic opportunities or other negative consequences that attach. These costs can accrue regardless of whether a child is adjudicated delinquent.[236]

1. Direct Costs

Direct costs in the juvenile court consist of numerous fees [237] and fines.[238] Because minors usually do not have financial assets, courts frequently require parents to pay.[239]

Among the fees are those associated with defense counsel. While the Supreme Court in *In re Gault*[240] emphasized the importance of an attorney to the effectuation of due process,[241] the right to counsel is compromised by the routine practice of assessing counsel fees. While in some states, juveniles are presumptively indigent and thus entitled to court-appointed counsel without regard to their parents' income and without the imposition of fees, in others, parents must first demonstrate

236. Economic sanctions are not unique to juvenile court. *See* Beth Colgan, *Beyond Graduation: Economic Sanctions and Structural Reform*, 69 DUKE L.J. 1529, 1537 (2020) (stating that "[a]ll levels of courts—traffic and municipal courts, juvenile courts, and misdemeanor and felony courts at the local, state, and federal level—use economic sanctions, including fines, fees, surcharges, and restitution, to punish people").

237. One scholar refers to the welter of court fees as constituting "cash register justice." *See* Laura I Appleman, *Nickel and Dimed into Incarceration: Cash Register Justice in the Criminal Justice System*, 57 B.C. L. REV. 1483, 1483 (2016) (noting that fees are created as a means of assisting state courts and other agencies in the wake of falling tax revenues).

238. A fine is associated with the commission of the crime itself, distinct from a fee which is associated with the court process. *See, e.g.*, Monica Llorente, *Criminalizing Poverty Through Fines, Fees, and Costs*, AM. BAR ASS'N (Oct. 3, 2016), https://www.americanbar.org/groups/litigation/committees/childrensrights/articles/2016/criminalizing-poverty-fines-fees-costs [https://perma.cc/K4A8-WUL8].

239. JESSICA FEIERMAN, NAOMI GOLDSTEIN, EMILY HANEY-CARON & JAYMES FAIRFAX COLUMBO, DEBTOR'S PRISON FOR KIDS: THE HIGH COST OF FINES AND FEES IN THE JUVENILE JUSTICE SYSTEM (2016) (enumerating costs, fees, and fines and indicating states where they are assessed against parents, those where they are assessed against youth, and those where they are assessed against youth or parents). In a small number of states, juveniles are entitled to cash bail. *See* Joanna S. Markman, In re Gault*: A Retrospective in 2007: Is it Working? Can it Work?*, 9 BARRY L. REV. 123, 137 n.126 (2007) (noting most states do not authorize juveniles to be released on bail). Parents who must post bail undoubtedly incur financial hardship, however temporary.

240. 387 U.S. 1, 29 (1967).

241. *Id.* at 36 (citing Powell v. Alabama, 287 U.S. 45, 69 (1932)) (holding that the "child requires the guiding hand of counsel at every step in the proceedings against him").

that they themselves fall below a very low financial threshold to qualify for court-appointed counsel.[242] Even in those cases, attorneys' fees may be assessed against parents, notwithstanding the constitutional status of this right.[243] In total, fees are assessed for the right to counsel in all but ten states.[244] Along with fees for trial counsel, in a small number of jurisdictions parents are assessed counsel fees if their child unsuccessfully appeals a delinquency adjudication.[245]

A host of other fees may be assessed throughout the life of a juvenile case. In some jurisdictions, courts assess families' fees when their children are diverted from formal juvenile court processing.[246] Half of all states authorize assessment of fees for court-related costs—depositions, travel expenses, and the like.[247] Nearly all states have statutes authorizing the practice of charging families for some of their children's so-called "costs of care" when the children are taken into custody pre-adjudication or committed to a secure facility post-adjudication.[248] These include food, clothing, and sometimes the cost of the detention itself.[249] In addition, many states require parents to pay for the cost of a

242. NAT'L JUVENILE DEFENDER CTR, ACCESS DENIED: A NATIONAL SNAPSHOT OF STATES' FAILURE TO PROTECT CHILDREN'S RIGHT TO COUNSEL 10–12 (2017). Often, the bar for what constitutes "inability to pay" is quite low such that working-class families do not qualify. Mary E. Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in Juvenile Courts*, 54 FLA. L. REV. 577 (2002); *see also* Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1674 (2015).

243. Katayoon Majd & Patricia Puritz, *The Cost of Justice: How Low-Income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 GEO. J. ON POVERTY L. & POL'Y 543, 564–66 (2009). This is true in adult criminal courts as well, where Gideon v. Wainwright, 372 U.S. 335, 344 (1963) held that all indigent criminal defendants must be provided counsel at state expense. *See* Kate Levine, *If You Cannot Afford a Lawyer: Assessing the Constitutionality of Massachusetts' Reimbursement Statute*, 42 HARV. C.R.-C.L. L. REV. 191 (2007) (arguing that the imposition of counsel fees on indigent defendants undermines Gideon's counsel guarantee, belying conventional wisdom among commentators that "our criminal justice system is the fairest in the world").

244. JESSICA FEIERMAN, NADIA MOZAFFAR, NAOMI GOLDSTEIN & EMILY HANEY-CARON, THE PRICE OF JUSTICE: THE HIGH COST OF "FREE" COUNSEL FOR YOUTH IN THE JUVENILE JUSTICE SYSTEM (2018).

245. FEIERMAN, *supra* note 239, at 17.

246. FEIERMAN, *supra* note 239, at 12 (noting that twenty-two states have statutes authorizing fees for diversion). For a discussion of diversion, see *supra* notes 169–172, and accompanying text.

247. FEIERMAN, *supra* note 239, at 17.

248. *Id.* at 15.

249. *See* Eli Hager, *Your Kid Goes to Jail, You Get the Bill*, THE MARSHALL PROJECT (Mar. 2, 2017) https://www.themarshallproject.org/2017/03/02/your-kid-goes-to-jail-you-get-the-bill [https://perma.cc/AJ6C-XMAH] (discussing different approaches

child's health care.[250] Especially common are the costs associated with court-ordered probation,[251] which is the disposition most frequently imposed after a delinquency or status offense adjudication.[252] These include substance use evaluations, sex offender assessments, and other evaluations designed to produce recommendations for the sentencing judge.[253] They also include fees for electronic monitoring to determine compliance with probation.[254] While many of these fees are for programs ostensibly in lieu of detention, critics have noted the presence of a net-widening effect—in other words, that they are imposed on people who would not in fact otherwise be locked up.[255]

Finally, fines, imposed as punishment for specified offenses and often as an alternative to incarceration,[256] encompass any monetary restitution distributed to the person or entity denominated the victim post-adjudication.[257] All states allow for the imposition of some fines; mandatory fines are possible in ten states, while in the remainder of states fines are assessed as a matter of judicial discretion.[258]

that states take to these fees, ranging from an ability-to-pay system to seizing bank accounts and noting that some jurisdictions are eliminating the practice notwithstanding state statutes authorizing it).

250. FEIERMAN, *supra* note 239, at 15.

251. *Id.* at 10.

252. *Id.*

253. *Id*. at 15 (twenty states have statutes authorizing charging families for assessments).

254. *See generally* Kate Weisburd, *Monitoring Youth: The Collision of Rights and Rehabilitation*, 101 IOWA L. REV. 297 (2015); Chaz Arnett, *Virtual Shackles: Electronic Surveillance and the Adultification of Juvenile Courts*, 107 J. OF CRIM. L. & CRIMINOLOGY 399 (2018). Critics charge that electronic monitoring is often imposed not in cases where detention or incarceration would otherwise be imposed, but as a means of providing enhanced surveillance to juvenile probationers who are not legitimately at risk of being confined.

255. Stephen Mainprize, *Electronic Monitoring in Corrections: Assessing Cost-Effectiveness and the Potential for Widening the Net of Social Control*, 34 CANADIAN J. CRIMINOLOGY 161 (1992).

256. *Id.* at 162.

257. For a critique of the common assumption that the person claiming to have been harmed by a crime is properly considered a "victim" in the absence of proof beyond a reasonable doubt in a criminal proceeding, see Anna Roberts, *Victims, Right?*, 42 CARDOZO L. REV. 1449 (2021).

258. FEIERMAN, *supra* note 239, at 19.

2. Indirect Costs

Juvenile court involvement also brings about a number of indirect economic costs.[259] Although a given case may last mere minutes, delinquency cases are often collectively set at one time rather than being spread throughout the day.[260] Parents therefore must plan their entire days around one or more court appearances.[261] A delinquency adjudication that results in probation—the result in 63 percent of cases involving a delinquency adjudication[262]—may also affect a parent's work

259. On top of the costs imposed by delinquency involvement itself, the mere accusation of delinquency conduct can have financially damaging consequences. For example, a child may be suspended in North Carolina simply for having a felony charge. *See, e.g.*, N.C. GEN. STAT. § 115C-390.2 (2021) (allowing the Board of Education to suspend a student for "conduct not occurring on educational property" if it violates the Board's Code of Student Conduct or "is reasonably expected to have a direct and immediate impact on the orderly and efficient operation of the schools or the safety of individuals in the school environment"); *see also* CHILDREN'S LAW CENTER OF MASSACHUSETTS, QUICK REFERENCE ON SCHOOL DISCIPLINE (discussing a Massachusetts law that allows students to be suspended for a felony charge and expelled upon a felony conviction); *School Discipline Laws & Regulations by State*, NAT'L CTR. ON SAFE SUPPORTIVE LEARNING ENV'TS, https://safesupportivelearning.ed.gov/school-discipline-laws-regulations-state [https://perma.cc/47D4-PTQX] (surveying state laws on interplay between delinquency involvement and school consequences). [Insert date last visited] While the most obviously affected person in this scenario is the child, a parent must often stay home from work to supervise a suspended child, thereby potentially imperiling her income. Similarly, the allegation of delinquency conduct in the form of an arrest or charge can trigger negative housing consequences such as eviction or denial of a voucher for people living in public housing. *See, e.g.*, Dep't of Hous. & Urb. Dev. vs. Rucker, 535 U.S. 125, 125 (2002) (upholding federal statute that gave local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engaged in drug-related activity, regardless of whether tenant knew or should have known, of the drug-related activity). Since these harms arise not because of the juvenile court itself but because of state or federal laws regulating allegedly criminal conduct of young people and imposing consequences outside the court, they are beyond this Article's scope.

260. *See, e.g.*, *Juvenile Delinquency: General Information*, N.C. JUD. BRANCH, (last visited Feb. 7, 2021) https://www.nccourts.gov/help-topics/family-and-children/juvenile-delinquency [https://perma.cc/CA23-L4A3] (stating that "[m]any cases will be scheduled at the same time, and the court will handle cases one by one.").

261. *Id.* (instructing those attending juvenile court to be "prepared to sit and wait patiently in the courtroom or in a place designated by your attorney" and that it "is possible that your case may not be resolved when you appear in court and may be continued to a later date"); *see also* HEATHER HUNT & GENE NICHOL, THE PRICE OF POVERTY IN NORTH CAROLINA'S JUVENILE JUSTICE SYSTEM 9 (2021) ("Once at the courthouse, parents and children may have to wait for hours before their case is called").

262. SARAH HOCKENBERRY & CHARLES PUZZANCHERA, JUVENILE COURT STATISTICS 2017 50 (2019).

schedule. Terms of probation often include early curfews or even house arrest, which could necessitate ongoing parental supervision that similarly requires missed days of work, or reorganized schedules.[263]

3. Impacts

Several negative impacts flow from the direct and indirect economic costs in juvenile court. The first is that they can work to stunt the full and fair adjudications of delinquency allegations. For example, a parent who does not get paid when she misses work has a strong incentive to encourage her child to quickly make an admission of guilt to avoid the necessity of multiple court dates.[264] This incentive likely contributes to the fact that well over 90 percent of cases are resolved by way of admission.[265] Moreover, a family in a jurisdiction where fees are assessed in the event of unsuccessful appeals is disincentivized to pursue claims in appellate court, thereby stunting the development of juvenile appellate law.[266]

Second, and more pressing for this Article's analysis, however, is that these fees and fines create economic strain on already vulnerable parents. While a family of economic means may be able to pay these costs without having to forego necessary expenses, for other families, fulfilling court obligations can mean not paying essential bills.[267] Even before the COVID-19 pandemic, more than half of adults reported a level of

263. *See, e.g.*, N.C. GEN. STAT. § 7B-2506 (2019) (granting court the ability to impose house arrest as a punishment); N.C. GEN. STAT. § 7B-2510 (2019) (granting court authority to impose curfew on a juvenile on probation, to prevent the juvenile from being in "specified places" and "any other conditions determined appropriate by the court"). This Article characterizes conscription of parents into court-actor roles as a dignitary harm. See *infra* notes 311–321 , and accompanying text.

264. NAT'L. JUV. DEF. CTR., *supra* note 184, at 28 (outlining how "[p]arents could be . . . wary of taking time off work to attend court hearings . . . [which could] lead parents to believe their child should simply waive their rights and plead guilty").

265. Fedders, *supra* note 48, at 795.

266. For an in-depth exploration of how poverty stunts the development of law in adjudication of housing claims, *see* Kathryn A. Sabbeth, (*Under) Enforcement of Poor Tenants' Rights*, 27 GEO. J. ON L. & POL'Y 97, 120–21 (2019) (explaining how forcing poor tenants to pay for counsel to adjudicate claims of housing code violations results in the underenforcement of tenants' rights and continuation of substandard housing conditions).

267. HUNT & NICHOL, *supra* note 261, at 6 (arguing that "[w]hen 16 [percent] of American adults are unable to pay all of their current month's bills in full—and almost 40 [percent] lack $400 to cover an emergency—even a few hundred dollars of court debt can destroy the fragile balancing act of household budgeting").

economic insecurity that would make a significant court-related expense unaffordable based on average monthly financial assets.[268] The assessment of costs can thus create financially untenable choices: fulfill the court-ordered financial obligation and forego paying other critical expenses, such as rent, utilities, or food,[269] or default on or defer court-assessed fines and fees and risk negative consequences for their child. Sixty-two percent of survey respondents who reported that youth or families were charged for probation also reported that "difficulty paying caused not only heightened juvenile justice system involvement, but also more frequent court contact, family debt, driver's license issues, and family stress and strain."[270] Yet failure to pay can mean the issuance of a petition if the parents were assessed fees as part of a diversion contract.[271] If probation terms included fines or fees that are not paid, the probation can be extended, subjecting the child to increased state surveillance, [272] and can trigger probation violation proceedings that lead to detention or incarceration.[273] For failing to pay supervision fees, at least thirteen states impose a civil judgment, "allowing for wage garnishment, tax withholding, and a credit score reduction."[274] Of those states, five pursue the judgment against the parent, four against the child, and four against both once the child turns eighteen.[275] This credit score reduction in particular can result in long-term financial difficulties even

268. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2019, FEATURING SUPPLEMENTAL DATA FROM APRIL 2020 2 (May 2020).

269. *See, e.g.*, NAT'L JUV. DEF. CTR., A RIGHT TO LIBERTY: REFORMING JUVENILE MONEY BAIL 8 (2019) (discussing how money bail in juvenile court puts financial pressure on families forced to choose between having their children home with them and meeting monthly expenses).

270. FEIERMAN, *supra* note 239, at 10.

271. *Id.* at 12.

272. Eli Hager, *Punishing Kids with Years of Debt*, THE MARSHALL PROJECT (June 11, 2019) https://www.themarshallproject.org/2019/06/11/punishing-kids-with-years-of-debt [https://perma.cc/L76D-BZAX] (noting 2017 case of a teenager who agreed to pay $5000 in restitution in exchange for his charges being reduced to misdemeanors, but who is now homeless and still trying to pay that debt); *see also* Matthew Shaer, *Trapped*, SLATE (June 22, 2020) https://slate.com/news-and-politics/2020/06/juvenile-debt-families.html [https://perma.cc/H5EB-M29B] (discussing issue of how fines and fees from court involvement harm whole families).

273. FEIERMAN, *supra* note 239, at 15.

274. NATIONAL JUVENILE DEFENDER CENTER, THE COST OF JUVENILE PROBATION: A CRITICAL LOOK INTO JUVENILE SUPERVISION FEES 3 (2017).

275. *Id.*

after the fees have been paid and probation has ended.[276] Similarly, the policy of revoking driving privileges perpetuates the cycle by removing the child's or parent's ability to commute to work.[277] Finally, a family that does not pay "costs of care" may find their child deprived of needed and court-ordered treatment.[278]

Third, the imposition of costs serves as a potential source of intrafamilial tension.[279] It is easy to imagine a child feeling pressure from financially taxed parents to plead guilty to save her parents time in court in order to quickly resolve the case even when she has a viable defense to claims.[280] The stress that the imposition of fees places on children of low-income parents is exemplified by a California case decided shortly after the *Gault* opinion.[281] There, a child seeking to save his father the expenses associated with defense counsel waived the right at a preliminary hearing.[282] On appeal, the court held that such a waiver was involuntary.[283] Of course, the appellate decision, rendered long after the child had tendered his waiver, could do nothing to remedy the intrafamily tension likely created by this fee assessment.

It is difficult to know with certainty how broad of an economic impact these costs, fines, and fees have on families. Many states permit judges to consider a family's ability to pay before imposing costs or fees.[284] Other states make the assessment of fees and costs discretionary.[285] Still other states allow children to perform community service in lieu of restitution,[286] or cap the amount of restitution that can be assessed in any given case.[287]

Yet it is clear that even relatively limited fees or fines can have outsized impact given the financially precarious circumstances of many families in juvenile court.[288]

276. *Id.*
277. *Id.*
278. FEIERMAN, *supra* note 239, at 15.
279. *Id.* at 17 (noting that family debt incurred as a result of court fines and fees causes "rift" between parents and children).
280. *See supra* notes 262–263 and accompanying text.
281. In re Ricky H., 468 P. 2d 204 (Cal. 1970).
282. *Id.* at 206.
283. *Id.* at 211.
284. FEIERMAN, *supra* note 239, at 17.
285. FEIERMAN, *supra* note 239, at 17.
286. *Id.* at 18.
287. *Id.*
288. Judith Resnik & David Marcus, *Inability to Pay: Court Debt Circa 2020*, 98 N.C. L. REV. 361, 364 (2020).

The next Subpart considers the infringement on parental dignitary interests that also characterize juvenile court prosecutions.

B. Dignitary Harms

1. Parental Dignitary Interests Defined

Dignity is a central value in our legal system. Recognition of human dignity underlies our belief in the importance of popular sovereignty over monarchical rule, a limited state, and the centrality of individual liberty and individual rights.[289] While the U.S. Constitution does not specifically protect dignity, Supreme Court opinions regularly and with increasing frequency reference it in protecting individual rights.[290] Indeed, the Court has invoked dignity in analyzing protections under the First, Fourth, Fifth, Sixth, Eight, Ninth, Eleventh, Fourteenth, and Fifteenth Amendments.[291]

While important in U.S. jurisprudence, dignity has been difficult to define.[292] One scholar's taxonomy of the term revealed five distinct usages, positing that dignity is conceptualized by courts and commentators as institutional status, equality, liberty, personal integrity, and collective virtue.[293] Another argues for only three: dignity as life, dignity as liberty, and dignity as equality.[294]

Surveying scholarship and judicial opinions addressing dignity, one might conclude, as one constitutional scholar does, that the "primary judicial function [of dignity] is to give weight to substantive interests implemented in specific contexts."[295] Let us, then, adopt this instrumentalist understanding and consider how dignity plays out in the

289. *See* Maxine Eichner, *Families, Human Dignity, and State Support for Caretaking: Why the United States' Failure to Ameliorate the Work-Family Conflict is a Dereliction of the Government's Basic Responsibilities*, 88 N.C. L. REV. 1593, 1615 (2010).
290. Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1736 (2008).
291. Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 UNIV. PA. L. REV. 169, 172–73 (2011) (internal case citations omitted).
292. I am grateful to Maxine Eichner for suggestions for how better to articulate dignitary harm. *See* Maxine Eichner, *Families, Human Dignity, and State Support for Caretaking, supra* note 289 at 1615.
293. Meltzer Henry, *supra* note 291, at 190 (internal citations omitted).
294. Siegel, *supra* note 290, at 1739–40 (internal citations omitted).
295. Meltzer Henry, *supra* note 291, at 190.

specific context of two separate but sometimes overlapping legal doctrines regarding parents' rights.

The first is the line of cases enshrining parental autonomy. In the 1923 case *Meyer v. Nebraska*, the Supreme Court ruled that "the rights of parents to engage [a teacher] so to instruct their children" are "within the liberty of the [Fourteenth] amendment," recognizing "the power of parents to control the education of their own [children]."[296] Four years later, the Court developed the nature of the parental liberty interest. In *Pierce v. Society of Sisters*, the Court invalidated an Oregon statute requiring parents to send their children to public school.[297] In that case, the Court declared "the child is not a mere creature of the state" and that parents "have the right, coupled with the high duty" to direct their children's upbringing.[298] The parental autonomy right enshrined in *Meyers* and *Pierce* has been repeatedly reaffirmed[299] and is a bedrock constitutional principle of family law.[300]

Along with this parental autonomy right, courts in the latter part of the twentieth century have recognized and elaborated on a more capacious right to family integrity. Courts have relied on this right in conferring due process protections when the state intervenes in a family to remove children from their parents' physical or legal custody.[301] As

296. Meyer v. Nebraska, 400–01 (1923).
297. Pierce v. Society of Sisters, 268 U.S. 510 (1925).
298. *Id.* at 535.
299. *See, e.g.*, 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").
300. Peggy Cooper Davis refers to *Meyers* and *Pierce* as "old chestnuts." *Little Citizens & Their Families*, 43 FORDHAM URB. L.J. 1009, 1010 (2016).
301. "We have little doubt that the Due Process Clause would be offended," the U.S. Supreme Court held in Quilloin v. Walcott, "'if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (quoting Smith v. Org. of Foster Families, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring)); *see also* M.L.B . v. S.L.J., 519 U.S. 102, 116 (1996) (holding that a Mississippi statute violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment while specifically recognizing the unique importance of termination proceedings); Santosky v. Kramer, 455 U.S. 745 (1982) (requiring that all states use a clear and convincing standard of proof, that is, more than a preponderance of the evidence but less than the beyond a reasonable doubt standard required in criminal proceedings, when seeking a termination of parental rights). These cases, which addressed family integrity, both centered on attempts

articulated in an oft-cited 1977 Second Circuit case, family integrity encompasses not only parents' rights but interests of children in "not being dislocated from the emotional attachments that derive from the intimacy of daily association, with the parent."[302] While the "care/custody/control" line of cases often involved rights of relatively privileged parents, the right to family integrity developed in response to child welfare intervention into poor families.[303]

Both rights—parental autonomy and family integrity—rest on dignity interests. As one prominent children's rights scholar argues, "The right to family privacy and parental autonomy, as well as the reciprocal liberty interest of parent and child in the familial bond between them," he asserts, "need no greater justification than that they comport with each state's fundamental constitutional commitment to individual freedom and human dignity."[304]

Along with working to undergird restraint on state action in the parental autonomy and family integrity contexts, dignity buttresses the claims of economically and racially marginalized people to be treated with respect, even when they are ensnared in or must rely on public systems.[305] Poor people and people of color who struggle for civil rights and economic justice frequently invoke dignity.[306] One scholar conceptualizes "the long battle to attain racial justice in the United States

by the state to permanently terminate the rights of poor or otherwise socially marginalized parents.

302. Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977); *see also* Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 333 (2003) (noting "the integrated way in which courts have examined the complex and overlapping realms of personal autonomy, marriage, family life, and child rearing").

303. Caitlin Mitchell, *Family Integrity and Incarcerated Parents: Bridging the Divide*, 24 YALE J.L & FEMINISM 175, 181 (2012).

304. Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 649 (1977).

305. William Forbath, *Constitutional Welfare Rights: A History, Critique, and Reconstruction*, 69 FORDHAM L. REV. 1821, 1852–53 (2001) (discussing welfare rights organizers' objections to work programs as undignified and demeaning).

306. *See* Jamie Allison Lee, *Poverty, Dignity, and Public Housing*, 47 COLUM. HUM. RTS. L. REV. 97, 109 ("Dignitary rights became a national focus as the civil rights movement established new rights for racial minorities and as President Johnson's War on Poverty galvanized policymakers, activists, and legal scholars around welfare reform"); *see also* Cooper Davis, *So Tall Within, supra* note 31, at 470 (citing Malcolm X's experience as a child with the state child welfare system, who recalled his mother's efforts to maintain her dignity: "My mother was, above everything else, a proud woman, and it took its toll on her that she was accepting charity . . . [Child welfare authorities]were vicious as vultures. They had no feelings, understanding, compassion, or respect for my mother").

'as a struggle to secure dignity in the face of sustained efforts to degrade and dishonor persons on the basis of color.'"[307]

2. Juvenile Court Infringement on Parental Dignitary Interests

Infringement on a parent's dignity interests often accompanies the prosecution of children in juvenile court. Without suggesting that any of these infringements necessarily constitute denial of a parent's right to autonomy or family integrity such that they would support a legal claim, they nonetheless act as a dignitary burden on parents. At least three separate infringements exist.

a. Conscription by Court Officials

Recall that the most common dispositional outcome when juveniles are adjudicated delinquent is supervised probation.[308] When a judge places a child on probation, she often issues a supplemental order against the parent as well, aimed at ensuring compliance with the court.[309] Probation typically includes requirements to report to a juvenile probation officer, but many other terms and conditions effectively require that the parent do the monitoring, reporting, and enforcement.[310] For example, common delinquency terms and conditions of probation

307. Darren Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1 (2017) (internal citation omitted). *See also* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 526–27 (2010) (arguing, "A dignity-based approach to individuals' post-incarceration lives would seek to promote, rather than suppress, their standing in the community. It would aim to restore individuals, as much as possible, to their prior status, rather than impose broad legal restrictions that serve to degrade and marginalize them.").

308. *See supra* note 261, and accompanying text.

309. *See, e.g.*, MICH. COMP. LAWS SERV. § 712A.18(1)(g) (LexisNexis 2005) (stating, "[The court may] [o]rder the parents, guardian, custodian, or any other person to refrain from continuing conduct that the court determines has caused or tended to cause the juvenile to come within or to remain under this chapter or that obstructs placement or commitment of the juvenile by an order under this section."); MONT. CODE ANN. § 41-5-1412(3) (2007) (stating, "A youth's parents or guardians are obligated to assist and support the youth court in implementing the court's orders concerning a youth . . . . and the parents . . . are subject to the court's contempt powers if they fail to do so."); N.C. GEN. STAT. § 7B-2703(b) (2009) (stating that the court may order a parent to comply with orders of the court and "to cooperate with and assist the juvenile in complying with the terms and conditions of probation").

310. MONT. CODE ANN. § 41-5-1412(3) (2007) .

include obeying the rules of the home, observing a curfew, and avoiding certain peers.[311]

On the one hand, deputizing a parent to act as the eyes and ears of a probation officer may seem to be common sense. It is she, after all, who already has a series of statutory and common-law responsibilities to her child's wellbeing.[312] Moreover, such conditions ordered by a court may seem an obvious delegation; should parents not already be requiring a child's obedience and respect, keeping her at home after a certain hour, and paying attention to the people whom she is around anyway?[313]

On the other hand, this "devolution of legal control"[314] from court actors to parent raises several troubling issues. For one, courts need not explicitly warn parents of the range of consequences that can attach upon their receipt of parent-provided incriminating information about their children, and they may ignore the parents' wishes about what should happen as a result of the information. The child of a parent in this precise situation was incarcerated as a consequence for a probation violation after failing to reliably wake up on time and log in for remote school.[315] The court became aware about the girl's school troubles after the mother dutifully reported them to the juvenile probation officer. She did so, notably, without desiring detention.[316]

It is also one thing to want to be a good parent and do what one can to be so. It is quite another to have one's parenting scrutinized by state authorities, who impose demands on top of the already difficult task of raising children. We know that the people whose children are on probation are likely to have financial struggles already.[317] Court orders

311. *See, e g.*, N.C. GEN. STAT. § 7B-2510.
312. *See* John H. Wigmore, *Comment, Torts—Parent's Liability for Child's Torts*, 19 ILL. L. REV. 202, 203 (1924–1925).
313. Tina Maschi, Craig Schwalbe & Jennifer Ristow, *In Pursuit of the Ideal Parent in Juvenile Justice: A Qualitative Investigation of Probation Officers' Experiences with Parents of Juvenile Offender*s, 52 J. OFFENDER REHAB. 470, 477–78 (2013) (describing some partnership behaviors between parents and probation officers including calling the probation officer when the parent needs help for parenting problems, and reporting youth noncompliance when it occurs).
314. Forrest Stuart et al., *Legal Control of Marginal Groups*, 11 ANN. REV. L. & SOC. SCI. 235, 238 (2015).
315. Jodi S. Cohen, *A Teenager Didn't Do Her Online Schoolwork. So A Judge Sent Her to Juvenile Detention*, PROPUBLICA (July 14, 2020, 5:00 AM), https://www.propublica.org/article/a-teenager-didntdo-her-online-schoolwork-so-a-judge-sent-her-to-juvenile-detention [https://perma.cc/8883-WPHF].
316. *Id.*
317. *See supra* notes 143–168, and accompanying text.

that a parent surveil her child at particular times may necessitate schedule changes in jobs that are difficult to attain and maintain. They almost surely create additional stress within the family, as they did in the case described above.[318]

b. Denial of Voice

Throughout the course of a delinquency proceeding, prosecutors, defense attorneys, and judges often override parents' perspectives or fail to even elicit them in the first instance. The issues and stakes are different depending on the particular court actor.

Consider first the scenario in which the parent is the complaining witness and/or the alleged victim in a case. She may make the difficult decision to contact the police upon discovery of drugs or alcohol.[319] Physical violence may occur between a child and her sibling,[320] or against the mother herself. An angry child might throw something at home and break a treasured vase or damage a wall.[321] Such events are not uncommon in rearing a child.[322] External stressors such as the COVID-19 pandemic might make them even more common—and certainly may make it more likely that a parent will know about them.[323] If she contacts the police, she is setting in motion a process in which a delinquency complaint will likely issue from the court unless the case is diverted or dismissed.[324]

318. Cohen, *supra* note 315. The impact that these orders have on parent-child bonds is discussed *infra* Part 0.

319. *See generally* N.C. GEN. STAT. ANN. § 90-95 (2020); *see also* N.C. DEP'T OF PUB. SAFETY, UNDERAGE DRINKING (noting that 38 percent of eighth graders in North Carolina have had alcohol at least once).

320. *See, e.g.*, N.C. GEN. STAT. ANN. § 14-33 (2020) (defining and criminalizing assault and not exempting family members, including minor siblings).

321. *See, e.g.*, N.C. GEN. STAT. ANN. § 14-127 (2020) (criminalizing malicious destruction of real property).

322. *See, e.g.*, Corinna Jenkins Tucker & David Finkelhor, *The State of Interventions for Sibling Conflict and Aggression: A Systematic Review*, 18(4) TRAUMA, VIOLENCE, & ABUSE, 396, 396 (2017) (describing how "[s]ibling conflict is frequent and occurs in some cases up to eight times an hour."); *see also* NATIONAL CENTER FOR HEALTH STATISTICS, HUS 2018 TREND TABLES, TABLE 20 (noting 11.2 percent of persons aged twelve years and older reported using any illicit drug and 51.0 percent of persons aged twelve years and older reported alcohol use in the past month in 2017).

323. Molly Buchanan Erin D. Castro, Mackenzie Kushner & Marvin D. Khron, *It's F**ing Chaos: COVID-19's Impact on Juvenile Delinquency and Juvenile Justice*, AM. J. CRIM. JUST. 1, 5 (June 23, 2020) (explaining how "stay-at-home mandates further increase the likelihood that caregivers are aware of youths' movements and activities").

324. *See supra* notes 169–170, and accompanying text.

Studies suggest that parents who rely on police in such situations are disproportionately likely to be low-income mothers of color.[325] These mothers may do so notwithstanding their own negative lived experience with law enforcement.[326] This seemingly anomalous phenomenon makes sense when one considers that these parents have minimal access to the resources other parents might secure in similar situations—extended family, private drug treatment, or boarding school, to name a few.[327] Indeed, particularly in the absence of a strong and supportive community of family and friends, these parents may in fact have nowhere to turn for help except to the police.

Such parents may hope, even expect, that authorities will in turn respect their views about whether to proceed with a prosecution. That just as they brought the police and the state into their lives, they may in turn ask them to exit. Indeed, they may surmise, but for their voluntary involvement, the state in many instances would have no case at all. Yet they may quickly discover that their wishes about what should happen with a child matter little once the police have been contacted.[328]

While some prosecutors may elect to drop a case when the parent is uninterested in proceeding, often they need not do so. There is no federal statutory or common-law testimonial privilege to protect the communications between parents and their children.[329] Only a handful of states have such a privilege.[330] The absence of a parent-child testimonial privilege in the majority of states means that a prosecutor

325. Monica C. Bell, *Situational Trust: How Disadvantaged Mothers Reconceive Legal Cynicism*, 50 L. & SOC'Y REV. 314, 315 (2016) (hereafter Bell, *Situational Trust*).

326. *Id.*

327. Joseph B. Richardson, Jr., Waldo E. Johnson, Jr. & Christopher St. Vil., *I Want Him Locked Up: Social Capital, African American Parenting Strategies, and the Juvenile Court*, 43 J. OF CONTEMP. ETHNOGRAPHY 488 (2014).

328. Bell, *supra* note 325, at 316.

329. Hillary Farber, *Do You Swear to Tell the Truth, the Whole Truth, and Nothing but the Truth Against Your Child?* 43 LOY. L.A. L. REV. 551 (2010) [hereinafter, Farber, *Truth*].

330. *Id.* at 601 (listing Connecticut, Idaho, Massachusetts, and Minnesota). In one of those states, the parent-child privilege is abrogated in cases involving allegations of violence by the child against the parent. CONN. GEN. STAT. ANN. § 146b-138a. (stating that "in any juvenile proceeding . . . the parent or guardian of such child shall be a competent witness but may elect or refuse to testify for or against the accused child except that a parent or guardian who has received personal violence from the child may. . . be compelled to testify in the same manner as any other witness").

may call a parent to testify against her child about what she has seen or heard, even over her objection.[331]

Defense attorneys, too, also often fail to elicit the parents' perspectives. The defense attorneys may be acting from a variety of motives. An unfortunate reality of juvenile court practice is that busy court-appointed counsel with high caseloads may not have or make the time to speak with the client, much less find space for conversations with the parent.[332] On the other end of the spectrum of diligence, a conscientious attorney may correctly reason that the client will be more forthcoming about potentially incriminating information when out of earshot of her parent.[333] Best practice guides for juvenile defense lawyers in fact make clear that the attorney owes a duty of loyalty to the child, not the parent.[334] Without adhering to the child's expressed interest, the guarantees of *Gault* are largely devoid of meaning; if a parent, for example, can direct a child's attorney to enter a guilty plea, the right against self-incrimination is of little import.[335]

The fact that lawyers may appropriately decide not to include parents in confidential meetings with their young clients, however, need not mean that defense attorneys should not consult with parents at all.[336] To the contrary, parents can contribute to a child's defense in several ways. They can supplement a child's account of her strengths and weaknesses to aid a lawyer in arguing against detention. They can assist

331. Scholars disagree about how often prosecutors compel parental testimony over the objection of parents. Hillary Farber points to media accounts of parents testifying against their children and other anecdotal evidence as suggesting the practice is not infrequent. Farber, *Truth*, *supra* note 329, at 606. *Compare* Margareth Etienne, *Managing Parents: Navigating Parental Rights in Juvenile Cases*, 50 CONN. L. REV. 61, 87–88 (2018) (noting few recorded instances of compelled parental testimony and arguing that prosecutors' reluctance to subpoena a hostile parent to the stand for fear of her sabotaging the case acts as a deterrent to the practice).

332. Fedders, *Losing Hold, supra* note 48, at 772.

333. *Id.*

334. NAT'L JUVENILE DEFENDER CENTER, NAT'L JUVENILE DEFENSE STANDARDS 19 (2012) (articulating that "counsel's primary and fundamental responsibility is to advocate for the client's expressed interests"); *see* Kristin Henning, *Loyalty, Paternalism and Rights: Client Counseling Theory and the Role of the Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 255–59 (2005) (discussing joint standards by the ABA and IJA requiring the attorney to respect the client's determination of her own interests).

335. Martin Guggenheim, *The Right to be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 86 (1984).

336. Henning, *It Takes, supra* note 36, at 780–81; *see also* Margareth Etienne, *Managing Parents: Navigating Parental Rights in Juvenile Cases*, 50 CONN. L. REV. 61, 79 (2018).

a child in articulating components that would comprise a probationary sentence at which a child is most likely to be successful.[337] In addition, parents who are apprised by their child's attorneys about what to expect during the juvenile court process will—during hearings—be less likely to act in ways that could, even inadvertently, jeopardize their child's case. Moreover, it is quite likely that a child will rely on her parent's advice regarding many aspects of the case. When the attorney can involve the parent—ensuring that she does not disclose privileged and confidential client communication[338] or otherwise jeopardize client rapport—the child may feel more comfortable in both speaking candidly to the lawyer and fully considering her advice. These reasons for including parents in conversations, with carefully guarded parameters to ensure the maintenance of confidentiality, help explain why recently issued professional standards suggest that lawyers and parents have different roles but may be conceptualized as being part of the same team.[339]

In addition, a parent is encouraged to share a child's progress and struggles with the probation officer.[340] Again, the child on probation may be there because the court is serving as a de facto safety net for a family unable to access services elsewhere.[341] A parent might understandably confide in a probation officer when the child is struggling. She may be doing so to secure validation or support, which is important in parenting and especially parenting in a pandemic.[342] Yet she can easily find that these shared confidences result in an unwanted outcome, such as detention.[343]

337. NAT'L JUVENILE DEFENDER CENTER, JUVENILE DEFENSE ATTORNEYS & FAMILY ENGAGEMENT: SAME TEAM, DIFFERENT ROLES 1 (2014).
338. *See supra* note 330, and accompanying text.
339. NAT'L JUVENILE DEFENDER CENTER, JUVENILE DEFENSE ATTORNEYS & FAMILY ENGAGEMENT: SAME TEAM, DIFFERENT ROLES 1 (2014); *see also* Henning, *It Takes*, *supra* note 36, at 780–81.
340. Sarah Vidal & Jennifer Woolard, *Parents' Perceptions of Juvenile Probation: Relationship and Interaction with Juvenile Probation Officers, Parent Strategies, and Youth's Compliance on Probation*, 66 CHILD & YOUTH SERVS. REV. 1, 6 (2016) (describing the importance of probation officers' attitudes in parent-probation relationships).
341. Jenny Gross, *Judge Declines to Release Girl, 15, Held for Skipping Online Schoolwork*, N.Y. TIMES (July 21, 2020), https://www.nytimes.com/2020/07/21/us/michigan-teen-coursework-detention.html [https://perma.cc/MT3Y-Y44X] (citing Michigan advocate arguing that "[a] lot of Black children get their introduction to the criminal legal system through school, through detention, through the police getting involved because they have no other place to go").
342. Van Dam, *supra* note 141.
343. Cohen, *supra* note 315.

Finally, consider the judge. Emboldened by the *parens patriae* logic that continues to undergird the contemporary juvenile court, judges can (and frequently do) lock children up as a consequence of noncriminal acts.[344] These include technical violations of probation, such as missing school or being late for curfew.[345] They may do so notwithstanding parents' objections to detention.[346]

c. Attribution and Penalization

Recall that the courts' broad discretion to act in a child's best interest[347] confers on it the ability to issue orders to parents as part of delinquency dispositions.[348] Along with requiring them to monitor and report on the child, these orders often extend further. They sometimes include orders to attend parenting classes.[349]

Such orders seem premised on a series of questionable assumptions. The first is that a child's delinquent conduct is attributable to, and remediable by, the parent. In this respect, they resemble prosecutions of parents for their children's truancy.[350] The questionable premise for those prosecutions is that a child who chronically misses school is under the control of a parent who, upon threat of being held criminally liable, will find it within herself to ensure that her child attends. Yet orders to

344. Mark Soler, Dana Shoenberg & Marc Schindler, *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. ON POVERTY L. & POL'Y 483, 503–04 (2009) (discussing 2001 study showing that approximately one-third of youth in juvenile detention centers were held not for new delinquent conduct but for technical violations of court orders).

345. *Id.*

346. Simpson, *supra* note 221, at 497–98.

347. Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 250–53 (2005) (discussing juvenile courts' best-interest focus).

348. *See, e.g.*, N.C. GEN. STAT. § 7B-2702 (permitting court to require that the parent undergo psychiatric, psychological, or other evaluation or treatment or counseling directed toward remedying behaviors or conditions that led to or contributed to the juvenile's adjudication); *see also supra* notes 305–306 and accompanying text.

349. *See* In re Cunningham, 2002-Ohio-5875, 2002 WL 31412256 (Oct. 18, 2002) (holding that a trial court had authority to initiate contempt proceedings against juvenile's mother based on a violation of an order that required mother to attend parenting classes).

350. Truancy prosecutions of parents pursuant to criminal statutes are distinct from status offense proceedings against juveniles for failure to attend school. *See* Adriane Kayoko Peralta, *An Interrogation and Response to the Predominant Framing of Truancy*, 62 UCLA L. REV. DISCOURSE 42, 51 (2014); Janet Stroman, *Holding Parents Liable for Their Children's Truancy*, 5 U.C. DAVIS J. JUV. L. & POL'Y 47, 50 (2000).

attend parenting classes need not be based on judicial findings that parenting deficiencies contributed to the delinquent conduct.[351]

Rather than, or at least in addition to, ostensibly deficient parenting, other social forces in a child's life may equally contribute to delinquent conduct. A child's actions may be related to undiagnosed learning disabilities.[352] They may also arise from proximity to weapons or readily available gang-involved peers. Delinquency court judges, however, have circumscribed authority to meaningfully intervene in the institutions in which children are involved that may be contributing to delinquent behavior.[353] A delinquency judge does not have the authority to order a school, for example, to conduct an evaluation to determine if a child is eligible for special-education services.[354] In addition, other than waiving court costs where possible, a juvenile court judge cannot ameliorate food insecurity or housing instability. Given the court's inability to address these social circumstances contributing to a child's court involvement, a requirement to attend parenting classes to a parent might seem especially burdensome and unfair.[355]

Finally, parenting-class orders seem premised on an understanding that the classes will be effective and meaningfully address any issues that

351. In this respect these orders resemble parental responsibility laws. DiFonzo, Parental Responsibility, *supra* note 34; *see also* Leslie Joan Harris, *An Empirical Study of Parental Responsibility Laws: Sending Messages, But What Kind and To Whom?*, 2006 UTAH L. REV. 5, 7 (2006); Elena R. Laskin, NOTE, *How Parental Liability Statutes Criminalize and Stigmatize Minority Mothers*, 37 AM. CRIM. L. REV. 1195, 1206 (2000).

352. *See* KRISTIN C. THOMPSON & RICHARD J. MORRIS, JUVENILE DELINQUENCY AND DISABILITY 31–39 (Springer 2016) (outlining theories of the link between disability and delinquency).

353. While examples abound of juvenile court judges taking leadership roles in convening juvenile justice stakeholders, see, e.g., Leonard Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43 Juvenile & Family Court Journal 1, 29 (1992), in any one particular case a judge's role is confined to the facts and legal issues presented by the child before the court.

354. 20 U.S.C.A. § 1414 (stating, "[E]ither a parent of a child, or a State educational agency, other State agency, or local educational agency may initiate a request for an initial evaluation to determine if the child is a child with a disability."); 34 C.F.R. § 300.301 (stating, "[E]ither a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability."); *see also Evaluating School-Aged Children for Disability*, CTR. PARENT & INFO. RESOURCES (Sept. 9, 2019) https://www.parentcenterhub.org/evaluation [https://perma.cc/TF24-Y8B7].

355. Kristyne Armenta & Janell Edith Huerta, *Effectiveness of Parenting Classes for Parents of At-Risk Youth*, ELECTRONIC THESES, PROJECTS, AND DISSERTATIONS (2015) (noting that a 2002 study found that nearly 50 percent of parents were unable to complete the program as a result of the "erratic schedules" of the participants).

do exist. Yet little research has been done on the efficacy of parenting classes; the studies that exist suggest that classes may not be culturally responsive in accounting for different parenting styles and family compositions.[356] Notwithstanding the thin evidence base for the effectiveness of parenting classes, courts can and do hold parents in civil or criminal[357] contempt upon the state[358] showing that a parent failed to comply with lawful orders.[359]

One can see remnants of *parens patriae* in the practices of requiring parents to participate in the probation process, overriding their expressed wishes about whether a case should go forward and what should happen as a result, and ordering parents to attend classes in the absence of evidence of efficacy or of findings that the child's misbehavior stems from poor parenting.[360] The power dubiously claimed by the state in the nineteenth century pursuant to a broad interpretation of the *parens patriae* doctrine continues to stand for the notion that parents must make their homes "fit training places for their children" or face state sanction.[361]

This Part has analyzed the economic costs and dignitary harms in the treatment of parents, linking them to the fact that the *parens patriae* doctrine claimed by the state in the early court has contemporary relevance as well. In the next Part, I identify and analyze the implications

356. Mary Eamon & Meenakshi Venkataraman, *Implementing Parent Management Training in the Context of Poverty*, AM. J. OF FAMILY THERAPY (2003).

357. Courts need not necessarily designate whether they are finding the offending parent in civil or criminal contempt. *See, e.g.*, In re J.D., 728 S.E.2d 698 (Ga. App. 2012).

358. Sockwell v. State, 123 So.3d 585 (Fla. Dist. Ct. App. 2012) (holding that it was impermissible for trial judge to find a parent in contempt without state first showing willful violation by the parent of court order); *see also* In Interest of Holmes, 355 So.2d 677 (Miss. 1978).

359. *See* In re Cunningham, 2002-Ohio-5875, 2002 WL 31412256 (Oct. 18, 2002) (upholding contempt order for failing to attend parenting classes); *see also* In Interest of EWR, 902 P.2d 696 (Wyo. 1995) (holding similarly); D.M. v. Glover, 711 So.2d 259 (Fla. App. 1998) (discussing finding of contempt for failure to pay restitution, a finding that was overturned when court made no finding of present ability to pay assessed amount); Brown v. State, 2017 WY 45, 393 P.3d 1265 (Wyo. 2017) (holding juvenile court had jurisdiction over criminal contempt action brought against juvenile's mother for violating juvenile court order).

360. *See also* DiFonzo, *supra* note 44, at 857.

361. *Id.*

of these costs and harms and argue that they undermine the court's rehabilitative aspirations.[362]

IV. IMPLICATIONS FOR REHABILITATION

Recall that the juvenile court, in its earliest iteration as well as its post-*Gault* version, is committed to individualized treatment of youths with the aim of encouraging rehabilitation.[363] Indeed, studies suggest that minors prosecuted in juvenile rather than criminal courts are less likely to reoffend,[364] and part of the reason for this comparative success is the rehabilitative emphasis.[365] In order for juvenile courts to have their intended effect, then, they need generous human and programmatic resources that can address the circumstances underlying the commission of criminal conduct.[366] Commentators have long argued that insufficient funding for such resources within the juvenile court apparatus prevents them from fully realizing the rehabilitative aspirations of juvenile court proponents.[367] They also have exhorted parents to further the rehabilitative goals of the juvenile court, through assisting the child in complying with pretrial terms, and ensure her compliance with any posttrial dispositions.[368]

As this Part argues, however, the juvenile court process itself, with its infliction of economic costs and dignitary harms, often compromises a child's rehabilitation through negatively affecting parents. Moreover,

362. Future work will propose a normative framework, grounded in the value of dignity, for policymakers to use in assessing how they might change juvenile court to minimize if not entirely eliminate the dignitary harms inflicted on parents. More broadly, this Part argues that a more robust understanding of the importance of dignity rights to marginalized populations should inform policy reform in juvenile justice.

363. In re Gault, 387 U.S. 1, 51 (1967) (holding that the early court's stated aim of providing "individualized treatment" to further a child's best interests should continue); *see also* In re Winship, 397 U.S. 358, 366 (1970) (suggesting that imposition of a beyond a reasonable doubt proof standard does not negatively affect confidentiality, flexibility, and opportunity for individualized treatment); *supra* notes 79–91; 187–204.

364. Donna M. Bishop, Charles E. Frazier, Lonn Lanza-Kaduce & Lawrence Winner, *The Transfer of Juveniles to Criminal Court: Does it Make a Difference?*, 42 CRIME & DELINQUENCY 1 (1996).

365. Birckhead, *Delinquent, supra* note 29.

366. *Id.*

367. *Id.*

368. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, LITERATURE REVIEW: A PRODUCT OF THE MODEL PROGRAMS GUIDE, FAMILY ENGAGEMENT & JUVENILE JUSTICE 1 (2018).

the racial and socioeconomic skew of the court intensifies the impact of these costs and harms.

A. Creation of Economic Instability

Recall that, to the extent that there is a link between poverty and crime commission[369] by young people, it appears to arise from how poverty can diminish a parent's ability to provide sufficient attachment, supervision, and appropriate discipline consequences to her child.[370] Poor parents, especially parents raising children without a cohabitating partner, are stretched thin, often working multiple jobs to make ends meet that deprive them of the opportunity to spend meaningful time with their children.[371] Given that poor parents receive scant, if any, income supports to assist in raising their children, a parent's poverty negatively affects her child's ability to receive nurturance and support elsewhere as well—from, say, high-quality child care and excellent schools.[372] Moreover, the time that poor parents do have with their children is often characterized by parental exhaustion, far from conducive to the patience one needs to confront the myriad challenges of raising children.[373]

One might think that the juvenile court—originally conceived as a poverty-fighting institution[374]—would find ways to prop up families or, at a minimum, avoid practices that tear them down financially. Yet the assessment of costs against already struggling families can do the latter, as paying fines and fees can require foregoing a rent or utility payment, skimping on groceries, and the like.[375] In further immiserating a child's family, the court may thus precipitate a parent picking up yet more hours at work, thus compounding some of the stressors that may underlie the criminal conduct in the first instance. To the extent that the assessment of costs against a child's parents financially destabilizes the family, then, it thwarts the aim of rehabilitation.

369. *See supra* note 145, and accompanying text.
370. *See supra* note 146, and accompanying text.
371. *See also* MAXINE EICHNER, THE FREE MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED) 25, 27, 136 (2020) (internal citation omitted).
372. *Id.* at 120–39.
373. *Id.*
374. TANENHAUS, *supra* note 43, at 5.
375. *Supra* notes 264–267, and accompanying text.

The imposition of fees at the probation stage appears especially contraindicated. With some frequency, youths on probation may fulfill all of the conditions other than the payment of fees.[376] Inability to pay fees can be an extension of probation and the assessment of additional fees and so "the vicious cycle continues."[377] More time on probation in turn means greater exposure to state surveillance and more stigma attached to the young person.[378] Unsurprisingly, studies point to a correlation between fee schedules for juvenile offending and protracted entanglement in the juvenile system by a child.[379] In other words, the imposition of costs lengthens and deepens, rather than shortens, a child's involvement with court authorities.

A parent's ability to effectively nurture, support, and discipline her child is not only a question of finances, of course. Less tangible but equally critical components include the existence of close emotional bonds between parent and child and the external validation of and respect for a poor parent's ability to make considered child-rearing decisions.[380] The juvenile court process can threaten both, especially when families are already fragile from the impacts of poverty and racism.

To be sure, some of these impacts are likely endemic to juvenile court involvement. A child charged and prosecuted in court will more than likely incur parental disapproval, if not worse. Moreover, the moment a probation officer, prosecutor, or judge enters a courtroom, the exclusiveness of a parent's authority over her family has been lost. At the

376. Birckhead, *Delinquent, supra* note 29, at 91 (discussing how "it is not uncommon for youth on probation to complete all of their conditions except for the payment of fees, leading to an extension of probation and the assessment of additional fees").

377. *Id.*

378. *See, e.g.*, Ioan Durnescu, *Pains of Probation: Effective Practice and Human Rights*, 55 INT. J. OFFENDER THERAPY & COMP. CRIMINOLOGY 530, 534–37 (2011) (finding that parolees often face humiliation, stigmatization, and a lack of autonomy); Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1372 (2008) (arguing that "[m]any people would likely trade a year in jail to avoid a lifetime ban from their hometown or the indelible stigma of public registration."); *see generally* ELECTRONICALLY MONITORED PUNISHMENT: INTERNATIONAL AND CRITICAL PERSPECTIVES (Mike Nellis et al., eds. Willan Publishing 2012).

379. Jeff Selbin, *Juvenile Fee Abolition in California: Early Lessons and Challenges for the Debt-Free Justice Movement*, 98 N.C. L. REV. 401, 406 n.29 (2020) (internal citations omitted).

380. Cooper Davis, *So Tall Within, supra* note 31, at 466 (describing family life as a site of "morally significant and life-defining choices"); *see also* U.S. v. Windsor, 570 U.S. 23 (2013) (discussing significance of "integrity and closeness" of family members to meaningful family life).

same time, much of the practice in juvenile court seems to unnecessarily undermine parental authority and damage the parent-child bond.

B. Damage to the Parent-Child Relationship

The law's concept of the family rests on a presumption that "natural bonds of affection" between child and parent prompt parents to make considered decisions to advance their children's best interests.[381] At the same time, the law recognizes that children do—and should— rely primarily on their parents for nurturance and guidance, however imperfectly given.[382] The family integrity doctrine recognizes the importance of the parent-child bond both as a matter of parental rights and children's well-being.[383]

The parent-child relationship is a uniquely complex and intimate one,[384] perhaps especially during adolescence[385]—the time when a child is most likely to become involved in the juvenile court.[386] It is developmentally appropriate for teens to push against their parents, yet their parents must continue to provide critical support.[387] Parenting during this period requires flexibility and nuance, not heavy-handed state intervention that disregards the parental role.[388]

When the interests of parents and children are placed squarely in tension with each other by the State, as they are in the situations discussed throughout the previous Part,[389] parents and children may find that already-tenuous bonds snap. When that happens, as our

381. J.R. v. Parham, 442 U.S. 584, 590 (1977).
382. *See generally*, Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13 (2009).
383. For a child, the consequences of termination of his natural parents' rights may well be far-reaching. In Colorado, for example, it has been noted: "The child loses the right of support and maintenance, for which he may thereafter be dependent upon society; the right to inherit; and all other rights inherent in the legal parent-child relationship, not just for [a limited] period . . ., but forever." Santosky v. Kramer, 455 U.S. 745, 761 n.11 (1982) (citations omitted).
384. Mai Stafford, Diana L. Kuh, Catherine R. Gale & Marcus Richards, *Parent-Child Relationships and Offspring's Positive Mental Well-Being From Adolescence to Early Older Age*, 11 J. OR POSITIVE PSYCH. 326 (2016).
385. *See supra* notes 74–75, and accompanying text.
386. CHARLES PUZZANCHERA, JUVENILE JUSTICE STATISTICS, JUVENILE ARRESTS 2019 3 (2020).
387. AMERICAN ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY, PARENTING: PREPARING FOR ADOLESCENCE (2015).
388. Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2417 (1995).
389. *Supra* Part III.B.

understanding of the relationship between a strong and stable family and childhood offending suggests,[390] the rehabilitation commitment of the juvenile court is compromised. At least three such scenarios could and do occur in juvenile court.

First is the circumstance where court actors disregard a parent's perspectives on what should happen with a case and to her child. Consider in this regard the prosecutor who insists on pursuing a case against a child where the parent is the alleged victim or complaining witness but does not wish to go forward. The paradigmatic example is that of a poor parent calls the police about a child over whom she feels she has diminished control or about whom she has emergent concerns. When the state insists on prosecution of a child who is in the system only because her parent took steps to place her there, such an action suggests to parents that they should not rely on the police for assistance, depriving them of perhaps the only meaningful safety net they feel they have. Moreover, forcing parents to continue to participate in a prosecution of their child—especially one who is in the system only because of a parent's actions—negates the legally sanctioned presumptions about parents: that they know what is best for their child.[391]

Relatedly, when no one in the court makes space for a parent to share her perspectives on the appropriate sentence, including the imposition of detention, parental authority is compromised. Recall that case law and statutes confer on juvenile court judges the ability to hold children in detention without bail under a range of circumstances, including many that do not involve allegations of new criminal conduct. One such incident occurred in the case of the woman whose daughter was detained after a probation violation for failing to do her homework in remote school.[392] The mother was reportedly adamant in her opposition to the detention of her child, yet her views were ignored. It is not difficult to imagine the resulting tension that this turn of events placed on the family relationship. Public outcry over this excessive court response eventually prompted the court to reverse its decision and release the child to her mother.[393] Yet outrage focused on how unfair it

390. *See supra* note 144, and accompanying text.
391. J.R. v. Parham, 442 U.S. 584, 590 (1977).
392. Cohen, *supra* note 315.
393. Aimee Ortiz, *Court Frees Michigan Teen Who Was Held for Skipping Online Schoolwork*, N.Y. TIMES (July 31, 2020), https://www.nytimes.com/2020/07/31/us/michigan-teen-homework-release.html [https://perma.cc/HXM9-EM3H].

was for the court to have penalized a child for a problem in online school[394] rather than the fact that the court ignored the mother's wishes to have her daughter out of detention.[395]

One might reasonably ask why it is essential for court actors to respect the wishes of a child's parent when the child is involved in the court.[396] After all, the child has now allegedly committed, or even been adjudicated of, a criminal offense. Such actions arguably negate the zone of deference that parental autonomy doctrines suggest. Moreover, given the still applicable *parens patriae* doctrine applicable to children in the juvenile court, it might seem appropriate to override what the parent thinks should happen.

The socioeconomic skew of the juvenile court, however, counsels otherwise. Parents of means are able to wall themselves off from government scrutiny and intervention, able to rely on private and nonpunitive resources to assist in managing their children's troubles. It seems, by contrast, normatively dubious to make demands of parents of children in the juvenile court that interfere with their parental autonomy interests, particularly if the reason their children became involved in the court in the first instance was the parent's lack of access to services and supports.[397]

Third, when a juvenile court judge conscripts parents to act as the eyes and ears of the court, the court can create or aggravate parent-child tensions. Consider in this regard the parent ordered to report her child's location, school attendance, friends and associates, and suspected drug use to the juvenile probation officer. When this information is redisclosed to the juvenile court judge, a host of negative consequences can ensue—including detention—none of which may be in the parents' judgement in the best interests of the child.

Fourth and finally, court orders that link a child's misconduct to perceived parenting flaws—absent a proven link between the two and

394. Cohen, *supra* note 315 (noting that officials at the Michigan Protection & Advocacy Service, the organization with oversight authority over state treatment of the disabled population, indicated being "especially troubled that a student with special needs — one of the most vulnerable populations — was punished when students and teachers everywhere couldn't adjust to online learning").

395. Gross, *supra* note 341 (noting that the prosecutor had joined defense counsel's motion for the girl to be released after the mother expressed her wishes but that the judge denied the joint motion).

396. Christine Gottlieb, *Children's Attorneys' Obligations to Turn to Parents to Assess Best Interests*, 6 NEV. L.J. 1263 (2006).

397. Bell, *supra* note 325.

without evidence that the required programs or services will be effective—needlessly undermine a parent's authority. An order that a mother attend parenting classes may not address the underlying dynamics that have fueled a child's delinquency involvement. A parent wishing to contest these orders will need to expend time and resources she may not have. Moreover, because parental orders can be issued in the absence of any demonstrated causal link between parenting and juvenile misbehavior, a parent may reasonably feel resentful and demeaned by the process. At the same time, the child must now see her parent cast as an object of suspicion and held in little regard by an institutional authority. It is easy to imagine a parent forced to attend parenting classes garnering less, rather than more, respect for a perhaps already recalcitrant child.

In threatening family integrity, these dignitary harms may alienate both parent and child from the juvenile court process and promote disengagement from its attendant terms and conditions.[398] At a minimum, a parent who was shut out of the process may lack an understanding of whether and how she can help her child succeed with completing the requirements of whatever disposition was ordered by the court. The child may internalize this parental alienation, to her detriment; research indicates that when a child believes she is not treated fairly, she is less likely to invest in court programs and services.[399] Moreover, at least one study has found that probation supervision diminished rather than strengthened parents' attentiveness to their children.[400]

CONCLUSION

This Article has identified and analyzed the economic and dignitary harms that juvenile delinquency courts inflict on the low-wealth parents whose children are prosecuted within them. It has demonstrated that these impacts can be harmful, and that the harms have economic and dignitary dimensions. These harms undermine the juvenile court's

398. *See supra* notes 369–388, and accompanying text.
399. *See, e.g.*, Tamar Birckhead, *Toward a Theory of Procedural Justice for Juveniles* 33 BUFF. L. REV. 898 (2014).
400. Adam D. Fine, Zachary R. Rowan & Elizabeth Cauffman, *Partners or Adversaries? The Relation Between Juvenile Diversion Supervision & Parenting Practices*, 44 L. & HUM. BEHAV. 461 (2020).

rehabilitative aspirations. Moreover, given the racial and socioeconomic skew of the court, policymakers ought to pay closer attention to whether these costs and harms are justified.

Having called attention to the parent-damaging practices of juvenile court, I do not suggest that the juvenile court should be abolished, as some commentators have.[401] While a full set of prescriptions for reform is beyond this Article's scope, the analysis undertaken here suggests at least two policy takeaways, which future work will explore. The first is that, without reforms ameliorating the economic and dignitary harms to parents, the juvenile court is unlikely ever to achieve its most ambitious, rehabilitative goals.[402] The second is that, given the seeming intractability of racial and socioeconomic disparity within juvenile courts, more noncourt mechanisms for addressing the issues that bring children to the court's attention are advisable.[403]

401. Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1118–21 (1991) (recommending abolition because of the availability of greater procedural safeguards and greater opportunity for effective assistance of counsel).

402. Barbara Fedders, *The Indignity of Juvenile Court: A Prescription for Reform* (draft on file with the author).

403. In a recent article, Maximo Langer differentiates penal abolitionism from prison abolitionism, arguing that penal abolitionist scholars critique not just prisons or even prisons and policing, but "the practice of looking at many social situations as crimes and through the lens of criminal law. For these thinkers, criminal law has an impoverished view of social life and of human beings that distracts from 'more serious problems' and justifies 'inequality and relative deprivation.'" *Penal Abolitionism and Criminal Law Minimalism*, 134 HARV. L. REV. F. 42, 49 (2020) (internal citation omitted). Langer's explication of penal abolitionism applies here; the call to shrink the juvenile court suggests examining social problems encountered and created by children neither only as crimes nor exclusively through the lens of criminal law.

THE ANTI-PARENT JUVENILE COURT

Barbara Fedders

ABSTRACT

This Article identifies and analyzes features of the juvenile delinquency court that harm the people on whom children most heavily depend: their parents. By negatively affecting a child's family—creating financial stress, undermining a parent's central role in rearing her child, and damaging the parent-child bond—these parent-harming features imperil a child's healthy growth and development. In so doing, the Article argues, they contravene the juvenile court's stated commitment to rehabilitation.

In juvenile court, fees and fines are assessed against parents, who also often must incur lost wages to comply with court orders. In addition, while youths of all economic backgrounds and races commit crimes, poor youth of color are disproportionately likely to become involved in the juvenile court. These parents, with less financial cushion, are uniquely likely to suffer as a result of imposed fees, fines, and lost wages.

Moreover, court actors regularly engage in at least three practices that infringe on parents' dignity interests. First, judges conscript parents to act as the court's eyes and ears, requiring regular reports about a child's whereabouts and suspected misbehavior. Such requirements interfere with family privacy. They also deprive parents of the ability to make thoughtful and considered decisions about whether and to what extent they disclose to state authorities information that may result in restrictions on a child's liberty and disruption of parents' physical custodial rights over their child. Second, court actors regularly override—and sometimes fail to elicit in the first instance—parents' views, disregarding established child development principles about the centrality of parents' input in decisions affecting minor children. Third, courts can impose onerous requirements on parents, which are ostensibly designed to improve their parenting but lack evidence of efficacy or judicial findings of a link between a child's misconduct and actions of the parent.

Such interference with the court's rehabilitative aims, combined with the court's socioeconomic and racial skew, suggest a need for more scrutiny by policymakers to eliminate those costs and harms to parents that are inequitable, unnecessary, and counterproductive.

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