

CULTURE CLASH: THE CHALLENGE OF LAWYERING ACROSS DIFFERENCE IN JUVENILE COURT

*Tamar R. Birckhead**

ABSTRACT

In analyzing the causes of wrongful convictions of youth in juvenile court, the role of the defense attorney can be overlooked and its importance underestimated. Although juvenile defenders are trained to advocate based on their young client's expressed interest rather than relying on what they deem to be in the child's best interest, this basic tenet is often more challenging to follow than is commonly acknowledged. The norms of effective criminal defense practice—which emphasize rigorous oral and written advocacy with little mention of whether the client has learned a lesson from the experience—stand in direct contrast to the informal culture that permeates most juvenile courtrooms in the United States. When delinquency court judges do not apply the beyond-a-reasonable-doubt standard of proof, when prosecutors neglect to respond substantively to motions filed by the defense, and when probation officers reflexively recommend punitive sanctions that fail to address the child's actual needs, defense attorneys are confronted with hurdles that are difficult to overcome. In addition, the parents of juvenile clients may have goals and objectives vis-à-vis the case that differ greatly from those of the attorney, a serious problem that is compounded when the parent herself is a co-defendant, witness, or alleged victim of the offense. Further, even defense attorneys who are committed to their role and to the most robust form of representation are not immune from feeling conflicted, as juvenile clients can be impulsive, unreliable, and incapable of mature decision-making.

This Article examines the phenomenon that results when criminal defense culture, juvenile court culture, and the culture of

* Assistant Professor of Law, University of North Carolina at Chapel Hill School of Law (tbirckhe@email.unc.edu). I presented an earlier version of this paper at the Rutgers Law Review 2010 Symposium, *Righting the Wronged: Causes, Effects, and Remedies of Juvenile Wrongful Convictions*. I am grateful to Laura Cohen for inviting me to participate and to my co-panelists Steve Drizin, Laurence Steinberg, Allison Redlich, and Huwe Burton for sharing their insights. Thanks also to Barbara Fedders, Bob Mosteller, and Eric Zogry for helpful comments on previous drafts, and to Lauren DeMille for excellent research assistance.

the family intersect. It argues that when the defense attorney is caught in the middle of these competing norms, accurate fact-finding ceases to be a priority, the quality of advocacy falters, and a whole host of harms result—from the stigma of being labeled a juvenile delinquent to the trauma of institutionalization and commitment to the direct and collateral consequences of wrongful convictions. The Article proposes that law schools, state bar associations, and public defender agencies import the pioneering work of Sue Bryant and Jean Koh Peters on the five practices—or habits—of cross-cultural lawyering to juvenile court, thereby helping to ensure that defense attorneys are equipped with the tools necessary to practice law based on facts rather than assumptions. It emphasizes the importance of acknowledging the challenging nature of the problem and offers strategies for training juvenile defenders as well as for taking proactive steps to change the culture of juvenile court.

I. INTRODUCTION	961
II. CRIMINAL DEFENSE NORMS.....	964
A. Rigorous Advocacy	964
B. Expressed Interest Not Best Interest	967
C. No Apologies	968
III. JUVENILE COURT CULTURE	970
A. Judges	970
B. Prosecutors	973
C. Probation Officers	975
D. Defenders	977
IV. CULTURE OF THE FAMILY	980
A. Parents.....	980
B. Lawyers.....	981
V. PROPOSALS.....	982
A. Import the Five Habits	982
B. Acknowledge the Problem	986
C. Provide Training	988
D. Change the Culture.....	989
VI. CONCLUSION	990

I. INTRODUCTION

In 2007, Steve Drizin and Greg Luloff identified the principal factors that cause juvenile defendants to be at special risk for being wrongfully convicted,¹ including developmental differences that make them less competent during pretrial and trial proceedings than adults, and more compliant and suggestible during police interrogations.² They also highlighted the fact that the due process protections in place for criminal defendants are in many—if not most—cases of little use to juveniles in delinquency court because of the nature of juvenile court culture.³ Trials, for instance, are not true tests of whether the state can prove the case beyond a reasonable doubt because few states grant juveniles the jury trial right,⁴ and judges for the most part are not objective fact-finders when they preside over bench trials in juvenile court.⁵ Likewise, the right to counsel means little when children can readily waive that right, which they can do in the juvenile courts of many states.⁶

1. Although the formal terminology for a conviction in juvenile court is “adjudication,” for purposes of both clarity and emphasis the term “conviction” is used here.

2. Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 260 (2007) (“[D]evelopmental differences between juveniles and adults (especially in the areas of judgment, maturity, assessing and weighing risks, vulnerability to peer pressure, and an inability to see the long-term consequences of their actions) make juveniles less competent trial defendants. Juveniles also tend to be more compliant and suggestible during police interrogations, two traits which are risk factors for false confessions.”).

3. See *id.* at 260, 266-83 (discussing procedural deficiencies that continue to exist in juvenile court, including *Miranda* warnings, police interrogation tactics, identification procedures, and child suggestibility). “Culture” as used in this piece refers both to objective culture or that which we observe, including artifacts, food, clothing, names, as well as subjective culture, which refers to the invisible, less tangible aspects of behavior, including one’s values, beliefs, and attitudes. Cross-cultural misunderstandings typically occur at the level of subjective culture. See Sue Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, in RACE, CULTURE, PSYCHOLOGY, & LAW 47, 48 & 60 n.3 (Kimberly Holt Barrett & William H. George eds., 2005).

4. See Drizin & Luloff, *supra* note 2, at 260, 303 n.369 (“[T]he lack of meaningful probable cause hearings and the absence of jury trials [in juvenile court] may affect the reliability of the judge-made determinations of innocence and guilt.”).

5. See Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 564-71 (1998) (“The case law suggests that judges often convict on evidence so scant that only the most closed-minded or misguided juror could think the evidence satisfied the standard of proof beyond a reasonable doubt.”).

6. Drizin & Luloff, *supra* note 2, at 285 (“Children’s waiver of their right to counsel has been a cause for concern at both the state and the federal level.”); see also Tamar R. Birkhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L.

This Article builds and expands upon Drizin and Luloff's analysis of the causal connection between substandard or ineffective lawyering in juvenile court and wrongful convictions, as the role of the defense attorney can be easily overlooked and its importance underestimated.⁷ Part II argues that although relevant professional norms and ethical guidelines establish that juvenile defenders should advocate based on their young client's expressed interest—what the youth says she wants—rather than relying on what the attorney deems to be *best* for the child,⁸ this basic tenet is often more challenging to follow than is commonly acknowledged. The norms of effective criminal defense practice—which emphasize rigorous oral and written advocacy with little mention of whether the client has learned a lesson from the experience—stand in direct contrast to the informal culture that permeates most juvenile courtrooms in the United States.⁹ Part III demonstrates that when delinquency court judges fail to apply the beyond-a-reasonable-doubt standard of proof, when prosecutors neglect to respond substantively to discovery motions filed by the defense, and when probation officers reflexively recommend punitive sanctions regardless of the child's actual needs, defense attorneys are confronted with hurdles that are difficult to overcome.¹⁰ Furthermore, as set forth in Part IV, the parents of

REV. 1447, 1448-95 (2009) (applying procedural justice theory to the practice of allowing juveniles to waive counsel and admit to criminal charges at arraignment, which has been justified as enabling young offenders to receive rehabilitative treatment without the delay that can result from protracted litigation).

7. Drizin & Luloff, *supra* note 2, at 284 (“The problem of ineffective assistance of counsel may be even more serious in juvenile courts. While the punishment is nowhere near that in capital cases, children suffer the double problem of inadequate access to counsel and poor representation in juvenile court.”).

8. See ROBIN WALKER STERLING, NAT'L JUV. DEFENDER CTR., *ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT* 3, 7-9 (2009), http://www.njdc.info/pdf/njdc_role_of_counsel_book.pdf (“At each stage of the case, juvenile defense counsel acts as the client's voice in the proceedings, advocating for the client's expressed interests, not the client's ‘best interest’ as determined by counsel, the client's parents or guardian, the probation officer, the prosecutor, or the judge.”); see also MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 1 (2007) (conferring “upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations”).

9. STERLING, *supra* note 8, at 6 (“Most [juvenile defenders] understand that, in theory, they are bound to zealously represent their clients' expressed interests. Nonetheless, in practice, many yield to the unified pressure from other stakeholders and from the seemingly irresistible momentum of the proceedings, and advocate for their clients' best interests.”).

10. *Id.* at 5-7; 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, 247 (2005) (“Even absent normative objections to client-directed advocacy, the most zealous advocate will often find it difficult and sometimes impossible to engage in traditional client-directed advocacy. . . . and poor and changing

juvenile clients may have goals and objectives vis-à-vis the case that differ greatly from those of the attorney, a serious problem that is compounded when the parent herself is a co-defendant, witness, or alleged victim of the offense.¹¹ Likewise, even defense attorneys who are firmly committed to their role and to the most robust form of representation are not immune from feeling conflicted, as their young clients can be impulsive, unreliable, and incapable of mature decision-making.¹²

This Article examines the phenomenon that results when criminal defense culture, juvenile court culture, and the culture of the family intersect. It argues that when the defense attorney is caught in the middle of these competing norms, accurate fact-finding ceases to be a priority, the quality of advocacy falters, and a whole host of harms result—from the stigma of being labeled a juvenile delinquent to the trauma of institutionalization and commitment to the direct and collateral consequences of wrongful convictions. Part IV proposes that law schools, state bar associations, and public defender agencies import the pioneering work of Sue Bryant and Jean Koh Peters on the five practices—or habits—of cross-cultural lawyering¹³ to juvenile court, thereby helping to ensure that defense attorneys are equipped with the tools necessary to practice law based on facts rather than assumptions. The Article emphasizes the importance of acknowledging the challenging nature of the problem and concludes by offering strategies for training juvenile defenders as

value systems may all frustrate the traditional attorney-client paradigm.”).

11. Birkhead, *supra* note 6, at 1502-04; Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 AM. CRIM. L. REV. 1277, 1293-94 (2004); *see also* 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, 849-52 (2006) (discussing how the role of the parent in a juvenile case is fraught with tension and inherent contradictions).

12. STERLING, *supra* note 8, at 6; Henning, *supra* note 10, at 271-73 (“The attorney may face real challenges in allocating decisions to children who generally have a limited fund of information, sometimes lack the capacity to engage in effective cognitive reasoning, often exercise poor and/or short-sighted value judgments, and frequently err in predicting future outcomes.”); *see also* Graham v. Florida, 130 S. Ct. 2011, 2032 (2010) (recognizing that “special difficulties” are encountered by juvenile defenders resulting from the cognitive limitations and immaturity of youth, and that “[t]hese factors are likely to impair the quality of a juvenile defendant’s representation”).

13. Bryant & Peters, *supra* note 3, at 47 (introducing five habits to prepare lawyers “to engage in effective, accurate cross-cultural communication and to build trust and understanding between themselves and their clients”); *see also* Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 33-34 (2001) (“By outlining and giving examples of the role that culture plays in decision making, communication, problem solving, and rapport building, the article demonstrates the importance of lawyers learning cross-cultural concepts and skills.”).

well as for taking proactive steps to change the culture of juvenile court.

II. CRIMINAL DEFENSE NORMS

The adversary criminal trial, in which the prosecutor presents evidence and proof, the defendant is represented by counsel, and the judge is a neutral and passive decision maker, is of fairly recent historical origin.¹⁴ Prior to the seventeenth century, prisoners were denied the right to counsel—even when charged with capital crimes of treason and felony—as well as the right to subpoena witnesses, know the details of the indictment against them, and have access to the depositions of prosecution witnesses.¹⁵ It was not until the nineteenth century that prisoners were routinely allowed representation, signaling a shift to an adversarial model that protected the lives and liberty of imperiled defendants in ways that the inquisitorial system had not.¹⁶ Whether this development resulted from the judiciary's desire to correct a system that had unfairly favored the prosecution, the influence of Enlightenment philosophy and a heightened awareness of the concept of human rights, or a combination of factors¹⁷ is beyond the scope of this Article. What is relevant, however, is the way in which these same tensions between adversarial or expressed-interest representation and inquisitorial or best-interest practice are reflected in today's juvenile court system, resulting in a culture clash between the practice advocacy standards of the criminal defense bar and the procedural informality of juvenile court. This Part examines the former, while Part II details the latter.

A. *Rigorous Advocacy*

The contemporary best practice norms of criminal defense are perhaps best reflected by the Model Rules of Professional Conduct, which emphasize the lawyer's dual role as advisor and advocate, stating that she must provide "an informed understanding of the client's legal rights and obligations" as well as "zealously assert[] the client's position under the rules of the adversary system."¹⁸ The

14. JOHN HOSTETTLER, *FIGHTING FOR JUSTICE: THE HISTORY AND ORIGINS OF ADVERSARY TRIAL* 11 (2006).

15. *Id.* at 11-13.

16. *Id.* at 17; see also Stephan A. Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 732-33 (1983).

17. See HOSTETTLER, *supra* note 14, at 18; Landsman, *supra* note 16, at 736-38. See also JOHN. H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 170-77 (2003) (discussing the role of eighteenth century judges in changing the rule that had forbidden counsel from assisting defendants in felony trial practice).

18. MODEL RULES OF PROF'L CONDUCT pmbL § 2 (2010); see also Jonathan A.

Rules highlight the lawyer's duty to "uphold the legal process" while also recognizing that "a lawyer can be a zealous advocate on behalf of a client and at the same time *assume* that justice is being done."¹⁹ In other words, as long as the defense attorney provides rigorous representation within the bounds of the law, her ethical obligations are complete; there are no separate and discrete actions that must be taken to ensure that justice is achieved. Similarly, the American Bar Association standards for defense attorneys explicitly state that defense counsel's "basic duty . . . is to serve as the accused's counselor and advocate with courage and devotion and to *render effective, quality representation.*"²⁰

These norms are also made manifest through training and practice models at premier public defender offices such as the Public Defender Service ("PDS") for the District of Columbia, the Neighborhood Defender Service of Harlem ("NDS"), and Bronx Defenders.²¹ PDS is regarded as one of the best public defender offices in the United States and is often the benchmark by which other public defender systems are measured.²² In addition to

Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL'Y REV. 161, 164-65 (2009) (discussing the core principles fundamental to representing indigent defendants).

19. MODEL RULES OF PROF'L CONDUCT pmbll. §§ 5, 8 (emphasis added).

20. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEF. FUNCTION Standard 4-1.2(b) (1993) (emphasis added).

21. See, e.g., Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 448 (2001) (stating that these three public defender organizations are "innovative organizations designed to operate effectively" in regard to providing zealous advocacy, problem solving, and community building for their clients); see also *Criminal Practice*, LEGAL AID SOC'Y, <http://www.legal-aid.org/en/criminal/criminalpractice.aspx> (last visited Aug. 11, 2010) ("The Legal Aid Society's Criminal Practice is the largest public defender program in the country and serves as the primary provider of indigent defense services in New York City."); *Philadelphia Public Defender*, CITY OF PHILADELPHIA, <http://www.phila.gov/defender/> (last visited Aug. 11, 2010) ("In 1987, the American Bar Association and the National Legal Aid and Defender Association voted the Defender Association the most outstanding public defender office in the country," an award that recognized the office's innovative training program.).

22. Barbara A. Babcock, *"How Can You Defend Those People?": The Making of a Criminal Lawyer*, 53 GEO. WASH. L. REV. 310, 312 (1984-85) (book review) (describing PDS as an "exemplary institution" that is "characterized by extensive training, reasonable caseloads, and the ability to attract young lawyers with impressive credentials to do the work"); Clarke, *supra* note 21, at 453-54; THE PUB. DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, <http://www.pdsdc.org/> (last visited Aug. 11, 2010). See generally Robert P. Mosteller, *Why Defense Attorneys Cannot, But Do, Care About Innocence*, 50 SANTA CLARA L. REV. 1 (2010) (discussing his personal experiences as an attorney at PDS and characterizing the office as well-resourced and one that consistently provides high-quality representation to its indigent clients).

providing its indigent clients with excellent legal advocacy, PDS is committed to holistic representation in which social workers and investigators are an integral part of the defense team.²³ Further, the organization expends “significant effort” toward coordinating community education and affecting public policy.²⁴ In New York City, NDS has taken the concept of holistic or whole-client lawyering even further by not only handling the criminal matter and the social service needs of the client—as well as corollary legal matters such as eviction and forfeiture—but by continuing to work with the client and her family long after the criminal case is closed, linking them to housing, medical, and employment resources in the community and offering educational outreach programs that have received national recognition.²⁵ Bronx Defenders also models itself on client or community-centered representation in which defenders and social workers assist clients and their families with housing, employment, and educational opportunities that extend far beyond the boundaries of the criminal case.²⁶ In a profession in which public interest practice and poverty law are often considered unappealing and carry little prestige, all three offices actively recruit and consistently retain top Ivy League law school graduates.²⁷

Likewise, non-profits that are specifically dedicated to trial practice training of defense counsel, such as the National Criminal Defense College (“NCDC”) in Macon, Georgia, also serve to promulgate such norms.²⁸ NCDC offers extensive training programs for criminal defense attorneys through its Trial Practice Institute that are designed to hone skills in such specialty areas as “jury

23. Clarke, *supra* note 21, at 453.

24. *Id.*

25. *Id.* 449-51; see also Cait Clarke & Christopher Stone, *Bolder Management for Public Defense: Leadership in Three Dimensions*, 29 N.Y.U. REV. L. & SOC. CHANGE 113, 114-15 (2004) (describing NDS's mission to educate the community); Kim Taylor-Thompson, *Taking it to the Streets*, 29 N.Y.U. REV. L. & SOC. CHANGE 153, 198 (2004) (describing NDS's use of team approach to “address all of the client's needs”).

26. Clarke, *supra* note 21, at 452-53; see also DAVID FEIGE, *INDEFENSIBLE: ONE LAWYER'S JOURNEY INTO THE INFERNO OF AMERICAN JUSTICE* 120-21 (2006) (stating that at the Bronx Defenders (“BD”), clients receive representation “as good, and often better, than that provided by most private lawyers,” because BD has access to resources—“social workers, investigators, and experts”—that “none but the wealthiest criminal defendants can afford”).

27. See, e.g., Babcock, *supra* note 22, at 312 (noting PDS's unusual “ability to attract young lawyers with impressive credentials”); Bernard Koteen Office of Pub. Interest Advising, *Careers in Indigent Defense: A Quick Guide to Public Defender Programs*, HARVARD LAW SCH., 16-17 (2006), <http://www.law.harvard.edu/current/careers/opia/planning/careerresources/docs/guide-public-defender.pdf> (describing a Harvard Law School graduate's experience working for PDS).

28. NAT'L CRIMINAL DEF. COLLEGE, <http://www.ncdc.net/> (last visited Aug. 11, 2010).

selection, . . . cross examination, impeachment and closing arguments.”²⁹ Similarly, the National Legal Aid and Defender Association (“NLADA”) conducts the National Defender Leadership Institute, which provides rigorous training, education, and assistance to defense lawyers.³⁰ All of these forums emphasize the critical import and essential role of rigorous advocacy.

B. Expressed Interest Not Best Interest

Only in recent years has zealous representation been considered an essential part of the defense attorney’s duty to her juvenile client; in fact, for many decades young offenders regularly appeared without counsel.³¹ It was not until 1967 that the United States Supreme Court held in the landmark case of *In re Gault* that youth have a right to counsel in delinquency adjudications,³² catalyzing much debate among academics and juvenile justice advocates regarding the specific “role, responsibilities, and loyalties” the child’s lawyer would assume.³³ *Gault* left open a number of critical questions—whether the attorney should adopt a best-interest approach or an adversarial one when advocating on behalf of her young client, whether the juvenile has a right to representation at the dispositional—in addition to the adjudicatory—phase of the case, and whether the youth’s parents should direct their child’s representation.³⁴ Consensus over the precise orientation of the defense attorney in juvenile cases was not reached until the early 1980s when the American Bar Association published Juvenile Justice Standards that explicitly called for client-directed, zealous advocacy at all phases of the delinquency case.³⁵

In the ensuing years, consistent with the norms promoted for model criminal defense practice, those who train and set advocacy standards for juvenile defenders have emphasized the duty of counsel to represent the client’s expressed interest and not to advocate for

29. *Trial Practice Institute*, NAT’L CRIMINAL DEF. COLLEGE, <http://www.ncdc.net/tpi/index.html> (last visited Aug. 11, 2010).

30. *National Defender Leadership Institute*, NAT’L LEGAL AID AND DEFENDER ASS’N, <http://www.nlada.net/ndli> (last visited Aug. 11, 2010).

31. See, e.g., Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1199-1200 (1989) (finding that “many juveniles were neither adequately advised of their right to counsel nor had counsel appointed for them”).

32. 387 U.S. 1, 41-42 (1967) (holding that juveniles in delinquency adjudications have due process rights to notice, counsel, the privilege against self-incrimination, and a finding based on sworn testimony with the opportunity for cross-examination).

33. Henning, *supra* note 10, at 250.

34. *Id.* at 250-54.

35. *Id.* at 255-56; see also STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES §§ 3.1(a), 9.4(a) (IJA-ABA Joint Comm’n on Juv. Justice Standards 1996).

her best interest as “determined by counsel, the client’s parents . . . , the probation officer, . . . prosecutor, or . . . judge.”³⁶ Endorsed by scholars and policy makers,³⁷ this advocacy model has become the standard by which delinquency lawyers are judged.³⁸

C. No Apologies

In addition to the formal norms that are expressed via model rules and institutionalized training and skills programs, rigorous criminal defense practice is characterized by a set of informal norms and attitudes. They include the basic premise that the accused’s actual guilt is irrelevant to representation, as the lawyer’s role is to defend every client fully regardless of personal opinion and not to seek or determine the truth;³⁹ a lack of concern for whatever lessons may be learned by the client during the pendency of the case, based on the defender’s duty to advance the client’s position, not to ensure their rehabilitation;⁴⁰ a focus on getting the best result for the client, which may involve impeaching a prosecution witness even if the lawyer believes she is telling the truth as well as the arguably unethical practice of counseling the client to deny what (she claims) she did or admit to something other than what (she claims) she did;⁴¹

36. See, e.g., STERLING, *supra* note 8, at 7.

37. See, e.g., Martin Guggenheim, *The Right to be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76 (1984); 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 (2003); Wallace J. Mlyniec, *Who Decides: Decision Making in Juvenile Delinquency Proceedings*, in ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER 105, 109 (Rodney J. Uphoff ed., 1995); see also Wallace J. Mlyniec, *In re Gault at 40: The Right to Counsel in Juvenile Court—A Promise Unfulfilled*, 44 CRIM. L. BULL. 371, 409 (2008) (finding that although the Rules of Professional Conduct mandate the express interest model, nearly every juvenile system that has been assessed identified its form of representation as the best interest model).

38. Henning, *supra* note 10, at 257.

39. See Mosteller, *supra* note 22, at 5-8; see also CANONS OF PROF'L ETHICS Canon 5 (1908) (“It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense.”); Babcock, *supra* note 22, at 314 (“The defender goes down the treacherous path of burnout once she concerns herself with guilt or innocence.”).

40. See *United States v. Wade*, 388 U.S. 218, 256-58 (1967) (White, J., dissenting in part & concurring in part) (stating that “defense counsel has no comparable obligation to ascertain or present the truth” but a mission to “defend his client whether he is innocent or guilty” and to “put the State to its proof, to put the State’s case in the worst possible light, regardless of what he thinks or knows to be the truth”).

41. See *id.* at 258 (“[M]ore often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying.”); see also Monroe H. Freedman, *But Only if You “Know,”* in ETHICAL PROBLEMS FACING THE

and a disposition that does not include probationary supervision or includes the fewest possible conditions, to which agreement will be made only if strategic, not merely because it would be good for the client.⁴²

In short, defenders make no apologies. They see themselves—in theory if not in practice—as righteous upholders of the Sixth Amendment, as David to the state’s Goliath, as the modern-day embodiment of such heroes as Clarence Darrow⁴³ and Atticus Finch,⁴⁴ and as the “happy few” who are “doing the ‘Lord’s work.’”⁴⁵

CRIMINAL DEFENSE LAWYER 135, 137-38 (Rodney J. Uphoff ed., 1995) (discussing that without a firm factual basis to accuse a client of perjury, defense counsel may violate ethical and constitutional mandates by not serving as the client’s champion and advocate).

42. See Mosteller, *supra* note 22, at 50-51; Rapping, *supra* note 18, at 182 (describing attorney’s use of “seemingly obvious” but novel argument to secure client’s release).

43. See, e.g., RICHARD J. JENSEN, CLARENCE DARROW: THE CREATION OF AN AMERICAN MYTH 7 (1992) (“Darrow’s myth of defender of the weak was created in defense of labor and expanded through his defense of other less fortunate members of society, particularly the poor, radicals, and blacks.”). See generally CLARENCE DARROW, THE STORY OF MY LIFE (1932).

44. See, e.g., Renee Newman Knake, *Beyond Atticus Finch: Lessons on Ethics and Morality from Lawyers and Judges in Postcolonial Literature*, 32 J. LEGAL PROF. 37, 37, 44-45 (2008) (stating that the character of Atticus Finch from Harper Lee’s *To Kill a Mockingbird* “conjures the image of the ultimate attorney”); Carrie Menkel-Meadow, *The Sense and Sensibilities of Lawyers: Lawyering in Literature, Narratives, Film and Television, and Ethical Choices Regarding Career and Craft*, 31 MCGEORGE L. REV. 1, 12 (1999) (describing Atticus Finch as “[p]erhaps the most revered lawyer in modern literature”); Thomas L. Shaffer, *The Moral Theology of Atticus Finch*, 42 U. PITT. L. REV. 181, 223 (1981) (characterizing Atticus Finch as a character who satisfies the American Bar’s “need for a hero who knew how to see and tell the truth and whose sense of himself as a lawyer was not a compartment of his life but was the same sense he had of himself as a person”); see also HARPER LEE, TO KILL A MOCKINGBIRD 228 (1960) (“[A]s I waited I thought, Atticus Finch won’t win, he can’t win, but he’s the only man in these parts who can keep a jury out so long in a case like that. And I thought to myself, well, we’re making a step—it’s just a baby-step, but it’s a step.”). But see, e.g., Robert Batey, *Race & the Limits of Narrative: Atticus Finch, Boris A. Max, and the Lawyer’s Dilemma*, 12 TEX. WESLEYAN L. REV. 389, 394-400 (2005) (questioning “how well Atticus discharged his ethical responsibility as an attorney to maintain the integrity of the justice system”); Steven Lubet, *Reconstructing Atticus Finch*, 97 MICH. L. REV. 1339, 1340 (1999) (considering “the possibility that Atticus Finch was not quite the heroic defender of an innocent man wrongly accused”).

45. Babcock, *supra* note 22, at 312-14. But see A.B.A., EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS 1 (2009), http://www.abanet.org/legal-services/sclaid/defender/downloads/eight_guidelines_of_public_defense.pdf (finding that the goal of quality indigent defense is not achievable when the lawyers who provide such representation have too many cases, as is frequently the case in the United States); THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 6-8 (2009), <http://www.constitutionproject.org/manage/file/139.pdf> (finding that there is a dire need for reform of indigent defense as a result of unmanageable caseloads, lack of independence from

Critical for our purposes here, they also see themselves as outsiders who operate on the margins of the criminal justice system, defender-outlaws who reject the attitudes and assumptions of prosecutors, judges, and court personnel;⁴⁶ they are committed to a role that requires complete allegiance to the client and are willing to do whatever it takes—within the bounds of ethical norms—to fulfill their duty.⁴⁷

III. JUVENILE COURT CULTURE

Comparing and contrasting the norms of criminal defense practice with the culture that permeates many juvenile courts in the United States helps illuminate the process by which rigorous advocacy and accurate fact-finding become compromised in the name of consensus-building and helping the child. This Part details the role played by each of the principal players in the juvenile courtroom—from the judge and prosecutor to the probation officer and defender—and the ways in which their attitudes and decisions combine to undermine the duty to provide juveniles with “zealous, holistic, client-centered advocacy.”⁴⁸

A. Judges

“We don’t pay much attention to the fact-portion of the case. We just want to get these kids help.”

*- Juvenile court judge, North Carolina*⁴⁹

Juvenile courts were originally designed over a century ago to be forums for the rehabilitation of youth, rather than the vehicle by which young offenders would be punished.⁵⁰ Prior to *Gault*, “youth

county officials and the judiciary, lack of enforceable practice standards, and unintelligent waivers of counsel).

46. Babcock, *supra* note 22, at 314; see Taylor-Thompson, *supra* note 25, at 167 (stating that criminal defenders see themselves as “underdogs in an uneven battle . . . [which] defines and delineates a mode of practice that prides itself on independence and finds less value in working with others”).

47. See Babcock, *supra* note 22, at 315 (“Only by staying outside the system altogether can the defender act effectively and avoid the self-doubt and ambivalence that lead to burnout.”).

48. STERLING, *supra* note 8, at 5.

49. Notes of author (Sept. 7, 2004) (on file with author); see also, e.g., ABA JUVENILE JUSTICE CTR. & S. CTR. FOR HUMAN RIGHTS, GEORGIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 24 (2001) [hereinafter GEORGIA ASSESSMENT], <http://www.njdc.info/pdf/georgia.pdf> (“Overall, there is a general sense of futility among defense attorneys about preparing juvenile cases for adjudication because courts are less interested in inquiring into the guilt or innocence of a child, and more intent on dispensing treatment or punishment to the child.”).

50. CHRISTOPHER SLOBOGIN & MARK R. FONDACARO, JUVENILES AT RISK: A PLEA FOR PREVENTATIVE JUSTICE (forthcoming 2010) (“[I]n the traditional juvenile court

rarely had legal representation in juvenile [delinquency] court[],” justified by the rehabilitative—rather than the retributive—focus of the forum.⁵¹ Juvenile court sessions typically consisted of casual dialogues between the judge and the child—often across a desk in chambers rather than in a courtroom—which were a combination of instruction, lecture, and counseling session.⁵² By the 1950s and ‘60s, the informal tone and tenor of the proceeding had not changed, but delinquency dispositions had become increasingly punitive, with young offenders sentenced to lengthy terms in juvenile penitentiaries without benefit of counsel or basic due process protections, or transferred to adult criminal court without regard to objective standards or constitutionally sanctioned criteria.⁵³ In fact, one of the catalysts for the *Gault* decision was the recognition that juveniles were being denied both basic due process protections as well as meaningful rehabilitative services, leaving them with the “worst of both worlds.”⁵⁴

Given this background, it is not surprising that some judges persist in focusing on the needs of the juvenile without first objectively determining whether a criminal offense has been committed.⁵⁵ Furthermore, most jurisdictions do not provide juveniles with the right to a jury trial,⁵⁶ and the bench trial model typically employed in juvenile court has problematic features that

system rehabilitation was the preeminent goal.”).

51. Katayoon Majd & Patricia Puritz, *The Cost of Injustice: How Low-Income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 GEO. J. ON POVERTY L. & POL’Y 543, 544 (2009).

52. See Julian Mack, *The Juvenile Court*, 23 HARVARD L. REV. 104, 120 (1909) (“Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.”).

53. SLOBOGIN & FONDACARO, *supra* note 50 (“Even in the early days of the juvenile court judges found ways to transfer to adult court juveniles who committed serious crimes or appeared to be particularly dangerous.”); Jeffrey Fagan, *Juvenile Crime and Criminal Justice: Resolving Border Disputes*, THE FUTURE OF CHILD., Fall 2008, at 81-82.

54. *In re Gault*, 387 U.S. 1, 19 n.23 (1967) (citing *Kent v. United States*, 383 U.S. 541, 556 (1966)).

55. See Guggenheim & Hertz, *supra* note 5, at 564-70; see also, e.g., ELIZABETH M. CALVIN, ET AL., ABA JUVENILE JUSTICE CTR. ET AL., WASHINGTON: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE OFFENDER MATTERS 23-24 (2003) [hereinafter WASHINGTON ASSESSMENT], <http://www.njdc.info/pdf/wareport.pdf> (noting that some juvenile court judges have personal biases in favor of a *parens patriae* or surrogate parent approach to young offenders, making it difficult to maintain objectivity as neutral fact-finders).

56. Birckhead, *supra* note 6, at 1451 (stating that only twenty states “either provide jury trials to juveniles by right or allow them under limited circumstances”); see also Linda A. Szymanski, *Juvenile Delinquents’ Right to a Jury Trial (2007 Update)*, NCJJ SNAPSHOT (Nat’l Ctr. for Juvenile Justice, Pittsburgh, Pa.), Feb. 2008.

perpetuate unfairness.⁵⁷ It has been found, for example, that juvenile court judges are inclined to evaluate evidence in a manner that favors the prosecution, which may be attributable to a desire to avoid being perceived as “soft on crime,” to protect the community by erring “on the side of conviction,” or to ensure that troubled youth receive services as mandatory conditions of probation, as well as instances of individual bias on the part of the trial judge.⁵⁸ As a result, although the United States Supreme Court held in 1970 that the “beyond a reasonable doubt” standard of proof applies to juvenile delinquency cases,⁵⁹ this is inconsistently reflected in practice.⁶⁰

In addition, juvenile court judges managing heavy dockets or operating in jurisdictions in which all pending matters must be resolved within a single court session face systemic pressures to move cases, giving rise to impatience and disdain for defense attorneys—and their young clients—who file motions and/or request adjudicatory hearings rather than readily admit to the charges.⁶¹ Defense attorneys who fail to cooperate may face both subtle and direct forms of retaliation, including reduction in fees and removal from court-appointed lists.⁶² Such an attitude on the part of judges can be exacerbated by the prevailing view that the youth charged as a delinquent may not have done this, but he must have done *something*.⁶³ In jurisdictions in which juvenile court judges are elected—and therefore compelled to campaign on their record in order to win the popular vote—such views are even more likely to predominate.⁶⁴

57. See Guggenheim & Hertz, *supra* note 5, at 564-82.

58. Guggenheim & Hertz, *supra* note 5, at 569-70.

59. *In re Winship*, 397 U.S. 358, 368 (1970).

60. See Guggenheim & Hertz, *supra* note 5, at 564-65.

61. See STERLING, *supra* note 8, at 5 (“[I]n some jurisdictions, because they view juvenile court first and foremost as an opportunity to ‘help a child,’ judges and other system participants undermine attorneys’ efforts to challenge the government’s evidence and provide zealous, client-centered representation, considering such advocacy an impediment to the smooth function of the court.”); see also ABA JUVENILE JUSTICE CTR. ET AL., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 27 (1995) [hereinafter A CALL FOR JUSTICE], <http://www.njdc.info/pdf/cjf/full.pdf> (“In some courts, attorneys are subtly reminded by the court, the prosecutor, and other court personnel that zealous advocacy is considered inappropriate and counter-productive.”).

62. A CALL FOR JUSTICE, *supra* note 61, at 27.

63. See GEORGIA ASSESSMENT, *supra* note 49, at 24 (“Reflecting the attitude of the system, ‘Most trials are about what was done [by the juvenile], not if something was done,’ says a contract defender.”).

64. See TEXAS APPLESEED FAIR DEF. PROJECT ON INDIGENT DEF. PRACTICES IN TEX.—JUVENILE CHAPTER, SELLING JUSTICE SHORT: JUVENILE INDIGENT DEFENSE IN TEXAS 16-17 (2000) [hereinafter TEXAS ASSESSMENT], <http://www.njdc.info/pdf/TexasAssess.pdf> (finding that Texas judges, who are elected, “appear to be overly

Further, juvenile court is frequently used as a training ground or brief rotation for judges who are unfamiliar with the state juvenile code or the ways in which adolescent development, mental health, and special education needs can impact a child's behavior.⁶⁵ These judges may have "distorted views" of the delinquency court system and the young people who are in it.⁶⁶ When the juvenile's lawyer is also untrained and inexperienced—a not-uncommon occurrence—a power imbalance can develop in the courtroom that results in an over-reliance on the probation officer.⁶⁷ This, too, compromises the system's commitment to justice and contributes to the risk of wrongful convictions.

B. Prosecutors

"Suppression motions are disruptive. Motions and defense attorneys interfere with the process."

- Juvenile court prosecutor, Georgia⁶⁸

Prosecutors who are assigned to juvenile delinquency court are a second contributing factor in the calculus. They commonly receive minimal supervision and training; they are saddled with unwieldy caseloads; and they—like judges—are under pressure to resolve matters quickly and expeditiously.⁶⁹ As a result, many juvenile court

concerned with keeping control of their budgets and their dockets" and "feel pressured by the county to minimize their expenditures for appointed counsel," resulting in "a scarce amount of vigorous defense advocacy going on in the juvenile courts across the state"); *see also id.* at 16 (discussing the impact of judicial elections on juvenile court practice, and finding that "[i]n at least two counties, many attorneys stated that making campaign contributions or attending judicial fundraisers is one of the 'requirements' for getting appointments from the judge").

65. *See, e.g.,* PATRICIA PURITZ & CATHRYN CRAWFORD, NAT'L JUVENILE DEFENDER CTR., FLORIDA: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 54-55 (2006) [hereinafter FLORIDA ASSESSMENT], <http://www.njdc.info/pdf/Florida%20Assessment.pdf>.

66. *Id.* at 55.

67. *Id.*; *see also infra* notes 85-89 and accompanying text (discussing the problematic role of juvenile probation officers).

68. *See* GEORGIA ASSESSMENT, *supra* note 49, at 24; *see also* TEXAS ASSESSMENT, *supra* note 64, at 21 (quoting an appointed attorney as stating, "it is the culture of the courthouse not to file pre-trial motions").

69. *See* AM. PROSECUTORS RESEARCH INST., BRINGING BALANCE TO JUVENILE JUSTICE 5 (2002) (acknowledging that there is a high turnover rate in the juvenile divisions of prosecutors' offices, resulting in "new and inexperienced prosecutors [who] may exercise their discretion inappropriately"); Tamar R. Birckhead, *North Carolina, Juvenile Court Jurisdiction, and the Resistance to Reform*, 86 N.C. L. REV. 1443, 1498 (2008) (discussing the practice of "training inexperienced prosecutors . . . in juvenile court until they are deemed ready to 'graduate' to one of the more respected forums, such as traffic or criminal district court"); JESSIE BECK, PATRICIA PURITZ & ROBIN WALKER STERLING, NAT'L JUVENILE DEFENDER CTR., NEBRASKA: JUVENILE LEGAL DEFENSE: A REPORT ON ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION FOR

prosecutors have little understanding or tolerance for defense attorneys who practice with more than the barest modicum of rigor. They are annoyed when expected to provide discovery in advance of a hearing;⁷⁰ they are perplexed—and sometimes threatened—by the filing of written motions,⁷¹ although the practice is, of course, allowable under the rules of criminal procedure and juvenile code of every state;⁷² and they are troubled when the defense interviews prosecution witnesses prior to adjudication, suggesting that such a practice is unethical and burdens the complainant.⁷³

Likewise, juvenile court prosecutors benefit from the structural realities of the system. They typically have access to investigative resources that the defense lacks,⁷⁴ they have the discretion to file certain cases in adult court, and they use the threat of transfer to extract admissions from juveniles who otherwise would have requested a hearing.⁷⁵ In addition, prosecutors often share the

CHILDREN IN NEBRASKA 22 (2009) [hereinafter NEBRASKA ASSESSMENT], http://www.njdc.info/pdf/nebraska_assessment.pdf (finding that unrepresented youth “may be influenced by prosecutors or judges, who are sometimes pressured to clear cases from their calendars”); *see also* Marrus, *supra* note 37, at 359 (“Decreasing the prosecutorial caseload would also benefit children in juvenile court because it would facilitate more accurate assessments of the quality of evidence in individual cases.”).

70. *See, e.g.*, TEXAS ASSESSMENT, *supra* note 64, at 22-23 (finding that attorneys have little, if any, contact with prosecutors prior to court hearings, all such hearings are informal, and motions for discovery are uncommon).

71. *See, e.g.*, GEORGIA ASSESSMENT, *supra* note 49, at 24 (quoting a juvenile court prosecutor as stating, “Sometimes Fourth and Fifth Amendment issues are missed. Other times, everybody just does a wink-wink and ignores the Fourth and Fifth Amendment issues because it would be in the child’s best interest to be committed to [the juvenile court probation department] in order to get services from the system.”); WASHINGTON ASSESSMENT, *supra* note 55, at 30 (finding that some prosecutors prefer that pretrial issues should be handled “informally—through discussion”).

72. *See* STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, *supra* note 35, at § 7.2 (“[I]t is the lawyer’s duty to make all motions, objections, or requests necessary to protection of the client’s rights in such form and at such time as will best serve the client’s legitimate interests at trial or on appeal.”).

73. *See* GEORGIA ASSESSMENT, *supra* note 49, at 23 (finding that some prosecutors do not trust defense lawyers and will not provide them with access to their files or other needed discovery).

74. *See, e.g.*, ABA JUVENILE JUSTICE CTR. & MID-ATLANTIC JUVENILE DEFENDER CTR., MARYLAND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 31 (2003) [hereinafter MARYLAND ASSESSMENT], <http://www.njdc.info/pdf/mdreport.pdf> (finding that public defenders lack investigators and social workers to assist in case preparation, giving the state a distinct advantage).

75. *See id.* at 62 (“Stakeholders reported over and over that local prosecutors coordinate with police departments to ensure that youth are sent to the adult system regardless of whether the facts support such a charge.”); NEBRASKA ASSESSMENT, *supra* note 69, at vi (“[P]rosecutors use[] the threat of transfer [to adult court] to extract guilty pleas from youth.”).

normative view of the judge that juvenile court is *not* an adversarial forum, and that no negative consequences to the child will result.⁷⁶ Thus, given the distain with which prosecutors treat those few attorneys who are committed to rigorous, client-directed representation, it can become a self-fulfilling prophesy when defenders assume the posture of one who is seen and not heard.⁷⁷

C. Probation Officers

"I could take my client to my office to talk, but then I would get behind on court call—the court does not wait."

- *Juvenile probation officer, Florida*⁷⁸

Probation officers who work with juveniles in delinquency court often face a classic Hobson's Choice⁷⁹ when making dispositional recommendations on behalf of juveniles. Although in theory they may recommend a comprehensive package of services that includes psychological treatment, anger-management counseling, and academic tutoring, because of the resource-strapped budgets of most juvenile courts, mental health agencies, and school systems, often the only real choice is some form of incarceration.⁸⁰ Even in jurisdictions in which funding is not at issue, probation officers make retributive rather than rehabilitative dispositional recommendations because of a fear of appearing soft and thereby losing credibility with the judge and prosecutor.⁸¹ Likewise, it is not uncommon for probation officers to become burned out after years in the trenches with heavy caseloads and little support; some tire of fighting the more punitive

76. See GEORGIA ASSESSMENT, *supra* note 49, at 30-31 ("A juvenile court judge described the approach of juvenile court as 'a conspiracy of justice' where a 'huge bond of trust' exists that ensures a nonadversarial environment with everyone believing they are acting in the best interests of the child. . . . Prosecutors view this philosophy as particularly suited for the juvenile process.")

77. See *infra* Part III.D (discussing how the lack of criminal defense training and experience on the part of lawyers who practice in juvenile court contributes to this phenomenon).

78. FLORIDA ASSESSMENT, *supra* note 65, at 35.

79. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1076 (3rd ed. 1993) ("[A]n apparent freedom to take or reject something offered when in actual fact no such freedom exists: an apparent freedom of choice when there is no real alternative.")

80. See, e.g., GEORGIA ASSESSMENT, *supra* note 49, at 37; WASHINGTON ASSESSMENT, *supra* note 55, at 38 ("Often the probation officer or prosecutor will seek a higher sentence because the offender has serious emotional, addiction or behavioral problems, and community-based resources have not been secured.")

81. See, e.g., ABA JUVENILE JUSTICE CTR. & MID-ATLANTIC JUVENILE DEFENDER CTR., VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 27 (2002) [hereinafter VIRGINIA ASSESSMENT], <http://www.njdc.info/pdf/Virginia%20Assessment.pdf> (quoting a probation officer as stating, "Most of these kids are guilty anyway, so what's the point?")

aspects of the system, while others internalize the clichés and stereotypes perpetuated about juveniles and buy into the warehousing of “bad kids.”⁸² The result is that juvenile probation officers may privately acknowledge to defenders that their client’s family is profoundly dysfunctional, and that the child has serious psychological, developmental or learning issues that have never been properly addressed, but publicly before the judge they ask for the most punitive sanctions,⁸³ euphemistically known as “detention homes,” “training school[s],” or “youth development center[s].”⁸⁴

The problematic role of juvenile probation officers is compounded by the fact that they are often the best informed people in the courtroom and have the most sustained contact with the child.⁸⁵ This results in an overreliance on their recommendations by the judge and prosecutor—whether at a detention or dispositional hearing—that

82. See Patricia McFall Torbet, *Juvenile Probation: The Workhorse of the Juvenile Justice System*, JUV. JUST. BULL. (Office of Juvenile Justice & Delinquency Prevention, Washington, D.C.), Mar. 1996, at 1 (stating that juvenile probation officers’ “greatest sources of frustration are an inability to impact the lives of youth, the attitudes of probationers and their families, and difficulties in identifying successes”); see also BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 264 (1999) (“A number of actors in the juvenile justice process—police, intake social workers, detention personnel, prosecutors, and judges—make dispositional decisions; their decisions cumulate and affect the judgments that others make subsequently Juveniles’ prior records reflect discretionary decisions that people in the justice process make over time, and previous dispositions affect later sentences Within this flexible dispositional process, minority youths are disproportionately overrepresented at every stage . . .”).

83. See, e.g., WASHINGTON ASSESSMENT, *supra* note 55, at 38 (“Sometimes the child’s probation officer recommends a longer sentence because the child has nowhere to live. In several counties, [juveniles] with a history of running from placements have been given exceptionally long sentences for minor offenses because the parties see no other options.”); see also GEORGIA ASSESSMENT, *supra* note 49, at 35 (quoting a juvenile probation officer as stating, “Detention could be used for more juveniles, to send a message to juveniles Some kids just have to get the message. Detention helps.”).

84. See, e.g., N.C. GEN. STAT. § 7B-1501(9), (29) (2009) (referencing “detention homes” and “youth development center[s]” as examples of facilities that provide “secure confinement and care for juveniles”).

85. ELIZABETH GLADDEN KEHOE, NAT’L JUVENILE DEFENDER CTR. & KIM BROOKS TANDY, CEN. JUVENILE DEFENDER CTR., INDIANA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 37 (2006) [hereinafter INDIANA ASSESSMENT], <http://www.njdc.info/pdf/Indiana%20Assessment.pdf> (“In fact, one probation officer reported that he often acts as a liaison between the youth, the parents and the defense counsel because he knows more about the families than the attorney.”); LAVAL S. MILLER-WILSON, JUVENILE LAW CTR. & PATRICIA PURITZ, ABA JUVENILE JUSTICE CTR., PENNSYLVANIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 7 (2003) [hereinafter PENNSYLVANIA ASSESSMENT], <http://www.njdc.info/pdf/pareport.pdf> (“[S]everal chief juvenile probation officers [who were] interviewed acknowledged their undue influence with judges, prosecutors, youth and families.”).

makes it even less likely that the state will need to prove its case against the juvenile.⁸⁶ In some jurisdictions, probation officers provide procedural as well as substantive legal advice to juveniles, arguably crossing the line into the unlicensed practice of law.⁸⁷ The failure of defense counsel to question the nearly unfettered discretion of the probation officer or to challenge the “accuracy, credibility, and weight of probation reports” serves to further the department’s influence in juvenile court;⁸⁸ this phenomenon is particularly troublesome in complex cases in which the juvenile has serious mental health or drug treatment needs or has been found delinquent of a sex offense, the potential consequences of which can be severe.⁸⁹

D. Defenders

“I don’t always listen to what [the clients] say. Mine is not the role of the typical defense attorney; I must consider what is best for the child, and I do not take the position that I must ‘get the child off at all costs.’”

- Juvenile defense attorney, Mississippi⁹⁰

It has been reported that prior to the *Gault* decision in 1967, fewer than 10% of those in juvenile court received any legal assistance⁹¹—and others place the figure as fewer than 5%.⁹² Traditionally, the lack of counsel for juveniles was justified by the view that attorneys serve “neither the interests of the child nor the interests of justice” and that it is the court that is “the defender as

86. PENNSYLVANIA ASSESSMENT, *supra* note 85, at 7; FLORIDA ASSESSMENT, *supra* note 65, at 45 (describing instances in which judicial deference to probation officers results in their “almost complete influence over youths’ fates”); ABA JUVENILE JUSTICE CTR. & S. JUVENILE DEFENDER CTR., NORTH CAROLINA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 4 (2003) [hereinafter NORTH CAROLINA ASSESSMENT], <http://www.njdc.info/pdf/ncreport.pdf>. (finding that there is “great reliance . . . to the point of dependence” by defense attorneys on probation officers, and that judges, prosecutors, and defense attorneys “routinely accept” their dispositional recommendations).

87. See, e.g., GEORGIA ASSESSMENT, *supra* note 49, at 35 (finding that probation officers advise juveniles on whether to exercise the right to counsel as well as whether to admit to the charge or contest the case).

88. PENNSYLVANIA ASSESSMENT, *supra* note 85, at 6.

89. *Id.*; see also WASHINGTON ASSESSMENT, *supra* note 55, at 37 (finding that some defense attorneys do not advocate at disposition because they feel it is “hopeless,” as they “are not going to win”).

90. PATRICIA PURITZ & ROBIN WALKER, NAT’L JUVENILE DEFENDER CTR., MISSISSIPPI: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN YOUTH COURT PROCEEDINGS 42 (2007) [hereinafter MISSISSIPPI ASSESSMENT], http://www.njdc.info/pdf/mississippi_assessment.pdf.

91. PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND THE ADMIN. OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY & YOUTH CRIME 82 (1967).

92. A CALL FOR JUSTICE, *supra* note 61, at 21.

well as corrector of the child.”⁹³ In fact, pre-*Gault* judges were encouraged to “discuss” the special nature of juvenile court with counsel and to convey the concept “that as officers of the court, they had a professional obligation to assist in the supervision, rehabilitation, and treatment of the ward.”⁹⁴

Forty years later, state assessments of juvenile court practice have established that the model of client-directed robust defense is infrequently—at best—put into practice.⁹⁵ Rather, while some juvenile defenders are experienced and have received high-quality training and supervision, many others are new to the practice of law and have been placed there by under-staffed public defender offices or out of their own misguided belief that juvenile court is an appropriate learning ground because the stakes are low.⁹⁶ Others are crossovers from family court or abuse, neglect, and dependency court (also known as “DSS” or Department of Social Services court); they have no criminal defense training but have developed delinquency caseloads as a result of being regulars in these corollary courts—or sometimes merely because they happen to be warm bodies who practice in district or even traffic court.⁹⁷

Systemic barriers also contribute to the challenges faced by today’s defenders. It is not unusual, for instance, for courthouses to lack adequate facilities in which lawyers and their young clients can have confidential communications regarding the case before, during,

93. HERBERT H. LOU, *JUVENILE COURTS IN THE UNITED STATES* 138 (1927).

94. William B. McKesson, *Right to Counsel in Juvenile Proceedings*, 45 MINN L. REV. 843, 845-46 (1961).

95. Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 791-92 (2010) (stating that national and state assessments of juvenile defender systems demonstrate that “these performance standards and ethical rules appear to be honored mostly in the breach”); Henning, *supra* note 10, at 257.

96. See, e.g., MISSISSIPPI ASSESSMENT, *supra* note 90, at 45 (finding that juvenile court attorneys are not as well-trained as defense counsel in adult criminal court); see also RANDY HERTZ ET AL., *TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT* 276-78 (ALI-ABA 2007) (1991) (discussing the potential harm resulting from the collateral criminal and civil consequences of juvenile delinquency adjudications, including enhanced penalties for future offenses, immigration consequences, and forfeiture); Bonnie Mangum Braudway, *Scarlet Letter Punishment for Juveniles: Rehabilitation Through Humiliation?*, 27 CAMPBELL L. REV. 63, 81 (2004) (describing the problems faced by individuals whose juvenile court record is revealed to employers and colleges); Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles About the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111, 1114-18 (2006) (discussing collateral consequences of juvenile adjudications in the areas of housing, employment, and education).

97. See, e.g., VIRGINIA ASSESSMENT, *supra* note 81, at 3 (“In appointed counsel jurisdictions, counsel reported a greater number of years in practice [than in public defender offices], but overall handling of juvenile delinquency matters as a small portion of their work.”).

or after hearings,⁹⁸ and even in jurisdictions that do *not* have such limitations, the complacent attitude of the local defense bar can serve as a deterrent.⁹⁹ Likewise, the fact that most juvenile cases are resolved by admission—often at the initial appearance—further supports the view that preparation is unnecessary and an impediment to judicial economy; in fact, it is not uncommon for a lawyer to negotiate a plea agreement without first speaking to her juvenile client, to summarily discuss it with the youth in the moments before the hearing and then immediately proceed into the courtroom and enter the plea.¹⁰⁰ It is also not unusual for salary disparities to exist between those attorneys who represent juveniles in delinquency court and their higher paid counterparts who represent defendants in adult criminal court; meanwhile, the same discrepancies in compensation are not typically found among prosecutors.¹⁰¹

As a result, lawyers representing juveniles are particularly susceptible to the message conveyed by the other actors in the juvenile court system: don't investigate, don't talk to state's witnesses, don't file motions, don't make the state meet its burden, and—in short—don't be zealous advocates. Therefore, for some it is a *fait accompli* that their principal role is to work in partnership with the judge and prosecutor in order to get the child "help."¹⁰²

98. See, e.g., MISSISSIPPI ASSESSMENT, *supra* note 90, at 45 (finding that the juvenile court system is not as well-funded as adult criminal court, and that the facilities and meeting rooms are inadequate); NEBRASKA ASSESSMENT, *supra* note 69, at 36 ("Across the state, there were few courthouses with facilities that allowed confidential communications between defense attorneys and their juvenile clients.").

99. NEBRASKA ASSESSMENT, *supra* note 69, at 36 (finding that even in counties where conference or meeting rooms were available, defense attorneys did not use them, choosing to speak with their clients in the hallways instead).

100. NEBRASKA ASSESSMENT, *supra* note 69, at 36-37.

101. See, e.g., FLORIDA ASSESSMENT, *supra* note 65, at 53 (describing "use [of] juvenile court as a training ground for new attorneys," who transfer to adult court upon acquiring better skills); MISSISSIPPI ASSESSMENT, *supra* note 90, at 45 (finding that juvenile court attorneys are not as well-compensated as those who practice in adult criminal court); see also H. Ted Rubin, *The Legal Defense of Juveniles: Struggling but Pushing Forward*, JUV. JUST. UPDATE, June-July 2010, at 1-2 (reporting that more local resources are committed to juvenile prosecution than defense and that prosecutors are better paid and their offices better staffed).

102. See, e.g., GEORGIA ASSESSMENT, *supra* note 49, at 24 (quoting a defense attorney who stated, "Juvenile court is a chance to straighten a kid out. I don't look at a trial as a matter of winning or losing, but as a question of are we going to get this kid some help."); TEXAS ASSESSMENT, *supra* note 84, at 24 ("One attorney stated that he doesn't feel bad about pleading a child guilty to a case the state cannot prove 'if the kid really needs services.'"); WASHINGTON ASSESSMENT, *supra* note 55, at 24 (finding that "it's easy [for the defense attorney] to slip into the role of parent, even in a system that has rejected *pars patriae* [or best interest advocacy] as its guiding principle").

IV. CULTURE OF THE FAMILY

In addition to criminal defense culture and juvenile court culture, there is a third animating feature in this picture, which may be termed the culture of the family. Because juvenile courts have jurisdiction over the parents of children in the system, thereby establishing a formal role for them in delinquency cases,¹⁰³ it is incumbent upon the defense attorney to interact with and gain the cooperation and trust of her client's parents.¹⁰⁴ This Part examines the ways in which the interests and attitudes of parents can conflict and, thus, interfere with the defender's role vis-à-vis her juvenile clients.

A. *Parents*

"If he didn't do it, then he needs a lawyer."

- *Parent of juvenile, Indiana*¹⁰⁵

While many parents of children charged with criminal offenses in juvenile delinquency court have constructive—even amicable—working relationships with their child's attorney, others stand in direct opposition to the lawyer's goals and objectives.¹⁰⁶ Some parents pressure their child to "do the right thing"—readily admit to the crime and take responsibility for what they did, regardless of the consequences.¹⁰⁷ They believe that in this way their son or daughter will emerge from the experience a better person; they insist that the youth make amends, show remorse, and not reoffend.¹⁰⁸ Others,

103. See, e.g., MICH. COMP. LAWS SERV. § 712A.18(1)(g) (LexisNexis 2005) ("[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) ("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").

104. Henning, *supra* note 11, at 845-47.

105. INDIANA ASSESSMENT, *supra* note 85, at 31.

106. See, e.g., NORTH CAROLINA ASSESSMENT, *supra* note 86, at 39 ("One attorney indicated that parents are viewed as a 'big problem' because 'they always want to know what's going on.'").

107. See Henning, *supra* note 10, at 300-01 ("The parents may force or encourage the child to plead guilty so he can get treatment . . . [or] may support confession as good for the child's moral redemption, but fail to recognize the dangers of relying on the juvenile justice system as a forum through which to instill values and moral upbringing.").

108. See *id.*

however, cannot accept that their child could ever have been *capable* of committing the act alleged; they insist upon an adjudicatory hearing and refuse even to consider allowing the youth to admit to the charge—again, regardless of the consequences.¹⁰⁹

In general, most parents of juveniles are, at best, conflicted. Parenting ideally means, *inter alia*, conveying positive values, imposing a rational structure, and utilizing constructive forms of discipline; it is antithetical to witness one's child be publicly adjudicated a juvenile delinquent or taken away in shackles and leg irons.¹¹⁰ To further complicate matters, the parent may be the alleged victim in the case, a percipient witness to the offense, a co-defendant, or in danger of being held in contempt because of her failure to abide by a court order.¹¹¹ Further, most parents are unable to escape the lingering question that inevitably arises when a youth is accused of violating the law: how does my child's case reflect upon me?

B. Lawyers

"I believe it's what the parents want; so I cannot really argue against it."

- Juvenile defense attorney responding to the judge regarding the possibility of detaining his client, Maryland¹¹²

Because of the parent's established role in delinquency matters, in many ways the culture of the family pits the juvenile's lawyer against the parent, as the goals and objectives of each group may not only differ, but be diametrically opposed.¹¹³ While the parent is determined either to keep her child out of the system (which may be rational but unrealistic) or to get her child into the system (because she is frustrated and feeling helpless), the child's lawyer stands at the other end of the spectrum working for the *least punitive* result for her client—nothing more, nothing less.¹¹⁴

109. See Henning, *supra* note 11, at 851 ("Parents may even insist on the child's innocence and refuse to support a guilty plea in the face of overwhelming evidence.")

110. See Henning, *supra* note 101, at 849-51 (describing perception of juvenile delinquency as attributable to parental failure).

111. Birkhead, *supra* note 6, at 1502-03.

112. MARYLAND ASSESSMENT, *supra* note 74, at 43.

113. See Henning, *supra* note 11, at 853-66 (identifying sources of "[t]ension within the attorney-parent relationship").

114. FLORIDA ASSESSMENT, *supra* note 65, at 52 ("Many defenders reported feeling trapped between parents and children. Resolving these awkward tensions can be difficult, especially if the defender does not have the backing of the court."); Henning, *supra* note 11, at 853 ("[L]awyers 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."); Marrus, *supra* note 37, at 315.

Further, even defense lawyers who are committed to their role and to the most rigorous form of advocacy are not immune from feeling conflicted themselves. They are adults and their clients are children or adolescents whose brains are not fully formed, who are impulsive, unpredictable, and often not capable even of providing a linear account of what happened.¹¹⁵ Further, in our society, the normative role of the adult vis-à-vis the child is that of mentor, counselor, and protector—one who conveys positive values for children to live by as they mature. Yet any defender who is worth her salt will admit that this familial function can be in direct opposition to the legal counseling that may be needed by a juvenile defendant.¹¹⁶

The result is a culture clash: criminal defense culture versus juvenile court culture versus the culture of the family, leaving the child's lawyer caught in the middle and gradually worn down by all sides. Accurate fact-finding stops being a priority; advocacy, both oral and written, falters; the quality of representation suffers; and wrongful convictions, among other harms, occur. Further, while this Article's focus is on juvenile delinquency court, this same dynamic can also develop and predominate among attorneys who represent youth in adult criminal court, as young people transferred to that forum for prosecution may face longer terms of imprisonment but the fact of their immaturity and developmental incompetence remains.¹¹⁷

V. PROPOSALS

Given the dynamic established in the preceding sections, what normative strategies might be utilized to lessen the competing systemic pressures faced by juvenile defenders? This Part sets forth several proposals directed at confronting the culture clash that can negatively impact the effective representation of juveniles in delinquency court where—as explained *supra*—culture clash or the lawyer's inability to navigate among the cultures of criminal defense, juvenile court and the family is a contributing cause of a variety of potential harms.

A. *Import the Five Habits*

In their groundbreaking work on the “Five Habits of Cross-Cultural Lawyering,” Sue Bryant and Jean Koh Peters observed that

115. See Henning, *supra* note 10, at 271-73 (describing “common cognitive and psychosocial features” affecting juveniles’ “abilities to participate effectively as trial defendants”).

116. Marrus, *supra* note 37, at 321-22.

117. See Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 843-44 (2005) (discussing the need for evaluating and determining the developmental competence of younger juveniles eligible for waiver to criminal court).

practicing law is itself cross-cultural, as the law is a culture with strong professional norms.¹¹⁸ The lawyer-client interaction, therefore, is by definition a cross-cultural experience because of the specific norms and behaviors that arise from within legal culture itself.¹¹⁹ This cross-cultural dynamic (lawyer/non-lawyer) is compounded by the many other differences that can exist between lawyers and their clients, including gender, race, skin color, ethnicity, nationality, age, economic status, social status, language, sexual orientation, physical characteristics, marital status, role in the family, birth order, immigration status, religion, and accent—to name but a few.¹²⁰ Such differences can cause even the most well-meaning lawyers to misjudge clients based on bias or stereotype and, thus, can interfere with the ability to understand the client's individual behaviors, communications, values, and goals.¹²¹ For instance, does nodding during an interview indicate assent and agreement or is it merely a sign of active listening? Is maintaining eye contact a signal of openness and honesty or one of disrespect? Does the failure to keep appointments or the propensity to arrive late mean that the client does not care about the case or just lacks reliable transportation? Differences between lawyer and client can lead to making assumptions, stereotyping, categorizing, and over-generalizing that can result in ineffective assistance of counsel, which in turn contributes to the risk of wrongful convictions.¹²²

This risk is heightened when the client is a youth, as children and adolescents are in the midst of a multi-dimensional process of development that invariably has implications for every stage of juvenile court representation.¹²³ Whether the attorney is attempting to conduct an initial interview, determine if a *Miranda* waiver was valid, or craft a dispositional argument that reflects the juvenile's expressed interests, the fact of the client's youth presents hurdles that do not exist to the same extent and degree in the representation of adults.¹²⁴ At a minimum, juvenile defenders must have an

118. Bryant & Peters, *supra* note 3, at 47.

119. *Id.*

120. *Id.* at 48.

121. *Id.* at 42-43.

122. *Id.* at 49-51.

123. See, e.g., LAURENCE STEINBERG, *ADOLESCENCE 12-14* (8th ed. 2008) (stating that the "major psychosocial developments" of adolescence are "identity, autonomy, intimacy, sexuality, and achievement"); see also *id.* at 104-05 (finding that "significant numbers" of juveniles under the age of sixteen may not be competent to stand trial in adult criminal court).

124. *But see id.* at 105 (finding that one-third of juveniles thirteen and younger, and one-fifth of fourteen-year-olds and fifteen-year-olds were "as impaired in their abilities to serve as a competent defendant as were mentally ill adults who had been found not competent to stand trial").

appreciation for how adolescents develop their cognitive skills, moral framework, social relations, and identity, as well as for how brain development, disabilities, and the external environment affect their behavior and decision making.¹²⁵

Bryant and Peters endorsed five practices—or habits—to help lawyers achieve the goal of practicing law based on facts rather than assumptions.¹²⁶ As the differences between lawyer and client are especially pronounced in the context of juvenile court, and because the systemic pressures and tensions faced by juvenile defenders are particularly intense, the need to work toward this goal is critical. In sum, the habits are as follows:

First, identify how cultural¹²⁷ differences and similarities between the lawyer and the client influence the interaction.¹²⁸ If there are many similarities between the two, the lawyer must consciously work to develop proper professional distance.¹²⁹ If there are many differences, the lawyer must consciously work to bridge the gap between the client's experiences and her own.¹³⁰

Second, examine how cultural differences and similarities influence the interactions between the client and the legal decision maker (whether the prosecutor, judge, probation officer, or jury), and between the legal decision maker and the lawyer.¹³¹ Consider how cultural similarities might help establish connections and understanding between the client and the decision maker as well as how cultural differences might lead the decision maker to negatively judge the client.¹³² Repeat this analysis for the relationship between the lawyer and the legal decision maker: "How acculturated to the law and legal culture has the lawyer become? In what ways does the lawyer see the 'successful' client [from] the same [perspective] as

125. See Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in YOUTH ON TRIAL 9, 19-21 (Thomas Grisso & Robert Schwartz eds., 2000) (stating that "an understanding of child and adolescent development can be especially informative" with respect to questions regarding the juvenile's adjudicative competence, culpability, and amenability to treatment, and that defense attorneys need this information to "practice law more effectively"); see also ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 175-77 (2008) ("Many attorneys and judges are unsophisticated about developmental psychology and would benefit from guidelines for evaluating and enhancing the capacities of immature youths to participate in delinquency proceedings.").

126. Bryant & Peters, *supra* note 3, at 51-60.

127. See *supra* note 3 (discussing the meaning of the term "culture" as used in this piece).

128. Bryant & Peters, *supra* note 3, at 51-52.

129. *Id.* at 52.

130. *Id.* at 53.

131. *Id.* at 53-54.

132. *Id.* at 54.

the . . . legal decision maker . . . ?”¹³³ Then analyze the effect of these similarities and differences, and “consciously examine influences on the case that may be invisible” but will nevertheless affect the outcome.¹³⁴

Third, explore multiple alternative interpretations for any client behavior, a particularly critical step when the lawyer is feeling judgmental about her client.¹³⁵ Explore the reason(s) for the client’s questionable behavior rather than operating on blanket assumptions.¹³⁶

Fourth, utilize “mindful” communication with the client; do not operate on automatic pilot via old scripts and introductory rituals.¹³⁷ Use techniques to confirm understanding—give the client clear verbal feedback and elicit the same from her; encourage her to convey information in narrative mode rather than in monosyllables; inquire directly and explicitly as to her expectations; and consistently look for red flags—if the client seems bored, unresponsive, distracted, or angry, take immediate corrective measures.¹³⁸

Fifth, take deliberate steps to avoid reaching one’s breaking point.¹³⁹ Remember that relying on bias and stereotype is more likely during periods of stress.¹⁴⁰ If needed, take a step back from the interview or a break from representation in general.¹⁴¹ Make time to identify and analyze one’s biases.¹⁴² Control what can be controlled and identify what cannot be controlled—whether it is pressure from the court, lack of resources, or a heavy caseload.¹⁴³ Emphasize self-analysis and not self-judgment.¹⁴⁴ And, perhaps most important, be reflective in one’s practice.¹⁴⁵

Although building cross-cultural competence among juvenile defenders will not eliminate the challenges posed by the very nature of the practice, it is an essential aspect of good lawyering.¹⁴⁶ It is also particularly relevant and necessary in the United States, an ever-

133. *Id.* at 54-55.

134. *Id.* at 55.

135. *Id.* at 56.

136. *Id.* at 56-57.

137. *Id.* at 57.

138. *Id.* at 57-58.

139. *Id.* at 59.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 59-60.

144. *Id.* at 60.

145. *Id.*

146. *Id.* at 37.

increasing multi-cultural country.¹⁴⁷ By making “the invisible more visible,” juvenile defenders as well as others trained in these concepts will come to understand that no interaction is “culture-neutral,” an awareness that should help mediate the systemic pressures they inevitably confront.¹⁴⁸

B. Acknowledge the Problem

In a variety of forums both formal and informal, juvenile defenders are reflexively told to rely on their client’s expressed interest and not their best interest without acknowledging that this is often easier said than done, even for the most defense-minded advocates.¹⁴⁹ Whether the client is nine, thirteen, or seventeen, it can be a struggle for the attorney to put aside the impulse to act based on what would be “best” for the youth, particularly given that the defender is the only party in the system who does not operate under this mandate.¹⁵⁰ In any attorney-client relationship, assumptions, biases, and feelings of resignation may arise, but when the client is a child, this dynamic is magnified as such factors as paternalism, role confusion, and culture clash enter into the mix.¹⁵¹

As social science research has demonstrated, the act of describing—and naming—a condition or set of symptoms can provide great comfort and solace to those who experience it.¹⁵² Upon learning that their experiences are typical of others who are similarly-situated and that the phenomenon has standard traits, they are better able to address its underlying causes.¹⁵³ Rather than engage in self-blame

147. *Id.* at 38.

148. *Id.* at 37-40.

149. *See, e.g.,* Henning, *supra* note 10, at 256-57.

150. *See supra* Part III.

151. *See* Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in *YOUTH ON TRIAL* 73, 91-92 (Thomas Grisso & Robert Schwartz eds., 2000) (“Attorneys [representing juveniles] should . . . recognize that they may have to explain many aspects of the criminal proceedings that they may take for granted in representing adults, including the nature of a right.”); Ellen Marrus, *Can I Talk Now?: Why Miranda Does Not Offer Adolescents Adequate Protections*, 79 *TEMP. L. REV.* 515, 517 (2006) (“Representing children is much harder than defending adults. The work that is necessary to ensure effective assistance of counsel for children is much greater than that required for adults. The attorney must not only know civil, criminal, school, and juvenile law, but must be knowledgeable in child development and family dynamics.”).

152. *See, e.g.,* Marcus J. H. Huibers & Simon Wessely, *The Act of Diagnosis: Pros and Cons of Labeling Chronic Fatigue Syndrome*, 36 *PSYCHOL. MED.* 895, 897 (2006) (“Finding a label that fits one’s symptoms may bring that relief and legitimacy, especially if the label is a biomedical one, free from the stigma of psychiatric illness.”).

153. *Id.* at 898 (“[R]eceiving a . . . diagnosis is an intervention in itself, a breakthrough that brings an end to the burden of uncertainty and de-legitimization and that determines the course of action to follow.”); *see also* Phyllis Solomon, *Peer*

under the mistaken belief that their feelings are aberrant and, thus, fraudulent, they can more objectively analyze the situation; rather than deny that the dynamic persists and perpetuate self-delusion, they can directly confront it.¹⁵⁴ This sort of development has been seen with clinical conditions, such as chronic fatigue syndrome,¹⁵⁵ lupus,¹⁵⁶ and Alzheimer disease,¹⁵⁷ as well as with laws that are directed towards specific conduct, such as sexual harassment and hate crimes.¹⁵⁸

Without suggesting that the conflict or culture clash experienced by juvenile defenders is comparable to the diagnoses mentioned above, much can be learned from the salient effect of giving a name to a common set of behaviors and experiences.¹⁵⁹ By recognizing the challenges that defenders face in the juvenile court system, and by

Support/Peer Provided Services Underlying Processes, Benefits, and Critical Ingredients, 27 PSYCHIATRIC REHABILITATION J. 392, 395 (2004) ("Peers who interact with peers with positive outcomes enhance their own sense of self-efficacy in dealing with their illness, its ramifications, and with the treatment system. Peers who have confidence in coping with their illness are more hopeful and optimistic about their future.").

154. See Huibers & Wessely, *supra* note 152, at 898 ("Diagnosis can provide a refuge that preserves self-esteem and protects from (or takes away) stigma and the feeling of guilt.").

155. See *id.*

156. See, e.g., Andrea Stockl, *Complex Syndromes, Ambivalent Diagnosis, and Existential Uncertainty: The Case of Systemic Lupus Erythematosus (SLE)*, 65 SOC. SCI. & MED. 1549, 1552 (2007) ("Getting a diagnosis of long-term illness can be devastating. However, not having a diagnosis may be even worse: most often, people who do not have a diagnosis for a long time suffer from a loss of integrity and feel a threat to their sense of dignity because nobody believes they are experiencing connected, or even indeed real, medical difficulties.").

157. See, e.g., Anna M. Byszewski et al., *Dementia Diagnosis Disclosure: A Study of Patient and Caregiver Perspectives*, 21 ALZHEIMER DISEASE ASS'N DISORDER 107, 112 (2007) ("Caregivers spoke of the fact that the disclosure process helped people to accept what was happening and to provide some understanding for their memory loss. For some the disclosure brought confirmation of what they suspected all along and a sense of relief and a desire to plan for the future.").

158. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 103-04 (1987) ("The existence of a law against sexual harassment has affected both the context of meaning within which social life is lived and the concrete delivery of rights through the legal system. The sexually harassed have been given a name for their suffering and an analysis that connects it with gender.").

159. See Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, in *FEMINIST LEGAL THEORY: FOUNDATIONS* 58, 61 (D. Kelly Weisberg ed., 1993) ("Men have had the power of naming our world and giving our words meanings. Naming controls how we group things together, which parts of things are noted and which are ignored, and the perspective from which we understand them. We also learn that 'things' that are named somehow count, and that things without names do not merit our attention."); see also VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* 31-38 (Harcourt, Brace & World 1957) (1929) (describing the process of naming as one in which we reclaim our own world and our own experiences).

acknowledging the difficulty of negotiating among competing interests, constructive steps may be taken toward remediation.

C. Provide Training

In order to encourage awareness and recognition of the problem—the culture clash—and to ensure that juvenile defenders are provided with the tools necessary to navigate the system, formal training inspired by the work of Bryant, Peters, and other scholars should be offered. Law schools should teach cross-cultural lawyering and theory both in the classroom as a doctrinal subject and in experiential and clinical courses in which live or simulated client representation is closely supervised and modeled.¹⁶⁰ Introducing the topic early in the law school curriculum and reiterating its value throughout the program is essential to convey the message that effective lawyering requires close attention to cultural norms and attitudes.¹⁶¹ Likewise, the state bar association should offer training programs for new lawyers that focus generally on strategies for lawyering across differences and, more specifically, that prepare defenders for the culture clash they are likely to experience in juvenile court. Advanced training should be provided to experienced juvenile defenders to reinforce the importance of remaining fluent in these practices and habits.¹⁶²

As with the impact of naming, the very fact of providing training on cross-cultural lawyering will give legitimacy and value to a topic that would otherwise be readily marginalized. On the micro level, such developments will improve the quality of client representation and enhance juvenile and criminal defense practice in an increasingly diverse legal profession; on the macro level, students and lawyers with this training will be better equipped to help shape

160. See, e.g., Bryant, *supra* note 13, at 36; Ascanio Piomelli, *Cross-Cultural Lawyering By the Book: the Latest Clinical Texts and a Sketch of a Future Agenda*, 4 HASTINGS RACE & POVERTY L.J. 131, 133 (2006); Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLINICAL L. REV. 369, 373-74 (2005).

161. See, e.g., *Cultural and Lingual Competence*, CUNY SCH. OF LAW, <http://www.law.cuny.edu/clinics/practices/Competence.html> (last visited Aug. 12, 2010) (“We explore the role that ethnicity, culture and language play in the attorney-client relationship To this end, we utilize a variety of approaches to build cross-cultural, cross-lingual competence”); *Community Building Workshop*, VILLANOVA UNIV. SCH. OF LAW, <http://www.law.villanova.edu/About%20VLS/Diversity%20at%20VLS/Inclusiveness%20Commission/Community%20Building%20Workshop.aspx> (last visited Aug. 12, 2010) (requiring that students read Bryant’s *The Five Habits: Building Cross-Cultural Competence in Lawyers*).

162. See, e.g., *Community Partnership Council*, R.I. OFFICE OF THE PUB. DEFENDER, <http://www.ripd.org/community.htm> (last visited Aug. 12, 2010) (“Public Defender employees completed several weeks of intensive [cultural diversity] training to better understand and service its diverse clientele.”).

and craft a more just juvenile court system.¹⁶³

D. Change the Culture

Lastly, advocates, policy makers, and legislators should not settle for the status quo in juvenile court but should brainstorm and take proactive steps to challenge the prevailing attitude that it is “kiddie court” and not important in terms of human resources, prestige, and outcomes.¹⁶⁴ Several modest but essential reforms to help accomplish this objective include the following: organize with state or local bar associations to make juvenile defense a practice specialty or a sub-specialty of criminal law that is recognized and certified by the state bar;¹⁶⁵ lobby for funding for in-house investigators, social workers, and clinicians to work alongside juvenile defenders, with the goal of developing holistic representation models for youth;¹⁶⁶ educate judges on the importance of achieving accurate fact-finding by regularly asserting that the juvenile’s need for services—whether social, educational, medical, therapeutic, or rehabilitative—does not justify wrongfully adjudicating her delinquent;¹⁶⁷ bolster the juvenile appeals bar and encourage the

163. Bryant, *supra* note 13, at 36.

164. See, e.g., STERLING, *supra* note 8, at 5 (“[A]cross the country, juvenile court suffers from a ‘kiddie court’ mentality where stakeholders do not believe that juvenile court is important.”); FLORIDA ASSESSMENT, *supra* note 65, at 53 (“Even the senior staff and managers of some public defender offices harbor thoughts that juvenile defenders are less than ‘real lawyers’ and view delinquency cases as ‘kiddie court.’”). But see Rubin, *supra* note 101, at 2, 12 (finding that juvenile defense has been “garnering more allies,” including the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, which has produced significant research on adolescent brain development, and the National Juvenile Defender Center, which trains defense lawyers, provides technical assistance, and works to improve juvenile indigent defense policy and practice).

165. See, e.g., N.C. Advocates for Justice & Juvenile Def. Section, IDS Office of the Juvenile Defender, *Electronic Newsletter*, N.C. ADMIN. OFFICE OF THE COURTS (Feb. 2010), http://www.aoc.state.nc.us/www/ids/Juvenile%20Defender/Newsletters/Feb_2010.htm (stating that Section leadership is seeking to make juvenile defense a specialty area recognized by the N.C. State Bar); *Specialty Areas*, TEX. BD. OF LEGAL SPECIALIZATION, <http://www.tbls.org/SpecialtyAreas.aspx> (last visited Aug. 12, 2010) (listing juvenile law as a specialty area in Texas).

166. See, e.g., *supra* notes 21-27 and accompanying text (discussing the holistic representation models developed at premier public defender agencies); see also, e.g., Clarke, *supra* note 21, at 426 (stating that defenders “engage in direct lobbying on specific criminal justice issues and organize public education campaigns”).

167. See Guggenheim & Hertz, *supra* note 5, at 583-85 (proposing that a judge other than the one presiding over the trial resolve pretrial suppression issues; a mechanism to allow for collective decision-making to ensure that evidence is evaluated fairly; and strategies to ensure that judges carefully consider lawyers’ arguments and maintain open minds until the conclusion of the trial); see also Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 234 (1984) (“One need not attack the foundations of the entire judicial function in bench

filing of ineffective assistance of counsel claims;¹⁶⁸ and challenge the notion that delinquency adjudications do not have a negative impact upon a child's future, as the collateral consequences can be severe as well as the stigma associated merely with appearing in juvenile court.¹⁶⁹

VI. CONCLUSION

As a mother of children who will soon be as old as my juvenile clients, I have found that my own identity as a parent can be another source of conflict in my defense practice.¹⁷⁰ At times, I, too, have been caught between acting as the hard-core, take-no-prisoners defense attorney and wanting to take account of what would be best for the child—as have many of the third-year law students whom I supervise in this work. There is no magic bullet for resolving this dilemma, but I have found that the Five Habits can help, whether it is through active listening and mindful communication with the client, reminding oneself not to rely on assumptions, or taking a short break. Yes, we are counselors, and yes, we must try to build meaningful relationships with our clients and counsel them to make decisions that are both legally savvy and objectively beneficial,¹⁷¹ but it is not always easy. When heavy caseloads, court pressure, and concerns regarding expedience take over, we operate on autopilot, facts are overlooked, and mistakes inevitably are made. Perhaps with recognition of the problem of the culture clash faced by juvenile

trials, however, to question whether, as a matter of policy, it might not be preferable to have a judge other than the one who actually tries the case make preliminary determinations of admissibility.”).

168. See generally Fedders, *supra* note 95 (finding that in practice, systemic and doctrinal barriers prevent juveniles from filing ineffective assistance of counsel claims, and that the appellate review that is granted fails to provide meaningful remedies). See also *State v. A.N.J.*, 225 P.3d 956, 967-68 (Wash. 2010) (reversing a twelve-year-old's criminal conviction based on ineffective assistance of counsel, and holding that the failure to give the juvenile an opportunity to consult with and confide in counsel without his parents present is a factor that may be considered when considering whether a plea was knowing, voluntary, and intelligent).

169. Fedders, *supra* note 95, at 773-74 (discussing the consequences that flow from the fact of a delinquency adjudication but are not part of the court-imposed disposition); Pinard, *supra* note 96, at 1114-18 (discussing collateral consequences of juvenile delinquency adjudications in the area of housing, employment, and education); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 634-35 (2006).

170. See *Juvenile Justice Clinic*, UNC SCH. OF LAW, <http://www.law.unc.edu/academics/clinic/jj/default.aspx> (last visited Aug. 12, 2010) (describing the clinic, how cases are assigned, and course requirements).

171. See Emily Buss, *The Role of Lawyers in Promoting Juveniles' Competence as Defendants*, in *YOUTH ON TRIAL* 243, 253-62 (Thomas Grisso & Robert Schwartz eds., 2000).

defenders, we can take proactive steps to change the culture of juvenile court and thereby lower the risk of wrongful convictions of youth.
