

Criminal Law Bulletin

May-June 2008

In re Gault at 40: The Right to Counsel in Juvenile Court-A Promise Unfulfilled

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On May 15, 1967, the United States Supreme Court decided the case of *In re Gerald Gault*, [FN1] a case seemingly destined to change forever and for better the way children accused of crimes are treated in state juvenile courts. In its opinion, the Court held that children were “persons” under the United States Constitution, and as such, had to be treated fairly when the state sought to deprive them of their liberty for the commission of criminal offenses. The history of the Gault case is well known and there is little need here for in-depth description. Suffice it to say that Gerald Gault, then fifteen years old, was charged with using language during a phone call that was lewd and indecent under the laws of Arizona. Notwithstanding the potential legal consequences of the language, the words were not particularly uncommon among adolescent boys. In the Court’s opinion, Justice Fortas described the words as being of the “irritatingly offensive, adolescent, sex variety.” [FN2]

Arrested and processed in a way that had changed little since the first juvenile court was created in Chicago in 1899, [FN3] Gerald was detained and then tried without notice of the charges against him. He had no lawyer to represent him. His case proceeded to verdict without testimony from either his accuser or from friendly witnesses. He was interrogated by the judge at the hearing, [FN4] convicted, and sentenced as a delinquent to Fort Grant Reform School until his twenty-first birthday. Because he was only fifteen years old at the time, the twenty-first birthday commitment meant he received a six-year sentence for the crime. [FN5] Had he been an adult convicted of the crime, Gerald would have been subject to a small fine and/or two months in jail.

Amelia Lewis, an Arizona ACLU lawyer, was outraged by the procedures used in the Arizona juvenile court-procedures that would never have been tolerated had Gerald been an adult. [FN6] She litigated habeas corpus petitions on Gault’s behalf in the Arizona courts and then, after enlisting the aid of other lawyers, [FN7] brought the case to the United States Supreme Court.

The Supreme Court, in an eight-to-one decision, ruled that children subject to juvenile court proceedings are entitled to notice of the charges against them, [FN8] to the assistance of legal counsel, [FN9] to confront and cross examine their accusers, [FN10] and to the protection of the privilege against self incrimination. [FN11] In the Court’s opinion, Justice Abe Fortas noted that the “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone” [FN12] and that “the condition of being a boy does not justify a kangaroo court.” [FN13] By applying the Bill of Rights to children, the Supreme Court changed the nation’s juvenile courts forever.

The Gault decision was both narrow and broad. The holding was broad since no prior Supreme Court case had ever held that rights enumerated in the U.S. Constitution applied to children. [FN14] In addition, the Gault ruling forced almost every state in the nation to change its procedures because few state juvenile courts were, at the time, appointing lawyers to defend children [FN15] or using adult criminal trial procedures in delinquency cases. The holding, however, was also narrow. It did not address pre- or post-trial procedures, was silent about other constitutional rights such as jury trials, speedy trials, and double jeopardy, and did not address appellate

rights. Nor did it address the nature of the lawyer's relationship with an adolescent client. [FN16] Moreover, the Supreme Court did not seek to eliminate or to diminish the nation's historical commitment to rehabilitative treatment as it imported some the Bill of Rights into the juvenile court. [FN17]

I. *Gault* 's Immediate Aftermath

As stated earlier, few states permitted lawyers to represent juveniles in delinquency cases at the time *Gault* was decided. [FN18] Thus, the *Gault* case held great promise for the fair treatment and the well-being of children. The exuberance experienced by lawyers and academics following the *Gault* decision produced numerous law review articles and standards setting endeavors. Writers speculated on how this revolution in juvenile court procedures would impact children. Sanford Fox wrote that “the eventual result [of the *Gault* opinion] will very likely be drastic changes in the design and function of juvenile courts.” [FN19] Professor B.J. George was even more expansive in his predictions.

Gault will produce sweeping changes in juvenile court practice. The Court's pointed warning that at some time and in some court a record must be reconstructed of what happened during the delinquency hearings will inevitably force juvenile courts to keep transcripts. ... Juvenile codes will have to be rewritten to distinguish clearly among preliminary hearings, waiver hearings to transfer the juvenile to an adult criminal court, adjudication, and disposition. The right to counsel will spill over into all these areas, and some day may reach juvenile court proceedings in neglect and custody cases. The notice requirements will bring into immediate focus the vague and indefinite statutory language defining delinquency or authorizing juvenile court intervention in family affairs. This is but a sampling of the questions certain to be litigated as a result of *Gault*'s deceptively simple due process requirements. [FN20]

Other commentators disagreed with this expansive view of *Gault*. Platt and Friedman wrote that “[a]lthough the *New York Times* greeted *Gault* as a landmark decision requiring ‘radical changes,’ it seems unlikely that the decision will generate anything more than a few modest alterations in the total juvenile court system.” [FN21] They, however, underestimated the power of the case.

In the aftermath of the ruling, states revised their juvenile codes to guarantee the right to counsel to those able to pay for a lawyer and to require appointed counsel for those who could not. Following the *Gault* opinion, several organizations began to draft standards to help lawyers, legislators, and judges implement new procedural guidelines for juvenile courts. The most comprehensive set was the twenty-two volume Standards for the Administration of Juvenile Justice drafted between 1971 and 1980 by the Institute for Judicial Administration and the American Bar Association (IJA-ABA Standards). Standards also were written by the American Corrections Association, [FN22] the National Advisory Committee on Juvenile Justice, [FN23] the National Council of Juvenile Court Judges [FN24] and other groups and organizations, all explaining and expanding the role of children's lawyers in juvenile court. The IJA-ABA Standards took a strong position on the right to counsel. Calling the right to counsel “essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings,” [FN25] the Standards told lawyers to make the “client's interest paramount.” [FN26] The Standards also gave the juvenile, rather than the lawyer or other adult involved in case, the responsibility for determining the minor client's interests and goals. [FN27]

The case also inspired a “Children's Rights Movement” dedicated to establishing, expanding, and preserving children's rights. It spurred the creation of a cadre of lawyers who specialized in representing children alleged to be delinquent. [FN28] Public defender agencies created specialized juvenile units in an effort to improve the

quality of representation provided to children. Advocacy groups such as the Children's Defense Fund in Washington, the Juvenile Law Center in Philadelphia, and the Youth Law Center in California were created to export this "Children's Rights Movement" to all parts of the nation. These organizations provided the technical assistance that states needed to revise their juvenile delinquency laws and other laws relating to children. When states resisted, lawyers from these organizations litigated a host of issues concerning the precise procedural contours of the Due Process Clause as they related to proceedings involving children. They also litigated substantive legal issues such the right to treatment and the quality of conditions under which children were confined. [FN29] In addition, law schools developed juvenile courts classes and clinical education programs to represent children and to supply new, young, energetic, and well-trained lawyers to these children's rights organizations. [FN30]

Umbrella organizations such as the American Bar Association's Juvenile Justice Committee, the National Association of Counsel for Children, and most recently the National Juvenile Defender Center (hereinafter, NJDC) were founded to support these lawyers and to help define the role that a lawyer should play when representing children subject to court proceedings. The United States Congress also assisted these efforts. In 1974, Congress passed the Juvenile Justice and Delinquency Prevention Act (the JJDP Act), [FN31] creating the Office of Juvenile Justice and Delinquency Prevention (OJJDP) [FN32] and providing money to states to improve their juvenile delinquency systems. [FN33] This law has been continually reauthorized and remains in effect today. All of these endeavors owe their existence in large measure to the case of *In re Gault*.

The revolution in juvenile law was not, however, universally welcomed. The *Gault* ruling regarding lawyers was met initially with hostility by prosecutors and social workers and by judges who routinely found ways to avoid appointing counsel for children. Notwithstanding the constitutional nature of the *Gault* opinion, studies in the 1970s and 1980s found that few children were represented by counsel. [FN34] The studies showed that many children frequently waived their right to appointed counsel and appeared alone and unrepresented in juvenile court. In some of the cases, parents who had the means to retain a lawyer for their children did not do so. In others, parents were poor but earned too much money to qualify for appointed counsel. Even when counsel was appointed, it appeared that judges and others in the system conveyed a message that the *Gault* case would not change "business as usual" in their courts. Court personnel sent a message, subtle or otherwise, that the lawyer should assert the child's "best interest" as they had done since 1899, rather than assert the child's rights as the *Gault* case contemplated. [FN35]

The role of the lawyer in juvenile delinquency proceedings has remained controversial and virtually standardless within the states for many years. The nature of the role became even more diffuse and confused as the right to counsel was extended to children alleged to be neglected or abused, to those subject to divorce and other civil court proceedings, and to those involved in special education and school disciplinary proceedings. Most players in the juvenile system agreed that the "best interest" model of lawyering controlled a lawyer's actions in these kinds of cases. *Gault*, however, seemed to demand a more traditional agency role between the lawyer and the juvenile client in delinquency cases. Academic debates about the lawyer's role have continued since the *Gault* decision, with one group arguing for the adult model of representation [FN36] and other groups arguing for a role of a different nature. [FN37] Nonetheless, by the mid-1980s, a consensus began to emerge among academics and prominent juvenile delinquency lawyers that the adversarial model of representation should prevail at all stages of the juvenile delinquency proceeding. [FN38] The Rules of Professional Conduct, for example, assume that juvenile clients are competent and that lawyers should play a traditional role in delinquency cases. [FN39] In addition, the two most comprehensive sets of recommendations about the role of lawyers, developed by academic theoreticians and lawyers for children, followed the lead of the earlier standard setting groups, and again instructed lawyers to let children clients direct the course of delinquency litigation and to represent them

in approximately the same way they would represent an adult in a criminal case. [FN40]

Despite the early empirical studies and the continuing philosophical disagreements about the role of counsel, the combination of advocacy, scholarship, and legislative action suggested that the right to competent effective representation had become the norm in the nation's juvenile courts. Between the late 1980s and 1995, however, few studies existed to confirm or repudiate this belief.

II. Assessing the Effectiveness of Counsel

The right to counsel derives its meaning from the Due Process Clause of the U.S. Constitution. To insure this right is enjoyed by all, the Constitution guarantees that if parents want the assistance of counsel for their child but are unable to afford it, the state, through a juvenile court judge, will appoint a lawyer. Of course, this right is effectuated only if parents able to pay for a lawyer choose to do so or if a poor child does not waive the right to appointed counsel. Moreover, the right has little meaning if the lawyer performs his or her duties in ways that fall short of the performance standards expected by the profession. Various bar association codes and standards of practice combine to define competence. A competent lawyer must be knowledgeable [FN41] and have adequate resources to support the advocacy. [FN42] Competent lawyers will "inform clients of their rights and pursue any investigatory or procedural steps necessary to [the] protection of their clients' interest." [FN43] They will interview their clients to determine their positions concerning the goals of the representation, [FN44] keep them informed about the progress of the case, [FN45] and counsel them concerning the various strategies that can be pursued. [FN46] Lawyers must interview witnesses and police officers knowledgeable about the case and pursue an investigation even if the client has acknowledged responsibility for the offense. [FN47] Counsel must be involved in the pre- and non-judicial stages of the case, [FN48] participate in intake decisions when possible, [FN49] actively pursue pre trial release or, at least, minimize the degree of pre-trial detention, [FN50] and attend to diagnostic and treatment regimes when warranted. [FN51] Should the case go to trial, counsel must present clear and compelling evidence on the child's behalf, [FN52] cross examine adverse witnesses, [FN53] call favorable witnesses when appropriate, [FN54] and present compelling arguments for acquittal. [FN55] If the child is found guilty, counsel must actively participate in the disposition process in the court [FN56] and in the treatment processes that follow after conviction. [FN57] Lawyers should also ensure that the appellate process is invoked for those children wishing to appeal their convictions. [FN58]

Because the client in juvenile court is a minor, counsel's representation is more expansive than that of a criminal defense lawyer for an adult. Lawyers for children must be aware of their clients' individual and family histories, their schooling, developmental disabilities, mental and physical health, and the clients' status in their communities in order to assess their capacities to proceed and to assist in their representation. Once those capacities are understood, the lawyer must vigorously defend the juvenile against the charges with that capacity in mind, and then prepare arguments to obtain rehabilitative treatment should the child be found guilty.

Although standard setting groups and legal commentators provided clear mandates for the competent practice of law, leaders of the delinquency bar began to believe that the quality of practice in juvenile courts was less than that originally envisioned by the Supreme Court when it wrote the Gault opinion. They saw high case loads, small budgets, low professional status, and inexperienced juvenile defenders combining to produce a low quality of defense practice in many state juvenile courts. As mentioned earlier, very few studies of juvenile defender practices had been completed prior to 1990, and those that had looked only at a limited number of counties or states. [FN59] Between 1993 and 1995, however, the American Bar Association, in conjunction with the Youth

Law Center of California and Washington D.C., and the Juvenile Law Center of Philadelphia, conducted the first national assessment of defender practices in delinquency cases. Funded by OJJDP, the project sought to “build the capacity and effectiveness of juvenile defenders through increasing access to lawyers for young people in delinquency proceedings and [through enhancing] the quality of representation those lawyers provide.” [FN60] Although the surveys distributed by the assessors were necessarily limited in number, more than 200 defender organizations responded to them. [FN61] Using site visits to ten jurisdictions, interviews, literature searches, surveys, meetings, and consultations, the assessors collected data concerning the general state of representation of youth and, more specifically, collected data concerning the quality of training, support, and other litigation needs of lawyers. They evaluated their findings in relation to the IJA-ABA Standards and subsequently issued a report called *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (A Call for Justice). [FN62] In it, they reported that while superb representation existed in some jurisdictions, it was “not widespread, or even very common.” [FN63] Moreover, the assessors “raised serious concerns that the interests of many young people in juvenile court are significantly compromised, and [noted] that many children are literally left defenseless.” [FN64] They reported that an under-funded juvenile defense bar with crippling caseloads, low morale, and inadequate access to experts, investigative resources, and support staff was the norm throughout the country. [FN65] Seventy-eight percent of the offices surveyed for A Call for Justice did not have a training budget for juvenile defenders; 50% had no training program for new lawyers; 48% had no on-going training opportunities. [FN66] In many of the jurisdictions surveyed, an extremely high percentage of youth routinely waived their right to counsel. The majority of juvenile court cases resulted in plea bargains, many of which were agreed to without the assistance of counsel and which were not understood by the children who accepted them. [FN67] In addition, the circumstances under which counsel was waived raised the possibility, and perhaps the likelihood, that the waivers were not made knowingly, voluntarily, or intelligently as required by the U.S. Constitution. [FN68]

Although the information provided by A Call for Justice was helpful to reformers, advocates in many states noted that the absence of individual state-based assessments made local reform difficult to achieve. When local advocates showed the conclusions from A Call for Justice to state administrators, judges, and legislators, they were often told, “That can't be us. Things are better here.” [FN69] In an effort to counter this response, the National Juvenile Defender Center began a new set of investigations to assess the quality of the juvenile defense system that looked at individual states rather than at the nation as a whole. Using funding from OJJDP and from state and private sources, assessors began visiting individual states in 2001 to compile data and impressions, conduct interviews, and perform observations to determine if and how the constitutional right to counsel was being implemented in the individual states. The assessors did not seek to cast blame on any individual or organization. Instead, their purpose in each state project was to provide data and analyses to state legislatures, lawyers, courts, and administrators in order to help them improve the quality of justice at the local level.

The methodology used in the studies provided both hard data and impressionistic data. Teams of experts, both national and state based, interviewed judges, prosecutors, defense lawyers, police officers, probation officers, court staff, children, and parents to gain insight into the workings of the various state juvenile justice systems. Teams visited juvenile facilities, conducted literature reviews, read statutes, rules, and reports, and observed court proceedings in various counties throughout the states they studied. They then issued findings concerning a child's access to counsel, the actual appointment of counsel, the effectiveness of appointed counsel, and the financial and other support provided to defense counsel. The assessors also tried to determine what barriers existed in each state that prevented children accused of crime from receiving high quality representation. They tried to understand the culture of the various state and county juvenile justice systems to determine wheth-

er the vision of representation contemplated by the Supreme Court in the Gault opinion and by the various standard setting organizations was truly in place within the state systems. In general, these state assessments have found that “juvenile indigent defense systems across the country are really not systems at all; instead they are, [for the most part,] chaotic, under-funded, disenfranchised, county-by-county hybrids of public defenders, appointed counsel, [and] contract attorneys, [supplemented by] the occasional law school clinical program or non-profit law center.” [FN70]

To date, sixteen studies have been issued. [FN71] Most have been received enthusiastically. The information that follows describes the state of practice as it was at the time the information was gathered between 2001 and 2007. Changes have occurred since then. These assessments prompted officials in some states to begin to mend their dysfunctional systems and substantial progress has been made in several states. Even though some states have significantly improved the delivery of legal services, the overall picture is far from exemplary. Moreover, conversations with lawyers at annual defender summits conducted by the NJDC provide at least anecdotal evidence that the conclusions reported in the surveys conducted thus far would be replicated if conducted in states that have not yet been studied. Thus, one can hypothesize that the state of juvenile representation, while improving in some places, remains unsatisfactory overall.

III. Right to Counsel in the Assessed States

One would assume that forty years after the Gault decision was rendered, every child would have an attorney when facing delinquency charges in state juvenile courts. The assessments demonstrate that at the time they were conducted, this assumption was not valid. Children not entitled to appointed counsel must rely on their parents to provide a lawyer; but not all parents will. Some parents will be angry at their child and support the court's imposition of sanctions because they want their child punished or because they believe the child needs help and will receive it through the court. [FN72] Some parents cannot afford to pay for a lawyer but nonetheless did not qualify for an appointment under state eligibility rules. Applications for appointed counsel in Ohio, for example, were based on a standardized form that neglected to consider personal information on an individual level. [FN73] Some states required parents to meet the federal poverty standard. [FN74] In Florida, juveniles only qualified for appointed counsel if their parents' financial status met 200% of the federal poverty standard. [FN75] In addition, indigency rules in Florida were so strict that having \$5 in the bank made a family ineligible for appointment counsel. [FN76] Moreover, Florida parents had to pay a \$40 fee just to apply for an indigency determination. [FN77] If parents were ineligible for appointed counsel, they had to pay for an attorney. Since most children charged with delinquent behavior are poor, paying legal fees will often result in other bills not getting paid. Faced with this reality, parents often sent their children to court without lawyers.

In other cases, parents of children eligible for the appointment of counsel did not avail themselves of the opportunity. In Maryland, parents had to go to the public defender office before the arraignment for an intake interview. In one Maryland county, 60% to 70% of the eligible parents never met with the public defender before the arraignment. [FN78] Aside from costs, language barriers, confusing official forms, and unhelpful personnel all combined to weaken the right to counsel.

The decision in Gault was limited to the adjudicatory stage of delinquency proceedings, and thus, did not guarantee a right to counsel at the pretrial or post-trial stages of the proceedings. In many cases, the pretrial detention hearing and the post-trial disposition hearing are the most critical hearings in the child's delinquency case. A judge's pretrial release decisions has far reaching consequences. For example, children who are released

pretrial are able to assist their lawyers during the investigation of the case, thereby increasing the chances for a successful outcome. Moreover, children who are able to go to school and otherwise adapt their behavior to the standards of the community while awaiting trial are generally less likely than detained children to be placed in secure facilities if they are convicted. Disposition hearings are often said to be the heart of a well-run juvenile court since that is where rehabilitation can be individualized and where treatment plans are implemented. Yet Gault did not require counsel at these stages.

Notwithstanding the limitations of the Gault decision, every state has a statute that guarantees the right to counsel. [FN79] Such statutory rights, however, do not ensure counsel will actually represent children at all critical stages of the juvenile delinquency proceeding. In most of the states studied by the NJDC, counsel was not present at the detention hearing, the first critical hearing in the delinquency proceeding. [FN80] Counsel's first appearance was more likely to occur at the arraignment or on the day of trial. In 93% of the cases observed in Maryland, for example, counsel was appointed at the adjudication hearing. [FN81] Attorneys were appointed at the arraignment in only one urban jurisdiction. [FN82] Observations in other assessed states indicated that day of trial appointments of counsel were a common practice. [FN83]

Assuming a lawyer is otherwise prepared to enter an appearance, the right to effective representation is thwarted when children waive their right to counsel. The right to counsel is a personal right. Citizens may waive that right and represent themselves. [FN84] Courts in adult cases, however, are reluctant to grant a waiver unless the accused understands the nature of the charge and its statutory requirements, the range of punishments, the possible defenses and circumstances of mitigation, and other facts necessary to defend against the charges. [FN85] It seems counterintuitive to believe children are capable of representing themselves in court if only a few adults can adequately do so. Moreover, the National Advisory Committee Standards [FN86] and the IJA-ABA Standards [FN87] specifically reject the idea that children can represent themselves in delinquency cases. Notwithstanding, the assessors reported that many children waived their right to counsel when it was offered. Although official statistics were seldom kept, interviews and observations conducted by the assessors in state after state reported this stunning finding. In Maryland, 40% to 58% of children charged with crimes waived their right to a lawyer, [FN88] and 90% to 95% did so in Louisiana. [FN89] Depending on the county, 50% to 75% waived the right in Florida. [FN90] Interviews and observations in Georgia, [FN91] Ohio, [FN92] and Kentucky [FN93] all revealed that more than 50% of the children charged in juvenile court waived their right to an attorney. In Washington, up to 30% waived their right. [FN94]

There are many reasons why waivers occurred. At one time, some Florida judges specifically asked children to waive counsel. They stopped this practice after the public defender threatened to sue; [FN95] but those same judges directly or indirectly pressured young people to waive the right to counsel during the time that the Florida assessment was being conducted. [FN96] When doing so, the judges highlighted the short-term benefits of a waiver, such as avoiding public defender fees or moving the case along quickly, but ignored the potentially serious repercussions, such as being suspended or expelled from school, losing driving privileges, and being incarcerated that might arise from a conviction or plea of guilty. [FN97] In some states, judges considered the child's need for a lawyer in relation to the nature of the charge. [FN98] Virginia judges recommended that the child get an attorney for serious charges, but rarely did so when the child was charged with misdemeanors. [FN99] Once the right to and need for counsel was waived, it was not raised again after the arraignment hearing. Thus, cases proceeded to completion without further inquiry into the need for counsel, even when the need was apparent. [FN100]

The method judges used for accepting a waiver of counsel also impacted the number of cases in which coun-

sel was waived. In Washington, for example, a survey showed that judges failed to discuss the voluntary nature of the waiver in 69% of the cases where waiver occurred. [FN101] The judge neglected to mention that counsel would be provided regardless of ability to pay in 72% of the cases. [FN102] The right to trial was not mentioned 79% of the times, [FN103] and the right to present witnesses was not explained 69% of the times. [FN104] Judges neglected to mention the right to cross-examine in 66% of the cases where waiver occurred, [FN105] and failed to mention the right to appeal in 59% of the cases. [FN106] In 24% of the cases, the judge did not address the child's ability to understand legal concepts. [FN107] Finally, the judge did not discuss the consequences of an adjudication of guilt in 72% of the Washington waiver hearings. [FN108]

Washington was not alone in these shortcomings. In Kentucky, most defenders believed that the judges' colloquies concerning the waiver of counsel were insufficient and lacking in thoroughness. [FN109] The same was true in Ohio. [FN110] Defenders in Indiana indicated that juveniles generally received inadequate and incomplete advice when waiver occurred. [FN111] Two-third of the defenders interviewed said that no meaningful questioning took place about whether the youth and/or the parents understood the legal concepts presented. [FN112] Contributing to the waiver decision in Indiana and in other states was the fact that children had no opportunity to consult with counsel prior to waiving the right. [FN113]

Often, and probably more often than not, children and their parents had a poor understanding of the waiver decision. Moreover, they discussed the benefits and detriments of waiving counsel not with lawyers but with others in the system who were either misinformed or who wished to obtain a waiver of counsel. Thus, the decision to appoint counsel was affected by non-lawyer participants such as probation officers and judges who had influence over the process and power over the family. [FN114] In Florida, staff of the Department of Juvenile Justice (the probation office) informed the prosecutor when they felt a youth should proceed with counsel. [FN115] The prosecutor then informed the public defender or judge. [FN116] In Indiana, parents discussed waiver with their child 25.8% of the time. [FN117] Judges discussed it with the child 24.2% of the time, [FN118] and the parole or probation officer provided the information 15.2% of the time. [FN119]

Each of these actors may have an interest in avoiding the appointment of counsel. Some probation and corrections officers believe a lawyer is an impediment to obtaining services or punishing "guilty" children. Guilt, in their minds, may be determined solely by virtue of the child's appearance in the court, or may be considered irrelevant in their assessments of the child's need for services. Judges often share that view and have courtroom efficiency concerns as well. Parents have little knowledge about the child's legal rights and may be considering financial or other interests when giving their children advice about legal assistance. Parents often believe waiver is the easiest way to proceed and children often share that belief. Many children who commit criminal acts believe that they will be set free if they admit to the crime. In Kentucky, for example, children interviewed often claimed that they waived counsel because they did not believe severe consequences would follow or because there was no lawyer on site to counsel them about the accuracy of their beliefs. [FN120] In one county in Ohio, the assessors found a practice that permitted parents and prosecutors to work out agreements before calling in defense counsel, leading to yet more guilty pleas without representation. [FN121] Indeed, in most of the states assessed, waiver occurred without prior assistance of counsel, thereby diminishing the possibility that the waiver was knowingly, intelligently, and voluntarily entered. [FN122] When a child does not receive critical legal advice prior to a waiver, the child's right to counsel becomes dependent on non-lawyers' views of the child's needs and desires, and on a skewed and improper understanding of the nature of a juvenile delinquency adjudication. These factors all increase the likelihood that a waiver of the right to counsel would occur.

Although these findings are based on interviews and observations in only sixteen states, they are chilling.

The Gault Court believed that a “juvenile needs the assistance of counsel to cope with the problems of law, to make skilled inquiry into the facts, to insist on regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child requires the guiding hand of counsel at every step in the proceeding against him.” [FN123] The NJDC assessments, however, reveal a stunning story of neglect or worse when it comes to the constitutional right to counsel. Except in rare instances, there appeared to be no “guiding hand” and little enforcement of the constitutional right to counsel in the states at the time they were assessed.

IV. Quality of Representation

A. The Definition of Quality

Defining high quality representation is not easy. Good lawyers know it when they see it; but when pressed to describe high quality representation, they often rely on the performance of tasks listed in professional standards and ethical codes rather than on the quality of the performance. Many factors influence the quality of a lawyer's performance. Some lawyers are just innately more talented than others. Some are new at the job and are not very accomplished, but will improve with time and experience. Others who once were very good may find their talent or energy diminishing with the passage of time and the acquisition of biases and prejudices that come from too much experience. Personal styles of practice vary, as do styles within organizations that employ lawyers. Large firms with great resources often, though not always, provide better lawyering than sole practitioners. Public defender organizations may provide training and thus, develop lawyers who will seem more accomplished than sole practitioners or lawyers from small practice groups. Possessing the ability to make good decisions matters; but in the practice of law, competent and successful lawyers often disagree on strategy or tactics. Two attorneys may both exercise good judgment and then offer good, but differing, analyses and strategies for the same legal problem. When they do, only one path will be chosen and no one will ever know whether the outcome would have been different if the other strategy or tactic had been employed. In most of life's endeavors, winning is considered an acceptable measure of quality; but that is not so with criminal and juvenile delinquency defense work where pleading guilty is the norm and losing rather than winning at trial is common.

The standards and professional codes give some guidance when one seeks to define high quality representation. The Rules of Profession Conduct (RPC) requires that lawyers be agents who work to secure the client's interests. [FN124] They also state that lawyers must be counselors and advisors [FN125] and advocates [FN126] who are competent, [FN127] diligent and zealous, [FN128] and without of conflicts of interest. [FN129] Those qualities presuppose a “requisite knowledge and skill in a particular matter,” [FN130] thoroughness and preparation, [FN131] and “commitment and dedication to the interests of the client,” [FN132] but with some degree of independence. [FN133]

The American Bar Association Standards assume that the following tasks are required in the defense of a client accused of a crime: interviewing clients; [FN134] investigating cases; [FN135] keeping clients informed; [FN136] advising the accused; [FN137] engaging in plea discussions; [FN138] giving opening statements; [FN139] presenting evidence; [FN140] examining witnesses; [FN141] giving closing arguments; [FN142] attending to post-trial motions; [FN143] investigating sentencing options; [FN144] and noting appeals when requested. [FN145] As discussed earlier, the IJA-ABA standards require even more from lawyers who seek to represent juveniles. The A.B.A.'s MacCrate Report on law schools and the profession [FN146] lists several fundamental skills that a competent lawyer must possess and employ on behalf of a client. The skills noted are problem solving, [FN147] legal analysis and reasoning, [FN148] legal research, [FN149] investigation, [FN150]

communication, [FN151] counseling, [FN152] negotiation, [FN153] litigation and alternative dispute resolution, [FN154] organization, [FN155] and ethics. [FN156] Given these guidelines, one would assume that an effective lawyer would do all of these tasks and do them well.

Court opinions discussing lawyer performance most often focus on incompetence rather than competence. Judicial opinions describe the standard for ineffective assistance of counsel as a performance that falls below an objective standard of reasonableness. [FN157] Because of the number of tasks a lawyer performs, and because hindsight can skew one's assessment of quality, courts will seldom second guess a lawyer's tactical choices when determining reasonableness. [FN158] Even when the performance falls below that which is objectively unreasonable and can therefore be called incompetent, courts will provide a remedy only if there is a reasonable probability that but for counsel's ineffectiveness, the result at trial would have been different. [FN159] Few appeals based on ineffectiveness of counsel are successful because proving the possibility of a different result is very difficult to do.

Considering the factors listed in the standards described above, one can say that high quality representation is defined by the tasks a lawyer undertakes for a client and by whether those tasks are performed reasonably. Quality will not, however, be defined by the success of the strategy or by the result a lawyer obtains for a client. If a lawyer performs all of the tasks noted above with knowledge, skill, diligence, zeal, and loyalty, and performs them in a way that is considered reasonable according to the professional norms of acceptable practice, the lawyer is competently representing a client. Unfortunately, the assessments revealed that when the quality of practice in the studied states was measured against these professional standards and exhortations from the bar, adequate representation for children in juvenile delinquency cases was the exception rather than the rule.

B. Findings from the Assessments

In determining the quality of legal representation in juvenile court at the time of each state's assessment, the assessors reviewed the timing of the actual appointment of counsel, whether the lawyers investigated their cases and were prepared for detention hearings, trials, and disposition hearings, and whether the lawyers' performances at the various hearings met the standards of competence.

1. Time of Appointments

The Gault opinion required that counsel be appointed only at the trial stage of delinquency proceedings. Because the opinion is silent as to other stages of the proceeding, one might argue that the United States Constitution requires the appointment of counsel only between the commencement of the trial and the rendering of a verdict. A court strictly interpreting Gault could hold detention hearings, arraignments, and disposition and post-disposition hearings without the presence of counsel. In adult cases, the Sixth Amendment to the United States Constitution [FN160] requires the appearance of counsel at all critical stages [FN161] of an adult criminal prosecution if the defendant is facing incarceration. [FN162] The need for counsel in adult criminal cases is so well recognized that it is hard to imagine that anyone would ever again question it. Thus, it is not surprising that legal commentators believe that the Due Process Clause, not to mention common sense, similarly requires the assistance of counsel at all stages of a juvenile delinquency proceeding. Indeed, even in the absence of constitutional rulings by state and federal courts, most state statutes provide for such a right. [FN163]

Notwithstanding court rulings and state laws, the assessments in the states studied show that counsel was seldom appointed at arraignments or detention hearings. In Maryland, public defenders were generally appointed at arraignment in only one county and were hardly ever appointed at the first hearing in other counties. [FN164]

Maryland judges claimed they notified parents at these early hearings of the child's right to have counsel during the proceedings, but also claimed that more often than not, parents did not meet the income eligibility requirements for the appointment of counsel. [FN165] In cases where public defenders were appointed, office rules required that parents and children appear at the public defender office for an intake interview within ten days of arraignment; but many parents did not do so. [FN166] As a result public defenders appeared in only 40% of subsequent detention hearings. [FN167] In 93% of the Maryland jurisdictions, the lawyer first appeared to represent the child at adjudication hearing, [FN168] and terminated representation after the disposition hearing. [FN169] In Montana, lawyers were not appointed until after the initial hearing. [FN170] In Florida, attorneys could be appointed at detention hearings but fees and eligibility guidelines discouraged parents from seeking counsel [FN171] and limited the number of children eligible for appointment. In Virginia, clients were advised of their right to a lawyer at arraignment; but lawyers were often absent from that hearing and only contacted their clients within the next forty-eight hours. [FN172] In Ohio, lawyers seldom appeared before the adjudication hearing. [FN173] In Pennsylvania and in other states with large urban centers, the lack of lawyers who spoke Spanish or Asian dialects further minimized the number of attorneys available at the early stages of the delinquency cases. [FN174] In only a few states were attorneys appointed at the first hearing. [FN175]

The time of appointment is critical in delinquency cases. A competent lawyer who is appointed at the first judicial hearing will understand the factors that the court may legally consider when making pretrial release and detention decisions. Zealous advocacy at the detention hearing can affect the judge's decision and provide benefits that continue beyond the hearing. Early appointments permit time for lawyers and clients to establish the trust relationship so necessary to successful lawyering. Lawyers who hear a judge's concerns about the child's adjustment in the community will be better prepared to maintain the child's pretrial release status and to maintain the child in the community at the disposition hearing should the child be convicted. Early appointment also permits early investigation. All lawyers know that witnesses' stories change as time passes. Memories fade and can be artificially enhanced by conversations with others about the case. Getting information from a client at an early stage and finding and interviewing witnesses quickly all enhance the quality of representation and the likelihood of a successful outcome. Notwithstanding, the assessments determined that counsel was appointed at the child's first hearing in only a few states. [FN176] When appointments at the first hearing did occur, cases were often passed down to other lawyers at a later time. In Maine, for example, a lawyer appeared at the initial hearing for that hearing only and had no duty to assure the continuing appointment of counsel. As a result, children who were detained often had no contact with a lawyer until the next court hearing. [FN177] When an appointment is limited in this way, it eliminates the good that can be derived from an early appointment and hampers the establishment of a trusting relationship between client and counsel. [FN178]

2. Investigation and pretrial preparation

As noted earlier, if a lawyer performs all of the tasks associated with investigation and preparation with knowledge, skill, diligence, zeal, and loyalty, and performs them in a way that is within the general norms of acceptable practice, the lawyer is competently representing a client. The assessments conducted thus far show that at the time they were done, competent lawyering was the exception rather than the norm in juvenile court of those states. Lawyers seldom investigated their cases, filed pre trial motions, or prepared for trial. Maryland defense lawyers routinely met their clients just before adjudication hearings at the courthouse. [FN179] Ninety percent of the juveniles interviewed reported that they did not know the names of their lawyers and the majority of counsel did not visit their clients. [FN180] In Indiana, over one-half of the children interviewed felt they did not have adequate time to consult with their lawyers. [FN181] In Florida, lawyers failed to communicate meaningfully with clients before hearings and often conducted rushed conversations about their cases in the halls of

the courthouse, thereby compromising their clients' confidentiality and limiting the amount of useful information they obtained. [FN182] Again in Maryland, most counsel did not investigate the underlying facts of the case or the educational, mental health, and other social history that was needed to engage in adequate representation. [FN183] In Virginia, the majority of defenders did not contact their clients and did not perform the necessary investigation into the child's background, family history, or medical and educational history. [FN184] Georgia lawyers made it a practice never to initiate contact with the clients. Instead, they put the burden on the child to contact them. [FN185] In Kentucky, one-third of the lawyers interviewed did not meet their client until the day of adjudication and one-half said they did not meet with them until disposition. [FN186]

In Pennsylvania, 99% of attorneys interviewed said they filed pre-trial motions "sometimes," "rarely," or "never." [FN187] They also rarely requested exhibits, photographs, or information about identification procedures in advance of the trial or otherwise sought discovery. [FN188] In Louisiana, there was almost a complete lack of investigation. Lawyers did not even keep their own files on their cases. [FN189] In Georgia, defense attorneys rarely conducted investigations, visited crime scenes, tracked down witnesses or retained experts. [FN190] Somewhat surprisingly, they also rarely interacted with the probation officers who were largely responsible for gathering the information. [FN191] As a result of this limited preparation, motions were rarely filed. [FN192] Georgia defenders relied on prosecutors for discovery, and did not file suppression motions or motions to dismiss because the cost to employ expert testimony for these issues came out of their own pockets. [FN193] Motions practice was essentially nonexistent in some Kentucky counties. The lawyers who were interviewed claimed that a lack of experience was the primary reason. [FN194] In Texas the court culture encouraged attorneys to seek guilty pleas from their clients. Attorneys who did not convince their clients to plead guilty were seen as incompetent or interfering with the court. [FN195]

In the jurisdictions studied, as in most courts in America, cases were usually resolved by pleas of guilty rather than by trial. [FN196] Perhaps that phenomenon caused lawyers to appear in court unprepared, uninformed, and ill equipped to advocate on behalf of their clients. [FN197] The fact that most cases plead out, however, does not and cannot justify inadequate lawyering. Although pleas of guilty are and will remain a legitimate part of any juvenile court, no client should enter a plea of guilty if he or she is innocent [FN198] or if there are legal defenses to the charge. [FN199] The prosecution's seemingly strong evidence against a child is often compromised. Confessions, especially from young people charged with serious offenses, have been shown to be coerced or nonexistent. [FN200] Identifications by victims, no matter how certain, are often wrong. [FN201] Drug laboratories have been shown to be deficient, thus, calling into the question the analyses of alleged illegal substances. [FN202] Cases must be thoroughly investigated and appropriate motions must be filed or at least seriously considered before a client enters a plea of guilty. [FN203] Entering a plea of guilty or going to trial without pretrial investigation and consultation are both ineffective. Moreover, forcing a child to plead guilty in order to obtain services that a lawyer, judge, or parent believes are necessary is inappropriate and violates the child's right to counsel and the Rules of Professional Conduct. [FN204] Therefore, lawyers must have serious and detailed conversations with their child clients about the merits of the case, the possible outcomes stemming from various tactical choices, and the client's options before a plea of guilty is entered. [FN205] Unfortunately, these conversations seldom occurred in the states assessed.

The assessors have told a scandalous story about the kind and quality of lawyering that took place between the time counsel was appointed and the time the verdict was entered in the states assessed. Opportunities were lost, cynicism reigned, justice was denied, and children suffered.

3. Dispositions

The Supreme Court has never abandoned the historical goals of the juvenile court. From the Gault case through *Schall v. Martin*, [FN206] the Court has continued to endorse the rehabilitative function of the juvenile court. The Justices have continually espoused the belief that the dispositional phase of the juvenile court exists to do what is in the child's best interest and to prepare him or her to be a constructive adult. State juvenile justice statutes all espouse the same goals. [FN207] As a result, one would think that the level of representation at and in preparation for disposition hearings would be exemplary. The assessments suggest the contrary. At the time of the assessment, Maryland lawyers rarely presented witnesses or proffered alternative treatment plans to the court during disposition. [FN208] Attorneys rarely obtained educational records, mental health records, or other information from the community about their clients for the disposition hearing. [FN209] In 73% of jurisdictions lawyers permitted and judges encouraged clients to go directly to the disposition hearing following a plea or verdict of guilty. [FN210] Dispositions were set for two weeks after the adjudication in only four counties. [FN211] Defenders in some North Carolina counties reported that up to 70% of cases went to disposition hearings immediately after an adjudication, thus eliminating the possibility that supplemental information could be found to assist the client. [FN212] In Pennsylvania, the assessors concluded that most of the defense attorneys they interviewed or observed did not effectively protect their client's rights or advocate for their treatment needs, and rarely challenged the probation officers' recommendations. [FN213] Perhaps this lack of effective advocacy resulted from the fact that 94% of the Pennsylvania attorneys for juveniles did not have access to independent investigators or social workers. Consequently, it was difficult for the lawyers to find and offer creative disposition alternatives. [FN214] Fifty-two percent of the lawyers rarely or never prepared witnesses for the disposition hearing and only one-third investigated alternative placements. [FN215] Twenty percent of the Pennsylvania lawyers reported that they did not review court-ordered evaluations or assessments, and most juvenile defenders were unfamiliar with treatment programs. [FN216] Similarly, there were very few contested dispositional hearings in Virginia juvenile courts, and the hearings in some courts were reported to last no longer than ten minutes. [FN217] There was a heavy reliance on the probation department to gather information on the child's background and personal history because Virginia attorneys had limited resources with which to gather this information independently. [FN218] Louisiana public defenders frequently waived the right to a continuance before the disposition hearing so the hearings frequently took place without an effective independent investigation. [FN219] Thus, the lawyers proceeded without an alternative sentencing plan. [FN220] Georgia defenders resigned themselves to the will of the court. They saw themselves as ill-equipped to properly research disposition alternatives, even when judges indicated a willingness to consider them. [FN221] Montana lawyers were similarly discouraged because contesting disposition recommendations made by a probation officer usually proved futile. [FN222] Very few Texas attorneys presented evidence at disposition hearings; instead they relied on the recommendations of probation officers. [FN223] The Texas defenders claimed that this reliance was due to the fact that they were not compensated for dispositional work. [FN224] They believed that probation officers acted in the best interest of the child and that there were not enough alternatives for which to advocate anyway. [FN225] Dispositional hearings in Texas were usually informal and lasted under ten minutes. [FN226] In Kentucky, only a few attorneys were observed raising objections to the contents of the probation officers' pre-disposition reports. [FN227] Defenders in Ohio were, like their counterparts in other states, unaware of options and alternatives available to each client. [FN228] Even when attorneys were present for disposition, they had minimal impact as the court relied upon the probation officers' findings and recommendations. [FN229]

Post-disposition advocacy in the trial court was practically non-existent at the time of the assessments in all of the states and was even less effective than that at a disposition hearing. Representation for appellate purposes was also rare. In Pennsylvania, 15% of conflict counsel [FN230] ended their representation of the client at the

disposition hearing without a formal waiver of the right to counsel by the child. [FN231] Most attorneys were unprepared to deal with probation violations, as revocation varied by county. [FN232] Only 6% contested adverse recommendations at formal revocation hearings. [FN233] A mere 2% interviewed the juvenile and only 1% interviewed the probation officer. [FN234] Sixty-eight percent did not file a single appeal in 2001 and 23% filed less than five appeals. [FN235] Pennsylvania attorneys were also unprepared to deal with incarcerated youths. Although there was a mandatory review of the case to keep track of juveniles in residential facilities, only 9% of the lawyers in the forty Pennsylvania public defender offices confirmed that they interviewed clients before these hearing. [FN236] Only 26% of the defenders reviewed the treatment reports and only 15% routinely interviewed probation officers. [FN237] Generally speaking, Pennsylvania attorneys did not monitor their clients' progress within facilities. [FN238]

Most Indiana attorneys believed that their responsibility to their clients ended after the disposition order was entered. [FN239] As a result, 56.8% of juveniles interviewed said they were not told of their right to appeal, [FN240] and 77.1% said they did not discuss any possible issues on appeal. [FN241] In Ohio, attorneys were not even sure whether they had an obligation to provide post-disposition representation. [FN242] Forty-one percent of those interviewed claimed representation ended after the disposition hearing while 49% believed that representation continued until the disposition order was fulfilled. [FN243] Most Georgia attorneys did not visit children at detention centers, and those who did were likely to be retained, not appointed. [FN244] Representation in Georgia typically ended after disposition, so it was rare for an attorney to ask the court to modify the disposition order for a client. [FN245] Parents concerned about an incarcerated child's well-being typically initiated modification requests themselves. [FN246] These parents were usually guided by probation officers and not by the child's attorney. [FN247] In Montana, there was little contact between attorneys and clients following disposition. [FN248] In one county, only one attorney continued to keep in contact with clients. [FN249] In another county, only one attorney reported ever filing an appeal. [FN250] Post-dispositional access to counsel was also limited by the distance between detention centers and the counties wherein the cases were adjudicated. [FN251] Post-disposition advocacy was diminished because judges sometimes refused to cover travel expenses. [FN252] Texas attorneys were not paid to follow up on their work so there was little incentive to contact their clients after the disposition hearing. [FN253] Thus, there was little oversight of juvenile facilities by lawyers and no way to ensure that the children committed to them were properly treated. [FN254]

Given that so many children plead guilty and given that the odds of being found not guilty in a judge trial is small, one would think that lawyers would consider disposition and post-disposition advocacy main parts of their representation. Certainly, state court and Supreme Court decisions speak of disposition as the heart of the juvenile process and most players in the juvenile court system believe it to be so. Standard setting organizations believe that "the active participation of counsel at disposition [and post-disposition] are often essential to [the] protection of clients' rights and to the furtherance of their interests. In many cases, the lawyer's most valuable service to clients will be rendered at this stage of the proceedings." [FN255] Because of the significance of disposition, the IJA-ABA Standards require that counsel gain access to all reports, interview pertinent witnesses, become familiar with dispositional programs, and conduct an independent investigation into the client's social, family, educational, medical, psychological and psychiatric circumstances. [FN256] Moreover, counseling clients is a crucial responsibility that should continue through all post-disposition and appellate hearings. [FN257] Although case law concerning the constitutional right to an attorney after a sentence is imposed in adult court varies from state to state, [FN258] it seems incongruous that such a right should not exist in a rehabilitative court that has criminal justice overtones. Rehabilitation is an ongoing process and many courts still issue twenty-first birthday commitments. Leaving children and parents alone after disposition to maneuver through

the bureaucratic morass of state corrections administrations and to bring the existence of mistreatment or the failure to implement disposition plans to the courts' attention is cruel, foolish, and dangerous. Nonetheless, the assessments suggested that lawyers in most of the states surveyed were not even close to providing adequate representation.

V. Causes of Poor Representation

It is not my purpose to disparage the attorneys who practice in juvenile courts. The assessments demonstrated that there were very good attorneys practicing in the courts of the states studied. There were also other attorneys who might render quality services under more favorable circumstances. Nonetheless, the assessments revealed that children's lawyers were not consistently providing quality representation. It would be easy to lay the blame on the lawyers and suggest that the states and the bar associations should better police the practice of law; but the assessments point out that several systemic factors significantly contributed to the low quality of legal representation. The most commonly mentioned were lack of training, inadequate resources, and heavy caseloads. These factors, all intertwined, were further exacerbated by perceptions of judges, prosecutors, and probation officers about the proper role of defense lawyers in the juvenile court.

Caseloads

Attorneys' caseloads in juvenile court were generally so high that adequate representation is virtually impossible. The National Advisory Committee on Criminal Justice Standards and Goals recommended that lawyers for juveniles undertake representation in no more than 200 cases per year. [FN259] In Maryland, caseloads in some counties exceeded 360 cases per year at the time of the assessment. [FN260] In Pennsylvania, excessive caseloads prevented lawyers from having meaningful contact with clients. [FN261] Although it was difficult to get accurate statistics since offices did not track the numbers [FN262] and because caseloads varied by attorney, Pennsylvania defenders reported that their caseloads ran higher than 620 cases per year. [FN263] The number of cases these lawyers carried was so high that many experienced burnout early in their careers. [FN264] In Louisiana, the estimated caseload far surpassed recommended limits. Some attorneys took on over 800 juvenile cases per year. [FN265] Although the average caseload rested somewhere between 150 and 300 cases per year, caseloads for attorneys in some districts were well over 1,000 cases per year when their adult criminal cases and private practice caseload were considered. [FN266] These high caseloads led to the inability of most public defenders to have any meaningful contact with their clients. [FN267] For example, 40% of incarcerated children in Louisiana said they had never met with a lawyer. [FN268] Twenty percent said their meeting with the lawyer lasted five minutes or less. [FN269] Only 15% indicated the meeting was at least thirty minutes in duration. [FN270] Ninety percent of adjudicated children did not have any contact with their lawyer since their incarceration. [FN271]

Washington defenders reported that their caseloads ranged from 360 to 750 cases per year. [FN272] Full time defenders averaged close to 400 cases per year and part-time defenders had proportionately higher caseloads. [FN273] Eighty-six percent of Washington defenders who participated in the survey reported they did not place a cap on the number of cases they accepted. [FN274] The defenders in Washington cited the high caseloads as a major factor contributing to the low quality of representation for juveniles. [FN275] There were no mandatory caseload limits for juvenile public defenders or court appointed attorneys in Virginia. [FN276] Lawyers interviewed indicated that their caseloads ranged from 679 per year in rural areas to as many as 1500 a year in urban jurisdictions. [FN277] Court appointed lawyers in urban jurisdictions with a separate public defender

office indicated that they handled between 200 and 500 cases. [FN278] The Virginia lawyers reported that high caseloads impeded their ability to adequately represent their clients. [FN279] Lawyers across the state of Georgia reported excessive caseloads. Part-time lawyers often carried the highest burden, with some lawyers estimating caseloads of more than 900 cases per year. [FN280] On average, a part-time lawyer was allotted between 200 and 350 cases, but these numbers easily increase to well over 1,000 cases per year when the attorney's private practice was factored in. [FN281] Georgia lawyers blamed the heavy caseloads for their lack of meaningful contact with clients and for the low quality of representation. [FN282] More than 80% of the Kentucky attorneys interviewed believed their caseloads limited their ability to represent their clients effectively. [FN283] Caseloads between 200 and 500 per year were found in one-third of the jurisdictions. [FN284] About two-thirds of the Kentucky jurisdictions reported caseloads of between 500-1000 per year, or even higher. [FN285]

Large caseloads were a severe detriment to the quality of practice. Many of the states assessed had caseloads that were staggeringly high. These caseloads far exceeded the NAC recommendations of 200 juvenile cases per year for each lawyer. [FN286] Staggering caseloads make it impossible for lawyers to perform even the most basic tasks associated with effective lawyering. Clients were not consulted, investigations did not take place, motions were not filed, allegations were not contested, treatment plans were not developed, and unnecessary transfers to adult courts occurred. Clients remained incarcerated for extended periods of time, services were not provided to clients, and clients never had viable defenses presented. Moreover, lawyers had no time to attend training programs in order to improve their skills.

There is a limit to the number of cases that even well organized lawyers can maintain. When caseloads rise above that number, children will suffer. The IJA-ABA Standards say that "it is the responsibility of every defender office to ensure that its personnel can offer prompt, full and effective counseling and representation to each client. A defender office should not accept more assignments than its staff can adequately discharge." [FN287] Assigned counsel plans should also have an adequate pool of lawyers to handle cases competently. [FN288] Most defense lawyers aspire to high quality practice; but defender agencies do not act in a vacuum. If state legislatures do not provide funds for a sufficient number of lawyers, caseloads will rise as judges continue to make appointments. Judges will continue to make appointments despite protests from the defender agencies about insufficient staff, and with the often unexpressed knowledge that lawyers cannot adequately manage the added burden. In the end, clients will be forced to endure inadequate representation. The assessments show, without a doubt, that children in the studied states endured poor representation as a consequence of the large caseloads.

Training

Given the high caseloads children's attorneys carried, it is not surprising that few lawyers in the assessed states received adequate pre-representation or in-service training at the time of the assessments. No county in Pennsylvania had minimum attorney performance standards. [FN289] Only 21% of their public defender offices provided criminal law training program for new attorneys. [FN290] Eighty-eight percent had no office manual, [FN291] and 83% had no training budget. [FN292] They reported that they had difficulty presenting evidence and had little knowledge of the relevant law because they were poorly trained. [FN293] Louisiana did not require training for defenders in juvenile court partly because there were no funds allocated for attorneys to attend CLE classes. [FN294] There was a two-day training seminar provided by the Louisiana Public Defender Association, but it was optional and did not include juvenile specific training. [FN295] Comprehensive training was not available to juvenile defenders in most counties in Washington. [FN296] The absence of training about legal procedure and ethics became apparent as lawyers seldom filed motions or performed other necessary tasks.

[FN297] Only three Washington counties provided training for new attorneys, [FN298] and only four counties had training specific to juvenile defense. [FN299]

There were no standards to govern or ensure the quality of juvenile defense in Virginia. [FN300] Lawyers there believed that the failure to set standards was a major factor in the substandard level of representation in the state. [FN301] Although defenders wanted training programs, the state's lack of available funding was a major barrier. [FN302] The Public Defender Commission did pay for defenders to attend training seminars, but stipends were sufficient to cover only the minimum number of hours necessary to maintain bar membership. [FN303] Legal training was almost nonexistent in Texas at the time of the assessment, with only one jurisdiction providing training sessions. [FN304] In that county, the juvenile judge hosted a luncheon twice a year with specific topics relating to juvenile court, but attendance was optional and few attorneys attended. [FN305] Legal training was relatively nonexistent in Ohio at the time of the assessment. [FN306] Although the Ohio Association of Criminal Defense Lawyers made juvenile-specific training available during the two years prior to the assessment, attendance was sparse because of little funding and publicity. [FN307] When surveyed, the majority of Ohio attorneys reported that training opportunities were inadequate. [FN308] Lawyers thought that training in detention advocacy, special education, appeals and extraordinary writs, transfer hearings, and conditions of confinement were especially lacking. [FN309]

Few lawyers, except perhaps those who participated in a juvenile justice clinical program, are prepared by their law schools to represent children accused of crime. Many lawyers practicing in the juvenile courts are new, often fresh out of law school, and are experiencing their first cases. Others supplement their civil or adult criminal practices by taking juvenile delinquency cases. Lawyers who are used to practicing in adult criminal courts soon learn that representing juveniles is not exactly the same. Every day, behavioral and developmental scientists report more discoveries about the complexities of the adolescent brain. [FN310] Thus, lessons learned in adult practice do not always translate easily into juvenile court. Learning the overall culture of the juvenile court may also be perplexing. Service programs come and go and agencies change the way they provide services. The law changes often as legislators “crack down” on juvenile offenders, and the court rules, procedures, and customs constantly undergo revision. No lawyer can learn to provide, or can continue to provide, effective representation to adolescent clients without a serious training regime.

Many state bar associations recognize the need for in service training and require that lawyers take continuing legal education courses in order to retain their licenses. These courses, however, seldom concentrate on the needs of lawyers for children. The IJA-ABA Standards recognized that training is essential to the effective assistance of counsel. The standards encouraged the courts, defender agencies, and the bar to provide formal and regular training in “legal and nonlegal subjects relevant to representation in juvenile and family courts.” [FN311] They also called for “careful and candid evaluation” of the lawyers who represent children so that their performances can improve. [FN312] Yet “formal and regular” training for lawyers was rare in the states at the time they were assessed. As a consequence, effective lawyering for children was rare as well.

Resources

The lack of resources was a major cause for the poor quality of representation in all of the states surveyed. Maryland attorneys considered all of their resources, including their library and offices, to be subpar. [FN313] The low salaries for Maryland public defenders at the time of the assessments, salaries lower than other state professionals, resulted in a high staff turnover and the employment of a large number of inexperienced lawyers. [FN314] The same was true in Louisiana. [FN315] In Pennsylvania, 66% of all public defenders had fewer re-

sources than did the prosecutors they challenged in court. [FN316] Seventy-six percent had no access to investigators or experts. [FN317] The lack of resources prevented hiring expert witnesses to offer testimony on matters such as competency or the amenability to treatment. [FN318] Salaries for Pennsylvania public defenders were one-half of the salary of a state prosecutor. [FN319] Funds available for indigent defense in Florida were uneven because many counties did not supplement the state's base funding for defender salaries. [FN320] In addition, resources for juvenile defenders varied greatly from one circuit to another because each circuit's chief public defender organized the office and allocated staff according to his or her own sense of need. [FN321]

Part-time attorneys in Louisiana had to supply their own resources and thus, resources were generally insufficient to meet the need. [FN322] Attorneys in Texas faced the same problem. [FN323] Louisiana attorneys struggled to supply necessities as simple as office space, telephones, computers files, and clerical support. [FN324] Most attorneys did not have their own investigators, paralegals, or social workers to perform independent fact investigations or to prepare disposition plans. [FN325] Low reimbursements rates made retaining such services impossible. [FN326] Moreover, the low status of public defenders in the eyes of legislators and the Bar allowed glaring differences to exist between defender resources and the resources available to prosecutors in the same jurisdictions. [FN327]

In Washington, only 21% of defenders interviewed said they frequently used investigators and the frequency of use varied by county. [FN328] At the time of the assessment, Virginia had one of the lowest compensation rates for court appointed attorneys in the country. [FN329] Many expenses, such as support staff, investigators, phone, travel, rent, and copying expenses were not taken into consideration when determining payments to appointed attorneys. [FN330] Court-appointed attorneys were paid \$75 per hour for in court time and \$50 per hour for out of court time, with maximum fees determined by the type of charges filed. A statute allocated a maximum of \$120 per charge to each juvenile case, but the court was only funded for \$112 per charge. [FN331] Juvenile judges had no discretion to override the cap on attorney fees, even for complex cases. [FN332] Many of them, however, felt that lawyers would perform more comprehensive reviews of their cases if their fees were not capped. [FN333]

Flat fees and caps also hampered performance in Texas, [FN334] Ohio, [FN335] and Montana. [FN336] Georgia attorneys, like their counterparts in the other states surveyed, believed that the biggest problem facing indigent defense services was an inadequate level of funding. [FN337] Attorneys supplemented their inadequate reimbursements in the juvenile court by engaging in private practice, thus devoting less time to their child clients. [FN338] Only 42% of Ohio attorneys said they had adequate computer and word processing capability, and only 25% had secretarial assistance. [FN339] Only about half had access to Westlaw or Lexis, and a little more than half had access to library text. [FN340] Rural counties in Ohio and in most other states fared worse than their urban counterparts. [FN341]

The practice of law is complex and demanding. The practice of juvenile delinquency law can be more so because of the intricate family and social dynamics that affect a case and because of the sometimes limited competency of juvenile clients to understand legal proceedings. Moreover, representing children combines the complexity of criminal law with the rehabilitative ideal of the juvenile court. "Competent representation cannot be assured unless adequate support services are available." [FN342] Unless adequate financial resources are available to defenders, salaries will remain low and turnover will remain high. Lawyers will continue to work with inadequate supplies and poor investigative and dispositional services. Case loads will remain high, training will be sporadic or non-existent, and legal support services will not be available. [FN343] Obtaining sufficient funds, however, is not easy. State legislators win elections by being tough on crime and criminals, not by being solicit-

ous of the alleged offenders' attorneys and their needs. As a result, public defender services have always been a low priority on the legislative and fiscal calendar. That is why in almost every jurisdiction surveyed, juvenile court prosecutors were better paid and better supported than their public defender and appointed counsel counterparts. [FN344] The IJA-ABA Standards recognized that defense attorneys command little sympathy from the public and little respect from the political powers of the state. That is why they recommended that prosecutors and defense attorneys be equally compensated. [FN345] Moreover, the drafters of the Standards knew that a defender system cannot provide effective representation in the absence of adequate resources. [FN346] Unless state and county elected officials provide sufficient funds for defense services, the promises of Gault will not be fulfilled.

Culture of the Court

The assessments demonstrated that the juvenile justice system is subject to unflattering characterizations by prosecutors, public defenders, the organized bar, and the general public. Most attorneys viewed the juvenile system as an entry-level position or a stepping-stone to bigger criminal cases in the adult system. Lawyers who did not litigate in the juvenile system viewed delinquency defenders as less capable litigators and cogs in a wheel that dashes the already diminished hopes of young people and their families. Given the promise of Gault, it is hard to believe that so little progress has been made in forty years. It would be easy to blame the lawyers themselves for their poor quality of representation. But as the IJA-ABA commission reminded us, “the provision of satisfactory legal representation in juvenile and family court cases is the proper concern of all segments of the legal community.” [FN347] Judges, legislators, and the organized bar all bear some responsibility for the current state of affairs. Judges, however, because of their unique and historical control over juvenile delinquency proceedings, bear the greatest responsibility to ensure that the constitutional right to zealous representation by competent counsel is fostered in juvenile court. Unfortunately, courts and their personnel are often a part of or the source of the problem.

The assessments show that in most of the assessed states, judges and probation officers united to maintain a juvenile justice system that ignored the role and duties of counsel and that discouraged the formation of appropriate lawyer client relationships. They did so in order to promote their personal views of the child's best interest, [FN348] or to promote other institutional interests. In either case, they created disincentives to serious and competent adversarial lawyering. For example, there was an overpowering sense of resignation among public defenders in Pennsylvania about the outcome of contested cases. [FN349] Lawyers assumed that they would not be heard and that their legal and factual defenses would be ignored. The same mentality prevailed among defense lawyers in Indiana, Maine, Montana, and North Carolina. [FN350] Court personnel in Indiana believed that the role of the attorney for a child alleged to be delinquent was to identify the child's best interest and promote it, rather than to identify legal defenses to the charge. [FN351] This misguided belief existed to a greater or lesser degree in most of the state's assessed. The Gault Court sought to restrain this kind of thinking by bringing some procedural formality to the juvenile court judge's decision-making. The Justices found little justification for sacrificing liberty interests in exchange for beneficent governmental purposes. Yet liberty interests were being sacrificed every day in most of the states assessed.

Attorneys in Pennsylvania adhered to the best interest model of lawyering because that mentality prevailed among the judges. [FN352] Attorneys throughout the other states assessed slipped into this same mentality more often than not. In Ohio, more than 40% of attorneys believed that their role in the court system was to represent the best interest of the youth and not to act as the youth's advocate. [FN353] These attorneys tended to agree with the views of the probation officers [FN354] rather than to assume the role, as required by the Rules of Pro-

fessional Conduct [FN355] and by Gault as the voice for the youth.

The juvenile court in Virginia was viewed as a less respected court in the state judicial system. [FN356] Many Virginia lawyers felt that juvenile court judges induced them to work for the best interest of the child rather than to protect a child's rights. [FN357] In addition, an attorney who zealously argued for a child's rights was viewed as attempting to get a child off when he really needed discipline. [FN358] As a result, attorneys tended to accept fewer and fewer juvenile cases as they gained trial experience, or "graduated" to the adult felony division. [FN359]

The Georgia juvenile court was also taken less seriously than the adult court and the perception was reflected in the quality of representation. [FN360] Competent defense attorneys were discouraged from continuing to pursue a juvenile defense practice as they became aware of the pervasive belief existing throughout the bar that the juvenile court was suitable for only unskilled and inexperienced lawyers. [FN361] Defenders often saw the value of their work diminished or dismissed completely. [FN362] The court's lack of receptiveness to proper defense work, combined with the low status the attorneys experienced, allowed the lawyers to justify minimal effort for each case. [FN363] It was worse in Texas. Attorneys who stirred up trouble by actively representing their clients were likely to lose appointments. [FN364] Attorneys interviewed for the survey indicated that they were pressured not to file motions or to ask for continuances to prepare for dispositions. They were encouraged to ignore legal issues and to encourage their clients to plead guilty. [FN365]

This attitude is not new. It was the foundation of the pre-Gault juvenile court and was retained by many adherents of the best interest model immediately after Gault was decided. What is surprising is the resiliency of this attitude. Academic opinion clearly supports an "expressed interest" model of representation rather than the "best interest" model. [FN366] Every standard setting organization [FN367] and the Rules of Professional Conduct [FN368] endorse a traditional lawyer-client relationship as opposed to the "best interest" model. Nonetheless, forty years after the right to counsel for juveniles in delinquency proceedings was secured, the assessments show that old habits and old attitudes die hard.

Juvenile court judges have great power. They control their court rooms with the power of persuasion, the power of contempt, and the power of the purse. They control the behavior of the probation officers and other court personnel and they usually control the appointment and reimbursement of counsel. As a result, they exercise an undue and often negative influence on the way law is practiced in their courts. Self-interest and fear, however, are not the only forces that make lawyers bend to the will of the judges. Most lawyers recognize that a successful outcome for one's client often depends on counsel's understanding of how the judge thinks and fashioning a strategy that will appeal to the judge's way of thinking. The lawyer's desire to achieve a client's goals often depends upon going along with "business as usual" rather than "rocking the boat." Because the power of juvenile court judges is so great, the "best interest" style of representation in juvenile delinquency court can not disappear until judges realize that forcing a "best interest" model of legal representation upon lawyers violates Gault, is contrary to the Rules of Professional Conduct, [FN369] and may hamper a child's rehabilitation. [FN370]

VI. Progress and Improvement

Despite the bleak and disheartening findings reported in the various assessments, cause for optimism exists. The purpose of the assessments was to provide data and analyses to state legislators, lawyers, judges, and administrators in order to help them improve the quality of juvenile justice at the local level. For the most part, the

assessments have been enthusiastically embraced and real progress has been made in several states. At least thirteen of the assessed states have formed commissions to study their juvenile justice systems. These commissions, set up by governors, chief justices, legislators, and state bars presidents, have studied the desirability of state-wide public defender systems, increased funding for defender organizations, specialized training for and performance standards for lawyers, the creation of oversight boards, and the prohibition of waiver of counsel. [FN371] Significant legislation such as the Georgia Indigent Defense Act of 2003, [FN372] the Louisiana Juvenile Justice Reform Act of 2003, [FN373] and the Mississippi Juvenile Delinquency Prevention Act of 2006, [FN374] as well as less comprehensive but still significant laws in other states have been passed to address the recommendations made by the assessors. [FN375] As a result, funding for juvenile defenders has increased in many of the assessed states and defenders have reached comparability of salaries with prosecutors in several states. [FN376] Juvenile Justice clinical education courses have been created at the University of Maine Law School and at the University of Richmond School of Law in Virginia, and a new Juvenile Justice Center was created at Barry Law School in Florida. Eight states have created new state-wide public defender offices or increased staffing at existing offices. [FN377] Performance standards or training programs have been developed in every assessed state studied thus far. Finally, the process for waiving counsel has been improved or is under study in four states. [FN378]

As noted earlier, neither the assessments nor this article intended to attack individual defenders for the sorry state of juvenile defense practice in America today. In many ways, these juvenile defenders are heroes operating in terrible terrain. Old habits die hard and generational shifts in attitudes and practices are often necessary before reform can truly be accomplished. The Gault case was indeed revolutionary. It challenged almost seventy years of entrenched thinking about juvenile courts and hundreds of years of common law notions about the legal relationship between parents, children, and the state. Clearly, children would have been better served if more progress had occurred in the forty years since the Gault decision. Despite the uneven progress during that period, a second wave of reform to fulfill the Gault vision may be about to begin.

The 1980s and 1990s were terrible times for children in low income families. Safety nets disappeared, drugs decimated communities, and pundits predicted a generation of adolescent predators. These attitudes and conditions resulted in harsh, sometimes draconian, laws that sent children into the horrors of the adult criminal system and weakened the rehabilitative aspects of juvenile court. Throughout those years, advocates for children fought what often seemed like a hopeless battle to restore common sense and mercy to the juvenile and criminal justice debates. Although drugs continue to negatively impact our communities and the disparities between the poor and the rich have been exacerbated, the expected explosion in crime did not occur. Indeed, crime decreased. The decrease in juvenile crime during the last ten years has combined with incredible advances in brain science and adolescent development theory to bring some sanity back to the juvenile justice debate. This time, the country seems ready to look anew at its juvenile justice systems and to realize just how poorly those systems have served children accused of crime. [FN379] Studies have shown that adolescence is a time of experimentation and growth and a time when development and personality cannot conclusively be determined. Thus, the foolish acts that adolescents perform do not necessarily tell us what kind of person will emerge when their development is complete. Justice Fortas wrote the Gault opinion against a background that recognized that children were in the process of formation, and that fairness was an important component to successfully completing that formation. The Supreme Court of 1966 also knew that laws had meaning and that lawyers were needed to implement and apply those laws fairly. Perhaps now, forty years after the Gault decision, the philosophy underpinning the opinion can take hold of today's crime debates so that children can finally realize its promise.

There is, of course, more to be done. Assessments have been performed in only sixteen states. Although

there is movement in those states toward fulfilling Gault's promise to provide quality representation for children in the courts, movements come and go and are often replaced by the next crisis. The assessed states have made good starts in reforming their juvenile courts and momentum is on the side of reformers. On the other hand, thirty-four states have not been assessed. Anecdotal evidence from national summits and regional defender meetings suggest that the conditions the assessors found in the studied states are likely to be found in those states yet to be assessed. One would hope that the momentum so far derived will continue to expand and that the force of history will bring change to the juvenile justice systems of each state in the nation. Gerald Gault himself has dedicated his remaining years to helping juvenile advocates fulfill the promise of the Gault case. Forty years have passed since his unfair and unconstitutional conviction and imprisonment was reversed. Children in this country should not have to wait another forty to reap the benefits of his victory.

[FNa1]. Lupo-Ricci Professor of Clinical Legal Studies and Director of the Juvenile Justice Clinic at Georgetown University Law Center. I wish to thank the entire staff at the National Juvenile Defender Center, but especially Director Patti Puritz and Deputy Director Mary Ann Scali for their tireless efforts on behalf of children and their lawyers, and for their comments about this article. I also wish to thank Courtney Taymour, a second-year student at Georgetown, for her extraordinary research and editing skills and her diligence and humor in bringing this project to its completion.

[FN1]. *Application of Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

[FN2]. *Gault*, 387 U.S. at 4.

[FN3]. 1899 Ill. Laws 131.

[FN4]. Gault had previously been interrogated by the probation officer and by the judge at a detention hearing.

[FN5]. Most commitments to state custody were, at that time, twenty-first birthday commitments. It is possible but unlikely that Gault or any juvenile charged with this kind of crime would have been incarcerated for the entire time. Nonetheless, Gault spent six months in the state training school.

[FN6]. Lewis told interviewers later that she was very upset when she heard how children were treated in juvenile courts. She had never represented juveniles or “did anything for a kid in trouble” so she decided that “it was time [she] did something.” *Legal Heroes* (Weil Productions, Larry Dubin, producer, 1988).

[FN7]. Norman Dorsen argued the case in the Supreme Court. He is currently the Stokes Professor of Law at New York University School of Law, where he has taught since 1961. He has been the director or co-director of the Arthur Garfield Hays Civil Liberties Program since 1961 and was affiliated with the American Civil Liberties Union when he argued the case.

[FN8]. *In re Gault*, 387 U.S. at 33.

[FN9]. *Gault*, 387 U.S. at 41.

[FN10]. *Gault*, 387 U.S. at 57.

[FN11]. *Gault*, 387 U.S. at 55.

[FN12]. [Gault, 387 U.S. at 13.](#)

[FN13]. [Gault, 387 U.S. at 28.](#)

[FN14]. A year earlier, the Supreme Court had decided [Kent v. U.S., 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 \(1966\)](#). In that case, the Court discussed constitutional principles in the context of a District of Columbia statute permitting transfers of jurisdiction over children from the juvenile court to the adult criminal court. In prior cases involving children, the Court had always focused on the constitutional rights of parents, not the children. See, e.g., [Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A.L.R. 1446 \(1923\)](#); [Prince v. Massachusetts, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 \(1944\)](#).

[FN15]. See Barry C. Feld, *Justice for Children: The Right to Counsel and the Juvenile Courts* 27 (Northeastern Univ. Press 1993).

[FN16]. At common law, children do not generally determine their destinies or employ agents to secure their rights. Absent a specific statutory grant of authority, children are subject to the whims of parents, teachers, and other adults. Codes of professional responsibility, on the other hand, assume that lawyers act as agents for their clients.

[FN17]. The subsequent Supreme Court cases of [McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 \(1971\)](#), and [Schall v. Martin, 467 U.S. 253, 104 S. Ct. 2403, 81 L. Ed. 2d 207 \(1984\)](#), made that clear.

[FN18]. See Feld, *Justice for Children*, supra note 15, at 27.

[FN19]. Stanford Fox, [Juvenile Justice Reform: An Historical Perspective, 22 Stan. L. Rev. 1187, 1187 \(1970\)](#).

[FN20]. B.J. George Jr., Book Note, [77 Yale L. J. 817, 820 \(1968\)](#) (reviewing Jay Katz et al., *Psychoanalysis, Psychiatry, and the Law* (1967)).

[FN21]. Anthony Platt & Ruth Friedman, [The Limits of Advocacy: Occupational Hazards in Juvenile Court, 116 U. Pa. L. Rev. 1156, 1179 \(1968\)](#); see also Elyce Z. Ferster et al., *The Juvenile Justice System: In Search of the Role of Counsel*, 39 *Fordham L. Rev.* 375, 384-85 (1971); Richard Kay & Daniel Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, 61 *Geo. L.J.* 1401, 1401, 1403 (1973); Monrad G. Paulsen, *Juvenile Courts and the Legacy of '67*, 43 *Ind. L.J.* 619 (1968); Daniel L. Skoler, *The Right to Counsel and the Role of Counsel in Juvenile Court Proceedings*, 43 *Ind. L.J.* 558 (1968); Jacob L. Issacs, *Role of the Lawyer in Representing Minors in the new Family Court*, 12 *Buff. L. Rev.* 501, 507 (1962); see also Jane Gilbert et al., [Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model \(Delinquency\), 52 Ala. L. Rev. 1153, 1161 \(2001\)](#); Katherine R. Kruse, *Justice, Ethics, and Interdisciplinary Teaching and Practice: Lawyers Should be Lawyers, But What Does That Mean?: A Response to Aiken & Wizner and Smith*, 14 *Wash. U. J.L. & Pol'y* 49, 80 (2004) (providing a historical discussion).

[FN22]. Am. Corrections Ass'n, *Standards for Juv. Correctional Facilities* (2007).

[FN23]. Report of the Nat'l Advisory Comm. for Juv. Just. and Delinq. Prevention, *Standards for the Admin. of Juv. Just.* (1980).

[FN24]. Nat'l Council of Juv. and Family Ct. Judges, *Juv. Delinq. Guidelines: Improving Ct. Prac. in Juv. De-*

linq. Cases (2005).

[FN25]. IJA-ABA Juv. Just. Standards Relating to Couns. for Private Parties § 1.1 (1980) (Hereinafter IJA-ABA Private Parties).

[FN26]. IJA-ABA Private Parties § 3.1(a).

[FN27]. IJA-ABA Private Parties § 3.1(b)(i).

[FN28]. This in turn led to cadres of lawyers dedicated to representing children alleged to be neglected, those accused of violating school disciplinary rules, and those subject to special education proceedings.

[FN29]. See Paul Holland & Wallace J. Mlyniec, [Whatever Happened to The Right to Treatment?: The Modern Quest for a Historical Promise](#), 68 *Temp. L. Rev.* 1791 (1995), and cases cited therein.

[FN30]. Georgetown Law Center and New York University Law School created two of the earliest such programs in 1973 and many other schools have since followed their lead.

[FN31]. Juvenile Justice and Delinquency Prevention Act of 1974, [Pub. L. 93-415](#), 88 *Stat.* 1141 (codified in sections of 5, 18, & 42 U.S.C.) (hereinafter Juvenile Justice and Delinquency Prevention Act of 1974).

[FN32]. Juvenile Justice and Delinquency Prevention Act of 1974.

[FN33]. Juvenile Justice and Delinquency Prevention Act of 1974. The Juvenile Justice and Delinquency Prevention Act (JJDP A) sets out core principles for the protection of youth in the juvenile justice system. These include: keeping status offenders out of secure facilities; preventing youth from being confined with in adult facilities; ensuring that youth who are held with adults in some limited instances are separated by sight and sound from adult offenders; and requiring that states address the disproportionate contact of youth of color at key contact points in the juvenile justice system.

[FN34]. Feld, *Justice for Children*, supra note 15, at 27-29; see also Barry C. Feld, *In re Gault Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 *Crime & Delinq.* 393 (1988); Barry C. Feld, *The Right to Counsel in Juvenile Courts: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 *J. Crim. L. & Criminology* 1185 (1989); Barry C. Feld, *Justice by Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration*, 82 *J. Crim. L. & Criminology* 156 (1991).

[FN35]. I have practiced juvenile delinquency law for over thirty years and have spoken to hundreds of lawyers about the Gault case. We have all seen the hostility directed at lawyers who refuse to accept the best interest model and the ways judges manipulate lawyers, parents, and children into accepting the best interest model of representation.

[FN36]. Ferster et al., *The Juvenile Justice System: In Search of the Role of Counsel*, supra note 21; Kay & Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, supra note 21, at 1401-02; Martin Guggenheim, *The Right To Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 *N.Y.U. L. Rev.* 76 (1984).

[FN37]. Isaacs, *Role of the Lawyer in Representing Minors in the new Family Court*, supra note 23; Kay & Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, supra note 21, at

1402-03, 1411; Platt & Friedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court*, supra note 21, at 1179; see also Gilbert et al., *Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, supra note 21, at 1161; Kruse, *Justice, Ethics, and Interdisciplinary Teaching and Practice: Lawyers Should be Lawyers, but What Does That Mean?: A Response to Aiken & Wizner and Smith*, supra note 21, at 80.

[FN38]. See 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, 255 (2005).

[FN39]. ABA Model R. Prof. Conduct 1.14 (2007).

[FN40]. See [Recommendations of the Conference on Ethical Issues in the Legal Representation of Children](#), 64 *Fordham L. Rev.* 1301, 1302 (1996); Symposium, University of Nevada, Las Vegas [Conference on Representing Children in Families: Children's Advocacy and Justice Ten Years After Fordham](#), 6 *Nev. L.J.* 591 passim (2006).

[FN41]. ABA Model R. Prof. Conduct (2007).

[FN42]. IJA-ABA Private Parties § 2.1(c).

[FN43]. IJA-ABA Private Parties § 4.1.

[FN44]. IJA-ABA Private Parties § 4.2.

[FN45]. IJA-ABA Private Parties § 5.1.

[FN46]. IJA-ABA Private Parties § 5.1.

[FN47]. IJA-ABA Private Parties § 4.3.

[FN48]. IJA-ABA Private Parties § 6.1.

[FN49]. IJA-ABA Private Parties § 6.2.

[FN50]. IJA-ABA Private Parties § 6.4.

[FN51]. IJA-ABA Private Parties § 7.1.

[FN52]. IJA-ABA Private Parties § 7.7.

[FN53]. IJA-ABA Private Parties § 7.8.

[FN54]. IJA-ABA Private Parties § 7.8.

[FN55]. IJA-ABA Private Parties § 7.10.

[FN56]. IJA-ABA Private Parties § 9.1.

[FN57]. IJA-ABA Private Parties §§ 10.1, 10.2, 10.5, 10.6.

[FN58]. IJA-ABA Private Parties §§ 10.3, 10.4.

[FN59]. Feld, *Justice for Children*, supra note 15; J. Knitzer & M. Sobie, *Law Guardians in New York State: A Study of the Legal Representation of Children*, New York State Bar Association 4-5 (1984); see generally Thomas C. Castellano, *The Justice Model in the Juvenile Justice System: Washington State's Experience*, 8 L. & Pol'y 488 (1986); Jane Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. Rev. 1083 (1991) (discussing Feld's Minnesota work and other surveys); Robert L. Bing et al., Center for Metropolitan Studies, Univ. of Mo.-St. Louis, *An Analysis of Apparent Disparities In the Handling of Black Youth within Mo.'s Juv. Just. Systems* (Nov. 1990); Mo. Dep't of Public Safety and Mo. Juv. Just. Advisory Group, *The State of Juv. Just.: Issues and Priorities for Mo.'s Juv. Just. System* (1994).

[FN60]. Patricia Puritz et al., *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 4 (American Bar Association Juvenile Justice Center 1995).

[FN61]. Puritz et al., *A Call For Justice*, supra note 60, at 15.

[FN62]. *A Call for Justice* followed up on the work of the American Bar Association's earlier report, *America's Children at Risk* (1993) and *America's Children Still at Risk* (2001).

[FN63]. Puritz et al., *A Call for Justice*, supra note 60, at 6.

[FN64]. Puritz et al., *A Call for Justice*, supra note 60, at 6-7.

[FN65]. Puritz et al., *A Call for Justice*, supra note 60, at 8-9.

[FN66]. Puritz et al., *A Call for Justice*, supra note 60, at 11.

[FN67]. E-mail from Mary Ann Scali, Deputy Director of NJDC, dated Aug. 20, 2007 (on file with the author).

[FN68]. The United States Supreme Court has ruled that when defendants relinquish constitutional rights, they must do so knowingly, intelligently, and voluntarily. *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A.L.R. 357 (1938); see also *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (citing *Von Moltke v. Gillies*, 332 U.S. 708, 68 S. Ct. 316, 92 L. Ed. 309 (1948)) (discussing the waiver of counsel).

[FN69]. Personal conversations with various lawyers from states assessed.

[FN70]. E-mail from Mary Ann Scali, Deputy Director of NJDC, dated Aug. 20, 2007 (on file with the author).

[FN71]. Nat'l Juv. Just. Center et al., *An Assessment of Access to Couns. and Quality of Representation in Delinq. Proc. in Ind.* (2006) (hereinafter *Ind. Assessment*); Nat'l Juv. Just. Center et al., *An Assessment of Access to Couns. and Quality of Representation in Delinq. Proc. in Fla.* (2006) (hereinafter *Fla. Assessment*); Nat'l Juv. Just. Center et al., *An Assessment of Access to Couns. and Quality of Representation in Delinq. Proc. in Md.* (2003) (hereinafter *Md. Assessment*); Nat'l Juv. Just. Center et al., *An Assessment of Access to Couns. and Quality of Representation in Delinq. Proc. in Pa.* (2003) (hereinafter *Pa. Assessment*); Nat'l Juv. Just. Center et al., *An Assessment of Access to Couns. and Quality of Representation in Delinq. Proc. in Me.* (2003) (hereinafter *Me. Assessment*); Nat'l Juv. Just. Center et al., *An Assessment of Access to Couns. and Quality of Representation in Delinq. Proc. in N.C.* (2003) (hereinafter *N.C. Assessment*); Nat'l Juv. Just. Center et al., *An Assessment of Access to Couns. and Quality of Representation in Delinq. Proc. in Mont.* (2003) (hereinafter

Mont. Assessment); Nat'l Juv. Just. Center et al., An Assessment of Access to Couns. And Quality of Representation in Delinq. Proc. in Ohio (2003) (hereinafter Ohio Assessment); Nat'l Juv. Just. Center et al., An Assessment of Access to Couns. And Quality of Representation in Delinq. Proc. in Wash. (2003) (hereinafter Wash. Assessment); Nat'l Juv. Just. Center et al., An Assessment of Access to Couns. And Quality of Representation in Delinq. Proc. in Ky. (2002) (hereinafter Ky. Assessment); Nat'l Juv. Just. Center et al., An Assessment of Access to Couns. and Quality of Representation in Delinq. Proc. in Va. (2002) (hereinafter Va. Assessment); Nat'l Juv. Just. Center et al., An Assessment of Access to Couns. and Quality of Representation in Delinq. Proc. in Ga. (2001) (hereinafter Ga. Assessment); Nat'l Juv. Just. Center et al., An Assessment of Access to Couns. and Quality of Representation in Delinq. Proc. in La. (2001) (hereinafter La. Assessment); Nat'l Juv. Just. Center et al., An Assessment of Access to Couns. and Quality of Representation in Delinq. Proc. in Tex. (2000) (hereinafter Tex. Assessment); Nat'l Juv. Just. Center et al., An Assessment of Access to Couns. and Quality of Representation in Youth Ct. Proc. in Miss. (2007); Children and Family Just. Center et al., An Assessment of Access to Couns. and Quality of Representation in Delinq. Proc. in Ill. (2007)

[FN72]. Ga. Assessment, *supra* note 71, at 22.

[FN73]. Ohio Assessment, *supra* note 71, at 34.

[FN74]. Pa. Assessment, *supra* note 71, at 46; Tex. Assessment, *supra* note 71, at 17.

[FN75]. Fla. Assessment, *supra* note 71, at 33.

[FN76]. Fla. Assessment, *supra* note 71, at 33.

[FN77]. Fla. Assessment, *supra* note 71, at 33.

[FN78]. Md. Assessment, *supra* note 71, at 27.

[FN79]. Jennifer Davitt, Juvenile Right to Counsel Statutes (Georgetown University Law Library Faculty Services, Working Paper, Sept. 10, 2007).

[FN80]. IJA-ABA Private Parties § 1 (1980).

[FN81]. Md. Assessment, *supra* note 71, at 29.

[FN82]. Md. Assessment, *supra* note 71, at 29.

[FN83]. Fla. Assessment, *supra* note 71, at 34 (suggesting that appointing counsel at first hearing is resorted to as a second choice for judges); Wash. Assessment, *supra* note 71, at 29 (stating in some counties counsel is never present, and in others counsel is rarely present); Va. Assessment, *supra* note 71, at 21 (defenders are not appointed at arrest, intake, initial detention hearings, or arraignments); Tex. Assessment, *supra* note 71, at 18 (some children get counsel at first hearing, but many wait weeks for their appointed counsel); Md. Assessment, *supra* note 71, at 30 (defenders routinely meeting clients for the first time at adjudication); Ky. Assessment, *supra* note 71, at 29 (defenders are not appointed until the detention hearing and do not meet clients until adjudication); Ohio Assessment, *supra* note 71, at 25 (only 10% of attorneys and 22% of judges say counsel is appointed at the detention hearing stage in their jurisdiction).

[FN84]. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

[FN85]. Wayne R. LaFave et al., *Criminal Procedure*, 545 (2d ed. 2006); see also [Faretta v. California](#), 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

[FN86]. Report of the Nat'l Advisory Comm. for Juv. Just. and Delinq. Prevention, *Standards for the Admin. of Juv. Just.* at § 3.132 (1980).

[FN87]. IJA-ABA *Private Parties* § 1.1 (1980).

[FN88]. Md. Assessment, *supra* note 71, at 25.

[FN89]. La. Assessment, *supra* note 71, at 60.

[FN90]. Fla. Assessment, *supra* note 71, at 28.

[FN91]. Ga. Assessment, *supra* note 71, at 19-20.

[FN92]. Ohio Assessment, *supra* note 71, at 27.

[FN93]. Ky. Assessment, *supra* note 71, at 28.

[FN94]. Wash. Assessment, *supra* note 71, at 27.

[FN95]. Fla. Assessment, *supra* note 71, at 28.

[FN96]. Fla. Assessment, *supra* note 71, at 28.

[FN97]. Fla. Assessment, *supra* note 71, at 30.

[FN98]. In [Scott v. Illinois](#), 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979), the United States Supreme Court said that the constitution guaranteed the right to appointed counsel only when the defendant faced incarceration.

[FN99]. Va. Assessment, *supra* note 71, at 23.

[FN100]. Va. Assessment, *supra* note 71, at 23.

[FN101]. Wash. Assessment, *supra* note 71, at 28.

[FN102]. Wash. Assessment, *supra* note 71, at 28.

[FN103]. Wash. Assessment, *supra* note 71, at 28.

[FN104]. Wash. Assessment, *supra* note 71, at 28.

[FN105]. Wash. Assessment, *supra* note 71, at 28.

[FN106]. Wash. Assessment, *supra* note 71, at 28.

[FN107]. Wash. Assessment, *supra* note 71, at 28.

[FN108]. Wash. Assessment, *supra* note 71, at 28.

[FN109]. Ky. Assessment, supra note 71, at 29.

[FN110]. Ohio Assessment, supra note 71, at 27-28; but see *In re C.S.*, No. 2006-1074 (Ohio Dec. 27, 2007) (limiting the circumstances under which waiver of counsel can be accepted by the court).

[FN111]. Ind. Assessment, supra note 71, at 32.

[FN112]. Ind. Assessment, supra note 71, at 32.

[FN113]. Ind. Assessment, supra note 71, at 32.

[FN114]. Ga. Assessment, supra note 71, at 20; Ohio Assessment, supra note 71, at 28.

[FN115]. Fla. Assessment, supra note 71, at 29.

[FN116]. Fla. Assessment, supra note 71, at 29.

[FN117]. Ind. Assessment, supra note 71, at 30.

[FN118]. Ind. Assessment, supra note 71, at 30.

[FN119]. Ind. Assessment, supra note 71, at 31.

[FN120]. Ky. Assessment, supra note 71, at 29.

[FN121]. Ohio Assessment, supra note 71, at 27.

[FN122]. See generally Ind. Assessment, supra note 71; La. Assessment, supra note 71; Fla. Assessment, supra note 71; Wash. Assessment, supra note 71; Va. Assessment, supra note 71; Ga. Assessment, supra note 71; Ky. Assessment, supra note 71; Ohio Assessment, supra note 71.

[FN123]. *Application of Gault*, 387 U.S. 1, 36, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

[FN124]. See generally ABA Model R. Prof. Conduct (2007).

[FN125]. ABA Model R. Prof. Conduct 2.1 (2007).

[FN126]. ABA Model R. Prof. Conduct 1.3 (2007).

[FN127]. ABA Model R. Prof. Conduct 1.1 (2007).

[FN128]. ABA Model R. Prof. Conduct 1.3 (2007).

[FN129]. ABA Model R. Prof. Conduct 1.7 (2007).

[FN130]. ABA Model R. Prof. Conduct 1.7 cmt. (2007).

[FN131]. ABA Model R. Prof. Conduct 1.7 cmt. (2007).

[FN132]. ABA Model R. Prof. Conduct 1.3, 1.6 cmt. (2007).

[FN133]. ABA Model R. Prof. Conduct 1.2, 1.6(d) cmt. (2007).

[FN134]. IJA-ABA Juv. Just. Standards, Standards Relating to the Def. Function § 4-3.2 (1980). (hereinafter IJA-ABA Def. Function).

[FN135]. IJA-ABA Def. Function § 4-4.1.

[FN136]. IJA-ABA Def. Function § 4-3.5.

[FN137]. IJA-ABA Def. Function § 5.1.

[FN138]. IJA-ABA Def. Function § 6.1.

[FN139]. IJA-ABA Def. Function § 7.4

[FN140]. IJA-ABA Def. Function § 7.5.

[FN141]. IJA-ABA Def. Function § 7.6.

[FN142]. IJA-ABA Def. Function § 7.7.

[FN143]. IJA-ABA Def. Function § 7.9.

[FN144]. IJA-ABA Def. Function § 8.1.

[FN145]. IJA-ABA Def. Function § 8.2

[FN146]. Am. Bar Assoc., Section of Legal Educ. and Prof'l Dev.-An Educ. Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (1992) [hereinafter The Maccrata Report].

[FN147]. The Maccrata Report, *supra* note 146, at 141-48.

[FN148]. The Maccrata Report, *supra* note 146, at 151-57.

[FN149]. The Maccrata Report, *supra* note 146, at 157-63.

[FN150]. The Maccrata Report, *supra* note 146, at 163-72.

[FN151]. The Maccrata Report, *supra* note 146, at 172-76.

[FN152]. The Marate Report, *supra* note 146, at 176-84.

[FN153]. The Maccrata Report, *supra* note 146, at 185-90.

[FN154]. The Maccrata Report, *supra* note 146, at 191-99.

[FN155]. The Maccrata Report, *supra* note 146, at 199-203.

[FN156]. The Maccrata Report, *supra* note 146, at 203-07.

[FN157]. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[FN158]. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[FN159]. For example, courts have ruled that failing to investigate can result in ineffectiveness but only if it has prejudiced the defendant. See *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). Failure to exercise reasonable choices or perform other tasks usually associated with good lawyering will also result in a finding of incompetence but only require reversal if actual prejudice arises.

[FN160]. *Powell v. State of Ala.*, 287 U.S. 45, 61, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527 (1932) (upholding the court's authority to decide whether the right to counsel under the then prevailing "fundamental fairness interpretation of the Due Process Clause"); *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A.L.R.2d 733 (1963) (extending the Sixth Amendment right to counsel to the states); see also LaFave et al., *Criminal Procedure*, supra note 85, at 519-523.

[FN161]. The right to counsel applies only at "critical stages" of the prosecution, i.e., those affecting substantial rights. See LaFave et al., *Criminal Procedure*, supra note 85 at 535.

[FN162]. *Argersinger v. Hamlin*, 407 U.S. 25, 31, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972); *Scott v. Illinois*, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979).

[FN163]. Jennifer Davitt, *Juvenile Right to Counsel Statutes* (Georgetown University Law Library Faculty Services, Working Paper, September 10, 2007); IJA-ABA Standards, *Standards Relating to Pretrial* § 5.1 (1980) (hereinafter IJA-ABA Pretrial).

[FN164]. Md. Assessment, supra note 71, at 43.

[FN165]. Md. Assessment, supra note 71, at 43.

[FN166]. Md. Assessment, supra note 71, at 27.

[FN167]. Md. Assessment, supra note 71, at 29.

[FN168]. Md. Assessment, supra note 71, at 29.

[FN169]. Md. Assessment, supra note 71, at 29.

[FN170]. Mont.Assessment, supra note 71, at 29.

[FN171]. Fla. Assessment, supra note 71, at 27-28.

[FN172]. Va. Assessment, supra note 71, at 22, 25.

[FN173]. Ohio Assessment, supra note 71, at 30.

[FN174]. Pa. Assessment, supra note 71, at 47-48.

[FN175]. Me. Assessment, supra note 71, at 18; Mont. Assessment, supra note 71, at 29; N.C. Assessment, supra note 71, at 26.

[FN176]. Fla. Assessment, supra note 71, at 34 (suggesting that appointing counsel at first hearing is resorted to

as a second choice for judges); Wash. Assessment, supra note 71, at 29 (stating in some counties counsel is never present, and in others counsel is rarely present); Va. Assessment, supra note 71, at 21 (defenders are not appointed at arrest, intake, initial detention hearings, or arraignments); Tex. Assessment, supra note 71, at 18 (some children get counsel at first hearing, but many wait weeks for their appointed counsel); Md. Assessment, supra note 71, at 30 (defenders routinely meeting clients for the first time at adjudication); Ky. Assessment, supra note 71, at 29 (defenders are not appointed until the detention hearing and do not meet clients until adjudication); Ohio Assessment, supra note 71, at 25 (only 10% of attorneys and 22% of judges say counsel is appointed at the detention hearing stage in their jurisdiction).

[FN177]. Md. Assessment, supra note 71, at 29.

[FN178]. Puritz Et Al., A Call for Justice, supra note 60, at 9.

[FN179]. Md. Assessment, supra note 71, at 30.

[FN180]. Md. Assessment, supra note 71, at 30.

[FN181]. Ind. Assessment, supra note 71, at 36.

[FN182]. Fla. Assessment, supra note 71, at 34-35.

[FN183]. Md. Assessment, supra note 71, at 31.

[FN184]. Va. Assessment, supra note 71, at 25.

[FN185]. Va. Assessment, supra note 71, at 25.

[FN186]. Ky. Assessment, supra note 71, at 29.

[FN187]. Pa. Assessment, supra note 71, at 51.

[FN188]. Pa. Assessment, supra note 71, at 50.

[FN189]. La. Assessment, supra note 71, at 66.

[FN190]. Ga. Assessment, supra note 71, at 26.

[FN191]. Ga. Assessment, supra note 71, at 26.

[FN192]. Ga. Assessment, supra note 71, at 26.

[FN193]. Ga. Assessment, supra note 71, at 26.

[FN194]. Ga. Assessment, supra note 71, at 30.

[FN195]. Tex. Assessment, supra note 71, at 21.

[FN196]. Fla. Assessment, supra note 71, at 31 (estimating over 90% of youths waive their right to an adjudication hearing and plead guilty); Va. Assessment, supra note 71, at 27 (estimating that 85-90% of youths plead guilty); Tex. Assessment, supra note 71, at 14 (91-99% of youths plead guilty); Ga. Assessment, supra note 71,

at 20 (90% of children waive counsel at nearly all those cases end in guilty pleas).

[FN197]. Md. Assessment, *supra* note 71, at 29.

[FN198]. In limited circumstances, defendants may plead guilty while maintaining their innocence. *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[FN199]. IJA-ABA Juv. Just. Standards, Standards Relating to Adjudication §§ 3.1-3.6 (1980) (hereinafter IJA-ABA Adjudication).

[FN200]. Steven A. Drizen & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891 (2004).

[FN201]. Gary L. Wells et al., *Eye Witness Identification Procedures: Recommendations for Lineups and Photo-spreads*, 22 Law & Hum. Behav. 603 (1988).

[FN202]. See, e.g., *Matter of Investigation of West Virginia State Police Crime Laboratory, Serology Div.*, 190 W. Va. 321, 438 S.E.2d 501 (1993).

[FN203]. IJA-ABA Private Parties §§ 4.3, 7.3.

[FN204]. *Who Decides: Decision Making in Juvenile Delinquency Proceedings, Ethical Problems Facing the Criminal Defense Lawyer: Practical Answers to Tough Questions* 105 (Rodney J. Uphoff ed., 1995).

[FN205]. IJA-ABA Adjudication § 3.6; IJA-ABA Private Parties §§ 5.1, 7.1.

[FN206]. *Schall v. Martin*, 467 U.S. 253, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984).

[FN207]. See, e.g., *Ind. Code Ann. § 31-10-2-1*; M.R.S.A § 302; D.C. Code § 162301.02 (3). Many states have added community protection as a goal as well.

[FN208]. Md. Assessment, *supra* note 71, at 33.

[FN209]. Md. Assessment, *supra* note 71, at 33.

[FN210]. Md. Assessment, *supra* note 71, at 33.

[FN211]. Md. Assessment, *supra* note 71, at 33.

[FN212]. N.C. Assessment, *supra* note 71, at 33.

[FN213]. Pa. Assessment, *supra* note 71, at 51.

[FN214]. Pa. Assessment, *supra* note 71, at 52.

[FN215]. Pa. Assessment, *supra* note 71, at 52.

[FN216]. Pa. Assessment, *supra* note 71, at 52.

[FN217]. Va. Assessment, *supra* note 71, at 29.

[FN218]. Va. Assessment, supra note 71, at 29.

[FN219]. La. Assessment, supra note 71, at 69.

[FN220]. La. Assessment, supra note 71, at 69.

[FN221]. Ga. Assessment, supra note 71, at 32.

[FN222]. Mont. Assessment, supra note 71, at 31.

[FN223]. Tex. Assessment, supra note 71, at 14.

[FN224]. Tex. Assessment, supra note 71, at 14.

[FN225]. Tex. Assessment, supra note 71, at 14.

[FN226]. Tex. Assessment, supra note 71, at 23.

[FN227]. Ky. Assessment, supra note 71, at 30.

[FN228]. Ohio Assessment, supra note 71, at 31.

[FN229]. Ohio Assessment, supra note 71, at 31.

[FN230]. Pa. Assessment, supra note 71, at 53. Conflict counsel refers to those private attorneys who are appointed so that codefendants of clients with public defenders have independent advice.

[FN231]. Pa. Assessment, supra note 71, at 53.

[FN232]. Pa. Assessment, supra note 71, at 54.

[FN233]. Pa. Assessment, supra note 71, at 54.

[FN234]. Pa. Assessment, supra note 71, at 54.

[FN235]. Pa. Assessment, supra note 71, at 54. Of course, pleas of guilty under many state procedures waive the right to appeal.

[FN236]. Pa. Assessment, supra note 71, at 54.

[FN237]. Pa. Assessment, supra note 71, at 54.

[FN238]. Pa. Assessment, supra note 71, at 53.

[FN239]. Ind. Assessment, supra note 71, at 38.

[FN240]. Ind. Assessment, supra note 71, at 38.

[FN241]. Ind. Assessment, supra note 71, at 38.

[FN242]. Ohio Assessment, supra note 71, at 33.

[FN243]. Ohio Assessment, *supra* note 71, at 33.

[FN244]. Ga. Assessment, *supra* note 71, at 26.

[FN245]. Ohio Assessment, *supra* note 71, at 32.

[FN246]. Ohio Assessment, *supra* note 71, at 32.

[FN247]. Ohio Assessment, *supra* note 71, at 32.

[FN248]. Mont. Assessment, *supra* note 71, at 29.

[FN249]. Mont. Assessment, *supra* note 71, at 29.

[FN250]. Mont. Assessment, *supra* note 71, at 29.

[FN251]. Mont. Assessment, *supra* note 71, at 29.

[FN252]. Mont. Assessment, *supra* note 71, at 29.

[FN253]. Tex. Assessment, *supra* note 71, at 14.

[FN254]. Tex. Assessment, *supra* note 71, at 14.

[FN255]. IJA-ABA Private Parties § 9.1.

[FN256]. IJA-ABA Private Parties §§ 9.1-9.3

[FN257]. IJA-ABA Private Parties §§ 10.1-10.6.

[FN258]. See LaFave et al., *Criminal Procedure*, *supra* note 85, at 523-29.

[FN259]. Nat'l Advisory Comm. on Crim. Just. Standards and Goals-Courts, Chapter 13, *The Defense* (1973).

[FN260]. Md. Assessment, *supra* note 71, at 35.

[FN261]. Pa. Assessment, *supra* note 71, at 42.

[FN262]. Pa. Assessment, *supra* note 71, at 41; see generally Wash. Assessment, *supra* note 71, at 41; Pa. Assessment, *supra* note 71, at 37; La. Assessment, *supra* note 71, at 57.

[FN263]. Pa. Assessment, *supra* note 71, at 41.

[FN264]. Pa. Assessment, *supra* note 71, at 41.

[FN265]. La. Assessment, *supra* note 71, at 63.

[FN266]. La. Assessment, *supra* note 71, at 63.

[FN267]. La. Assessment, *supra* note 71, at 63.

[FN268]. La. Assessment, supra note 71, at 64.

[FN269]. La. Assessment, supra note 71, at 64.

[FN270]. La. Assessment, supra note 71, at 64.

[FN271]. La. Assessment, supra note 71, at 64.

[FN272]. Wash. Assessment, supra note 71, at 41.

[FN273]. Wash. Assessment, supra note 71, at 41.

[FN274]. Wash. Assessment, supra note 71, at 41.

[FN275]. Wash. Assessment, supra note 71, at 41.

[FN276]. Va. Assessment, supra note 71, at 20.

[FN277]. Va. Assessment, supra note 71, at 20.

[FN278]. Va. Assessment, supra note 71, at 20.

[FN279]. Va. Assessment, supra note 71, at 21.

[FN280]. Ga. Assessment, supra note 71, at 25.

[FN281]. Ga. Assessment, supra note 71, at 25.

[FN282]. Ga. Assessment, supra note 71, at 25.

[FN283]. Ky. Assessment, supra note 71, at 27.

[FN284]. Ky. Assessment, supra note 71, at 27.

[FN285]. Ky. Assessment, supra note 71, at 27.

[FN286]. See Nat'l Advisory Comm. on Crim. Just. Standards and Goals-Courts, Chapter 13, The Defense (1973).

[FN287]. IJA-ABA Private Parties § 2.2(b)(iv).

[FN288]. IJA-ABA Private Parties § 2.2(c).

[FN289]. Pa. Assessment, supra note 71, at 36.

[FN290]. Pa. Assessment, supra note 71, at 40.

[FN291]. Pa. Assessment, supra note 71, at 40.

[FN292]. Pa. Assessment, supra note 71, at 40.

[FN293]. La. Assessment, supra note 71, at 57.

[FN294]. La. Assessment, supra note 71, at 57.

[FN295]. La. Assessment, supra note 71, at 57.

[FN296]. Wash. Assessment, supra note 71, at 42.

[FN297]. Wash. Assessment, supra note 71, at 42.

[FN298]. Wash. Assessment, supra note 71, at 42.

[FN299]. Wash. Assessment, supra note 71, at 42.

[FN300]. Va. Assessment, supra note 71, at 29.

[FN301]. Va. Assessment, supra note 71, at 29.

[FN302]. Va. Assessment, supra note 71, at 29.

[FN303]. Va. Assessment, supra note 71, at 29.

[FN304]. Tex. Assessment, supra note 71, at 28.

[FN305]. Tex. Assessment, supra note 71, at 28.

[FN306]. Ohio Assessment, supra note 71, at 38.

[FN307]. Ohio Assessment, supra note 71, at 38.

[FN308]. Ohio Assessment, supra note 71, at 38.

[FN309]. Ohio Assessment, supra note 71, at 38.

[FN310]. See, e.g., Thomas Grisso & Robert G. Schwartz eds., *Youth on Trial: A Developmental Perspective on Juvenile Justice* (2000).

[FN311]. IJA-ABA Private Parties § 2.1(ii).

[FN312]. IJA-ABA Private Parties § 2.1(iii).

[FN313]. Md. Assessment, supra note 71, at 36.

[FN314]. Md. Assessment, supra note 71, at 37.

[FN315]. La. Assessment, supra note 71, at 54.

[FN316]. Pa. Assessment, supra note 71, at 38.

[FN317]. Pa. Assessment, supra note 71, at 38.

[FN318]. Pa. Assessment, supra note 71, at 39.

[FN319]. Pa. Assessment, supra note 71, at 40.

[FN320]. Fla. Assessment, supra note 71, at 14.

[FN321]. Fla. Assessment, supra note 71, at 14.

[FN322]. La. Assessment, supra note 71, at 54.

[FN323]. Tex. Assessment, supra note 71, at 21.

[FN324]. La. Assessment, supra note 71, at 55.

[FN325]. La. Assessment, supra note 71, at 55.

[FN326]. La. Assessment, supra note 71, at 55.

[FN327]. La. Assessment, supra note 71, at 55.

[FN328]. Wash. Assessment, supra note 71, at 31.

[FN329]. Va. Assessment, supra note 71, at 19.

[FN330]. Va. Assessment, supra note 71, at 19.

[FN331]. Va. Assessment, supra note 71, at 19.

[FN332]. Va. Assessment, supra note 71, at 19.

[FN333]. Va. Assessment, supra note 71, at 20.

[FN334]. Tex. Assessment, supra note 71, at 19.

[FN335]. Ohio Assessment, supra note 71, at 35.

[FN336]. Mont. Assessment, supra note 71, at 38.

[FN337]. Ga. Assessment, supra note 71, at 28.

[FN338]. Ga. Assessment, supra note 71, at 28.

[FN339]. Ohio Assessment, supra note 71, at 36.

[FN340]. Ohio Assessment, supra note 71, at 36.

[FN341]. See generally Ohio Assessment, supra note 71; Mont. Assessment, supra note 71; Tex. Assessment, supra note 71.

[FN342]. IJA-ABA Private Parties § 2.1(c).

[FN343]. See IJA-ABA Private Parties § 2.1.

[FN344]. See, e.g. Pa. Assessment, supra note 71, at 38.

[FN345]. IJA-ABA Private Parties § 2.1(b)(iv).

[FN346]. IJA-ABA Private Parties § 2.2.

[FN347]. IJA-ABA Private Parties § 2.1(a).

[FN348]. See generally Tex. Assessment, supra note 71, at 16; Ohio Assessment, supra note 71, at 27.

[FN349]. Pa. Assessment, supra note 71, at 58.

[FN350]. Ind. Assessment, supra note 71, at 40; Me. Assessment, supra note 71, at 35; Mont. Assessment, supra note 71, at 31; N.C. Assessment, supra note 71, at 39.

[FN351]. Ind. Assessment, supra note 71, at 40.

[FN352]. Pa. Assessment, supra note 71, at 58-59.

[FN353]. Ohio Assessment, supra note 71.

[FN354]. Ohio Assessment, supra note 71.

[FN355]. ABA Model R. Prof. Conduct 1.14 (2007).

[FN356]. Va. Assessment, supra note 71, at 31.

[FN357]. Va. Assessment, supra note 71, at 31.

[FN358]. Va. Assessment, supra note 71, at 31.

[FN359]. Va. Assessment, supra note 71, at 31.

[FN360]. Ga. Assessment, supra note 71, at 29.

[FN361]. Ga. Assessment, supra note 71, at 29.

[FN362]. Ga. Assessment, supra note 71, at 29.

[FN363]. Ga. Assessment, supra note 71, at 29.

[FN364]. Tex. Assessment, supra note 71, at 16.

[FN365]. Tex. Assessment, supra note 71, at 16.

[FN366]. Bruce A. Green & Bernadine Dohrn, [Foreword: Children and the Ethical Practice of Law](#), 64 *Fordham L. Rev.* 1281, 1294 (1996); Recommendations of the Conference on Ethical Issues in the Legal Representation of Children, supra note 40, at 1302; Symposium, University of Nevada, Las Vegas Conference on Representing Children in Families: Children's Advocacy and Justice Ten Years After Fordham, supra note 40, at passim.

[FN367]. Green & Dohrn, Foreword: Children and the Ethical Practice of Law, *supra* note 366, at 1294; Symposium, University of Nevada, Las Vegas Conference on Representing Children in Families: Children's Advocacy and Justice Ten Years After Fordham, *supra* note 40, at *passim*.

[FN368]. ABA Model R. Prof. Conduct 1.14 (2007).

[FN369]. Henning, Loyalty, Paternalism, and Rights; Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases, *supra* note 38, at 286-88.

[FN370]. Henning, Loyalty, Paternalism, and Rights; Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases, *supra* note 38, at 286-88.

[FN371]. Florida, Georgia, Kentucky, Louisiana, Maryland, Montana, Mississippi, North Carolina, Ohio, Pennsylvania, Texas, Virginia, and Washington. Conversations with NJDC Staff on Oct. 20, 2007.

[FN372]. Ga. Code Ann. § 17-12-1 (West 2003).

[FN373]. H.B. 2018, 2003 Leg., Reg. Sess. (La. 2003).

[FN374]. 2006 Miss. Laws Ch. 539 (H.B. 199).

[FN375]. S.B. 163, 2004 Leg., Reg. Sess. (Md. 2004); S.B. 146, 59th Leg., Reg. Sess. (Mont. 2005); H.B. 119, 2006 Leg., Reg. Sess. (Ms. 2006).

[FN376]. Report to the Mid Atlantic Regional Conference at the 2007 National Juvenile Defender Summit.

[FN377]. Georgia, Indiana, Louisiana, Mississippi, Montana, North Carolina, Ohio, Washington. Conversations with NJDC staff on Oct. 20, 2007.

[FN378]. Louisiana, Maryland, Ohio, Virginia. Conversations with NJDC staff on Oct. 20, 2007. See also *In re C.S.*, No. 2006-1074 (Ohio Dec. 27, 2007) (limiting the circumstances under which waiver of counsel can be accepted by the court).

[FN379]. The Supreme Court recognized as much in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), where the nature of adolescence was used to rule that children under eighteen years of age could not be sentenced to death.

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