LOSING HOLD OF THE GUIDING HAND: INEFFECTIVE ASSISTANCE OF COUNSEL IN JUVENILE DELINQUENCY REPRESENTATION

by
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Lawyers for children in juvenile delinquency proceedings frequently provide their clients deficient representation. In addition to failing to investigate the facts of a case and research the applicable law, they ignore relevant ethical mandates and fail to address the demands created by the unique characteristics of children. The widespread nature of substandard legal representation, combined with delinquent adjudications' serious and long-term consequences, makes it imperative that juveniles harmed by deficient legal representation have access to some form of legal redress. Yet, at present, no such remedy exists. A child who is adjudicated delinquent can theoretically bring a claim of ineffective assistance of counsel (IAC), which, if granted, results in a new adjudicatory or dispositional hearing or a plea withdrawal. In practice, however, systemic and doctrinal barriers prevent children from filing IAC claims and from receiving appellate review of those claims. As a recent survey of IAC claims in delinquency cases suggests, children file these claims in an extremely small number of cases. Moreover, courts almost never grant relief on the basis of these claims. This form of appellate review fails to provide meaningful remedies to the large number of children harmed by substandard legal representation. Although commentators have explored this problem in the context of adult criminal defendants, this Article is among the first to examine the inadequacy of the IAC remedy for juveniles. It traces the history of the grant of the right to counsel to juveniles; analyzes substandard representation's nature, causes, and extent; details systemic and doctrinal barriers facing juveniles who wish to file IAC claims; and offers preliminary proposals for reform.

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"[The juvenile] requires the guiding hand of counsel at every step in the proceedings against him."[**]

I. INTRODUCTION

This Article explores the widespread occurrence of deficient legal representation in juvenile court and the absence of any meaningful remedy to this problem. In 1967, the U.S. Supreme Court issued *In re Gault*, holding that the assistance of counsel was "essential" in juvenile delinquency cases that could end in confinement for a child.[1] Appalled at the frequent disregard of rudimentary due process standards by juvenile court judges, the *Gault* Court ruled that the Fourteenth Amendment required that children and youth charged with criminal offenses in

[**] *In re* Gault, 387 U.S. 1, 36 (Fortas, J.) (1967) (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).

[1] *Id.* at 36–37.

juvenile court were entitled to a number of legal protections.[2] Among these, the right to counsel was most notable.[3] Some forty years later, the routinely substandard quality of the legal representation provided by lawyers in juvenile court has undermined the significance of the right.[4]

Children and youth who are adjudicated delinquent—juvenile court terminology for being criminally convicted—confront a number of serious short- and long-term negative consequences.[5] They may, for instance, be confined in state facilities for many years.[6] Beyond the life of

[2] *Id.* at 41–42, 56 (holding that juveniles have right to notice of charges, to counsel, to confrontation and cross-examination of witnesses, and to privilege against self-incrimination).

[3] *See, e.g.*, Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1458 n.36 (2009) (citing articles praising *Gault*'s holding that children facing criminal charges have a right to counsel).

[4] *See* PATRICIA PURITZ ET AL., ABA JUVENILE JUSTICE CTR., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (1995) (documenting deficient representation in juvenile courts around the country); ABA PRESIDENTIAL WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN & THEIR FAMILIES, AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION (1993) (noting lack of competent representation in juvenile courts throughout the country); Wallace J. Mlyniec, In re Gault *at 40: The Right to Counsel in Juvenile Court—A Promise Unfulfilled*, 44 CRIM. L. BULL. 371, 381–82, 39 (2008) (discussing findings of sixteen state-wide assessments of juvenile courts conducted by National Juvenile Defender Center and noting that their findings indicate that "at the time they were done, competent lawyering was the exception rather than the norm in juvenile court of those states"); Susanne M. Bookser, Note, *Making* Gault *Meaningful: Access to Counsel and Quality of Representation in Delinquency Proceedings for Indigent Youth*, 3 WHITTIER J. CHILD & FAM. ADVOC. 297 (2004) (noting juvenile courts' common characteristics detailed in state reports regarding the quality of counsel).

[5] Where this Article uses the term "juvenile," it refers to those children and youth under the jurisdiction of their state's juvenile delinquency court. Most states end juvenile court jurisdiction at age eighteen or seventeen. Tamar R. Birckhead, *North Carolina, Juvenile Court Jurisdiction, and the Resistance to Reform*, 86 N.C. L. REV. 1443, 1445 nn.1 & 3 (2008). Many states refer to courts that handle juvenile cases as "family courts." *See, e.g.*, N.Y. FAM. CT. ACT § 113 (McKinney 2008) ("The family court of the state of New York is established in each county of the state as part of the unified court system for the state."). This Article will describe these courts as "juvenile courts," the term by which they are more commonly known. *See, e.g.,* MASS. GEN. LAWS ANN. ch. 218, § 57 (West 2005) (establishing territorial divisions in the juvenile court system); *and* N.C. GEN. STAT. § 7B-1501 (2009) (defining "juvenile court"). All states provide for circumstances in which minors can be tried as adults and deficient representation problems permeate that context. HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 110 (2006); John Johnson Kerbs, *(Un)equal Justice: Juvenile Court Abolition and African Americans*, 564 ANNALS AM. ACAD. POL. & SOC. SCI. 109 (1999). However, the reasons for and implications of those problems are distinguishable from the problems detailed here, and are therefore beyond the scope of this Article.

[6] *See, e.g.*, Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed?,* 34 N. KY. L. REV. 189, 253–54 (2007) (noting that beginning in the late 1980s, juvenile courts developed a more punitive nature). Many states have changed their juvenile codes to place a stronger emphasis on punishment. *See, e.g.*, COLO. REV. STAT. § 19-2-102(1) (2009) (to protect the public, the juvenile system "will appropriately sanction juveniles who violate the law").

the case, they face so-called "collateral" consequences that can hinder their chances at productive and law-abiding lives.[7] The pervasiveness of substandard legal representation, combined with the high stakes of delinquent adjudications, makes it imperative that juveniles harmed by this representation have access to some form of legal redress. Yet, at present, no such remedy exists.[8]

In theory, a child who is adjudicated delinquent and given a disposition pursuant to deficient representation can bring an appellate claim based on an argument that her trial counsel provided ineffective assistance of counsel (IAC).[9] If an appellate court ruled favorably on such a claim, the relief granted would be a new adjudicatory or dispositional hearing; it could also allow a child to withdraw her plea of delinquency.[10] However, systemic and doctrinal barriers work to prevent children from filing IAC claims and from having such claims fairly considered.[11] As a recently conducted survey of IAC claims in delinquency cases indicates, these claims are filed in an extremely small number of cases and are almost never granted. It does not appear that they provide meaningful relief to the large number of children harmed by substandard legal representation.[12]

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[7] Collateral consequences are not part of the disposition imposed by a court but consequences that flow from the fact of an adjudication. *See* Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles About the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111, 1114–15 (2006) [hereinafter Pinard, *Difficulties*] (describing how delinquent adjudications negatively affect children's future education, housing and employment opportunities, and may serve as a basis for enhanced sentences if juveniles are convicted of crimes as adults); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals,* 86 B.U. L. REV. 623, 634–35 (2006) [hereinafter Pinard, *Integrated Perspective*].

[8] Feld, *supra* note 6, at 220 (noting dearth of juvenile appeals and describing juvenile justice process as "nearly incapable of correcting its own errors").

[9] Courts have long held that the entitlement to the assistance of legal counsel is the entitlement to *effective* assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970); Powell v. Alabama, 287 U.S. 45, 71 (1932). *See* Ellen Marrus, *Effective Assistance of Counsel in the Wonderland of "Kiddie Court"—Why the Queen of Hearts Trumps* Strickland, 39 CRIM. L. BULL. 393, 393 n.4 (2003) (summarizing reported cases where appellate courts heard juvenile IAC claims).

[10] Strickland v. Washington, 466 U.S. 668, 687 (1984) (outlining two-prong test that defendant must meet in establish ineffective assistance such that conviction or death sentence will be reversed); Hill v. Lockhart, 474 U.S. 52, 58 (1985) (holding that *Strickland v. Washington* test applies to withdrawal of guilty pleas based on ineffective assistance of counsel).

[11] N. Lee Cooper et al., *Fulfilling the Promise of* In re Gault*: Advancing the Role of Lawyers for Children*, 33 WAKE FOREST L. REV. 651, 674–75 (1998) (noting that practice of taking appeals of juvenile delinquency cases is lacking in most jurisdictions); Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 294–99 (2007) (no "active and zealous" appellate or post-conviction practice in juvenile court); Marrus, *supra* note 9, at 417–19 (describing hurdles to prevailing on IAC claim presented by legal standard).

[12] *See* discussion *infra* Part IV.C (detailing survey results and methodology).

The problem of widespread deficient legal representation plagues adult criminal courts as well.[13] Adults convicted of crimes pursuant to such representation face similar obstacles to those faced by juveniles in obtaining relief through IAC claims. Legal scholars have extensively explored the obstacles facing adults.[14] They have proposed such reforms as creating a more stringent legal standard for assessing the adequacy of trial attorney performance,[15] extending the right to counsel to collateral review proceedings,[16] and allowing appellate attorneys on direct appeal to supplement the trial court record to bring and adequately support claims of ineffectiveness on direct appeal.[17] By contrast, the unique problems facing juveniles harmed by substandard representation have gone almost entirely unexamined.[18]

This Article strives to address this vacuum. It explores the nature and pervasiveness of substandard legal representation, considers the causes of such representation, and examines the inadequacy of the IAC claim as a remedy for the resulting harm. Finally, it offers preliminary proposals toward reform that would allow juveniles both to file IAC claims and to have them fairly considered by reviewing courts.

Part II offers a critical appraisal of *Gault*.[19] While *Gault* granted legal protections designed to eliminate the procedural arbitrariness that characterized the pre-*Gault* juvenile court, the right to counsel as framed by the opinion is in many respects inadequate to the task of ensuring due process. For example, the right to counsel for children in delinquency proceedings is more limited in scope than the comparable adult right.[20]

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[13] *See, e.g.*, Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81 (1995); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

[14] *See, e.g.*, Martin C. Calhoun, Note, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413 (1988); Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425, 439 (1996); Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1467 (1999); Robert R. Rigg, *The Constitution, Compensation, and Competence: A Case Study*, 27 AM. J. CRIM. L. 1 (1999).

[15] Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 503 (1993) (arguing for a redefinition of "counsel" to include only skilled practitioners in criminal cases rather than any licensed attorneys).

[16] Donald A. Dripps, *Ineffective Litigation of Ineffective Assistance Claims: Some Uncomfortable Reflections on* Massaro v. United States, 42 BRANDEIS L.J. 793, 801–02 (2004).

[17] Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 682 (2007).

[18] A *Westlaw* search uncovered only two articles that addressed IAC claims in delinquency cases in any length: Marrus, *supra* note 9, and Drizin & Luloff, *supra* note 11.

[19] 387 U.S. 1 (1967).

[20] *See* Marsha Levick & Neha Desai, *Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel at All Stages of the Juvenile Court Process*, 60 RUTGERS L. REV. 175, 184–90 (2007) (describing the scope of adult and juvenile rights to counsel).

Additionally, the Court failed to consider whether and how juveniles' cognitive and psychosocial underdevelopment would affect their ability to exercise their newly granted rights.[21] Similarly, the Court did not address whether attorneys in juvenile court would have any special ethical responsibilities given that their clients tend to be, relative to adult defendants, cognitively underdeveloped and immature. Part II argues that *Gault* did not thus establish the parameters of effective assistance of counsel. Further, by declining to address whether juveniles have a right to the transcript of the proceedings or a right to appeal, *Gault* also failed to ensure that children aggrieved by IAC would have an appellate remedy.[22]

Part III examines the nature and pervasiveness of substandard legal representation in juvenile court. Drawing primarily on recent assessments of juvenile defense systems conducted by the National Juvenile Defender Center, an organization that provides training and technical assistance to attorneys for youths in delinquency proceedings,[23] Part III presents an overview of the deficient lawyering that occurs regularly in juvenile courts across the country. This Part also explains how substandard representation can lead to significant and lifelong negative consequences for children and adolescents harmed by it. Finally, Part III suggests reasons that substandard representation appears endemic in juvenile court. These reasons include many factors that contribute to substandard representation in adult criminal court, which are discussed here briefly, but Part III focuses on those factors that are unique to juvenile practice.

Part IV considers the viability of the IAC remedy for juveniles harmed by substandard representation. It explains the legal doctrine governing a reviewing court's consideration of IAC claims and the mechanics of filing them. It outlines the types of arguments a juvenile might make to support her claim of ineffective assistance—some of which are similar to those an adult might file, and some of which are age-specific and thus unique to juveniles. It surveys the extremely low number of IAC claims filed over a ten-year period, which provides support for this Part's suggestion that IAC claims do not constitute a meaningful form of relief. Part IV argues that the legal doctrine and rules governing IAC claims create nearly insurmountable hurdles for juveniles. While these obstacles are similar to those that face adult criminal defendants seeking to file IAC claims, Part IV explores how the rules and case law governing juvenile appeals make accessing the appellate system

[21] Donna M. Bishop & Hillary B. Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by* In Re Gault, 60 RUTGERS L. REV. 125, 135–36 (2007) ("In essence, Gault placed the expectation on children to access and exercise due process rights in the same way adult criminal defendants are expected to. The Court erred in failing to recognize that procedures that succeed in securing fairness for adults may not be sufficient to secure fairness for children.").

[22] *In re Gault*, 387 U.S. at 58.

[23] National Juvenile Defender Center, About Us, http://www.njdc.info/about_us.php.

via an IAC claim particularly difficult for juveniles. Part IV offers preliminary proposals for reform that would enhance a juvenile's ability to file an IAC claim and to have it fairly considered.

The Article concludes by noting that in addition to providing relief to juveniles on an individual basis, IAC claims can also have some impact, albeit limited, on the system-wide problem of deficient representation in juvenile court. It therefore urges that child advocates include among their advocacy demands and goals a call for reform of the system of filing IAC claims.

II. THE PROMISE AND UNREALIZED POTENTIAL OF *GAULT*

Before considering substandard legal representation in juvenile court, and the inadequacy of the IAC remedy to address the harm that results from it, it is first necessary to understand how children and adolescents in that court came to be entitled to legal representation. This Part briefly traces the development of the modern juvenile court, focusing on the procedural arbitrariness generated by its emphasis on flexibility and informality as well as on its hostility to lawyers.

Responding to widespread criticism of that arbitrariness, *Gault* provided juveniles with due process protections, including the right to counsel.[24] The extension of the right to counsel to children was unprecedented and dramatic. Yet the opinion did little to ensure that the legal counsel rendered would in fact be effective, or that children would have an appellate remedy if it were not.

A. *Before* Gault*: "To Protect Children from the Law, Not to Bring More Law to Bear on Them"*[25]

Just over a hundred years ago, child advocates successfully lobbied for the creation of the nation's first juvenile courts.[26] Troubled that children tried and jailed with adults were denied the opportunity for

[24] 387 U.S. at 13, 41–42, 56.

[25] JOHN R. SUTTON, STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES, 1640–1981, at 160–61 (1988) ("The reformers' aim was to protect children from the law, not to bring more law to bear on them. They had little inclination to specify what the court should look like as a legal institution. Thus they emphasized the personal and professional qualities of court personnel and largely ignored the formal properties of court decision making.").

[26] In 1899, Illinois passed the first Juvenile Court Act. 1899 Ill. Laws 131 (current version at 705 ILL. COMP. STAT. 405/1-2 (West 2009)). Within twenty years, all but three states had passed similar legislation. ELLEN RYERSON, THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT 81 (1978). Today, every state has a juvenile court. David B. Mitchell & Sara E. Kropf, *Youth Violence: Response of the Judiciary*, *in* SECURING OUR CHILDREN'S FUTURE: NEW APPROACHES TO JUVENILE JUSTICE AND YOUTH VIOLENCE 118, 122 (Gary S. Katzmann ed., 2002). *See generally* TASK FORCE ON JUVENILE DELINQUENCY, PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 2–4 (1967), *reprinted in* ELLEN MARRUS & IRENE MERKER ROSENBERG, CHILDREN AND JUVENILE JUSTICE 3–6 (2007).

rehabilitation, exposed to criminal role models, and abused by convicted adults with whom they were housed, these advocates envisioned a separate, and different, system for juveniles.[27]

Rather than being adversarial and governed by rules of criminal procedure, juvenile court proceedings would be informal and flexible, with all parties focused primarily on the child's rehabilitation.[28] The vocabulary of the juvenile court reflected the desire to create a system distinct from the criminal one. Instead of "complaints" or "indictments," charging documents were petitions "in the welfare of the child."[29] Rather than being found "guilty," youths would be found "delinquent."[30] Instead of "sentences," youths received "dispositions."[31] The juvenile court was to act as would a "kind and just parent."[32] Conspicuous by their omission were defense lawyers for juveniles who, according to many in the juvenile court movement, would only make the proceedings unnecessarily narrow and contentious.[33]

The state assumed it had *parens patriae* power to proceed solely according to its view of the child's best interest.[34] Rudimentary due process concerns—such as whether reliable evidence existed to prove that a child had committed an alleged crime,[35] whether the child had

[27] *In re Gault*, 387 U.S. at 14–18 (summarizing scholarly literature describing juvenile court's origins); *see also* DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING 3–22 (2004) (describing efforts of reformers and philanthropists during latter part of the nineteenth century to set up separate justice system in Chicago for children accused of committing crimes). Some commentators dispute an account of the juvenile court's founders that ascribes to them only beneficent motivations. *See, e.g.*, BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 56 (1999) (arguing that pro-juvenile court activists and legislators viewed the court as a social control mechanism for immigrant children flooding the nation's urban centers at the turn of the century); Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1194 (1970) (juvenile court created out of frustration of law-enforcement professionals that criminal courts routinely failed to obtain convictions of children owing to jury sympathy).

[28] FELD, *supra* note 27, at 68.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] WILLIAM AYERS, A KIND AND JUST PARENT: THE CHILDREN OF JUVENILE COURT 24 (1997).

[33] *See generally id.* at 26 (discussing Chicago reformer and juvenile court champion Jane Addams' negative views about lawyers); Jacob L. Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court,* 12 BUFF. L. REV. 501, 503 (1963).

[34] *Parens patriae* is the state's power, derived from chancery practice, to act *in loco parentis* to protect the property interests and person of the child. *In re* Gault, 387 U.S. 1, 16 (1967).

[35] *See In re* Bentley, 16 N.W.2d 390, 393–94 (Wis. 1944) (holding that a petition alleging the child was delinquent in the language of the statute, if signed by a probation officer "familiar with the facts," did not have to include a brief statement of facts supporting this assertion); State *ex rel.* Raddue v. Superior Court, 180 P. 875, 876 (Wash. 1919) (holding that a petition alleging that a child "associates with a group of disorderly boys and engages in conduct which endangers his moral welfare" was

notice of the charges and an opportunity to contest them,[36] and whether the child was compelled to incriminate himself[37]—were subordinated to this power.[38] The doctrinal justification for the state's ability to do as it pleased with the juvenile was that the juvenile had no liberty interest that the state was bound to respect.[39] Instead, the juvenile had only a right to custody, which could be provided by a parent or by the state without legal consequence.[40] Thus, children's rights as we understand them today were not ignored or violated by pre-*Gault* juvenile court personnel; they were simply not recognized.

Beginning in the late 1950s, support for the juvenile court began to wane. Empirical evaluations revealed that children "treated" in the juvenile court did not appear to be deterred from future offending.[41] Civil rights activists objected to the uneven application of juvenile court laws based on race and income.[42] In a series of cases issued beginning in 1945, the Supreme Court emphasized the importance of procedure in criminal justice and administrative proceedings.[43] Scholars began to document and critique abuses that resulted from juvenile court judges' unbridled discretion.[44] Several influential government reports issued in

sufficient for a claim of disorderly conduct at a school, citing privacy concerns of the child as a reason to leave out more specific facts).

[36] *See In re Bentley*, 16 N.W.2d at 395 (holding that the court was not limited to the charge in the original petition but was permitted to make additional determinations in the best interest of the child).

[37] *See In re* Santillanes, 138 P.2d 503, 508 (N.M. 1943) (classifying juvenile proceedings as "special statutory proceedings" rather than criminal proceedings as justification for the lack of protection against self-incrimination); People v. Lewis, 183 N.E. 353, 354–55 (N.Y. 1932) (holding that a juvenile delinquency hearing is not a criminal case, and therefore procedural safeguards against compelled self-incrimination are neither necessary nor a right guaranteed by the constitution or state law).

[38] Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909) ("Why is it not the duty of the state, instead of asking merely whether a boy or a girl has committed a specific offense, to find out what he is, physically, mentally, morally, and then if he learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen[?]").

[39] Sara Sun Beale, *You've Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms as Seen from Jena, Louisiana*, 44 HARV. C.R.-C.L. L. REV. 511, 516 n.31 (2009) (citing *In re* Gault, 387 U.S. 1, 16 (1967)).

[40] *See id.*

[41] *In re Gault*, 387 U.S. at 21–22; FELD, *supra* note 27, at 80.

[42] FELD, *supra* note 27, at 80.

[43] *See, e.g., In re Gault*, 387 U.S. at 20–21 ("The history of American freedom is, in no small measure, the history of procedure." (quoting Malinski v. New York, 324 U.S. 401, 414 (1945))); Kent v. United States, 383 U.S. 541, 555 (1966) (holding that due process hearing must precede transfer of juvenile to adult court and noting that "admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness"); Gideon v. Wainwright, 372 U.S. 335, 339–40 (1963).

[44] Chester James Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORNELL L.Q. 387 (1961) (expressing concern that traditional constitutional rights are denied to a large number of children in juvenile court proceedings without persuasive reasons as

the 1960s called into question whether the benevolence and paternalism of juvenile court were more theoretical than real.[45] Against this backdrop of skepticism, state legislatures around the country amended their juvenile codes to add elements of due process to delinquency proceedings.[46]

B. Announcing an End to a Kangaroo Court

In 1967, amidst widespread condemnation of the juvenile court's procedural arbitrariness and abuses, the Supreme Court in *Gault* held that children and youth in delinquency proceedings possess constitutional rights.[47] The facts of the case presented an egregious example of the troubling verdicts and the harsh and disproportionate dispositions common in juvenile court, as well as the casual handling of evidence and procedure that facilitated such outcomes. As a result of making a single obscene telephone call, fifteen-year-old Gerald Gault was taken from his home by a probation officer, who failed to tell his parents where he had been taken or why.[48] Gerald was brought before a juvenile court judge without first receiving notice of the charges against him, adjudicated delinquent, and sentenced without any attorney or adversarial, fact-finding hearing.[49] The probation officer was permitted to offer hearsay evidence from the complaining witness. There were no other witnesses and no other evidence. The judge remanded Gerald to a state industrial school—the juvenile system's prison equivalent—for a term of up to six years. The penalty that would have applied to an adult charged with the same offense was a fine of up to fifty dollars, or imprisonment for not more than two months.[50]

Asserting that "the condition of being a boy does not justify a kangaroo court," *Gault* held that constitutional protections were

to the necessity of such a denial); Sheldon Glueck, *Some "Unfinished Business" in the Management of Juvenile Delinquency*, 15 SYRACUSE L. REV. 628 (1964) (exploring problems of absence of procedural protections in juvenile court); Monrad G. Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 550 (1957) (stating that humanitarian goals of original juvenile court are no justification for denying young people constitutional rights, notwithstanding absence of "criminal" label).

[45] *See, e.g.*, NATIONAL CRIME COMMISSION REPORT, H.R. DOC. NO. 90-53 (1967), *available at* http://bulk.resource.org/gao.gov/90-618/0000551A.pdf; PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967) [hereinafter PRESIDENT'S COMM'N], *available at* http://www.ncjrs.gov/pdffiles1/nij/42.pdf.

[46] As of 1967, at least one-third of the states provided, via either statute or court rule, the right of representation by retained counsel in juvenile delinquency proceedings, notice of the right, assignment of counsel, or a combination of these. *In re Gault*, 387 U.S. at 37 n.63.

[47] *Id.* at 13 ("[W]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

[48] *Id.* at 4–5.

[49] *Id.* at 7–8.

[50] *Id.* at 8–9.

necessary to prevent the arbitrariness that had resulted in the six-year sentence for Gerald.[51] Specifically, juveniles would henceforth be entitled to written and timely notice of the charges against them, the right to confront and cross-examine witnesses against them, the privilege against self-incrimination, and the right to counsel at an adjudicatory hearing that could result in confinement.[52] In its holding, the majority rejected the notion that the juvenile court's rehabilitative aspirations depended on denying children constitutional protections.[53] It held that none of the unique and benevolent features of the juvenile court (emphasis on rehabilitation, flexibility, and confidentiality) would be impaired by the extension of due process to juveniles. The Court instead viewed due process guarantees as consistent with, and important for the achievement of, the goal of rehabilitation. In support, it cited a sociological study that had concluded: "Unless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel."[54] The holding that a child in a delinquency proceeding has a liberty interest that demands protection, not merely a custody interest, constituted a significant doctrinal shift.[55] So too did the statement that that liberty interest could not reliably be protected by a probation officer or judge.[56]

The majority emphasized the necessity of counsel to ensuring the realization of due process for youths in juvenile court.[57] Without counsel, the Court noted, a juvenile could not be expected to perform the necessary fact investigation, legal research, evidentiary objections, or

[51] *Id.* at 28.

[52] *Id.* at 33–55.

[53] *Id.* at 25–31.

[54] *Id.* at 26 (quoting STANTON WHEELER & LEONARD S. COTTREL, JUVENILE DELINQUENCY: ITS PREVENTION AND CONTROL 33 (1966)).

[55] *See id.* at 17. Seventeen years later, a different Court appeared to reconsider the robustness of the liberty interest it was willing to grant to juveniles. Upholding a vague preventive detention scheme for juveniles, the majority in *Schall v. Martin* declared that while a "juvenile's . . . interest in freedom from institutional restraints . . . is undoubtedly substantial . . . that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody." 467 U.S. 253, 265 (1984). The dissent found the characterization of preventive detention as nothing more than a transfer of custody from a parent or guardian to the State "difficult to take seriously." *Id.* at 289 (Marshall, J., dissenting).

[56] *In re Gault*, 387 U.S. at 35–36 ("Probation officers . . . are also arresting officers. They initiate proceedings and file petitions . . . and they testify, as here, against the child. . . . The probation officer cannot act as counsel for the child. His role in the adjudicatory hearing, by statute and in fact, is as arresting officer and witness against the child. Nor can the judge represent the child.").

[57] *Id.* at 41. The majority quoted approvingly from the Report of the President's Commission on Law Enforcement and the Administration of Justice: "[N]o . . . action holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel." *Id.* at 38 n.65 (quoting PRESIDENT'S COMM'N, *supra* note 45, at 86).

presentation of a defense.[58] Such tasks were essential because delinquency proceedings that could end in a juvenile's confinement in a state facility were, the Court ruled, comparable in seriousness to a felony prosecution.[59] Accordingly, the Court cited as precedent those cases that had extended the right to counsel to adults.[60] Furthermore, the Court stated that the assistance of counsel was to be *effective* assistance of counsel.[61]

C. Gault*'s Limitations*

While the extension of a right to counsel to youths in delinquency proceedings was doctrinally dramatic, the right granted was actually less powerful than it could have been. The narrow scope of the right to counsel, the Court's treatment of a child's right to waive counsel, and the ambiguity in the Court's explanation of a parent's role in delinquency proceedings have all contributed to a diminution of the power of the grant of a counsel right. Additionally, in failing to consider how immaturity and cognitive underdevelopment would affect youths' ability to exercise their newly granted due-process rights, the Court missed a crucial opportunity to define the parameters of effective assistance of counsel. Further, by declining to address whether juveniles have a right to a transcript of the proceedings or a right to appeal, *Gault* also failed to ensure that children aggrieved by IAC would have an appellate remedy.[62]

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[58] *Id.* at 36–40.

[59] *Id.* at 36, 49. "[C]ommitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.'" *Id.* at 50. The majority also noted that many juvenile courts typically disregarded even those due process protections that would typically be available even in civil proceedings, such as notice. *Id.* at 17 n.22.

[60] *Id.* at 36 n.57 (citing Powell v. Alabama, 287 U.S. 45, 61 (1932) (extending right to counsel to capital defendants in state trial under Due Process Clause of the Fourteenth Amendment); Gideon v. Wainwright, 372 U.S. 335 (1963) (extending right to counsel to adult defendants under the Sixth Amendment and incorporating the Sixth Amendment against the states)).

[61] The majority's discussion of effective assistance was contained in its reference to *Kent v. United States*, 383 U.S. 541 (1966), concluding "In *Kent* . . . we stated that . . . . [w]ith respect to the waiver by the Juvenile Court to the adult court of jurisdiction over an offense committed by a youth . . . 'there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.' We announced with respect to such waiver proceedings that while 'We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.' We reiterate this view, here in connection with a juvenile court adjudication of 'delinquency' . . . ." *In re Gault*, 387 U.S. at 30 (citations omitted) (quoting *Kent*, 383 U.S. at 554, 562).

[62] *See In re Gault*, 387 U.S. at 58.

1. Narrow Scope

In spite of holding that "the child 'requires the guiding hand of counsel at every step in the proceedings against him,'"[63] the Court did not extend the right to counsel to all phases of a delinquency proceeding. The majority declined to address those phases of delinquency proceedings—detention hearing (analogous to a criminal bail hearing), arraignment, dispositional hearing (analogous to a criminal sentencing hearing), and post-dispositional hearing[64]—that were not at issue in the factual context of *Gault*.[65] These omissions are significant. As commentators have argued, important rights are at stake in these phases of a delinquency proceeding. Without counsel who can argue for their release, for example, juveniles face unnecessary detention while waiting for trial, as well as prolonged and excessive periods of confinement following adjudication. [66] Additionally, without an attorney to represent them after they have been committed to a state facility, juveniles essentially have no ability to argue that they are being denied necessary or court-ordered services. Today, while some states provide counsel for juveniles in the other phases of delinquency proceedings, many do not.[67] This has meant that many youths are subject to some of the same unfair treatment that characterized juvenile courts pre-*Gault*.

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[63] *Id.* at 36 (citing *Powell*, 287 U.S. at 69).

[64] *See* HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 104 (2006) (explaining the stages of a delinquency proceeding).

[65] *In re Gault*, 387 U.S. at 13. "We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile 'delinquents.' For example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process. We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution." *Id.* (citations omitted).

[66] *See, e.g.*, Levick & Desai, *supra* note 20, at 175 (stating that the "failure of states to . . . provide counsel at certain critical stages of delinquency proceedings, leaves many youth vulnerable"); Sandra Simkins, *Out of Sight, Out of Mind: How the Lack of Postdispositional Advocacy in Juvenile Court Increases the Risk of Recidivism and Institutional Abuse*, 60 RUTGERS L. REV. 207, 210 (2007) (arguing that, because a child's rehabilitation occurs, if it occurs at all, entirely through post-adjudication programs ordered by a court, legal advocacy is essential in the post-adjudication phase to ensure that these programs are provided and function as intended). Although the problems of substandard juvenile court legal representation are similar to the problems created by the absence of an attorney at all stages of a delinquency proceeding, it is beyond the scope of this Article to consider fully and separately the impact of not providing attorneys to juveniles at all stages.

[67] *See* Tory J. Caeti et al., *Juvenile Right to Counsel: A National Comparison of State Legal Codes*, 23 AM. J. CRIM. L. 611, 628 & n.115 (1996) (listing nineteen states that provide counsel at all stages of delinquency proceedings); Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in*

The scope of the right to counsel for adult criminal defendants is broader. The Supreme Court has held that adults charged with crimes with a potential penalty of incarceration must be appointed counsel at all stages of the prosecution in which substantial rights may be affected.[68] These so-called "critical" stages include pretrial lineups,[69] arraignments,[70] probable cause hearings,[71] and sentencing hearings.[72]

Even though the majority held earlier in the opinion that delinquency proceedings that could result in significant deprivations of liberty are comparable to felony prosecutions,[73] it justified the narrower scope of the juvenile right to counsel by stating that because a delinquency proceeding is different from a criminal prosecution, it need not conform to all the requirements of a criminal trial.[74] The Court anchored the right to counsel not to the Sixth Amendment, reserved for criminal prosecutions, but to the Due Process Clause of the Fourteenth Amendment.[75] Other than the privilege against self-incrimination, which was based on the Fifth Amendment, all the rights extended to juveniles by *Gault* were grounded in the Due Process Clause.[76] After *Gault*, the

Delinquency Cases, 81 NOTRE DAME L. REV. 245, 252 & n.31 (2005) (listing twenty-eight states that provide for counsel at dispositional stage).

[68] Scott v. Illinois, 440 U.S. 367, 373 (1979) (citing Argersinger v. Hamlin, 407 U.S. 25 (1972)); *Argersinger*, 407 U.S. at 37.

[69] United States v. Wade, 388 U.S. 218, 224 (1967) ("[O]ur cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings.").

[70] Hamilton v. Alabama, 368 U.S. 52, 53 (1961).

[71] Coleman v. Alabama, 399 U.S. 1, 8–9 (1970).

[72] Mempa v. Rhay, 389 U.S. 128, 134 (1967).

[73] *In re* Gault, 387 U.S. 1, 36 (1967).

[74] *Id.* at 30–31 (citing Kent v. United States, 383 U.S. 541, 562 (1966)). For an argument that a critical-stage analysis be applied to delinquency proceedings, see Levick & Desai, *supra* note 20, at 184–90.

[75] *In re Gault*, 387 U.S. at 41 ("We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child."). In his concurrence, Justice Black rejected the view that the rights in question should be afforded under the Due Process Clause. He argued that the proceeding at issue was the functional equivalent of a criminal trial. Under his view, the Fifth and Sixth Amendments should have applied; failure to extend to juveniles the specific right under these amendments violated equal protection guarantees. *Id.* at 60–61 (Black, J., concurring). *See* Irene Merker Rosenberg, *The Constitutional Rights of Children Charged With Crime: Proposal for a Return to the Not So Distant Past,* 27 UCLA L. REV. 656, 669 (1980) (explaining that because Justice Black found functional equivalence between delinquency proceedings and criminal trials, under his total incorporation view of the Fourteenth Amendment, all guarantees of the Bill of Rights at issue applied).

[76] *In re Gault*, 387 U.S. at 30–31, 55. After *Gault,* the Court extended to juveniles in delinquency proceedings new constitutional rights, but only in two areas. *See In re* Winship*,* 397 U.S. 358, 364 (1970) (holding "beyond a reasonable doubt" standard governs juvenile prosecutions as well as criminal trials); Breed v. Jones, 421 U.S. 519, 531 (1975) (applying the Double Jeopardy Clause to delinquency proceedings).

relevant inquiry for courts considering whether to extend additional protections would be whether such protections are necessary to ensure that delinquency proceedings comport with the "fundamental fairness" mandates of the clause.[77]

2. Inadequate Definition of Role and Purpose

In addition to creating a juvenile right to counsel of narrower scope than that for adults, the Court also failed to adequately define the role and purpose of counsel for children, or to do so in a way that accounts for the unique characteristics of children. It said merely that children in delinquency proceedings need the assistance of counsel in order "to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [they have] a defense and to prepare and submit it."[78]

This definition is at best a bare-bones sketch of what a conscientious and zealous attorney in juvenile court must do; it ignores, for example, discussion of any counseling duties, such as whether to accept a plea offer or proceed to trial. Compounding this problematic definition is the *Gault* majority's failure to address whether or how the incomplete cognitive development and social and emotional immaturity common to children and adolescents affect their ability to exercise the right to counsel.[79] Children and adolescents tend to think concretely and have difficulty with abstract concepts, including the rights at issue in the delinquency process as well as the significance of exercising or waiving those rights, as numerous studies have shown.[80] In many cases, they

Otherwise, the Court has halted the extension of procedural protections afforded criminal defendants to juveniles, employing the flexibility of the due process standard to diminish juvenile rights. *See* Schall v. Martin, 467 U.S. 253, 281 (1984) (statute authorizing pretrial detention of juveniles without bail pending adjudication based on a judicial finding of future dangerousness did not run afoul of fundamental fairness guarantees); McKeiver v. Pennsylvania, 403 U.S. 528, 540–45 (1971) (plurality opinion) (juveniles not entitled to jury trials under either the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment).

[77] While the majority never actually used the phrase, justices who issued separate opinions described the majority's reasoning as having been based on the "fundamental fairness" provisions of the Due Process Clause. *In re Gault*, 387 U.S. at 61–62 (Black, J., concurring); *Id.* at 72 (Harlan, J., concurring in part and dissenting in part). In subsequent cases, the Court characterized *Gault* this way. *See, e.g.*, *Martin*, 467 U.S. at 263; *Jones*, 421 U.S. at 531; *McKeiver*, 403 U.S. at 543.

[78] *In re Gault*, 387 U.S. at 36.

[79] *See* Bishop & Farber, *supra* note 21, at 135–36; Emily Buss, *The Missed Opportunity in* Gault, 70 U. CHI. L. REV. 39, 39 (2003) (arguing that *Gault*, "in assuming that children's due process rights would, at best, match those of adults," pretermitted thoughtful consideration of a range of changes that would be required to make the system fair to juveniles).

[80] *See* Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 9, 25 (Thomas Grisso & Robert G. Schwartz eds., 2000); Tamar R. Birckhead, *The Age of the Child*: *Interrogating Juveniles After* Roper v. Simmons, 65 WASH. & LEE L. REV. 385, 418 & n.127 (2008) (summarizing studies on difficulties juveniles face understanding their

understand rights not as legal entitlements that they may choose to assert or to waive, but as opportunities to be given and taken away at the whim of the adults in their lives.[81] Because they lack a well-developed fund of life experiences, juveniles can make imprudent and hasty decisions.[82] They also tend to have more difficulty than adults in weighing options, considering long-term consequences, and making choices.[83]

Throughout *Gault,* the Court demonstrated concern for the particular vulnerabilities of young people and their need for protection against the overwhelming power of the state.[84] Yet the Court did not address these same issues with respect to either how they would affect a child's relationship with her lawyer or whether a child's lawyer had any special ethical responsibilities as a result. The Court failed to clarify whether an attorney for a child was obliged to take special care to ensure a child's comprehension of the complex rights at stake, as well as the court process. Furthermore, the Court did not articulate whether the attorney should allow the child client—who is recognized by the Court to be, in many contexts, immature and unable to make responsible decisions—to direct the course of her representation. This omission has resulted in a flurry of conflicting scholarly commentary and disagreement among courts about whether an attorney should practice

Miranda rights as well as studies pertaining to juvenile competence to stand trial). *But see* Robert Epstein & Jennifer Ong, *Are the Brains of Reckless Teens More Mature than Those of Their Prudent Peers?*, SCI. AM., Aug. 25, 2009, *available at* http://www.scientificamerican.com/article.cfm?id=are-teens-who-behave-reck (summarizing a study that purports to show no difference between the brains of risk-taking teens and those of adults).

[81] *See* Emily Buss, *The Role of Lawyers in Promoting Juveniles' Competence as Defendants*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 243, 244–45 (Thomas Grisso & Robert G. Schwartz eds., 2000) (summarizing studies).

[82] *See,* Roper v. Simmons, 543 U.S. 551, 569 (2005) ("[A] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993))). *See also* Steinberg & Schwartz, *supra* note 80, at 26.

[83] Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE, *supra* note 80, at 33. *But see* Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89 (2009) (cautioning against overreliance on generalizations about youth based on neuroscience).

[84] *In re* Gault, 387 U.S. 1, 14–17 (1967) (discussing the historical treatment and view of children in juvenile court); *Id.* at 26 (citing studies which show that the lax attitude of paternalistic courts followed by strict discipline is harmful to the child "who feels that he has been deceived or enticed"); *Id.* at 45 (Justice Douglas's characterization of a young boy as an "easy victim of the law," who "cannot be judged by the more exacting standards of maturity," during "the period of great instability which the crisis of adolescence produces" (quoting Haley v. Ohio, 332 U.S. 596, 599 (1948))); *Id.* at 48 (confessions obtained from children are especially suspect); *Id.* at 51–52 (children may be induced to give false confessions by "'paternal' urgings" of officials they feel they can trust); *Id.* at 52–53 (examples of children who felt pressured to give false confessions).

according to a child's expressed interests or according to the attorney's view about the child's best interest.[85]

The contemporary professional and academic consensus is that the "expressed interest" standard most closely adheres to *Gault*'s emphasis on the distinctness of a child's liberty interest.[86] As Professor Martin Guggenheim has explained, if a child is not given the power to direct his own counsel, the other due process rights granted by *Gault* would be "rendered illusory," as an attorney could usurp those rights if he believed that doing so was in the child's best interest.[87] The absence of authoritative guidance from the Supreme Court has meant that some courts have ruled that an attorney is not ineffective when he practices according to his own view of the client's best interest—even when it conflicts with the client's expressed interest.[88]

3. Problematic Treatment of Waiver of Counsel by a Juvenile

The Court's discussion of whether and under what circumstances a juvenile may waive his right to counsel is problematic. The Court's emphasis on the centrality of counsel in ensuring due process would seem to indicate that it would have critically examined the concept of waiver in the delinquency context. The Court, however, did not do so and indicated that the juvenile could waive the right to counsel, and that the validity of the waiver would be evaluated under a totality-of-circumstances test imported from adult court.[89] It failed to specifically examine whether and, if so, how age, cognitive limitation, or immaturity could render a child's waiver of counsel invalid; it also did not suggest any special safeguards for ensuring a child's waiver was voluntary, such as

[85] Henning, *supra* note 67, at 253 (discussing commentary and conflict).

[86] Martin Guggenheim, *The Right To Be Represented but Not Heard: Reflections on Legal Representation For Children*, 59 N.Y.U. L. REV. 76, 86 (1984); *see also* Henning, *supra* note 67, at 255 (summarizing articles, professional standards, and model rules supporting the expressed-interest model for delinquency proceedings).

[87] Guggenheim, *supra* note 86, at 86.

[88] *See, e.g.*, *In re* B.K., 833 N.E.2d 945, 948 (Ill. App. Ct. 2005) (holding no per se conflict of interest for counsel to act as both defense counsel and guardian ad litem in guilty plea cases); *In re* R.D., 499 N.E.2d 478, 481 (Ill. App. Ct. 1986) (same); *In re* K.M.B., 462 N.E.2d 1271, 1272–73 (Ill. App. Ct. 1984) (rejecting a juvenile's claim that her lawyer's "best-interest lawyering" deprived her of effective assistance of counsel when her lawyer made a dispositional recommendation contrary to her wishes). For an argument that the underpinnings of these holdings have been eroded by changes in the juvenile court as well as an evolution in scholarly and professional ethical norms, see Brief of Juvenile Law Center et al. as Amici Curiae Supporting Respondent-Appellant at 34–38, *In re* Austin M., No. 4-08-0435 (Ill. App. Ct. Nov. 19, 2009) [hereinafter Brief of Juvenile Law Center].

[89] Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938) (stating that a determination of whether there has been an intelligent waiver of right to counsel depends on the particular facts and circumstances surrounding that case and should be made on the record).

requiring that a child speak with an attorney before waiving his right to be represented by one.[90]

Furthermore, if a child has interests distinct from those of a probation officer or a judge, as the majority indicated,[91] then it would seem that the Court would not have countenanced a child's waiver at the inducement or invitation of one or the other, without the child first being required to speak with an attorney. Yet that is exactly what *Gault* allowed. In jurisdictions around the country, many children in delinquency proceedings appear without counsel.[92] What is more, delinquency judges frequently permit children to waive counsel without following procedures created by the courts to ensure that waivers are knowingly and intelligently made.[93]

The perils of allowing children to waive counsel were revealed in the scandal surrounding two juvenile court judges in northeastern Pennsylvania charged with taking bribes from juvenile detention center officials in exchange for sentencing juveniles to their facilities. Half of the children sentenced by one of the judges had waived counsel.[94]

4. The Ambiguous Role of Parents

Yet another issue that has proved confusing for juvenile court practitioners is the question of the rights and role of parents. The *Gault* majority extended to both child and parent the right to counsel. If they could not afford to pay for an attorney, delinquency courts would henceforth appoint counsel.[95] The majority noted the Arizona court's ruling that both a parent and a probation officer could be relied upon to protect a child's interest in a delinquency proceeding.[96] The majority

[90] In 1996, twenty-seven states allow juveniles in delinquency proceedings to waive their right to counsel. Caeti et al., *supra* note 67, at 624. In other legal contexts, the Court has similarly failed to require that state officials take special steps to ensure juvenile waivers of rights are voluntary. *See* Fare v. Michael C., 442 U.S. 707, 725 (1979) (holding that the totality-of-circumstances test used to evaluate whether an adult has waived her rights under *Miranda* is sufficient to evaluate the same issue for juveniles).

[91] *In re* Gault, 387 U.S. 1, 35–36 (1967).

[92] A 1993 study showed that in many states, less than half of juveniles accused of delinquency offenses receive counsel; waiver was the most common reason why juveniles were unrepresented. Caeti et al. *supra* note 67, at 617–18. *See* Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577 (2002) (offering a historical overview of waiver of counsel in juvenile court pre- and post-*Gault*).

[93] Berkheiser, *supra* note 92, at 611–16, apps. C, D (discussing a study finding that eighty of ninety-nine cases in which a juvenile's waiver was challenged as invalid were overturned on appeal).

[94] Ian Urbina & Sean D. Hamill, *Judges Plead Guilty in Scheme to Jail Youths for Profit*, N.Y. TIMES, Feb. 13, 2009, at A22. *See also* Juvenile Law Center, http://www.jlc.org/luzerne (detailing litigation surrounding federal prosecutions and civil suits involving these judges).

[95] *In re Gault*, 387 U.S. at 41. The Court did not specify whether "they" referred to the parents alone, or the parents and the child.

[96] *Id.* at 35.

explicitly rejected that court's holding regarding the probation officer, but was less clear regarding its views on the parent.[97] The Court's lack of regard for the Arizona court's position on the probation officer, combined with the rights-protecting logic driving the opinion, suggests that the Court would have intended for the parent to play no role in the child's representation. And yet, later in the opinion, the Court indicated that parents can play such a role and can, in fact, waive a child's right to counsel.[98] The majority indicated that Gerald Gault's mother had not executed a valid waiver of Gerald's right to counsel.[99] Yet it appeared to approve the concept that his mother *could* have properly waived counsel on his behalf.[100]

In taking this seemingly inconsistent position on waiver, the Court also failed to discuss or even acknowledge the numerous situations that might arise in which a parent would have an actual or perceived conflict with the child that would prevent the parent from acting in the child's best or expressed interest.[101] Compounding the confusion about a

[97] *Id.* at 35–36. The relevant portion of the opinion addressing the status of the parent reads: "The [Supreme Court of Arizona] argued that 'The parent and the probation officer may be relied upon to protect the infant's interests.' . . . We do not agree. Probation officers . . . are also arresting officers. They initiate proceedings and file petitions which they verify, as here, alleging the delinquency of the child; and they testify, as here, against the child. . . . The probation officer cannot act as counsel for the child. His role in the adjudicatory hearing, by statute and in fact, is as arresting officer and witness against the child. Nor can the judge represent the child." One could argue that the majority's "we do not agree" declaration pertains to the inability of both the parent and the probation officer to protect the interests of the juvenile. Yet the majority elaborated only on the role that might be played by the probation officer, essentially ignoring the parent's role in this regard.

[98] *In re Gault*, 387 U.S. at 41–42. *See* discussion *supra* Part II.C.3 (on waiver of counsel).

[99] *In re Gault*, 387 U.S. at 42.

[100] The Court explained, "At the habeas corpus proceeding, Mrs. Gault testified that she knew that she could have appeared with counsel at the juvenile hearing. This knowledge is not a waiver of the right to counsel which she and her juvenile son had, as we have defined it. They had a right expressly to be advised that they might retain counsel and to be confronted with the need for specific consideration of whether they did or did not choose to waive the right. If they were unable to afford to employ counsel, they were entitled in view of the seriousness of the charge and the potential commitment, to appointed counsel, unless they chose waiver." *Id.* at 41–42.

[101] Henning, *supra* note 67, at 255 (noting areas of parent-child conflict such as where a parent is the party initiating the proceedings against a child or where, in the course of defending a child, defense counsel will need to introduce information that could lead to criminal or civil charges against the parent for neglect or contributing to the delinquency of a minor); Brief of Juvenile Law Center, *supra* note 88, at 20 (noting attorney's view that because he had been retained for the juvenile by the parents who wanted to know "the truth" about what had happened, it would have been inappropriate for the attorney to proceed solely according to the client's expressed interest). In my own ten-year experience as a defender in the juvenile court, I have witnessed many parents who, out of frustration with their children's behavior and a sense of having exhausted all options for addressing it, want their children to be adjudicated delinquent so that they can receive services available only

parent's role was the Court's reference to a "parent's right to . . . custody" of his or her child and its implication that parents have due process interests in delinquency proceedings because that right is threatened by the commencement of the delinquency case.[102]

The Supreme Court realistically could not have been expected to anticipate or address each of the above issues pertaining to a juvenile's right to counsel in a single opinion.[103] Yet the failure of the opinion to articulate anything other than a bare-bones sketch of a juvenile defender's role—and the absence of any subsequent Supreme Court consideration of these issues—means that attorneys have no definitive guidance on many practical and ethical issues relevant to how they might endeavor to represent their clients well, or well enough for their performance to be considered constitutionally *effective* assistance of counsel.[104]

5. Declining to Find a Right to Appeal

In addition to failing to take steps to ensure that the child's right to counsel would be the right to the effective assistance of counsel, *Gault* did nothing to ensure that children harmed by ineffective assistance of counsel would have an appellate remedy. Indeed, the majority declined to rule on whether a juvenile who is adjudicated delinquent has the right to appeal or to obtain a transcript of her trial court proceedings.[105] As will be discussed further in Part III, *Gault*'s ambiguities and omissions with respect to the role, purpose, and duties of counsel contribute to the problem of substandard legal representation. And as will be discussed in Part IV, the failure of *Gault* to rule that a juvenile has a constitutional right to appeal a delinquency finding constitutes one of the systemic barriers against filing an IAC claim.

through the juvenile court. Such parents have little or no incentive to seek to ensure that their child is well defended by a zealous and competent attorney.

[102] *In re Gault*, 387 U.S. at 34. For a thorough exploration of this point, see Henning, *supra* note 67, at 253. The influential developmental psychologists Joseph Goldstein, Anna Freud, and Albert Solnit argued that the right to counsel extended by *Gault* was not a personal right belonging to the child but a collective right of the family, which would "prevent juvenile 'justice' from usurping parental functions." JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 128–29 (1979).

[103] *See* Rosenberg, *supra* note 75, at 671 n.69 (suggesting that the *Gault* majority decided only what it had to because of the "far-reaching implications of the holdings that the Court did render"). Multiple issues pertaining to the adjudicatory phase were similarly reserved. Left undecided were the questions of whether, and to what extent, the juvenile court may admit hearsay or other normally inadmissible evidence, what the correct burden of proof is, and whether a juvenile court judge must state the grounds for his findings when he sits as trier of fact. *In re Gault*, 387 U.S. at 11, 58. With *In re Winship*, the Court clarified that the State must prove all allegations against a juvenile beyond a reasonable doubt. 397 U.S. 358, 367 (1970).

[104] The failure of the Supreme Court to clarify the practical and ethical issues discussed is at least in part attributable to the difficulties juveniles have in filing appeals of their cases through which the question of effective assistance could reach appellate courts. These difficulties are, of course, the central concern of this Article.

[105] *In re Gault*, 387 U.S. at 58.

III. *GAULT* ON THE GROUND

The promise of *Gault*, that delinquency proceedings would no longer be "kangaroo courts," is threatened by routine and widespread substandard representation by attorneys that has plagued the post-*Gault* juvenile court.[106] The reality is that in today's juvenile courts, assigning an attorney to a case does not guarantee that a child's due process rights will be honored. Nor does attorney representation mean that the child will have a voice in the proceedings, an advocate who will try to win her case, or, if that is not possible, an advocate who will craft the best available disposition.[107] This Part will explore the problem of substandard lawyering in juvenile court: what it looks like, why it matters, and why it occurs so frequently.

A. The Nature and Pervasiveness of Substandard Legal Representation

After *Gault,* state and national bar associations and judicial organizations promulgated practice standards and model rules that filled in some of the gaps in *Gault*'s right-to-counsel holding discussed in Part II. These guidelines established that a delinquency attorney should perform essentially the same duties as are expected of attorneys in adult criminal court. Additionally, attorneys for juveniles in delinquency proceedings would be expected to familiarize themselves with their clients' educational status and family history. Some of the standards required attorneys to attend to issues presented by their clients' youth and immaturity when those issues were relevant to competency, the state's ability to prove a case, or the attorney-client relationship.[108] They

[106] FELD, *supra* note 27, at 124–27, 131–35 (summarizing the performance of defense counsel post-*Gault*).

[107] For a discussion of the importance of dispositional advocacy to excellent lawyering in the juvenile court, see Barbara Fedders et al., *The Defense Attorney's Perspective on Youth Violence*, *in* SECURING OUR CHILDREN'S FUTURE: NEW APPROACHES TO JUVENILE JUSTICE AND YOUTH VIOLENCE 84, 91–100 (Gary S. Katzmann ed., 2002).

[108] The Model Rules of Professional Conduct require that lawyers work to secure the client's interests. They also state that lawyers should be counselors, advisors, and advocates who are competent, zealous, and free of conflicts of interest. Those qualities assume a "requisite knowledge and skill in a particular matter," thoroughness and preparation, and "commitment and dedication to the interests of the client." MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 1 (2006); *id.* R. 1.3 cmt. 1. The Rules also call upon attorneys to maintain as "normal" a relationship as possible with their clients, even when they have diminished decision-making capacity. *Id.* R. 1.14(a).

Standards drafted jointly by the Institute for Judicial Administration and the American Bar Association (IJA-ABA) outline the following specific tasks for attorneys representing juveniles: interviewing clients; investigating cases; keeping clients informed; advising the accused; engaging in plea discussions; giving opening statements; presenting evidence; examining witnesses; giving closing arguments; attending to post-trial motions; investigating sentencing options; and noting appeals when requested. IJA-ABA standards state that juvenile clients' youth and immaturity create additional burdens and responsibilities for their lawyers, requiring lawyers for

also established that an attorney should practice according to the child's expressed interest rather than the attorney's idea of the child's best interest.[109]

As suggested by national and state assessments of juvenile defender systems, the reality is that in spite of the presence of some excellent public defenders, specialized juvenile defense organizations, private attorneys, and law students and professors working in juvenile courts around the country, these performance standards and ethical rules appear to be honored mostly in the breach.[110] In courts across the country, many attorneys for juveniles do not interview witnesses or visit the crime scene.[111] They do not file pre-trial motions.[112] They do not

children to familiarize themselves with their clients' individual and family histories, their education, state of physical and mental well-being, and cognitive or developmental disabilities, which it recognizes as relevant to competency, the ability of the state to prove the offense, the ability of the juvenile to raise a defense, as well as to the quality of the attorney-client relationship and the child's ability to understand and process information from the attorney. *See generally*, NAT'L ADVISORY COMM. FOR JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE 273–79 (1980), *available at* http://www.eric.ed.gov/ERICWebPortal/contentdelivery/servlet/ERICServlet?accno=ED201923.

In 2004, the National Juvenile Defender Center, and the National Legal Aid and Defender Association, in partnership with the American Council of Chief Defenders, promulgated principles for indigent defense systems, which include "public defender offices, contract, appointed, and conflict counsel, law school clinics, and non-profit legal providers." NAT'L JUVENILE DEFENDER CTR., TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH PUBLIC DEFENSE DELIVERY 3 n.2 (2d ed. 2008), *available at* http://www.njdc.info/pdf/10_Core_Principles_2008.pdf. The principles urge indigent defense systems to provide quality, specialized, and independent representation to child clients "throughout the delinquency process." *Id.* at 2. They also recognize that "representing children in delinquency proceedings is . . . equally as important as[] the representation of adults," and the need to "promote a juvenile justice system that is fair, non-discriminatory and rehabilitative." *Id.* at 2–3.

[109] *See* Henning, *supra* note 67, at 246 (summarizing the relevant standards).

[110] A non-exhaustive list includes the Youth Advocacy Project in Boston, MA; the Children's Law Center in Lynn, MA; the Juvenile Law Center in Philadelphia, PA; JustChildren in Charlottesville, VA; the Children and Family Justice Center at Northwestern Law School; the New York University School of Law Juvenile Rights Clinic; the Georgetown Juvenile Justice Clinic; and the Barton Clinic at Emory Law School. *See* Laura Cohen, *New Hope Found in Practice Standards*, CRIM. JUST., Winter 2009, at 49 (noting small number of excellent attorneys in juvenile court).

[111] *See* ABA JUVENILE JUSTICE CTR. & MID-ATL. JUVENILE DEFENDER CTR., MARYLAND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 31 (2003), *available at* http://www.njdc.info/pdf/mdreport.pdf.

[112] *See, e.g.*, ABA JUVENILE JUSTICE CTR. & JUVENILE LAW CTR., PENNSYLVANIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 5 (2003), *available at* http://www.njdc.info/pdf/pareport.pdf (noting that in Pennsylvania, only one percent of court-appointed counsel reported regularly filing pre-trial motions other than requests for discovery).

prepare for dispositional hearings.[113] They are by-and-large ill prepared for the particular challenges presented by bench trials, which are the norm in juvenile court.[114] For reasons including exposure to prejudicial extra-record evidence about a particular juvenile and political pressure not to appear soft on crime, judges who sit as finders of fact are typically more skeptical of defense arguments than are juries.[115] Yet most articles and treatises on trial skills focus on jury trials, with little to no training provided on the special challenges presented by bench trials.[116]

Along with failing to do what would be expected for adult clients, attorneys also routinely ignore demands that the special characteristics of youth and the realities of delinquency proceedings place on their representation. In many instances, for example, attorneys do not meet with their juvenile clients outside of court appearances. Often, they meet with them for the first time on the day of trial.[117] While this would be a problematic practice for adult defendants, it is particularly problematic with juvenile clients. Children, who have little to no experience with adults—especially adults outside the family—who can be trusted to pursue their wishes and expressed interests, need to spend time with an attorney before they can trust him and even consider following his advice.[118] A typical hearing features court officers yelling orders, judges issuing warnings, prosecutors threatening punishment, and probation officers laying down rules.[119] Absent repeated and consistent demonstrations of concern and loyalty from a defender, the child will likely perceive him as yet one more of what Professor Emily Buss memorably describes as the "finger-wagging lecturers" that predominate in juvenile court.[120] However well-intended the attorney's instruction or advice, if a child's experience does not indicate that the attorney is on her side, she has no reason to listen.[121]

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[113] *See, e.*g., ABA JUVENILE JUSTICE CTR. & MID-ATL. JUVENILE DEFENDER CTR., *supra* note 111, at 33.

[114] In *McKeiver v. Pennsylvania,* the Supreme Court held that the fundamental fairness guarantees of the Due Process Clause are not offended by denying juveniles the right to trial by jury. 403 U.S. 528, 545 (1971). Only twenty states provide for jury trials for juveniles as a matter of state statutory or constitutional law. Birckhead, *supra* note 3, at 1451.

[115] *See* Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries and Justice: Ensuring the Fairness of Juvenile Delinquency Trials,* 33 WAKE FOREST L. REV. 553, 571–75 (1998).

[116] *Id.* at 586–87.

[117] *See, e.g.,* NAT'L JUVENILE DEFENDER CTR., MISSISSIPPI: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN YOUTH COURT PROCEEDINGS 32 (2007), *available at* http://www.njdc.info/pdf/mississippi_assessment.pdf.

[118] Buss, *supra* note 81, at 256–62.

[119] *Id.* at 260.

[120] *Id.*

[121] Of course, developing a relationship in which a client will learn to trust an attorney requires significant expenditures of time. Given the reality of huge, unmanageable caseloads for many defenders, such expenditures of time may be impossible. However, this reality does not change the fact that effective assistance

Children also need complicated legal concepts explained in language they can understand. Yet many attorneys make no effort to slow down court hearings, which typically move at lightning-quick speed, or to ensure their clients' understanding of the court's process and its significance.[122] *Washington v. A.N.J.*, a recent Washington Supreme Court decision allowing a twelve-year-old juvenile's motion to withdraw a plea to first-degree sexual molestation based on the court's finding that the attorney had been ineffective, offers an egregious but not atypical example of the deficient representation described herein.[123] In that case, the court found that the attorney met with his client for a total of approximately ninety minutes prior to the plea hearing, failed to investigate in a meaningful way, and misinformed the juvenile of the consequences of the plea—which included possible placement on a sex offender registry for the rest of his life and notification of his school.[124]

Additionally, rather than respect their duty of loyalty and confidentiality to the child, attorneys may routinely violate client confidences and have important conversations in the presence of parents or other court personnel.[125] They may not follow their clients' expressed wishes and instead insert their own judgment about what is best—even when that runs counter to their clients' expressed interests.[126] For example, such attorneys may fail to adequately research and investigate a case, believing that an adjudication that will lead to probation, and services, is what the child needs most.[127] Even if they do not substitute their judgment for that of their clients, attorneys may practice a passive

requires time. The lack of a structure that provides for it simply indicates a lack of political will, likely based on the lack of popularity of expending taxpayer dollars to adequately fund juvenile defense.

[122] *See, e.g.*, NAT'L JUVENILE DEFENDER CTR., FLORIDA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 36 (2006), *available at* http://www.njdc.info/pdf/Florida%20Assessment.pdf. As Emily Buss has noted, the presence of a jury functions to slow down the court process; because judges need to be sure that lay people understand the legal proceedings, judges take more time to give instructions in jury trials. In juvenile court, where most proceedings are bench trials, there is no jury to provide an external pressure to slow down the proceedings. Buss, *supra* note 81, at 252. This makes it incumbent on attorneys to serve that role.

[123] No. 81236-5, 2010 WL 314512 (Wash. Jan. 28, 2010).

[124] *Id.* at *1.

[125] *Id.* at *8, *10, *14 (holding that failure of juvenile's attorney to provide opportunity to juvenile to "consult with and confide in his attorney without his parents present" was factor to be considered in assessing whether plea "was knowing, voluntary, and intelligent" and ultimately, based on other deficiencies of the attorney, allowing juvenile to withdraw plea to first-degree sexual molestation). *See also* Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 344–45 (2003) (discussing the issue of confidentiality violations committed by juvenile defenders).

[126] *See, e.g.*, TEXAS APPLESEED, SELLING JUSTICE SHORT: JUVENILE INDIGENT DEFENSE IN TEXAS 24 (2000), http://texasappleseed.net/pdf/projects_fairDefenseJ_sell short.pdf.

[127] Marrus, *supra* note 125, at 290–91.

version of expressed-interest lawyering in which they blindly follow their clients' wishes and do not offer them their counsel or explore alternatives.[128]

In sum, attorneys fail their clients in myriad ways, by neglecting to do those tasks that would be required of them in adult court and by neglecting the ways in which youthfulness affects a client's participation in a case. The next Sections explore the impact of these failings.

B. The Negative Effects of Poor Lawyering on Youth

Substandard lawyering negatively affects a youth's case at both the adjudicatory and dispositional phases. At the adjudicatory phase, attorneys who do not investigate, file motions, or do legal research are unable to contest the state's evidence at trial, thus all but ensuring a delinquent adjudication.[129] Attorneys who are poorly prepared for trial may be inappropriately eager to resolve a case by way of a guilty plea, even when more diligent work would have revealed a ground for suppression of key evidence or a meritorious defense. The rate at which cases are decided by means of guilty pleas is extraordinarily high in juvenile court. While no national figures of the rate at which delinquency cases are resolved by means of a guilty plea are available, state studies indicate that the rate is upward of ninety percent.[130] The high number of guilty pleas is not entirely attributable to poor legal representation. Yet the "plea culture" that predominates in juvenile court can countenance

[128] Kristin Henning has criticized this version of expressed-interest lawyering as insufficiently attentive to the realities of what a child client needs from his attorney. "Because children reason with a relatively small fund of general information and an even smaller fund of legal information, children need lawyers to help them understand the full range of options available to them in litigation. In a delinquency case, for example, the child may be asked to decide whether he will litigate pre-trial evidentiary issues; plead guilty or assert his right to trial; assert his right to cross-examine government witnesses; and testify on his own behalf. Children have limited experience in these contexts and need and want the assistance and advice of a knowledgeable adult and legal advisor." Henning, *supra* note 67, at 314.

[129] *See* Emily Buss, *supra* note 81, at 245 (noting prevalence of "cases in which judges find against the accused on thin evidence presented in a procedurally inappropriate manner").

[130] *See* Mlyniec, *supra* note 4, at 371, 394 (summarizing studies of four states that estimated that approximately ninety percent or more of delinquency cases were resolved by plea). This number parallels that in state and federal criminal courts, where ninety-one percent of defendants plead guilty. Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas,* 110 YALE L.J. 1097, 1150 & n.330 (2001) (analyzing Bureau of Justice Statistics data on federal and state prosecutions). A number of commentators have critiqued the high rate of guilty pleas in the adult criminal context. *See, e.g.*, Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983); Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 YALE L.J. 1131, 1196–99 (1991); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?* 97 HARV. L. REV. 1037 (1984).

lackluster efforts by defense attorneys.[131] Poor preparation and performance by attorneys then encourages clients to plead guilty out of a sense of hopelessness.[132]

The performance of attorneys at the dispositional phase of a delinquency proceeding is frequently poor as well.[133] States provide for dispositional hearings at which all sides can present witnesses, offer written memoranda, and make oral arguments designed to procure a particular disposition.[134] Model rules and standards make clear an attorney's obligations at the dispositional stage.[135] For juveniles to obtain the programs and services available to adjudicated delinquents, they need an attorney to make the case that those services are essential to their rehabilitation.[136] Yet lawyers often fail to obtain education or health records of their clients or to seek available public funds to hire independent forensic psychologists or social workers. They instead rely on probation departments for relevant biographical information on their clients, essentially abdicating their critical role in this process.[137] As such, their ability to make informed and persuasive dispositional arguments is limited.

In addition to leading to outcomes the youth experiences as adverse and unfair at both the adjudication and the dispositional phases, deficient representation can also negatively affect her prospects for rehabilitation in more subtle but still significant ways.

Gault recognized that the rehabilitative aspiration of the juvenile court requires that it adhere to due process, citing a study that concluded "[u]nless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel."[138]

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[131] F. Andrew Hessick III & Reshma M. Saujani, Note, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 210 (2002) (describing pressure to move cases quickly to resolution).

[132] *See generally* Drizin & Luloff, *supra* note 11, at 292.

[133] *See* Marrus, *supra* note 125, at 291.

[134] *See, e.g.*, N.C. GEN. STAT. § 7B-2501(a)–(b) (2007) (describing evidentiary requirements for dispositional hearing, and establishing that juvenile may present evidence and advise court concerning disposition believed to be in juvenile's best interest).

[135] *See* IJA-ABA JOINT COMM'N ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO INTERIM STATUS: THE RELEASE, CONTROL, AND DETENTION OF ACCUSED JUVENILE OFFENDERS BETWEEN ARREST AND DISPOSITION § 8.2 (1980); *see also* IJA-ABA JOINT COMM'N ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES § 9.2 (a)–(b) (1980) (proffering standards requiring attorneys to be familiar with all community services and treatment alternatives available to the court and to investigate the source of any evidence introduced at a disposition hearing).

[136] *See* Simkins, *supra* note 66, at 210.

[137] *See* Marrus, *supra* note 125, at 290–91.

[138] *In re* Gault, 387 U.S. 1, 26 (1967) (citing STANTON WHEELER & LEONARD S. COTTRELL, JR., JUVENILE DELINQUENCY—ITS PREVENTION AND CONTROL 33 (1966)). *See* Bernard P. Perlmutter, "*Unchain the Children*": Gault*, Therapeutic Jurisprudence, and*

Subsequent social science research has demonstrated a causal connection between whether a youth was treated fairly in court and her likelihood of reoffending.[139] An important component of a child's perception of whether the process was fair is her attorney's performance; if a child reasonably believes that her attorney did not adequately prepare her defense, present a dispositional plan, or elicit her views on the case, that child may well view the entire court process as illegitimate.[140]

What is more, the cost to youths of representation by substandard lawyers is high. Dispositions in juvenile court are becoming longer and more punitive.[141] Today, most states have multiple areas in which delinquency adjudications have collateral consequences that follow a child into adulthood.[142] A delinquent adjudication can result in suspension or expulsion from school,[143] which decreases a child's employment options.[144] It can imperil a child's chances at obtaining citizenship, permanent residency, or asylum if she is an immigrant; keep a child on a sex offender registry for multiple years or even, in some instances, for life; prevent a child from enlisting in the military; keep her from being accepted by a college or university, or hinder her chances at obtaining financial aid; disqualify her family from obtaining public housing; and prevent a child from eventually obtaining employment in

Shackling, 9 BARRY L. REV. 1, 39 (2007) (describing opinion's focus on child's feelings and perceptions of fairness in the process as key elements of the child's amenability to rehabilitation and discussing how this insight augurs the approach of therapeutic jurisprudence scholarship).

[139] Birckhead, *supra* note 3, at 1479 & n.132 (citing studies).

[140] *See* Henning, *supra* note 67, at 285. "In fact, a model of advocacy that denies the child a meaningful voice in the attorney-client relationship, and thus in the juvenile justice system as a whole, may actually hinder the rehabilitative and public safety objectives of the court. The client who is excluded from the process will be less likely to disclose important information, less likely to follow through on necessary steps in the case and less likely to comply with orders issued by a judge who has never heard or considered the child's views." *Id.* (footnotes omitted).

[141] As part of the "tough on crime" movement of the 1980s and 1990s, legislatures across the country modified their juvenile codes' enabling clauses to include punitive language, enacted determinate and mandatory-minimum sentencing statutes, and reduced confidentiality protections for a subset of juvenile offenders. By the end of 2004, juvenile codes in every state allowed juvenile court records to be released to prosecutors, law enforcement, social services agencies, schools, and/or victims. Codes also permitted law enforcement agencies to fingerprint and photograph juveniles under certain circumstances and exposed a subset of juveniles to some form of criminal sanctions. Perry L. Moriearty, *Combating the Color-Coded Confinement of Kids: An Equal Protection Remedy*, 32 N.Y.U. REV. L. & SOC. CHANGE 285, 297 (2008).

[142] *See, e.g.*, Pinard, *Difficulties, supra* note 7, at 1114–15 (cataloguing collateral consequences for juveniles).

[143] *See, e.g.*, TEX. EDUC. CODE ANN. § 37.006(b)–(e) (Vernon 2006) (describing circumstances allowing or mandating placement in alternative education program for students engaging in felony conduct on or off campus).

[144] *See* john a. powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 796–97 (2008) (discussing the relationship between school exclusion and labor market chances).

law enforcement.[145] Additionally, a delinquent adjudication enhances adult sentences in all fifty states in one form or another.[146] Furthermore, approximately half of all states now specify by statute that a prior delinquent adjudication makes a child eligible for transfer to adult court.[147] Less tangibly but no less significantly, at a time when they are exploring and establishing their identities, youths labeled "delinquent" may come to embrace the role—to their own detriment as well as the detriment of society.[148]

C. Reasons for the Pervasiveness of Substandard Representation

The routinely poor performance of defense lawyers in juvenile court appears to have many root causes. Some pertain to both adult defendants and juveniles; some are unique to juveniles.

1. Structural Causes

Like adult criminal defendants, most juveniles are poor and thus eligible for appointed counsel.[149] A number of problems endemic to indigent defense contribute to inadequate representation in both juvenile and adult courts. High caseloads, inadequate funding, and insufficient training are common in both adult and juvenile courts and

[145] *See* Pinard, *Difficulties*, *supra* note 7, at 1114–15 (noting collateral consequences of juvenile adjudications in the areas of housing, employment, and education); 1 RANDY HERTZ ET AL., TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT § 14.07, at 365–66 (1991) (discussing immigration consequences, use of delinquency adjudications as sentencing enhancements, and forfeiture).

[146] *See* A.M. v. Butler, 360 F.3d 787, 790 (7th Cir. 2004). *See also* People v. Nguyen, 209 P.3d 946, 948, 957 (Cal. 2009) (finding that juvenile adjudications fall under the "prior conviction" exception, and later use of that adjudication to enhance adult sentencing was appropriate) (citing Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)); State v. Weber, 149 P.3d 646, 649, 653 (Wash. 2006) (en banc) (same) (citing *Apprendi*, 530 U.S. at 490); Joseph B. Sanborn Jr., *Second-Class Justice, First-Class Punishment: The Use of Juvenile Records in Sentencing Adults*, 81 JUDICATURE 206, 209–10 (1998).

[147] Robert E. Shepherd, Jr., *Collateral Consequences of Juvenile Proceedings: Part I*, CRIM. JUST., Summer 2000, at 59.

[148] After being accused of being a thief, Jean Genet became one; "[t]hus . . . I decisively repudiated a world that had repudiated me." LeninImports.com, Jean Genet Biography, http://www.leninimports.com/jean_genet.html. For a discussion of the shame and humiliation associated with involvement in juvenile court, see Paul R. Kfoury, *Confidentiality and the Juvenile Offender*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 55, 56 (1991).

[149] *See generally* NAT'L CRIMINAL JUSTICE COMM'N, THE REAL WAR ON CRIME 130 (Steven R. Donziger ed., 1996) (study of American crime, noting correlation between it and poverty). While comparable studies are not available for juvenile court, studies of criminal courts indicate that up to ninety percent of criminal defendants are financially eligible for appointed counsel. *See* Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States,* 58 LAW & CONTEMP. PROBS. 31 (1995).

contribute to inadequate representation in both court systems.[150] Some appear to apply with particular force in juvenile court. For example, attorneys for indigent juveniles and adults often have high caseloads.[151] The numbers are, however, particularly punishing for juvenile defenders.[152] While lack of training characterizes all indigent defense programs, the problem is particularly acute in juvenile court. Juvenile courts are often the first stop for recent law graduates, who, after gaining experience, are typically rotated into criminal court to represent adults.[153] They are also often havens for defenders looking for less scrutiny from their professional peers or their superiors.[154]

An additional set of factors that contributes to inadequate representation is unique to the juvenile court. These are issues and problems that arise at least in part because of the gaps and ambiguities in *Gault*. But they also reflect long-standing cultural assumptions about children that *Gault,* despite bestowing a new set of rights on children, did not effectively dislodge.

2. Resistance to the Empowerment of Youth and the Persistence of Best-Interest Representation

The first such factor is the belief that the consequences of involvement in juvenile court for a youth are insufficiently serious to merit a defense attorney's best and most sustained efforts. As noted in the state-wide assessment of juvenile delinquency representation in Georgia, lawyers may rationalize half-hearted preparation on behalf of juvenile clients based on the fact that these clients, unlike their adult ones, will not face prison time.[155] A related factor is the resistance of attorneys to the notion that the values and views of their child clients are worthy of respect. The backdrop to this resistance is the society-wide belief, sanctioned in centuries of statutory and constitutional law

[150] *See* Erica J. Hashimoto, *The Price of Misdemeanor Representation,* 49 WM. & MARY L. REV. 461, 465, 474 (2007) (discussing problems of lack of funding and high burnout rate for attorneys which result in defense attorneys with minimal training in adult criminal court).

[151] Steven N. Yermish, *Ethical Issues in Indigent Defense: The Continuing Crisis of Excessive Caseloads*, CHAMPION, June 2009, at 22 (describing problem of high caseloads for defenders of indigent adults and juveniles).

[152] Jerry R. Foxhoven, *Effective Assistance of Counsel: Quality of Representation for Juveniles Is Still Illusory,* 9 BARRY L. REV. 99, 119 (2007) (noting national studies of juvenile defense that document caseloads as high as 1,500 cases per year in Virginia).

[153] Birckhead, *supra* note 5, at 1498 (describing phenomenon in North Carolina of assigning new attorneys to juvenile court).

[154] *See* BARBARA FLICKER, PROVIDING COUNSEL FOR ACCUSED JUVENILES (1983). "In some defender offices, assignment to 'kiddie court' is the bottom rung of the ladder, to be passed as quickly as possible on the way up to more visible and prestigious criminal court assignments. Little attention may be paid by superiors to performance in juvenile court, providing few incentives for hard work." *Id.* at 2.

[155] ABA JUVENILE JUSTICE CTR. & S. CTR. FOR HUMAN RIGHTS, AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 29 (2001), *available at* http://www.njdc.info/pdf/georgia.pdf.

opinions, that children are too immature to be trusted to make choices that have long-term implications.[156] Laws that deny children rights in the name of protecting them have been repeatedly upheld against constitutional attack.[157] For many attorneys, the relatively recent academic and professional consensus in favor of client-directed representation runs strongly counter to their own experiences and belief systems. When these attorneys practice in one of the many courts around the country that foster and reward a go-along-to-get-along approach by defense lawyers, the pressure to abandon the child's expressed interest may well be overwhelming.[158]

In certain delinquency cases, a lawyer's view of a child's best interest might match the child's actual and expressed interest such that the goals of the lawyer and client might be aligned. Yet even in these cases, if the lawyer allows his own views about the appropriate rights and status of children to interfere with his client's exercise of their due process rights, as described in Part III.A, he has violated the spirit of *Gault* and likely contributed to a process, if not an outcome, that the client experiences as adverse.[159]

3. The Trouble with Parents

Another juvenile-specific factor underlying substandard legal representation, also traceable to the gaps and ambiguities in *Gault,* is the reality—and potentially troubling interference—of parents and guardians. This problem takes many forms. An attorney may experience conflict when his client expresses a desire to plead guilty but his client's parents insist on a trial. In such instances, parents may unreasonably believe in their child's innocence, either because their child has been less than truthful with them or because they refuse to acknowledge that she has broken the law.[160] Conversely, an attorney may be ordered by parents to pressure the child to take a plea deal, even when the child is insisting she wants a trial, because the parents do not wish to continue to come to

[156] *See* Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589, 638 (2002).

[157] *See, e.g.,* Bellotti v. Baird, 443 U.S. 622, 643 (1979) (upholding parental notification statutes regulating minors' access to abortion lawful if minors can seek judicial bypass); Ginsberg v. New York, 390 U.S. 629, 636–37 (1968) (upholding a law restricting the dissemination of non-obscene, sexually explicit material to individuals over the age of seventeen).

[158] *See* Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court,* 69 N.C. L. REV. 1083, 1129–30 (1991); BARRY C. FELD, JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURTS 238 (1993) (documenting instances where judges sentenced represented juveniles more harshly than those who were pro se).

[159] Marrus, *supra* note 125, at 290–91, 326–27 (criticizing best-interest lawyering as harmful to children); Marrus, *supra* note 9, at 417–19 (same).

[160] For a discussion of the tensions and need for collaboration among children, parents, and attorneys, see Kristin Henning, *It Takes a Lawyer to Raise a Child? Allocating Responsibilities Among Parents, Children, and Lawyers in Delinquency Cases*, 6 NEV. L.J. 836, 837–67 (2006).

court, or want their child to "learn a lesson," or for any other number of reasons. If an attorney adheres to his client's wishes, parents can simply wait until they are alone with the child and then direct her to plead guilty, or to accept punitive consequences at home. Such tensions may be particularly acute when the parents have retained the attorney, who may experience conflict between the ethical demands of loyalty to a juvenile client and the reality that parents footing a hefty legal bill may expect to direct the legal representation.[161]

As with best-interest representation, any inclination an attorney may have to accede to the wishes of a child's parents instead of a child is linked to a society-wide belief system sanctioned in law. That is, any rights possessed by a child are thought to be subordinate to the prerogatives of parents to raise their children as they see fit.[162] In *Parham v. J.R.,* for example, the Supreme Court ruled that a child's liberty interest in not being involuntarily confined in a state mental institution is "inextricably linked with the parents' interest in and obligation for the welfare and health of the child."[163] It followed for the Court that a procedure authorizing the commitment of a child by her parent over the child's objection and in the absence of any adversary pre-admission proceeding did not offend the Constitution. In its ruling, the Court noted the presumption in the law that "parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions," and that "natural bonds of affection lead parents to act in the best interests of their children."[164] It does not ineluctably follow in every case that an attorney experiencing role conflict because of the presence and involvement of parents will in fact resolve that conflict against the interests of her client. Nonetheless, parents' pressure can make the already difficult work of delinquency representation even harder**.**

[161] Henning, *supra* note 67, at 302 (noting problem and noting clear ethical mandates in Model Rules against allowing paying parent to direct course of representation).

[162] *See* Guggenheim, *supra* note 156, at 592 ("[O]ne cannot discuss constitutional rights of children without recognizing that children must be discussed in relational terms.").

[163] 442 U.S. 584, 600 (1979).

[164] *Id.* at 602. In his concurrence, Justice Stewart explained that because of the commonality of interest between parents and children, children are in the position of patients who commit themselves voluntarily, and "voluntary" patients do not require legal rights or procedural protections. *Id.* at 622–23. As one commentator memorably described, "In one quick stroke, Justice Stewart transformed the parent into a ventriloquist, and the child into Charlie McCarthy; no matter how the voices sound, they all come from the same place." Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571, 1581 (1996). The presumption of parental fitness is of course subject to the exception of parental abuse and neglect authorizing state intervention in the family unit. Santosky v. Kramer, 455 U.S. 745, 769–70 (1982) (holding that clear and convincing evidentiary standard applies to termination of parental rights proceedings).

The pressure to practice best-interest lawyering and to cede to wishes of parents—in other words, to ignore ethical norms and professional standards—may feel particularly intense because of the closed-door, rarefied atmosphere of juvenile court. Many states close their juvenile courtrooms to the public, pursuant to confidentiality statutes presumably enacted to shield juveniles from the stigma associated with delinquency.[165] Yet closed doors effectively shield lawyers and judges from scrutiny they might otherwise face from the public and the press. With more scrutiny, attorneys might take their ethical duties more seriously, and judges might behave more professionally and appropriately.[166]

IV. IN SEARCH OF AN EFFECTIVE APPELLATE REMEDY

There is an appellate remedy—at least in theory—for children who are harmed by poor lawyering: file an appellate claim of ineffective assistance of counsel (IAC). This Part will provide the background, underpinnings, and procedural nuances of that remedy and suggest types of claims a juvenile might wish to file. It will present findings from a survey conducted by the author that reveals an extremely low number of IAC claims filed in delinquency cases over the last ten years. It will then examine how both legal doctrine and rules and policies governing IAC claims create nearly insurmountable hurdles for aggrieved juveniles.

A. The Mechanics and Doctrine of a Juvenile IAC Claim

Although *Gault* did not provide for a juvenile's right to appeal from a delinquency adjudication and disposition, the right to direct appeal is now explicitly provided to children adjudicated delinquent in most states as a matter of state statutory or constitutional law.[167] Additionally,

[165] *See, e.g.,* MASS. GEN. LAWS ANN. ch. 119, § 65 (West 2008) (excluding public from delinquency proceedings).

[166] For a discussion of the arguments for and against confidentiality in juvenile delinquency proceedings, see Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities be Notified?*, 79 N.Y.U. L. REV. 520 (2004). Observers have attributed the scandal surrounding the Pennsylvania judges who took bribes for sentencing juveniles to detention facilities in part to the confidentiality provisions that apply to the state's juvenile proceedings. Ian Urbina & Sean D. Hamill, *Judges Plead Guilty in Scheme to Jail Youths for Profit*, N.Y. TIMES, Feb. 13, 2009, at A22. In his concurring and dissenting opinion in *McKeiver v. Pennsylvania*, Justice Brennan noted that the value of fundamental fairness could be honored in a bench-trial delinquency system only where that system was open to public exposure, so that the "accused may in essence appeal to the community at large, by focusing public attention upon the facts of his trial, exposing improper judicial behavior to public view, and obtaining, if necessary, executive redress through the medium of public indignation." 403 U.S. 528, 555 (1971) (Brennan, J., concurring). This insight applies equally to defense lawyers who behave improperly.

[167] Statutes which establish the right to appeal: ALA. CODE § 12-15-601 (LexisNexis Supp. 2008); ALASKA STAT. § 47.12.120 (2008); ARIZ. REV. STAT. ANN. § 8-325 (2007); ARK. CODE ANN. § 9-27-325(f) (2008); CAL WELF. & INST. CODE § 395 (West

appellate courts have assumed the authority to hear juvenile appeals based on arguments of IAC.[168] Further, national standards have been promulgated stating that an appellate attorney has an ethical obligation to comb the record for ineffective assistance and to make an IAC claim where one is warranted.[169] Thus, a structure is in place in which a child can bring an IAC claim.

2008); CONN. GEN. STAT. ANN. § 46b-142 (West 2009); DEL. CODE ANN. tit. 10, § 1051 (1999); FLA. STAT. ANN. § 985.01 (West 2006); GA. CODE ANN. § 15-11-3 (2008); HAW. REV. STAT. § 571-11 (2006); ILL. CT. R. & P. 604 (West 2009); IND. CODE ANN. § 31-32-15-1 (LexisNexis 2007); IOWA CODE ANN. § 232.133 (West 2006); KY. REV. STAT. ANN. § 610.130 (LexisNexis 2008); LA. CHILD. CODE ANN. art. 330 (2004); ME. REV. STAT. ANN. tit.15, § 3402 (Supp. 2009); MD. CODE ANN., CTS. & JUD. PROC. § 12-301 (LexisNexis 2006); MASS. GEN. LAWS. ANN. ch. 119, § 56(g) (West 2008); MICH. CT. R. 3.993 (2009); MINN. R. CT. 21.03 (2009); MO. ANN. STAT. § 211.261 (West 2004); MONT. CODE ANN. § 41-5-1423 (2009); NEB. REV. STAT. § 43-287.06 (2008); NEV. REV. STAT. § 62D.500 (2007); N.H. REV. STAT. ANN. § 169-B:29 (LexisNexis 2001); N.J. STAT. ANN. § 2A:4A-40 (West 1987); N.M. R. ANN. 10-251 (2009)); N.Y. FAM. CT. ACT § 1112 (McKinney 1999); N.C. GEN. STAT. § 7B-2602 (2007); N.D. CENT. CODE § 27-20-56 (2006); OHIO REV. CODE ANN. § 2501.02 (West 2006); OKLA. STAT. ANN. tit. 10A, § 2-2-601 (West 2009); OR. REV. STAT. § 419A.200 (2007); R.I. GEN. LAWS § 14-1-52 (2002); TENN. CODE ANN. § 37-1-159 (2005); TEX. FAM. CODE ANN. § 56.01 (Vernon 2009) (appeal is limited); VT. STAT. ANN. tit. 33, § 5113 (2009); VA. CODE ANN. § 16.1-296 (Supp. 2009); WASH. REV. CODE ANN. § 13.04.033 (West 2004); W. VA. CODE ANN. § 49-5-13 (LexisNexis 2009); WYO. STAT. ANN. § 14-6-233 (2009). Constitutions which provide the right to appeal: PA. CONST. art. V, § 9; UTAH CONST. art. VIII, § 5. There is no reference in the state codes of Colorado, Idaho, Kansas, Mississippi, South Carolina or South Dakota to a juvenile's right to appeal. *But see* Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503 (1992) (some form of appellate review is provided by statute in every state); 1 HERTZ ET AL., *supra* note 145, at 913 ("If a State allows appeals of criminal convictions, a juvenile respondent who is not given a statutory right to appeal may be able to contend that this disparate treatment violates the equal protection of the laws.").

[168] One notable outlier is Seventh Circuit Court of Appeals Judge Easterbrook, who suggested, in a dissenting opinion in a case in which a juvenile was granted relief pursuant to a habeas petition, that juveniles are not entitled to effective assistance because *Strickland v. Washington,* 466 U.S. 668 (1984), and progeny are based on the Sixth Amendment (which does not govern the juvenile right to counsel). A.M. v. Butler, 360 F.3d 787, 806 (7th Cir. 2004) (Easterbrook, J., dissenting). Easterbrook surely puts the doctrinal cart before the horse here; as asserted *infra* Part V, the question that should concern appellate courts is the appropriate constitutional standard by which to assess juvenile claims of ineffective assistance of counsel, not whether juveniles are entitled to effective assistance in the first instance, a matter which *In re Gault*, 387 U.S. 1 (1967), settled.

[169] Lee Teitelbaum, *Standards Relating to Counsel for Private Parties*, *in* IJA-ABA JUVENILE JUSTICE STANDARDS ANNOTATED: A BALANCED APPROACH 69 (Robert E. Shepherd, Jr. ed., 1996). Standard 10.7(a) provides that, "A lawyer appointed or retained to represent a client previously represented by other counsel has a good faith duty to examine prior counsel's actions and strategy. If, after investigation, the new attorney is satisfied that prior counsel did not provide effective assistance, the client should be so advised and any appropriate relief for the client on that ground should be vigorously pursued." *Id.* at 94.

Nearly all appellate courts evaluate such claims using the two-prong test articulated in *Strickland v. Washington*,[170] or a state constitution-based analog.[171] The *Strickland* test requires a showing by the juvenile that; (1) his attorney's performance fell below objective standards of reasonable attorney performance; and (2) but for counsel's unprofessional errors, there existed a reasonable probability that the result of the proceeding would have been different.[172] When both prongs of the test are satisfied, the representation is defective and the juvenile is entitled to a new adjudicatory or dispositional hearing, or to withdraw a plea.[173]

B. Types of Claims that Are, or Could Be, Filed by Juveniles

Reviewing courts have found trial counsel for juveniles ineffective for failing to file an appeal of an adjudication based on insufficient evidence;[174] failing to move to suppress an involuntarily obtained confession without which, the juvenile indicated in a habeas corpus

[170] 466 U.S. at 687. *Strickland* held that the test should govern the adjudicatory and sentencing phases of capital trials as well as the adjudicatory phase of non-capital, adult criminal cases. The facts of the case did not require a consideration of whether the test would apply to sentencing phases of non-capital trials or to delinquency cases, and the Court did not reach beyond the facts to decide that question. *Id.* The test was later applied to guilty pleas. Hill v. Lockhart, 474 U.S. 52, 58 (1985).

[171] *See, e.g.*, Commonwealth v. Bart B., 679 N.E.2d 531, 534 (1997) (stating that the determination of ineffective assistance of counsel is governed by *Strickland*); State v. Dawson, 768 So. 2d 647, 650 (La. Ct. App. 2000) (citing several state cases that analyzed ineffective assistance of counsel claims under two-prong *Strickland* test, finding that juvenile defendants did not meet either prong when their attorney stipulated to probable cause prior to transfer hearing). *See also* Marrus, *supra* note 9, at 393 n.4 (2003) (cataloguing cases in which Strickland standard utilized in juvenile appeals featuring IAC claims).

In Hawaii, the state Supreme Court has rejected the *Strickland* test in measuring ineffectiveness of counsel for adults and juveniles for all claims brought under both the Hawaii State Constitution and the U.S. Constitution. State v. Smith, 712 P.2d 496, 500 n.7 (Haw. 1986). Finding the test's prejudice requirement unduly burdensome for defendants, the state's high court has ruled that individuals raising ineffective assistance of counsel claims need only show "specific errors or omissions . . . reflecting counsel's lack of skill, judgment, or diligence," and that "these errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." State v. Antone, 615 P.2d 101, 104 (Haw. 1980).

[172] *Strickland*, 466 U.S. at 687. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694.

[173] *See Hill*, 474 U.S. at 58; *Strickland,* at 687. Additionally, where a state actor deprives a defendant of access to an attorney or interferes in the attorney-client relationship, or an attorney is burdened by conflicts of interest, a defendant is presumed to have been denied effective assistance of counsel without needing to meet the two-prong test. *See* United States v. Cronic, 466 U.S. 648, 649–50 (1984); Cuyler v. Sullivan, 446 U.S. 335, 345, 348 (1980).

[174] *See, e.g.*, *In re* Anthony J., 11 Cal. Rptr. 3d 865, 867, 872 (Cal. Ct. App. 2004) (insufficient evidence to sustain the adjudication in case of receiving stolen motor vehicle after finding juvenile's counsel ineffective for failing to preserve right to appeal).

proceeding, he would not have made an admission;[175] erroneously advising a juvenile about the possibility of a deferred disposition prior to adjudication;[176] and sending subpoenas to key defense witnesses with the incorrect date of return.[177] Juveniles have also had success raising claims of IAC based on substandard lawyering that resulted from a lawyer's excessively high caseload.[178]

In addition to claims based on the types of deficient trial counsel performance discussed above that are common to both juvenile and adult criminal court, juveniles also are harmed when their attorneys substitute their own views of what is best for their child clients' expressed wishes. As argued above, best-interest lawyering can negatively affect both the outcome and the child's experience of the process in a particular case. Specifically, where an attorney's actions on behalf of a client are limited or constrained by his own view of what is best for the client, he is arguably unable to provide assistance of counsel that is "not diluted by conflicting interests or inconsistent obligations."[179] In these instances, he will have provided ineffective assistance. At least one court has acknowledged that best-interest lawyering in a delinquency case could constitute such a conflict of interest.[180]

Juveniles are also harmed when their attorneys do not account for their cognitive deficits and immaturity in ways that affect the outcome. In theory, they should be able to bring IAC claims on this basis. Yet a search for IAC claims arising out of cases where an attorney prejudicially failed to attend to a child's cognitive or maturity deficits uncovered only one such claim.[181] While it is of course possible that such claims have been

[175] *In re* Matthew K., No. E031468, 2002 WL 31840658, at *1 (Cal. Ct. App. Dec. 19, 2002) (finding ineffective assistance of counsel for failure to challenge coerced and inadmissible confession, reversing delinquency adjudication and remanding the case). *See also In re* S.E., No. 22458, 2008 WL 2404039, at *1 (Ohio Ct. App. June 13, 2008) (finding counsel ineffective for failing to renew at trial motion to suppress statement).

[176] State v. B.J.S., 169 P.3d 34, 39 (Wash. Ct. App. 2007) (reversing adjudication after finding attorney's failure to advise juvenile that deferred disposition was possible undermined confidence in the outcome of a guilty plea).

[177] *In re* Parris W., 770 A.2d 202, 209–10 (Md. 2001) (finding juvenile's lawyer ineffective for incorrectly listing the date of subpoenas for five corroborating witnesses after reviewing their potential statements and determining juvenile could have presented a sound alibi defense).

[178] *In re* Edward S., 92 Cal. Rptr. 3d 725, 741 (Cal. Ct. App. 2009) (counsel ineffective in sex offense case for failing to investigate potentially exculpatory material and failing to move for substitution of counsel knowing he was unable to devote required time to case).

[179] People v. Spreitzer, 525 N.E.2d 30, 34 (Ill. 1988). In instances where a defendant can demonstrate a conflict of interest, the Sixth Amendment right to effective assistance is implicated. *See* Cuyler v. Sullivan, 446 U.S. 335, 348 (1980).

[180] State v. Joanna V., 94 P.3d 783, 786–87 (N.M. 2004) (counsel required to follow client's express interest rather than attorney's belief in best interest).

[181] *In re* Victoria D., 864 N.Y.S.2d 13, 14 (N.Y. App. Div. 2008) (denying juvenile's claim that her attorney provided ineffective assistance at trial by failing to ensure that she understood that once the defense rested she was no longer able to testify).

filed and rejected in unpublished opinions that are not reported in Westlaw or Lexis, the near-total absence of such claims in opinions that do appear in these search engines suggests otherwise.

C. Juvenile IAC Claims: Few and Far Between

Juveniles file IAC claims on any grounds very infrequently. Between 1995 and 2005, the last year for which comprehensive data are available, over six million youths were adjudicated delinquent.[182] In that same time period, in all fifty states, only 290 adjudicated juveniles filed IAC claims that resulted in opinions published by Westlaw and/or LexisNexis.[183] Among those cases, only forty-one IAC claims yielded appellate relief.[184] While precise numbers documenting the national scope of IAC over that same ten-year period do not exist, the incidence of substandard representation—as measured in statewide and national assessments of the National Juvenile Defender Center—does not appear to be reflected in the low number of IAC claims brought on behalf of juveniles harmed by poor representation.[185] While it is not possible to say definitively why so

[182] The total number of delinquency adjudications between 1995 and 2005 was, according to the Office of Juvenile Justice and Delinquency Prevention, 6,314,800. *See* C. PUZZANCHERA & W. KANG, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS DATABOOK: CASE PROCESSING (2008), http://ojjdp.ncjrs.gov/ojstatbb/jcsdb/asp/process.asp.

[183] The methodology I employed to arrive at this number is as follows. I first searched the "All States" database in Westlaw for cases in which the words "juvenile" and "appeal" appeared in the case summary. I then searched those cases for "effective assistance" or "ineffective assistance," while excluding the word "dependency," which would have found abuse and neglect rather than delinquency cases. I then performed a similar search on LexisNexis using "juvenile" or "minor w/s delinqu!" and "appeal" and "ineffective w/2 assistance" and "HEADNOTES(juvenile)." I then excluded all claims on behalf of juveniles tried as adults, except for any hearings in the juvenile court pertaining to whether a transfer to adult court would occur, as the analysis in this Article does not necessarily apply to cases of juveniles tried in adult court, who are often represented by attorneys different from those who typically appear in juvenile court, operating under different circumstances. Establishing conclusive data regarding juvenile IAC claims proves difficult for a number of reasons, including variations among states in reporting unpublished legal opinions to Lexis Nexis and Westlaw, limitations in search engines including the unavailability of parameters restricting searches to juvenile court, and inconsistent terminology among court systems.

[184] Research on file with Author. I included in this number cases in which appellate courts specifically allowed the IAC claim(s); cases in which relief was provided only on other grounds are not included. *See, e.g.*, *In re* Orr, No. 1999AP040032, 2000 WL 502692, at *1 (Ohio Ct. App. Apr. 3, 2000) (reversing conviction of juvenile for grand theft of a motor vehicle on ground that trial court improperly conducted plea colloquy and ruling that claim of ineffective assistance of counsel was moot).

[185] A number of methodological problems make it impossible to state definitively that appellate attorneys inappropriately underutilize IAC claims relative to the rate of substandard legal representation. For one, as discussed *supra* note 183, many unpublished appellate opinions are not reported. Additionally, attorneys may initially file IAC claims in appeals which their clients ultimately decide to withdraw. Finally,

few IAC claims are brought when the preceding discussion would seem to indicate that many more are warranted, a multitude of legal and practical factors do function to make it extremely difficult for juveniles to bring and prevail on IAC claims. The remaining Sections in this Part consider these impediments.

D. Doctrinal and Systemic Impediments

Among the most significant barriers to bringing and prevailing on a meritorious IAC claim is the *Strickland* standard.[186] This case governs adult and juvenile IAC practice.[187] The *Strickland* test has facilitated extremely deferential appellate review of trial attorney performance—so deferential that for sixteen years after the decision was issued, the Supreme Court failed to find ineffective assistance in a single case.[188] In considering the test's first prong, lower courts hearing IAC claims are instructed by *Strickland* to presume that conduct of trial counsel falls within the "wide range of reasonable professional assistance."[189] This presumption is strongest where counsel can justify what appear to be questionable actions as "strategy" or "tactics."[190]

juveniles harmed by deficient representation may not, for any number of reasons, seek to pursue an appeal—they may wish to simply put the incident behind them, or they may never learn of their right to appeal, to name two of the most obvious. Criminal law scholars have similarly suggested that the rate of substandard representation in adult criminal court significantly outpaces the number of IAC claims. Primus, *supra* note 17, at 683–84 & n.23 (summarizing judicial opinions and commentary noting the relatively low numbers of ineffective assistance of counsel claims).

[186] Strickland v. Washington, 466 U.S. 668, 687 (1984).

[187] As developed further *infra*, *Strickland* is based on the Sixth Amendment, and not the Due Process Clause, which anchors the juvenile right to counsel. The case did not discuss delinquency cases at all. Thus, it is not clear that *Strickland* need be the governing standard. Yet a Westlaw search of published opinions pertaining to juvenile delinquency appeals did not reveal that any litigant had raised a challenge to the use of the *Strickland* standard as a means of assessing ineffective assistance of counsel.

[188] John H. Blume & Stacey D. Neumann, *"It's Like Deja Vu All Over Again":* Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard *and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel*, 34 AM. J. CRIM. L. 127, 133–34 (2007). *See, e.g.*, Burger v. Kemp, 483 U.S. 776, 788–90, 794, 813 (1987) (finding no ineffective assistance of counsel where capital defense counsel presented no mitigating case whatsoever at his sentencing hearing, conducted almost no investigation to prepare for the sentencing hearing, met with the defendant for only about six hours to prepare for both the guilt and the sentencing phases of the trial, and failed to uncover any of the evidence later uncovered by habeas counsel of the defendant's extremely abusive family and his own psychological problems); Darden v. Wainwright, 477 U.S. 168, 186–87 (1986) (finding no ineffective assistance of counsel). In 2000, the Supreme Court ended the drought. Williams v. Taylor, 529 U.S. 362, 395–99 (2000) (poor preparation for sentencing phase constituted ineffective assistance).

[189] *Strickland*, 466 U.S. at 689.

[190] *Id.* ("[A reviewing] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the

The second prong, which obligates defendants to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,"[191] has proven as difficult to meet as the first, if not more so.[192] Where a reviewing court believes a prosecutor's case to have been strong, even a showing of egregiously deficient representation will not win the defendant a new trial.[193] In fact, the ruling in *Strickland* allows appellate courts to forego any assessment of attorney performance whatsoever and move directly to evaluation of the prejudice requirement.[194] This requirement problematically places defendants in a logical bind: Where trial counsel failed to do adequate factual investigation, file motions or consult with experts, defendants cannot establish whether or how the outcome might have been different. What might have been exculpatory evidence is not found or indeed even sought.[195] In this way, the prejudice requirement works as a demand for the defendant to demonstrate factual innocence.[196]

The Court's reasons for creating such a deferential test for measuring effective assistance were instrumentalist ones: concern that a less deferential test would open the floodgates for appeals of unhappy convicted defendants, as well as a fear that more exacting scrutiny would discourage attorneys from accepting appointed cases.[197] The Court

defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"). *See, e.g.*, Cable v. State, 540 So. 2d 769, 774 (Ala. Crim. App. 1985) (finding that defendant did not meet burden of showing professional error or prejudice on three claims of ineffective assistance of counsel because attorney's failure to move for suppression of search evidence was "an exercise of reasonable professional judgment").

[191] *Strickland*, 466 U.S. at 694.

[192] Stephen B. Bright, *The Death Penalty and the Society We Want*, 6 PIERCE L. REV. 369, 374 n.16 (2008) ("[E]ven when a defendant receives deficient representation, the conviction and sentence may be upheld based upon a reviewing court's conclusion that it did not matter all that much.").

[193] For an argument that appellate efforts to scrutinize a trial record resulting in conviction are subject to confirmatory biases whereby guilty verdicts appear inevitable, see Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 2 (2004).

[194] *Strickland*, 466 U.S. at 697.

[195] WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.10(d), at 671 (5th ed. 2009) ("[I]n case after case alleging that counsel's factual investigation was inadequate, the standard response is that there has been no showing of prejudice because defendant has failed to establish exactly what further evidence existed for counsel to discover if he had investigated more thoroughly.").

[196] *See, e.g.*, Vanessa Merton, *What to Do When You Meet a "Walking Violation of the Sixth Amendment" if You're Trying to Put that Lawyer's Client in Jail?* 69 FORDHAM L. REV. 997, 1024 n.69 (2000) ("In effect, *Strickland* means that the 'factually guilty' defendant does not deserve the same right to effective assistance of counsel as the 'innocent' defendant.").

[197] *Strickland*, 466 U.S. at 689–90. As Carol Steiker and Jordan Steiker explain, "[t]he Court was remarkably candid about its fear of opening the floodgates of litigation and the unfairness of evaluating attorney decision-making with the benefit of hindsight. Thus, the Court refused to create any 'checklist' of specific minimum

bolstered these policy considerations with this doctrinal pronouncement: "[T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial."[198] As a result of the deferential test created by *Strickland*, ineffectiveness claims have failed where the trial attorney has been asleep,[199] drunk or on drugs,[200] unprepared,[201] or utterly inept.[202] *Strickland* has been toothless.[203]

In addition to the difficulty of meeting the *Strickland* standard, several other factors impede the filing of IAC claims on behalf of juveniles. For one, some defender offices create a strong potential for

requirements for adequate representation and exhorted lower courts to accord a 'strong presumption' of adequacy of representation and to give deference to attorney strategy." Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 192 (2008) (footnotes omitted).

[198] *Strickland*, 466 U.S. at 689.

[199] *See* McFarland v. State, 928 S.W.2d 482, 505 & nn.19–20 (Tex. Crim. App. 1996) (holding that seventy-two-year-old lawyer in capital case who said he "customarily take[s] a short nap in the afternoon" was not ineffective where napping might have been a "strategic" move to generate jury sympathy and where co-counsel remained awake).

[200] *See* People v. Garrison, 765 P.2d 419, 440 (Cal. 1989). *See also*, Frye v. Lee, 235 F.3d 897, 907 (4th Cir. 2000) (admitting the court was troubled by defense counsel's "decades-long routine of drinking approximately twelve ounces of rum each evening" but denying ineffective assistance claim where there was no showing of specific instances of defective performance); Gardner v. Dixon, No. 92-4013, 1992 U.S. App. LEXIS 28147, at *17–36 (4th Cir. Oct. 21, 1992) (per curiam) (refusing to vacate petitioner's death sentence where petitioner had several affidavits demonstrating counsel was severely addicted to cocaine and alcohol and used both substances throughout trial because evidence was not newly discovered and defendant made no showing that trial would have resulted in a different outcome absent the drug and alcohol use); Berry v. King, 765 F.2d 451, 454 (5th Cir. 1985) (finding that regardless of whether or not counsel used drugs during trial, "under *Strickland*, the fact that an attorney used drugs is not, in and of itself, relevant to an ineffective assistance claim"). *See generally* Kirchmeier, *supra* note 14, at 427.

[201] Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986) (sentencing schizophrenic youth to death despite his lawyer's failure to present evidence of mental impairment because denial of assistance of counsel was harmless error).

[202] *See generally*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1839 & nn.31–33 (1994) (describing *Birt v. Montgomery*, 725 F.2d 587 (11th Cir. 1984), where defense attorney in capital case was asked to name a criminal law case but could name only *Miranda* and *Dred Scott*). An abundance of scholarship condemns the *Strickland* standard as too lax to ensure effective assistance. *See generally*, Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59 (1986); Klein, *supra* note 14, at 1467; Kirchmeier, *supra* note 14, at 427; Rigg, *supra* note 14.

[203] Bibas, *supra* note 193, at 6 ("*Strickland* winds up being almost as toothless as rational-basis review under the Equal Protection Clause, which also rests on post hoc rationalizations instead of actual reasons.").

conflict of interest when they assign an appellate attorney to represent a client where that client was represented by an attorney from the same office at the trial level.[204] An attorney is extremely unlikely to raise a claim of ineffective assistance against herself or someone in her office.[205] While many appellate defender offices instruct an appellate attorney to withdraw if she believes there may be IAC issues in the record, self-protective psychological biases might well make it difficult for the appellate attorney to recognize or admit that her own conduct at the trial level might constitute a legitimate instance of IAC.[206]

Second, an appellate court is limited on direct appeal to reviewing the trial record,[207] and while there are cases in which IAC is so clear from the trial record that a child could win on direct appeal,[208] much of what constitutes ineffective assistance for juveniles occurs outside of the trial. Defense counsel's failure to investigate, and some conflicts of interest, for example, are not issues that would be apparent from the trial record. An

[204] *See, e.g.*, Burns v. Gammon, 173 F.3d 1089, 1092 (8th Cir. 1999) (where direct appeal will raise issue of ineffectiveness, conflict of interest exists if appellate attorney is same, or from the same office, as trial counsel).

[205] Massaro v. United States, 538 U.S. 500, 502–03 (2003) (concluding that in the habeas context "ineffective-assistance claims usually should be excused from procedural-default rules because an attorney who handles both trial and appeal is unlikely to raise an ineffective-assistance claim against himself.").

[206] United States v. Del Muro, 87 F.3d 1078, 1080 (9th Cir. 1996) (holding that the defendant had a Sixth Amendment right to be represented by new counsel, since trial counsel would have an inherent conflict of interest in vigorously advocating the interests of his client).

[207] Some jurisdictions allow for ineffective assistance claims that pertain to issues outside the record by allowing for direct appeals; however, this is not the majority rule. Primus, *supra* note 17, at 680. *See* Commonwealth v. Grant, 813 A.2d 726, 734–36 (Pa. 2002) (surveying federal and state jurisdictions and summarizing general rule that only claims that can be adequately reviewed on the existing record may be brought on direct appeal).

[208] There are numerous cases in which the "deficient performance" prong of *Strickland* was satisfied by a lawyer's failure to make what would have been a meritorious objection at trial. *See, e.g.*, Girts v. Yanai, 501 F.3d 743, 756–57 (6th Cir. 2007) (concluding "[t]his inaction simply cannot be characterized as litigation strategy" when trial counsel committed ineffective assistance by failing to object to prosecutor's closing argument references to accused's constitutionally protected silence); Ege v. Yukins, 485 F.3d 364, 378–79 (6th Cir. 2007) (defense counsel was ineffective, thereby supplying "cause," by failing to object to lack of proper foundation for prosecution bite-mark expert's testimony); Martin v. Grosshans, 424 F.3d 588, 591 (7th Cir. 2005) ("[D]efense counsel performed deficiently for failing to make the proper objections" to inadmissible, prejudicial testimony by prosecution witnesses and "for failing to move for a mistrial after the prosecution's [improper and prejudicial] closing argument"); Cox v. Donnelly, 387 F.3d 193, 199–200 (2d Cir. 2004) ("Where counsel . . . repeatedly fails to object to a clearly unconstitutional charge on the key issue in a criminal case" and where the state's characterization of counsel's conduct as "deliberate tactic" is "implausible," the state court's "rejection of an ineffectiveness claim . . . simply cannot be viewed as reasonable"); Washington v. Hofbauer, 228 F.3d 689, 702 (6th Cir. 2000) ("This Court has on several occasions found that a counsel's failure to object to prosecutorial misconduct constitutes defective performance . . . .").

adjudicated delinquent would have to raise an IAC claim based on these issues in a collateral, post-conviction proceeding,[209] yet few states appoint post-conviction counsel to juveniles or adults.[210] Furthermore, a number of states require that a juvenile must be in state custody in order to raise a claim of ineffective assistance via a state post-conviction proceeding, so unless a juvenile's attorney's ineffectiveness is apparent from the record, the un-incarcerated juvenile may not file an IAC claim.[211]

Third, there is no guarantee that an attorney appointed to appeal a conviction or sentence, whether on direct appeal or collateral proceedings, will perform any better than trial counsel.[212] While the Supreme Court has held that criminal defendants are entitled to effective assistance in pursuing their direct appeals,[213] no state or federal court has

[209] Primus, *supra* note 17, at 680. Failing to raise an IAC claim on direct appeal does not bar the claim from being brought in a post-conviction, collateral proceeding. *See Massaro*, 538 U.S. at 504.

[210] The Supreme Court has held that a state is not required to appoint counsel to represent indigent defendants in collateral attacks on their convictions and sentences. Murray v. Giarratano, 492 U.S. 1, 7–8 (1989); Pennsylvania v. Finley, 481 U.S. 551, 556–57 (1987). While *McFarland v. Scott*, 512 U.S. 849, 859 (1994), made appointed counsel mandatory for all indigent capital prisoners in federal habeas corpus proceedings, most states do not provide for attorneys in non-capital cases. *See* Coleman v. Thompson, 501 U.S. 722, 752 (1991) (right to appointed counsel does not extend to appeal from state habeas trial court judgment); *Finley*, 481 U.S. at 555; United States v. Prows, 448 F.3d 1223, 1229 (10th Cir. 2006) (right to counsel does not extend to post-conviction proceedings); Lopez v. Wilson, 426 F.3d 339, 340–41, 352 (6th Cir. 2005) (right to appointed counsel does not extend to application to reopen case because of ineffective assistance of appellate counsel, because such motion is collateral rather than direct review); United States v. Harrington, 410 F.3d 598, 600 (9th Cir. 2005) (right to counsel does not extend to petitioner's motion for new trial after completion of direct appeal and habeas petition); United States v. Berger, 375 F.3d 1223, 1227 (11th Cir. 2004) (right to appointed counsel does not extend to post-conviction, post-appeal Rule 33 motion); Rouse v. Lee, 339 F.3d 238, 250 (4th Cir. 2003) (right to appointed counsel does not extend to federal habeas proceedings); United States v. Riggs, 314 F.3d 796, 799 (5th Cir. 2002) (right to appointed counsel does not extend to post-conviction proceedings); Ellis v. United States, 313 F.3d 636, 652–53 (1st Cir. 2002) (right to appointed counsel does not extend to habeas proceedings); McKethan v. Mantello, 292 F.3d 119, 123 (2d Cir. 2002) (right to appointed counsel does not extend to state collateral proceedings); Reagan v. Norris, 279 F.3d 651, 656 (8th Cir. 2002) (right to counsel does not extend to post-conviction proceedings "because such proceedings are usually civil in nature").

[211] *See, e.g.*, Mason v. State, 914 S.W.2d 751, 751–52 (Ark. 1996) (holding that since child's guilty plea resulted in probation, minor not permitted to raise ineffective assistance of counsel). Habeas proceedings in federal court have more relaxed requirements; rather than requiring actual custody, federal law holds that anyone who, "as a result of action by a state or federal criminal court, is 'subject to restraints not shared by the public generally'" meets the "'status' jurisdictional requirement in the habeas corpus statute." RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 8.2a, at 392–93 (5th ed. 2005) (internal quotations omitted) (quoting Hensley v. Mun. Court, 411 U.S. 345, 351 (1973)).

[212] *See* Bright, *supra* note 192, at 374.

[213] Evitts v. Lucey, 469 U.S. 387, 396 (1985).

required that the assistance of counsel provided in any collateral attack on a conviction, adjudication, sentence, or disposition be constitutionally effective assistance.[214]

In addition to the obstacles that prevent juveniles from filing claims of IAC, additional disincentives exist for lawyers to appeal delinquency cases on any grounds whatsoever.[215] While nearly all states now provide a right to appeal, most of them do not provide for an attorney to help a child exercise that right.[216] *Douglas v. California* establishes that where a state provides for the right to appeal, equal protection requires it to provide counsel for indigent appellants;[217] this case would appear to apply with equal force in juvenile court. However, in a 1995 survey, thirty-two percent of juvenile public defenders stated they were not authorized to handle appeals. Only one in five attorneys took any appeals the previous year.[218] Because *Gault* did not hold that a child has a constitutionally protected right to appeal, states may lawfully deny them the right to appeal as well. And while, under *Douglas*, it would appear that if they provide the right to appeal they must provide appellate counsel, in many instances counsel is not in fact being provided.

While some states fund public defender agencies, which can elect to appoint counsel to appeal delinquency cases, these agencies tend not to prioritize juvenile appeals in determining how to allocate their scarce appellate resources,[219] so unless a youth adjudicated delinquent takes the initiative to contact the local public defender to request representation, his appellate rights are unlikely to be actualized. Additionally, some state provisions allow for the state to recoup costs from the family of a juvenile

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[214] *See Finley,* 481 U.S. at 555 (holding that there is no right to effective assistance of counsel in state collateral proceedings). *Cf.* Ross v. Moffitt, 417 U.S. 600, 617–18 (1974) (holding that no right to effective assistance of counsel exists when seeking a discretionary appeal following an appeal of right).

[215] *See, e.g.*, Donald J. Harris, *Due Process vs. Helping Kids in Trouble: Implementing the Right to Appeal from Adjudications of Delinquency in Pennsylvania*, 98 DICK. L. REV. 209, 220, 228 (1994) (reporting that public defenders filed about ten times as many appeals for adult defendants as for delinquents and attributing the differences to juvenile defense lawyers' internalization of *parens patriae* ideology); Patricia Puritz & Wendy Shang, *Juvenile Indigent Defense: Crisis and Solutions*, CRIM. JUST., Spring 2000, at 22, 23 (reporting that public defenders and court appointed counsel rarely, if ever, file appeals).

[216] Those states with statutes providing for counsel to juveniles on appeal are: ARIZ. REV. STAT. ANN. § 8-325 (2007); IOWA CODE ANN. § 232.133 (West 2006) (as interpreted by Chambers v. Dist. Court of Dubuque County, 152 N.W.2d 818, 820 (Iowa 1967)); ME. REV. STAT. ANN. tit. 15, § 3404 (2003); N.J. STAT. ANN. § 2A:4A-39 (West 1987); N.M. R. ANN. 10-251 (2009); TENN. R. JUV. P. 36 (2009); TEX. FAM. CODE ANN. § 56.01 (Vernon 2009); and WYO. STAT. ANN. § 14-6-233 (2009).

[217] 372 U.S. 353, 357–58 (1993).

[218] *See* PATRICIA PURITZ ET AL., ABA JUVENILE JUSTICE CTR., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 10 (1995). *See generally* Marrus, *supra* note 125.

[219] *See* Puritz & Shang, *supra* note 215, at 23; Harris, *supra* note 215, at 220, 224.

whose appeal is unsuccessful.[220] Such rules create sharp disincentives for children to bring an appeal based on any ground. Appellate defender attorneys and organizations may not prioritize juvenile appeals in part because of a perception that the stakes are insufficiently high. Delinquency adjudications result in relatively short sentences overall, as compared with adult criminal defendants.[221] The average amount of time it takes for an appeal—adult or juvenile—to make its way through the appeals process is four years.[222] The average length of a juvenile sentence is considerably shorter than four years[223]—so short as to create a disincentive for adjudicated delinquents to bother with an appeal.[224] Yet, as argued above in Part III.B, collateral consequences make adjudications harmful to the child in the long run, suggesting that the better practice would be for juveniles with meritorious IAC claims to consider seeking counsel to file them.

V. REMEDYING THE REMEDY

It seems clear that juveniles harmed by deficient representation do not at present have a meaningful legal remedy in ineffective assistance of counsel claims. In order to ensure that juveniles have the means to file appropriate IAC claims, several reforms addressing the practical and legal impediments discussed in Part III must occur. The remainder of the Article will offer some preliminary thoughts toward reform.

State legislatures and judiciaries must take steps to ensure that provisions are made for juveniles to exercise the right to appeal granted by every state.[225] Only some states require that a child be informed of the

[220] *See, e.g.,* N.C. GEN. STAT. § 7A-450.1 (2007) (providing for payment by parent or guardian unless juvenile prevails on appeal). "It is the intent of the General Assembly that, whenever possible, if an attorney or guardian ad litem is appointed pursuant to G.S. 7A-451 for a person who is less than 18 years old or who is at least 18 years old but remains dependent on and domiciled with a parent or guardian, the parent, guardian, or any trustee in possession of funds or property for the benefit of the person, shall reimburse the State for the attorney or guardian ad litem fees, pursuant to the procedures established in G.S. 7A-450.2 and G.S. 7A-450.3. This section shall not apply in any case in which the person for whom an attorney or guardian ad litem is appointed prevails." *Id.*

[221] *See* OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, STATISTICAL BRIEFING BOOK: JUVENILES IN CORRECTIONS (2008), http://ojjdp.ncjrs.gov/ojstatbb/corrections/qa08405.asp (see Custody Data) [hereinafter STATISTICAL BRIEFING BOOK].

[222] *See* Primus, *supra* note 17, at 693 (noting average length of appeal and comparing it to length of appellate process).

[223] *See* STATISTICAL BRIEFING BOOK, *supra* note 221.

[224] *See* Judith B. Jones, *Access to Counsel*, JUV. JUST. BULL. (Office of Justice Programs, U.S. Dep't of Justice, Wash., D.C.), June 2004, at 5–6, http://www.ncjrs.gov/pdffiles1/ojjdp/204063.pdf. (noting the dilemma facing juvenile defenders seeking to file appeals when clients have relatively short sentences, yet the appellate process is long and the juvenile court unlikely to stay a disposition pending appeal).

[225] *See* Arkin, *supra* note 167, at 513–14.

right.[226] The right is nearly meaningless if they are not told about it and not provided an attorney to pursue it. A fourteen-year-old cannot be expected to know that she can ask a reviewing court to consider errors at trial or in her plea, and she certainly cannot navigate the complex rules of appellate procedure on her own.[227] Therefore, court rules must be enacted that require judges to inform juveniles of their right to appeal upon resolution of their cases. Additionally, juveniles should be entitled to expedite appeals, given that the length of time it typically takes to prosecute an appeal exceeds the average juvenile sentence. Jurisdictions should abandon or modify the in-custody requirement for state post-conviction claims for the same reason.[228]

[226] *See, e.g.*, ALA. CODE § 12-15-202(f)(1)(c)(3) (LexisNexis Supp. 2009) (requiring the child's attorney to advise him or her in language they can understand on whether to appeal a court decision); ARIZ. REV. STAT. ANN. § 8-325(B) (2007) ("Immediately after an order of disposition the juvenile hearing officer shall advise the juvenile that a right to appeal exists, the applicable time limit and the location and manner of filing the notice of appeal."); CAL. R. CT. 5.590 (2009) ("In juvenile court proceedings in which the child is found to be a person described by section 300, 601, or 602 after a contested issue of fact or law, the juvenile court, after making its order at the conclusion of the dispositional hearing or an order changing or modifying a previous disposition at the conclusion of a hearing on a supplemental petition, will advise, either orally or in writing, the child and, if present, the child's parent, guardian, or adult relative of any right to appeal from such order, of the necessary steps and time for taking an appeal, and of the right of an indigent person to have counsel appointed by the reviewing court."); ILL. CT. R. & P. 605(a)–(b) (2009) (Defendant in a juvenile court proceeding to be notified of right to appeal after entering a plea); MISS. CODE ANN. § 43-21-557(1) (West 2008) ("At the beginning of each adjudicatory hearing, the youth court shall . . . explain to the parties . . . the right to appeal."); NEB. REV. STAT. § 43-279.01(1)(g) (2008) ("[T]he court shall inform the parties of the . . . [r]ight to appeal and have a transcript or record of the proceedings for such purpose."); OHIO R. JUV. P. 34(J) (2008) ("At the conclusion of the hearing, the court shall advise the child of the child's right to record expungement and, where any part of the proceeding was contested, advise the parties of their right to appeal."); S.D. CODIFIED LAWS § 26-7A-30 (2004) ("The court shall advise the child and the child's parents, guardian or custodian . . . [of] the right to appeal according to the rules of appellate procedure governing civil actions."); TENN. R. JUV. P. 36(c) (2009) ("At the dispositional hearing on a petition alleging delinquent or unruly conduct, whether before the referee or judge and whether on a plea of guilty or not guilty, if the respondent is found guilty, he or she shall be informed of the right to appeal, the time limit for appeal, the manner in which to perfect an appeal, and the right to an appointed attorney on appeal if indigent."); TEX. FAM. CODE ANN. § 56.01(e) (Vernon 2008) ("On entering an order that is appealable under this section, the court shall advise the child and the child's parent, guardian, or guardian ad litem of the child's rights [to appeal] listed under Subsection (d) of this section."); UTAH CODE ANN. § 78A-6-1109(3) (2008) ("If the parties are present in the courtroom, the court shall inform them of . . . their right to appeal within the specified time limits . . . .").

[227] Marrus, *supra* note 125, at 302.

[228] I also endorse proposals offered by would-be IAC reformers in the adult context, such as providing counsel for federal habeas corpus proceedings. *See* Emily Garcia Uhrig, *A Case for a Constitutional Right to Counsel in Habeas Corpus,* 60 HASTINGS L.J. 541, 544 (2009). In addition, I support proposals allowing appellate attorneys to

Even if such reforms were implemented, the *Strickland v. Washington* standard[229] would continue to present a formidable obstacle. Yet the case may not forever be the obstacle it is now.

In a trio of capital cases—*Williams v. Taylor*,[230] *Wiggins v. Smith*,[231] and *Rompilla v. Beard*[232]—the Court reversed death sentences after it found trial counsel ineffective for failing to conduct adequate investigation to prepare for the sentencing phase. Commentators agree that the amount and quality of investigative work in these cases was actually better than that performed by the trial attorney for David Strickland.[233] The Court nevertheless held it ineffective in all three cases, distinguishing without overruling *Strickland*.[234]

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supplement the trial record in order to bring an IAC claim on direct appeal. *See* Primus, *supra* note 17, at 682.

[229] 466 U.S. 668, 678 (1984).

[230] 529 U.S. 362, 395–96 (2000) ("[C]ounsel did not begin to prepare for [the sentencing] phase . . . until a week before the trial . . . failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, . . . failed to introduce available evidence that Williams was 'borderline mentally retarded' and did not advance beyond sixth grade in school . . . [and] failed to seek prison records recording Williams' commendations for [good conduct while in prison]. . . . [T]rial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background.").

[231] 539 U.S. 510, 528, 534 (2003) (trial lawyers' limited investigation of mitigating evidence violates petitioner's right to effective assistance of counsel at the capital sentencing phase notwithstanding counsel's claim of "strategic decision" to curtail investigation and concentrate on other types of appeals to sentencing jury, when attorneys' "decision to end their investigation when they did was neither consistent with the professional standards that prevailed . . . [at the time of sentencing], nor reasonable in light of the evidence counsel uncovered in the social services records—evidence that would have led a reasonably competent attorney to investigate further").

[232] 545 U.S. 374, 377, 383, 385–86, 390 (2005) (trial attorney was "deficient in failing to examine the court file on Rompilla's prior conviction," given that the "prosecution was going to use the dramatic facts of a similar prior offense, and [accordingly] Rompilla's counsel had a duty to make all reasonable efforts to learn what they could about the offense . . . [which] certainly included obtaining the Commonwealth's own readily available file on the prior conviction to learn what the Commonwealth knew about the crime, to discover any mitigating evidence the Commonwealth would downplay, and to anticipate the details of the aggravating evidence the Commonwealth would emphasize," and that all of this was true even when, as in this case, the "capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial" and that trial counsel's omission was prejudicial in that review of file would have revealed a "range of mitigation leads that no other source had opened up.").

[233] *See, e.g.*, Gregory J. O'Meara, *The Name is the Same but the Facts Have Been Changed to Protect the Attorneys:* Strickland*, Judicial Discretion, and Appellate Decision-Making*, 42 VAL. U. L. REV. 687, 687 (2008) ("[C]ounsel in both *Wiggins* and *Rompilla* did far more than trial counsel in *Strickland v. Washington*, where the Court found counsel's representation to be effective under the Constitution.").

[234] Blume & Neumann, *supra* note 188, at 129.

In each of the cases, the Court elevated in importance the ABA Standards for Criminal Justice as a benchmark for assessing whether trial counsel's failure to conduct a comprehensive sentencing investigation was reasonable.[235] In *Strickland*, Justice O'Connor had rejected the notion that trial counsel's performance should be measured against ABA standards, admonishing that they were simply to function as guides to determine reasonableness.[236] In *Wiggins*, by contrast, Justice O'Connor referred to ABA standards as "well-defined norms;" trial counsel's departure from the standards by failing to investigate constituted ineffective assistance.[237] While the doctrinal shift signified by the *Williams-Wiggins-Rompilla* trilogy has done nothing to alter the problematic "prejudice" prong of *Strickland*,[238] it does appear to have given the attorney-performance prong teeth, at least in the sentencing phases of capital cases.[239] The fact that *Williams*, *Wiggins*, and *Rompilla* all employ the ABA Standards as the benchmark against which to measure objectively reasonable representation bolsters the argument that juvenile trial-level lawyering must comport with accepted professional standards to be considered effective.[240]

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[235] *Id.*

[236] Strickland v. Washington, 466 U.S. 668, 688 (1984).

[237] Wiggins v. Smith, 539 U.S. 510, 524 (2003). In *Bobby v. Van Hook*, the U.S. Supreme Court found that the Sixth Circuit had improperly relied on ABA Guidelines in finding the representation of an attorney in the sentencing phase of a capital case ineffective. Bobby v. Van Hook, 130 S. Ct. 13 (2009) (per curiam) (citing ABA, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (2003), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf). However, this case does not overrule *Wiggins*.

[238] Adam M. Gershowitz, *Get In the Game or Get Out of the Way: Fixing the Politics of Death,* 94 VA. L. REV. IN BRIEF 51, 53 (2008), http://www.virginialawreview.org/inbrief/2008/09/29/gershowitz.pdf (arguing that *Williams-Wiggins-Rompilla* trilogy, in failing to alter prejudice requirement, does little to ensure effective assistance of counsel).

[239] Scholars are divided over whether these cases will have any impact outside the capital context. *See, e.g.,* Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 355 (2008); Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1117–20 (2004) (arguing that results in these cases reflect an evolution in the Court's view of the centrality of investigation in defense lawyering brought about by high-profile exonerations of death-row prisoners whose attorneys had conducted no or minimal investigation). *But see* Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069, 1111 (2009) (arguing that these cases can and should apply in non-capital sentencing).

[240] Ellen Marrus argues that the first prong of *Strickland* makes IAC claims in juvenile delinquency cases nearly impossible to make. She suggests that because the overall level of performance in juvenile court is low, and is in many instances dominated by attorneys practicing "best-interests" lawyering, in which they substitute their own judgment for that of their own clients, that reviewing courts would find that sub-par representation is actually consistent with professional norms. Marrus, *supra* note 9, at 417–20. However, *Wiggins,* decided after Marrus's article, appears to suggest that the first prong of *Strickland* can be decided against professional standards, rather

While *Strickland*, particularly as it has been modified by *Williams, Wiggins,* and *Rompilla,* need not be a barrier to the filing of IAC claims, it is worth noting in closing that it is not clear that *Strickland* need be the standard that is applied to juvenile ineffective assistance of counsel claims in any event. As noted above, the juvenile right to counsel is premised on the Due Process Clause of the Fourteenth Amendment, while the adult right to counsel is premised on the Sixth Amendment. The due process grounding of the juvenile right to counsel—along with the different, more rehabilitative purpose of juvenile court—creates an opening for an appellate attorney to argue that the two-prong test of *Strickland* is not the appropriate standard for measuring juvenile IAC claims.[241]

Commentators have proposed many alternatives to the *Strickland* test in the adult context.[242] A variation on one such alternative that would be appropriate in the juvenile context is one proposed by Judge David Bazelon in *United States v. DeCoster*.[243] In that case, decided eleven years before *Strickland*, Judge Bazelon essentially adopted the ABA Standards as a constitutional benchmark for evaluating the provision of effective assistance. He proposed that if a defendant could establish a violation of those standards by trial counsel, the burden would shift to the government to establish lack of prejudice on the eventual outcome.[244] A juvenile-appropriate alternative to *Strickland* would, like Judge Bazelon's test in *DeCoster*, eliminate or modify *Strickland*'s prejudice requirement. The reason for the change would be different from the reasons motivating proposals in the adult context, which focus on the "hindsight bias" of reviewing courts that make convictions appear inevitable that in fact might have been avoided with competent trial counsel,[245] or the fact that the prejudice requirement functions as a demand that the defendant/appellant essentially demonstrate that he is factually innocent.[246]

A juvenile-appropriate IAC standard would eliminate or modify the prejudice requirement because the goals of juvenile court—as recognized by *Gault* and again in every subsequent Supreme Court case addressing the requirements of due process in delinquency

than simply against the lowest common denominator of attorney performance. *See Wiggins*, 539 U.S. 510.

[241] *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 339 (1963) (noting that due process is "a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights"); Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961) (establishing fluidity of due process).

[242] *See, e.g.*, William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 168–70 (1995) (summarizing alternatives to *Strickland*).

[243] *DeCoster I*, 487 F.2d 1197 (D.C. Cir. 1973).

[244] *Id.* at 1203–04. The District of Columbia Circuit Court, sitting en banc, rejected Bazelon's proposal in a lengthy opinion. United States v. DeCoster (*DeCoster II*), 624 F.2d 196 (D.C. Cir. 1976).

[245] Bibas, *supra* note 193, at 2.

[246] Merton, *supra* note 196, at 1025.

proceedings—include rehabilitation,[247] and, again as recognized in *Gault*, a child's ability to invest in his rehabilitation is premised on his perception that he was treated fairly. That is, the process of the delinquency proceeding may be as significant for a juvenile's rehabilitation as its outcome. Thus, whether or not the deficient representation affected the fact-finder's decision that the juvenile was delinquent is not the only, or even necessarily the most significant, inquiry that a reviewing court should undertake in evaluating whether the representation was ineffective.[248] Even if the deficient representation did not affect the factual finding of guilt or innocence, if it thwarted the juvenile's rehabilitation, it may nevertheless have been constitutionally ineffective—or so one could argue in appropriate cases.

VI. CONCLUSION

Child advocates and scholars have long documented the need for more zealous representation of juveniles. They have called for increased salaries, lower caseloads, increased training for attorneys, an end to the practice of assigning the most inexperienced practitioners to juvenile court, and judicial training on the importance of expressed-interest lawyering.[249] Comparatively less attention has been paid to the need for increased access to appellate advocacy, particularly to the juvenile's ability to file IAC claims, as a means of ensuring system-wide reform. Yet IAC claims do have a role to play in this regard.

IAC claims also can have some impact, however limited, on the system-wide problem of deficient representation in four principal ways:[250]

[247] Today, a few state purpose clauses focus primarily on child welfare goals, while other states weigh public safety, punishment, and deterrence goals. Most states, however, adopt a balanced approach that addresses public safety but also addresses a youth's rehabilitation. SNYDER & SICKMUND, *supra* note 5, at 97.

[248] The Due Process undergirding of the juvenile right to counsel could facilitate such an argument. As Professor Tracey Meares has argued, early criminal procedure cases decided under the Due Process Clause emphasized the importance of public perceptions of fairness in the criminal justice system. *See* Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice,* 3 OHIO ST. J. CRIM. L. 105, 111–14 (2005). In such cases, defendants were entitled to reversals of their convictions where "fundamental principles of justice and liberty" were ignored—in spite of evidence (sometimes strong) of guilt. *Id.* at 111. While the Due Process Clause has almost completely given way to the specific guarantees of the Bill of Rights in the adult criminal context in assessments of whether prosecutions are constitutional or not, it continues to govern appellate analysis of juvenile proceedings. As such, what Professor Meares describes as the "public-regarding" elements of due process could lead to a different view of whether an attorney in a delinquency case performed effectively than the *Strickland* analysis, through which a lack of demonstrated prejudice to the juvenile can doom an IAC claim. *Id.* at 106, 111–14.

[249] *See, e.g.,* ABA JUVENILE JUSTICE CTR. & MID-ATL. JUVENILE DEFENDER CTR., *supra* note 111.

[250] Thanks to Randy Hertz for helping me develop this insight on the systemic role that IAC litigation can play.

(1) establishing a standard of professional conduct, albeit a floor of what is constitutionally permissible conduct rather than a ceiling of zealous advocacy; (2) deterring actionable misconduct through the setting of these norms; (3) performing a signaling[251] function for attorneys that delinquency practice is a serious one; and (4) identifying those lawyers who have practiced ineffectively and who should therefore be considered for removal from the panel of court-appointed lawyers.[252]

For those reasons, everyone who cares about *Gault*'s promise that children, through legal representation, must be treated fairly and with dignity, should also be concerned with the inadequacy of IAC claims to ensure that attorneys achieve those results for their clients.

[251] *See generally* Lissa Lamkin Broome & Kimberly D. Krawiec, *Signaling Through Board Diversity: Is Anyone Listening?*, 77 U. CIN. L. REV. 431, 447 (2009) (describing signaling theory and applying it to broad diversity in corporation).

[252] An argument can be made that even if IAC claims were filed on behalf of aggrieved juveniles at a rate commensurate with ineffective assistance, it would be at best a weak form of redress for the individual who was harmed. Appeals take years to wind through the courts, and by the time an IAC claim is heard, the impact of the harm—a probation period or even an incarcerating sentence, for example—has dissipated. And even when a juvenile "wins" on the basis of IAC, the remedy is at best either a retrial or resentencing. *See* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2120–21 (2000) (discussing the inadequacy of appellate procedure in relation to death penalty cases).