

# The Capacity for Effective Relationships Among Attorneys, Juvenile Clients, and Parents

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## *Abstract*

*An effective (e.g., honest, trusting, and informed) attorney-client relationship is required for adolescents to properly assist counsel in their own defense. These relationships require (a) an understanding of the advocacy role of the attorney, and (b) a sense of trust that the attorney will work diligently to defend and protect their client. However, younger adolescents struggle to understand the advocacy role of defense attorneys and tend to misunderstand attorney-client privilege. Although parents may be thought of as compensating for their children's lack of knowledge and experience, it is not clear whether parents themselves understand the lawyer's role and how the lawyer may interact differently with parents and youthful clients. We review the empirical literature on youth understanding of the attorney-client relationship, particularly for public defenders and court-appointed counsel. We also report results from an empirical study of parents' and youths' understanding of lawyers, including age-based differences in expectations of attorney behavior. We discuss the implications for policy and practice for individual lawyers who represent youth as well as the justice system more generally.*

## I. THE NEED FOR REPRESENTATION IN JUVENILE COURT

The way the United States handles juvenile defendants has changed dramatically within the last century. At its inception in 1899, juvenile court hearings were handled informally: with social workers and probation officers rather than attorneys, judges deciding instead of juries, and no perceived need for due process.<sup>1</sup> The court intended to act as a benevolent parent, viewing the juvenile's presenting offense as a mere symptom of larger problems, usually attributed to the family, which could be addressed by an intervention approach

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<sup>1</sup> BARRY A. KRISBERG, JUVENILE JUSTICE: REDEEMING OUR CHILDREN 39 (2005).

consistent with a medical model of curing a disease.<sup>2</sup> This approach afforded the court wide discretion to dispense individualized justice that was tailored to the specific needs of a youth, and his family, rather than a standardized response to a particular offense.

In what has become known as the “due process” era of juvenile justice, a series of Supreme Court cases in the 1960’s acknowledged that the promise of benevolent, effective intervention was not regularly achieved.<sup>3</sup> Instead, as Justice Fortas wrote in *Kent v. United States*,<sup>4</sup> juveniles in court received the “worst of both worlds”—none of the care and intervention promised by the original court and none of the due process protections afforded adult clients who faced punishment in the criminal justice system. One of the major changes to the early court provided juveniles with the rights to counsel, avoid self-incrimination, receive adequate notice of charges, and confront witnesses at hearings.<sup>5</sup> In the landmark decision *In re Gault*, the Supreme Court determined the Due Process Clause of the Fourteenth Amendment also affords juvenile defendants the right to effective counsel.<sup>6</sup> Moreover, a number of state codes explicitly guarantee juveniles the right to counsel in juvenile court.<sup>7</sup>

In the wake of a third wave of juvenile justice reform that introduced harsher punishments, determinate sentencing, and increased avenues for transferring youth to criminal court,<sup>8</sup> Levick and Desai outline three reasons why juveniles need to be represented by counsel throughout court processing, not just the adjudication hearing.<sup>9</sup> First, accumulating research documents the incomplete development of important cognitive and psychosocial capacities that directly bear on youth decision-making generally, and decision-making as defendants specifically.<sup>10</sup> Second, counsel can assist the court in keeping treatment and rehabilitation, the original cornerstones of the court’s approach to delinquency, as a priority.<sup>11</sup>

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<sup>2</sup> David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in *A CENTURY OF JUVENILE JUSTICE* 42 (Margaret K. Rosenheim et al. eds., 2002).

<sup>3</sup> Jennifer L. Woolard & Elizabeth S. Scott, *The Legal Regulation of Adolescence*, in 2 *HANDBOOK OF ADOLESCENT PSYCHOLOGY* 345 (Richard M. Lerner & Laurence Steinberg eds., 3d ed. 2009).

<sup>4</sup> *Kent v. U.S.*, 383 U.S. 541, 556 (1966).

<sup>5</sup> *In re Gault*, 387 U.S. 1, 10 (1967).

<sup>6</sup> *Id.* at 41.

<sup>7</sup> 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 (2007).

<sup>8</sup> Woolard & Scott, *supra* note 3, at 358–59.

<sup>9</sup> Levick & Desai, *supra* note 7, at 182.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

Finally, the attorney's advocacy can temper the quantity and quality of punitiveness that came to characterize juvenile court proceedings during the latter part of the 20th century.<sup>12</sup>

Of the changes afforded by *Gault*, the right to counsel is arguably one of the most important.<sup>13</sup> The foundation of an effective relationship between an attorney and her client is built on communication and trust. Clients must trust their attorney to be competent legal advocates, while attorneys should trust that their clients are providing relevant and accurate information. The client must trust that their attorney is fighting for the best outcome in court in order for the client to feel secure sharing private, and potentially incriminating, information with their attorney. At its core, the relationship exists to address a legal problem for the client.<sup>14</sup>

In this paper we investigate the effectiveness of this critically important relationship between the juvenile client and her attorney. We begin by examining two important characteristics that distinguish the juvenile-attorney relationship from that of adult clients—juveniles' developmental capacities and the role of parents. We then briefly describe various models of representation that respond in different ways to these unique characteristics of the juvenile client. Next, we turn in greater detail to the three main challenges that derive from these unique characteristics. First, we examine research on youths' capacities to understand the attorney's role, to appreciate the nature of the attorney-client relationship, and to trust that attorney's commitment to treat the client fairly. Then, we focus on parents, presenting original data from our study of 170 parent-youth pairs about those same capacities in parents as well as how parents view their own role in the decisions their adolescents make while working with attorneys. Finally, we review how a high demand for public defenders combined with inadequate funding for indigent defense serves as a hindrance to building rapport with younger defendants who may require more time and attention to build an effective attorney-client relationship.

## II. TWO KEY DIFFERENCES BETWEEN JUVENILE AND ADULT CLIENTS

Generally, the legal system acknowledges that juveniles do not have the same rights and responsibilities as adults. As dependent minors, juveniles are unable to make legally binding decisions in almost any circumstance, including entering

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<sup>12</sup> *Id.*

<sup>13</sup> Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 250 (2005).

<sup>14</sup> Vance L. Cowden & Geoffrey R. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings—Cognitive Maturity and the Attorney-Client Relationship*, 33 U. LOUISVILLE. J. FAM. L. 629, 640–45 (1995).

contracts, getting married without parental consent, or voting.<sup>15</sup> The justice system, however, is one of the few contexts in which juveniles are expected to function as autonomous, competent legal actors who understand, appreciate, and assert their constitutional rights. Although the justifications for this legal framework vary,<sup>16</sup> developmental differences play a key role.

#### A. Ongoing Cognitive and Psychosocial Development

Advances in brain science over the past twenty-five years have expanded our understanding of the developing structure and function of the brain. Combined with decades of behavioral research, our more nuanced understanding of adolescence indicates important cognitive and psychosocial capacities relevant to their status as defendants are still developing. Brain imaging studies document that both structural and functional changes in the brain continue during adolescence and into young adulthood.<sup>17</sup>

Research on psychosocial maturity has focused on several components of judgment and decision making that are particularly relevant for juveniles' capacity to function effectively as defendants. Studies indicate that adolescents, particularly younger adolescents, are less able than adults to understand risks and benefits, to identify and weigh future consequences against short-term effects, to resist the influence of peers, to delay gratification, and more.<sup>18</sup> Presumably, these capacities for executive functioning, or self-regulation, mature over the course of adolescence and continue developing well into young adulthood, or emerging adulthood.<sup>19</sup>

In addition to their underdeveloped capacities, youths are less able than adults to make effective decisions in immediate emotional circumstances ("hot") compared with more delayed, less emotional conditions ("cool"). For example, Figner and colleagues used a type of card game to test adolescents' proclivity to take risks under more and less emotionally laden circumstances (*e.g.*, "hot" and "cool" conditions).<sup>20</sup> In the "hot condition," participants played one card at a time and ended the round when they were satisfied with the points gained or when they

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<sup>15</sup> Woolard & Scott, *supra* note 3, at 345.

<sup>16</sup> *Id.*

<sup>17</sup> Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174 (2004); Laurence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 BRAIN & COGNITION 160 (2010).

<sup>18</sup> Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 459, 472 (2009).

<sup>19</sup> See Steinberg, *supra* note 17, at 163.

<sup>20</sup> Bernd Figner et al., *Affective and Deliberative Processes in Risky Choice: Age Differences in Risk Taking in the Columbia Card Task*, 35 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 709, 721 (2009).

turned over a losing card.<sup>21</sup> Importantly, immediately after each round in the hot condition, participants received information about average gain, loss, and the number of loss cards remaining in the deck.<sup>22</sup> Unbeknownst to the players, the hot condition was rigged so the first few decisions resulted in a points gain, reinforcing the decision to keep turning over cards.<sup>23</sup> In contrast, the cool context minimized emotion and time pressures by asking participants to decide how many total cards they wanted rather than deciding one card at a time, and also by delaying feedback until the end of the entire game.<sup>24</sup> In both hot and cool conditions, the more cards turned over, the more risk was being taken.<sup>25</sup> Their findings revealed that children, adolescents, and adults turned over similar amounts of cards in cool conditions.<sup>26</sup> However, adolescents turned over significantly more cards (*i.e.*, took more risks) than the other groups in the hot or affective condition.<sup>27</sup>

Although just one example, these results are consistent with adolescents' well-documented proclivity for engaging in risky behaviors compared to adults,<sup>28</sup> which are thought to "reward" a youth through excitement, material possessions, and peer approval, among other things. If risks are taken successfully, the possibility of negative consequences such as physical harm or legal accountability may seem remote and unlikely. Moreover, adolescents' capacities to regulate their own behavior are more easily overwhelmed by emotional, affective conditions that are likely even more common outside the laboratory setting.<sup>29</sup>

It is important to note that some adults demonstrate "immature" development in a number of these capacities too.<sup>30</sup> The important difference here is that adolescents as a group are likely to demonstrate these deficits because of their age, not just because of individual differences in personality or preference. For some adolescents, those differences will remain into adulthood, but the majority of youth will grow out of those deficits into mature individuals. Compared to adults, juveniles' immature psychosocial capacities mean they are more prone to risky behavior, more likely to discount future consequences in favor of immediate

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<sup>21</sup> *Id.* at 712.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 713.

<sup>24</sup> *Id.* at 712.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 722.

<sup>27</sup> *Id.*

<sup>28</sup> See, e.g., Eveline A. Crone et al., *Annual Research Review: Neural Contributions to Risk-Taking in Adolescence—Developmental Changes and Individual Differences*, 57 *J. CHILD PSYCHOL. & PSYCHIATRY* 353 (2016).

<sup>29</sup> B. J. Casey & Kristina Caudle, *The Teenage Brain: Self Control*, 22 *CURRENT DIRECTIONS PSYCHOL. SCI.* 82 (2013).

<sup>30</sup> Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 *AM. PSYCHOLOGIST* 469 (2000).

consequences, more susceptible to peer pressure, and more likely to be affected by emotionally laden, time pressured, stressful circumstances.

### B. Roles and Responsibilities of Parents

Another key difference between adolescents and adults is the role of parents. American legal philosophy holds that parents are in the best position to make decisions in the best interests of their children. Children are assumed to be incompetent to make decisions and, because of their vulnerability to the influence of others, dependent on the care of adults.<sup>31</sup> Parents are the adults who are accorded both the rights and responsibilities to raise their children as they see fit, within some broad parameters that protect children's safety and well-being justified through the states' *parens patriae* authority.<sup>32</sup> For the most part, the law does not differentiate adolescence from childhood or adulthood.<sup>33</sup> Adolescents require parental consent for most decisions ranging from the serious (*e.g.*, getting married) to the mundane decisions (*e.g.*, attending a school field trip). Parents are the ultimate arbiter of virtually all aspects of an adolescent's life and usually will be familiar with the child's capacities and tendencies.

Although stereotypes about the "storm and stress" of adolescence emphasize conflict with and disengagement from parents and increasing influence of peers, disagreements between parents and adolescents are relatively common but serious conflict is relatively rare.<sup>34</sup> The rates of parent-adolescent disagreement decline throughout adolescence, but the negativity increases during early adolescence and does not decline significantly.<sup>35</sup> Adolescence brings increases in several aspects of autonomy including cognitive autonomy (*i.e.*, thoughts and values), emotional autonomy (*i.e.*, emotional regulation, own sense of maturity), and behavioral autonomy (*i.e.*, independent control and regulation of behavior).<sup>36</sup> Most families are able to negotiate changes in authority and relationships successfully as adolescents mature, but a minority of families do not.<sup>37</sup>

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<sup>31</sup> Woolard & Scott, *supra* note 3, at 345.

<sup>32</sup> *Id.* at 347.

<sup>33</sup> *Id.*

<sup>34</sup> Brett Laursen & W. Andrew Collins, *Parent-Child Relationships During Adolescence*, in 2 HANDBOOK OF ADOLESCENT PSYCHOLOGY 3, 21 (Richard M. Lerner & Laurence Steinberg eds., 3d ed. 2009).

<sup>35</sup> *Id.* at 22.

<sup>36</sup> Kathleen Boykin McElhaney et al., *Attachment and Autonomy During Adolescence*, in 1 HANDBOOK OF ADOLESCENT PSYCHOLOGY 358 (Richard M. Lerner & Laurence Steinberg eds., 3d ed. 2009); Woolard & Scott, *supra* note 3, at 364.

<sup>37</sup> Laursen & Collins, *supra* note 34, at 25.

## III. MODELS OF REPRESENTING THE JUVENILE CLIENT

The attorney is faced in many ways with a more complicated and demanding relationship with a juvenile client compared to an adult client. The youth acts simultaneously as a defendant who can assert or waive constitutional rights, an adolescent who is still developing important psychosocial and self-regulation capacities, and a child embedded in a family and subject to their care and control (in theory). The attorney simultaneously acts as an adult who must communicate complex legal concepts to an adolescent, a lawyer bound to advocate for a client's wishes that may undermine the client's best interests, and a member of a court system that operates through formal and informal culture, pressures, and rules.

Since *Gault*, attorneys' relationships with juveniles have transitioned from an initially more paternalistic model (*i.e.*, best interests) to more of a legal advocacy role (*i.e.*, expressed interest model).<sup>38</sup> Professor Henning examined the possible models for the attorney-client relationship when the client is a juvenile, describing the range of approaches on a continuum from a best-interests model to an expressed-interests model.<sup>39</sup> A traditional best-interests model acknowledges the ongoing development of youth and allows the attorney to make decisions on behalf of that still-maturing client.<sup>40</sup> Henning also describes the possibility of a "parent-directed best-interest" model in which the parents make key decisions and guide the attorney's advocacy for her juvenile client.<sup>41</sup> Professor Henning notes that this approach is consistent with the general deference to parental authority for children that we described earlier. A third type of model is the substituted judgment doctrine in which the attorney attempts to discern the juvenile's wishes and, combined with information obtained from other sources when needed, makes decisions about the case.<sup>42</sup> Each of these doctrines relies in part on questionable assumptions about youth, parents, and attorneys that we address later in the paper.

The traditional model of legal representation, which Henning describes as "expressed-interest," places the lawyer in the position of advocating the desires and decisions of her juvenile client. Within this client-directed model, attorneys could exert significant influence and control (the "authoritarian" model), remain non-directive but provide the necessary information for clients to make their own decisions (the "client-centered counseling" model), or scaffold the client's decision making with information and advice that create a process for good decision making (the "collaborative" model).<sup>43</sup> Henning concludes that the collaborative model is best suited to adapt to the developmental capacities of youth as well as the role of

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<sup>38</sup> Cowden & McKee, *supra* note 14, at 636–37.

<sup>39</sup> Henning, *supra* note 13.

<sup>40</sup> *Id.* at 282.

<sup>41</sup> *Id.* at 294.

<sup>42</sup> *Id.* at 303.

<sup>43</sup> *Id.* at 309–15.

parents while maintaining the youth's ultimate decision-making authority.<sup>44</sup> Therefore, juveniles are being advised by counsel but ultimately are responsible for making their own legal decisions and instructing their attorneys on how to move forward and which goals and objectives to prioritize.

#### IV. CHALLENGES TO AN EFFECTIVE ATTORNEY-JUVENILE CLIENT RELATIONSHIP

Whether or not juvenile defendants as a class are capable of entering into an effective attorney-client relationship is an empirical question. Do adolescents understand the role of the defense attorney and other legal actors involved in their case? Do adolescents' prior beliefs about the justice system facilitate an understanding of privilege? Are adolescents' decision-making capacities sufficiently developed to facilitate the attorney-client relationship? What role, if any, might parents play in their adolescent's legal decisions? Ultimately, these questions all examine the concept of whether or not adolescents can effectively assist with their defense.

The Supreme Court has outlined what is legally required for the attorney-client relationship to be effective as an essential part of due process. According to *Dusky*,<sup>45</sup> a defendant must be able to factually understand the charges and the significance of the charges against them, and must be able to consult with counsel about those charges throughout the course of their case. This standard suggests the defendant must be able to provide counsel with any information and assistance needed in order to proceed with adjudication.<sup>46</sup> Therefore, a defendant should (1) understand the role of counsel, (2) trust that the attorney is working for them as their advocate, (3) understand and appreciate the concept of attorney-client privilege, and (4) understand the consequences of having and not having assistance from counsel. Being competent to stand trial requires a juvenile client to be able to work alongside their attorneys in order to assist in their own defense. The assumptions being made by the Supreme Court beg the question of whether juveniles are competent legal actors who factually understand and can appreciate the role of counsel as well as assist counsel in their own defense. Although *Dusky* concerned an adult defendant and some scholars and advocates question whether adjudication in juvenile court requires a *Dusky*-level of competence,<sup>47</sup> the *Dusky*

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<sup>44</sup> *Id.* at 322–23.

<sup>45</sup> *Dusky v. United States*, 362 U.S. 402 (1960).

<sup>46</sup> See Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539, 554 (1993).

<sup>47</sup> See, e.g., NAT'L JUVENILE JUSTICE NETWORK, COMPETENCY TO STAND TRIAL IN JUVENILE COURT: RECOMMENDATIONS FOR POLICYMAKERS 2 (2012), [http://www.njjn.org/uploads/digital-library/NJJN\\_MfC\\_Juvenile-Competency-to-Stand-Trial\\_FINAL-Nov2012.pdf](http://www.njjn.org/uploads/digital-library/NJJN_MfC_Juvenile-Competency-to-Stand-Trial_FINAL-Nov2012.pdf) [https://perma.cc/RD4T-AZ29].



framework has been extended to juvenile court jurisdiction in many states.<sup>48</sup> Here we are less concerned with the debate over a juvenile court standard than with the capacities of youth to engage competently and effectively with an attorney regardless of court jurisdiction.<sup>49</sup>

As we will review in greater detail, research on whether juveniles understand and appreciate the attorney's role has indicated that younger adolescents in particular seem to be at risk of misunderstanding. Specifically, younger adolescents struggle to understand the advocacy role of defense attorneys and tend to misunderstand attorney-client privilege. For example, research has shown that compared to only 6% of adults, almost 30% of juveniles surveyed believed that their attorney worked for the juvenile court,<sup>50</sup> a fact that can impede the attorney-client relationship by undermining trust. Additionally, other research has shown that juveniles misunderstand attorney-client privilege, such that adolescents are more likely than adults to believe their attorney can tell judges or police officers what was discussed during private attorney-client conversations.<sup>51</sup> Finally, lessons from developmental science suggest that adolescents' capacities related to competence to stand trial are normatively underdeveloped compared to adults, leading adolescents to struggle with judgment and legal decision-making.<sup>52</sup> Therefore, as a class, juveniles are not only more likely than adults to struggle with factual misunderstandings and beliefs regarding counsel, but they also struggle to appreciate the long-term consequences of their legal decisions and instructions for counsel.<sup>53</sup> This group is likely less able than adults to assist counsel effectively in their own defense without deliberate efforts to assist them, such as the collaborative approach to representation.<sup>54</sup>

Of course, the attorney-client relationship doesn't develop in a vacuum but in a larger developmental and social context.<sup>55</sup> Adolescents' decisions do not occur without input from other actors, and their misunderstandings and beliefs are likely partially influenced by those actors as well. For example, most adolescents live

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<sup>48</sup> KIMBERLY LARSON & THOMAS GRISSO, NAT'L YOUTH SCREENING & ASSESSMENT PROJECT, DEVELOPING STATUTES FOR COMPETENCE TO STAND TRIAL IN JUVENILE DELINQUENCY PROCEEDINGS: A GUIDE FOR LAWMAKERS 21 (2011).

<sup>49</sup> See Eraka Bath & Joan Gerring, *National Trends in Juvenile Competency to Stand Trial*, 53 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 265 (2014).

<sup>50</sup> Thomas Grisso, *Juvenile's Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1158 (1980).

<sup>51</sup> See Rona Abramovitch et al., *Young People's Understanding and Assertion of Their Rights to Silence and Legal Counsel*, 37 CAN. J. CRIMINOLOGY 1 (1995).

<sup>52</sup> Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003).

<sup>53</sup> Henning, *supra* note 13.

<sup>54</sup> *Id.*

<sup>55</sup> URIE BRONFENBRENNER, THE ECOLOGY OF HUMAN DEVELOPMENT: EXPERIMENTS BY NATURE AND DESIGN (1979).

with a parent, parents, or a legal guardian. That family unit lives within a larger societal context influenced by laws, policies, and beliefs about the justice system. This is true for the attorney as well. Attorneys may be working with high caseloads or client loads and inadequate funding,<sup>56</sup> which may result in less time spent building rapport with their clients. Given their potential for misunderstandings, time to build trust is particularly important for juvenile clients. In fact, according to the recommendations set out by the UNLV Conference on Representing Children in Families, attorneys should dedicate approximately one-hour to solely building rapport with their juvenile client.<sup>57</sup> In order to understand the unique circumstances of an effective relationship between an attorney and her juvenile client, we must account for the (a) *developmental* challenges (*e.g.*, capacities to function effectively as defendants), (b) *contextual* challenges (*e.g.*, the role of parents), and the (c) *structural or systemic* challenges (*e.g.*, inadequate resources for indigent defense of juveniles).

*A. Developmental Capacities to Function Effectively in the Attorney-Client Relationship*

In this section, we briefly review the empirical literature on youths' capacities relevant to the attorney-client relationship. First, we review research examining age differences in factual understanding and appreciation of the justice system process generally and the role of the attorney specifically. We examine both factual information about attorneys and beliefs about the functions that they perform (*e.g.*, the difference between not knowing what the term *defense attorney* means and believing the defense attorney is someone who takes on an adversarial role in your case). We then examine age-based differences in perceptions of fairness and trust in attorneys.

Much of the research on adolescents' factual and functional capacities as defendants is framed by the legal construct of competence to stand trial in criminal court. Also known as adjudicative competence, competence to stand trial refers to an individual's ability to participate as a trial defendant and to aid their attorney in their defense (*e.g.*, being able to consult with your attorney, understanding the charges brought against you).<sup>58</sup> Adjudicative competence is legally required in order to try a defendant in criminal court because an individual must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and . . . a rational as well as factual understanding of the

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<sup>56</sup> JUDITH B. JONES, U.S. DEP'T OF JUSTICE, JUVENILE JUSTICE BULLETIN: ACCESS TO COUNSEL 6 (2004), <https://www.ncjrs.gov/pdffiles1/ojdp/204063.pdf> [<https://perma.cc/X29S-VZZ5>].

<sup>57</sup> *Recommendations of the UNLV Conference on Representing Children in Families: Children's Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. 592, 596 (2006).

<sup>58</sup> *Dusky*, 362 U.S. at 402.

proceedings against him.”<sup>59</sup> In other words, individuals must be able to participate in their own defense and understand the consequences of pleading guilty when, among other things, the outcome may result in a loss of liberty.<sup>60</sup> Defendants cannot be tried if they are found incompetent to stand trial and action must be taken to restore competence in order to continue pursuing charges against that person. According to the *Dusky* criteria for competence to stand trial, attorneys must be able to communicate with their clients about the case and the client must be able to understand the proceedings against her.<sup>61</sup> Defendants must have a factual and rational understanding of the charges (and implications) against them as well as an ability to assist counsel.<sup>62</sup> For example, among other things, defendants must (a) be aware of the charges against them (and options for pleading) as well as the possible outcomes associated with those charges (*i.e.*, sentences), (b) have an understanding of the implications or significance of the proceedings (*e.g.*, not only know they have the right to a trial but also the implications of waiving that right), (c) understand the attorney’s role and be able to communicate adequately with the attorney, and (d) be able to make rational informed decisions about pleading and waiver of rights.<sup>63</sup> Developmental incompetence, which refers to a lack of adjudicative competence that is as a result of *normative* cognitive and/or psychosocial immaturity,<sup>64</sup> impedes the attorney-client relationship and the defendant’s ability to assist counsel in their own defense.

#### B. Age-based Deficits in Knowledge About Court Process and Attorney’s Role

Significant age-based differences in competence-related capacities have been documented in multiple samples of justice-involved youth<sup>65</sup> and by attorneys reporting on youth clients.<sup>66</sup> Age-based differences cannot be explained away by justice experience; they are developmentally normative.<sup>67</sup> As one example, Grisso

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<sup>59</sup> *Id.*

<sup>60</sup> Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 799–800 (2005).

<sup>61</sup> *Dusky*, 362 U.S. at 402; *see also* Scott & Grisso, *supra* note 60.

<sup>62</sup> Steinberg, *supra* note 18, at 474.

<sup>63</sup> Scott & Grisso, *supra* note 60, at 817–19.

<sup>64</sup> Steinberg, *supra* note 18, at 474.

<sup>65</sup> *See* Eraka Bath et al., *Correlates of Competency to Stand Trial Among Youths Admitted to a Juvenile Mental Health Court*, 43 J. AM. ACAD. PSYCHIATRY L. 329, 336 (2015); Jodi L. Viljoen et al., *Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys, and Appeals*, 29 LAW & HUM. BEHAV. 253 (2005).

<sup>66</sup> *See* Jodi L. Viljoen et al., *Defense Attorneys’ Concerns about the Competence of Adolescent Defendants*, 28 BEHAV. SCI. & L. 630 (2010).

<sup>67</sup> Steinberg, *supra* note 18, at 473.

and colleagues examined capacities relevant to competence to stand trial in adolescents and young adults with and without justice-system experience.<sup>68</sup> Approximately 1,400 individuals (aged 11–24) from four different states across the United States (*i.e.*, California, Pennsylvania, Florida, and Virginia) were assessed on intellectual ability (WASI), mental health (MAYSI-2), capacities relevant to competence to stand trial (MacCAT-CA), and judgment and legal decision-making (MacJEN).<sup>69</sup> Unlike many other studies that solely looked at the cognitive capacities relevant to competence to stand trial (CST), this study also tested hypotheses that adolescents' immature psychosocial capacities (*e.g.*, influence of peers and authority figures, valuation of short vs. long-term consequences) would predict their decision-making in legal contexts.

Adolescents, particularly young (11–13) and middle adolescents (14–15), differed from young adults (18–24) in three important ways. First, the two youngest adolescent groups performed worse than older adolescents (16–17) and young adults on the competence capacity assessment, with one-third to one-quarter scoring comparably to samples of mentally ill adults found incompetent to stand trial.<sup>70</sup> It is important to note that 16–17 year-olds did not differ significantly from young adults on this particular assessment.<sup>71</sup> Second, although low IQ impaired participants' capacities regardless of age or justice system experience, the impairment was greater for adolescents than young adults.<sup>72</sup> Third, adolescents as a class (ages 11–17) had less mature psychosocial capacities (*e.g.*, risk preference, future orientation) and made different decisions in legal vignettes (*e.g.*, policy interrogation, plea agreement) than young adults; those decisions were predicted in part by psychosocial maturity levels. Specifically, adolescents were more likely than adults to make decisions that complied with authority figures in the vignettes (*e.g.*, accepting pleas or confessing to police) and were less likely to consider the risks and future consequences of their decisions.<sup>73</sup> None of these age-based differences varied by race, ethnicity, gender, or socioeconomic status.

Youths' misunderstanding of the role of defense counsel can also lead to inaccurate beliefs regarding confidentiality and the advocacy role of the attorney.<sup>74</sup>

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<sup>68</sup> Grisso et al., *supra* note 52.

<sup>69</sup> *Id.* at 337–41.

<sup>70</sup> *Id.* at 343–44, 356.

<sup>71</sup> *Id.* at 343.

<sup>72</sup> *Id.* at 346–50.

<sup>73</sup> *Id.* at 357.

<sup>74</sup> See Michele Peterson-Badali & Rona Abramovitch, *Children's Knowledge of the Legal System: Are they Competent to Instruct Legal Counsel?*, 34 CAN. J. CRIMINOLOGY 139 (1992); Christine S. Pierce & Stanley Brodsky, *Trust and Understanding in the Attorney-Juvenile Relationship*, 20 BEHAV. SCI. & L. 89 (2002); Melinda G. Schmidt et al., *Effectiveness of Participation as a Defendant: The Attorney-Juvenile Client Relationship*, 21 BEHAV. SCI. & L. 175 (2003); Viljoen et al., *supra* note 66.

In an early study, between one-quarter and a one-third of the juveniles sampled (28%), compared to only 6% of adults, believed that the defense attorney would advocate for their juvenile clients only if they believed they were innocent.<sup>75</sup> In some cases, these juveniles believed that the attorneys would have to report to the juvenile court if the juvenile admits guilt.<sup>76</sup> They may have understood that the role of the attorney is to provide an advocacy role to the defendant, but they did not realize that this was true regardless of actual guilt or innocence. Some studies show that a substantial proportion of adolescents also believe defense attorneys can share information with police, judges, and parents without the juvenile's consent.<sup>77</sup> Researchers interviewed approximately 200 individuals between the ages of 10 and 23 on the role of the attorney and the notion of confidentiality between the attorney and their client.<sup>78</sup> Eighty percent of young adolescents (13 and younger) and 56% of middle adolescents (ages 14–16) believed the attorney could share information with their parents.<sup>79</sup> Similarly, about 70% of young adolescents and 44% of middle adolescents believed the defense attorney could share information with the judge.<sup>80</sup> Finally, about 50% of young adolescents and 25% of middle adolescents believed confidential attorney-client discussions could be shared with police.<sup>81</sup> A more recent study of approximately 150 males ages 12–20 suggests that although even more adolescents understand discussions cannot be shared with police (~90%), adolescents continue to struggle with the notion of confidentiality with regard to parents and judges.<sup>82</sup>

Juveniles are likely to experience misunderstandings about the justice system because of cognitive immaturity and limited experience, but also because of misinformation and assumptions that are untrue. This lack of understanding could hinder rapport building between attorneys and their juvenile clients. Some of the research reviewed suggests that as age increases, so does the understanding of the roles of defense attorneys and the rules they must adhere to. However, the same evidence suggests that even older adolescents struggle with understanding the advocacy role and confidentiality rules attorneys must abide by.

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<sup>75</sup> Grisso, *supra* note 50, at 1158.

<sup>76</sup> *Id.* at 1158 n.91.

<sup>77</sup> Peterson-Badali & Abramovitch, *supra* note 74, at 150–52.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 151.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Pierce & Brodsky, *supra* note 74, at 98.

### C. Mistrust, Unfairness, and Race

To establish an effective working relationship with her attorney, a client must not only accurately understand the attorney's role, but trust the attorney to represent and advocate for her accurately and fairly.<sup>83</sup> Developed with adults, theories of procedural justice or "the justice of the decision-making process,"<sup>84</sup> have also been used to examine juvenile experiences with legal counsel.<sup>85</sup> Tyler proposes four procedural components that affect individuals' assessments of the justice system process: *participation or voice* (individuals' opportunities to raise their opinions or suggestions on how to resolve personal problems), *neutrality* (having an impartial resolution from unbiased authority figures), *trustworthiness*, and *treatment with dignity and respect*.<sup>86</sup> If individuals believe that their experience with the legal system was procedurally just, they are more likely to be satisfied with their experience and more likely to accept the outcome, even if that outcome (distributive justice) is not entirely favorable for them.<sup>87</sup>

Trust in legal authorities may be particularly important to adolescents and their relationships with legal system officials.<sup>88</sup> Adolescence is described as an important time of "legal socialization," when interactions with authorities instantiate a view of the legitimacy of legal officials and the degree to which adolescents are likely to comply with laws and cooperate with authorities.<sup>89</sup> Experiences in juvenile court can be an important source of legal socialization for

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<sup>83</sup> Henning, *supra* note 13, at 272–73; Michele LaVigne & Gregory Van Rybroek, "He Got in My Face so I Shot Him": How Defendants' Language Impairments Impair Attorney-Client Relationships, 17 CUNY L. REV. 69, 100–02 (2013).

<sup>84</sup> Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117, 119 (2000).

<sup>85</sup> Michele Peterson-Badali et al., *Young People's Perceptions and Experiences of the Lawyer-Client Relationship*, 49 CAN. J. CRIMINOLOGY & CRIM. JUST. 375 (2007).

<sup>86</sup> Tyler, *supra* note 84, at 121.

<sup>87</sup> See Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experiences*, 18 LAW & SOC'Y REV. 51 (1984); Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988).

<sup>88</sup> See Henning, *supra* note 13, at 272 n.123; Tom R. Tyler, *Why Trust Matters with Juveniles*, 85 AM. J. ORTHOPSYCHIATRY S93 (2015); Emily Buss, "You're My What?" *The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699 (1996).

<sup>89</sup> See Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUST. RES. 217 (2005). See generally June Louin Tapp & Felicia J. Levine, *Legal Socialization: Strategies for an Ethical Legality*, 27 STAN. L. REV. 1, 4–9, 17 (1974) (discussing that, as children age, their understanding about the law generally evolves from viewing laws as simple rules devised by authority figures to conceptualizing law as a series of complicated social agreements); Alex R. Piquero et al., *Developmental Trajectories of Legal Socialization Among Serious Adolescent Offenders*, 96 J. CRIM. L. & CRIMINOLOGY 267 (2005).

both youth and their parents.<sup>90</sup> Youth may be even more concerned than adults about “fairness.”<sup>91</sup> Grisso theorized that adolescents’ reduced trust in attorneys also could be a function of their developmental stage (*e.g.*, questioning authorities and adults), their experience with attorneys (*e.g.*, some attorneys do not work well with juvenile clients), or some combination of the two.<sup>92</sup> Moreover, research also documents the expressive and receptive language difficulties among many youth involved in the justice system.<sup>93</sup> Youths’ linguistic capacities to communicate with their attorney can create additional challenges to establishing an effective relationship.

Peterson-Badali, Care, and Broeking hypothesized that juveniles’ perceptions of how much voice they had, how likely they were to be treated equally as others, how trustworthy they found their attorney to be, and whether or not they were treated with respect would influence their level of satisfaction with their attorney.<sup>94</sup> They also hypothesized that satisfaction would be influenced by these four components (procedural justice) more so than case outcomes (distributive justice). They interviewed 48 pretrial or presentencing adolescent offenders in the Toronto area about their perceptions and evaluations of their lawyers and the lawyer-client exchange.<sup>95</sup> The outcome of the case did not influence satisfaction with the attorney. Instead, the four components of procedural justice were all positively related with attorney satisfaction; assessments of how objective, trustworthy, and respectful their lawyers most strongly predicted satisfaction. Those juveniles who reported being dissatisfied were overwhelmingly dissatisfied because they felt their lawyer lacked respect for them or were unresponsive (*e.g.*, the lawyer didn’t listen to the client or fight for what the client asked for).<sup>96</sup> Clients who were satisfied with their attorneys felt that their lawyer was a competent legal advocate and respected them.<sup>97</sup> Perhaps most telling, youths’ satisfaction with their attorney had nothing to do with the outcome of their case, but rather, with how well and how fairly they felt they were treated by their attorney.<sup>98</sup> By discounting the juvenile clients’ wants and treating them with disrespect, attorneys decreased their juvenile

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<sup>90</sup> Liana J. Pennington, *Engaging Parents as a Legitimacy-Building Approach in Juvenile Delinquency Court*, 16 U.C. DAVIS J. JUV. L. & POL’Y 481 (2012).

<sup>91</sup> See Jennifer L. Woolard et al., *Anticipatory Injustice Among Adolescents: Age and Racial/Ethical Differences in Perceived Unfairness of the Justice System*, 26 BEHAV. SCI. & L. 207 (2008).

<sup>92</sup> Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL’Y & L. 3, 14–16 (1997).

<sup>93</sup> See LaVigne & Rybroek, *supra* note 83.

<sup>94</sup> Peterson-Badali et al., *supra* note 85, at 378–79.

<sup>95</sup> *Id.* at 381–86.

<sup>96</sup> *Id.* at 389–90.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 391–92.

clients' satisfaction and likely undermined trust in the relationship.

Our discussion of trust and unfairness with juvenile clients would be incomplete without also considering race and ethnicity. For example, Pierce and Brodsky interviewed 163 detained males between the ages of 12 and 20 about their understanding of lawyers and their trust in their lawyers.<sup>99</sup> The main factors that led to distrust in their study were race and IQ.<sup>100</sup> More specifically, an interaction between race and IQ predicted differing levels of distrust, such that young white men with higher IQs were more trusting of their defense attorneys than young white men with lower IQs.<sup>101</sup> This, the authors hypothesized, was likely due to the misunderstandings that exist regarding the roles of defense counsel. However, this relationship was reversed for young black men.<sup>102</sup> Young black men with higher IQs were less trusting of defense attorneys, whereas young black men with lower IQs were more trusting of their attorneys.<sup>103</sup> Schmidt, Reppucci & Woolard found that compared to other groups, African Americans were significantly less likely to "speak positively" about having trust in their defense attorney.<sup>104</sup> Woolard and colleagues found that age and race combined to predict anticipatory injustice, or how much unfairness adolescents and adults expected to experience in the justice system.<sup>105</sup> When asked to compare themselves to others in the justice system, older African American adolescents and young adults were more likely to anticipate unfair treatment and greater punishment than younger African Americans.<sup>106</sup> Each study speculated that race-based expectations of unfairness and mistrust could be quite reasonable due to the racial inequities African Americans face in our justice system.

Buss argues that the very nature of the court structure and process renders youths' active participation as almost irrelevant, with a series of adults (including the youth's attorney) speaking *about* the youth but not to or with the youth.<sup>107</sup> "But also of concern, and related to this exclusion, is the message that the entire court full of professionals, including the young person's own lawyer and even more significantly the judge, are on a single team that excludes the young person."<sup>108</sup>

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<sup>99</sup> See Pierce & Brodsky, *supra* note 74, at 92.

<sup>100</sup> *Id.* at 97.

<sup>101</sup> *Id.* at 99–100.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 103–04.

<sup>104</sup> Schmidt et al., *supra* note 74, at 190.

<sup>105</sup> Woolard et al., *supra* note 91.

<sup>106</sup> *Id.* at 221.

<sup>107</sup> See Emily Buss, *The Developmental Stakes of Youth Participation in American Juvenile Court*, in INTERNATIONAL PERSPECTIVES AND EMPIRICAL FINDINGS ON CHILD PARTICIPATION: FROM SOCIAL EXCLUSION TO CHILD-INCLUSIVE POLICIES 303 (Tali Gal & Benedetta Duramy eds., 2015).

<sup>108</sup> *Id.* at 317.



Henning outlines potential practical implications of cognitive limitations and lack of trust on the juvenile-attorney relationship, including a greater likelihood of withholding information because the youth doesn't trust the attorney, or doesn't understand what information might be relevant to an effective defense.<sup>109</sup> These studies highlight the importance of paying attention to a juvenile client's needs, providing information in understandable formats, and treating them with respect. Without this focus on developing a sense of respect and rapport with the juvenile client, particularly minority juvenile clients, it is likely these clients will be at a disadvantage within the attorney-client relationship. Youth don't know what they don't know and, for developmental reasons, may have fewer opportunities to figure that out.

V. PARENTS AS CONTEXTUAL CHALLENGE AND/OR OPPORTUNITY:  
AN EMPIRICAL STUDY

The role of parents complicates court processing for juvenile defendants in juvenile court in ways that criminal defendants simply do not face. Although attorneys are not legally required to have any involvement with the juvenile's parents,<sup>110</sup> it is unrealistic to assume that the attorney-juvenile client relationship happens absent any parental involvement or influence. Some states have tried to facilitate the *parent as advocate* model by requiring parental presence or the presence of an interested adult for a child to make a valid waiver decision.<sup>111</sup>

Parents may be thought of as compensating for their children's lack of knowledge and experience; however, it is not clear whether parents themselves understand the legal processes, the lawyer's role, or how a parent's relationship to their child's lawyer differs from the child's. Defense attorneys in one exploratory interview study reported that some parents enabled their youth to better understand the legal process, but that other parents provided inaccurate information and advice to their children or were unable to provide support and assistance because of their own poor functioning or language barriers.<sup>112</sup> It is also unclear if the parent can maintain an advocacy role when factors such as restitution are included during disposition. Restitution, for example, is technically part of the child's disposition, yet it is expected that the parent is responsible for paying fines and therefore may not be impartial when advising their child. For example, in our example above, the

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<sup>109</sup> See Henning, *supra* note 13, at 272–73.

<sup>110</sup> See MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 2015); JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES § 3.3(b)(i) (AM. BAR ASS'N 1980).

<sup>111</sup> Linda A. Szymanski, *Juvenile Waiver of Miranda Rights: Interested Adult Test*, 7 NAT'L CTR. FOR JUVENILE JUST. SNAPSHOT 1 (2002).

<sup>112</sup> Ann Tobey et al., *Youths' Trial Participation as Seen by Youths and Their Attorneys: An Exploration of Competence-Based Issues*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 225, 239 (Thomas Grisso & Robert G. Schwartz eds., 2000).

child may want to go to court but the parent may be concerned that restitution charges will be higher if the child doesn't accept the plea offered. The ultimate conclusion is that it depends; some parents have the knowledge and capacity to help their children but others do not, and it is not entirely apparent what predicts those differences.

Assuming the parent has an accurate understanding of the attorney's role, they may be able to encourage their child to be open and honest with the defense attorney and in turn may serve as an "interpreter" between the attorney and the child given their familiarity with their child's abilities.<sup>113</sup> However, parents may have difficulty communicating with their child and/or have different ideas about important case decisions. Several attorneys in the Tobey et al. study worried that parents' own interests conflicted with their adolescents' interests.<sup>114</sup> For example, a parent may want their child to accept a plea bargain and admit guilt to teach them a lesson and have them learn from their experience. The child and defense attorney, however, might prefer to go to court and fight the charges against her. Or, as Birkhead notes, many families have intra-family conflicts that result in or from poor parent-child relationships that may affect the attorney's role.<sup>115</sup> Moreover, family members may be directly involved in a juvenile's case as victims, witnesses, or in other roles. In the absence of such conflicts though, Katner argues that attorneys should consult with parents, and that the Model Rules of Professional Responsibility should clarify parental roles in juvenile court.<sup>116</sup> Such clarification could include addressing the lack of privilege for parent-child communications, which may hinder true and effective parental consultation.<sup>117</sup>

Whether parents' legal knowledge can compensate for their children's is an empirical question. The authors of this review conducted a study examining parents and their children's understanding of the role of defense attorneys and their understanding of concepts such as attorney-client privilege. To do this, 170 English-speaking, youth-parent dyads were recruited from communities in the Mid-Atlantic region. Youths were ages 11–17, and primarily male and African American (64%).<sup>118</sup> Parents or guardians were predominantly female (85%) and either African American (62%) or Caucasian (26%). Families were recruited from

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<sup>113</sup> See Henning, *supra* note 13, at 302.

<sup>114</sup> Tobey et al., *supra* note 112, at 239.

<sup>115</sup> Tamar R. Birkhead, *Culture Clash: The Challenge of Lawyering Across Difference in Juvenile Court*, 62 RUTGERS L. REV. 959, 976 (2010).

<sup>116</sup> See David R. Katner, *Revising Legal Ethics in Delinquency Cases by Consulting with Juveniles' Parents*, 79 UMKC L. REV. 595, 631–32 (2011).

<sup>117</sup> See Brittany Libson, Note, *Promoting Parental Guidance: An Argument for the Parent Child Privilege in Juvenile Adjudications*, 53 AM. CRIM. L. REV. 137 (2016).

<sup>118</sup> Original data analyses reported here were conducted for this paper from a dataset that is described in Jennifer L. Woolard et al., *Examining Adolescents' and their Parents' Conceptual and Practical Knowledge of Police Interrogation: A Family Dyad Approach*, 37 J. YOUTH ADOLESCENCE 685 (2008).

one of the ten metropolitan statistical areas with the largest population, which included an urban city and several associated counties.<sup>119</sup> Because we were interested in how families generally understood juveniles' rights and responsibilities in court irrespective of their own justice experience, we recruited families from the community, not from the justice system specifically. Even so, about 18% of the parents, 22% of middle adolescents (ages 14–15), 39% of older adolescents (ages 16–17), and 3% of young adolescents (ages 11–13) reported justice system experience. Among other measures, youth and their parents were assessed on their understanding of lawyers, including their advocacy role and confidentiality.

Our results showed that parents might be able to compensate for their adolescent's incorrect knowledge in some arenas but not others. Almost 65% of parents believed that the lawyer's most important role is doing what the parent wants; only 13% said what the child wants is most important. This was true for parents both with and without justice system experience. When asked who a court-appointed lawyer works for, 93.5% of parents responded that the lawyer works for the child. Similarly, 94% of parents believe the lawyer works for the child when the child themselves pays. When parents hire the lawyer, however, 52.4% indicated the lawyer works for the parent; 41.8% said the lawyer works for the child, and again, these numbers are similar for parents with justice system experience. Now it is possible that some of those parents were responding in a technical sense about employment and not in a substantive sense about whether the parent or child directs the lawyer's actions. However, 52% of parents believed the attorney should listen to them rather than their child if there was a family disagreement regarding proper course of action in the child's case. About 60% strongly agreed with the statement that young people should not have the right to act as their own lawyer.

Parents also misunderstood the extent of attorney-client privilege. For example, a substantial percentage of parents distinguished between themselves and other justice system stakeholders regarding the confidentiality of lawyer-youth conversations. Half of parents believed that the lawyer can disclose information about their conversations with the child to the parent without the child's permission. About 30% of parents believed that the lawyer can disclose information without the child's permission to the judge and the child's probation officer. Only 11% believed lawyers can do so with police. Interestingly, having justice system experience did not increase the likelihood that parents had a better understanding of confidentiality and privilege. For example, about 40% of parents with justice system experience believed the lawyer can disclose information about the lawyer-child conversations to the parent without the child's permission.

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<sup>119</sup> See Notice, Standards for Defining Metropolitan and Micropolitan Statistical Areas, 65 Fed. Reg. 82,228 (Dec. 27, 2000), <https://www.bls.gov/lau/frn249.pdf> [<https://perma.cc/8B4A-Z89M>] (defining metropolitan statistical area).

Approximately 20% of parents with justice system experience believed the lawyer could disclose such information to the judge or the child's probation officer. Only about 13% of parents with justice system experience believed lawyers could do so with police. We can see how these beliefs might influence parent-child conversations about important decisions.

As a part of the interview, parents and youth each read separate descriptions of a hypothetical situation in which the police catch the youth stealing from a local store. The parent and youth then came together and were videotaped while talking about what to do next. After an initial vignette about police interrogation, a second vignette involved the youth's court-appointed attorney indicating that the youth and the attorney should meet without the parent in the room. The parent received the same description. Then, parent and youth were videotaped talking about whether the youth should talk to the attorney without his or her parent. One parent talked with her eleven-year-old son about it this way:

**Parent:** Well I don't want you to talk to the lawyer by yourself. You're only 11. This is complicated. I'm not a lawyer but I'm at least an adult. I think I can understand some of the consequences.

**Youth:** I think I should talk to my lawyer.

**Parent:** Why? I mean yes, I agree you should talk to your lawyer but why without me?

**Youth:** Well then I might say more if I'm without you. And I might be more honest. You might make me, I don't know, nervous.

**Parent:** So you're worried that whatever you say in front of me, you're going to have to pay for at home. Well, whatever happens at home (name), you can live with that, that's between us. You're not going to get hurt. If you have consequences at home, those are private; those are not part of the court system.

**Youth:** Then maybe should I talk to them about it?

**Parent:** I want to be here because this is your future. I don't want her . . .

**Youth:** I already said . . .

**Parent:** She might get you to say things . . .

**Youth:** It was my opinion that we should talk, but I understand that, that, I mean, you want to be there, but I don't know, I don't know, I think I should, yeah.

**Parent:** You think you should talk to her by yourself?

**Youth:** No, I think I should not talk to her by myself. Okay, I won't talk to her.

**Parent:** This is just the most serious thing that's ever happened to you and I think you need your parents by your side.

**Youth:** Okay.

From a developmental perspective, it is not unreasonable for a parent to be concerned about an 11-year old's capacities to make informed judgments. Another family with an older adolescent (16–17) reached the opposite conclusion:

**Parent:** Okay now, we need to go down to the attorney's office and the attorney wants to talk to you in the room without me, so I said that I am confident that you should tell the attorney everything. If you stole something from Walmart, I'm not going to be in the room so you should open up and tell your lawyer everything, do you agree?

**Youth:** Yes.

**Parent:** You agree you should tell them everything?

**Youth:** Yeah.

**Parent:** About what happened?

**Youth:** Yeah.

**Parent:** Okay. So, I'm not going to be in the room so tell her everything that happened at Walmart that day. And, um, that's it, I guess.

Afterwards, this adolescent marked "somewhat agree" to the statement "my parent gave me a chance to express my opinions and feelings." The parent reported trying to take her child's needs into account and that her involvement made things easier for her child to understand; the youth responded similarly. With very little discussion, it is difficult to discern the adolescent's opinions as independent from the parent's.

Although this next youth and parent actually talked about the youth's previous case instead of the vignette, they shared differing views about parental presence with the lawyer:

**Parent:** Now, I should be in the room when you talk with that lawyer. You remember what that lawyer did to you?

**Youth:** The lawyer? It was cool, I was like, like, she asked me if the lawyer, should I tell the lawyer everything about what happened, and then I was like yeah, I'll tell her everything that happened.

**Parent:** Without me being in the room?

**Youth:** And I'll tell you what happened too. What, did you say you wanted to be in the room?

**Parent:** I think I need to be in the room.

**Youth:** Why?

**Parent:** Because the lawyer can tell you, well, you know, you did this and slip, you know, how they did it last time. You didn't, you had a lawyer but he was slippery and being, well, "you need to do this."

**Youth:** My lawyer was cool last time.

**Parent:** I don't think so. I think that's why you got time.

The parent then went on later to talk about the different information they were receiving from the lawyer and the youth:

**Parent:** Yeah but I think I, if I had uh been there, and had uh, you know, and you and I both would have known what was said. You were told one thing and I was told another. Remember when we sit down and we was talking about that with the lawyer?

**Youth:** We never sat with my lawyer. I mean...

**Parent:** Me and you both. That's why I said we needed to be together. Because things they told you I never knew. And then when I found out that they were telling me one thing and he was telling me one thing and you was telling me another thing. But I like to hear the case and the truth, which you and the lawyer and, you know, there, and then they say that in front of that lawyer I felt that I needed to be there with you. You agree?

**Youth:** I'm still thinking like, I still think I could tell her like everything without you being in the room, because like you would eventually find out well, what happened.

**Parent:** I don't think I would find out everything.

We do not know what happened in that youth's previous case, but clearly that experience of hearing different stories affected the parent's desire to be in the room when the lawyer and her child spoke. The youth did not seem to feel there would be a problem meeting the lawyer without the parent because the parent would eventually find out, but the parent didn't believe him. These examples are not necessarily representative of families more generally or even the kinds of conversations that parents and youth might have; families were recruited from the community and participating in an interview study that required a degree of organization and family function. However, they do provide insight into the types of interactions that might occur, or what parents and youth might have in mind as they come together to interact with an attorney.

Acknowledging the broader legal and social framework in which parents have the rights and responsibilities for making decisions on behalf of their children, Fedders notes that attorneys may feel pressure to incorporate and respond to parents' wishes, especially if they are hired by the parent (a view that our data suggest parents may hold as well).<sup>120</sup> In interviews with defense attorneys, Tobey, Grisso & Schwartz found that often parent and adolescent interests were not aligned.<sup>121</sup> Defense attorneys may also feel pressured to ensure parents are on board with their children's decisions if those decisions might require parental involvement (*e.g.*, parental engagement at the disposition phase). Parental involvement laws may require that parents be held legally culpable for their children's illegal behavior<sup>122</sup> and may also allow the courts to require parents to pay restitution fees, attend the juvenile's court hearings, and participate in social services for the family. Of course, if a parent fails to comply, they may face additional fines or more serious consequences, such as jail time.<sup>123</sup> With the presence of parent involvement laws, parents may experience a very real and direct legal consequence of their child's case that could affect their input to their child's decisions.

These data suggest that parents may not always be effective advocates for their children, especially those parents who bring their own misunderstandings

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<sup>120</sup> See Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 800-01 (2010).

<sup>121</sup> See Tobey et al., *supra* note 112, at 235-36.

<sup>122</sup> See Eve M. Brank & Leroy Scott, *The Historical, Jurisprudential, and Empirical Wisdom of Parental Responsibility Laws*, 6 SOC. ISSUES & POL'Y REV. 26 (2012).

<sup>123</sup> Hope Viner Samborn, *Kids' Crimes Can Send Parents to Jail*, 82 A.B.A. J. 28 (1996).

about the attorney-client relationship to the table. It is likely that parents suffer from some of the same procedural justice barriers that their adolescent children do and also misunderstand the attorney's advocacy role and confidentiality rules. Particularly for parents of young clients, ceding decision making autonomy to their child may contradict all other aspect of parenting. Certainly, some parents have a better understanding of their children's rights, but these data suggest policymakers and juvenile defense attorneys should not assume all parents do.

#### VI. QUANTITY OR QUALITY OF TIME WITH CLIENTS AS REMEDY? STRUCTURAL CHALLENGES

Since *Gault*, commentators and researchers have examined whether one partial remedy for adolescents' increased risk of impairment may be talking with their attorneys.<sup>124</sup> Viljoen and Roesch examined 152 pretrial adolescents' understanding and legal competence-relevant capacities, as well as legal learning opportunities.<sup>125</sup> Compared with the 16–17 year olds, those 15 and younger with low intelligence scores were far more likely to have inadequate legal capacities.<sup>126</sup> However, youths who spent more time with their attorneys had better understanding.<sup>127</sup> This was especially true for youths with lower cognitive abilities, which the authors explained as likely being due to those individuals having “greater room for improvement.”<sup>128</sup> Their data provides preliminary (albeit not sufficient) evidence that support the notion that spending additional time with juvenile clients could improve juveniles' capacities.

Although teaching does appear to have some salutary effects, the limited research doesn't suggest it can eliminate those age-based deficits. Research has not examined whether the improvements from teaching alone are sustained over time and few studies assess whether juveniles can apply their understanding appropriately.<sup>129</sup> Although better understanding could lead to better rapport between attorneys and their clients, it does not solve all developmental barriers to the attorney-client relationship. A juvenile's relationship to an attorney is probably unique among her experiences with other adults and difficult to grasp.<sup>130</sup> Compared to adults, adolescents' psychosocial immaturity makes them more

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<sup>124</sup> See, e.g., Gary B. Melton, *Taking Gault Seriously: Toward a New Juvenile Court*, 68 NEB. L. REV. 146 (1989); Tobey et al., *supra* note 112, at 232–33.

<sup>125</sup> Jodi L. Viljoen & Ronald Roesch, *Competence to Waive Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact, and Psychological Symptoms*, 29 LAW & HUM. BEHAV. 723 (2005).

<sup>126</sup> *Id.* at 732.

<sup>127</sup> *Id.* at 734.

<sup>128</sup> *Id.* at 737.

<sup>129</sup> See, e.g., LaVigne & Van Rybroek, *supra* note 83; Woolard et al., *supra* note 91.

<sup>130</sup> See LaVigne & Van Rybroek, *supra* note 83, at 77.



suggestible to authority figures' requests and recommendations and less able to weigh the long-term consequences of decisions made in emotionally salient contexts, especially when those decisions have positive and emotionally valuable immediate consequences (*e.g.*, the difference between going home today on probation and having a record that could affect job prospects in five years).

Attorneys need not only time to spend with juvenile clients but the capacities and skills to engage with them appropriately. Compared to attorneys in criminal court, juvenile defense attorneys often have the least experience and, at least developmentally, more complicated clients. The juvenile courts have been described as "training grounds" for recent law graduates who eventually will move on to the criminal courts<sup>131</sup> where pay is potentially better,<sup>132</sup> and the work more highly regarded.<sup>133</sup> Moreover, standard legal training is insufficient; specific knowledge of adolescent development should be required.<sup>134</sup> Understandably, scarce resources may not cover extra-legal training topics. Unfortunately, a better understanding of adolescent development could indeed assist counsel with building rapport and with appropriately assessing issues such as understanding, acquiescence, and decision-making in their client.<sup>135</sup>

High caseloads in juvenile defense may incentivize plea agreements, particularly for less serious cases, over quality representation. Of particular concern is the fact that juvenile defense caseloads are never actually at the level the U.S. Bureau of Justice Assistance recommends for quality representation (*i.e.*, juvenile defense caseloads should not exceed 250 cases annually).<sup>136</sup> According to Jones' review of access to counsel,<sup>137</sup> many states suffered from problematically high caseloads. For example, Louisiana reported as many as 800 cases per year and Virginia reported a range of 679–1,500 cases for public defenders between

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<sup>131</sup> See Fedders, *supra* note 120, at 799.

<sup>132</sup> CATHRYN CRAWFORD ET AL., ILLINOIS: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 64 (2007), [https://www.macfound.org/media/article\\_pdfs/ILJFINALREPORT.PDF](https://www.macfound.org/media/article_pdfs/ILJFINALREPORT.PDF) [<https://perma.cc/AMZ7-TM7U>].

<sup>133</sup> JONES, *supra* note 56, at 10.

<sup>134</sup> CRAWFORD ET AL., *supra* note 132, at 64–66.

<sup>135</sup> See, *e.g.*, Henning, *supra* note 13, at 321.

<sup>136</sup> See U.S. DEP'T OF JUSTICE, COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS: A RESOURCE GUIDE FOR PRACTITIONERS AND POLICYMAKERS, VOL. V: STANDARDS FOR JUVENILE JUSTICE DEFENSE C5 (2000), <http://permanent.access.gpo.gov/lps13150/www.ojp.usdoj.gov/indigent-defense/compendium/pdfxt/vol5.pdf>. The ABA standards agree that juvenile workload should be capped at a lesser number than that set for defense representation in misdemeanor cases but they differ on degree. In Indiana, it is 200 juvenile cases versus 300 misdemeanor cases, in Washington it is 250 juvenile cases versus 700 misdemeanor cases, and in Minnesota it is 175 juvenile cases versus 700 misdemeanor cases. U.S. DEP'T OF JUSTICE, COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS: A RESOURCE GUIDE FOR PRACTITIONERS AND POLICYMAKERS, VOL. I: STANDARDS FOR ADMINISTRATION OF DEFENSE SERVICES E49–E62 (2000).

<sup>137</sup> See JONES, *supra* note 56, at 8–9.

2000 and 2003.<sup>138</sup> If the standards recommend caseloads not exceed 250 per year, numbers approaching 1,000 cases annually should raise concern regarding the quality and effectiveness of counsel. Specifically, how much time is counsel able to devote to their juvenile clients to build rapport and develop trust, not to mention actually investigating their cases? Moreover, Buss raises the possibility that, although the youth's attorney is perhaps best positioned to facilitate her client's true participation in court processes, the informal culture of the court values efficiency and going against standard procedure might (inappropriately) redound negatively to her client.<sup>139</sup>

Structural policies could also hinder the relationship between attorneys and juvenile clients by limiting the amount of time they actually have to discuss the case facts and for the attorney to get to know the client. Specifically, the time at which counsel is appointed can play a significant role in how effectively counsel can defend their client. Access to counsel before pretrial detention is crucial for attorneys to be able to investigate and develop a proper course of action through consultation with their client, yet state reports suggest that many juvenile defendants are not provided with counsel until their first appearance in court.<sup>140</sup> This results in attorneys having insufficient preparation time to familiarize themselves with the case and their client and often only meeting with their client for several minutes before any real decisions need to be made. This is obviously a concerning practice for any defendant, but is particularly concerning for juvenile defendants who require additional consultation time when decisions have to be made.

Taken together, structural barriers in juvenile defense create severe time constraints which directly affects the ability for attorneys to develop any rapport with their client, correct misunderstandings, build trust, and investigate the case sufficiently to provide effective quality legal representation. States' high annual caseloads are enough to raise concern. However, for those states who are not struggling with problematically high caseloads, there is still the issue of insufficient training in general, not to mention a lack of emphasis on juvenile-specific legal training. The fact that juvenile defense is often underappreciated and results in lower pay means the incentive to remain in juvenile defense for long periods of time is low.<sup>141</sup> This further aggravates the training issue such that those within juvenile defense who might train others are possibly inexperienced themselves. Finally, when policies do not exist to ensure attorneys are assigned to their clients early on (*e.g.*, before pre-trial detention), it will always be difficult to dedicate a sufficient amount of time to building rapport and trust with a juvenile

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<sup>138</sup> See *id.* at 9.

<sup>139</sup> See Buss, *supra* note 107, at 312.

<sup>140</sup> See JONES, *supra* note 56, at 2–4.

<sup>141</sup> See *id.* at 10.

client, which ultimately puts juveniles at a disadvantage and at risk for inadequate representation.

## VII. CONCLUSION

The research suggests that younger adolescents in particular are not likely to have the capacities needed to be successful legal actors who can engage in an effective attorney-client relationship. Adolescents are more likely than adults to acquiesce to the requests of authority figures; they are also more myopic than adults when considering the consequences of their actions, valuing short-term consequences over long-term ones. Compared to adults, juveniles are more likely to misunderstand the rules to which defense attorneys must adhere, and perhaps less likely to trust their attorneys, in part for developmental reasons, not just experience or individual differences.<sup>142</sup> Some of the research reviewed suggests that as age increases so does the understanding of the roles of defense attorneys and the rules they must adhere to. However, the same evidence suggests that even older adolescents struggle with understanding the advocacy role and confidentiality rules attorneys must abide by. Likewise, parents may not be equipped with the information to assist their youth in working with an attorney, or may have beliefs and ideas that the attorney (or the youth) think are not in the youth's best interests. The research reported here represents some of the only data examining parent and child conversations about the role of parents in the attorney-juvenile client relationship. We found that parents' and youths' views about the parental role are varied and potentially contradictory. Although differing views between parents and youth are not inherently negative, these data suggest that attorneys may need to address a lack of information, misinformation, and disagreements among their youthful clients and their clients' parents. It is possible, but not guaranteed, that greater resources for the attorney and the family might scaffold their capacities enough to improve the attorney-client relationship and therefore the quality of defense representation and advocacy.<sup>143</sup> It would be worth finding out.

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<sup>142</sup> See Pierce & Brodsky, *supra* note 74, at 102–04.

<sup>143</sup> Jennifer L. Woolard et al., *Power, Process, and Protection: Juveniles as Defendants in the Justice System*, in EQUITY AND JUSTICE IN DEVELOPMENT SCIENCE: IMPLICATIONS FOR DIVERSE YOUNG PEOPLE, FAMILIES, AND COMMUNITIES 171 (Stacey Horn, Martin Ruck & Lynn S. Liben eds., 2016) (Volume 51 of the ADVANCES IN CHILD DEVELOPMENT AND BEHAVIOR series).